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Public Comments Processing
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National Marine Fisheries Service
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Re: Docket Numbers: FWS-HQ-ES-2018-0006
FWS-HQ-ES-2018-0007
FWS-HQ-ES-2018-0009

The American Forest Resource Council (AFRC) submits these comments in response to the Department of Commerce and Department of Interior's Notices of Proposed Rulemaking regarding Endangered and Threatened Wildlife and Plants; *Revision of the Regulations for Listing Species and Designating Critical Habitat* (Docket No. FWS-HQ-ES-2018-0006; Docket No. 180202112-8112-01; 500030113); *Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants* (Docket No. FWS–HQ–ES–2018–0007; 4500030113); and *Revision of the Regulations for Interagency Cooperation* (Docket No. FWS–HQ–ES–2018–0009; FXES11140900000–189–FF09E300000; 180207140–8140–01; 4500090023); as stated in 83 Fed. Reg. 35,193, 83 Fed. Reg. 35,174, 83 Fed. Reg. 35,178 (July 25, 2018).

I. Introduction

AFRC is a forest products trade association representing approximately 50 lumber and plywood manufacturing companies and landowners throughout Washington, Oregon, California, Idaho and Montana, 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.

AFRC's members, and the communities in which they work, have been affected by reductions in timber harvest resulting from critical habitat designations, on federal, state, and private land, for species such as northern spotted owl, marbled murrelet, and Canada lynx. AFRC members' timber contracts have been suspended, slowed or cancelled because of overbroad critical habitat

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designations, which fail to comply with the Endangered Species Act's (ESA) strict requirements. Overbroad designations also threaten AFRC members' interests in forest health, federal timber supply, and private forest land because those designations impede forest management projects that promote forest health and provide timber supply. AFRC and its members have brought legal challenges to the sufficiency of some of these designations. AFRC believes many of the overbroad critical habitat designations would have been significantly less burdensome if the Government faced accountability for its balancing of economic and other impacts.

The U.S. Fish and Wildlife's (FWS) and the National Marine Fisheries Services' (NMFS) (collectively, the Services) proposed rulemaking is long overdue. The last major updates to the ESA were made in 1982, more than 30 years ago, and the regulations have not been significantly updated since 1986. Since our members operate in one of the most litigious corners of the country, AFRC has devoted a significant amount of its resources to participating in litigation initiated by environmental groups to challenge federal agency decisions related to endangered or threatened species. For that reason, AFRC provides a valuable perspective on ESA regulations. AFRC welcomes the proposed changes to the ESA to streamline a cumbersome and bureaucratic permitting process by allowing the Services to spend more time on species preservation rather than creating unnecessary red tape.

The below commentary is structured to respond to proposed regulation revisions.

II. Revision of the Regulations for Listing Species and Designating Critical Habitat

Section 424.02 — Definitions

On February 16, 2016, the Services finalized revisions to its regulations concerning the designation of critical habitat and made new additions to the regulatory definitions section for the terms "geographical area occupied by the species" and "physical or biological features," which were previously only addressed in the ESA. Now, the Services seek input regarding whether those definitions should be modified:

"Geographical area occupied by the species:" An area that may generally be delineated around species' occurrences, as determined by the Secretary (i.e., range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

Comment 1: This definition has important implications because it forms the basis for the Services' designation of a particular area as occupied critical habitat. The regulatory definition currently blurs the statutory distinction between "occupied" and "unoccupied" critical habitat. Specifically, Congress intended the statutory definition of occupied critical habitat to mean the specific areas actually occupied by the species that contain the physical or biological features that are essential to the conservation of endangered and threatened species, and that may need special management or protection. 16 U.S.C. § 1532(5)(A). However, the definition of "geographical area occupied by the species" eliminates the need for the Services to demonstrate that the area is occupied by the listed species and, instead, allows the designation to migratory corridors or areas sporadically used by the species.

The designation of critical habitat impacts the forest products industry by restricting their ability to perform active management on national forests. AFRC recommends withdrawing the definition of "geographical area occupied by the species" to avoid the designation of critical habitat for an area that lacks the presence of the endangered or threatened species and is incapable of supporting the species.

"Physical or biological features:" The features that support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Comment 2: This definition provides the Services a basis for designating specific areas as critical habitat. The definition, however, allows the Services to designate of critical habitat without identifying specific physical features on the landscape. The Services are also free to designate critical habitat based on the possibility that such physical or biological features suitable for habitat may develop in some time in the future. The regulation is in conflict with the statutory definition of occupied habitat, which requires physical or biological features to be present in the area that is designated. AFRC recommends that the Services withdraw this recently promulgated definition.

Section 424.11 — Factors for Listing, Delisting, or Reclassifying Species

Economic Impacts

Comment 3: Section 4(b)(1)(A) provides that "[t]he Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts . . . ." 16 U.S.C. § 1533(b)(1)(A). As stated in the notice of the proposed changes, the legislative history provides that Congress intended a listing determination to be made "solely upon biological criteria." H.R. Rep. No 970567 at 19-20, May 17, 1982. With this language, Congress intended to prohibit non-biological considerations from affecting listing decisions. However, Congress raised no barrier to publishing non-biological information to accompany the listing determination. Therefore, AFRC supports the removal of the phrase "without reference to possible economic or other impacts of such determination" from paragraph (b) of Section 424.11. This removal aligns and supports the purposes of the Act as the Services do not purport to influence the biological decision-making process but rather provide more information to the public regarding the effects of a listing determination.

Comment 4: In addition to its support, AFRC also proposes clarifying the economic effects that may be referenced in association with a listing determination. Simply removing the phrase does not adequately identify which economic costs may be referenced by the Services. Therefore, AFRC proposes that in addition to removing the phrase in question, the Services add language

clarifying that the Services may reference the economic impacts to local governments, states and state agencies, and commercial impacts to industries, individuals, and business entities when relevant to a particular listing decision. Without this addition, the Services may limit the referenced economic effects to the administrative costs of the agencies. Providing a clause identifying what economic information may be provided to the public will further the goal of the Services to inform the public of the effects of a listing decision. This information will also allow AFRC's members to act more effectively and consistently in light of particular listing decisions.

Foreseeable Future

Comment 5: AFRC supports the efforts of the Services to clarify the scope of threatened species by defining the term "foreseeable future" in section 424.11. The Act defines a threatened species as "any species which is likely to become endangered within the foreseeable future throughout all or a significant portion of its range." 16 USC 1532 3(20). Neither Congress nor the Services have delineated the bounds of the term through statute or regulation. AFRC believes now is an appropriate time to define this inherently ambiguous term. Limiting the application of the term to instances where "the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable" brings the regulations in conformity with the Supreme Court interpretation of the Act. According to the Supreme Court, the purpose of the requirement to "use the best scientific and commercial data available is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise." *Bennett v. Spear*, 520 U.S. 154, 176, (1997).

In the absence of a promulgated definition, the Services have relied on a 2009 opinion from the Department of the Interior, Office of the Solicitor when make listing decisions based on the foreseeable future. The opinion stated that, at the time, "the need to clearly articulate a detailed interpretation of 'foreseeable future' has not been pressing." M-37021, at 4, January, 16, 2009. The need for an articulable definition of the term, in the form of a regulation, is now much more pressing. Recent listing determinations have grappled with the difficulty of applying this standard in the context of climate change. *See e.g., In Re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation*, 709 F.3d 1, 15-16 (D.C. Cir. 2013) (finding that the Services adequately considered a period of 45 years as within the foreseeable future) and *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 680 (9th Cir. 2016) (relying on "volatile" climate projections for the years 2050 through 2100 to make a listing determination). While this new standard for what constitutes the foreseeable future will not prevent all listing decisions based upon future climate projections, it will provide a degree of consistency that will assist the timber industry in its goals to continue to manage forests actively in a manner that improves climate conditions.

Comment 6: The case-by-case approach to the foreseeable future analysis of a listing determination is an important element of the listing determination. The Services provide that this approach specifically considers life-history characteristics of the species, threat-projection timeframes, and environmental variability. AFRC continues to stand behind this approach. However, to further improve the process, the Services should require that each listing determination explicitly discuss the manner that uncertainty was evaluated within the scope of the foreseeable future. This discussion should not only focus on the projected threats to a certain

species but the expected biological responses to those threats as well. The Services should also use this discussion as an opportunity to discuss why a listing determination may have conformed with the quantitative modelling to establish the bounds of the foreseeable future. As the Services correctly note, time horizons from such models cannot, per se, dictate the limits of the foreseeable future. A blind reliance on model timelines would necessarily result in decisions made in response to a hypothetically possible future. Therefore, when applicable, the Services should discuss why the foreseeable future analysis adopted the timeline of the relevant modelling.

Comment 7: AFRC also seeks more discussion from the Services regarding when professional judgment may be relied upon in lieu of modelling projections. Specifically, the notice states that "[i]n some circumstances, such analyses may include reliance on the exercise of professional judgment by experts where appropriate." 83 Fed. Reg. at 35195. No further discussion is provided on this point. Consequently, it is difficult to determine who may exercise such judgment or when it may be the basis of a listing determination. To avoid inconsistent application of this standard, the Services should provide further discussion, examples, or other parameters for when professional judgment may be the basis of a listing determination.

Comment 8: In order to achieve consistency in the application of the term foreseeable future, NMFS should consider revisiting the 2016 Guidance for Treatment of Climate Change in NMFS ESA Decisions. This guidance should be aligned with regulatory changes in both the listing and consultation arenas.

Factors Considered in Delisting Species

Comment 9: AFRC supports the formulation of the new paragraph (e) in section 424.11. The resulting changes clarify the standard while ensuring that a decision to delist a species is made on biological grounds. Scientifically, a species will be considered threatened or extinct regardless of whatever legal label may have applied to that species in the past. Requiring that delisting decisions are based on the five factors in section 4(a)(1) of the Act ensures that the best science available will dictate whether a species will remain listed.

The changes are necessary because the current regulations allow for confusion as to what criteria must be met to delist a species. The new paragraph (e) resolves this confusion. A species may only be delisted under the factors in section 4(a)(1) of the Act unless the species is now extinct, or the species no longer meets the statutory definition of a species. Additionally, the Services removed confusing language regarding when a species will be considered extinct. This change not only makes the regulations more understandable but also ensures that determining whether a species is now extinct is a purely biological evaluation. According to the Services' data, only three species between the two agencies were delisted due to extinction between 1997 and 2017. Because extinction occurs so rarely, these changes will clarify the regulations without significantly altering their application.

Comment 10: AFRC agrees that current section 424.11(d)(3) would be redundant under the proposed changes. That section previously allowed for delisting when an error was discovered in the original data that the Services relied upon when initially listing the species. AFRC

acknowledges that any errors in the data would justify delisting under proposed paragraphs (e)(2) and (e)(3). However, AFRC finds value in allowing the discovery of such an error to trigger a reconsideration of the initial listing. Therefore, AFRC suggests that the Services alter and retain the language of former section 424.11(d)(3) rather than eliminating it entirely.

Comment 11: AFRC seeks further clarification on how the proposed regulations interact with recovery plans. As written, the changes will simplify the process to delist a species without a recovery plan. However, the proposed language does not adequately discuss how to accommodate a recovery plan that varies from the five factors in section 4(a)(1) of the Act. Therefore, AFRC suggests that the Services clarify the relationship between the factors and a recovery plan. Courts have established that a recovery plan is not legally binding nor the sole pathway to delist a species. *See e.g.*, *Conservation Cong. v. Finley*, 774 F.3d 611, 614 (9th Cir. 2014) (citing *Friends of Blackwater v. Salazar*, 691 F.3d 428, 434 (D.C. Cir. 2012)). Consequently, the Services should acknowledge that the five factors control the decision to delist a species—even if a recovery plan presents a different standard.

Section 424.12 — Criteria for Designating Critical Habitat

Not Prudent Determinations

Comment 12: AFRC supports the revisions to section 424.12 to provide a non-exclusive list of circumstances in which the Services may find it is "not prudent" to designate critical habitat. The determination of whether the designation of critical habitat would not be prudent is highly fact-specific and the Services should be given flexibility in making such a determination. Under the current regulations, there are only two enumerated circumstances in which the Services could not make a prudent determination.

According to the Services' data, FWS has determined that critical habitat was not prudent in 12 instances (or 0.6 species per year) and NMFS determined that critical habitat was not prudent in two instances. Under the new proposed language, it is likely that the Services will increase the likelihood of a not-prudent determination. Those circumstances would include situations where the species do not face habitat-based threats or threats to habitat are based on causes that cannot be managed through management actions. To require critical habitat designation in those would place an unnecessary burden on the Service and stakeholders with interests in activity on federal land, without providing any conservation value to the listed species.

Comment 13: AFRC supports the removal of the language in section 424.12(a)(1)(ii), which states that it would not be prudent to designate critical habitat when the "designation of critical habitat would not be beneficial to the species." As stated in the notice, this language has been misconstrued by courts in litigation. *See, e.g.*, *Nat. Res. Def. Council v. U.S. Dep't of the Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997) (finding that "[t]he Service d[id] not explain why a designation that would benefit such a large portion of critical habitat is not 'beneficial to the species'" even though "most populations of gnatcatchers are found on private lands to which Section 7's consultation requirement would not apply"). The "beneficial" language is not mirrored in the ESA and should be removed.

Designation of Unoccupied Habitat

Comment 14: The Services have proposed revising section 424.12(b)(2) by restoring the requirement that the Secretary will first evaluate areas occupied by the species before evaluating unoccupied areas and by clarifying when the Secretary may determine unoccupied areas are essential for the conservation of the listing species. The proposed language states that the Services would consider unoccupied areas to be essential in two circumstances: when a critical habitat designation limited to geographical areas would (1) be inadequate to ensure the conservation of the species and (2) result in less-efficient conservation for the species.

AFRC supports this proposed change but cautions that the proposed language should not allow for the designation of unoccupied areas when the current state of the area is unsuitable for the species and is unlikely to contribute to conservation. For example, in *Markle Interests, L.L.C. v. United States Fish & Wildlife Serv*., 827 F.3d 452 (5th Cir. 2016), *cert. granted sub nom. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 138 S. Ct. 924 (2018) (No. 17-71), the FWS designated over 1,500 acres of privately owned forest in Louisiana as "critical habitat" for the dusky gopher frog, which prevented plans to develop the land resulting in an economic impact of $34 million, in a circumstance where the frog was not located on the designated land, the area did not meet all of the criteria for the survival of the species, and the frog was not identified in the area in over 50 years. The issue of whether the Endangered Species Act allows FWS to designate private land as critical habitat when it is neither a habitat nor critical is now before the U.S. Supreme Court. AFRC filed an amicus brief with the National Association of Home Builders to ensure that the interpretation of section 424.12(b)(2) is aligned with the purpose of critical habitat designation, which is to protect actual habitat for areas that are reasonably certain to become habitat. The approach of designating unoccupiable areas reads the term "habitat" right out of the statute.

AFRC recommends that the proposed language makes clear that the term "essential" for unoccupied habitat carries the same standards listed for occupied habitat in 16 U.S.C. §1532(5)(A)(i).

Comment 15: The Services should revisit existing designations which include significant amounts of unoccupied habitat. With many such designations, the economic impacts exceed any conservation benefit, and thus exercise of the Services' discretionary exclusion authority under ESA section 4(b)(2) should be exercised.

The most glaring example of critical habitat overreach is the 9.5 million acres designated for the northern spotted owl (NSO). *U.S. Fish & Wildlife Service, Endangered and Threatened Wildlife and Plants; Designation of Revised Critical Habitat for the Northern Spotted Owl (Strix caurina occidentalis)*, 77 Fed. Reg. 71,876 (Dec. 4, 2012). Of the lands designated as critical habitat, more than 2.6 million acres are "matrix lands," which were set aside under the Northwest Forest Plan (NWFP) to provide a steady supply of federal timber to the local forest products-based economy. 77 Fed. Reg. at 71,876; *id.* at 71,880 (noting that "matrix areas [are] where timber harvest would be the goal."). The Service concluded that "economic impacts to [Forest Service] timber harvest *are relatively more likely in unoccupied matrix lands* or approximately 1,158,314

acres of 2,629,031 total acres of all [Forest Service] matrix lands." 77 Fed. Reg. at 72,028 (emphasis added). The resulting decrease in timber supply is substantial. *Id.*

To place this in context, the Service's 2012 rule designated over 65% of the "matrix" lands as owl critical habitat. U.S. Forest Service and Bureau of Land Management, *Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl,* April 13, 1994 (NWFP ROD) at 7. This despite the fact that the NWFP already set aside about 20 million acres in the form of Late Successional and Riparian Reserves and other land allocations. *See* NWFP Standards and Guidelines, at A-5. Such reserves already included areas that "will maintain a functional, interactive, late-successional and old-forest growth ecosystem." NWFP ROD at 6.

In the Forest Service's own words, the NWFP failed its economic and social mission. The NWFP was expected to "provide predictable levels of resource outputs and recreation opportunities, which would in turn provide predictable levels of employment. *This was not achieved with respect to timber supply.*" U.S. Forest Service, *Social and Economic Status and Trends*, *Northwest Forest Plan: The First 20 Years, Report*, Report No FS/R6/PNW/2015/0006, Feb. 2016, at 57 (emphasis added). Not surprisingly, the failure to offer a stable timber supply coincided with substantial downturns in rural population and vibrancy. *See id.* at 39 (showing metropolitan population increase by eight percent since 1994 and nonmetropolitan decrease by 10 percent).

But in revising the critical habitat for the spotted owl, the Service disregarded the economic dislocation that had already occurred and waved away concerns about continued disruption. The Service concluded "only a portion of the overall proposed revised designation will result in more than incremental, minor administrative costs." 77 Fed Reg. at 71,946. It further discounted economic effects by claiming there could be positive or negative effects. *Id.* at 71,947. But the Service did not exclude a single acre based on economic effects, instead exercising its Section 4(b)(2) discretion only to exclude areas under conservation agreements, programs and partnerships. *Id.* at 71,890. The Service concluded its analysis with the following remarkable assertion:

> While there is uncertainty over whether such [economic] impacts will occur and to what extent, *even assuming higher economic impacts suggested by some commenters, we would not exclude these lands from designation under section 4(b)(2)* because a critical habitat designation on these [matrix] lands will have benefits in conserving this essential habitat.

77 Fed. Reg. at 71,947 (emphasis added). By a logical reading of Section 3(5)(A), all critical habitat must have some sort of conservation benefit. 16 U.S.C. § 1532(5)(A). But under the Services' approach, federal lands with any conservation benefit whatsoever would not be excludable.

The Service also made use of its powers to coerce changes to governing land use plans. The final rule explained that it "does not change land use allocations or Standards and Guidelines for management under the NWFP." 77 Fed. Reg. at 71,880. In the same breath, however, the Service

asserted conservation outside NWFP reserves "is increasingly important for species recovery." *Id.* at 71,881. In essence, the Service arrogated to itself the authority to rewrite the governing Forest Plan without the public process that normally accompanies such initiatives. *See* 16 U.S.C. § 1604; *Ohio Forestry Ass'n, Inc. v. Sierra Club,* 523 U.S. 726, 729-30 (1998).

Even where its critical habitat designation is subject to challenge on the merits, the Service has denied the existence of economic impacts in disputing the standing of affected stakeholders. Although the Service initially obtained a dismissal of a challenge to the spotted owl critical habitat rule, *Carpenters Indus. Council v. Jewell*, 139 F. Supp. 3d 7 (D.D.C. 2015), the D.C. Circuit reversed. The Circuit Court held "the Service's designation will likely cause a decrease in the supply of timber from designated forest lands." *Carpenters Indus. Council v. Zinke*, 854 F.3d 1, 6 (D.C. Cir. 2017). The court further held the Services' "argument to the contrary belies the text, purpose, and operation of the Final Rule designating the critical habitat in this case. Not to mention, it defies basic common sense." *Id.*

Contrast the Service's approach in 2012 with how it approached NSO critical habitat in earlier stages. For example, the first spotted owl critical habitat rule, issued in 1992, recognized "the overall effects on the Northwest timber industry and to some counties in particular, were potentially severe . . . " *U.S. Fish & Wildlife Serv., Endangered and Threatened Wildlife and Plants; Determination of Critical Habitat for the Northern Spotted Owl*, 57 Fed. Reg. 1796, 1807 (Jan. 15, 1992). As a result, the first designation excluded some federal lands to mitigate the worst job losses. *Id.* at 1807-08.

We encourage the Services to re-examine current designations, such as the NSO critical habitat designation, for unoccupied habitat with severe economic implications.

III. Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants

Comment 16: AFRC supports, as a general matter, the replacement of the "blanket" 4(d) regulation, 50 C.F.R. § 17.31, with species-specific regulations. This is the approach taken by NMFS, which issues a special rule for each designated threatened species.

Although we understand the Services may not presently have the resources, we encourage you to consider enacting 4(d) rules for each species presently listed as threatened. There are several examples of 4(d) rules that have been successful at rationalizing the regulatory burden for listed species, including with the polar bear and streaked horned lark.

Comment 17: The Northern Spotted Owl is currently listed as threatened and would be eligible for a 4(d) rule. AFRC recommends considering some or all of the below practices that could be exempted from the take prohibition yet are necessary and advisable. Current regulations are a significant impediment to active forest management in the Pacific Northwest and would be significantly improved by the following exemptions.

1. Forest management activities within the lands designated as "Matrix" in the Northwest Forest Plan as incorporated in the individual Forests Resource

Management Plans if such activities comply with the Standards and Guidelines associated with those Plans.
2. Forest management activities within the lands designated as "Harvestable Landbase" in the Western Oregon BLM Resource Management Plans if such activities comply with the Standards and Guidelines associated with those Plans with the exception of the prohibition of take within those Plans.
3. Preforming activities associated with emergencies such as catastrophic wildfire, windthrow events, or insect and disease outbreaks.
4. Activities outside of the 500-acre core of any currently occupied nest site.
5. Activities inside any unoccupied historic nest site and home range.
6. Activities associated with the removal of trees deemed to be a danger to public safety such as "hazard" trees along roads or near buildings.
7. Activities that do not directly affect known northern spotted owl occupied stands within one mile of the activity.
8. Action needed to reduce the likelihood of a high severity, non-characteristic wildfire through forest manipulation, i.e. fire breaks, shaded fuel breaks, thinning of overly dense stands, etc.
9. Activities inside the 500-acre core area of any occupied site that affect habitat not classified as "suitable."

Comment 18: We suggest the following parameters for a special rule for marbled murrelet in the Pacific Northwest. Murrelet-related restrictions are a significant impediment to active management on state lands in Washington which fund schools, public services, and hospitals.

1. Forest management activities within the lands designated as "Matrix" in the Northwest Forest Plan as incorporated in the individual Forests Resource Management Plans if such activities comply with the Standards and Guidelines associated with those Plans.
2. Forest management activities within the lands designated as "Harvestable Landbase" in the Western Oregon BLM Resource Management Plans if such activities comply with the Standards and Guidelines associated with those Plans.
3. Preforming activities associated with emergencies such as catastrophic wildfire, windthrow events, or insect and disease outbreaks.
4. Activities associated with the removal trees deemed to be a danger to public safety such as "hazard" trees along roads or near buildings.
5. Activities that do not directly affect a known marbled murrelet occupying stands within one mile of the activity.
6. Management that is needed to reduce the likelihood of a non-characteristic wildfire to an acceptable level.

Strengthening HCP compliance

Comment 19: The section 4 regulations contain robust protections for permittees in the event of unforeseen or changed circumstances, known as the "no surprises" rule. 50 C.F.R. § 17.32(b)(5). Despite this rule, we have observed, in development of the Marbled Murrelet Long-Term Conservation Strategy, that the FWS is willing to rewrite or ignore its own obligations under

existing HCPs. In the murrelet process, the governing Implementation Agreement only requires a permit amendment if additional take would result from the Long-Term Strategy, but the FWS is requiring a permit amendment without demonstrating additional take. In essence, the FWS is treating an anticipated minor plan change as an entirely new application. This approach undermines confidence in the HCP program as a whole and needs to be addressed.

To start, 50 C.F.R. § 17.32(b)(5) should be made retroactive as it currently applies only to HCPs from 1998 forward. The Washington state lands HCP was issued in 1997. The Services should also consider ways to further strengthen the no surprises rule to encourage private conservation efforts across the landscape.

Comment 20: The Services should narrow the scope of ESA consultation before an ITP is issued. Presently, an applicant proposing an HCP for one species, and seeking take coverage for only that species, can be forced to adopt mitigation measures for unrelated species. This is especially onerous when the applicant seeks an HCP for terrestrial species and then mitigation is imposed for aquatic species.

To address the issue, the Services should issue a definition of the scope of the action when evaluating a proposed ITP. The action should be limited to the issuance of the ITP for the covered species- it is not the underlying activity. That issuance has no effect on non-covered species, the take of which the applicant could still be liable. This change could greatly increase the ability of some applicants to obtain ITPs and put in place meaningful conservation measures.

IV. Revision of the Regulations for Interagency Cooperation

Although these changes are welcome improvements to ESA implementation, we believe more changes are important and are possible. The most important of these would be implementing "counterpart" regulations to allow forest managers to make their own decisions as to whether formal consultation is required.

Definitions – Section 402.02
Destruction or adverse modification.

Comment 21: AFRC supports the proposed revision here, to add "as a whole" to the definition of "destruction or adverse modification" to clarify that section 7 determinations on critical habitat should be made at the species level. This is a helpful clarification that section 7 is not violated by every impact on critical habitat. This is a step toward rationalizing consultation as well as decreasing litigation. Many disputes center on the appropriate scale of a critical habitat analysis.

Comment 22: AFRC strongly supports removal of the second sentence, which relates to impairment of development of physical or biological features as an example of adverse modification. The second sentence tracks revisions to critical habitat designation regulation that are themselves being revised due to litigation by the State of Alabama and others. The example in the second sentence expands the definition of critical habitat beyond the reach of the statute. It contemplates adverse modification by preventing development, i.e. *preventing* modification or

maintaining the status quo. The Services are not permitted to rewrite the statutory language ("destroy or adversely modify") by regulation.

This would apply only to habitat that does not yet have the features necessary to conservation of the species, that is, habitat that does not yet meet the definition of critical habitat. The pending Supreme Court case regarding the Mississippi gopher frog, *Weyerhaeuser v. USFWS*, correctly seeks to overturn designation of such areas as critical habitat. The second sentence should be eliminated here to avoid backdoor designation of areas that are presently unoccupiable, as such designations do not comply with the statutory definition in section 3(5).

Comment 23: We suggest some revisions to make the definition clearer and more objective. "Value … for conservation of a listed species" is necessarily vague. It would be helpful to clarify how value is assessed. One way to do this is to add at the end of the sentence "such that the likelihood of the species' survival or recovery is appreciably diminished." This complies with cases, such as *Gifford Pinchot Task Force*, that overruled the original definition, but constrains the Service or courts from imposing their own notions of conservation "value."

If the proposed language is retained we suggest changing "conservation of *a* listed species" to "conservation of *the* listed species." This eliminates any prospect that the Services could find adverse modification on the basis of effects to species other than the designee species. It also more closely tracks the language of section 7(a)(2).

Comment 24: The Services should consider adding language regarding the scope of analysis that clarifies the determination of value to the species as a whole must be made at the unit level or larger. Biological opinions for wide-ranging species generally compare the effects of the action to the scale of the affected unit, and address effects on the functioning of that unit, as a means to address impacts of the action on critical habitat as a whole.

Appreciably reduce/ appreciably diminish.

Comment 25: The continued use of the "appreciably" reduce/diminish standard is well supported by the statutory text and structure. AFRC strongly agrees with the discussion, at 83 Fed. Reg. 35,182-83, reiterating that the section 7 analysis in determining "appreciable" reductions or diminishment must always consider some *new* impact on the species rather than assuming that any harm results in jeopardy where the species is "jeopardized" by baseline conditions. Jeopardize is a verb, not a noun.

Although the discussion in the proposed rule is helpful, there is little in the proposed revised definition that precludes the Services from relying on degraded baseline conditions. Some additional regulatory definition is needed as courts continue to rule against agency actions on the basis of "baseline jeopardy." In *National Wildlife Fed'n v. Nat'l Marine Fisheries Service*, 886 F.3d 803, 821 (9th Cir. 2018), the Ninth Circuit rejected a reasonable and prudent alternative (RPA) in a biological opinion, and affirmed a mandatory injunction, despite the fact the RPA would have led to "significant improvements" in the species' habitat. The court found this "does not establish an absence of harm; it only establishes an incremental improvement." *Id.* It also held that the district court "properly concluded that the listed species remain in a 'precarious'

state, and that they will remain in such a state without further conservation efforts beyond those included in the 2014 BiOp." *Id.*

We suggest that a definition of *appreciably reduce* and *appreciably diminish* be added to 50 C.F.R. § 402.02. The most appropriate language for that definition, as your discussion suggests, would be based in part on the Services' 1998 consultation handbook. NMFS has used a definition in the past that has two steps to determine appreciable reduction. First, it determines whether any effects are statistically significant, constituting a "real reduction." Second, it asks whether any real effects constitute a "considerable or material reduction in the likelihood of survival and recovery." Accordingly, the following definition would be appropriate:

> *Reduce appreciably* or *appreciably diminish* means to cause a reasonably certain reduction or diminishment, beyond baseline conditions, that constitutes a considerable or material reduction in the likelihood of survival and recovery.

By qualifying "reduce" with the modifier "appreciably," the current regulation indicates that something more than reduction *per se* is called for. If "appreciable" is defined to mean "detectable," then a non-appreciable reduction is a nullity. If a detectable reduction means that an action jeopardizes a species, then any adverse impact is the same as jeopardy.

By the same token, equating "appreciable reduction" with any mortality would entirely wipe out the meaning of section 9 of the ESA, which prohibits take of listed species; 50 C.F.R. 402.14(a)-(b), which states that the trigger for consultation is "likely to adversely affect" a species or critical habitat; and sections 7(b)(4) and 7(o)(2), which provide for the issuance of an ITS if an action may take individuals of a listed species but will not jeopardize the species. Thus, the statutory structure supports defining "reduce appreciably" as more than simply an impact on the species that is capable of detection.

District courts that have closely examined the meaning of "appreciably" in the ESA regulations and have agreed that the term means "considerable" or "material." *Pac. Coast Feds. of Fishermen's Assn's v. Gutierrez*, 606 F. Supp. 2d 1195, 1209 (E.D. Cal. 2008); *Forest Guardians v. Veneman*, 392 F. Supp. 2d 1082, 1092 (D. Ariz. 2005). Courts have also been willing to adopt definitions from the Consultation Handbook. *Medina County Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 700-01 (5th Cir. 2010); *Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 948 (9th Cir. 2010).

Effects of the Action.

Comment 26: AFRC supports the clarification that effects of an action are those that are caused by the action and are reasonably certain to occur. This simplifies and strengthens the current definition and leads to greater certainty and predictability.

Comment 27: It is not clear whether the new definition is intended to encompass what are currently defined as "interdependent" actions, which are "those that have no independent utility apart from the action under consideration." Arguably, such actions are not "caused" by the action under consideration but are essentially part of the same actions. In NEPA terms, the

projects would lack independent utility and would therefore need to be reviewed in the same document. *California ex rel. Imperial Cty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781, 795 (9th Cir. 2014); 40 C.F.R. § 1508.25.

The definition here should be clarified to address the status of interdependent actions. As a starting point, the definition at 40 C.F.R. 1508.25(a)(1) of "connected" actions is helpful to analyzing the whole action. Connected actions include actions automatically triggered by the subject action, can't or won't proceed without the subject action, or are parts of a larger action which depend on the larger action for justification. *Id.* Adopting this definition would also serve a larger goal of greater harmonization between ESA and NEPA analyses.

Environmental Baseline.

Comment 28: AFRC supports the proposed addition clarifying that ongoing actions are part of the environmental baseline and therefore not part of the subject action. There continues to be confusion on this point in the courts, and clarification from the Services is helpful. Confusion has also occurred between discretionary and non-discretionary aspects of agency operations. AFRC suggests you add a statement that non-discretionary portions of agency actions are included within the baseline.

Programmatic consultation and tiering.

Comment 29: AFRC agrees with adding a definition of programmatic consultation that provides for either "tiered" or "batched" consultations. The definition should be amended to clarify that programmatic consultation is optional. The scope of programmatic actions subject to consultation is a matter that continues to play out in the courts.

When an agency consults at a programmatic level, it obtains ESA clearance for a wide variety of activities that comply with the overall plan, but this does not mean every project requires two tiers of consultation. The Ninth Circuit first approved such a tiering procedure in *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1068, *amended,* 387 F.3d 968 (9th Cir. 2004), relating to the Northwest Forest Plan.

Though the ESA permits tiering, it does not require it. In the forestry context, projects must be consistent with the ESA and with the Forest Plan. A project may achieve ESA compliance via the Forest Plan if a programmatic opinion is complete, but it may also do so independent of the Forest Plan. The project's ESA compliance need not tier off a Forest Plan's compliance. The regulations should continue to be clear that plan-level consultation is not required for a project to proceed if appropriate consultation for the project has been completed.

Comment 30: AFRC encourages more guidance and leeway for subsequent consultations in a tiered framework. This is important because some courts have questioned the appropriateness of tiering under the ESA, *Nat. Res. Def. Council v. Rodgers*, 381 F.Supp.2d 1212, 1227-28 (E.D. Cal. 2005), and have overturned some efforts at segmented consultation. *See*, *e.g.*, *Conner v. Burford,* 848 F.2d 1441, 1453 (9th Cir. 1988). Thus, the definition, or the formal consultation provisions, should state that subsequent consultations may incorporate material by reference.

Adopting agency practice, the regulations should also permit subsequent actions to be deemed not likely to adversely affect listed species if their effects are within the scope of an existing programmatic incidental take statement.

Section 402.03 – Applicability

The Services ask for comment on a provision in section 402.03 which would limit the application of section 7 to preclude consultation where (1) no effect would occur; (2) remote impacts from global processes are unlikely, or (3) effects are wholly beneficial.

Comment 31: Subpart (1) is unnecessary. It is already well understood that consultation is not required when an agency determines there will be no effect. *Sierra Forest Legacy v. U.S. Forest Serv.*, 598 F.Supp. 2d 1058, 1065-66 (N.D. Cal. 2009); *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447 (9th Cir. 1996). Issuing a regulation might give more ammunition to arguments that a no-effect "determination" is required when an action would have no effect.

Comment 32: As to subpart (2), AFRC supports a regulation that rationalizes how consultation is affected by global processes, which presumably includes climate change. How to address climate change in the ESA context is a vexing problem. The proposed regulation is similar to the 4(d) rule for polar bear, which provides that activities do not constitute "take" unless they are "caused by activities in areas subject to the jurisdiction or sovereign rights of the United States within the current range of the polar bear." 50 C.F.R. § 17.40(q)(4). The polar bear rule was upheld as a valid exercise of agency authority in *In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 233 (D.D.C. 2011).

To track the polar bear rule more closely, we suggest writing the regulation to preclude consultation for actions outside the species' range which manifest impacts through global processes and whose individual contribution to impacts on species cannot be reliably discerned.

Comment 33: Subpart (3) may be useful, although its scope of application is likely to be limited. Even where actions are designed to benefit species, determining whether the effect is *wholly* beneficial is challenging. And if an action's effects are hard to measure, that may be an area where the Services' expertise is especially useful.

Comment 34: AFRC suggests an additional modification to section 402.03 to align with agency practice and with other proposed changes to the consultation process. Many agency actions have both discretionary and non-discretionary components. The Services' practice is to analyze the discretionary components for compliance with the ESA. To formalize this practice, the phrase, "to the extent of the discretionary involvement or control" could be added to the end of the regulation.

Section 402.13 – Informal Consultation

Deadline for Informal Consultation

Comment 35: AFRC supports the proposal to add a 60-day deadline for informal consultation. As described below, informal consultation can unnecessarily delay or shrink projects. We suggest that a deadline be triggered by an action agency's determination of not likely to adversely affect (NLAA) and a request for concurrence.

By the time an action agency has determined whether adverse effect is likely, it has usually gone through significant work on project planning an analysis. Thus, the Services should consider a 30-day timeline for informal consultation when the action agency submits its NLAA determination. After 30 days, without any response, the informal consultation should be considered concluded.

Forest managers should be enabled to make their own "not likely to adversely affect" (NLAA) determinations

Comment 36: Under current regulations, informal consultation may be concluded if the action agency determines, "with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat. …" 50 C.F.R. § 402.13(a). The federal agencies which implement forest management projects, the Forest Service and Bureau of Land Management, have significant expertise in dealing with forest ecology *and* administer their lands under extensive land management plans (many of which have gone through their own formal consultation). It makes both legal and practical sense to empower these agencies' biologists and foresters.

The Services have become enmeshed in project teams at the land management agencies, where they play a constant role of additional process and obstruction. The Services essentially act as super-members of the project team, holding veto power over needed management actions they disagree with. Thus, although the time between NLAA determination and concurrence is relatively short, the Services have imposed delays throughout the process.

To address this issue, AFRC urges you to amend sections 402.13 and 402.14, or to add a new regulation, to permit certain agencies engaged in forest management to determine that an action is not likely to adversely affect listed species or critical habitat, and thereby comply with any consultation requirement.

AFRC acknowledges that the former counterpart regulations under the National Fire Plan were struck down in *Defenders of Wildlife v. Salazar*, 842 F.Supp.2d 181 (D.D.C. 2012). The flaw in those regulations is reparable. The court upheld the regulations when the government maintained that the rationale was that the concurrence process had caused delays. But it went the other way when the government abandoned that rationale in favor of relying on *potential* future delays. *Id.* at 184-85. Moving forward with a focus on past effects is likely to be successful. As *Defenders* noted, "Plaintiffs themselves concede that if this [past delays] was the actual rationale

and it was supported by evidence in the Administrative Record, it would properly survive an "arbitrary and capricious" challenge." *Id.* at 185.

Formal consultation procedures – 50 USC 402.16

Comment 37: The consultation process between the Forest Service and the wildlife agencies is taking too long. The statute and regulations generally provide a 135-day timeframe for concluding consultation. 16 U.S.C. § 1536(b)(1)(A); 50 C.F.R. § 402.14(e). The agencies may "mutually" agree to extend consultation beyond that period. In practice, the Forest Service and BLM are subject to the timeframe that either FWS or NMFS can support. The Forest Service can be reluctant to put too much pressure on because it is aware of the determinative effect of a biological opinion under the ESA. As the Supreme Court wrote 20 years ago, the FWS "itself is, to put it mildly, keenly aware of the virtually determinative effect of its biological opinions." *Bennett v. Spear*, 520 U.S. 154, 170 (1997). In one recent instance, the ESA consultation process, though ultimately approving a project, resulted in the loss of an entire operating season for a project to recover from fire destruction of spotted owl habitat in northern California. Circumstances like this show that the delay is not to anyone's benefit, much less to that of a listed species.

Comment 38: AFRC supports the measures to streamline consultation procedures by giving guidance as to what is required to initiate formal consultation. In current practice, determining whether a sufficient consultation package has been submitted is a significant point of contention between agencies. These regulations help prevent such extensive delays. Further allowing incorporation of other documents into a biological opinion also increases efficiency.

Comment 39: It would be appropriate to set out more procedures for tiered consultation in sections 402.13 and 402.14. Current regulations are not clear that the take levels in a programmatic ITS can be incorporated into subsequent consultations. Current agency practice essentially issues NLAA concurrence letters for subsequent consultations that stay within the scope of the programmatic ITS. The regulations should be amended to reflect that practice.

Reinitiation of Consultation – 402.16

Comment 40: AFRC strongly supports the proposed amendment to exempt FLPMA and NFMA land management plans from the requirement to reinitiate consultation. This fixes the *Cottonwood* decision from the Ninth Circuit which has been a disaster for land management in many western states. *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075 (9th Cir. 2015). It is consistent with Congressional intent, as Congress enacted a partial *Cottonwood* fix in the 2018 Consolidated Appropriations Act. 16 U.S.C. § 1604(d)(2).

This change will allow projects to move forward under existing forest plans if an appropriate plan-level ESA consultation is completed. It will eliminate any requirement for the Forest Service or Bureau of Land Management to *reinitiate* consultation at the plan level—and only at the plan level. The regulation does not change existing law regarding applicable requirements to consult on individual projects, new forest plans or plan revisions. The Ninth Circuit requires

consultation on new plans, while the Tenth Circuit does not. The regulation does not attempt to resolve this circuit split.

The Ninth Circuit requires a land management agency to consult on its management plans (forest plans) and obtain a plan-level biological opinion. *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994). The Tenth Circuit does not require any plan-level consultation. *Forest Guardians v. Forsgren*, 478 F.3d 1149 (10th Cir. 2007). We believe the Tenth Circuit has the better argument and the Obama Administration agreed, as it filed a petition for certiorari in *Cottonwood.* Forest plans do not authorize or implement any ground-disturbing activity. Instead, they set a series of land classifications, management standards and guidelines, and management goals. For that reason, the Tenth Circuit concluded that a forest plan is not concrete enough to constitute agency "action" subject to the ESA.

Since nearly every forestry project already undergoes ESA consultation, this plan-level exercise has no real conservation benefit. A plan-level analysis generally assesses an amount of species-wide impact that is sustainable. Projects can proceed as long as their impacts fall within the plan-level approved impacts. When a project is evaluated without plan-level clearance, there is no such buffer for the agency to rely on. Therefore, ESA consultation at the project-specific level is likely to be more conservative.

We agree with your conclusion that *Cottonwood* is inconsistent with both *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (*SUWA*), and *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). 83 Fed. Reg. at 35,189. *SUWA* involved a NEPA challenge to the BLM's resource management plans (RMPs) for parts of Utah in light of new information regarding increased off-road vehicle use. *SUWA*, 542 U.S. at 61. Plaintiffs argued that BLM violated NEPA by failing to supplement its RMPs with additional environmental analysis in light of significant new circumstances or information. *Id.* at 72-73. The Court noted that "although the '*approval* of a land use plan' is a 'major Federal action' requiring an EIS, that action is completed when the plan is approved." *Id*. at 73 (emphasis in original) (citation omitted). The Court held that for previously approved RMPs "[t]here is no ongoing major federal action that could require supplementation (though BLM is required to perform additional NEPA analyses if a plan is amended or revised)." *Id.* (emphasis added). SUWA's effect was to clearly articulate that "actions" constitute discrete, affirmative occurrences, and that definition necessarily does not include the mere existence of a plan after its adoption.

SUWA's interpretation of "major Federal action" in the NEPA context is applicable to the ESA definition of "action" in the context of an approved plan because the court's holding was predicated on the completed nature of the RMP. This understanding of "action" is further reinforced by the explanation that "BLM *is* required to perform additional NEPA analyses if a plan is amended or revised," or in other words, when it performs other discrete, affirmative acts directly addressing the contents of the RMP. *Id.* at 73 (emphasis in original). After *SUWA*, a management plan, once promulgated and standing alone, is not agency action until additional affirmative changes or revisions to the plan occur.

As a matter of logic, an agency no longer has control over an action that it has completed. "Agency discretion presumes that an agency can exercise 'judgment' in connection with a particular action." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. at 668. Thus, Section 7 applies to actions "which remain to be authorized, funded, or carried out. . . ." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 186 n. 32 (1978). Once an action is complete, there is no longer any judgment that can guide its implementation. Instead, any modifications to the subject of the action, such as a significant amendment or revision of a forest plan, would be a new action.

Cottonwood blurs the difference between plans and projects – a distinction which the Supreme Court has determined to be essential. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 729, 734 (1998). *Cottonwood* found that agencies remain "involved" in forest plans under § 402.16 because they make "additional decisions" at the "site-specific level" to implement the plans.

Revising the reinitiation of consultation regulation is an important step toward rational implementation of the ESA.

Other Provisions – 402.17

Comment 41: AFRC supports adding more clarity to "reasonably certain to occur." As with the definitional section, we are concerned about the treatment of "interdependent" actions and suggest further clarification.

In conclusion, AFRC appreciates the opportunity to provide comments on Proposed Rulemaking regarding Endangered and Threatened Wildlife and Plants.

Sincerely,

Travis Joseph
President