Housing Finance and Regulatory Affairs
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Attn: Regulatory Reform, FWS Docket # DOI-2017-0003

Dear Mr. Lawyer:

On behalf of the National Association of Home Builders (NAHB), I am pleased to submit the following recommendations regarding which U.S. Fish and Wildlife Service (FWS) regulations, policies, guidance documents, and permitting programs under the Endangered Species Act (ESA) impact the U.S. residential home building industry and warrant consideration as the Agency formulates its response to Executive Order (E.O.) 13777, "Enforcing the Regulatory Reform Agenda." NAHB's provides these comments in response to FWS's request published in the Federal Register on June 22, 2017.[1] NAHB is a federation of more than 700 state and local associations representing more than 140,000 member firms nationwide. NAHB's members are involved in home building, remodeling, multifamily construction, land development, property management, and light commercial construction. Collectively, NAHB's members employ more than 1.26 million people and construct about 80 percent of all new housing units constructed within the U.S. each year. Due to the wide range of activities NAHB members conduct to house the nation's residents, they are often required to comply with the regulatory requirements of the ESA. Specifically, this happens if the FWS or the National Marine Fisheries Service (NMFS) (hereafter referred to collectively as "the Service") determines the activity will result in the "take" of a listed species, is likely to jeopardize the continued existence of a listed species or may result in destruction or adverse modification of its designated critical habitat.

Once the Service determines a project triggers ESA compliance, the project proponent must obtain an incidental take authorization through either an ESA Section 10 Incidental Take Permit if the project consists of wholly private actions where no federal permit or other federal nexus is required, or ESA Section 7 Consultation if the activity requires a federal permit, funding, or authorization. According to a 2015 study conducted by the Defenders of Wildlife (Defenders) that purported to have examined all of the Section 7 consultations performed between 2008 and 2015, the industry triggering the most ESA compliance obligations was the land development and construction industry.[2] Defenders' finding comes as no surprise to NAHB, since the residential construction sector obtains a significant number of federal Clean Water Act (CWA) Section 404 dredge and fill permits from the U.S. Army Corps of Engineers (Corps) on an annual basis, and obtaining a federal permit in areas designated by FWS as critical habitat is the most common trigger for the ESA's Section 7 consultation process. Therefore,

[1] 82 Fed. Reg. at 28,429 (June 22, 2017)
[2] Jacob W. Malcom and Ya-Wei Li, Data contradict common perceptions about a controversial provision of the US Endangered Species Act. *Proceedings of the National Academy of Science (PNAS)*. December 2015.

given the impact of the ESA on the land development and construction industry, NAHB is keenly interested in any efforts by FWS to respond to the President's call for eliminating, modifying, or streamlining federal regulations in order "to alleviate unnecessary regulatory burdens placed upon the American people" as required under E.O. 13777.

Implementation of the ESA has proven to be highly divisive, ceaselessly litigious, and overly challenging. Stakeholders such as landowners, builders, developers and state and local governments have grown weary of the ESA's protracted permitting process, the controversial legal settlements FWS enters into with environmental groups that abuse the ESA's listing process, and the confusing array of regulations and policies that are themselves constantly in flux. Perhaps the most tangible demonstration of how contentious and flawed the administration of the ESA has become is the fact that Congress has refused to reauthorize the statute since 1988.[3]

NAHB has participated in previous bipartisan efforts by Congress, as well as prior administration's efforts to find consensus between environmental groups, landowners, and impacted industry on ways to efficiently and equitably implement key regulatory provisions of the ESA.[4,5] While these prior attempts at ESA reform were unsuccessful, they did identify and document a number of longstanding problems with how the ESA's regulatory and permitting programs are being implemented.[6]

For example, the FWS's existing regulatory and permitting programs disincentives landowners from taking proactive measures to protect species or habitats. Instead, they impose blanket federal prohibitions restricting the future use of property while requiring landowners to submit to expensive and time consuming federal permitting processes for even minor projects. As FWS considers which existing ESA regulatory or permitting programs to recommend for withdrawal and or reform in response to E.O. 13777, it is urged to revisit the stakeholder input provided by NAHB and others during these prior ESA reform initiatives.

Introduction

Reducing unnecessary regulatory burdens, promoting economic growth and job creation, and minimizing the impacts of government actions on small businesses are central tenets of President Trump's agenda. To effectuate these goals, President Trump released Executive Order 13771, "Reducing Regulation and Controlling Regulatory Costs," on January 30, 2017.[7] This Order, among

[3] Endangered Species Act Amendments of 1988, Pub. L. 100-478 Stat. 2306, codified as amended at 16 U.S.C. §§1531-1544
[4] Hearing before the Subcommittee on Fisheries, Wildlife, and Water of the Committee on Environment and Public Works, U.S. Senate. 109th Cong. Page 3 (2005). Retrieved from GPO's website on November 3, 2017 at https://www.gpo.gov/fdsys/pkg/CHRG-109shrg32210/html/CHRG-109shrg32210.htm
[5] 69 Fed. Reg. §167 (August 30, 2004) Executive Order 13332, entitled "Facilitation of Cooperative Conservation," issued by President George W. Bush, directed all federal agencies including the FWS to implement federal environmental and species protections regulations in a manner that encouraged rather than discouraged proactive conservation efforts.
[6] The Keystone Center, Keystone Working Group on Endangered Species Act Habitat Issues - Final Report. (2006) Last retrieved on November 1, 2017 at: https://www.keystone.org/wp-content/uploads/2015/08/042506-Keystone-Working-Group-on-Endangered-Species-Act.pdf

[7] 82 Fed. Reg. at 939 (February 3, 2017).

other things, directs the agencies, for each new regulation issued, to identify at least two prior regulations to be modified or eliminated so that the net cost of the regulation is zero. Recognizing the challenges associated with this Order's implementation, on February 24, 2017, the President signed E.O. 13777, "Enforcing the Regulatory Reform Agenda," which provided additional guidance as to how the agencies are to "alleviate unnecessary regulatory burdens" on the American people.[8]

Section 3(a) of E.O. 13777 requires each federal agency to establish a "Regulatory Reform Task Force" that is charged with evaluating existing regulations and "making recommendations to the agency head regarding their repeal, replacement, or modification." The term "regulation" is defined under Section 4 of E.O. 13771 to include any rules, regulations, or policies that "establish an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedures or practice requirements of an agency."[9] As a result, "regulation" can be broadly interpreted to include regulations, policies, guidance documents, and even federal programs that prescribe procedures or practices that either the Service or regulated entities must follow to comply with agency requirements. Importantly, when evaluating existing regulations and making recommendations for repeal, replacement or modification, each federal agency is also directed to ensure their respective Regulatory Reform Task Forces, "seek input and other assistance, as permitted by law, from entities significantly affected by Federal regulations including State, local and tribal governments, small businesses, consumers, non-governmental organizations and trade associations."

Directing federal agencies to periodically review existing regulations for potential repeal or modification and asking for public input is not a new concept. The idea of presidentially-directed regulatory review was introduced by President Clinton in 1993 through E.O. 12866, "Regulatory Planning and Review,"[10] and most succeeding presidents have tweaked these provisions or added new ones to ensure systematic and periodic review of most regulations. In addition, Congress, under Section 610 of the Regulatory Review Act, requires all federal agencies to periodically review existing regulations. [11] NAHB does not view these two retrospective review processes as redundant or duplicative. Rather, they underscore the importance both Congress and the Administration place on ensuring federal regulations, policies, and programs remain relevant, efficient, and accomplish their stated objectives, while imposing the least possible burdens upon the regulated community. Unfortunately, while compelling in concept, these efforts, to date, have resulted in arguably minimal impacts on the small businesses that feel the brunt of the regulatory bite.

President Trump's most recent initiatives recognize this problem and are intended, in part, to help get struggling industries back on their feet. In an effort to provide necessary relief to the residential construction industry, NAHB strongly urges the Administration to use this opportunity to make housing a priority. By focusing its retrospective review and oversight responsibilities for new rules

[8] 82 Fed. Reg. at 12,285 (March 1, 2017).
[9] E.O. 13771, "Reducing Regulations and Controlling Regulatory Costs" Section 4.
[10] 58 Fed. Reg. at 51,735 (October 4, 1993).
[11] 5 U.S.C. § 610.

on those policies that impact builders and developers, this Administration has an opportunity to create jobs and restore a broken segment of the economy. By examining the cumulative impacts and burdens placed by the myriad of federal regulations – many of which are duplicative, overlapping, or contrary to one another– along with assessing their performance, NAHB is certain that the agency will find sufficient room for efficiencies and streamlining.

Regulatory Burdens on Residential Construction are Untenable

The stresses confronting the U.S. housing market, specifically those affecting the small businesses that comprise the vast majority of residential construction companies, are real and widespread, including an increasingly tight labor market, lack of available financing for new construction projects, impacts of trade sanctions on lumber costs, declining housing production levels, and declined home values and their collective impact on remodeling activity. Furthermore, residential construction is one of the most heavily regulated industries in the country. In these economic times, the decrease in production, loss of residential construction jobs, and other factors point to the need to reduce the regulatory burden on this vital industry.

The majority of NAHB's members run small businesses that construct 10 or fewer homes each year and/or have fewer than 12 employees. Small businesses are the engine of growth for the U.S. economy. At the same time, they are disproportionately impacted by federal regulations, underscoring the need for, and importance of, conducting meaningful reform to reduce these onerous requirements. For example, residential construction is one of the few industries in which a government-issued permit is typically required for each unit of production. The rules do not stop there, as a constricting web of regulatory requirements affects every aspect of the land development and home building process, adding substantially to the cost of construction and preventing many families from becoming homeowners.

NAHB estimates that, on average, regulations imposed by government at all levels account for nearly 25 percent of the final price of a new single-family home built for sale.[12] The significant cost of regulations reflected in the final price of a new home has a very practical effect on housing affordability. According to NAHB research, approximately 14 million American households are priced out of the market for a new home by government regulations.[13] Given the outsized impact of regulations on the final price of a newly built single-family home, it is critical that each existing regulation, whether found at the federal, state, or local level, actually addresses the problem it was created for, avoids duplication with identical or similar regulation, and is designed in a manner to impose the least possible burden on the regulated entities. Further, because the cumulative burdens associated with layers of regulations can be overwhelming, FWS is strongly urged to also be cognizant of the challenges that will remain if the cumulative impacts from complying with regulations at all levels of government are not considered.

NAHB Recommended Service Regulations for Repeal, Replacement or Modification

[12] http://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=250611&channelID=311&_ga=1.255452874.

[13] http://eyeonhousing.org/2016/05/14-million-households-priced-out-by-government-regulation/

Section III (e) of E.O. 13777requires the agencies to gather input from a variety of sources, including regulated industries and sets the baseline criteria that each Regulatory Reform Task Force is to consider when reviewing and making recommendations for repeal, replacement, or modification.[14] Specifically, agencies are to attempt to identify existing federal regulations that:

i. Eliminate jobs or inhibit job creation;
ii. Are outdated, unnecessary, or ineffective;
iii. Impose costs that exceed benefits;
iv. Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
v. Are inconsistent with requirements under the Data Quality Act of 2001, or rely on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard of reproducibility; or
vi. Derive from or implement Executive Orders or other Presidential directives that have since been subsequently rescinded or substantially modified.

While E.O. 13777 provides a criteria for the U.S. Department of the Interior (DOI) Regulatory Reform Task Force to use to evaluate existing regulations for possible repeal or reform, the E.O. is essentially silent on what factors DOI should consider when identifying specific existing regulations to be repealed or revised. A primary concern for NAHB and other small businesses is how DOI and in particular FWS will ensure all sectors of the economy and different sized firms (i.e., large and small firms) both benefit from E.O. 13777's call for regulatory relief.

While DOI could fulfill its obligations under E.O. 13777 by simply identifying a subset of federal regulations that cost the most and thereby focus its deregulatory actions on those specific regulations, following such an approach would only benefit a few sectors of the economy (i.e., electric utilities or energy production). Furthermore, it is unclear under such an approach how other sectors of the economy, in particular the residential construction sector that is dominated by small businesses, would benefit. NAHB believes it is imperative for DOI to provide the public and the regulatory community with some indication of the criteria the Agency will use to identify federal regulations that will be addressed under the E.O.. At a minimum, NAHB suggests DOI should consider the following criteria when assessing existing regulations (including guidance documents, interpretive memoranda and other related actions) for potential deregulatory action:

- **Impacts.** What sector(s) of the economy are impacted; what types of businesses are impacted; how many entities are impacted (direct and indirect); and what is the nature of the impact(s)?
- **Economics**. What are the costs, benefits and cost/benefit ratio; who incurs the costs and reaps the benefits; how do costs impact small vs. large entities?
- **Need**. Is the regulation required by statute; does the regulation confer authorization (such

[14] 82 Fed. Reg. at 12,285 (Wednesday, March 1, 2017) Executive Order 13777, "Enforcing the Regulatory Reform Agenda."

as a permit) that is needed for the lawful operation of certain businesses?

- **Data & Technology**. Is there new, publicly available information that would impact the underlying rule or the underlying assumptions; does new data impact the rule's achievability, efficacy, cost or value; does a change in technology impact costs or achievability?
- **Redundancy**. Are there similar regulations within any agency or at any level of government that address the same or similar issue(s); are those rules duplicative or inconsistent with one another?
- **Other Rules**. Do more current regulations surpass the need for an existing rule; can rules be combined to meet the same outcome?

Importantly, in contemplating any reforms, NAHB strongly encourages DOI's Regulatory Reform Taskforce to group existing regulations by which industry sector or entity size must comply with the regulations. Such an approach not only helps to better promote regulatory relief across all sectors of the economy, but it also compels DOI, along with the FWS, to better understand, evaluate, and address cumulative impacts, as oftentimes it is not the costs and burdens of individual regulations that are problematic, but the additive nature of the rules or federal permitting processes that disproportionately impact heavily regulated industries like residential construction. Similarly, because some federal regulations provide necessary federal authorizations (i.e., federal permits) to ensure business operations are in compliance with the law, care must be taken to avoid the unintended consequences that can result from rushed deregulatory action(s).

Consistent with the directives under E.O. 13777, NAHB submits the following FWS regulations, policies and programs for consideration by DOI's Regulatory Reform Task Force. NAHB's recommendations are divided into the following three categories: regulations; policies and guidance documents; and federal permitting programs. Under each category, the comments provide a brief overview, followed by an explanation of the impact the particular "regulation" has on the home building industry, along with references to prior public comment letters NAHB has submitted to FWS on the specific topic, if applicable. Each entry concludes with a recommendation for repeal, replacement, or modification.

Category A: FWS Regulations

***1. Listing Endangered and Threatened Species and Designating Critical Habitat; Implementation (81 Fed. Reg. at 7,414 (February 11, 2016))* 50 C.F.R. § 424**

On February 11, 2016, the Service finalized revisions to its regulations governing the designation of critical habitat. NAHB submitted detailed comments in response to FWS's various proposals on October 8, 2014.[15] The changes made under this final rule focus on two key areas — regulatory

[15] See NAHB's comment letter to FWS filed within the rulemaking docket FWS-HQ-ES-2012-0096. Last retrieved on November 1, 2017 from the website www.Regulations.gov: https://www.regulations.gov/document?D=FWS-HQ-ES-2012-0096-0081.

definitions and changes to the regulatory criteria the Service uses for designating areas as critical habitat. With regard to regulatory definitions, the final rule both amended existing definitions, including the definition of "*conserve, conserving, and conservatio*n," and created entirely new definitions for key terms that had previously only existed under the statute. These include "*geographical areas occupied by the species,*" and "*physical or biological features.*" These definitions are important because they form the basis for the Service's designation of any particular area as occupied critical habitat. The Service's final rule also changed the regulatory criteria used for designating critical habitat, including allowing the Service the discretion to "designate critical habitat at a scale determined by the Secretary (i.e., Service) as appropriate." According to the Service, the purpose of this change is to relieve it from having to demonstrate every square inch, square acre, or even square mile of designated critical habitat actually meets the Service's new regulatory definition of occupied critical habitat for a specific species. Instead, this new language allows the Service to designate critical habitat at a scale it determines to be sufficient – whatever that means. Taken together, these changes dramatically expand the scope and legal effect of future critical habitat designations.

Unfortunately, the Service's final regulatory definitions of "*geographical areas occupied by the species*" and "*physical or biological features*" are completely inconsistent with the statutory definition of "critical habitat," which requires areas considered "occupied" to actually have members of the species present at the time the species was listed by the Service.[16] Similarly, under the statutory definition of "occupied critical habitat," areas must contain the specific physical or biological features that formed the basis for the Service's critical habitat designation concurrent with a species listing.[17] However, under the Service's final regulatory definitions, neither of these two statutory requirements must be met. NAHB therefore urges the FWS to withdraw both of these final regulatory definitions concerning the designation of occupied critical habitat.

Critical habitat impacts developers, builders, and other landowners by restricting their ability to obtain federally-required permits, such as CWA Section 404 permits for activities that result in the discharge of dredge and fill material into "waters of the United States." Under the ESA Section 7(a)(2), federal agencies are prohibited from authorizing any proposed activity if the Service determines the activity *is likely to adversely affect* a species or a species' designated critical habitat. Such a determination is made only after the Service and the federal action agency (e.g., Corps in the case of a CWA 404 permit) develop a biological assessment (BA) of the proposed project's presumed impacts on the species or its critical habitat and the Service completes a Biological Opinion (BiOp) of the proposed project's impact on the species or its critical habitat. While the Service's regulations contain a recommended timeframe of 135 days for this process, frequent disagreements can result in permitting delays of months or even years.

[16] 16 U.S.C. § 1532(5)(A)(i).
[17] *Ibid.*

Further, since the ESA prohibits activities that result in *jeopardizing the continued existence of the species* or the *destruction or adverse modification of critical habitat,* the Service and the federal action agency must identify specific project restrictions or modifications to the proposed activity that, if adopted by the landowner, would avoid a *jeopardy* or *adverse modification* determination. These restrictions on proposed activities, such as seasonal land clearing prohibitions or reduced lot coverage, become binding permit conditions of the underlying federal permit, (e.g., CWA Section 404 permit) and enable the Service to authorize the proposed activity by issuing an incidental take statement under the ESA's Section 7 consultation process. Due to these requirements, the economic impact of critical habitat designations on the home building industry can be significant. In situations where the species or the critical habitat being designated is located in or near metropolitan areas or in areas experiencing growth, the burden of the designation is even more acute.[18]

Equally problematic is the fact that under FWS's new critical habitat regulations, species' presence is not even required for an area to be designated as critical habitat, yet permitting restrictions and prohibitions still apply. Unlike the ESA's Section 9 "take" prohibitions, where the Service must determine the species is actually present and that the proposed activity will directly result in the death or injury of the species, once critical habitat is designated, any proposed activity needing a federal permit, funding, or authorization can trigger a *likely to adversely affect* determination. A landowner whose property has been designated as critical habitat only needs to apply for a federal permit or approval, as typically occurs when land developers or builders seek to improve or develop a property, to trigger the ESA's Section 7 consultation process. Given the outsized impact critical habitat designation has on land developers, builders, and landowners, NAHB is keenly interested in any regulatory changes instituted by the Service regarding how and where critical habitat is established.

- ***Definition of "Conserve, Conserving, and Conservation"*** **(50 C.F.R. § 424.02)**

The Service's final rule amends the previous regulatory definition of "conserve, conserving, and conservation" to include the phrase "i.e., the species is recovered." According to the Service, the inclusion of the phrase does not create a new standard under Act, but rather was intended "to clarify the link between conservation and recovery." NAHB disagrees. The Service's amendment is inappropriate given Congress' clear intent that critical habitat designation be limited to specific areas that are essential to the species *survival*, not recovery. Furthermore, by explicitly including the concept of "recovery" within the definition of "conserve, conserving, and conservation," the public and regulators within the Service could erroneously conclude that designation of critical habitat is somehow linked to recovery planning, which is contrary to both legislative history and prior statements by the Service. Therefore, NAHB strongly urges FWS to withdraw the recently amended definition of "conserve, conserving, and conservation." NAHB further questions why this term needs to be defined in the regulations at all, given that it is already defined in the statute.

[18] U.S. Fish and Wildlife (FWS) Economic Analysis of Critical Habitat Designation for Four Central Texas Salamanders. *Industrial Economics*. January 1, 2013. Exhibit ES-4 on page ES-7 found 97.7 percent (97.7%) of all of the costs resulting from critical habitat designation will occur on the residential construction industry.

- ***Definition of "Geographical Areas Occupied by the Species"*** **(50 C.F.R. § 424.02)**

The Service's final rule created a new regulatory definition for a phrase that previously only appeared within the statutory definition of "critical habitat".[19] Within the ESA, the phrase "geographical areas occupied by the species," appears in the definition of occupied critical habitat and serves to require the Service, when designating critical habitat, to identify those specific areas occupied by the species at the time the species is listed. Presumably, this is to ensure that the Service does not take an overly broad view of what should be deemed "critical" and limit its designation to where the species actually existis. Furthermore, the statutory definition of critical habitat requires that occupied critical habitat contain those specific "physical or biological features" that the Service determines are essential for the species' conservation (i.e., continued survival). Therefore, Congress intended the statutory definition of occupied critical habitat to be narrowly focused on those specific areas actually "occupied" by the species at the time of listing and that contain the specific "physical or biological features" that are necessary for the species' survival.

However, under the Service's final rule, the Agency has created an entirely new regulatory definition that is completely at odds with both Congress' intent and the existing statutory definition. Specifically, the Service's regulatory definition of "geographical areas occupied by the species" attempts to eliminate the current statutory distinction between "occupied" and "unoccupied" critical habitat; specifically, that "occupied" critical habitat means the species actually must be present on the property at the time of the critical habitat designation. Instead, the Service's final regulatory definition allows it to broadly designate areas as "occupied critical habitat" despite the fact the species is not actually present in the area(s) in question. The Service states in preamble of the final rule that it could designate "occupied critical habitat" based upon a given species' habitat range, including areas such as migratory corridors, or even areas only used sporadically by the species. The Service's new definition of "geographical areas occupied by the species" effectively eliminates the need for the Service to demonstrate "occupancy" by a species. Now, the Service can define areas as "occupied critical habitat" based on presumed migratory corridors for a given species that could include millions of acres of potential habitat. That makes little sense given that the very purpose of critical habitat is to protect those areas that are essential for a species' survival.

Such a broad expansion is not only unlawful, it is severely problematic for landowners. In addition to being subject to the ESA's permits and conditions, landowners have limited recourse. For impacted landowners, the only effective way for determining whether or not their property has been correctly designated as "occupied critical habitat" is to hire qualified biologists who follows Service-approved species surveying techniques to document occupancy by the species in question. For its part, the Service has historically relied upon the results of such property surveys to confirm the presence or absence of species and revised prior critical habitat designations when surveys failed to demonstrate species occupancy. However, given the Service's expansive final regulatory definition of "geographical

[19] 16 U.S.C. § 1532 5(a).

areas occupied by the species" allowing the Service to identify areas as occupied critical habitat as being "generally be delineated around species' occurrences," including areas such as migratory corridors or even a species habitat range.[20] Given this expansive regulatory definition of "geographical areas occupied by the species," it seems highly unlikely the Service would accept the results of species surveys conducted by landowners whose properties are located within proposed critical habitat – even those species surveys conducted using the Service's own species survey protocols - as sufficient evidence of a given area not meet the regulatory definition of "geographical areas occupied by the species." With nearly limitless discretion, the Service will likely be under pressure to designate ever larger landscapes as critical habitat. NAHB urges the Service to withdraw the regulatory definition of "geographical areas occupied by the species" as inconsistent with the statutory definition of "critical habitat" and contrary to Congress' intent. Instead, the Service should rely on the statutory definition which is clear and easily understood.

- ***Definition of "Physical or Biological Features"*** **(50 C.F.R. § 424.02)**

The Service's final rule also created a new regulatory definition for the previously undefined phrase "*physical or biological features.*" The new definition provides the Service wide discretion when identifying the statutorily-required features that form the basis for designating specific areas as critical habitat. What's more, the Service's final rule allows it to base a critical habitat designation on features that do not yet even exist on the landscape. The final regulatory definition of "physical or biological features" enables the Service to avoid specific physical features on the landscape, but instead designate private property as critical habitat based upon conservation principals, such as habitat connectivity or presumed migration corridors. This regulatory definition is clearly contrary to the statutory definition of "occupied critical habitat" that requires both the species and the specific physical biological features, called "primary constituent elements," to be present in the area being designated. The Services cannot include areas as occupied critical habitat merely because there is a possibility for such features to develop in the future. NAHB calls upon the Service to withdraw the recently finalized regulatory definition of "physical or biological features."

2. ***Definition of Destruction or Adverse Modification of Critical Habitat*** **(81 Fed. Reg. at 7,214 (February 11, 2016)) 50 C.F.R. § 402.02**

Under a different rulemaking, the Service recently finalized a new regulatory definition of the phrase "*destruction or adverse modification*" of critical habitat. This definition determines what types of land development or construction activities can occur within areas designated as unoccupied critical habitat. NAHB submitted detailed comments explaining our concerns with FWS's proposed definition during the public comment period.[21] The regulatory definition of "destruction or adverse modification" of critical habitat has very real economic and legal implications for states, local governments, and private landowners whose property has been designated by the FWS as critical habitat. A study of land values in northern California conducted by economists from the University of California Berkeley found that

[20] See final regulatory definition of the term "*geographical areas occupied by the species*" at 50 C.F.R. §402.02

[21] For additional information, see NAHB's regulatory comments on FWS's proposed regulatory definition for "Destruction of Adverse Modification" of critical habitat, submitted on October 8, 2014 to Docket No. FWS-R9-ES-2011-0072.

relative land values following a critical habitat designation declined over 50 percent as compared to land values prior to the critical habitat designation.[22]

How "destruction or adverse modification" is defined also has direct implications on the effectiveness of the Act. The Service's recently finalized definition of "adverse modification" is significantly different from the prior regulatory definition that was invalidated by the federal courts.[23,24] Under these two rulings, the federal courts found that the definition of "adverse modification" was insufficient because it required a proposed activity to diminish of the value of critical habitat to such a degree that both the survival and recovery of a listed species were at risk. In their rulings, the federal courts stated that the definition focused too heavily on the potential impacts to a species' survival and not enough on its ultimate recovery, despite Congress' clear intent that the role of critical habitat is to focus on the immediate survival needs of the species and not its long term recovery needs.

In an effort to be true to the courts, the Service's new regulatory definition of "adverse modification" also includes a recovery standard as part of a modified regulatory definition of "conservation." The inclusion of a recovery standard significantly expands the Service's regulatory and permitting authority over private landowners by imposing additional obligations. Prior to the revised "adverse modification" definition, the Service was required to prepare recovery plans for each listed species, but the specific contents of recovery plans were not binding on either the Service or private landowners. In fact, the Service had repeatedly stated that private landowners have no obligation to implement the contents of recovery plans under either the Section 7 consultation process or the Section 10 Incidental Take Permitting process. Furthermore, federal courts have repeatedly ruled that recovery plans are non-enforceable planning documents and cannot be used to compel either the Service or private landowners to take specific actions for a species' recovery.[25]

Now, however, the Service's inclusion of the modified definition of "conservation" has clearly linked the concept of recovery to the existing permitting authorities under the ESA's Section 7 consultation provisions. As a result, private landowners whose property has been designated "critical habitat" face the prospects of the Service making an "adverse modification" determination simply because virtually any modification to an area designated as critical habitat could result in either delaying the conservation (i.e., recovery) of the species, or potentially precluding its recovery.

NAHB is not alone is expressing strong opposition to the Service's revised "adverse modification" definition. Several states, key state agencies, and other stakeholders have also cautioned against the revision. According to comments submitted by the State of Idaho, for example, the Service's revised

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[22] Affhammer, M., Oren, M. and Sunding D. (2009) The Economic Impact of Critical Habitat Designation: Evidence from the Markets for Vacant Land, *Journal of Law & Economic*.
[23] *Sierra Club v. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir 2001).
[24] *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, No. 03-35279 and *Sierra Club v. U.S. Fish and Wildlife Service,* 245 F. 3d (5th Cir. 2001).
[25] See *Defenders of Wildlife v. Lujan* 792 F. Supp. 834 (D.D.C. 1992).

regulatory definition "*makes a fundamental change in the interpretation of the Endangered Species Act, whereby the Services are enlisting the non-federal (i.e., private) landowners into participating in species recovery, which currently is a federal agency responsibility*.[26] NAHB agrees. NAHB urges the Service to withdraw the recently revised definition of "adverse modification," as it is inconsistent with the intent of the ESA and places overly burdensome requirements on affected states, local governments and private landowners.

3. *Economic Impact Analyses under the Endangered Species Act* (78 Fed. Reg. at 53,058 (August 28, 2013)) 50 C.F.R. § 424.19

In 2013, the Service issued a final rule clarifying how and when it will consider economic impacts stemming from the designation of critical habitat.[27] The final rule codifies changes to the existing regulations found at 50 CFR § 424.19 governing the process the Service follows during the critical habitat designation and the preparation of the statutorily required economic analysis under the ESA § 4(b)(2). Importantly, under the final rule, the Agency announced its decision to officially abandon the "co-extensive" approach, which allowed the Service to consider all the economic costs impacting landowners in areas designated as critical habitat, regardless of when or why those costs were incurred. Instead, the final rule lets the Agency only consider the "incremental costs" resulting from a critical habitat designation.[28] Under an incremental approach, the Service excludes any economic costs it believes are attributable to the species' listing and only examines those economic costs that are imposed by the designation of the critical habitat itself. For example, under an incremental approach, the Service could exclude the economic impacts occurring in areas identified as occupied critical habitat because future development in these areas was already restricted by virtue of the species being listed. In other words, the critical habitat designation would not impose any additional restrictions or obligations above and beyond those imposed by the initial listing. NAHB strongly opposes the use of the "incremental cost" approach because it allows the Service to avoid considering the full costs of critical habitat designation i.e., both occupied and unoccupied critical habitat. As a result, the use of the incremental approach reduces the likelihood that areas may be excluded from the final critical habitat designation because of the economic impact, as allowed under ESA § 4(b)(2).

The Service's requirement to perform an economic analysis when designating critical habitat is vital for NAHB's members for two reasons: (1) it represents the only time the Service is required to quantify and report the regulatory costs the ESA imposes on landowners; and (2) based on the results of the economic analysis, the ESA gives the Service the authority to exclude specific areas from the final critical habitat designation, thereby potentially reducing our members' ESA obligations. Specifically, Congress provided the Service with the discretion under ESA § 4(b)(2) to "*exclude any particular area from a final critical habitat designation if the costs/impacts (i.e., economic, national security, policy*

[26] For additional information, see comments submitted by Mr. Patrick Seymour, Endangered Species Program Manager, Idaho Department of Lands on October 3, 2014 to Docket Number FWS-R9-ES-2011-0072.
[27] 78 Fed. Reg. at 53,058 (August 28, 2013).
[28] 78 Fed. Reg. at 53,076 (August 28, 2013); 50 C.F.R. §424.19(a)

issues) outweigh the benefits to the species." The only limitation placed on the use of this discretion is if the Service determines that the failure to designate a specific area as critical habitat will result in the extinction of the species as a whole.[29]

The Service, therefore, enjoys broad statutory discretion to reduce the geographic size of critical habitat designations. Under the previous administration, there were significant reductions (typically 40% to 60%) between "proposed" and "final" critical habitat designations – reductions that were based in part on the results of the ESA § 4 (b)(2) economic analyses. One example was the *California Red Legged Frog*, where the Service had originally proposed to designate over 737,000 acres as critical habitat. However, following the economic analysis, nearly 40% (283,000 acres) of the proposed critical habitat designation was excluded at a cost savings of nearly $400 million to private landowners.[30] NAHB is concerned that similar exclusions from future critical habitat designations will be significantly curtailed under the co-extensive approach. NAHB urges the Service to revisit the changes to its regulations found at 50 CFR § 424.19(a) and instead follow a co-extensive approach when conducting the required economic analysis.

Category B: Service Guidance Documents

1. ***Policy Regarding Implementation of Section 4(b)(2) of the ESA*** **(81 Fed. Reg. at 7,226 (March 14, 2016))**

The Service's purpose in issuing the ESA § 4(b)(2) policy was to help implement the August 2013 regulations governing how the Service performs the required economic impact analyses on all proposed critical habitat designations. Under this revised policy, the Service states that, consistent with the revised regulations, the Service will base its discretionary authority to exclude a given area from a final critical habitat designation based upon "the probable incremental economics of designating a particular area as critical habitat."[31] NAHB strongly opposed the use of the incremental approach when it was proposed by the Service.[32] Specifically, NAHB believes the incremental approach inappropriately shifts the economic costs of critical habitat designations to the ESA listing process where the Service is prohibited under the statute from considering any economic costs.[33]

Ultimately, the Service's use of the incremental approach will result in fewer costs being attributed to final critical habitat designation, which will greatly reduce the likelihood of the Service using its discretionary statutory authority under ESA § 4(b)(2) to exclude any given area from a final critical habitat designation. Instead, NAHB supports the co-extensive approach, which requires the Service to

[29] 16 U.S.C. § 1533(b)(2).
[30] 71 Fed. Reg. at 19,244-19,346 (April 13, 2006).
[31] 77 Fed. Reg. at 27,057 (May 12, 2014).
[32] See NAHB's comments on the Service's Revisions to the Regulations for Impact Analyses of Critical Habitat; Proposed Rule Docket Number FWS-R9-ES-2011-0104.
[33] 16 U.S.C. § 1533.

consider both the direct and indirect costs attributable to a critical habitat designation. NAHB believes the co-extensive approach, which the Service has successfully used in the past, better reflects the full costs of proposed critical habitat designations and provides the Service with a more accurate picture of the potential economic impact of any final critical habitat designation. With a more accurate understanding of all of the potential economic costs resulting from a critical habitat designation, NAHB believes the Service will be far more likely to use its statutory discretion under § 4(b)(2) to exclude areas from a final designation. NAHB urges the Service to withdraw this policy regarding the § 4(b)(2) process, as well as revise the current regulations found at 50 CFR § 424.19 to require the Service to use the co-extensive approach to determine the economic costs resulting from critical habitat designations.

2. Final Policy on Interpretation of the Phrase "Significant Portion of Its Range" under the ESA (79 Fed. Reg. at 37,578 (July 1, 2014))

Under the Service's final "Significant Portion of Its Range" (SPR) policy, issued in 2014, the Service contends it has created an independent basis for protecting a "species" across its entire range (e.g., species, subspecies, or distinct population segment "DPS").[34] However, unlike the traditional ESA listing process where the Service makes a determination that threats impacting a species occur across the species' entire range, the SPR policy allows the Service to determine a species warrants ESA protections based upon threats that only occur within a portion of that species' range. To do so, the Service must conclude that those threats are so "significant" as to warrant protecting the species range-wide. NAHB's comments on the proposed SPR policy praised the Service for established a high-bar for triggering the "significance test" under the SPR policy.[35] However, the Service's final SPR policy still creates inequalities for landowners whose property is located outside a species' SPR, but still within that species range. Specifically, the Service's final SPR policy would impose all of the ESA restrictions and permitting obligations upon these landowners despite the fact that their activities pose no threats to the species or its habitat.[36] Given that any species' range can extend over several states or even span across international boundaries, the potential impact of the Service's final SPR policy becomes clear.

NAHB urges the Service to revisit its final SPR policy to identify existing flexibilities under the Act that would allow FWS to avoid imposing the ESA's restrictions across a species' entire range. For example, § 4(c)(1) of the statute allows the Service to identify specific portions of a species' range that are experiencing threats that should be subject to the ESA's statutory and regulatory protections while allowing similar actions occurring in areas outside of the SPR to be unregulated. NAHB had urged the Service to utilize its authority under § 4(c)(1) to avoid having to impose the ESA's regulatory restrictions upon states, local governments, and landowners whose activities occur outside of areas identified by the Service as SPR for a given species. The Service previously had rejected NAHB's suggestion based upon a (2001) court ruling, *Defenders of Wildlife v. Norton* from the 9th Circuit. Here the Ninth Circuit's ruled the Service must give operational meaning to both phrases appearing on

[34] 79 Fed. Reg. at 37,578 (July 1, 2014)
[35] See NAHB's comments on Service's draft SPR policy, docket number FWS-R9-ES-2011-0031, submitted March 8, 2011.
[36] 79 Fed. Reg. at 37,610 (July 1, 2014)

either side of the word "or" within the statutory text, e.g., "throughout all or significant portion of its range." [37] Therefore, under the final SPR policy the Service created two different mechanisms for a species to be listed under the ESA either (1) a species is danger of extinction throughout all of its danger or (2) if that species is in danger of extinction due to impacts within a significant portion of its range.

NAHB disagrees with the Service's final SPR policy we believe Congress' recognition under § 4(c)(1) that a species' entire habitat range need not be protected under the Act should be acknowledged by the Service under the final SPR policy. Furthermore, the Service has previously applied the ESA's restrictions and protections to selectively to only those areas where the species actually experienced threats (e.g., American Alligator, Grizzly Bear, and Marbled Murrelet), so there is precedent in continuing this practice. Finally, allowing the Service to impose the ESA's restrictions upon landowners whose properties are located outside of SPR areas and whose activities have no detrimental impact upon the species seems counter to the intent of E.O. 13777. NAHB urges the Service to revise the final SPR policy.

3. Final Endangered Species Act Compensatory Mitigation Policy (81 Fed. Reg. at 95,316 (December 27, 2017))

FWS's final mitigation policy was issued in December 2016 in response to President Obama's Memorandum entitled "Mitigation Impacts on Natural Resources from Development and Encouraging Related Private Investment."[38] Although the Service's 1981 mitigation policy did not apply to the conservation of species listed under the ESA, FWS's final policy specifically extends the requirement of compensatory mitigation to the ESA's permitting programs.[39,40] However, in its haste to meet President Obama's mandate within the final weeks of the Administration, FWS issued a final ESA Compensatory Mitigation Policy containing key terms that are completely undefined, such as what constitutes "high value habitat." Furthermore, FWS attempts to create by administrative fiat an entirely new mitigation standard of "net conservation gain."[41] Such concepts are completely at odds with the ESA's existing statutory and regulatory authorities under both ESA Section 7(a)(2) consultation requirements and ESA Section 10(a)(2) Incidental Take Permits.[42,43] Recognizing this, President Trump revoked the Obama administration's presidential memorandum under subsection 3(a)(iii) of Executive Order (E.O.) 13783, "Promoting Energy Independence and Economic Growth," on March 28, 2017.[44]

Given that President Trump has specifically revoked the Obama administration's presidential memorandum that served as the basis for FWS's ESA Compensatory Mitigation Policy, NAHB believes FWS must withdraw the final policy. However, if FWS intends to retain or re-issue a similar policy or

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[37] *Defenders of Wildlife v. Norton, 258 F 3d. 1136 (9th Cir. 2001)*
[38] Presidential Memorandum: *Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment*. November 3, 2015.
[39] 46 Fed. Reg. at 7,656 (January 23, 1981).
[40] 81 Fed. Reg. at 95,316 (December 27, 2016)
[41] *Ibid*.
[42] 16 U.S.C. § 1536(a)(2).
[43] *Id* at § 1539(a)(2)(B).
[44] 81 Fed. Reg. at 16,093 (March 31, 2017).

rulemaking in the future, NAHB urges the agency to review and address the concerns and questions NAHB submitted to FWS on the final compensatory mitigation policy.

For example, if FWS actually intends to impose a compensatory requirement upon otherwise lawful impacts to endangered species or designated critical habitat, one of the first challenges ESA permit applicants would face is the complete lack of FWS approved ESA mitigation banks. According to a federal database of all approved mitigation banks jointly administered by the Corps and FWS, there are currently only 141 compensatory mitigation banks that can be used for impacts under the ESA (see map above).[45] Furthermore, unlike wetlands mitigation banks that are generally capable of providing acceptable ecological compensation for impacts to various types of wetland resources, the few ESA mitigation banks are only capable of addressing impacts to either a single endangered species or a specific subset of endangered species. The result is that even developers and builders located in one of few states with FWS approved ESA mitigation banks may find that none of these banks can be used to compensate for the impacts to the endangered species or designated critical habitat found on their property.

As the map above clearly depicts, nearly 80 percent of all ESA mitigation banks are found in California, while the next most popular states Florida and Texas having less than a dozen each. By comparison, there are over 1,473 approved wetland mitigation banks, and even these are not necessarily able to

[45] U.S. Army Corps of Engineers. (2017) Regulatory In Lieu Fee and Bank Information Tracking System (RIBITS). Retrieved on November 2, 2017, from https://ribits.usace.army.mil/ribits_apex/

meet all of the demand.[46] Clearly, if FWS were to attempt to implement any of the concepts contained within the final ESA Compensatory Mitigation Policy, most ESA permit applicants, federal action agencies, and FWS's own biologists charged with reviewing and approving individual incidental take authorizations would be hard pressed to find any available ESA compensatory mitigation options. Identifying ESA compensatory mitigation banks that are also capable of achieving a "landscape-scale" mitigation and delivering a "net gain" to the overall status of an endangered species would be nearly impossible. Similarly, it is not clear that there are any existing ESA mitigation banks or FWS approved HCPs that are capable of achieving a "net gain" for the species covered. For these reasons and others explained within NAHB's comment letter to FWS in response to the proposed ESA Compensatory Mitigation Policy, the Service must withdraw the final policy.[47]

Category C: Federal Permitting Programs

The ESA establishes two federal permitting programs (Section 7 Consultation and Section 10 Incidental Take Permits) for landowners whose proposed activities have been determined by the Service as likely to jeopardize the continued existence of a species or result in the destruction or adverse modification of critical habitat. Landowners whose proposed activities trigger either a "jeopardy" or "adverse modification" determination must obtain an "incidental take" authorization from the Service under Section 7 or Section 10 in order to proceed with their proposed actions. NAHB members rely upon these two ESA permitting programs to obtain the necessary approvals for land development or construction activities which either the Service or a federal action agency, such as the U.S. Army Corps of Engineers (Corps), has determined will impact a threatened or endangered species or its designated critical habitat. Both programs are in desperate need of reform. NAHB urges FWS to consider the following suggestions to improve these important ESA permitting programs.

1. ESA Section 7 Regulations (50 C.F.R. § 402.02)

The Section 7 Consultation program is the principal mechanism NAHB's members and other landowners rely upon to obtain the necessary ESA "incidental take" authorization from the Service for activities that both have a federal nexus (e.g., requiring a federal permit, approval, or receiving federal funds) and potentially impact either an endangered species or designated critical habitat. Between 2008 and 2015, the FWS reported completing nearly 90,000 Section 7 consultations (informal and formal). By comparison, during the entire 35 year history of the ESA's Section 10 Incidental Take Permit program, the FWS has issued only 1,100 Section 10 ITP permits.[48] Clearly, the ESA Section 7

[46] U.S. Army Corps of Engineers. (2015*) The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources*. Institute for Water Resources. Page 10. Washington D.C.
[47] For additional information, see NAHB's comments on FWS's proposed ESA Compensatory Mitigation Policy, submitted on September 13, 2017 to Docket # FWS-HQ-ES-2015-0165.
[48] U.S. Fish and Wildlife Service, (2016), *Draft Habitat Conservation Planning Handbook*. Chapter 1, subsection 1.2, page 1-3. Retrieved August 29, 2016, from https://www.regulations.gov/document?D=FWS-HQ-ES-2016-0004-0002

Consultation program is the primary mechanism landowners use to obtain necessary incidental take authorization from the FWS. It is therefore critical that the program functions proficiently.

- Clarify regulatory terms used in the ESA's Section 7 Consultation process.

Unfortunately, the Section 7 Consultation program has been plagued with inefficiencies for decades. Investigations on the efficiency of the program conducted by the Government Accountability Office (GAO) in 2003, for example, found widespread permitting delays primarily as result of two factors.[49] First, disagreements between the Service's personnel and permitting staff within the other federal action agencies over the interpretation of key regulatory definitions within the Section 7 Consultation regulations, such as determining the "*action area*," "*effects of the action*," and/or "*cumulative effects*" were frequent. Similar disputes arose over important undefined terms such as what constitutes the "*environmental baseline*" of past and present human impacts to a given species or species' habitat against which the Service is to evaluate any presumed additional impacts resulting from the proposed project.

The second factor causing delays was the Service's biologists' attempts to pressure the staff of the other action agencies, such as the Corps, to agree to consult over ever larger "action areas," including areas located far beyond the action agency's jurisdictional reach. Although related to the definitional issue, the size of the area over which effects of a proposed action must be considered and how those effects are defined have a significant impact on the outcome of a Section 7 Consultation. For example, the definition of "effects of the action" determines which impacts (direct and indirect) are to be evaluated by the Service and the federal action agency during the Section 7 Consultation process. From a permit applicant's perspective, it is critical that any "effects of the action" attributed to a proposed activity undergoing Section 7 Consultation demonstrates a sufficient level of causation, meaning if an "effect" (either direct or indirect) would occur regardless of whether or not a proposed activity occurs, that "effect" cannot by definition be considered by the Service as being an effect of the proposed action.

However, GAO reported several instances where Corps personnel complained the Service's biologists would regularly demand that effects (direct or indirect) that had no plausible relationship to a proposed activity undergoing a Section 7 Consultation be considered "effects of the action."[50] The inclusion of effects that have no plausible connection to the proposed activity undergoing Section 7 Consultation unnecessarily delays the permitting process and can result in inappropriate and costly restrictions or modifications in the form of "reasonable and prudent alternative" (RPAs) imposed by the Service during the Section 7 formal Consultation process.

As a result of the confusion and disagreement between the Service's biologists and Corps permitting staff, nearly 40 percent of all formal consultation examined by GAO failed to be completed within the 135 days statutory deadline. GAO recommended that the Service improve the Section 7 Consultation

[49] General Accounting Office. (2004, March) Endangered Species: More Federal Management Attention Is Needed to Improve the Consultation Process. (Publication No. GAO-04-93)
[50] General Accounting Office. (2009, June) Testimony by Mr. Barry Hill, Director Natural Resources & Environment before the U.S. Senate Environment and Public Works' Subcommittee on Fisheries. Wildlife, and Water. (Publication No. GAO-03-949T)

process to resolve interagency disagreements including empowering federal action agencies as to decide when Section 7 consultation should be required.[51]

- FWS must establish strict deadlines to complete informal consultations

In 2008, the Service responded to GAO's findings by issuing a final rule containing a series of commonsense reforms to the existing Section 7 Consultation regulations.[52] Among the changes finalized by the Service was a revised regulatory definition of "effects of the action," clarifying that impacts (direct or indirect) that would occur regardless of whether or not the proposed activity occurs cannot be deemed "effects of the action."[53] FWS's 2008 final rule also clarified the limits of the "cumulative effects" analysis during a Section 7 Consultation by revising the definition to specifically exclude future federal actions which have not yet undergone their own Section 7 Consultation.[54] As the Service explained within the preamble of the final rule, the purpose in amending the regulatory definition of "cumulative effects" was to distinguish it from the expansive regulatory definition of "cumulative effects" under the National Environmental Policy Act (NEPA).[55]

The Service's final rule sought to reduce permitting delays experienced during the Section 7 Consultation process by empowering federal action agencies such as the Corps to make determinations during the initial (informal) Section 7 Consultation process on whether a proposed activity is "*not likely to adversely affect*" a listed species or designated critical habitat. The objective of these regulatory reforms was to reduce unnecessary administrative delays experienced by permit applicants as federal action agencies awaited the Service's concurrence before concluding the Section 7 informal consultation process. GAO's investigations of Section 7 Informal Consultation process found repeated complaints from the Corps and other federal action agencies about Service's biologists failure to respond in a timely manner to preliminary "*not likely to adversely affect*" determinations by the Corps.

Improving even just the ESA's informal Section 7 Consultation process could yield significant improvement to the overall Section 7 Consultation process given most of the consultations are in fact informal. For example, between 2008 and 2015 the FWS conducted 88,290 Section 7 Consultations, with nearly all of them being informal consultations (e.g., 81,461 out of 88,290). [56] Yet, under the Service's current regulations there is a 135-day deadline for completing formal consultations but no deadline to complete an informal consultation.

The Service's 2008 final rule addressed this problem by establishing a 60-day regulatory deadline for the Service to complete an informal consultation following a "*not likely to adversely affect*" determination by a federal action agency.[57] Furthermore, the Service's rule amended the ESA's informal consultation regulatory provisions to allow a federal action agency to proceed issuing a federal

[51] General Accounting Office. (2004, March) Endangered Species: More Federal Management Attention Is Needed to Improve the Consultation Process. (Publication No. GAO-04-93)
[52] 73 Fed. Reg. at 76,272 (December 16, 2008).
[53] 73 Fed. Reg. at 76,287 (December 16, 2008).
[54] 73 Fed. Reg. at 76,286 (December 16, 2008).
[55] 73 Fed. Reg. at 76,275 (December 16, 2008).
[56] Jacob W. Malcom, Ya-Wei Li. Data Contradict Common Perceptions About A Controversial Provision of the Endangered Species Act. *Proceeding of the National Academic of Sciences (PNAS)*. Washington D.C. December, 2015.
[57] 73 Fed. Reg. at 76,287 (December 16, 2008).

permit if the Service failed to respond to a "*not likely to adversely affect*" determination within the 60-day deadline. NAHB viewed these and other changes as critical improvements to the Section 7 Consultation process.

Unfortunately, the Obama Administration moved quickly to repeal these commonsense reforms. Initially, President Obama issued a presidential memorandum to heads of the Department of the Interior and Department of Commerce, directing both agencies to undertake a rulemaking to repeal the recently finalized regulations. Furthermore, President Obama's memorandum directed the Service to not implement the recently finalized improvements to the Section 7 Consultation process until such time as a new regulation allowing its repeal was put in place.[58] Finally, the Service issued a final rule without accepting public comment that repealed all of the prior ESA Section 7 reforms adopted by the Service.[59] The Service's action was disgraceful, leaving both landowners and federal agencies who must regularly submit to the Section 7 Consultation process without any needed reforms. Given the continued importance of the Section 7 Consultation process and need for reform, NAHB urges the Service to reconsider the once finalize reforms to the program.

2. ESA Section 10 Incidental Take Regulations (50 C.F.R. § 17.22)

Congress specifically created the ESA Section 10 program to provide landowners with an ESA permitting mechanism for the FWS to provide incidental take authorization for private activities (e.g., those actions lacking a federal nexus) that FWS has determined will result in the incidental take of listed species.[60] To obtain an Incidental Take Permit (ITP), permit applicants must develop a Habitat Conservation Plan (HCP), which outlines the steps that will be taken to minimize and mitigate the amount of incidental take to the maximum extent practicable.[61]

HCPs obtained by the residential construction industry typically fall into two categories:

- Individual HCPs secured by a land developer or builder covering a small parcel of land (e.g., a subdivision or a single lot within a larger subdivision); and

- Multispecies HCPs (MSHCPs) covering larger geographical areas, such as entire counties, that are designed to provide a local jurisdiction with umbrella "incidental take" authorization. These regional HCPs or MSHCPs, found in places like southern California and Texas, play a critical role in providing municipalities and counties an ESA compliance mechanism that can be used to plan for future population growth and needed transportation infrastructure investments while minimizing impacts to federally listed and non-listed species located within the HCP planning area.

Although these two types of Section 10 permits present very different opportunities for species conservation and may create different permitting challenges for landowners and local governments

[58] The White House, Memorandum for the Heads of Executive Departments and Agencies, March 3, 2009.
[59] 74 Fed. Reg. at 20,421 (Monday, May 4, 2009).
[60] 16 U.S.C. § 1539(a)(1).
[61] 50 C.F.R. § 17.22(b)(2)(B)

alike, under both approaches permit applicants need an understandable and efficient permitting process that provides certainty to all stakeholders.

Unfortunately, the FWS's regulations implementing Section 10 suffer from many of the same infirmaries as the Section 7 process with its series of undefined terms and vague standards. Unlike Section 7, Section 10 also suffers from having no set timeframe during which decisions must be made. For example, the Service has failed to adequately clarify the meaning of the ambiguous statutory phrase "*to the maximum extent practicable, minimize and mitigate the impacts of such taking*," which is the regulatory standard for the FWS to approve an applicant's HCP.[62] Failure to clarify this vague standard has resulted in confusion on the part of the FWS field offices and headquarters staff charged with reviewing and approving HCPs. As a result, ITP permit applicants spend months, if not years, debating with the FWS at the field, regional, and headquarters levels regarding how to demonstrate that the proposed mitigation or minimization techniques contained within a given HCP are sufficient to achieve the FWS's "maximum extent practicable" standard. Similarly, absent any deadlines or target timeframes by which HCPs are to be approved, applicants are at the mercy of the Service and oftentimes their projects get deemed lower priority, even though they may be more beneficial to species than other activities. The Service is strongly urged to reform the existing Section 10 ITP program to remove the unnecessary barriers and confusion created during HCP development and the challenges associated with HCP implementation.

- *Section 10 Process Must Be Streamlined*

Small businesses, including the majority of NAHB's members, face significant disadvantages when trying to navigate the complex and time consuming Section 10 permitting process. Small landowners usually lack the financial resources, professional consultants, and access to habitat mitigation options the traditional Section 10 ITP process requires. FWS has itself acknowledged the Section 10 ITP permitting process is far too inefficient, complex, time consuming, and expensive for many private landowners to pursue.[63] While the FWS has long had the "Low-Effect HCP" policy in place to streamline the HCP approval process for projects resulting in negligible impacts to endangered species, it has routinely limited the applicability of these low effect HCPs to either purely conservation activities or routine maintenance activities. Neither of these two categories apply to home building. Despite recognizing the existing ESA Section 10 permitting program should be reformed, the FWS has not yet instituted any meaningful improvements.

An example of a Section 10 permitting policy that has proven beneficial for small landowners is the FWS's General Conservation Plan (GCP) policy.[64] Under the GCP policy, a FWS regional office develops an HCP application for a specific species in a specific location. The FWS regional office completes the required Section 10 permit including the required NEPA analysis and public comment process, and subsequently issues individual Section 10 ITP authorizations for small landowners seeking coverage under the terms of the HCP developed and approved by the FWS. This GCP approach is particularly

[62] *Id* at § 1539(a)(2)(B)(ii).
[63] 81 Fed. Reg. at 41,987 (June 28, 2016)
[64] U.S. Fish and Wildlife Service (FWS) Memorandum to Assistant Regional Directors, Final General Conservation Plan Policy. (2007) U.S. Department of the Interior. Washington D.C.

useful in situations where local governments impacted by a species listing are unable or unwilling to take on the role of developing an HCP on behalf of their citizens.

A GCP for the Alabama Beach Mouse was successfully developed in 2012 for a single-family and duplex residential development.[65] This HCP was developed and issued by the FWS's Alabama Ecological Field Office and provides incidental take authorization for activities occurring on up to 400 building lots over the span of 20 to 50 years. Prior to FWS's development of the GCP/HCP, each individual landowner needed to secure his/her own Section 10 permit. As a result, the local FWS field office was flooded with Section 10 ITP applications and home builders were waiting over two years to obtain needed approvals for individual building lots. Under the Alabama Beach Mouse GCP/HCP, home builders can file for an individual Section10 ITP and provided they agree to the FWS's approved habitat mitigation and conservation measures contained within the approved HCP, can submit their own Section 10 ITP requests to the FWS. FWS by allowing individual home builders to use FWS's approved HCP for small impacts to Alabama Beach Mouse habitat, rather than requiring these home builders to prepare and submit HCP plans to the FWS on their own, the FWS has significantly reduced permitting burden upon these builders. NAHB's analysis of FWS's Section 10 ITP permitting data found on average it took landowners 399 days to develop the required HCP and it took the FWS an additional 243 days to review and approved submitted HCPs. The GCP policy and the Alabama Beach Mouse GCP/HCP are two promising examples of how the existing Section 10 permitting process can be improved to help small landowners comply with the ESA.

- *FWS Cannot Unilaterally Reinterpret HCP "Implementing Agreements"*

Implementing Agreements (IAs) are oftentimes used for complex, multi-party, multispecies and regional HCPs to outline the roles and responsibilities and provide assurances that agreed-upon obligations outlined in the HCP will be followed. According to FWS's HCP Handbook, IAs, which are tailored for each HCP, perform a variety of important functions as they relate to implementation of various habitat mitigation measures contained in the HCP, such as assigning responsibility for planning, approving, and enforcing specific habitat mitigation commitments.[66] In short, IAs serve as a sort of contract. Although the FWS Regional Offices are responsible for the creation and implementation of IAs, they are signed by all parties who are responsible for implementing the underlying HCP.[67]

NAHB members depend on the ESA incidental take authorizations contained within these MSHCPs and regional HCPs in order to undertake land development and construction activities occurring within areas the FWS has determined to be occupied by an endangered or threatened species. Because local jurisdictions possess the underlying permits, NAHB members obtain their incidental take authorizations by enrolling their proposed land development or construction activities in the local jurisdiction's Section 10 ITP. This typically requires them to pay a fee (often tens of thousands of dollars per project) into a habitat acquisition fund and/or purchase a specified number of mitigation credits from a FWS approved habitat mitigation bank. These habitat acquisition funds or habitat mitigation credits purchased by developers and builders are used by the local jurisdictions to track,

[65] U.S. Fish and Wildlife Service (FWS) General Conservation Plan for Single Family/Duplex Residential Development in Alabama Beach Mouse Habitat. (2012) FWS Alabama Ecological Services Field Office. Dauphin Island, AL.
[66] U.S. Fish and Wildlife Service. (1996) Habitat Conservation Planning Handbook. Section 3-27. Washington D.C..
[67] *Ibid*.

permanently preserve, and monitor the conservation of habitat for endangered or threatened species as required by the MSHCP's IA.[68] Given the need to plan for and comply with the details of the IAs, NAHB members rely on their terms and conditions to be consistent and predictable.

Recently, however, the FWS's Ecological Field Office in Carlsbad, CA, notified San Diego County that the IAs within its MSHCP do not cover current or future impacts to a specific non-listed species (golden eagle) occurring within significant portions of the MSHCP's planning area.[69] As a result, FWS's Carlsbad Field Office stated that several planned land development projects – including NAHB members' projects – could not be authorized under San Diego's MSHCP and would need to obtain separate incidental take authorizations, which may include additional mitigation requirements.[70] San Diego County rejected FWS's Carlsbad Office's assertion the IAs contained within its MSHCP do not provide adequate incidental take authorization for future impacts to all species (including golden eagles) covered under the MSHCP. Furthermore, San Diego County expressed astonishment at the Carlsbad Office's reinterpretation of the existing IAs as being dramatically different from how the County has been implementing the permit since it was first developed in 1997.[71]

The San Diego MSHCP and underlying ESA Section 10 ITP were issued twenty years ago and are not scheduled to expire until 2047.[72] The MSHCP was designed to address impacts from future land development, infrastructure, and construction activities for 85 species, including ESA listed species and non-listed species, such as the golden eagle. San Diego County's MSHCP planning area includes over half a million acres and requires the County, as part of the MSHCP's IA, to permanently protect 52,727 acres of habitat by 2047. NAHB members whose projects occur within the MSHCP planning area boundaries are required to enroll their projects in the MSHCP and pay mandatory habitat acquisition fees imposed by local jurisdictions. In return, they receive necessary authorizations from both the local jurisdiction and FWS for any impacts to species (listed or non-listed) covered by the MSHCP.

FWS's Carlsbad Office's reinterpretation the IA contained within San Diego's MSHCP as it relates to impacts to golden eagle habitat now casts a shadow of doubt over the viability of the MSHCP. The belief that IAs can be reinterpreted by FWS field office staff decades after they were issued threatens to significantly degrade the utility of MSHCPs. For NAHB members, this means the loss of certainty and expediency. For example, the habitat mitigation fees paid as a condition of enrollment could subsequently be deemed insufficient, triggering additional federal permitting and mitigation

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[68]City of San Diego Planning Department. (2017) Multiple Species Conservation Program (MSCP) Annual Report. August 18, 2017. Last retrieve on November 2, 2017 at: https://www.sandiego.gov/sites/default/files/2016_mscp_ar_ltr.pdf

[69]FWS's Carlsbad Fish and Wildlife Office, Ecological Services (2016) Letter to County of San Diego Land Use and Environment Group regarding Multiple Species Conservation Program Compliance with the Bald and Golden Eagle Act. Dated December 5, 2016.

[70] *Ibid*, FWS's Carlsbad Field Office letter notified the Deputy Chief Administrative Officer of San Diego County's Land Use and Environment Group that several planed land development projects seeking coverage under San Diego's MSHCP would need to obtain separate incidental take authorization and permits from FWS under the Bald and Golden Eagle Protection Act and could not be authorized by San Diego County under the existing MSHCP.

[71] County of San Diego's Land Use and Environment Group (2016) Letter to FWS Carlsbad Ecological Services on Multiple Species Conservation Program Compliance with The Bald and Golden Eagle Protection Act. Dated December 20, 2016.

[72]Environmental Conservation Online System (ECOS). (2017) MSCP, County of San Diego Subarea Plan Habitat Conservation Plan. Retrieved November 2, 2017, from https://ecos.fws.gov/ecp0/conservationPlan/plan?plan_id=129.

requirements. This is in stark contrast to FWS practice, through which it has long recognized the importance of certainty to HCP permit holders. The "No Surprises" Policy, for example, establishes a clear directive that once an HCP has been approved by FWS, additional mitigation measures would not be imposed except in "extraordinary circumstances."[73] However, disagreements, like the one between FWS's Carlsbad Field Office and San Diego County point to yet another flaw within FWS's administration of the HCP development process. If individual FWS field offices can unilaterally reinterpret IAs contained within MSHCPs, developers, builders, and local governments will have little certainty moving forward and little incentive to take proactive steps toward species conservation. Given the amount of public and private development originally authorized under San Diego County's MSHCP, coupled with investment-backed expectations and broad agreement on mitigation from numerous parties, FWS has no authority to unilaterally direct a change of course. On the contrary, FWS may only reinterpret IAs contained within approved MSHCPs if done so in a transparent manner that involves and considers the views of the local governments who hold these permits, as well as any other stakeholders who rely on MSHCPs to legally conduct their business.

- *FWS Must be Prepared for Added Workload Resulting from New Definition of "Waters of the U.S."*

Whether a permit applicant seeks a Section 7 or Section 10 permit depends on whether there is a federal nexus for the project. FWS's permitting data reveals virtually all of the ESA's incidental take authorizations are obtained through the Section 7 Consultation process rather than the Section 10 Incidental Take Permitting process. For example, FWS's Section 7 Consultation database reports that over 88,290 informal and formal Section 7 consultations were performed between 2008 and 2015 as compared to 1,100 Section 10 ITPs.[74,75] This fact is not surprising given the .fact that most residential land development projects require a substantial amount of land clearing and grading activities, thus must obtain federal permits under Clean Water Act (CWA) Section 404. The very need to obtain a Section 404 permit to address any discharges of dredge or fill material into a "water of the U.S," creates the federal nexus that triggers Section 7.

The scope of the CWA has been in flux over the past several years. In an attempt to clarify the definition of "waters of the U.S.," EPA and the Corps issued the "Clean Water Rule" in June 2015 (2015 WOTUS Rule).[76] The 2015 WOTUS Rule significantly expanded jurisdiction under the CWA to include isolated ponds, ephemeral streams, and most ditches under federal control. The rule immediately

[73] 63 Fed. Reg. § 8859 (February 23, 1998) "Habitat Conservation Plans Assurances "No Surprises" Rule."
[74] Jacob W. Malcom and Ya-Wei Li, Data contradict common perceptions about a controversial provision of the US Endangered Species Act. *Proceedings of the National Academy of Science (PNAS)*. December 2015.

[75] [9] U.S. Fish and Wildlife Service, (2016), *Draft Habitat Conservation Planning Handbook*. Chapter 1, subsection 1.2 page 1-3. Retrieved August 29, 2016, from https://www.regulations.gov/document?D=FWS-HQ-ES-2016-0004-0002

[76] 80 Fed. Reg. at 37,053 (June 29, 2015).

faced an onslaught of litigation and was placed under a nationwide stay by the 6th Circuit Court of Appeals in October 2015.[77]

In order to address the flawed 2015 WOTUS Rule, on February 28, 2017, President Trump signed Executive Order 13778 "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States,'" which directed EPA and the Corps to review the 2015 Rule and "publish for notice and comment a proposed rule rescinding or revising the rule, as appropriate and consistent with law."[78]
In response to E.O. 13778, EPA and Corps have begun a two-step federal rulemaking process to withdraw and replace the 2015 WOTUS Rule. Step one would rescind the 2015 rule and temporarily replace it with the pre-existing 1986 regulatory definition of "waters of the U.S.".[79] Under the second step, EPA and the Corps will propose a new regulatory definition of "waters of the U.S."[80] While the outcome of this rulemaking is not yet known, it seems highly likely, given the directive under E.O. 13778, that fewer features will be jurisdictional under the CWA in the future. With fewer projects having a federal nexus, more projects will have to obtain ESA authorization through Section 10 consultation.

According to FWS's permitting data, the most common federal permit triggering Section 7 Consultation is a CWA Section 404 permit.[81] In addition, the data also shows that the activities triggering the most Section 7 Consultations are land development activities, including home building.[82] Home building activities that occur in areas designated as critical habitat but that do not require a federal permit (i.e., a CWA Section 404 permit), do not trigger the ESA's Section 7 Consultation process. However, if these activities could result in a "take" of an endangered species, the project proponents must obtain "incidental take" authorization from the FWS under Section 10.

Recognizing the significant permitting costs and delays that landowners and local governments currently face when seeking Section 10 ITPs and the expectation that the number of Section 10 permits will grow once the new definition is finalized, FWS must commit to planning for this influx. FWS's permitting data shows the potential magnitude of the increased workload. If even a fraction of those requesting authorization under one of the 88,291 Section 7 Consultations (informal and formal) completed in the last seven years are required to obtain a Section 10 ITP, they could quickly overwhelm the FWS' ability to process these requests in a timely manner. NAHB urges the FWS to both plan for how it will address these additional permit requests, as well as identify ways to streamline the current Section 10 ITP approval process, particularly for small builders.

Conclusion

[77] *In re EPA*, 803 F.3d 804 (6th Cir. 2015).
[78] 82 Fed. Reg. at 12,497 (March 3, 2017).
[79] 82 Fed. Reg. 34,899 (July 27, 2017).
[80] 82 Fed. Reg. at 40,742 (August 28, 2017).
[81] Jacob W. Malcom and Ya-Wei Li, (2015) Data contradict common perceptions about a controversial provision of the US Endangered Species Act. Proceedings of the National Academy of Science (PNAS). Page 2. December 2015.
[82] *Ibid*.

NAHB appreciates the opportunity to provide the FWS Regulatory Reform Task Force with specific examples of existing regulations, regulatory policies, and programs for consideration as the Agency formulates its response to E.O. 13777. Please contact my colleague, Mr. Michael Mittelholzer at (202) 266-8660 or mmittelholzer@nahb.org if you have any questions regarding the recommendations set forth in this letter. NAHB looks forward to future opportunities to engage with FWS as it works toward reducing regulatory burdens and improving the overall implementation of the ESA's regulatory programs.

Sincerely,

Susan Asmus, Senior Staff Vice President