



NATIONAL ASSOCIATION OF STATE FORESTERS

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February 11, 2021

Public Comments Processing
Attn: FWS-HQ-ES-2020-0102
U.S. Fish and Wildlife Service, MS:JAO/3W 5275 Leesburg Pike
Falls Church, VA 22041-3803

**Docket: FWS-HQ-ES-2020-0102; 50 CFR 402; Endangered and Threatened Wildlife and Plants;
Regulations for Interagency Cooperation**

RIN: 1018-BF17; 0648-BJ77

Dear Sir or Madam:

The National Association of State Foresters (NASF) is pleased to provide comments in response to the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) proposed revisions to consultation regulations under the Endangered Species Act (ESA) of 1973, as amended pertaining to the U.S. Forest Service and Bureau of Land Management. The proposed rule addresses the precedent set by *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075 (9th Cir. 2015) ("*Cottonwood*"), cert. denied, 137 S. Ct. 293 (2016), a ruling which presents significant challenges for managing National Forest System lands.

NASF is composed of the directors of forestry agencies in all 50 states, eight U.S. territories, and the District of Columbia. Our members manage and protect state and private forests, which encompass nearly two-thirds of the nation's forests, and partner with federal agencies through authorities like Good Neighbor Authority in managing and protecting national forests, and support the goal of protecting threatened and endangered species. In many cases, the ecosystems involved in implementing ESA are forested landscapes. As such, ESA implementation plays a substantial role in how many forests are protected and managed in the U.S. Therefore, NASF has a substantial interest in the law's provisions and how they are implemented.

The *Cottonwood* decision set a harmful and disruptive precedent requiring the Forest Service to reinstate ESA consultation on completed National Forest plans when a new species is listed, when critical habitat is designated, and when "new information" is brought forward. The fundamental issue in the *Cottonwood* decision is whether a finalized (or approved) forest plan – that has already undergone consultation under the ESA – is a completed agency action or whether "discretionary Federal involvement or control over the action has been retained or is authorized by law." It was the Obama administration's position¹ that a finalized forest plan is *not* an ongoing action and *does not* allow for discretionary involvement. In practice, this means that the Forest Service should *not* be required to

¹ This position was argued by the Department of Justice during the Obama Administration's 2016 Petition for Certiorari to the Supreme Court appealing the *Cottonwood* decision. On October 11, 2016, the Supreme Court denied the Petition.

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reinitiate ESA consultation on completed plans when a new species is listed, critical habitat is designated, or new information becomes available.

The *Cottonwood* decision has created a new set of administrative and legal hurdles that have made it more difficult for the Forest Service to manage forests and reduce the threat of wildfire on federal lands. This issue affects program delivery and consumes valuable agency resources that could be used for active forest management and protecting communities from wildfire. The decision has no direct conservation benefit for threatened and endangered species. The Forest Service already consults on listed species and designated critical habitat when it approves, amends, and revises forest plans and when it carries out individual projects.

The Tenth Circuit Court of Appeals in *Forest Guardians v. Forsgren*, 478 F.3d 1149 (2007) has expressly rejected the premise that reinitiation of consultation is required for forest plans. The substantial burden associated with consulting on a forest plan after it has been finalized is duplicative and wasteful work that has no conservation benefits.

Congress recognized the implications of *Cottonwood* and worked in a bipartisan manner to provide a partial legislative fix to the problem in the Consolidated Appropriations Act of 2018 (Public Law 115-141, March 23, 2018). The “*Cottonwood* fix” exempts the Forest Service from having to reinitiate consultation on completed forest plans when a species is listed or critical habitat is designated, but does not provide an exemption from reinitiation of consultation when new information about a species is brought forward.

We strongly support this proposed rule to further amend the Code of Federal Regulations § 402.16 (b) and clarify the duty of federal agencies to reinitiate section 7 consultation under ESA. We agree that reinitiation of consultation is not necessary on approved land management plans prepared pursuant to the Federal Land Policy and Management Act (FLPMA) or the National Forest Management Act (NFMA) in instances when new information is identified.

The proposed rule reinforces bipartisan efforts to rectify the negative implications of the *Cottonwood* decision by providing much needed administrative relief. It also aligns the intent of Congress (as laid out in the Consolidated Appropriations Act of 2018) and ensures that the needs of listed species are addressed at the appropriate stage of the forest planning process and through project-level coordination and consultation.

More than 60 listed species reside in two or more Forest Service regions, including the lynx, grizzly bear, bull trout, and spotted owl. A single lawsuit challenging the agency’s decision to reinitiate plan-level consultation could involve significant acreage and delay important restoration, vegetation management, or fuels reduction projects over broad geographies. Significant agency resources are required to reinitiate consultation on finalized forest plans; and new species may be listed, new critical habitat designated, and new information may be brought forward at any time. The *Cottonwood* decision does not limit when or how often the agency is

required to reinitiate consultation on completed forest plans. If the requirements imposed by the *Cottonwood* decision are not changed, the Forest Service anticipates increasing legal actions seeking plan-level reinitiation of consultation that could have severe consequences on the landscape, long into the future.

We urge the FWS and NMFS to finalize the proposed rule, as it largely mirrors the legal opinions expressed by the Obama administration's Justice Department. With the ever-growing threat of wildfire and over 80 million acres of National Forest System land at risk of insect and disease infestation, we need to increase the pace and scale of active forest management. Both economic recovery and forest health will be enhanced by correcting *Cottonwood*.

Sincerely,

A handwritten signature in blue ink, appearing to read "Joe A. Fox". The signature is stylized and cursive.

Joe Fox
NASF President
Arkansas State Forester