

**Comments Submitted by the National Association of Forest Service Retirees (NAFSR) and the Public Lands Foundation (PLF) on 3 Proposed Rules published in the Federal Register on 6/22/2023. The docket numbers are FWS-HQ-ES-2021-0104, FWS-HQ-ES-2021-0107, and FWS-HQ-ES-2023-0018.**

- 1. Revision of Regulations for Interagency Cooperation. A Proposed Rule by the Fish and Wildlife Service and the National Oceanic and Atmospheric Administration**
- 2. Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants. A Proposed Rule by the Fish and Wildlife Service**
- 3. Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat”. A Proposed Rule by the Fish and Wildlife Service and the National Oceanic and Atmospheric Administration**

**Comments Submitted by the National Association of Forest Service Retirees (NAFSR) and the Public Lands Foundation (PLF) on the proposed regulation entitled “Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation”. 88 FR 40753 – A Proposed Rule by the Fish and Wildlife Service and the National Oceanic and Atmospheric Administration published on 6/22/2023.**

**The National Association of Forest Service Retirees (NAFSR)** is a national nonprofit membership organization that represents thousands of US Department of Agriculture (USDA) Forest Service retirees who are dedicated to: sustaining the heritage of caring for the National Forests and Grasslands, partnering with the Forest Service (FS), and helping understand and adapt to today’s and tomorrow’s challenges.

**The Public Lands Foundation (PLF)** is a national nonprofit membership organization that advocates and works for the retention of America’s Public Lands in public hands, professionally and sustainably managed for responsible use and enjoyment by American citizens. The PLF endorses and embraces the multiple use mission of the US Department of the Interior (DOI) Bureau of Land Management (BLM). Members are predominately retired BLM employees from across the United States.

Thank you for the opportunity to comment on the proposal to amend the Services’ consultation regulations under the Endangered Species Act of 1973, as amended, pertaining to the U.S. Forest Service and the Bureau of Land Management. The proposed revisions to Title 50, part 402, resulting from the FWS and NOAA review of the 2019 rule, would generally clarify, improve, and increase the transparency of the interagency consultation processes while continuing to provide for the conservation of listed species.

We support the revised definition of “effects of the action” to include both direct and indirect effects as well as including the other activities that are caused by the proposed action previously identified as “interrelated and interdependent”. We also support the two-part test to determine when a consequence is caused by the proposed action (“but for” causation and “reasonably certain to occur”). We support the move to establish a stand-alone definition of “environmental baseline” and the move into the instructions section the Services’ responsibilities during formal

consultation to add effects of the action to the environmental baseline. And finally, we support the inclusion of a new sentence regarding the spatial and temporal effects of the action – that the effects may occur throughout the action area and be ongoing or delayed after completion of the action.

Finally, the proposed amendment relating to the scope of reasonable and prudent measures (RPMs) in an Incidental Take Statement (ITS), through consideration of the use of offsetting measures outside the action area, is a significant expansion of the Services' existing regulatory authority. In the 50+ years that the Services have been implementing the ESA, we are unaware of instances where the Services have identified "residual" incidental take, that was unaccounted for, as being a significant problem that needs fixing. For such a radical change to Section 7(a)(2) implementation, the Services should document and disclose how listed species conservation has suffered in the past without these proposed offsets.

Without very clear sideboards, we are concerned about what would be considered "reasonable and prudent" under this new regulatory regime. The Services should specifically address what conceptually constitutes "reasonable and prudent" offsets when they are unlikely to be in the project area and have little relevance to the proposed action. We are also concerned that offsets could be required that are beyond the budgetary capacity of the action agency as well as any offsets that might be inconsistent with agency land use plans. Implementation of this new regulatory scheme would certainly provide another opportunity for litigation regarding whether RPMs requiring off-site mitigation are adequate or inadequate.

Although the imposition of these offsets could potentially result in better conservation outcomes for a particular species, they could also be inconsistent with the action agency's other legal mandates. We support the use of species conservation banks and other action agency mechanisms to achieve compensatory mitigation through their existing authorities. We don't believe the best way to achieve these conservation outcomes is through the Section 7(a)(2) process. The Services and land management agencies can probably achieve the same off-site conservation goals through cooperation during recovery planning, 7(a)(1) recommendations during action agency land use planning, and project-level planning. These processes are better understood, and would probably be more legally defensible.

We view the other provisions of the proposed new rule (regarding clarifying definitions) as essential if significant progress is to be made on the goal of the Endangered Species Act – to recover species that are in need of recovery.

**Comments Submitted by the National Association of Forest Service Retirees (NAFSR) and the Public Lands Foundation (PLF) on the proposed regulation entitled "Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants". A Proposed Rule by the Fish and Wildlife Service on 6/22/2023. 88 FR 40742 - 40753**

Thank you for the opportunity to comment on the proposal to revise regulations to reinstitute the blanket 4(d) rule as it pertains to the U.S. Forest Service and the Bureau of Land Management. Although it may increase workloads for the Services and action agencies, we do not object to the

reinstitution of the general application of the “blanket rule” option for protecting newly listed threatened species pursuant to section 4(d) of the ESA by revising the regulations at 50 CFR part 717, subparts C, D, F and G to match amendments to the ESA that Congress enacted in 1988. Use of the option to promulgate species-specific rules are consistent with the goal for Threatened species to prevent further declines and prevent the species from becoming endangered. Action agencies should still be familiar with consultation under this rule set. We encourage collaboration between the regulatory and action agencies when working on species-specific plans. We agree that applying the proposed regulations upon listing of a species as Threatened could help prevent further declines of the species and further the conservation purposes of the Act.

**Comments Submitted by the National Association of Forest Service Retirees (NAFSR) and the Public Lands Foundation (PLF) on the proposed regulation entitled “Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat”. A Proposed Rule by the Fish and Wildlife Service and the National Oceanic and Atmospheric Administration on 6/22/2023. 88 FR 40764 - 40774**

Thank you for the opportunity to comment on the proposal to revise regulations related to designating Critical Habitat as it pertains to the U.S. Forest Service and the Bureau of Land Management. We support the proposal to revise portions of the regulations (50 CFR part 424) to implement section 4 of the ESA of 1973 as amended. It is important to the federal land management agencies that the procedures and criteria used for listing, reclassifying, and delisting species on the Lists of Endangered and Threatened Wildlife and Plants and designating critical habitat be clarified, interpreted and implemented. We believe that it is important for the regulatory and action agencies to actively collaborate during discussions regarding unoccupied habitat and any potential designations of unoccupied areas as Critical Habitat.

We believe that the proposed revisions are timely given the changing landscapes from a variety of threats such as changes to plant communities from climate change. There is a need to identify areas where species can thrive regardless of whether those areas are occupied or within the historic range of that species. The proposed changes comport with the federal land management agencies’ goals to conserve ecosystems upon which endangered and threatened species depend.