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WASHINGTON STATE DEPARTMENT OF
Natural Resources

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STATE OF WASHINGTON

August 11, 1993

Dave Fredrick
Team Leader
Marriott Residence Inn, Room 1113
1710 N.E. Multnomah Street
Portland, Oregon 97232

Dear Dave:

Attached are our comments on the biological information we were provided.
Thank you for the opportunity to comment. Please call any one of us if you
have questions or would like additional information.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kaleen Cottingham".

Kaleen Cottingham
Supervisor, Department of Natural Resources

A handwritten signature in cursive script, appearing to read "Curt Smitch".

Curt Smitch
Director, Department of Wildlife

Tom Bristow
Director, Governor's Timber Team

AB:bg

Attachment

Washington State Comments on 4(d) Pre-decisional Material

We would like to express our appreciation for the initiative shown by the Fish and Wildlife Service to bring some certainty to northwest forest landowners and other citizens over the ground rules for conservation of the northern spotted owl on non-federal lands. We are also gratified that the affected states have been invited to participate in the rule development process from the very beginning. We believe the Service has made a good start on rule development, considering the short deadlines you have been given. We intend to continue to work with you in a cooperative manner.

The draft we have been given to review is not, as we expected, a draft of a proposed 4(d) rule, but rather a draft of biological background and objectives. While this is a necessary part of a rule, it leaves the state with almost no basis for understanding what the Service might be proposing as a rule. We understand the actual rule language is still being developed or reviewed by the Service. In order to participate as originally planned the State needs to review and comment on the draft rule language before it is released to the public. We must be given this opportunity in order to fulfill the partnership role originally described by the Service and the Clinton Administration.

Our original goal for this 4(d) rule was, consistent with the announced intent of President Clinton, that it would provide a mechanism to "ease restrictions on timber harvest from certain non-federal lands (modifying what have been known as 'owl circles')," We hope the rule will provide timely and biologically legitimate regulatory relief, offering incentives to provide needed conservation actions to benefit the owl, while reducing disincentives to provide needed timber supplies from non-federal lands. We hope this approach will point us toward a new system of ecosystem management on non-federal lands.

Our expectation about the effect of the rule was based on two assumptions: first, that Option 9 would provide increased owl protection on federal lands; and second, that the scope of federal authority under 4(d), while differing from the basic prohibition on "taking," would nevertheless recognize the different legal obligations of federal and nonfederal landowners. The draft spotted owl recovery plan recognized this difference and provided an appropriate balance of regulatory and non-regulatory recommendations. If these assumptions are incorrect, this reduces the degree to which the State's and Clinton Administration's goals can be met. In fact, our current analysis suggests that Option 9 does not provide increased protection in some areas. (see additional attachment) This raises the question of where needed protection would be provided, and what the obligations of federal and non-federal landowners would be.

We believe the 4(d) rule must explicitly define "take." The rule should explicitly describe where relief from the prohibition against taking will be provided, and when. If landowners do not submit plans of their own, what will be their responsibility to avoid take? For landowners outside "areas of concern," how and when can they begin to harvest around owl sites? We recommend at a minimum that take relief be provided in

the case of owl sites that are protected on federal lands, where "circles" currently overlap onto non-federal lands. Additionally, where protection of federal owls is not to be provided (eg: matrix areas), comparable relief, similarly timed, should be provided to non-federal lands within the "circles" of those owls. If no early relief from the take prohibition is included in the 4(d) rule, the Service should provide an explanation.

We agree with the concept of "areas of concern," however the rule must provide more detail on biological objectives, and ultimately these areas must be mapped if landowners and state agencies are to understand their obligations. (3)

In some areas of concern, the objectives appear to include protection or development of nesting, foraging, and roosting habitat independent of existing owl sites, or protection or development of dispersal habitat over very broad areas. This appears to be the case, for example, in southwest Washington. Meeting these objectives will have a major economic impact, as the recovery plan recognized. From the material provided for our review, we have no basis for understanding the mechanism the Service believes it can use to achieve these objectives, which in many cases will involve landowners who now have no owl constraints. We believe the "necessary and advisable" standard in Section 4(d) provides a basis for the Service to incorporate practical considerations of administration and enforcement. We caution against proposing unenforceable regulations to achieve broad recovery objectives, even if those objectives have merit. At a minimum, the proposed rule should explain its legal basis and propose administrative mechanisms. (4)

Although the option for landowners to develop alternative plans to meet biological objectives has been much discussed, the material we have been given to review makes almost no mention of this feature. This "local option" can allow landowners to take the initiative to protect the owl and other species, while preserving as much as possible the opportunity to practice commercial forestry. The proposed rule should discuss the "local option" in some detail. For example, what would be the NEPA obligations of landowners and the Service? How would the local option treat endangered species? What is the relation to the HCP process? Will landowners who have developed a plan be allowed to take an owl which other landowners are still required to protect? What will be the role of the Service in assisting these landowner plans? What role is assumed for the state as a regulator? These and other questions should be seriously addressed. (5)

We agree with the concept of general conservation goals. However, the proposed rule should provide some clarification of these goals.

Goal 1. Is measurement of the inadequacy of federal reserves to be based on owl numbers, habitat capability, or both? How will this capability be measured for smaller federal reserves common to Washington? We recommend incorporating the analysis discussed in the draft recovery plan to determine the need for supplementing federal reserve areas. Will there be any limit on the number of non-federal owl sites protected to restock the federal reserves? We believe actions to supplement understocked federal reserves should be equitably distributed between federal and non-federal land.

Goal 2. Is the habitat augmentation proposed here a permanent contribution?

Goal 3. What is the meaning of "well distributed," "widespread," and "adequate density?" Meeting this goal could imply some very extensive restrictions over a very large region.

Goal 4. Where will "core areas" be located and how large will they be?

Goal 5. What is the management prescription for dispersal habitat? The Service must carefully consider how it would intend to implement a fixed dispersal standard over a broad area of hundreds of separate landowners with independent management intentions. It may be that a more flexible standard is appropriate to non-federal lands, as was anticipated in the recovery plan. In addition, the proposed 4(d) rule should not attempt to apply a higher dispersal standard on nonfederal land than is considered adequate for federal land.

The proposed rule should specify what landowner restrictions will be imposed to meet the various conservation goals in each area.

How will the 4(d) rule be updated based on new and evolving biological information?

Surveying has been a major cost of the current regulatory approach. What will be the requirements for continued surveying in the proposed 4(d) rule? This should be specified for "areas of concern" and other areas, and for the "local option."

What provisions, if any, will be included to recognize the major impacts the regulations can have on small non-industrial landowners? These landowners constitute a major portion of the commercial forest ownership in Washington State.

What does the term "connectivity" mean as used in the proposed rule? In some places the term appears to refer to provisions for suitable habitat and in some places it appears to refer to dispersal habitat.

The material we have been given refers to the continuation of a taking prohibition under the Migratory Bird Treaty Act. How does this prohibition differ from taking under the Endangered Species Act? An explanation of this difference is essential to understanding the value of the proposed 4(d) rule as well as the meaning of the concept of "taking" in federal law.

We appreciate the opportunity to provide these comments. We wish to continue to work in a cooperative manner as partners with the Service. However, to do so requires that the State be given an early opportunity to review and comment on actual rule language before it is formally proposed. We look forward to discussing with you our additional review opportunities.

D R A F T - SUBJECT TO CHANGE - PREDECISIONAL**ANALYSIS OF SPOTTED OWL TERRITORIES IN OPTION 9 VS. THE
RECOVERY PLAN IN WASHINGTON**

August 6, 1992 - DWH

TOTAL NUMBER OF KNOWN TERRITORIES (STATUS 1-3) ON FEDERAL LANDS:

Option 9 Reserves, Cong. Withdrawn = 505
Recovery Plan DCA's, RPA's, MPA's = 565

Option 9 Adaptive Management Areas = 63
Option 9 Administrative Withdrawal = 19

BY PROVINCE:**Olympic Peninsula**

Option 9 Reserves, Cong. Withdrawn = 145
Recovery Plan DCA's, RPA's, MPA's = 142

Option 9 Adaptive Mgmt. Areas = 8
Option 9 Administrative Withdrawals = 0

Western Cascades North

Option 9 Reserves, Cong. Withdrawn = 120
Recovery Plan DCA's, RPA's, MPA's = 141

Option 9 Adaptive Mgmt. Areas = 18
Option 9 Administrative Withdrawals = 4

Western Cascades South

Option 9 Reserves, Cong. Withdrawn = 102
Recovery Plan DCA's, RPA's, MPA's = 98

Option 9 Adaptive Mgmt. Areas = 23
Option 9 Administrative Withdrawals = 9

Eastern Cascades

Option 9 Reserves, Cong. Withdrawn = 138
Recovery Plan DCA's, RPA's, MPA's = 184

Option 9 Adaptive Mgmt. Areas = 14
Option 9 Administrative Withdrawals = 6

SPECIFIC AREAS OF CONCERN:

reserve south of Cashmere, reserve south of Mt Adams, high risk fire areas of eastern Washington, I-90 adaptive management area, checkerboard ownership areas.

BARBARA ROBERTS
GOVERNOR



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August 11, 1993

David C. Frederick
4(d) Team Leader
USDI Fish and Wildlife Service
1710 NE Multnomah Street, Room 1113
Portland, Oregon 97232

Dear Mr. Frederick: *Dave*

Several months ago, when Jack Ward Thomas began the analysis that resulted in the FEMAT Report, we made a plea for creativity in the interpretation of federal laws and regulations to provide non-federal owners with relief from owl circles. Indeed, President Clinton's stated objective has been to "...ease restrictions on timber harvest from certain non-federal lands..." by improving the management of federal lands.

We remain enthusiastic about cooperating in meeting this objective. We are concerned, however, about the apparent direction of the proposed 4(d) rule. While we do not have sufficient information before us to adequately assess how the rule will work, it does not appear to be on a course to provide the promised relief.

It appears that non-federal landowners are being asked to make substantial contributions to recovery. The sketchy information provided to us so far appears to require much more from non-federal landowners than the ESA requires. As stated in the (unsigned) Recovery Plan for the Northern Spotted Owl, "...the only requirement of non-federal entities under the ESA is the prohibition against take...."

We suggest that the 4(d) team go back to "first principles" and assess what contributions the ESA requires various landowners to make. With that assessment complete, the 4(d) rule should then clearly set out what objectives the rule is intended to meet. If you intend to take a multi-species approach, as we encourage you to do, that should also be clear in the objectives.

David C. Frederick
August 11, 1993
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The thirty-page document offers general conservation goals and roughly-defined areas of concern. Repeated statements are made that "...no detailed assessment has been conducted to determine to what degree..." Option 9 provides for the habitat needs of the owl. Without that information, it appears premature to allocate conservation to non-federal lands, which, as you know, carry with them a different bundle of rights.

In addition to the vagueness of the biology and the boundaries of areas of concern, we do not know what management strategies will be applied to achieve dispersal, support, clusters, or well-distributed populations.

We respectfully suggest that if you cannot address these issues within the given time frames, it might be worthwhile to spend more time developing the rule. The consequences of proceeding with the rule as it now appears may ultimately cause greater problems than not meeting schedule objectives.

Sincerely,



Anne W. Squier
Senior Policy Advisor
Natural Resources

cc: Dale Hall
Jennifer Belcher
Terry Surguine
Christine Sprcul
Jim Brown
Randy Fisher
Ted Kulongoski