



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240



In Reply Refer To:
FWS/AES/DCHRS/049785

MAR 8 2012

Chief Tom Tidwell
USDA Forest Service (Chief's Office)
1400 Independence Avenue, SW
Mailstop 1144
Washington, D.C. 20250-1144

Dear Mr. Tidwell:

On July 27, 2011, the Forest Service requested consultation with the U.S. Fish and Wildlife Service (FWS) under section 7 of the Endangered Species Act for the adoption of a new National Forest Management Act planning rule. We conclude that the planning rule will be in accordance with the dictates of section 7(a)(1) and will be in compliance with 7(a)(2) of the Act. We have particularly appreciated the diligence, attention to detail, and good humor of Mr. Alan Williamson of your staff as we have worked our way through this consultation.

Consultation History

On September 17, 2010, staff of our two agencies, as well as of the National Marine Fisheries Service, began meeting periodically during the development of the rule to discuss the overall philosophy underlying it, compliance issues, and scheduling as it moves through approval. A detailed descriptive chronology of these meetings is appended to the final biological assessment. Our review and biological opinion are based on discussions during these meetings as well as the final biological assessment with appendices and the draft of the rule transmitted in November, 2011. We also rely upon an addendum to the biological assessment clarifying two points addressed in the rule and provided on January 11, 2012.

Description of the Proposed Action

The proposed action is the issuance of a final rule (planning rule) under the authority of the National Forest Management Act to guide units of the National Forest System (NFS) in preparing, revising, and amending land management plans. The planning rule is largely procedural in nature, requiring that plans contain certain elements and that certain steps be taken in approving, revising, or amending them. The planning rule also contains provisions related to monitoring toward meeting plan desired conditions and objectives. The planning rule does not contain provisions directed at particular species, but does prescribe that certain classes of species



(e.g. endangered, threatened, proposed, and candidate species) be given special consideration and levels of protection in land management plans.

Scope

The planning rule is the initial step in a process that will include adoption, revision, and amendment of over 100 individual land management plans and the planning and execution of projects pursuant to those plans. The rule itself is intended to remain in place over the indefinite future; the planning rule it would replace was adopted nearly 30 years ago. The scope of the rule is thus extremely broad, and the Forest Service addresses all listed species (374 species under FWS jurisdiction), proposed species (6 species under FWS jurisdiction), and candidate species (59 species under FWS jurisdiction) known or believed to occur within the NFS. Lists of these species are appended to the biological assessment. The composition of these lists is expected to change over time as additional species are listed or removed from the lists, proposed for listing, or recognized as candidates, but these changes will not alter our evaluation of the rule because it addresses species in general and does not entail any species-specific provisions. Consequently, we find it unnecessary to recount the current status of the species potentially affected by the planning rule.

Environmental Baseline

The environmental baseline is an expression of the effects of past and ongoing environmental processes and human influence leading to the current status of species, habitats (including designated critical habitat), and ecosystems, within the action area. The action area for the planning rule includes the entire NFS, which is expected to eventually be managed pursuant to plans adopted, amended, or revised according to the procedures prescribed in the rule. These planning exercises will take place over a protracted time scale, and the condition of the environment affected by these plans will respond to a variety of influences (e.g. fire, flood, vegetational succession, climate change, invasive species, etc.) in the time between adoption of the rule and later steps in the planning process. Those later steps, also subject to consultation under the Act, will provide opportunities to reassess the condition of the baseline at a more focused spatial scale and closer in time to any possible effects to species. Given the broad scale of the planning rule, the generic nature of its provisions, and opportunities later in the process to assess baseline conditions, an attempt to establish an environmental baseline for the NFS contemporaneous with adoption of the planning rule serves little if any purpose in informing our analysis under section 7(a)(1) and 7(a)(2) of the Act.

Nevertheless, it is possible to express in general terms the state of the environment throughout the NFS lands. The following account is drawn largely from the biological assessment provided by the Forest Service.

The NFS encompasses 193 million acres (78 million hectares) of diverse habitat types, including 12 million acres (4.9 million hectares) and 22,000 miles (35,000 kilometers) of streams designated as critical habitat for endangered or threatened species. Land management plans developed under the provisions of the 1982 planning rule are the primary source of direction for maintaining species diversity, managing plant and animal habitats, and conducting monitoring on the national forests and grasslands. Laws such as the Endangered Species Act, the Migratory Bird Treaty Act, and the Bald and Golden Eagle Protection Act; specific Forest Service directives and policy; and advances in scientific understanding of how ecosystems function also have been very important in maintaining biological diversity.

Insect and disease epidemics, catastrophic wildfires, changing climatic conditions, and the spread of non-native invasive species are examples of environmental stressors that are largely out of the control of the Agency and that influence ecological conditions and species diversity on units of the NFS.

The Interim Update of the 2000 Renewable Resources Planning Act Assessment includes the following summary statements and assumptions relevant to plant and animal diversity and to threatened and endangered species conservation on NFS lands:

- The largest reserves of intact forest are concentrated on public lands and the largest share of intact forest is contained in the NFS. For some types of ecosystems, only NFS lands contain significant amounts of intact forest.
- The status of adjacent private lands can determine the degree of intactness that can be achieved on public lands. For example, urbanization of private land next to public land increases the likelihood of invasive species on the public land. Since private lands can limit the degree of intactness on adjacent public lands, joint management with non-Federal landowners might be needed to achieve a specified level of forest intactness.
- Those species that have been able to adapt to human activities did well in the 20th century, as have species such as elk that are highly valued and managed by humans. Species that need large undeveloped landscapes or specialized habitats vulnerable to development pressures did not do as well.
- Forests in the United States are getting older. This aging will lead to increased diversity of forest structure, but to a decreased diversity of forest types because later successional stages will continue to increase at the expense of earlier successional stages. Although forests are getting older, duplication of pre-European conditions is not possible.
- The changing U.S. population is expected to demand increased ecosystem services coming from forest land and rangeland resources, including fresh water, protection from drought and floods, carbon storage, recreation, and other cultural benefits.

- Total forest land in the United States has remained relatively stable at about 750 million acres (305 million hectares) since 1900, but this stable trend masks dynamic shifts among forest types, forest age classes, and how forest cover is arranged on the landscape due to land use intensification.
- The area of rangeland in the United States has slowly declined from about 800 million acres (324 million hectares) in 1900 to approximately 580 million acres (235 million hectares) today. Rangeland area is projected to decline slowly over the next 50 years.
- Geographic areas within the United States that have high levels of threatened and endangered species continue to be concentrated in the southern Appalachians, coastal areas, and the arid Southwest.

Direct and Indirect Effects

The planning rule will not cause direct effects to endangered and threatened species, because it is programmatic in nature and prescribes the manner in which land management plans will be prepared, amended, and revised. Nevertheless, effects to species will take place in the future pursuant to those plans, are reasonably certain to occur, and thus may be characterized as indirect in nature.

Cumulative Effects

Cumulative effects include the effects of future State, Tribal, local or private actions that are reasonably certain to occur in the action area considered in this Biological Opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to Section 7 of the ESA.

The U.S. Forest Service's biological assessment did not identify future State, Tribal, local, or private actions that were reasonably certain to occur in the action area and that would not require Federal authorization, Federal funding, or the actions of a Federal agency. During this consultation, FWS did not become aware of any future private action in the action area that would not require Federal authorization or funding and that is reasonably certain to occur.

Interrelated and Interdependent Actions

The effects of actions that are interrelated to or interdependent with the action under consultation must be considered in the course of consultation. An interrelated action is one that is part of the proposed action and depends upon the proposed action for its justification. An interdependent action is one that has no independent utility apart from the action under consultation. FWS did not identify any actions interrelated to or interdependent with the adoption of the new planning rule.

Effects of the Rule Relevant to Section 7(a)(1) of the Act

Section 7(a)(1) of the Act requires Federal agencies “in consultation with and with the assistance of the Secretary” to “utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species....”

The Secretary referred to is the Secretary of the Interior or the Secretary of Commerce; within the Department of the Interior, responsibilities under section 7 are delegated to the Fish and Wildlife Service. We evaluate the planning rule to determine whether it effectively enlists the authorities available to the Forest Service to further the purposes of the Act, and what elements within the rule might constitute a program to conserve listed species.

The rule seeks to ensure that land management plans will support recovery of endangered and threatened species in several ways, and in fact goes beyond the directives of section 7(a)(1) by directing attention to proposed and candidate species as well as those that are listed. Initially, the rule (§219.8) requires that plans provide for ecological sustainability, which is likely to provide conditions conducive to the maintenance of native biodiversity generally and listed, proposed and candidate species in particular. Next, §219.9 requires that plans contain components to maintain or restore ecosystem integrity (§219.9(a)), ecosystem diversity (219.9(b)), and provide additional components where needed to contribute to the recovery of listed species and conservation of proposed and candidate species (§219.9(c)).

The rule would also require a plan to include a monitoring program (§219.12) that would assess the status of a select set of the ecological conditions required to contribute to the recovery of listed species and the conservation of proposed and candidate species (§219.12(a)(5)(iv)).

We conclude that the planning rule would establish a system for developing land management plans likely to promote the conservation of listed species occurring within the NFS, and that the elements of these plans dealing with endangered and threatened species constitute a program for their conservation, as described by section 7(a)(1) of the Act.

Recommendation to Improve Compliance with Section 7(a)(1)

We recommend that as land management plans are adopted, revised or amended they be subject to review under section 7(a)(1) of the Act. These plans are programmatic documents that will benefit from evaluation for their contributions to the recovery of listed species and for other elements that tend to further the purposes of the Act.

Effects of the Rule Relevant to Section 7(a)(2) of the Act

Section 7(a)(2) of the Act requires that a Federal agency insure “...in consultation with and with the assistance of the Secretary...that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or

threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary...to be critical....” The planning rule is a broad programmatic instrument. It prescribes methods for preparation, revision, and amendment of land management plans and, in very broad terms, the required content of these plans. Further consultation to evaluate compliance with the Act is anticipated in connection with adoption of the actual plans, and still further consultation will take place when projects undertaken in accord with the plans may affect listed species.

The planning rule is likely to affect listed species by prescribing the ways in which land management plans will provide for managing the species and their habitats. As noted above in the section 7(a)(1) evaluation, the planning rule contains several provisions directly addressing ecological sustainability and management of listed species, as well as requirements that units of the NFS carry out monitoring. In particular, the rule would require plans to support recovery of listed species, and thus is likely to result in significant beneficial effects to listed species. The planning rule, by itself, would not directly affect endangered or threatened species because, in the absence of implementation through development of land management plans and thereafter specific projects consistent with those plans, effects to listed species would not occur. Instead, the planning rule controls the development of land management plans that in turn control the development of site-specific actions. Effects to endangered or threatened species would occur only when a site-specific action or project is undertaken in compliance with a land management plan. Each land management plan and approval document for site-specific actions goes through several stages of review, including as appropriate consultations pursuant to section 7 of the ESA, and each level of review creates an opportunity to cancel, delay, or modify an action before that action might affect endangered or threatened species

We expect that as species are listed in the future or removed from the lists, or as new critical habitat is designated or existing critical habitat is revised or withdrawn, appropriate revisions or amendments will be made to land management plans. Consequently, we conclude that adoption of the planning rule is not likely to jeopardize the continued existence of any species now listed or listed subsequent to its adoption or to destroy or adversely modify any critical habitat now designated or designated subsequent to its adoption.

Incidental Take Statement

Section 9 of the Act and Federal regulation prohibit the take of endangered wildlife species without a permit or exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. Harm is further defined by FWS to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harass is defined by FWS as intentional or negligent actions that create

the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is defined as take that is incidental to, and not the purpose of, carrying out an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of an agency action is not considered to be prohibited taking under the Act provided the taking is in compliance with the terms and conditions of an Incidental Take Statement.

The FWS is not exempting take of endangered or threatened species incidental to the planning rule from the prohibitions of section 9 of the ESA in this opinion. The planning rule, by itself, would not result in the take of endangered or threatened species because, in the absence of implementation through development of land management plans and thereafter specific projects consistent with those plans, the planning rule will not cause the incidental take of any listed species. Instead, the planning rule controls the development of land management plans that in turn control the development of site-specific actions. Take of endangered or threatened species would occur only when a site-specific action or project is undertaken in compliance with a land management plan. Each land management plan and approval document for site-specific actions goes through several stages of review, including as appropriate consultations pursuant to section 7 of the ESA, and each level of review creates an opportunity to cancel, delay, or modify an action before that action might result in the take of endangered or threatened species. In consultation on the planning rule, it is impossible to identify the specific actions that might result in the take of endangered or threatened species or the number of individuals that might be taken by those actions, the proportion of populations of endangered or threatened species these might represent, or any surrogate measure.

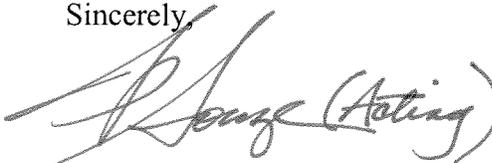
In addition, land management plans and approval documents for site-specific actions that might result in the take of endangered or threatened species would undergo separate formal consultation before any take would occur. Any biological opinion that resulted from one of those subsequent consultations would include an incidental take statement that exempted any incidental take likely to be caused by the action under consultation. Based on our interpretation of section 7(b)(4) and section 7(o)(2), deferring incidental take exemptions until subsequent consultations fulfills the letter and spirit of the obligations the ESA places on FWS. It is also appropriate in the context of a national consultation that evaluates a broad program or planning document, as described in the Interagency Endangered Species Consultation Handbook (U.S. Fish and Wildlife Service and NMFS 1998; Chapter 5, Special Consultations and Reviews and Formal Consultation, page 4-50).

Reinitiation

This concludes formal consultation on the proposed action outlined in the request. Reinitiation of formal consultation is ordinarily required where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if (1) the authorized amount or extent of incidental take is exceeded; (2) new information reveals effects of the proposed action on listed species or critical habitat in a manner or to an extent not considered in an opinion, (3) the agency action is subsequently modified in a manner that causes an effect to listed species or critical habitat that was not considered in the opinion or, (4) a new species is listed or critical habitat is designated that may be affected by the proposed action.

However, considering the generic nature of the planning rule we did not address effects to individual species or critical habitats in concluding that it is not likely to jeopardize species now or subsequently listed or destroy or adversely modify critical habitat now or subsequently designated. In addition, exemption of incidental take is deferred to subsequent stages of the land management planning process. We expect that initiation or reinitiation of consultation because of unanticipated effects to species or critical habitat or because of newly listed species or newly designated critical habitat will take place at the level of a unit or units of the NFS. We consider it extremely unlikely that reinitiation of consultation on the planning rule itself will become necessary unless the rule is amended in the future.

Sincerely,



for Gary D. Frazer
Assistant Director for
Endangered Species

cc: 420-ARLSQ-FWS/TE (JFay)

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