FOIA Number: 2012-0769-F

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Forest Conference-Section 4(d) of Endangered Species Act-Industry Correspondence

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August 20, 1993

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MEMORANDUM

TO: Mark Rey

FROM: Steve Quarles SPQ

RE: **THE PROSPECTIVE ESA § 4(d) SPECIAL RULE ON THE NORTHERN SPOTTED OWL**

On August 12, representatives of companies owning private timberlands in the Pacific Northwest and their associations met with Administration officials to discuss the forthcoming special rule on the northern spotted owl under section 4(d) of the Endangered Species Act of 1973 ("ESA"). The discussions during that meeting were beneficial in allowing us to understand better the Administration's intentions and approach concerning this prospective regulation ("4(d) rule" or "special rule").

Since the forest industry had advocated an ESA § 4(d) rulemaking to be conducted in conjunction with the President's post-Summit decisionmaking concerning management of the region's federal lands, our initial reaction to the announced intention to proceed with such a rulemaking was favorable. However, what we learned at the August 12 meeting was highly disturbing. If our understanding of the Administration's approach in this rulemaking is correct, the industry and other non-federal landowners likely will have no choice but to oppose vigorously the 4(d) rule. This outcome, however, is not necessary and can be readily avoided. Properly structured, the 4(d) rulemaking still can be beneficial to all concerned.

I set forth below (i) what I believe we were told about the 4(d) rule by the Administration officials, and (ii) the problems raised by these disclosures, together with recommendations to remedy these problems.

We heard the following:

(1) The 4(d) rule will impose the burden of conserving (i.e., recovering) the northern spotted owl on private lands (indeed, all non-federal lands including State lands). For each province, a determination will be made whether Option 9 alone, or in combination with constraints placed on private landowners under State Forest Practices Acts, is sufficient to provide for the owl's conservation. If it is not, then the 4(d) rule will place restrictions on private and other non-federal lands in that province sufficient to meet the conservation goal. A "local option" provision in the rule would permit a landowner to submit for approval of the Fish and Wildlife Service ("FWS") a plan which differs from the province-specific restrictions. Further, we are informed by third parties that the text of the preamble to an early draft of the 4(d) rule makes explicit this approach of imposing a conservation standard on non-federal lands and refers continuously to the conservation objective of the rule. Finally, one justification for placing a conservation obligation on non-federal landowners may be the assertion that the Forest Ecosystem Management Team ("FEMAT") report and, therefore, Option 9 are not sufficient to provide for the owl's conservation under ESA -- that (i) they are intended only to ensure viability of the owl under 36 C.F.R. § 219.19 for national forest lands and the FEMAT team's mission statement for Bureau of Land Management lands; and (ii) "viability" is regarded as a lesser standard than "conservation."

(2) The 4(d) rule will have binding effect. That is, failure of private landowners or the States to abide by the rule will be deemed to be a violation of the ESA (in contrast to a rule that informs affected persons that any deviance from its prescribed standards will be investigated for possible ESA violations). The rule will set territorial and other constraints on timber harvesting without any requirement that, to constitute a violation, such constraints must be accompanied by actual injury or death (harm), likelihood of injury resulting from intentional annoyance (harass), physical capture, or the other elements of the ESA's "take" prohibition. 16 U.S.C. §§ 1532(19), 1538(a)(1)(B), 50 C.F.R. § 17.3.

(3) The 4(d) rule will provide substantial relief from "existing" ESA constraints on private and non-federal lands. This assumes that private lands are somehow governed now by obligations not only to avoid "take" by adhering to the so-called "circles" in the Northern Spotted Owl Guidelines, but also to provide dispersal habitat on private lands. Apparently, the team drafting the

special rule somehow seems to think that the following are applicable to private lands today: the Northern Spotted Owl Guidelines were formally rescinded by the Department of the Interior ("Interior") in response to litigation; the Interior Assistant Secretary's memorandum which proposed only to concentrate enforcement investigations in 500-acre circles; the Interagency Scientific Committee ("ISC") report, Gang of Four report, or Scientific Advisory Team ("SAT") report even though all of them apply only to federal lands; or the draft recovery plan which has never been finalized.

(4) The Environmental Impact Statement ("EIS") on Option 9 and the other alternatives for management of the federal lands will not consider the prospective 4(d) rule or the measure of protection it will afford to the northern spotted owl. Therefore, the EIS's alternatives will be required to shoulder for the federal lands the entire owl protection burden.

(5) Any non-federal land which requires access across federal lands will still be subject to consultation under ESA § 7(a)(2). This destroys much of whatever utility the 4(d) rule might otherwise have for the non-federal landowner since the access grant will have to proceed through the multi-year process of National Environmental Policy Act ("NEPA") review and ESA consultation and will be subjected to reasonable and prudent measures (in case of a no-jeopardy opinion) or reasonable and prudent alternatives (in case of a jeopardy opinion) in lieu of or in addition to any constraints imposed by the 4(d) rule.

(6) The 4(d) rule has not yet incorporated any detail regarding existing State Forest Practices Acts' regulations designed to protect the northern spotted owl and how these State programs would fit with the "local option" approach. This leaves considerable uncertainty regarding how the local option provision will work in practice. It also reflects an apparent lack of understanding by the FWS of what is actually occurring on the ground to protect the owl on non-federal lands. This could lead to needless additional federal regulations.

We believe points (3), (4), (5), and (6) are misguided, substantially reducing any utility the 4(d) rule may have. More fundamentally, if we are correct in our understanding of points (1) and (2), we believe the intended 4(d) rule to be ultra vires and, thus, unlawful.

Below, we explain the problems we perceive with these points and suggest remedies to those problems.

I. FWS Has ESA § 4(d) Authority To Allow Takings Which Do Not Advance "Conservation," And Should Exercise That Authority Here

The first problem is that the prospective special rule appears to be too timid a use of FWS's broad authority under ESA § 4(d) to allow actions with respect to a threatened species that would be considered to be takings if applied to an endangered species. This timid approach is contrary to the Administration's and Secretary Babbitt's announced intention to use aggressively the flexible authority available in the ESA to minimize untoward economic and social effects.

The FWS's approach will lead to a 4(d) rule which would bar many timber harvesting actions that are not automatically takings under ESA § 9(a)(1)(B) or the 50 C.F.R. § 17.3 regulation defining "harm." This approach seems to be based on the assumption that the FWS has only limited authority under ESA § 4(d) -- that any special rule must advance the owl's "conservation" which is defined in the ESA § 3(3) in a manner that equates the term with the species' full recovery and delisting. 16 U.S.C. § 1532(3).

This assumption is contrary to the Government's litigating position, contrary to the most persuasive case law, contrary to ESA legislative history, and eliminates the ability to use ESA § 4(d) rules flexibly to accord a measure of relief to affected persons, as most recently contemplated by Interior in the proposed 4(d) rule for the California coastal gnatcatcher. 58 Fed. Reg. 16758-59 (March 30, 1993).

It is true that one Circuit Court and one district court have narrowly construed ESA § 4(d) as allowing only regulations which advance "conservation." _See_ _Sierra Club v. Clark_, 755 F.2d 608 (8th Cir. 1985) (setting aside a rule permitting some trapping of wolves); _Fund for Animals, Inc. v. Turner_, 1991 WL 206232 (D.D.C. Sept. 27, 1991) (preliminary injunction against regulation allowing some hunting of grizzly bears). These cases have noted that ESA § 4(d)'s first sentence mentions "conservation."[1/] They

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1/ The operative text of ESA § 4(d) is:

> Whenever any species is listed as a threatened species..., the Secretary _shall_ issue such regulations as he deems _necessary and advisable_ to provide for the _conservation_ of such species. The Secretary _may_ by regulation _prohibit with respect to any threatened species any act_ prohibited under section 1538(a)(1) [ESA § 9(a)(1)] [such as prohibiting takings]...with respect to endangered species....

16 U.S.C. § 1533(d) (emphasis added).

conclude the ESA definition of "conservation" (16 U.S.C. § 1531(3)) means that only "in the extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved, may...regulated taking" be allowed. This view severely limits the FWS's ability to allow some takings and to use ESA § 4(d) rules to provide relief in the case of certain threatened species from the stringent take prohibitions the ESA automatically applies to endangered species.

However, the FWS has never acquiesced in this restrictive interpretation. It has consistently argued that it has broad authority under ESA § 4(d). This position is fully supported by legislative history and two recent decisions in two federal Circuit Courts, and seemingly is acknowledged even by the leading environmental scholar on the statute.

The legislative history on ESA § 4(d) emphatically stresses the FWS's great discretion:

> Once an animal is on the threatened list, the Secretary has almost an infinite number of options available to him. He may, for example, permit taking, but not importation of such species, or he may choose to forbid both taking and importation but allow the transportation of such species.

H.R. Rep. No. 412, 93d Cong., 1st Sess. 12 (1973) (emphasis added).

> Among other protective measures available, he may make any or all of the acts and conduct defined as "prohibited acts"...as to "endangered species" also prohibited actions as to the particular threatened species.

S. Rep. No. 307, 93d Cong., 1st Sess. 8 (1973) (emphasis added).

This broad flexibility for ESA § 4(d) rules was affirmed by the U.S. Court of Appeals for the D.C. Circuit just last month. In Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, No. 92-5255, 1993 WL 270509 (D.C. Cir. July 23, 1993) ("Sweet Home I") a unanimous panel adopted the Government's position that: (1) it is reasonable for the FWS to interpret the two sentences in ESA § 4(d) as containing separate grants of regulatory authority; and (2) regulations regarding takings of threatened species are subject only to the second sentence:

> As appellees argue, however, there is a reasonable reading of § 1533(d) [ESA § 4(d)] that would not require the FWS to issue formal "necessary and advisable" findings when extending the prohibitions to threatened species. According to this interpretation, the two

> <u>sentences of § 1533(d) [ESA § 4(d)] represent separate grants of authority</u>. The second sentence gives the FWS <u>discretion to apply any or all of the § 1538(a)(1) [ESA § 9(a)(1)] prohibitions</u> to threatened species <u>without</u> obligating it to support such actions with findings of necessity [or advancing "conservation," since it too is only found in the first sentence]. Only the first sentence of § 1533(d) [ESA § 4(d)] contains the "necessary and advisable" language and mandates formal individualized findings. This sentence requires the FWS to issue whatever <u>other regulations</u> are "necessary and advisable," including regulations that impose protection measures <u>beyond those contained in § 1538(a)(1) [ESA § 9(a)(1)]</u>.

<u>Sweet Home I</u> slip op. at 13-14 (emphasis added).

Under the <u>Sweet Home I</u> interpretation, a regulation which allows (or prohibits) with respect to a threatened species actions which would constitute takings as applied to an endangered species under ESA § 9(a)(1) is subject only to ESA § 4(d)'s second sentence -- and not to the first sentence -- because it would not go "beyond" the ESA § 9(a)(1)(B) taking prohibition. Consequently, such a regulation does not have to advance "conservation," which is mentioned only in the first sentence.

As a result, the FWS has the ability to adopt a special rule which does not make every taking of a spotted owl unlawful, regardless of whether the special rule assists in owl "conservation." The <u>Sweet Home I</u> interpretation is consistent with the House Report's description that the FWS has "an infinite number of options available" on the regulatory constraints applicable to a threatened species, and, among such options, the FWS "may...permit taking" of such a species.

A second Court of Appeals -- the 5th Circuit -- was even more explicit in sustaining a special rule under ESA § 4(d) that allowed takings and was not purported to advance "conservation" in <u>State of Louisiana ex rel. Guste v. Verity</u>, 853 F.2d 322 (5th Cir. 1988) (affirming the National Marine Fisheries Service's rule permitting some takings of threatened turtles if shrimpers use a prescribed technology -- turtle excluder devices).

The Court held that the ESA § 4(d) regulation in question did not have to advance "conservation." It seemingly reasoned that the two sentences in ESA § 4(d)[2/] contain two separate grants of regulatory authority, and regulations designed to reduce takings can be issued under the discretionary "may" authority in the second sentence:

2/ <u>See</u> n.1 for the text of ESA § 4(d).

> In addition to this mandatory duty [to issue "conservation" regulation], the ESA also provides the Secretary discretionary authority to prohibit by regulation the taking of <u>any</u> threatened species of fish and wildlife. 16 U.S.C. §§ 1533(d), 1538(a)(1) [ESA §§ 4(d), 9(a)(1)]. This regulatory authority supplements the statutory prohibition against the taking of endangered species, <u>see</u> 16 U.S.C. § 1538(a)(1) [ESA § 9(a)(1)], the enforcement of which is not conditioned upon any showing that the prohibition will itself operate to restore the species to a level considered unendangered [<u>i.e.</u>, not limited to regulations advancing "conservation"]....
>
> In sum, therefore, regulations aimed at preventing the taking of a protected species cannot be invalidated on the ground that the record fails to demonstrate that the regulatory effort will enhance the species' chance of survival.... Rather, the record need only show that such regulations do in fact prevent prohibited takings of protected species. Here, the record developed by the Secretary amply satisfied this burden.

<u>Verity</u>, 853 F.2d at 333.

Mr. Michael J. Bean of the World Wildlife Fund also seems to accept this interpretation, although noting some uncertainty on the issue. In "Reconciling Conflicts Under The Endangered Species Act: The Habitat Conservation Planning Experience" he and his co-authors state:

> "[I]t would appear that FWS could authorize some or all incidental taking of threatened species by regulation." <u>Id.</u> at 44.

In sum, the FWS's current approach for a spotted owl special rule may be based on the incorrect legal assumption that a 4(d) rule must advance "conservation." Alternatively, the approach is a timid exercise of broader ESA § 4(d) authority. In either case, the result would not relieve, indeed would impose new regulatory standards that will continue, the bureaucratic gridlock facing the forest industry and other non-federal landowners in the Pacific Northwest.

<u>Recommendation:</u> We should urge this Administration to adhere to the commitment of Interior Secretary Babbitt to seek innovative solutions under the ESA. One such solution is to actually employ ESA § 4(d) as a relief mechanism for non-federal landowners -- relief that is particularly appropriate here where all previous reports and plans provide for full "conservation" or recovery of the species on federal lands only. For example, the 4(d) rule could state that timber harvesting conducted in compliance with

prescribed standards would not be considered to be an ESA taking, regardless of whether any injury occurs to an owl. This would create a desirable "bright line" test on precisely which timber harvesting activities are and are not lawful for ESA purposes.

II. The Proposal Would Unlawfully Create "Conservation" Duties For Private Landowners And Other Non-Federal Parties

Under ESA §§ 9(a)(1)(B) and 4(d) private landowners must avoid taking listed species. Private landowners, however, have no duty to manage their lands to assist in the "conservation" or recovery of listed species, as the text of the ESA and the United States' solemn position in court make clear. Consequently, the Administration's apparent intent to impose spotted owl conservation duties on non-federal landowners through a special rule under ESA § 4(d) is unlawful.

While the FWS has ESA § 4(d) authority to allow some actions that would otherwise be takings, other ESA provisions place limits on the FWS's ability to use special rules to advance "conservation." Foremost among those ESA limitations is the lack of authority to compel private and other non-federal landowners to manage their lands to assist in the "conservation" of listed species. As previously noted, we understand that the prospective rule would violate this limitation by directing private landowners to forego productive land uses in order to promote owl conservation. The ESA simply does not provide to the FWS such a broad license to establish a federal regulatory program, with severe penalties, to govern private land uses.

Under the ESA's statutory scheme, while federal agencies have some "conservation" duties, private landowners do not. Consistent with the federal lead structure of the statute, ESA § 2(b) declares "the policy of Congress that all Federal departments and agencies shall seek to conserve" listed species. 16 U.S.C. § 1531(c)(1) (emphasis added). This limited federal duty to conserve is then carried out in two other ESA provisions. ESA § 7(a)(1) requires each federal agency to implement some "programs for the conservation of endangered species and threatened species."[3/] ESA § 4(f) also embodies the limited federal duty to

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3/ 16 U.S.C. § 1536(a)(1). It is improper to read ESA § 7(a)(1) as creating such an all-encompassing federal duty to structure all federal actions to conserve, as the House Committee with ESA jurisdiction stated in rulemaking comments and as the FWS has agreed. See 51 Fed. Reg. 19954-55 (June 3, 1986). Instead, ESA § 7(a)(1) at most requires that a federal agency undertake some program to assist in conservation -- it can take other actions under ESA § 7(a)(2)

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conserve by requiring that the Secretary of the Interior prepare recovery plans for listed species.[4/]

Significantly, there is no mention of "conservation" in the ESA § 9 taking concepts, or in the regulations defining "harm" and "harass." This omission was intentional. The ESA creates conservation duties only for federal agencies. ESA provisions which apply to private persons and private lands as well as to federal agencies do not and cannot include any duty to assist in conservation or recovery.

The FWS has so interpreted the ESA and its own regulations in an amicus brief the United States filed with the Ninth Circuit in Palila v. Hawaii Department of Land and Natural Resources, 852 F.2d 1106 (9th Cir. 1988) ("Palila II").[5/] The United States

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(16 U.S.C. § 1536(a)(2)) which avoid jeopardy but which do not advance conservation. Id. Only ESA § 7(a)(2) applies to all federal actions and sets the more limited federal duty to not "jeopardize the continued existence of listed species."

4/ 16 U.S.C. § 1533(f). The recovery plan serves principally as a guidance document since non-Interior agencies and perhaps even Interior agencies have no duty to implement all aspects of a recovery plan. 16 U.S.C. § 1533(f)(1); see National Wildlife Federation v. National Park Service, 669 F. Supp. 384, 388 (D. Wyo. 1987).

5/ The United States' brief in the Palila II case explained why neither the ESA nor the implementing "harm" regulation permit using the ESA § 9 "take" prohibition to advance "conservation" or recovery objectives:

> Imposing a duty under Section 9 to avoid habitat modifications that merely prevent or delay the recovery [i.e., conservation] of an endangered species is not consistent with the overall structure of the Act. Without the significant qualification found in the Secretary's definition [of "harm"] (that habitat degradation must result in injury to the species), persons subject to Section 9 would be required to manage their property in a manner so as to promote the recovery of a listed species.
>
> The statute, however, creates such responsibility with respect to the activities and programs of the agencies of the federal government, and not other owners and managers of property, such as private entities or the states. [The brief then recites the federal duties to conserve in ESA §§ 2(c)(1) and 1536(a)(1), and the

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filed this amicus brief to explain why the Palila II district court's view (in a private citizen suit not involving the FWS) that an injury to the future recovery rate (i.e., conservation) of a listed species constituted "harm" and, therefore, violated the ESA taking prohibition.

The Ninth Circuit recognized that it must defer to the FWS's interpretation in the Palila II appeal: "We inquire whether the district court's interpretation is consistent with the Secretary's

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> ESA § 3(3) definition of "conserve."] There is no reference to this term, however, in Section 9, which sets out the prohibitions, including the ban on takings, applicable to the conduct of all persons subject to the jurisdiction of the United States.... This omission is a strong indication that Congress did not intend, through the provision of Section 9, to impose a duty to conserve on such non-federal entities....
>
> To be sure, the overarching purpose of the entire statute is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species****." 16 U.S.C. 1531(b) (emphasis supplied). Reliance on this broad statement of purpose cannot, however, overcome the limitations of the specific language Congress has chosen in Section 9 of the Act. National Wildlife Federation v. Gorsuch, 693 F.2d 156, 177-178 (D.C. Cir. 1982). The responsibility to conserve, as defined in the Act, is specifically directed to federal agencies and activities, and not to the other persons and entities that are subject to the civil and criminal penalties of the Act.... [E]xistence of this specific language in Section 8 [that federal actions must avoid adverse modification of critical habitat] militates strongly against reading into Section 9, applicable to non-federal parties, a similar duty to avoid adverse modifications to habitat that would not necessarily inflict actual injury on the species....
>
> Thus, the Secretary's interpretation of the term "harm" to exclude habitat modification that merely prevent recovery of a listed species accurately reflects Congressional intent as evidenced by the language, structure, and the legislative history of the statute. The district court's suggestion in dicta of a broader construction has no such support and therefore is plainly incorrect.

"Brief For The United States As Amicus Curiae" at 18-22 in Palila II.

construction of the statute since he is charged with enforcing the Act, and is entitled to deference." 852 F.2d at 1108. The Ninth Circuit affirmed only on the ground "habitat degradation that could result in extinction constitutes 'harm'" and found it unnecessary to decide whether "harm" also includes "habitat degradation that prevents recovery of an endangered species." 852 F.2d at 1110-11.

Reading between the lines, since the Ninth Circuit recognized that the Government's interpretation was controlling, it seemingly would agree that ESA taking principles cannot be stretched to create a duty for private landowners to manage their lands to assist in the future conservation and recovery of the owl.

Thus, due to both the structure of the ESA and the expert agency's interpretation adopted in the Government's Palila II amicus brief, there is no authority for this Administration to force private landowners to manage their lands to promote the future conservation and recovery of a listed species.[6/] If the prospective 4(d) rule crosses that line, it would be unlawful.

Recommendation: To avoid having the special rule set aside in court for being ultra vires of the ESA, we should urge the FWS to abandon the regulatory strategy that private lands must assist in conservation. Instead, the FWS should confine the special rule to defining, and limiting, the ESA § 9(a) prohibitions as they relate to the northern spotted owl, as described in Section I.

III. There Is No Need To Require Non-Federal Lands To Contribute To The Conservation Of The Owl

Even if the law permitted it, there is no justification for imposing a conservation duty on private landowners in the case of the northern spotted owl. We have no less than three reports -- commonly known as the ISC report, the Gang of Four report, and the SAT report -- that provide for recovery of the owl solely on federal lands, without any contribution from non-federal lands. We had assumed, until we were informed to the contrary, that the FEMAT report did the same. Indeed, in briefings on the FEMAT

6/ Although the federal government cannot compel landowners to assist in the conservation of listed species, landowners may choose to do so voluntarily by preparing habitat conservation plans and seeking incidental take permits under ESA § 10(a). 16 U.S.C. § 1539(a). For a landowner to submit to the conservation standard under ESA § 10(a) is an entirely discretionary, not obligatory, act. The only apparently voluntary aspect of the 4(d) rule is the so-called "local option." Depending on how that option is structured, a conservation standard may be applicable to it.

report, FEMAT team members asserted to us that Option 9 did meet or exceed all ESA requirements. Nevertheless, in the August 12 meeting we were told that the FEMAT report only sought to ensure the owl's viability on federal lands pursuant to 36 C.F.R. § 219.19 and the FEMAT mission statement, and that "viability" is a lesser standard than "conservation."

We are at a loss to understand how "viability" can be a lesser standard than "conservation." Resort to a dictionary suggests that for a species to be considered viable it cannot be "endangered" or "threatened" as those terms are defined in the ESA. 16 U.S.C. §§ 1532(6) and (20). More importantly, this view of the subservience of the viability standard was contrary to the position voiced to us by various government officials on numerous occasions that the "viability" standard is more stringent than the "conservation" standard because viability must be established "well distributed in the planning area" (in this case all federal lands with owl habitat) whereas a species may be deemed to be conserved or recovered in a "portion of its range." Cf, 36 C.F.R. § 219.19, and 16 U.S.C. §§ 1532(6) and (20). We believe Option 9 more than adequately meets the conservation obligation of ESA.

Recommendation: Accordingly, we suggest that the 4(d) rule neither explicitly nor implicitly impose a "conservation" obligation on non-federal landowners.

IV. The Special Rule Cannot Prohibit Timber Harvesting And Other Habitat Modifications Where There Is No Death Of Or Injury To An Owl

We were informed that any activity of a private landowner that deviates from the standards set in the prospective 4(d) rule will be a violation of the rule and, therefore, of the ESA itself, thereby subjecting the landowner to potential injunctive, civil, and criminal sanctions. In effect, the rule will be saying that timber harvesting that does not comply with the rule's requirements will be considered to be a taking of the owl in violation of the ESA. However, the FWS lacks the authority under the ESA to make unlawful a private land use action which does not kill or injure a member of a listed wildlife species. Therefore, the special rule would be invalid to the extent it would prohibit timber harvesting that is not determined to actually kill or injure an owl.

There may be room for, and there certainly has been, disagreement as to the nature of the injury which must be shown to demonstrate the "harm" form of "take" -- the only form which involves habitat modification. 16 U.S.C. § 1532(19), 50 C.F.R. § 17.3. However, there has been no disagreement as to the need to demonstrate that an injury has occurred while modifying habitat in order to establish a "take" violation; habitat modification alone, without proof of injury, is not an ESA violation.

In an Interior Solicitor's Office opinion published to explain why the FWS proposed to amend the "harm" regulation in 1981, Interior's legal officers concluded that the FWS lacked ESA authority to make habitat modification without injury to a species a taking:

> We conclude that the present definition [of "harm"] exceeds the scope of authority conferred by Section 9. We recommend that the Service's definition of "harm" be clarified so that only those habitat modifications that actually injure or kill wildlife are subject to Section 9....
>
> As a result of the FWS overly broad definition of "harm," the Ninth Circuit decision in <u>Palila</u> [<u>I</u>] erroneously supports the view that habitat modifications alone may constitute "harm." The implications of such a decision are far-reaching. The discussion set forth above indicates that the present definition of "harm," as interpreted by the Court of Appeals in <u>Palila</u> [<u>I</u>], exceeds the statutory authority conferred by Section 9 of the Act.

46 Fed. Reg. 29490-92 (June 2, 1981).

As described in the preamble to the 1981 rulemaking, the very purpose of the redefinition of "harm" was to require that some actual injury or death had occurred:

> The purpose of the redefinition was to <u>preclude claims</u> of a Section 9 taking for habitat modifications alone <u>without any attendant death or injury</u> of the protected wildlife....
>
> Many commenters suggested that the word "actually" be reinserted in the definition to bulwark the <u>need for a proven injury to a species</u> due to a party's actions. This has been done....
>
> To be subject to section 9, the modification or degradation must be significant, must be significantly impact essential behavioral patterns, and <u>must result in actual injury to a protected wildlife species</u>.

46 Fed. Reg. 54748-50 (Nov. 4, 1981) (emphasis added).

Thus, any special rule that attempts to prohibit habitat modification actions which do not actually kill or injure owls is unlawful under Interior's own legal interpretation of the ESA. This interpretation is plainly correct. The ESA speaks in terms of taking wildlife, not taking habitat. See 16 U.S.C. § 1538(a)(1).

Indeed, during the passage of the ESA, the Senate considered and rejected the inclusion of habitat modification alone as a form of taking. This legislative history is recounted at pages 2-3 of Chief Judge Mikva's opinion in Sweet Home I. Chief Judge Mikva concludes that this means habitat modification without injury cannot be a taking:

> The Committee may have rejected the S. 1983 definition only because it apparently would have made habitat modification a per se violation of the ESA. It is certainly possible that the Committee did not intend to foreclose an administrative regulation prohibiting habitat modification - so long as that prohibition was accompanied by limitations, such as those contained in the FWS regulation under review, requiring that there by actual injury or death to the species.

Mikva op. in Sweet Home I at 3. At the district court level, the FWS admitted that this legislative history precludes making habitat modification alone a taking:

> It may be, as defendants suggest, that the Senate rejected the definition of "take" in S. 1983 because it did not want habitat modification per se to constitute a taking.

Sweet Home v. Lujan, 806 F. Supp. 279, 283 (1992).

Moreover, under statutory construction principles, the Senate's rejection of habitat modification alone as a form of prohibited taking means that the FWS lacks ESA authority to make habitat modification (here, timber harvesting) a prohibited act where there is no demonstrable injury to an owl (or other listed species). INS v. Cardoza-Fonseca, 480 U.S. 421, 442-43 (1987) ("Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language"); see Dart v. United States, 848 F.2d 217, 229 (D.C. Cir. 1988) ("if a change occurs in legislative language a change was intended in legislative result").

For all these reasons, the special 4(d) rule would violate the ESA to the extent it renders unlawful private timber harvesting that does not inflict injury on the owl. Some courts have held that "harm" form of the "take" prohibition does not exist where there has been no proof that the challenged action caused the physical injury or death of a known individual member of a listed species. Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy, 898 F.2d 1410, 1420 (9th Cir. 1990); Morrill v. Lujan, 802 F. Supp. 424, 431-32 (S.D. Ala. 1992); National Wildlife

Federation v. National Park Service, 669 F. Supp. 384, 389 (D. Wyo. 1987). Other courts have relied on general statistics showing a species' population decline to indicate the required injury. E.g., Palila v. Hawaii Dept. of Land and Natural Resources, 649 F. Supp. 1070 (D. Ha. 1986), aff'd, 852 F.2d 1106 (9th Cir. 1988); Sierra Club v. Lyng, 694 F. Supp. 1260 (E.D. Tex. 1988), aff'd in part sub nom. Sierra Club v. Yeutter, 926 F.2d 424 (5th Cir. 1991).

We believe these latter opinions to be in error, but, in any case they are limited to actions which involve the entire or virtually entire habitat of the entire population (Palila bird in Hawaii under Palila), or an entire population segment (Red-cockaded Woodpecker in Texas under Sierra Club v. Lyng), of an endangered species and, therefore, threaten the entire species' or population segment's extinction. As individual non-federal landowners' actions -- indeed all their actions together -- could relate to only a very small portion of the threatened owl's entire habitat and cannot result in its extinction, these latter opinions' use of general population statistics in lieu of showing physical injury to establish the "harm" form of "take" is inapplicable here.

In any case, the intended 4(d) rule apparently would make certain private timberland operations unlawful without any evidence of injury. This it cannot do.

Recommendation: We suggest the rule should provide that failure to conform to its standards will subject the landowner to possible (or even certain) investigation to determine whether the ESA has been violated and "take" has occurred. In other words, the rule should provide a safe harbor from "take" prosecution for those who comply and substantially increase the risk for take prosecution for those who do not. Given the severe civil and criminal penalties applicable to ESA violations, such a rule would induce the necessary behavior without unlawfully broadening the "take" prohibition.

V. The Administration Seriously Misunderstands The Present "Take" Constraints On Non-Federal Lands

The principal spokesman for the Administration at the August 12 meeting appeared to have an extraordinarily expansive view of the present "take" constraints on non-federal landowners, thereby making the false assumption that the prospective 4(d) rule will provide substantial relief to, rather than more greatly burden, non-federal landowners.

Apparently, the Administration believes all, or a combination of some, of the elements of the Northern Spotted Owl Guidelines,[7/] the Assistant Secretary's Interim Policy,[8/] the ISC report, the Gang of Four report, the SAT report, and the draft recovery plan now apply to non-federal landowners. Additionally, the spokesman expressly said that failure to provide dispersal habitat would be considered a "take" today. These views are patently erroneous.

The Owl Guidelines were challenged in Sweet Home Chapter of Communities for a Great Oregon v. Turner, No. 91-2218-NHJ (D.D.C.) ("Sweet Home II"), on: (1) the procedural ground that they established binding rules on ESA takings which were unlawfully issued without compliance with the notice-and-comment rulemaking requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553; and (2) the substantive ground that, any assertion by the Guidelines that a certain amount of timber harvesting was a per se taking violates the ESA and regulatory requirements that actual injury must occur before a taking exists.

The FWS rescinded the Owl Guidelines, rather than defend them in court. Memorandum from Dale Hall, FWS Assistant Regional Director (October 2, 1991). The agency then moved to dismiss the case as moot. It submitted a Declaration of Mr. Hall to document that the Owl Guidelines "were never intended to be...used as binding or mandatory standards" and that the Guidelines have been withdrawn so the industry and the public "would no longer use and rely on" them.

> [I]t appeared that many persons believed that any action inconsistent with the incidental take portion of the Guidelines was automatically a violation of the prohibition in the ESA against take of a listed species. This was not correct because they were never intended to be viewed or used as binding or mandatory standards. Rather, they were intended to be used as a guide to be applied on a case-by-case basis...
>
> In rescinding the Guidelines, the Service withdrew the Guidelines from the timber industry, state and local

7/ Procedures Leading to Endangered Species Act Compliance for the Northern Spotted Owl, FWS, (FWS July 1990).

8/ Memorandum from the Interior Assistant Secretary for Fish and Wildlife and Parks to the FWS Director, entitled "Interim Policy Regarding Enforcement of Prohibition Against Taking for the Northern Spotted Owl" (August 24, 1992).

governments, and the general public so that they would no longer use and rely on the guidelines.

Declaration of Dale Hall, FWS Assistant Regional Director (February 21, 1992) (emphasis added).[9/]

Based on the Government's representations, the Court found that the Guidelines could not be enforced and, therefore, the case was moot:

> By rescinding the Guidelines, FWS has provided plaintiffs with the relief they sought in their original complaint.... Essentially, plaintiffs are seeking to prevent enforcement of the Guidelines. That is precisely what FWS has now done: FWS declared that the Guidelines were rescinded, thereby clearly indicating its intention no longer to apply or enforce them.

Sweet Home II order of dismissal at 4 (emphasis added).

The Assistant Secretary's Interim Policy memorandum also confirms that the Guidelines "were rescinded for external use" and cannot be used "in a manner inconsistent" with the Government's representations to the Sweet Home II Court. Accordingly, the Guidelines do not apply to non-federal landowners for at least three reasons.

First, the Owl Guidelines have been fully and completely rescinded for all external uses. As Mr. Hall stated, FWS has unambiguously "withdr[awn] the Guidelines from the timber industry, state and local governments, and the general public so that they would no longer use and rely on" them. Hall Declaration (emphasis added). Therefore, the FWS cannot "use or rely on them" to discipline the activities of non-federal landowners. As the Sweet Home II Court concluded, the FWS's action "prevent[s] enforcement of the Guidelines." Thus, the Owl Guidelines are a dead letter for all purposes except internal FWS guidance for consultation on actions of federal agencies under ESA § 7.

Further, the FWS advised that the Owl Guidelines "were never intended to be viewed or used as binding or mandatory standards."[10/] Indeed, the Owl Guidelines could not lawfully

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9/ As Mr. Hall stated in a contemporaneous letter, "[w]e had intended that those guidelines be used as a risk analysis rather than the 'rules' some felt they had become." Letter to Mr. William Sherlock (February 18, 1992).

10/ The Owl Guidelines themselves state that they only describe situations "when incidental take of owls might occur" or "may

(continued on next page)

establish a standard on when a take would occur because they were adopted without the notice-and-comment rulemaking required for a valid legislative rule. See W.C. v. Bowen, 807 F.2d 1502, 1504-05 (9th Cir. 1987); R. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals And The Like -- Should Agencies Use Them To Bind The Public? 41 Duke L.J. 1311, 1312, 1366-71 (1992) (discussing the Owl Guidelines). Accordingly, even if the Owl Guidelines were still in effect, they could not be employed as standards for determining the existence of an ESA taking on non-federal lands.[11/]

Third, if the Owl Guidelines are used as legal standards, their view that a certain amount of timber harvest (a form of habitat modification) is per se a taking would violate the ESA and regulations. As described above in Section IV, a person can "take any such species" within the meaning of ESA § 9(a)(1)(B) only by injuring a member of the listed species in some fashion -- habitat modification without injury does not constitute a taking.

For similar reasons, the successor to the Owl Guidelines -- the Interim Policy -- also does not provide standards on when "take" occurs. The document establishing the Interim Policy is simply an internal guidance memorandum from an Interior Assistant Secretary to the FWS Director which only concerns the FWS's exercise of enforcement discretion. It was not published in the Federal Register and does not purport to bind the public. Its title ("Interim Policy Regarding Enforcement") suggests a focus on FWS investigations and enforcement. This focus is borne out in its text:

> [T]he Fish and Wildlife Service must consider the most effective use of enforcement resources. In order to concentrate enforcement of the taking prohibition for

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(continued from previous page)
occur." Guidelines at 9. The Guidelines were intended to provide a safe harbor against prosecution for an ESA taking, not a regulatory duty. The "Service does not intend to seek prosecution in the unlikely event that incidental take occurs in spite of implementing the guidelines." Id.

11/ FWS officials have been quoted as saying that the Guidelines still represent the "best biology" and, therefore, somehow continue to serve as relevant behavioral guides. See, e.g., letter from Mr. Hall to Mr. William Sherlock (February 18, 1992). Even if these statements did not violate the Government's solemn pledge of rescission to the Sweet Home II Court, they are no longer relevant. We understood Mr. Hall to say at the August 12 meeting that the biology underlying the Guidelines has been superseded, particularly by the FEMAT report.

the owl on areas that are most likely to produce positive results for the species and to deter serious violations of the Endangered Species Act, you should focus attention on suspected violations that:

1. show evidence of a deliberate intent to cause harm or harassment of spotted Owls, or

2. produce physical evidence that a direct taking of owls or their parts has occurred, or

3. involve destruction of habitat in the immediate vicinity of a known activity center (less than a 500 acre circle centered at the activity center).

Point 3 of the Interim Policy cannot reasonably be read as saying any habitat modification in a 500-acre circle is a taking because: (1) that would assert the unlawful position that habitat modification alone is a taking; and (2) the Interim Policy repeatedly refers to the 500-acre zone as an area where "suspected violations" should be investigated to see if they turn up "evidence" of a taking as defined by regulation. Therefore, point 3 is simply a recommendation that the FWS investigate disturbances within the 500-acre zone to determine whether takings, as defined by regulation, have occurred.

Thus, the Interim Policy does not define current "take" obligations for two reasons. First, the Interim Policy was not intended to create taking standards binding on the public, nor could it do so, since the notice-and-comment rulemaking procedure required for a valid regulation was not followed. Second, if the Interim Policy is interpreted as a standard that any habitat modification within a 500-acre zone is <u>per se</u> a taking, without proof of actual injury to the owl, the standard violates the ESA and current regulations and becomes unenforceable.

Finally, the ISC report, the Gang of Four report, and the SAT report, by their own terms, apply only to federal land. Furthermore, they do not purport to define or proscribe activities that would "take" the owl. They are not relevant to non-federal landowners.

Significantly, none of these documents has ever suggested that, to avoid a "take," non-federal landowners should provide dispersal habitat. The suggestion that the "50-11-40 rule" has ever applied to non-federal land is simply incorrect. If the 4(d) rule is to provide the intended relief from existing regulations to protect owls on non-federal land, the Administration must start from an accurate understanding of what regulations and "take" avoidance measures are actually in place and followed. At this point, it appears they have very little understanding of this critical baseline reference point.

To suggest that any of these federal documents discussed above limit landowner activities and that landowners would be relieved from their constraints by a 4(d) rule is incorrect. A 4(d) rule that limits landowner behavior will be judged not by comparison with those documents or the 50-11-40 standard, but by comparison instead with the regulations defining "harm" and "harass" takings and existing on-the-ground constraints imposed under State forest practice laws and rules. We have tasked our biologists to describe in detail those constraints to FWS officials in Portland.

VI. No Consideration Is Given To The Effect Of A 4(d) Rule On The Requirements For Protection Of The Owl On Federal Lands

The forest industry originally proposed a possible 4(d) rule because it believed the rule would have two salutory effects. First, since previous reports assumed that conservation of the owl could be provided on federal lands only, a stringent definition and imposition of the take prohibition on non-federal lands was unnecessary; a 4(d) rule could lessen the application of that prohibition to the owl. Second, any protection provided to the owl by a liberal 4(d) rule, together with the protection the owl receives from State Forest Practices Acts' requirements, could be credited to the owl's management regime for federal lands, thus at least marginally improving the possibility of increasing federal timber land production.

Neither of these benefits will accrue under the prospective 4(d) rule. As noted in the Sections above, that rule will apparently stiffen the "take" prohibition beyond even what the ESA allows, not liberalize it. Moreover, since the EIS on Option 9 and the FEMAT report apparently will not consider the 4(d) rule or the owl protection effects of the State Forest Practices Acts on non-federal lands, the federal land management alternatives will be unnecessarily stringent, imposing a last measure of protection on federal lands that private lands will also be required to provide.

Recommendation: We should urge this Administration to incorporate fully a recognition of the contribution of non-federal lands to owl protection in all federal land management alternatives considered in the EIS and provided in the post-EIS decision documents.

VII. The Failure To Relieve Grants Of Access Across Federal Lands To Non-Federal Lands From Consultation Requirements Dramatically Reduces The Effectiveness Of The Special Rule

Finally, we must admonish that continued use of the ESA § 7(a)(2) consultation process for the granting of federal land access to non-federal lands will diminish substantially the utility of any 4(d) rule. First, it destroys the timeliness of the rule. Although the rule is applicable immediately without further federal decisionmaking or documentation to non-federal landowners who do not require federal access permits, the federal land-locked landowners will have to await completion of the processing of their access applications. This processing, with its NEPA and ESA consultation documents and procedures, has not been expeditious. The processing of most Forest Service access grants has required at least a year. Some applications are still pending before that agency after five years. Even if the Government makes a concerted effort to expedite these access applications, compliance with the NEPA and ESA documentation and procedural requirements inevitably requires significant time periods.

Second, consultations over access grants nearly always result in specific conditions suggested by the FWS -- reasonable and prudent measures under ESA § 7(b)(4)(ii) when no jeopardy is found or reasonable and prudent alternatives under ESA § 7(b)(3)(A) when jeopardy is determined. 16 U.S.C. §§ 1536(b)(4)(ii) and (b)(3)(A). These consultation conditions might not resemble the 4(d) rule's requirements and could even be contradictory. In any case, the likelihood that such access grant-specific conditions will be proposed means that no federal land-locked landowner can rely on the 4(d) rule in planning and preparing for a timber harvest.

Recommendation: We should suggest that the 4(d) rule be accompanied by a rule similar to a categorical exclusion under NEPA -- a rule that states the grant of access across federal land for any non-federal landowner will be deemed to not "likely affect" the northern spotted owl for consultation purposes under ESA § 7(a)(3) as long as the landowner abides by the requirements of the 4(d) rule. 16 U.S.C. § 1536(a)(3).

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MEMORANDUM

TO: Chip Murray
American Forest and Paper Association

FROM: Steve Quarles and Tom Lundquist

RE: Scope Of ESA § 4(d) Authority For Special Rules

We reviewed an August 5 memorandum entitled "Analysis of Endangered Species Act Section 4(d) with Respect to Proposed Spotted Owl Regulations." That memorandum construes the scope of ESA § 4(d) authority narrowly and concludes that courts will only sustain special rules which advance "conservation" as defined in the ESA. It would be difficult for any special rule which would allow timber harvesting that injures some spotted owls to meet this "conservation" standard.

The August 5 memorandum also concludes that a special rule would not take effect in Oregon until the State adopts a counterpart regulation.

For reasons summarized below, we differ with these conclusions. Although courts might reach the conclusions stated in the August 5 memorandum, they could well reach different results due to contrary legal authority.

Scope Of ESA § 4(d) Authority

ESA § 4(d) ambiguously states:

> Whenever any species is listed as a threatened species pursuant to section (c) of this section, the Secretary shall issue such regulations as he deems necessary and

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> advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) [such as prohibiting takings]...with respect to endangered species, except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 1535(c) of this title only to the extent that such regulations have also been adopted by such State.

16 U.S.C. § 1533(d) (emphasis added).

FWS's scope of lawful authority in issuing a special rule for a threatened species under ESA § 4(d) rules is very uncertain. There are two conflicting lines of cases and interpretations which cannot be reconciled. It is difficult to predict which interpretation a particular court would adopt, though the D.C. Circuit would likely side with the broad view of ESA § 4(d) authority.

One line of cases -- expressing the narrow view of ESA § 4(d) authority -- effectively holds that FWS can issue a special rule which allows some takings only where it would advance "conservation" as defined in the ESA. See Sierra Club v. Clark, 755 F.2d 608 (8th Cir. 1985) (setting aside regulations allowing some trapping of wolves); Fund for Animals, Inc. v. Turner, 1991 WL 206232 (D.D.C. Sept. 27, 1992) (preliminary injunction against regulation allowing some hunting of grizzly bears). These cases find that the ESA definition of "conservation" means that only "in the extraordinary case where population pressures within a given ecosystem cannot otherwise be relieved, may...regulated taking" be allowed. 16 U.S.C. § 1531(3).

Under this view, FWS's ability to allow takings is very limited. It exists only when the population of a listed species is above the carrying capacity of its ecosystem or when the species' recovery has been (or maybe will be) achieved through other means. This view rests on the assumption that ESA § 4(d) contains a single cohesive grant of regulatory authority, and that FWS can allow takings only when it would advance a "conservation" objective.

However, there is a competing view of ESA § 4(d) under which that section grants FWS broad discretion to allow, prohibit, and define takings for each threatened species. The two leading cases on the broad view are Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, No. 92-5255, 1993 WL 270509 (D.C. Cir. July 23, 1993), and State of Louisiana ex rel. Guste v. Verity, 853 F.2d 322 (5th Cir. 1988).

These cases are more consistent with the ESA legislative history on ESA § 4(d), which stresses FWS's great discretion:

> Once an animal is on the threatened list, the Secretary has almost an infinite number of options available to him. He may, for example, permit taking, but not importation of such species, or he may choose to forbid both taking and importation but allow the transportation of such species.

H.R. Rep. No. 412, 93d Cong., 1st Sess. 12 (1973) (emphasis added).

> Among other protective measures available, he may make any or all of the acts and conduct defined as "prohibited acts"...as to "endangered species" also prohibited actions as to the particular threatened species.

S. Rep. No. 307, 93d Cong., 1st Sess. 8 (1973) (emphasis added).

The Verity case affirmed NMFS's regulations allowing some takings of threatened turtles if shrimpers used a prescribed technology, turtle excluder devices ("TEDs"). The Court held that the regulation did not have to advance "conservation." It seemingly reasoned that the two sentences in ESA § 4(d) contain two separate grants of regulatory authority, and regulations designed to reduce takings can be issued under the discretionary "may" authority in the second sentence:

> In addition to this mandatory duty [to issue "conservation" regulations], the ESA also provides the Secretary discretionary authority to prohibit by regulation the taking of any threatened species of fish and wildlife. 16 U.S.C. §§ 1533(d), 1538(a)(1). This regulatory authority supplements the statutory prohibition against the taking of endangered species, see 16 U.S.C. § 1538(a)(1), the enforcement of which is not conditioned upon any showing that the prohibition will itself operate to restore the species to a level considered unendangered [i.e., not limited to regulations advancing "conservation"]....
>
> In sum, therefore, regulations aimed at preventing the taking of a protected species cannot be invalidated on the ground that the record fails to demonstrate that the regulatory effort will enhance the species' chance of survival.... Rather, the record need only show that such regulations do in fact prevent prohibited takings of protected species. Here, the record developed by the Secretary amply satisfied this burden.

Verity, 853 F.2d at 333.

Stretched to its limits, the logic of Verity could mean that FWS has ESA § 4(d) authority to adopt a special rule stating that timber harvesting in compliance with prescribed standards will not be considered to be a taking of the threatened spotted owl.[1/] Sweet Home supports this result.

In Sweet Home, a unanimous panel of the D.C. Circuit rejected appellants' argument that the blanket regulation (50 C.F.R. § 17.31(a)) -- which presumptively extends the "take" prohibition to all threatened species under FWS jurisdiction -- violates directives in ESA § 4(d) that the extension can only occur on a species-by-species basis and only where supported by findings that the take prohibition was "necessary and advisable" for the "conservation" of the species. See slip op. at 8-14.

In order to conclude that the missing "necessary and advisable" findings were not legally required, the panel held that it is reasonable for FWS to interpret the two sentences in ESA § 4(d) as containing separate grants of regulatory authority:

> As appellees argue, however, there is a reasonable reading of § 1533(d) that would not require the FWS to issue formal "necessary and advisable" findings when extending the prohibitions to threatened species. According to this interpretation, the two sentences of § 1533(d) represent separate grants of authority. The second sentence gives the FWS discretion to apply any or all of the § 1538(a)(1) prohibitions to threatened species without obligating it to support such actions with findings of necessity [or, presumably, advancing "conservation," since it too is only found in the first sentence]. Only the first sentence of § 1533(d) contains the "necessary and advisable" language and mandates formal individualized findings. This sentence requires the FWS to issue whatever other regulations are "necessary and advisable," including regulations that

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1/ However, the Verity logic may apply only to NMFS, which extends taking prohibitions to threatened species under its jurisdiction one species at a time. This makes it seem like each regulation, like the TED rules, is a protective regulation. Since FWS already has a blanket rule prohibiting taking of spotted owls and other threatened species (50 C.F.R. § 17.31(a)), a special rule for owls may be perceived as lessening protection -- allowing some takings which were not allowed in the past. This may make a court more likely to invoke the narrow view of ESA § 4(d) -- i.e., FWS cannot affirmatively allow regulated takings unless it advances "conservation" of that species. That was the fact pattern in the wolf and grizzly bear cases, where ESA § 4(d) rules were set aside.

impose protective measures beyond those contained in § 1538(a)(1).

Sweet Home slip op. at 13-14 (emphasis added).

Sweet Home is susceptible to interpretations which read ESA § 4(d) as a broad grant of discretionary regulatory authority. For example, since the "second sentence gives the FWS discretion to apply any or all of the § 1538(a)(1) prohibitions," FWS arguably has the authority to adopt a special rule which does not make every taking of a spotted owl unlawful. Such a special rule arguably would not be subject to the advance "conservation" limitation and "necessary and advisable" findings contained in the first sentence, because the special rule would not (in the words of the Sweet Home Court) go "beyond...[the bar on takings] contained in § 1538(a)(1).[2/]

Thus, contrary to the conclusion in the August 5 memorandum that there is a single line of cases reading ESA § 4(d) authority narrowly, we would suggest that there are two inconsistent lines of cases. The broader view of ESA authority may be more likely to prevail outside the Eighth Circuit (where Sierra Club v. Clark was decided) due to factors such as: (1) the respect accorded D.C. Circuit and Fifth Circuit decisions; (2) the legislative history of ESA § 4(d); and (3) judicial desires to loosen the stranglehold created by the narrow interpretation of ESA § 4(d). However, since there is credible authority on either side, no one can predict with certainty how a presently unknown judge from a politically diverse judiciary would view the legality of an ESA § 4(d) special rule.

State Counterpart Rule

The August 5 memorandum (at 8) also concludes that the final phrase in ESA § 4(d) means that, "before a 4(d) regulation could apply in Oregon, Oregon must adopt a state regulation." While this is a possible result, it is not the only potential result.

If the federal special rule is more stringent in terms of takings than State law, two courts have read the language in ESA § 6(f) as meaning that "less restrictive takings provisions under [State] law are preempted by the ESA." Swan View Coalition, Inc. v. Turner, 36 Envtl. Rep. Cas. (BNA) 1643, 1656 (D. Mont. 1992); see United States v. Glenn-Colusa Irrigation District, 788 F. Supp. 1126, 1134 (E.D. Cal. 1992). Thus, if these cases are

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2/ However, if the special rule is found to be subject to the first sentence in ESA § 4(d), Sweet Home holds that there must be "formal individualized findings" as to why the special rule is "necessary and advisable" for the "conservation" of the spotted owl. This could delay issuance of a special rule.

followed, less restrictive State law is preempted by a federal taking regulation, despite the apparently contrary language in ESA § 4(d).

No court has addressed the issue of which law controls if the federal special rule allows more activities and takings than does State law or regulation. ESA § 6(f) seems to say that more restrictive State law is not preempted:

> Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.

16 U.S.C. § 1535(f).

More importantly, the following ESA § 4(d) language arguably suggests, as the August 5 memorandum concludes, that a corresponding State regulation is required before a special rule lessening the take prohibition is in effect in a cooperative agreement State:

> The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) [such as prohibiting takings]...with respect to endangered species, except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 1535(c) of this title only to the extent that such regulations have also been adopted by such State.

16 U.S.C. § 1533(d).

However, this is not the only possible interpretation of ESA § 4(d). An additional complicating factor is the nearly impenetrable language in ESA § 6(g)(2):

> The prohibitions set forth in or authorized pursuant to sections 1533(d) and 1538(a)(1)(B) of this title shall not apply with respect to the taking of any resident endangered or threatened species (other than species listed in Appendix I to the convention or otherwise specifically covered by any other treaty or Federal law) within any State -
>
> (A) which is then a party to a cooperative agreement with the Secretary pursuant to subsection (c) of this section (except to the extent that the taking of any such species is contrary to the law of such State).

16 U.S.C. § 1535(g)(2).

There are at least two other ways to interpret ESA §§ 4(d) and 6(g)(2).

One interpretation is that a special rule authorizing something that would be a taking under prior law might not be viewed as one which has "prohibited" takings within the meaning of ESA § 4(d)'s second sentence, so the State regulation clause might not apply. Under this view, the special rule is effective regardless of State action.

The murky, ambiguous language in ESA § 6(g)(2) arguably leads to the same result. ESA § 6(g)(2) could mean that the federal government retains total control over the takings of species which are subject to federal treaty protection, such as the spotted owl. This also provides support for the view that only the federal special rule is relevant.

Second, ESA § 4(d) may mean that FWS can apply federal law (the special rule) while the State can apply both the State and federal law if it adopts a corresponding regulation. Under this interpretation, the federal special rule is effective when promulgated as a statement of federal prosecutorial discretion. A timber owner only remains subject to the threat of greater State taking prosecution until the State changes its law to conform with the federal special rule.

This view also is supported by the principle that an agency is bound by its own regulations. If FWS adopts a special rule which says that activity A is not a taking, there are strong arguments that it could not prosecute activity A as a taking, regardless of whether activity A is a taking under State law and regardless of what ESA § 4(d) says.

More pragmatically, a court may stretch to adopt one of these interpretations so a federal ESA regulation is not held hostage to differing State laws. That is what seemingly happened in the Swan View and Glenn-Colusa cases.

Thus, the issue of whether a State regulation is required to make a special rule adopted by FWS legally effective also seems to be fraught with uncertainty. The case law is too sparse and the ESA language is too ambiguous to state the result in court with any high degree of confidence.

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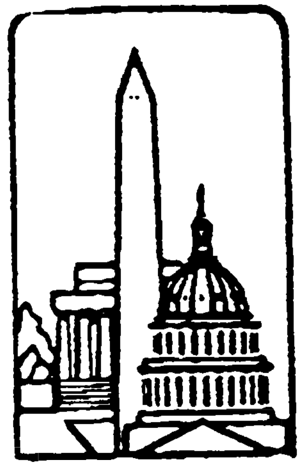

DATE: 8/11/93

TO: Will Stelle

FAX NO. 503 231-6243

FROM: Heidi Biggs

Will - as I mentioned, we
have an attachment entitled
"A review of recent Science on the
Northern Spotted Owl" that is lengthy.
Let me know when & if you need it.
Heidi

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FAX NUMBER 202-293-2955

COMMENTS ON THE PRELIMINARY INFORMATION PROVIDED BY THE OREGON AND WASHINGTON STATE OFFICIALS ON THE SECTION 4(d) RULE MAKING PROCESS

Oregon and Washington state officials held meetings on August 9, 1993, to inform constituent groups on the progress of the section 4(d) rule making process. The states were asked to provide specific input on the "50-11-40" approach for providing dispersal habitat. Additionally, input was requested on the areas of concern.

The attached comments detail Weyerhaeuser's view on these issues and focus extensively on dispersal habitat, areas of concern, and integration of the federal forest plan.

The background and biological information presented did not contain any detail on a number a very positive steps that are underway. We encourage the development of ideas leading to:

1. Opportunities for state and local alternatives to existing ESA requirements.
2. A mechanism for voluntary pre-listing agreements.
3. Approaches that result in multi-species protection rather than single species plans.

Based on the information provided by the states, we are encouraged by the overall goals for the rule. The following comments detail our concerns with the biological and prescriptive ideas that were presented by the states.

EXECUTIVE SUMMARY:

The U.S. Fish and Wildlife Service (FWS) has requested input on the preliminary background and biological information being used to develop a section 4(d) rule.

Specifically, the FWS asked for input on the 50-11-40 approach for providing dispersal habitat and on the areas of concern in which non-federal restrictions may be necessary to meet conservation objectives of the northern spotted owl.

In summary:

1. The FWS must incorporate the dramatic changes occurring on federal lands into the section 4(d) rule making process.

2. The FWS must fully incorporate the reliable and enforceable state forest practice laws which already insure that certain habitat attributes are provided on non-federal lands.

3. Given the drastic changes on federal land management policies proposed since the recovery plan was released, the draft recovery plan should not be the basis for the 4(d) rule.

4. Application of the 50-11-40 rule for providing dispersal habitat is not biologically supported. There are abundant silvicultural opportunities available to create dispersal habitat. Most, if not all, of the habitat attributes are already accomodated under state forest practice laws.

5. Application of the recovery plan standards, including the 50-11-40 rule, would cripple non-federal timber production. The economic impact would be additive to the impacts already occurring as a result of the reductions in federal timber supply.

6. The FWS must incorporate the recent scientific and monitoring findings on the biology of the northern spotted owl.

The following comments fully detail these points.

I. BACKGROUND

The President's plan calls for, "The development of a new rule from the Fish and Wildlife Service to ease restrictions on timber harvest from certain non-federal lands (modifying what have been known as owl circles) possible because the President's plan improves management of federal forests.."

The preliminary information from the U.S.Fish and Wildlife Service (FWS) contains some very positive ideas. Among these are the desire to clear up the current confusing take prohibitions on non-federal lands, to provide state or local alternatives to existing ESA requirements, to encourage voluntary pre-listing agreements, and the desire to find alternative methods of developing multi-species approaches to non-federal lands. Although these are positive steps, no details were provided to comment on.

Additionally, the preliminary information contains no information on how the FWS would propose to handle other threatened species such as the marbled murrellet.

However, the initial information provided to the states indicates that the FWS is incorporating many of the old concepts found in the recovery plan for the northern spotted owl. Although the FWS seems to acknowledge that the President's plan will assure the conservation needs of the owl, the background biology and specific areas of concern closely follow the outdated rationale supporting the draft recovery plan for the northern spotted owl.

Specifically, the FWS proposes that contributions from non-federal lands generally fall into one of the following categories:

1. The need for population clusters or well - distributed populations.
2. Supporting populations in and around federal reserves.
3. Dispersal habitat.

The states have been asked to provide input to the FWS on the background and the biology for the development of a section 4(d) rule. Additionally, the states have been asked to comment on the areas of concern and the use of the 50-11-40 rule for providing dispersal habitat on non-federal lands.

The following comments discuss the biological basis that we advocate the FWS employ in the development of a section 4(d) rule. These comments also examine the biological considerations for providing dispersal habitat on non-federal lands and some of the economic consequences.

II. UNDERLYING PRINCIPLES

A section 4(d) rule for the northern spotted owl must incorporate and take into consideration the changes occurring in federal forest management. It must also include current biological information on the spotted owl, and seek minimal restrictions on the use of non-federal lands.

The rule must also incorporate the reliable and enforceable standards of the state forest practice acts. Unnecessary additional restrictions on the use of non-federal forest lands will deepen overall timber supply problems caused by the halt in the federal timber sales program.

III. A SECTION 4(d) RULE MUST INCORPORATE THE CHANGES IN FEDERAL FOREST MANAGEMENT

The Forest Ecosystem Management Assessment Team (FEMAT) report states that implementation of Option 9 (the preferred option) would result in:

1. An 83 percent probability that "habitat is of the sufficient quality, distribution, and abundance to allow the species population to stabilize, well distributed across federal lands".

2. An 18 percent probability that "habitat is of sufficient quality, distribution, and abundance to allow the species population to stabilize, but with significant gaps in the historic species distribution on federal lands. These gaps cause some limitations in interactions among local populations".

3. A zero percent probability that "habitat only allows continued species existence in refugia, with strong limitations on interactions among local populations".

4. A zero percent probability that "habitat conditions will result in species extirpation from federal lands".

(FEMAT Report, pages IV-43 and IV-153)

Assuming the President's plan is adopted in its current or similar form, the need for onerous restrictions on non-federal lands is clearly diminished. Arguably, with a "zero percent probability of extirpation of the species," there is little need for overly restrictive prohibitions on incidental take from non-federal lands.

IV. THE AREAS OF CONCERN NEED TO BE RE-EVALUATED IN LIGHT OF OPTION 9.

Option 9 will reduce federal timber harvests approximately 1 billion board feet per year below the levels contemplated in the draft recovery plan. It is clearly inconsistent that more areas of concern and increased restrictions within those areas are necessary given the drastic changes proposed on federal lands.

The FEMAT report indicates that implementation of Option 9 will result in a high probability of success for distribution of the species. If Option 9, or something close to it, is implemented, there is, little, if any, need for prohibitions on incidental take from non-federal lands in the areas of concern identified in the draft recovery plan for the spotted owl. Stated another way, the FEMAT analysis indicates that there is an 83 percent probability the owl is conserved with no areas of extra protection (see FEMAT report, pages IV-43 and IV-153).

However, the preliminary information provided by the FWS indicates that additional areas of concern over and above those identified in the recovery plan are now under consideration. For example, the preliminary information suggests the need for providing supporting populations in and around federal reserves in the Oregon coast province (specifically between Highways 38 and 42). That area was not included in the draft recovery plan.

Further, specific objectives have also changed from the recovery plan for particular areas of concern. Again, based on the preliminary information provided by the FWS, the I-5 corridor area of concern in Oregon was originally identified as an area to provide dispersal habitat. Now, the FWS suggests that it may be necessary to provide supplemental populations in addition to dispersal habitat.

V. THE 50-11-40 RULE IS NO LONGER APPROPRIATE

The 50-11-40 concept originated in the ISC strategy and requires that 50 percent of land contain 11" diameter trees with at least 40 percent canopy closure. At the time, it was considered a best "guess" of what forest conditions were necessary for spotted owl dispersal across managed forest landscapes. The "rule" was to be applied in the matrix areas, which were those areas between designated habitat conservation areas on federal lands.

There was never any intention of applying the 50-11-40 standard to non-federal lands.

The Forest Ecosystem Management Assessment Team (FEMAT) report dismisses the 50-11-40 approach as well as the recovery plan's approach to management of the matrix.

> "Option 9 incorporates a reserve design different from that specified in the Recovery Plan but tailored to meet owl population objectives; it also substitutes Riparian Reserves and 15 percent green tree retention in the *matrix for the dispersal habitat provisions of the Recovery Plan. The reserved pair areas were dropped.*" (II-31, emphasis added)

Notably, Option 9 does not prescribe the 50-11-40 approach for the management of the matrix lands on federal forests (see FEMAT report, pages III-21,22).

Additionally, habitat conservation plans recently approved by the FWS for Simpson Timber Company and Murray Pacific Corporation do not prescribe the 50-11-40 rule.

Clearly, the state of the knowledge suggests that an alternative approach to dispersal habitat is both appropriate and prudent. The Simpson and Murray-Pacific HCP's provide the only examples for non-federal lands having been developed within the context of managed forests.

A. BIOLOGICAL CONSIDERATIONS THAT MUST BE EXAMINED.

Current research and monitoring results demonstrate that dispersal habitat for spotted owls:

* Provides room for the owls to fly under a partially closed canopy.

* Provides protection from predators by having a partially closed canopy.

* Is not dependent on age and diameter of the trees, but rather is based on the structure of the stand.

* Can be created through the use of silvicultural practices such as pre-commercial thinning, pruning, and fertilization.

VI. APPLYING THE 50-11-40 RULE AND OTHER RECOVERY PLAN STANDARDS ON NON-FEDERAL LANDS WOULD CRIPPLE PRODUCTION FROM PRIVATE AND STATE FORESTS.

As stated earlier, the information provided thus far strongly suggests that the FWS is considering applying many, if not most, of the non-federal land prescriptions contained in the recovery plan for the northern spotted owl. There would be an enormous economic impact of implementing the draft recovery plan. These impacts are directly linked to providing dispersal habitat and nesting, roosting and foraging habitat in particular areas of concern.

These economic consequence would be immediate and add to the impacts of federal timber supply reductions.

Analysis of the economic impacts shows that:

Reduction in non-federal timber harvest:

Washington -1,624 MMBF per year
Oregon - 546 MMBF per year

Employment impacts:

	Direct jobs	Total jobs
Washington	6,700	24,100
Oregon	2,700	9,400

VII. SILVICULTURAL OPPORTUNITIES ARE ABUNDANT FOR CREATING DISPERSAL HABITAT.

Based on recent biological information, it is unnecessary to employ a highly restrictive rule, such as the 50-11-40 approach, for providing dispersal habitat.

Instead, the rule should recognize management approaches. Silvicultural practices create dispersal habitat without unnecessarily constraining the use of non-federal forest lands. The FWS has recognized this in the past. In particular, both the Simpson and Murray-Pacific HCP's show alternative approaches for meeting dispersal needs.

For example, the following structural attributes to meet the biological function of dispersal can be created through silvicultural practices[1]. All of these attributes are already regulated under state forest practice laws, except for stand size.

Species Composition	State reforestation rules and practices will result in stands dominated by coniferous trees. These can be expected to have more than 70 percent canopy cover. This provides protection from precipitation and radiant heat loss during the fall and winter when the owl most uses dispersal habitat.
Tree Size and Density (the following stand characteristics are affected by tree size and density)	State reforestation rules mandate that stands will have more than 130 trees per acre. In Douglas fir forests in western Washington, approximately 33 percent of the forests will have a minimum diameter at breast height (dbh) of 10 inches, or equivalent basal area of larger trees. Total tree density will not exceed 300 trees per acre following pre-commercial thinning which is standard practice in intensively managed forests.
• Canopy development	• Trees with greater than 10" dbh protect the owl from rain and radiant heat loss, and from overhead predators.
• Limb size	• Trees that are 10 inches dbh have limbs that are at least 1.5 inches in diameter (at the base) throughout most of the live canopy and below. Limbs of this size are strong enough to support the owl for roosting and perching while sleeping, eating and foraging.
• Canopy lift	• Trees with at least 20 feet of canopy lift provide the owl with enough flying space between the top of the understory vegetation and the bottom of the live canopy.

1. Source: Murray-Pacific Habitat Conservation Plan

Residual Live Trees	Where possible, stands should have at least two residual live trees per acre from the dominant or codominant size class of the previous stand. State forest practice rules already require at least 2 green trees per acre be left after harvest in addition to 3 wildlife trees per acre (in Washington). The preferred residual tree is a western red cedar, at least 18 inches dbh. The next preferred species are Douglas fir, western hemlock and true fir. An average of two residual live nest trees is adequate to meet the nesting requirements of flying squirrels, the owl's principal prey.
Stand Size	The stand should consist of interior forest conditions which minimize the risk of predation and provide limited foraging opportunities.
Stand Spacing	Limits on clearcut size and timing under state forest practice regulations and hydrology rules (rain-on-snow) and watershed analysis already ensure that the distance between stands will allow the owl to see from one stand to the next, so it will not need to fly blindly in search of another stand.

VIII. THERE IS ADDITIONAL RESEARCH THAT MUST BE INCORPORATED INTO THE 4(d) RULE PROCESS.

There is a wealth of new research and monitoring results that should be incorporated into the section 4(d) rule making process. This recent research has shown that:

* Owl circles do not correspond to actual behavior or actual habitats used.

  Tracking owls over time shows a different use pattern.

* Owl circles do not fit the landscape.

  Owls are shown to be associated with topographic features, not circles.

* Forest structure and terrain are better indicators for owl habitat than the age of the forest.

Western Oregon Studies:

- The amount of mature and old growth habitat decreases with increased distances from owl sites.

- The likelihood of a pair of owls successfully occupying a site is very high when there is 250 acres, or more. of nesting/foraging habitat within a 500 acre area around the site center.

Eastern Washington Studies:

- The age of the forest does not determine the suitability of habitat.

- Forest manipulation maintains owl habitat.

- Reproductive success is not linked with the amount of suitable nesting forest habitat.

Habitat Studies:

- Suitable habitat includes more than forest age class. Suitable habitat includes:

  Topography
  Precipitation zone
  Forest zone and vegetation community types
  Number of trees per acre
  Snags, downed woody debris, and understory vegetation

This information must be considered in the drafting of any section 4(d) rule. A summary of this research is attached.

IX. CONCLUSION

The preliminary information on the 4(d) rule contains some very positive ideas. We encourage the FWS to continue to develop the concepts of local options, pre-listing agreements, and multi-species approaches to protecting threatened species on non-federal lands. We would like the opportunity to provide input on those ideas as they are formulated by the FWS.

The biological and policy issues raised in these comments should be incorporated into the current rule making process.

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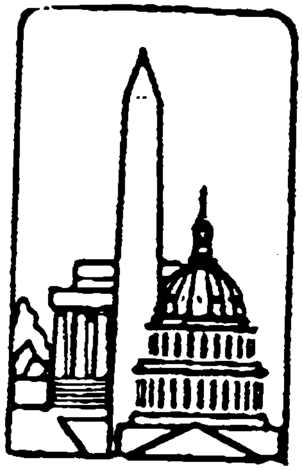

DATE: 7/21/93

TO: Will Stelle

FAX NO. 225-7094

FROM: Heidi Biggs

Will - For your consideration - our teams view of what a 4(d) rule could look like. We continue to work on the "Substance" as well.

Thanks Heidi

TOTAL NUMBER OF PAGES (INCLUDING COVER SHEET): __________
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Proposed Outline for a Rule
Under Section 4(d) of the Endangered Species Act

Summary

Under section 4(d) of the Endangered Species Act (Act), the Fish and Wildlife Service (FWS) would define the circumstances under which forest practices which might result in incidental take of the northern spotted owl and marbled murrelet would, nonetheless, be permitted. Non-incidental take (hunting, shooting, trapping, etc.) would remain prohibited.

In addition, the FWS and the National Marine Fisheries Service (NMFS) would define the conditions under which they would enter into watershed-based, multi-species, prelisting conservation agreements, called "forest habitat management plans," for unlisted fish and wildlife species. These conservation agreements would generally relieve the participating nonfederal landowners from liability for incidental take if the species were listed. They would also be taken into account in any listing decision by the two agencies as efforts in place to protect species as provided for under the Act.

Background

The rule would describe the results of implementing the President's proposed conservation strategy on federal lands in the region, and would recognize the conservation benefits of the federal strategy and of federal, state, and other reserves.

The rule would recognize the reliable and enforceable conservation benefits that are provided by state forest practices, other state laws, and binding, voluntary actions including:

- reforestation
- limits on clearcut size and timing
- sensitive sites -- controls on sediment and mass wasting (road construction standards, SEPA and cumulative effects)
- riparian buffers
- wetland buffers
- rain-on-snow rules (WA)
- hydraulics projects rules
- Shoreline Management Act (WA)
- wildlife trees
- bald eagle statute (WA) and sensitive bird sites (OR)
- road use and closure agreements
- etc.

The rule would also recognize the conservation value of keeping productive land in the forest land base, especially close to growing urban areas, and the need for regulatory stability to ensure this result.

The FWS would find that the proposed special rule would contribute to recovery of the northern spotted owl and marbled murrelet in a manner consistent with the Act.

National Environmental Policy Act

An EIS would be required on the rule itself, but would not be expected on the plans.

Proposed Special Rule

The special rule would propose to create a new section in chapter 17 of the Code of Federal Regulations that would provide the following:

1. **Northern spotted owl**

Option 1, if owl recovery is provided for under the federal conservation strategy:

(a) To ensure that the rule continues to prohibit non-incidental take, all prohibitions against take would apply to the northern spotted owl, except as provided in paragraph (1)(b).

(b) Incidental take of spotted owls from forest practices would be permitted.

Option 2, if owl recovery is __not__ provided for under the federal strategy:

(a) All prohibitions against take would apply to the northern spotted owl, except as provided in paragraphs (1)(b) and (c).

(b) Incidental take of spotted owls from forest practices would be permitted, except in the following areas:

(E.g., list of legal descriptions.)

(c) Incidental take of spotted owls would be permitted in the areas described in paragraph (1)(b) if the take results from activities conducted in accordance with the applicable provisions of a forest habitat management plan prepared, submitted, and implemented under subsections (3) and (5), below.

2. **Marbled murrelet**. *Parallel provisions to those above would apply to the marbled murrelet.*

(x. Other species -- Consider defining take for other forest species currently listed as threatened, e.g., the grizzly bear, bald eagle, Oregon silverspot butterfly, if they are addressed in the plan for federal lands and significantly affect forest practices.)

The following is an optional section, needed if option 2 for owls or a parallel option for murrelets is included:

3. **Forest Habitat Management Plans -- Threatened species.**

(a) Incidental take of the northern spotted owl would be permitted if the take results from activities conducted in accordance with a forest habitat management plan meeting the following conservation objectives:

(i) *(List site-specific objectives, e.g., providing dispersal habitat that meets specific standards in defined areas. Where possible, define around riparian protection and protections for other species.)*

((b) Parallel provision for marbled murrelets, if necessary.)

((c) Other species, if needed.)

4. **Forest Habitat Management Plans -- Multi-species conservation plans for unlisted species.**

(a) Nonfederal landowners would be entitled to submit to the FWS and NMFS forest habitat management plans meeting the conservation objectives described in paragraph (4)(b) for all forest-related fish and wildlife species.

(b) The conservation objectives of the plan would be to manage riparian areas to meet the following objectives, plus additional objectives the landowner wished to include:
(Describe specific riparian objectives, e.g., provide sufficient conifer trees for recruitment of large woody debris for instream fish habitat; sufficient shade to maintain favorable stream temperatures; large wildlife trees, snags, and downed logs in riparian areas for cavity-dependent wildlife species, etc.)

(c) A plan that proposed to manage forest land to meet the guidelines set forth below would be presumed to meet the objectives described in paragraph (4)(b). Landowners would be encouraged, however, to submit alternative, watershed-specific conservation measures, which the FWS and NMFS would approve if they met the objectives. A landowner would also be entitled to vary the conservation measures provided under the plan through a state-approved watershed analysis if the analysis addressed the objectives.
(Insert a description of specific riparian management guidelines.)

5. **Process to prepare, review, and terminate plans.**

(a) The FWS and NMFS would develop, in consultation with state forestry, wildlife, and fisheries agencies and other interested parties, procedures for nonfederal landowners to prepare and submit, for interested federal and state agencies and the public to review, forest habitat management plans.

(i) The plans would include effective monitoring and enforcement mechanisms, including:

(A) State enforcement of forest practice rules and other applicable state laws; and

(B) Contractual obligations between the participant and the federal government, enforced through annual reporting, with periodic auditing by federal agencies or states under cooperative agreements.

(ii) The plans would use watersheds as the basic planning unit, and allow landowners to submit plans for individual watersheds, multiple watershed areas, or larger provincial, state, or regional units of land.

(b) Forest habitat management plans would be deemed satisfactory within a certain time period *(90 days?)* unless one or both federal agencies or the applicable state suspended the plan for additional review and a determination as to whether it:

(i) Was developed and submitted in accordance with the procedures developed under paragraph (5)(a);

(ii) Met the applicable objectives under subsection 3 *(if included)* or 4; and

(iii) Contains adequate monitoring and reporting provisions for the agencies to determine whether the landowner is in compliance with the plan.

There would be a deadline *(90 days?)* for this additional review.

(c) By notice to the landowner, the FWS or NMFS could terminate a plan at any time if they determined that:

(i) The plan failed to meet the applicable objectives under subsection 3 *(if included)* or 4;

(ii) The landowner was not in substantial compliance with the plan and has failed to take reasonable and prudent measures proposed by the agencies to bring the covered lands into compliance and to mitigate adverse effects of the noncompliance on wildlife species listed or proposed for listing as threatened or endangered; or

(iii) Continued implementation of the plan was likely to cause additional species to become threatened or endangered.

(d) The landowner would be able to terminate a plan after a certain time period of notice *(12 months?)* to the FWS and NMFS, state agencies, and the public, subject to reasonable and prudent measures to mitigate the effects on any take of threatened species which would have been unlawful but for the plan.

Amendments to other rules

In addition to adopting a special rule under section 4(d) of the Act, the FWS and NMFS would adopt or amend other rules, if necessary, as follows:

1. Effect of the plans on listings and other decisions.

The FWS and NMFS would take into account the conservation benefits of the management regimes in place on federal lands, state forest practices laws, and conservation agreements under this section in a given area when making decisions to list a new species and when reviewing the status of listed species affecting that area. If necessary, the agencies would amend their rules governing listing decisions accordingly. Specifically, the agencies would:

(a) Not list species where they are adequately protected throughout their range *(e.g., not list fish runs in watersheds largely covered by federal lands, plans, and forest practice rules on the remaining landowners, assuming non-forestry issues are addressed)*;

(b) De-list species where they are adequately protected throughout their range;

(c) Downgrade from "endangered" to "threatened" areas in which risks to the species have been significantly reduced in all or portions of its range; and

(d) Exclude from listing portions of the range where species are protected.

2. Relief from liability for take.

(a) The FWS would amend its current generic rule, which extends the take prohibition to all threatened species, to exclude lands covered by a plan from liability for incidental take of future-listed threatened species.

(b) The FWS and NMFS would amend their rules governing incidental take permits to provide that, for any forest species listed,, the agencies would presume that the conservation benefits provided under approved forest habitat management plans were sufficient to minimize and mitigate any potential take for the purposes of approving an incidental take permit if the landowner were to submit the forest habitat management plan as a habitat conservation plan under section 10 of the ESA.

3. Access.

The FWS and NMFS would modify their "may affect" regulations to limit consultation and conferencing requirements for nonfederal activities, such as access, that are conducted in accordance with an approved forest habitat management plan *(e.g., consultations on access would be expedited, and would focus only on road construction on federal land, not on harvesting and other activities on nonfederal land under the approved forest habitat management plan)*.

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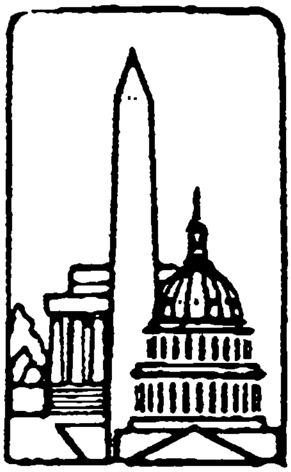

DATE: ~~6~~ 7-2-93

TO: Will Stelle

FAX NO. 225-7094

FROM: Heidi Biggs

TOTAL NUMBER OF PAGES (INCLUDING COVER SHEET): 15

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FAX NUMBER 202-293-2955

6/18

COMMENTS ON DRAFT STATE AND PRIVATE CONSERVATION REGIME
(draft of June 14, 1993)

Part One
Taking Requirements for the Northern Spotted Owl

We strongly support the idea of a section 4(d) rule providing relief from incidental take requirements for the northern spotted owl on nonfederal lands. We have several concerns about the proposed language, however, as follows:

Timing. Immediate relief is needed, and this will require strong policy guidance from the President. Section 1 refers to technical discussions with the states which could, if combined with the rulemaking process, extend the current situation for another operating season or more. These technical discussions should be held now, and should include landowners who have extensive data on owls. The 4(d) rule could then contain substance, not process, and should be announced at the same time as the President's announcement on federal lands. It may need revision if the federal land strategy is revised, but perhaps this could be provided for in the proposed rule.

The following suggested revisions would accomplish these objectives:

1. Following detailed technical discussions with the states and other interested parties, the Director of the FWS should issue a proposed 4(d) rule to clarify the taking requirements of the northern spotted owl. The proposed rule should be issued in conjunction with the President's (proposed) new Federal conservation strategy. The proposed rule would consist of the following:

Conservation Objectives. Subsection 1(a) could be read to endorse the adoption of the draft recovery plan, or something close to it, under a 4(d) rule. Our preliminary economic analysis of the recovery plan indicates that adopting it on private lands would have serious economic impacts and multiply the job losses expected from federal restrictions. The proposed restrictions in second-growth forests, especially in southwestern Washington, are enormously costly in terms of long-term timber supply and jobs. We would be happy to discuss our analysis with you.

In addition, a system that makes nonfederal landowners responsible for the actions of others (e.g., by maintaining large, multi-landowner owl circles, or regulating based on owl population targets in a geography) will aggravate the "rush to harvest" created by the current situation, and should be avoided.

As noted above, the administration could avoid both these problems by proposing a substantive 4(d) rule at the time of the President's announcement of a federal solution. The rule should define owl restrictions on nonfederal lands very narrowly. The best option would be to allow incidental take of owls on nonfederal land. This is consistent with Jack Ward Thomas's statements that his proposals provide for the conservation of the owl entirely on federal land; with critical habitat designation for the owl, which excludes nonfederal lands; and with our current knowledge that owls occur in, and will be protected in, second-growth forests, even in the absence of regulated habitat.

The following suggested revisions would accomplish the objectives discussed above, assuming more specific substantive requirements for the owl would follow in the President's announcement:

> a. CONSERVATION OBJECTIVES. The rule should identify ~~the~~ conservation requirements~~objectives served by the rule on a province by province basis (dispersal habitat; owl pairs; etc.),~~ for the species as a whole, taking into consideration the Federal conservation regime proposed by the President's preferred alternative and current knowledge about on owls in second-growth forests;

Watersheds. We do not believe a 4(d) rule on owls should require extensive habitat on nonfederal lands. We would agree, however, that whatever habitat protection is required should be designed where possible to accomplish multiple objectives. A suggested change is set forth below.

> b. WATERSHEDS. Where possible from a biological perspective, the taking requirements ought to be designed around a riparian habitat~~watershed~~ protection regime and contribute to the conservation of other listed species and species at risk, setting the stage for a watershed based, multi-species conservation regime;

Nonfederal contributions. We recommend that subsection 1(c) be changed as set forth below to clarify that the reference to state practices excludes state rules on threatened and endangered species. It is appropriate (and long overdue) for conservation strategies to take into account the basic management practices of the industry and the broad protections offered under the comprehensive state forest practices rules in the region:

> c. NON-FEDERAL CONTRIBUTIONS. The rule should recognize and account for the reliable and enforceable conservation achievements of the NSO on non-Federal lands as provided for under existing state forest practices laws (other than those designed specifically to protect threatened and endangered species) and typical landowner practices and seek to minimize its economic impacts on non-Federal forestry activities, consistent with the requirements of ESA.

Local options. Assuming spotted owl restrictions are very narrowly defined, we support the idea of local options to make them more efficient or flexible. We think that subsection 1(d) could be somewhat confusing, however. Is this section intended to refer just to the watershed planning option described in Part 2? We assume this would not preclude an HCP, and it would be helpful to clarify this. Also, either option could be too cumbersome for small landowners, and a third option might be for the FWS to assist landowners with site-specific "no take" plans, as suggested below:

> d. LOCAL OPTIONS. The rule should also provide ~~a~~ procedures whereby the states or landowners ~~within a given watershed~~ could submit for approval a set of alternative conservation requirements ~~for the watershed~~. One option would be the voluntary watershed-based plans provided for under Part Two. In that case, i~~I~~f the FWS found that the alternative requirements met the conservation objectives for that watershed, it would approve the alternative, which would then define the taking requirement for that watershed. Another option would provide guidance in the use of "no take" agreements whereby landowners could design site-specific protection plans to prevent the incidental take of individual owls. A third option would be the normal HCP process.

Part Two
An Interim Watershed Conservation Program

In commenting on this section, we should note that we are not taking a position on the proposals for federal land. We assume for the purposes of this discussion that there may be watershed-based plans on federal land, but our comments should not be taken as endorsing this over the current planning process.

The long term. We are concerned that this section could be read to propose a joint planning process for federal and nonfederal land. Private forest land is heavily regulated today under a number of federal and state laws. This section should establish a voluntary process for private landowners to harmonize these various requirements, not create another layer of regulation. The changes set forth below are recommended to clarify that the administration is not proposing a federal land-use planning regime for private land, or suggesting a planning process that would set forth goals for private land management. We believe it is critical that this point be clear if the administration's proposal is to gain broad support. ~~Instead, the~~ purpose should be to develop a workable, model incidental take permit process based on voluntary habitat (or watershed) conservation plans that take into account the unique contributions and needs of private forest landowners.

In addition, we recommend using a different term than "watershed analysis," which is a term of art in Washington under new forest practice rules. Its use here is confusing because it is not a process used on federal lands or in other states. Also, the references to short and long term, and to interim programs should be reconsidered. Nonfederal landowners need certainty to justify the long-term investments they make in forest land management. While the recommendations for federal land may be interim, any private land provisions should provide long-term regulatory stability.

Part Two
~~An Interim~~ Watershed Conservation Program

~~The Long Term~~

One major outcome of the Forest Conference may be a significant shift in Federal land management planning in the region from its current emphasis on individual forest plans and BLM districts to one defined on an ecosystem scale. Instead of formulating plans for individual forests or BLM districts, future planning could be based on a watershed ~~analysis~~, and the planning units may be a number of units of federal land grouped into physiographic provinces. The watershed-level plans for federal lands~~analyses~~ would be the building blocks for development of the province level plans which would, in turn, govern the step-down planning requirements for individual forest plans and BLM districts.

If an ecosystem approach with a watersheds emphasis is to succeed, new institutional arrangements will be required both within the Federal government and intergovernmentally with the states and tribes. Cooperative planning, monitoring, research and data sharing capabilities will also be required. The purpose of these institutions would not be to set objectives for private forest land management, to create new regulatory or planning requirements for nonfederal land, or to link federal and nonfederal land management in any way. Federal land management objectives would be enhanced, however, by a voluntary watershed conservation program for nonfederal lands, as discussed below.

The interim period. We support the general objectives stated in these two paragraphs: the development of voluntary, ecosystem or watershed-based plans by nonfederal landowners which, when viewed together with federal land management in the region, will prevent additional listings of threatened or endangered species.

This section raises several issues, however: first, we believe the plans for nonfederal land must provide relief from take for all species, not just riparian species, and must include species not yet listed (and perhaps not yet discovered!). This has to be accomplished, however, with full recognition of the appropriate roles of nonfederal lands. Attached is a paper that discusses the appropriate role of private industrial forest lands, which provides a valuable "template" for what private lands can and should be expected to do.

Second, we recognize that this is an ambitious undertaking. We propose that it should be tested in an expedited process, not to exceed one year, on one or more willing industrial forest landowners. This expedited process will show us whether a "model" approach is feasible, either practically or under current law.

The following changes are suggested to address these issues:

~~The Interim Period~~

Pending the completion of a long-term shift in Federal forest planning, the region will experience continuing land management challenges over the near term as additional species may be proposed for listing~~ed~~ under the Endangered Species Act, potentially triggering its protective requirement under sections 7 and 9.

In anticipation of these challenges, the President might direct the Federal listing agencies (FWS and NMFS) to develop ~~a~~ one or more model ~~watershed~~ conservation programs that would (1) seek to conserve essential riparian values in key watersheds, and (2) conserve other species on a regional level, taking into account the appropriate roles of Federal and nonfederal lands. These~~is~~ model watershed conservation programs would be available on a voluntary basis to those states and private landowners who elect to implement ~~a it~~them as a means to avoid any potential ~~the sharp~~ impacts of future listings on salmon or other ~~riparian dependent~~ species on their activities. To test the feasibility of this approach, t~~T~~he President would direct the agencies to work~~confer~~ closely with affected states and one or more ~~other~~ interested landowners ~~during the~~ to develop~~ment of~~ ~~the~~ a model program on an expedited basis, not to exceed one year.

Conservation objectives. The discussion of conservation objectives is a bit confusing. We assume these sections apply to nonfederal land only, that is, nonfederal lands would not be expected to meet objectives for federal lands. Also, although we assume the main planning unit of these plans will be watersheds, there may be species that are covered on a regional or landscape scale, and room should be allowed for this. Finally, it is critically important that the policy statements establishing this process recognize explicitly the wood production goals for nonfederal lands, and other policies set forth below:

The model program would consist of the following elements.

1. CONSERVATION OBJECTIVES. The model would articulate a set of conservation objectives for nonfederal lands in the watershed or other planning unit ~~conservation program~~. The purpose of these objectives would be to provide a target for those who wish to develop their own site-specific requirements in the event that either the states or private landowners elect to meet the conservation objectives by alternative measures other than those proposed by the model.

The central objective of the ~~watershed~~ conservation program would be the protection and recovery of important fish habitat and aquatic values through the protection of the riparian zone. The program would also seek to protect other riparian-dependent species that may be at risk, serving as the backbone for a multi-species conservation program for the region. At the same time, the program would recognize the need for sustainable timber supplies and the resulting jobs from commercial forest land management; the need to keep productive land in the forest land base, especially close to growing urban areas; and the need for regulatory stability and the need to find positive incentives for nonfederal landowners, especially nonindustrial landowners, to manage their land for the benefit of wildlife.

Model Setback Requirements. We read sections 2, 3, and 4 together as proposing that a model watershed program would consist, first, of riparian buffers (which could be varied on a site under section 3), and then protections under watershed analysis under section 4. This approach raises several issues.

The detailed watershed analysis process described in section 4 is in its infancy in Washington, and has not been endorsed in any other state. We are optimistic about the process, but would be concerned about the undue pressure that would be put on it if it were the sole method available to create workable habitat protection plans. Oregon would likely object to having the complex watershed analysis process endorsed by the administration while it has a study underway to create its own process. California also has a different approach, as does the Forest Service.

We would suggest approaching the model program using slightly different logic. It would begin with individual landowner (or state) plans that take into account the habitat protections provided under state forest practices laws, and would then add enhanced buffers and other voluntary measures to that base. The FWS and NMFS would then take into account, when making listing and status decisions, the adequacy of the full range of protection offered in the relevant area.

For example, if NMFS were considering listing a fish run in a watershed in Washington, they would look at how much of the habitat was protected under Forest Service plans, how much was protected under watershed conservation plans entered into by industrial landowners, what degree of protection was provided under the state forest practice rules, including watershed analysis, on all other nonfederal landowners, and what protection education and stewardship programs with nonindustrial landowners offered. The agency may find that the combination of protections was adequate to avoid listing that fish run (assuming non habitat issues were addressed, of course), especially if a watershed analysis had been done.

A few final comments: the term "setback" is not commonly used in forest practices, probably because it implies a fixed width, unmanaged zone. Fixed-width buffers do not make sense in forestry and have been repeatedly rejected by rulemaking bodies. We suggest a different term. 7

The changes suggested below would reflect the different logic and other changes described above:

2. MODEL <u>RIPARIAN CONSERVATION</u>~~SETBACK~~ REQUIREMENTS. The model<u>s</u> would contain a set of "model" <u>riparian conservation area</u>~~setback~~ requirements designed to achieve the conservation objectives of the program. These model <u>riparian conservation areas</u>~~setbacks~~ would be designed to address forestry-related activities primarily, although they might also address other activities as well. <u>Implementation of these riparian conservation areas would confer upon the forestry activities in the affected area the protections of a conservation agreement (described below). The models could also address the needs of non-riparian species, thus expanding the scope of protection offered by regional, multi-species program.</u>

3. SITE SPECIFIC VARIATIONS. In applying the model watershed protection program to any particular area or owner, the Service and landowners would be free to develop site-specific variations on the "model" so long as the conservation objectives were achieved. <u>These variations could be developed through "alternate plans" under state forest practice rules, through consultation with the listing agencies, or through a formal watershed analysis process under state law.</u>

~~4. PROGRAM REQUIREMENTS. The Federal agencies would be directed to develop a two tiered implementation regime for the program after close consultation with the states and other affected parties.~~

~~a. The first tier would serve as a temporary bridging mechanism to implement certain conservation restrictions pending the development of a watershed-by-watershed characterization and analysis. Implementation of this first tier would confer upon the forestry~~

~~activities in the affected area the interim protections of a conservation agreement (described below) pending the completion of the more detailed watershed analysis of tier two.~~

~~b. The second tier would consist of a watershed specific analysis, the purpose of which would be to tailor the "model" riparian requirements of the program to the specific conservation needs of that watershed. Tier two would provide a procedure for:~~

~~1. Identifying the primary problems confronting riparian habitat in the area and the activities causing or contributing to those problems;~~

~~2. Developing where necessary alternative conservation requirements that would address these problems more effectively than the model requirements; and~~

~~3. Developing the monitoring and compliance regimes that would accompany the effort in the watershed.~~

~~c. Open for further discussion is whether the above ought to be woven into the state water quality standards program to ensure that wherever possible the requirements were performing the "double duty" of satisfying the conservation requirements of the ESA and the water quality requirements of the CWA.~~

PRE-LISTING CONSERVATION AGREEMENTS. The conservation agreements developed under this program would also be structured as "pre-listing agreements" that would be taken into account making listing decisions and in status reviews of~~might affect the need to list certain~~ species covered by the agreement. In the event that these species were listed, the agreement would~~could~~ be rolled over into an immediate section 10 incidental take permit.

RELATIONSHIP TO LONGER-TERM PLANNING. ~~As the~~ If Federal and intergovernmental institutional arrangements are developed to institute long-term ecosystem and watershed planning objectives, the Federal and state agencies would ~~seek to~~ incorporate these voluntary~~interim~~ riparian conservation agreements into ~~the~~ any ensuing watershed plans.

: CONSERVATION REGIME
e 14, 1993)

One
he Northern Spotted Owl

ical discussions with the states Director of the FWS should issue the taking requirements of the osed rule should be issued in nt's (proposed) new Federal osed rule would consist of the

IVES. The rule should identify species as a whole, taking into vation regime proposed by the and current knowledge about on

e possible from a biological ts ought to be designed around a egime and contribute to the ies and species at risk, setting ulti-species conservation regime; IBUTIONS. The rule should able and enforceable conservation leral lands as provided for under laws (other than those designed ed and endangered species) and seek to minimize its economic activities, consistent with the

The rule should also provide or landowners could submit for conservation requirements. One tershed-based plans provided for , if the FWS found that the conservation objectives for that alternative, which would then that watershed. Another option of "no take" agreements whereby ific protection plans to prevent owls. A third option would be

Two
ervation Program

Forest Conference may be a management planning in the region ndividual forest plans and BLM ecosystem scale. Instead of forests or BLM districts, future rshed, and the planning units may

leral land grouped into physiographic vel plans for federal lands would be elopment of the province level plans the step-down planning requirements nd BLM districts.

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2. MODEL RIPARIAN CONSERVATION REQUIREMENTS. The models would contain a set of "model" riparian conservation area requirements designed to achieve the conservation objectives of the program. These model riparian conservation areas would be designed to address forestry-related activities primarily, although they might also address other activities as well. Implementation of these riparian conservation areas would confer upon the forestry activities in the affected area the protections of a conservation agreement (described below). The models could also address the needs of non-riparian species, thus expanding the scope of protection offered by regional, multi-species program.

3. SITE SPECIFIC VARIATIONS. In applying the model watershed protection program to any particular area or owner, the Service and landowners would be free to develop site-specific variations on the "model" so long as the conservation objectives were achieved. These variations could be developed through "alternate plans" under state forest practice rules, through consultation with the listing agencies, or through a formal watershed analysis process under state law.

PRE-LISTING CONSERVATION AGREEMENTS. The conservation agreements developed under this program would also be structured as "pre-listing agreements" that would be taken into account making listing decisions and in status reviews of species covered by the agreement. In the event that these species were listed, the agreement would be rolled over into an immediate section 10 incidental take permit.

RELATIONSHIP TO LONGER-TERM PLANNING. If Federal and intergovernmental institutional arrangements are developed to institute long-term ecosystem and watershed planning objectives, the Federal and state agencies would incorporate these voluntary riparian conservation agreements into any ensuing watershed plans.

A Discussion Paper

The Role of Industrial Forestlands in the Management of Western Washington's Forest Ecosystems

Private timberlands have unique roles and responsibilities, distinct from public forests. Yet, much of the public does not differentiate between public and private forestlands and assumes that practices on public forest lands should be applied to all forest lands. Private lands must be managed for profitable timber production even while fulfilling environmental obligations; if societal restrictions make this impossible, investment capital and the associated industrial base will go elsewhere.

Given such pressure, private forestland owners have a need to collectively develop and state the ecological objectives that are appropriate for industrial forestlands. In doing so, consideration must be given to the economic objectives of the industrial landowner, state and federal forest management regulations, interaction with other ownerships, and our current knowledge of the biological responses to various silvicultural practices. In the absence of such a statement, there is likely to be continued confusion among landowners and the public over roles and responsibilities, which in turn leads to unrealistic demands that industrial forestland owners meet all expectations.

Recognizing the need for positive action, the following statement of ecological objectives appropriate for private forest landowners in western Washington was developed by a sample of individuals affiliated with industrial forest companies, academia, agencies, and nonindustrial owners.* We believe this statement represents a significant step toward clarifying the appropriate role of industrial forestlands in managing western Washington's forest ecosystems. It builds on the substantial existing voluntary commitments and regulatory responsibilities of private forestland owners, and is placed within the context of the roles and responsibilities of other landownerships.

The appropriate key roles identified for private industrial landowner are as follows:

1. Protection of riparian areas and wetlands
Private forest landowners have the responsibility for managing riparian areas and wetlands to provide for water quality, fish habitat, and associated wildlife values. Management objectives may include provision of shade and large organic debris for streams, increasing the conifer component in riparian areas, assessing and monitoring the effectiveness of current regulations, and cooperating with adjacent landowners to achieve desired riparian conditions.

2. Provision of habitat for early and mid-successional species
Private forest landowners will provide habitat for early successional species in conjunction with their primary operational goal of sustainable timber production. In addition, through silvicultural treatments designed to create and retain structures (large trees, snags, and down logs) and diverse vegetative conditions, they will provide for many mid successional species (those that depend on the above structures) and some late-successional species (those that require structural attributes or features of old forest stands).

3. Assist public land managers in meeting their responsibilities for late successional ecosystems
While the protection of late successional ecosystems and species is primarily the responsibility of public land

* *This statement is the result of a workshop on March 1-3, 1993 sponsored by the Olympic Natural Resources Center at the University of Washington's College of Forest Resources*

continued on page 2

The Role of Industrial Forestlands in the Management of Western Washington's Forest Ecosystems (cont.)

managers, it is appropriate and desirable for private forest landowners to cooperate, where practical, in meeting these objectives. For example, private landowners might complement public obligations by providing owl dispersal habitat, participating in land trades or sales critical to conservation programs, and working within incentive and/or compensation programs that encourage protection of late successional species.

4. Maintaining Site Productivity
Private forest landowners will maintain the basic productive capacity of their lands, with particular reference to soil properties. This may be accomplished through such measures as minimizing soil disturbance and compaction, improving road construction and maintenance, and identifying and protecting fragile soils.

Premises

The key premises that underlie the private industrial forest landowner's commitment to the above ecological objectives are as follows.

1. Private landowners must have the opportunity to earn an acceptable rate of return on capital. Failing to achieve this economic goal will result in the loss of working forestlands throughout the state.

2. The spotted owl controversy must be resolved on private land and the roles of different landowners clarified with regard to this issue. While protection of the owl is necessary, current requirements are not compatible with the economic needs of private landowners. It is therefore not appropriate to require private landowners to support spotted owl populations without compensation.

3. We must look beyond traditional species-by-species approaches to conservation and begin focusing on ecosystems. Resolution of the spotted owl recovery process on private lands will mean little if we find ourselves facing one endangered species—and hence one crisis— after another. Developing new approaches that deal collectively with groups of species and habitats is critical: to be successful, these new approaches must accommodate the different goals of various landownerships.

4. Our current knowledge base is inadequate to the task of guiding the development and application of on-the-ground ecosystem management. Hence, private, public, and academic institutions need to make a strong collective commitment to developing the necessary knowledge base for ecosystem approaches to forest management. In addition, we need to make a stronger and more concerted commitment to monitoring and evaluating activities and programs already underway.

5. In light of the long-term nature of forest investments, much greater regulatory certainty than currently exists is required for private forest landowners to achieve ecological objectives in particular, and to stay in the forestry business in general.

6. Achieving some ecological objectives can impose significant economic costs on private landowners. Incentive and/or compensation programs are often a more appropriate and efficient means of meeting these objectives than are regulations. For example, when landowners make a commitment to forgo harvesting in a given area (e.g., extended riparian areas), tax relief measures might be provided. More investigation of appropriate incentives of this sort should be pursued.

7. Proposals that coordinate activities across landscapes must comply with antitrust laws.

This statement is proposed as the basis for defining social responsibilities between private forest landowners and society, in which the private landowner recognizes and accepts significant ecological responsibilities in return for regulatory stability and an acceptance of the basic economic principles that are necessary to maintain productive working forests.

Workshop Participants

The following individuals which participated in all or part of the workshop acted in a variety of roles including: representing companies, speaking on selected topics, and advising the process.

Ralph Alig
USDA Forest Service, PNW Forest Research Station

Dick Best
Murray Pacific

Jean Bolton
Washington Farm Forestry Association

Conor Boyd
Weyerhaeuser Company

Donna Brown (facilitator)
Weyerhaeuser Company

Mason Browne
John Hancock Timber Resource Group

Kaleen Cottingham
Washington State Department of Natural Resources

Dave Crooker
Plum Creek Timber Company

Catherine Elliott
Governor's Timber Team

Jerry Franklin
Olympic Natural Resources Center
College of Forest Resources, University of Washington

John Gorman
Simpson Timber Company

Jerry Gutzwiler
Weyerhaeuser Company

Don Hanley
College of Forest Resources, University of Washington

Andy Hansen
Montana State University

Bob Lee
College of Forest Resources, University of Washington

Kathryn Kohm (facilitator)
Olympic Natural Resources Center

Wayne Marion
John Hancock Timber Resource Group

Rex McCullough
Weyerhaeuser Company

Bob Meier
ITT Rayonier Inc.

Bob Naiman
College of Forest Resources, University of Washington

Cathy O'Halloran
Olympic National Forest

Chad Oliver
College of Forest Resources, University of Washington

Dick Pierson
Weyerhaeuser Company

Cassie Phillips
Weyerhaeuser Company

Jim Rochelle
Weyerhaeuser Company

John Shumway
Washington State Department of Natural Resources

Gordon Smith (facilitator)
Olympic Natural Resources Center

Art Stearns
Washington State Department of Natural Resources

Tom Terry
Weyerhaeuser Company

David Thorud
College of Forest Resources, University of Washington

John Warjohn
Port Blakely Tree Farms

Neil Wilkins
Port Blakely Tree Farms

Steve West
College of Forest Resources, University of Washington

Weyerhaeuser

5-17-93

Tom -

Enclosed are:

1. Weyerhaeuser letter requesting that owl circles be eliminated on private lands.

2. Rewritten draft of our commitments re: domestic supply, log exports, and riparian protection.

3. The first two letters from other private landowners on the owl circles. (More to come).

Charley and I are prepared to finalize this understanding on Thursday, if you are ready.

Fred

Will-

Weyerhaeuser

Corporate Headquarters
Tacoma, Washington 98477
Tel (206) 924 2345

May 14, 1993

The Honorable Bruce Babbitt
Secretary of Interior
1849 C Street
Washington D.C.

Dear Secretary Babbitt,

As we discussed during our meeting on May 3, 1993, Weyerhaeuser Company is heavily affected by restrictive circles imposed to protect northern spotted owls on private lands. All or part of 370 owl circles fall on our lands, affecting our ability to manage 390,000 acres of our forest lands in the Douglas fir region of Washington and Oregon. Approximately 4 billion board feet of Weyerhaeuser timber is contained within these circles.

Many other private landowners, as well as state lands, are similarly affected by owl circles.

These circles must be eliminated from private lands as part of the overall resolution of forest related issues in the northwest. Continued imposition of the circles will exacerbate the overall timber supply problems in the region by constraining the ability of private landowners to harvest timber.

The owl circles are neither equitable nor biologically sound. As we discussed in our meeting, the data from our years of research and monitoring of owls in second growth forests suggests that the circles do not correspond to actual owl behavior patterns and do not fit the landscape. They are differentially enforced across the three affected states, and bear no relationship to the conservation measures taken on federal lands.

We have committed to proceed with the development of a comprehensive habitat management plan that would be a model for industrial forest lands in Oregon and Washington. Our vision is a plan that addresses all species, including those currently listed under the Endangered Species Act and those that could be listed in the future. In other words, we envision a plan that transcends the current species-by-species approach and defines the role of industrial forest lands in an overall landscape context. The cornerstone of this approach will be riparian conservation and enhancement to benefit fish populations and other aquatic species.

The owl circles force us to unnecessarily maintain the current species-by-species approach. Their mere presence hinders the development of a more thoughtful and collaborative landscape plan for our lands.

Until there is a resolution of this issue, we will continue our historic commitment to protect spotted owls using our best science.

We urge you to eliminate the owl circles as part of the resolution to the northwest forest issues. Doing so will immediately help the overall timber supply situation and will be an important first step in the development of a model habitat management plan for industrial forest lands in Oregon and Washington.

Sincerely,

Charles W. Bingham

Charles W. Bingham
Executive Vice President

DRAFT

~~CONFIDENTIAL~~

You have asked how we would manage the incremental volume harvested from our fee timberlands should the protective circles around northern spotted owl sites be removed. We are prepared to voluntarily commit that during the three years following the removal of the spotted owl protective circles, any incremental increase in our overall Washington and Oregon fee harvest volume resulting from relief from those requirements will be made available for domestic processing.

During this same period, we will manage our log export volumes at levels that do not exceed our 1990-1992 average annual shipments.

We are committed to proceed with the development of a comprehensive habitat management plan that would be a model for industrial forest lands in Oregon and Washington. Our vision is a plan that addresses all species, those listed under the Endangered Species Act and those that could be listed in the future. In other words, a plan that transcends the current species-by-species approach and defines the role of industrial forest lands in an overall landscape context. The cornerstone of this approach will be riparian conservation and enhancement to benefit fish populations and other aquatic species.

Washington
FARM FORESTRY
ASSOCIATION
P.O. Box 7663
Olympia, WA 98507

May 14, 1993

The Honorable Bruce Babbit
Secretary of the Interior
1849 C St., NW
Washington, D. C. 20460

Dear Secretary Babbit:

Thank you for the opportunity to meet with you following your session with our Timber/Fish & Wildlife (TFW) group while visiting with Commissioner Belcher in Olympia on April 20.

One issue with significant impact on small landowners but beyond the scope of TFW is the "spotted owl circles". Their 1.8 mile radius (2.2 miles on the Olympic Peninsula) has completely locked up the land for many families.

Though the USFWS at one time used--and then abandoned--these huge circles, our state continues to use them. If a new and more realistic method for protecting habitat were adopted at the federal level, our state may follow suit.

A few examples to illustrate the geographic spread of the many small landowners who are now denied harvest permits because they are within these large owl circles (though far from any owl nests), are

Ross Frank, Leavenworth:
Bob Monahan, Kent
Ralph Newell, Leavenworth:
Betty Orem, Port Angeles
Vincent Shaudy, South Bend
Allen Thayer, Vancouver

The number who are impacted grows each year, because landowners only find they are in an owl circle when they apply for a harvest permit.

We would certainly welcome leadership from your office for viable spotted owl protection methods that are far less rigid than the geometric circles that impact private growers so severely. Please let us know if we can be of any help.

Sincerely yours,
Nels Hanson
Nels Hanson
Executive Director

"A Crop Today . . . Another Tomorrow . . .
THROUGH GOOD FOREST MANAGEMENT"

PORT BLAKELY TREE FARMS

GROWING & LOGGING TREES SINCE 1864

500 UNION STREET, SUITE 830
SEATTLE, WASHINGTON 98101
(206) 624-5810
FAX (206) 624-9745

May 14, 1993

Secretary Bruce Babbitt
Department of the Interior
1849 C Street NW, Rm. 6151
Washington, DC 20240

Dear Secretary Babbitt:

As a point of introduction, I am a professional wildlife biologist employed by a private landowner that manages forestlands entirely within the geographic range of the northern spotted owl. Therefore, my perspectives concerning the effectiveness of current spotted owl protection is influenced by my interactions with the take prohibition of Section 9(a)(1)(B) of the Endangered Species Act.

The current biological guidelines available from the U.S. Fish & Wildlife Service are not, in my opinion, in the best interests of the long-term conservation of spotted owls on private lands. Although the 1990 Take Guidelines proposed by the Service were officially rescinded in 1992, they do remain as "biological parameters" in the viewpoint of Service employees. Our state regulatory agencies use federal guidance as a basis for forest practices regulations. Furthermore, these guidelines have been referred to as a private lands contribution to recovery in the April 1992 Draft Recovery Plan. And, we hear rumors that a variation of these "Circles and Surveys" will be part of some future Section 4(d) protective regulation for private lands.

The mere existence of this cumbersome regulatory tool has resulted in the accelerated harvest of suitable owl habitats on some private lands. Also, for possibly the first time in this nation's history, private landowners have an extreme disincentive to allow for the development of specialized wildlife habitats on their lands. I attribute this to the inflexible nature of the current take guidelines.

I am involved with management planning for Port Blakely lands within several owl circles in Western Washington. Each owl circle encompasses up to 10,000 acres, within which there are several ownerships. These are productive lands that are valuable for both present and future wood supplies, while also providing extremely valuable wildlife habitats (even though the trees are second-growth). I can personally attest to the fact that silviculturists employed by private landowners have the technical expertise to manage for habitat features that are used by spotted owls (as well as other sensitive wildlife species). However, any private forestland that is now developed into usable owl habitat could be restricted from any further commercial management. This is not an incentive for a long-term forest management program that considers wildlife values. I am sure you can see the need for some real changes here.

In summary, we need more flexibility in the management response to the take prohibition for private lands. Private landowners can contribute to an overall strategy for the spotted owl. However, if the federal response is to simply apply a cook book recipe, such as the "Circles and Surveys" approach, we all lose. Please consider an alternative.

I suggest using a more integrated approach which takes entire sub-populations into account rather than bird-by-bird protective guidelines. For example, private land managers can compliment public land obligations towards population recovery by managing dispersal habitats such that sub-populations on public lands do not become isolated.

Secretary Babbitt, there are other roles in which private landowners may participate in a positive solution to the management of sensitive wildlife species. I encourage you to consult with private landowners and consider removing these disincentives to private lands contributions. Also, the officers of Port Blakely Tree Farms would like to invite you to visit some of our lands to see some results of long-term forest management. Please let me know if I may be of assistance in providing more information, or in arranging a field visit.

Sincerely,

R. Neal Wilkins, Ph.D.
Wildlife Biologist

Weyerhaeuser

2001 L Street N.W.
Suite 304
Washington, D.C. 20036
Tel (202) 293 7222

June 25, 1993

Mr. Tom Collier
Chief of Staff
U.S. Department of the Interior
1849 C Street, NW
Room 6151
Washington, DC 20240

Dear Tom:

Thanks for your time on the phone yesterday. You asked for our thoughts on the riparian zone issue, and I wanted to respond quickly.

The conservation and enhancement of riparian and aquatic ecosystems is best achieved through the application of individually tailored, site specific prescriptions; **not fixed width buffer zones.** Years of research and experience have shown that flexible, site specific prescriptions are most effective because:

a. The width and vegetation can be managed to meet specific ecological objectives for individual areas (e.g. wildlife or fish habitat).

b. Local topographic, geologic, and climatic influences can be accommodated for. For example, the management of a riparian ecosystem in steep topography should be much different than management in a floodplain. The conservation prescriptions should be customized for the specific conditions present on a site.

In contrast, a fixed width buffer system results "average" protection, applying unnecessary constraints on some sites, and, perhaps, failing to fully protect other sites.

Further, the conditions of the upland areas can be incorporated into the riparian conservation scheme to achieve ecologic objectives. An area prone to frequent "rain or snow" events in the upland areas should be managed differently than other areas. Again, a fixed width system does not allow for that necessary flexibility to be incorporated.

c. Land managers and scientists can more rapidly achieve ecologic objectives by applying site specific prescriptions. Alternatively, a fixed width buffer approach effectively "locks" in the current attributes of the riparian area.

For instance, past forest practice laws required that streams and their surroundings be cleaned out following logging. In many cases, these streamside areas have naturally reforested with fast growing hardwoods such as alder. These hardwood species, however, do not provide the same ecological functions for both wildlife and fish habitat that coniferous trees do. Without the flexibility to actively manage these areas, it is unlikely that coniferous trees will return to these riparian areas for decades.

d. Finally, the status of riparian and aquatic ecosystems can be effectively monitored using state of the art technology such as Landsat imagery and Geographic Information Systems. While fixed width buffers may appear to be a simple regulatory mechanism, there is no question that current technology allows for flexible site specific systems to be efficiently and accurately monitored over time.

In summary, site specific prescriptions can be tailored to:

a. Prioritize management of non-timber resources such as fish, wildlife and water.

b. Provide for late succession (e.g. old growth) forest characteristics.

c. Include restoration and enhancement efforts in the short run when and where appropriate.

d. Rely on natural processes for long term conservation and enhancement of the aquatic ecosystems.

Tom, we deeply appreciate your willingness to work with us on private lands issues. We continue to support your efforts to initiate a joint HCP process and remove the owl circles from private lands. I have told members of the delegation that we are working with you and that we will reserve comment until we have seen the final proposal. Let's stay in touch.

Warm regards,

Fred

Frederick S. Benson, III
Vice President

COAST RANGE CONIFERS

FAX TRANSMITTAL - 3 pages total

May 18, 1993

Secretary Bruce Babbitt
U.S. Department of the Interior
1849 "C" Street N.W., Room 6151
Washington, D.C. 20240

Dear Secretary Babbitt:

BACKGROUND

Coast Range Conifers is a family partnership consisting of myself, my mother, brother, sister and our families. We own and manage 2,800 acres of forest land in western Oregon. We are private, non-industrial forest landowners in our third generation. Our forest management plan stresses good stewardship and growing and harvesting trees beyond our lifetimes.

SITUATION

We were planning a 60 acre sale of standing trees that is 80-140 year old mature conifers located near the coast in Lincoln County, Oregon. This property has been in the family since 1926. Both spotted owls and marbled murrelets (federally listed as threatened species) are centered adjacent on U.S. Forest Service lands. A few days ago, we regretfully postponed our sale due to possible risk of an "owl taking" (see attached letter).

PROBLEM

We meet the requirements of the Oregon Forest Practices Act, which includes protecting a 70 acre core area around owl centers and seasonal logging restrictions to not disturb nesting birds. Beyond this, we are uncertain if a "taking" of an endangered species will occur if our trees are harvested because of the "owl circles" rules being used by the U.S. Fish and Wildlife Service. These circles currently cross all boundaries of private and public lands.

YOU NEED TO KNOW WHAT THIS IS DOING TO SMALL PRIVATE OWNERS

Forcing us (by threat of violating the endangered species act or threat of injunction or by actual prosecution after the fact) to completely or partially restrict our responsible harvest to provide owl or murrelet habitat IN PERPITUITY is a huge and unfair economic burden on us. There is no compensation for the risks and investments we have made for 67 YEARS!

The harvest of this mature timber is absolutely necessary to the family - we cannot go elsewhere to harvest. We would be forced to harvest our younger, immature growing trees.
Much of the area within "owl circles" has already been harvested by the U.S. Forest Service and other private owners. Some of the land is farmed, or in hardwoods. And a large portion is in younger timber "unsuitable" for owl habitat due to past fires in the area. We have planned an

[redacted] 503-343-4039 — 2690 SPRING BLVD., EUGENE, OR 97403 — SARA A. LEIMAN 503-847-5590

orderly harvest of our mature trees, but since we are one of the last to harvest in the "circle', we will unfairly suffer the consequences.

Forest landowners should not be forced to shoulder the huge economic costs of wildlife diversity that benefits all the people. Forest landowners do have a responsibility to follow good stewardship practices and we will if offered only a little encouragement. We had planned as part of this sale to sacrifice many dollars to go beyond the requirements of law to enhance and protect habitats - such as placing woody debris in streams to improve fish habitat, leaving all snags for nesting trees, etc. But without access to harvest of these trees in a responsible manner, we cannot afford to do these things. One suggestion from USFWS was to harvest but leave 60% tree crown closure to protect owl habitat. For all practical purposes, this means those trees will have to be left forever and getting new trees to grow underneath will be difficult.

This taking of our property is OUTRAGEOUS and I urge you to exclude private lands from any "owl circles" required as part of an owl recovery plan.

Sincerely,

Sara A. Leiman

Sara A. Leiman, managing partner

OREGON SMALL WOODLANDS ASSOCIATION

EXECUTIVE COMMITTEE
PRESIDENT: Jim Denison
1ST VICE PRESIDENT: Hage Waldorf
2ND VICE PRESIDENTS: Ray Beyer
Sara Leiman
Earl Sulliter
IMM. PAST PRESIDENT: Robert Mealey
EXECUTIVE DIRECTOR: Gary Carlson
LEGISLATIVE REP.: Julie Brandis

1149 Court Street N.E. · Salem, OR 97301-4030 · (503) 588-0050 · (503) 227-5636

May 17, 1993

Secretary Bruce Babbitt
Department of the Interior
1849 "C" Street N.W., Room 6151
Washington, D.C. 20240

Dear Secretary Babbitt:

Circles and squares do not mesh with private lands that are mainly governed by the public land survey system. I see many owl circles encroaching on the private land of many small woodland owners. With the abundance of owls being located, I now fear that two or three small parcels I own could be impacted by public land ownership that adjoins these parcels. If owls are discovered or encouraged to nest on the public ownership, my land will be suddenly "taken" by a circle that should only be on the public lands.

I feel private lands should be excluded from any "owl circles" that might be considered in a owl recovery plan on federal lands.

With the number of owls being found by looking for them, I question whether the threatened or endangered status really exists.

Sincerely,

Jim Denison,
President

JD:cle

cc: Vicki Cram, Ball, Janik & Novack

Weyerhaeuser

2001 L Street N.W.
Suite 304
Washington, D.C. 20036
Tel (202) 293 7222

June 4, 1993

Mr. Will Stelle
Special Assistant to the Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Dear Will:

Thank you very much for agreeing to meet with Charley Bingham, our Executive Vice President, Heidi Biggs, our Government Affairs Manager, and myself on Tuesday, June 8, at 10:00 am.

In light of the nation's timber supply problem, we feel it is important to once again emphasize the impact of the spotted owl circles on private land in the Pacific Northwest. We appreciate the opportunity to share our views with you.

Sincerely,

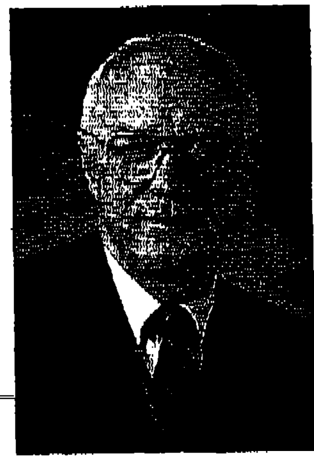
Fred

Frederick S. Benson, III
Vice President

Weyerhaeuser Company
Executive Biography

Charles W. Bingham

Executive Vice President



Charles W. Bingham joined Weyerhaeuser Company in 1960, and after several management assignments in the timberlands group he was elected vice president of wood products in 1968. He was elected executive vice president in December 1981.

Bingham graduated magna cum laude from Harvard College in 1955 and graduated from Harvard Law School in 1960. He served two years in the U.S. Army.

He is a director of Puget Sound Power & Light Company. He is chair of the Tacoma-Pierce County American Leadership Forum, vice president of The Mountains to Sound Greenway Trust, and a trustee of the Weyerhaeuser Foundation. He is past chair of the National Forest Products Association Board of Governors and the University of Puget Sound Board of Visitors for the School of Business and Public Administration.

Married, four children.

Weyerhaeuser

Exec bios.1
Rev. 1/5/93

Weyerhaeuser Company
Executive Biography

Frederick S. Benson III
Vice President
Federal Affairs, Washington, D.C.

Fred Benson joined Weyerhaeuser in 1983 in Washington, D.C., as vice president of Federal Affairs.

Prior to joining Weyerhaeuser, he was vice president of government affairs for the American Paper Institute in Washington, D.C., from 1980 to 1983 and corporate representative for International Paper Co., also in D.C., from 1979 to 1980. He was director of resource management for the Automation and Communications program in the Department of the Army, 1977-79; executive to the Assistant Secretary of Defense for Legislative Affairs, 1976-77; staff assistant to the President for Energy Policy (White House Fellow), 1973-74; and executive to the Assistant Secretary of the Army for Financial Management, 1970-72.

Benson served in the U.S. Army from 1959 to 1979 and held various command and management positions in the U.S. Army in Alaska, Vietnam and Korea. He was a colonel when he retired.

He received a master of arts degree in political science from Auburn University in 1969 and a bachelor of arts degree in government and law from Lafayette College in 1959. He also completed Harvard Business School's advanced management program in 1986.

Benson has been a member of the President's Commission on White House Fellowships since 1989 and of the Marimed Foundation's advisory board since 1984. He was an associate trustee for Lafayette College, 1986-89; co-chair of Neighborhood Friends of Mount Vernon, 1987-90; and president of the Lafayette College Alumni Association, 1975-80.

Rev. 11/14/91

Weyerhaeuser Company
Biography

Heidi E. Biggs
Government Affairs Manager

Heidi E. Biggs joined Weyerhaeuser Company in April 1992 as a government affairs manager in Weyerhaeuser's Washington, D.C., Government Affairs office. She is a registered lobbyist and represents the company on natural resource, transportation, and employee benefits issues.

Prior to joining Weyerhaeuser, Biggs was a government affairs representative for the American Forest Resource Alliance from 1990 to 1992. She was a legislative assistant responsible for resource and environmental issues for U.S. Senator Slade Gorton from 1989 to 1990, and on U.S. Senator Dan Evans' staff from 1985 to 1989. She graduated from the University of Puget Sound in 1985.

Biggs is a board member and past president of the Washington State Society in Washington, D.C. She is recording secretary and served as a collegiate/alums relations and scholarship chair for the Northern Virginia Alumnae chapter of Delta Delta Delta.

Rev. 2/4/93

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United States Department of the Interior

FISH AND WILDLIFE SERVICE
WASHINGTON, D.C. 20240

ADDRESS ONLY THE DIRECTOR,
FISH AND WILDLIFE SERVICE

August 4, 1993

In Reply Refer To:
FWS/Region 1/ES

Honorable Norman D. Dicks
House of Representatives
Washington, D.C. 20515

Dear Mr. Dicks:

I am writing to update you on our actions regarding a 4(d) rule for the northern spotted owl. Earlier this month, you asked for information from our Olympia office regarding the strategic differences between a 4(d) rule and a Habitat Conservation Plan (HCP) for spotted owls under the Endangered Species Act. In a letter dated July 6, 1993, our Olympia office sent you its preliminary views on this matter.

Additional analysis of the conservation benefits has subsequently convinced us that our letter of July 6, 1993, implicitly understated the owl conservation contributions to be made by federal lands under the President's plan, and explicitly overstated the scope of restrictions necessary and advisable for the conservation of owls on non-federal lands. In fact, our current view is that considerable relief should be available to a majority of non-federal landowners, particularly if the U.S. Fish and Wildlife Service receives close cooperation from the regulatory authorities of a given state.

As our thoughts on the merits of using the 4(d) mechanism have matured, we have concluded that a properly structured 4(d) rule will be an excellent mechanism for providing prompt relief to landowners from the taking guidelines issued earlier, while at the same time providing what is necessary for the conservation of the northern spotted owl. Such a rule need not -- and will not -- eliminate the opportunity for individual landowners or the states to develop HCPs or prelisting agreements if they so choose. The rule will complement the HCP process and provide another procedural mechanism to clear up what types of forestry activities are permissible under the Endangered Species Act. Thus, an HCP may make good sense for a state that is very far along in the development of a comprehensive HCP, or for a non-federal landowner located in an area that is of particular importance for the conservation of the owl. An HCP in the latter case might provide a level of localized and necessary mitigation "fine-tuning" that could not otherwise be achieved through a broadbased 4(d) rule.

In one short month, we have explored many innovative uses of a 4(d) rule and now have a much better understanding of the flexibility of this conservation tool. We hope to formulate a rule that will contribute to the conservation of the owl while opening the door for innovative uses of HCPs and other management options. We will keep you informed of progress in our analysis and, as always, appreciate your support and interest in our issues and activities. If I can be of any further assistance, please give me a call.

Sincerely,

Marvin L Plenert

Regional Director

cc: Director, U.S. Fish and Wildlife Service

bcc: FW/Don Barry
SIO/Will Stelle
FWS/Mike Spear
SIO/Tom Tuchmann
FWS/Dale Hall, ARD, Reg. 1

FW:DJBarry:ags:08/04/93:208-5347

AMERICAN
FOREST &
PAPER
ASSOCIATION

August 20, 1993

Will Stelle
Deputy Director
Office of Environmental Policy
The White House
Washington, D.C.

Dear Will:

We appreciated the opportunity to meet with you, Department of the Interior, and Fish and Wildlife Service staff on August 12 and 17 to discuss the Administration's efforts to develop a rule under Section 4(d) of the Endangered Species Act (ESA) to deal with the issues surrounding the regulation of non-federal lands for the northern spotted owl. The meetings were very helpful. Our members and other landowners in the region were very appreciative of the opportunity to interact with the people involved in writing this rule.

These meetings provided us with a better understanding of the information you need to fill some of the non-federal land data gaps with which your biologists are struggling. We know you need a better understanding of how the state forest practices acts' requirements affect our activities on the ground. A solid appreciation of these rules will most likely require a trip with your biologists into the field to meet with industry biologists and forest managers to review how our activities -- as regulated under state forest practice rules -- affect owl habitat needs. There are also data on owl nesting areas on private lands and additional industry research data that your biologists seemed to lack.

Notwithstanding their utility for information exchange, I must confess that these meetings were most significant in raising our level of concern about: (1) the approach that your agency team is taking with the rule; and (2) the likely result that will ensue for non-federal landowners. Based upon the information provided by Service biologists at our two meetings, it seems more likely that the rule will increase rather than decrease the burden of regulation on many non-federal landowners in the region compared to what they now face.

Because of the serious nature of what we heard and the concerns that it raised, we spent the better part of our industry-only meeting on August 13 reviewing our notes on what your biologists told us. Attached is a memorandum that: (1) reduces to writing our best recollection of what we heard; and (2) elaborates on the significant problems with what we believe to be the Fish and Wildlife Service's present approach to the development of the Section 4(d) rule.

1250 Connecticut Avenue NW, Second Floor, Washington, DC 20036
Phone: 202-463-2700 Fax: 202-463-2785

I would summarize our single, greatest concern as follows. Even with admitted gaps in data and understanding of what is occurring on the ground, it appears that this rule will be issued in proposed form by the end of this month. We do not believe that such a course of action will serve either the Department's interests or our own. Thus, we believe it is imperative that we meet early next week to discuss how to deal effectively with your additional information needs, and evaluate the significance of the data gaps that presently exist in the likely content of the proposed rule. We would also like to discuss with you the following principles that we believe should guide the development of the Section 4(d) rule:

(1) The rule should reaffirm -- as originally stated in Interagency Scientific Committee Report, the final Fish and Wildlife Service critical habitat designation, the Gang of Four Report, the Scientific Analysis Team Report, and the statements introducing the Forest Ecosystem Management Team Report (FEMAT) -- that the President's July 1 plan for federal lands provides all of the needed habitat for the conservation and recovery of the owl. As you already know, it is our view that Option 9 exceeds the owl's real habitat needs.

(2) The strategy that should govern the Section 4(d) rule should be to define and geographically limit the ESA Section 9(a) prohibitions related to the northern spotted owl and provide further relief from the "take" restriction to landowners who voluntarily implement conservation measures. The Fish and Wildlife Service should reject any regulatory strategy that imposes a mandatory duty on private landowners to assist in the "conservation" or recovery of the owl.

(3) The guiding principle underlying the development of the Section 4(d) rule should be to seek innovative solutions providing relief for non-federal landowners. The rule should limit the application of the "take" prohibition for the northern spotted owl and declare that timber harvesting conducted in compliance with prescribed standards would not be considered to be a "take" regardless of whether any injury occurs to an owl. The prescribed standards should build on existing state forest practice regulations to the extent possible. This would create a desirable "bright-line" test on precisely which timber harvesting activities are lawful for ESA purposes.

(4) The Section 4(d) rule should not create new grounds for prosecuting violations of the ESA and imposing the Act's injunctive, civil, and criminal sanctions. Violations of the rule should not be violations of the Act. Instead, the rule should provide that failure to conform to its standards will subject the landowner to possible investigation to determine whether the ESA has been violated and a "take" has occurred. In other words, the rule should provide a safe harbor from a "take" prosecution for those who comply, and substantially increase the risk for a "take" prosecution for those who do not. Given the severe civil and criminal penalties applicable to ESA violations, such a rule would induce the necessary behavior without establishing a federal regulatory program dictating private land uses.

(5) The rule should be developed with a feed-back loop to the FEMAT Option 9 Environmental Impact Statement (EIS) to incorporate fully a recognition of the contribution of non-federal lands to owl protection in all federal land management alternatives considered in the EIS and provided in the post-EIS decision documents.

(6) As part of this decisionmaking process, the Section 4(d) rule should be accompanied by a rule similar to a categorical exclusion under NEPA -- a rule that states the grant of access across federal land for any non-federal landowner will be deemed to not "likely affect" the northern spotted owl for consultation purposes under ESA Section 7(a)(3) as long as the landowner abides by the requirements of the Section 4(d) rule.

One further problem that appears to be developing in our meetings with the Agency biologists is their misplaced concern that their discussions with us are somehow constrained during this pre-proposal time period by Federal Advisory Committee Act (FACA). No such limitations apply to the type of informal discussions, meetings, or information exchange that we have had, or those that we have in mind. Nor do we have any intention of becoming an "advisory committee" in the FACA sense with you or your biologists. Therefore, there is no real justification for this reluctance on the part of Agency biologists to actively engage in discussions, and allow us to share data with them.

To the contrary, once the rule is proposed there may be limitations on certain forms of communication. Thus, it is imperative that, before the Section 4(d) rule is proposed, we engage in as broad and intensive exchange of ideas and data as possible.

We look forward to continuing to work with your office, as well as the Department and the Agency in the development of this proposed rule. I will be in contact in the very near future to discuss how the above and attached concerns can be addressed. Once again, thank you for the opportunity to meet.

Sincerely,

Mark Rey

Mark Rey
Vice President, Forest Resources

Attachment

cc: Tom Collier
Don Berry

AMERICAN FOREST & PAPER ASSOCIATION :-) **FAX COVER SHEET**

1250 Connecticut Ave., NW
Suite 200
Washington, D.C. 20036

TO:	Will Stelle	FROM:	Mark Rey
AT:		PHONE:	202/463-2750
FAX NO:	202-456-2710	FAX:	202/463-2708
DATE:	September 21, 1993		
TIME:	4:53pm		
NO PAGES:	6		

MESSAGE:

AMERICAN
FOREST &
PAPER
ASSOCIATION

September 21, 1993

Mr. Don Berry
Special Assistant to the
Secretary of the Interior
U.S. Department of Interior
Washington, D.C.

Dear Don:

Attached is a memorandum that describes how we would envision the structure of a "safe harbor" Section 4(d) rule. The memorandum is self-explanatory and I will not elaborate on it. It is the memorandum we promised when we last met with you.

If you have any questions on the attached materials, please do not hesitate to give me a call. We look forward to working further with you as the rulemaking process continues.

Sincerely,

Mark

Mark Rey
Vice President
Forest Resources

Attachment

1250 Connecticut Avenue NW, Second Floor, Washington, DC 20036
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September 21, 1993

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MEMORANDUM

TO: Mark Rey

FROM: Steven Quarles SPQ

RE: **THE BINDING EFFECT ISSUE CONCERNING THE POSSIBLE ESA § 4(d) RULE FOR THE NORTHERN SPOTTED OWL**

Among the issues we addressed in our August 20, 1993 memorandum to you concerning "The Prospective ESA § 4(d) Special Rule On The Northern Spotted Owl" was the disturbing news that the Fish and Wildlife Service ("FWS") was considering drafting the rule to have binding effect. That is, the rule would provide that any activity of a private landowner or other nonfederal party not in compliance with the rule is a violation of the "take" provision of the Endangered Species Act of 1973 ("ESA"). 16 U.S.C. §§ 1538(a)(1)(B), 1532(19). We suggested that the rule, instead, should provide that activities which are consistent with it would not be subject to prosecution as ESA violations should any incidental "take" occur, and that activities inconsistent with it would be subject to investigation for incidental "take" and possible prosecution if any ESA violation is found.

A. PROBLEMS WITH A BINDING EFFECT RULE

We believe that adoption of a binding effect rule would pose two fundamental and critical problems:

(1) <u>A Binding Effect Rule Will Greatly Increase Private Landowners' Exposure To Civil And Criminal Sanctions.</u> We have argued that the rule should have two components: (i) "bright line" guidance applicable to the activities of all timberland owners regarding what steps would avoid "take"; and (ii) a local option mechanism for individual landowners who wish to submit plans for activities that would depart from the rule's guidance. Any "bright line" guidance will almost certainly include habitat modification restrictions of some sort. Only the "harm" form of the "take" prohibition applies to habitat modification. That's because a FWS rule which defines "harm" includes "significant habitat modification" as an element of that form of "take." 50 C.F.R. § 17.3. However, that same regulatory definition requires <u>twice</u> that, to constitute "harm," the habitat modification must "injure[] wildlife" listed as threatened or endangered under the ESA. <u>Id.</u> The Interior Department has stated time and again in Solicitors' opinions, preambles to rules, and court filings that no "harm" form of "take" can occur in the absence of "injury." <u>See</u>, <u>e.g.</u>, 46 Fed. Reg. 29490-92 (June 2, 1981), 46 Fed. Reg. 54748-50 (Nov. 4, 1981). The courts have concurred. <u>See</u>, <u>e.g.</u>, <u>Sweet Home v. Lujan</u>, 806 F. Supp. 279, 283 (1992); <u>Sweet Home v. Babbitt</u>, No. 92-5255, 1993 WL 270509 (slip opinion; Mikva op. at 3) (D.C. Cir. July 23, 1993). There has been significant disagreement over the nature of the "injury" which must be shown to establish "harm," but no disagreement as to the need to demonstrate that some form of "injury" has occurred while modifying habitat in order to establish a "take" violation. This "injury" requirement is legally compelled by the ESA, its legislative history, and judicial decisions; it also makes good common sense considering that a "take" violation may lead to severe civil and criminal sanctions.

If the rule declares a landowner's failure to conform to guidance that would restrict habitat modification activity (without any evidence that the activity "injures wildlife") to be automatically a violation of the ESA, it will have fundamentally altered the law of "take." It will have effectively repealed the present FWS regulatory standard for the "harm" form of "take," and instead established a highly expansive new "take" test, for the spotted owl. This would be contrary to the avowed purpose of the rule to reduce, not expand, private landowners' exposure to ESA prosecution.

(2) <u>A Binding Effect Rule Would Impose A Mandatory Federal Land Use Control Program With Severe Sanctions Over Millions Of Acres Of Private Land.</u> There is a distinct difference between: (i) a rule which provides guidance for where and how private land activities might be conducted to avoid possible violation of a particular federal law and exposure to its civil and criminal sanctions; and (ii) a rule which declares in advance that any landowner who deviates from its declarations on where and how land use activities may be conducted has automatically violated the law, leaving little more than the severity of the sanctions to be

determined. One is voluntary; the other is mandatory. One induces, the other coerces, behavior. One is a discretionary supplement to, the other a compulsory preemption of, State and local planning and zoning. Not only timberland owners, but all private landowners -- farmers, homebuilders, cattlemen, miners, etc. -- would likely oppose a rulemaking that sets a precedent for establishing mandatory federal land use control or zoning programs for private lands and making noncompliance an automatic violation of federal law, punishable by severe civil and criminal sanctions.

B. <u>THE ALTERNATIVE AND PREFERABLE "SAFE HARBOR" RULE</u>

Instead of a rule that is binding on the landowner, we propose a rule that is discretionary for the landowner. The rule would offer a "safe harbor" from ESA prosecution if the landowner chooses to conform his or her actions to it, and provide stern warning that the landowner is at risk of prosecution if he or she chooses to act inconsistently with it.

This "safe harbor" rule would avoid both problems posed by a binding effect rule. First, as we noted above, the binding effect rule, by making all activities which do not conform with it automatic ESA violations, would override existing law and regulation defining "take" and provide a new, expansive definition of what behavior constitutes "take" and, therefore, a violation of the ESA. On the other hand, a "safe harbor rule," by announcing that nonconforming activities will be investigated for ESA violations, would, in effect, define only what is <u>not</u> "take" for purposes of the spotted owl (all conforming activities) and would leave in place the existing "take" definition (to be applied during enforcement investigations of nonconforming activities). Second, the "safe harbor" rule would not establish mandatory federal land use controls. Land use activities contrary to its guidance would not be automatically violations of federal law; a landowner could depart from the rule's guidance if he or she has good reason to believe that the inconsistent activity would still comply with the ESA.

A final reason for writing a "safe harbor" rule instead of a binding effect rule is that the former is sufficient, the latter unnecessary, to ensure compliance. Landowners are likely to conform to the rule's guidance if they know they are thereby made immune from ESA prosecution; all but the very few certainly will if they know that failure to do so will mark them for heightened enforcement attention, including possible investigation for prosecution. Although, to establish an ESA violation under the "safe harbor" rule, investigations will still be required and the burden of proof will still reside (as it should) with the federal government, the rule will be beneficial to enforcement by focusing enforcement dollars and personnel on the limited number of activities of the few recalcitrants.

We are not proposing anything novel for the "safe harbor" rule. Acceptable (if not the best possible) <u>language has already been penned by the FWS</u> in the rescinded Owl Guidelines:

> The Service gives notice that any incidental take of northern spotted owls that results from activities carried out in a manner inconsistent with the guidelines (and not authorized under the provisions of Section 7 or Section 10 of the Act), will be subject to investigation by the Service pursuant to Section 9 of the Act . . . . If the person engaged in timber harvest can demonstrate that these guidelines were followed, the Service does not intend to seek prosecution in the unlikely event that incidental take occurs in spite of implementing the guidelines.

As you will recall, the Owl Guidelines were rescinded after we filed a citizen suit notice challenging their legality in the absence of rulemaking. We never opposed "safe harbor" <u>regulations</u>; we sought, instead, to subject those "safe harbor" Guidelines to a rulemaking notice and comment process so that we could voice our concerns about their substance. Indeed, a § 4(d) rule is a far better, more legally secure, method of applying the "safe harbor" concept to the spotted owl than are the Guidelines, no-take letters and agreements, and "Interim Policy" memorandum which the FWS and other Interior Department officials have used for that purpose up to now.