Forest LANDOWNERS

Promoting Private Forests

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Public Comments Processing
Attn: FWS-HQ-ES-2018-0006
U.S. Fish and Wildlife Service, MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

http://www.regulations.gov
Submitted Electronically

Re: Revision of the Regulations for Listing Species and Designating Critical Habitat

To Whom It May Concern:

On July 25, 2018, the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) proposed a revision of regulations for listing species and designating critical habitat under the Endangered Species Act (ESA) of 1973. These regulations were promulgated to implement Section 4 of the ESA, and the revisions are intended to clarify, interpret, and implement portions of the Act concerning the procedures and criteria used for listing and delisting species. The USFWS and NMFS (collectively, the Services) seek comment from the public on these proposed changes.

The Forest Landowners Association (FLA) is an association of landowners who are the stewards of America's private forests. FLA represents over 5,000 members, representing over 50 million acres of forest in 45 states. Our members hold predominantly large tracts of forest and manage their land with a sustainable approach, ensuring the prosperity of their forests for future generations. Our constituents range from large forest businesses whose land has been in their families for generations to those who have become forest landowners because they view forests as a long-term investment. FLA is committed to preserving America's tradition of private forest ownership, promoting the importance of forest resources, and securing a legacy that can be passed to the next generation.

The largest family forests are among the most important economically and environmentally. These ownerships are large, uninterrupted tracts of contiguous forests. Our purpose is to advocate policies that enable those who own and manage their working forests with a holistic approach – financially, environmentally, and socially – to fulfill their family's forest legacy and pass on the tradition to future generations. It is in that regard, that we advocate for forest landowners to be acknowledged for the economic and environmental contributions their working forests make to society. A key component of our work is

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advocating for a regulatory framework that benefits working forests and the landowners who maintain them.

FLA is joined by the Southeastern Lumber Manufacturers Association (SLMA) in these comments. SLMA is a trade association that represents public and privately-owned sawmills, lumber treaters, and their suppliers in 13 states throughout the Southeast. SLMA's members produce more than 3 billion board feet of solid sawn lumber annually, employ over 12,000 people, and responsibly manage over two million acres of forestland. These sawmills are often the largest job creators in their rural communities, having an economic impact that reaches well beyond people that are in their direct employment. The association serves as the unified voice of its members on state and federal government affairs and offers various other programs including networking events, marketing and management, and operational issues.

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

Economic Impacts

Section 424.11 presents the criteria to be considered in making all listing determinations under the ESA. The Services propose to remove the phrase, "without reference to possible economic or other impacts of such determination," from paragraph (b) of this section.

We support this change and commend the service for improving the public transparency of listing determinations. From the perspective of a private forest landowner in America, listing decisions often have practical and economic impacts that go unnoticed by both policymakers and the public. Prohibiting even the acknowledgement of or reference to these impacts in a listing decision is a disservice to stakeholders as well as the public at large. The existing rule, which precludes any reference whatsoever to this type of information, serves to cast a shadow over information that should be made available to the public in presenting the broader context of a listing decision.

While the ESA still requires that the USFWS use only biological information as the basis for a listing decision, the public deserves to be made aware of other relevant information, such as cost-benefit analyses and the ripple effect of new regulations. Presenting a holistic picture of the listing decision as well as its impacts may shed new light upon the burdens many private landowners often bear in silence when a new listing decision is made. Hence, we support the proposed change and encourage the Services to reference economic and other information whenever pertinent to the presentation of a listing determination.

Foreseeable Future

Section 3(20) of the ESA 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." The Services seek to further define "foreseeable future" by adding a new paragraph (d) to Section 424.11, providing guidance for how to consider and apply this term when determining the status of a species. The proposed rule would define the foreseeable

future as extending only so far into the future as one can reasonably determine that the conditions posing a risk of extinction to the species are probable. As applied, the rule would guide the Services to make science-based determinations assessing the extent of the "foreseeable future" on a case-by-case basis. Scientific predictions would also be required to exhibit reliability, ensuring a reasonable degree of confidence in the prediction.

We support this approach to listing determinations and underscore the fact that this science-based, case-by-case approach has already been embraced by the courts. 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), cert. denied sub nom. Safari Club Intern. v. Jewell, 134 S. Ct. 310 (2013). This approach also lends itself to the Species Status Assessment approach being employed by the USFWS to assess relevant risks to petitioned and listed species. Confining the assessment of threats to a science-based timeframe and requiring predictions to be reliable ensures the efficient use of resources to conserve those species that are proven to be in or near actual peril of extinction.

Factors Considered in Delisting Species

In Section 424.11 paragraph (e), the Services propose to clarify that de-listing determinations will be based on the same criteria as listing decisions. Essentially, assessing the status of a species will occur in the same manner without regard to whether the species is currently listed or not. After reviewing the statutory criteria, the Services make a determination of whether a particular species meets the definition of a threatened species or an endangered species. It is noteworthy that this approach has been supported by the courts. See, e.g., Friends of Blackwater v. Salazar, 691 F.3d 428 (D.C. Cir. 2012).

The Services also propose to streamline Section 424.11 both technically and substantively to track more closely the language and structure of the ESA. These proposals include adding provisions to remove a listed species when it becomes extinct and to remove a listed species if it is determined that it no longer meets the definition of a species.

We support these proposed changes and commend the Services for working to establish greater consistency and clarity within the listing and delisting processes Hosting a listed species on private forestland often brings economic and legal burdens that landowners are forced to bear for the good of the species without any compensation. Once a species is listed, it is rare for it to be removed from the list. Hence, the regulatory burdens imposed are often viewed as permanent. A clear standard for delisting also serves to make conservation goals more concrete – and therefore more achievable. For these reasons, FLA and SLMA applaud the Services' efforts to clarifying the standard for delisting as well as other circumstances that can lead to delisting.

Section 424.12—Criteria for Designating Critical Habitat

Not Prudent Determinations

The Services propose a rule that would provide them with an option of determining that it would not be prudent to designate critical habitat under certain circumstances.

Critical habitat designation can have a profound effect on land use, even on private lands. For a private forest landowner, any actions involving a connection with the federal government (federal funds, authorization, agency action, permit, etc.) are restricted. A critical habitat designation places a long-term legal and economic burden on the land, often resulting in uncompensated economic losses far beyond the mere diminution in property value. Therefore, the decision to designate critical habitat when it is not necessary to the conservation of the species would place an excessive burden on private landowners, without achieving clear progress toward achieving the goals of the ESA.

While the proposed rule does identify many of the circumstances when a determination can and should be made that it is not prudent to designate critical habitat, FLA and SLMA would suggest one more: when the benefits of a "not prudent" determination (including avoidance of regulatory impacts) would outweigh the benefits of the designation. Under Section 4(b)(2) of the ESA, the Services are permitted to take such economic factors into consideration when designating critical habitat, and we believe that this factor should be strongly considered when determining whether critical habitat designation would be prudent at all.

Designating Unoccupied Areas

The proposed section 424.12(b)(2) specifies how the Services would determine whether unoccupied areas are essential to ensure the conservation of the species. This section must be revised, as the proposed language here suffers from a fatal flaw of internal inconsistency. First, it is stated that unoccupied habitat will only be designated "upon a determination that such areas are *essential* for the conservation of the species" (emphasis added). Next, it is explained that such a determination may be made when failure to designate unoccupied habitat will result in "*less efficient* conservation of the species" (emphasis added). A factor whose absence leads to a "less efficient" outcome is not an "essential factor;" it is merely one that will streamline or accelerate the process. Thus, a determination that failure to designate unoccupied habitat will lead to a less efficient outcome should not be sufficient to support a determination that such habitat is essential for the conservation of the species. As such, we believe that this language would not stand if challenged in court.

In light of the long-term burden that a critical habitat designation places on private lands, this tool should be used only to the extent necessary to conserve the species. Therefore, unoccupied habitat should only be designated in cases where occupied areas would be scientifically inadequate to ensure the conservation of the species. To make the proposed language more consistent, FLA and SLMA recommend striking all language referencing "less

efficient conservation of the species." In addition to the above-described internal inconsistency introduced by this phrase, this language – as well as the definition of "efficient conservation" – introduces uncertainty and unpredictability into the determination and may be difficult to apply in practice.

The proposed language also requires a finding that the "there is a reasonable likelihood that the area will contribute to the conservation of the species" before the Services may determine that unoccupied habitat is essential to the conservation of the species. However, in the Services' preamble to the proposed rule, they explain that they will continue their established practice of allowing a lower threshold for "likelihood" when the unoccupied habitat area exhibits characteristics that are highly valuable to species conservation.

We believe this practice to be inconsistent with the plain meaning of the proposed regulatory language as well as the "conservation purposes of the Act," and we urge the Services to utilize a consistent threshold for "likelihood" regardless of the conservation value of the property. The ability of unoccupied habitat to serve in conserving a species that is not present on that property is irrelevant to a determination of whether that property is likely to contribute to its conservation. Factors such as geographic connectivity, movement or migration patterns, and landowner intentions to enroll in reintroduction programs would be much more relevant considerations. Imposing burdens on landowners beyond those necessary or even "likely" to conserve a species is not contemplated by or required under the ESA. Therefore, we urge the Services to take a more consistent approach to this key determination.

Conclusion

FLA and SLMA applaud the Services' effort to streamline and clarify these regulations as they implement various provisions of the ESA. We appreciate the opportunity to provide insight into how these proposed changes will impact private forest landowners across the United States, and we look forward to working with the Services as they finalize and implement these new rules.

Sincerely,

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