

August 18, 2023

Submitted via [www.regulations.gov](http://www.regulations.gov)

Docket No. FWS-HQ-ES-2021-0107

Ms. Carey Galst  
Attn: FWS-R3-ES-2021-0107  
U.S. Fish and Wildlife Service  
MS: PRB/3W  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

**Re: *Endangered Species Act, Proposed Revisions to Certain Portions of Section 4 Regulations for Listing, Reclassifying and Delisting Species, 88 Fed. Reg. 40764 (June 22, 2023), Docket No. FWS-ES-2021-0107***

Dear Ms. Galst:

Please review the following comments submitted by the Hardwood Federation on the U.S. Fish and Wildlife Service's (USFWS) proposal to revise certain portions of Endangered Species Act (ESA) Section 4 regulations to list, reclassify and delist species on the lists of endangered and threatened wildlife and plants, especially as they relate to consideration of the economic impacts of ESA determination and criteria for designation of critical habitat. By way of background, the Hardwood Federation is the unified voice on federal legislative and regulatory policy in Washington, DC representing 31 local, regional, and national trade associations that serve hardwood businesses and their employees located in every state in the nation.

The U.S. hardwood sector is a fully integrated industry from logging to the manufacture of finished consumer goods which touch every aspect of American life including flooring, cabinets, furniture and moldings in our homes. Packaging, tissue and paper supplies are made of residual chips and dust from hardwood mills. Industrial mats, shipping pallets and railway ties made from low grade hardwood lumber are crucial to America's vast transportation infrastructure. Hardwood processing and manufacturing entities rely primarily on domestic private and public working forestlands for the raw materials that go into their products. As a threshold matter, the hardwood industry supports active forest management and strong domestic and international demand for hardwood products that capture carbon and promote sustainability and rejects policies that will lead to more restrictions on active forest management.

**Comments**

## **1. Active forest management serves as a key protection for the forest habitat of threatened and endangered species.**

Before addressing the issues of economic considerations as a factor in listing or delisting a species and designations of critical habitat, it is important to review the multiple environmental benefits that result from active forest management, which creates the conditions in which threatened and endangered species may thrive. Active forest management is a term that encompasses a wide range of actions, including vegetation control, ecosystem restoration and hazard reduction that all work in unison toward a singular goal: maintaining forest health. Managed forests deliver critical ecosystem services such as cleaning ambient air, filtering water supplies, controlling floods and erosion, sustaining biodiversity and providing venues for recreation, education, and cultural enrichment. Healthy, productive forests are cared for and maintained in ways that reduce the risk of wildfire, insect infestation and disease. They also improve habitat for a wider varieties of wildlife populations, thereby supporting the key policy objectives that underpin the ESA.

On the climate front, actively managed forests are crucial to achieving the Administration’s sustainability and resilience objectives. To that end, it is important to recognize that the carbon benefits of the forests do not end with tree growth. Markets for products derived from trees are an important piece of the solution as well. Also, wood products are 50% carbon by weight, continuing to store carbon for the life of the product.<sup>1</sup> The Biden Administration and congressional leaders acknowledge that the American forest system is vital to reducing atmospheric carbon, offsetting 12-15 percent of U.S. carbon emissions each year.<sup>2</sup> On the economic front, the forest products industry, which relies on domestically harvested wood fiber to manufacture goods that act as a significant carbon sink, supports approximately 900,000 jobs, largely in rural and underserved communities.

## **2. Proposal to Designate Unoccupied Areas as Critical Habitat**

The hardwood sector supports the 2019 regulations which limit classification of unoccupied areas as critical habitat only when such a classification “would be inadequate to ensure the conservation of the species” (See 88FR 40769). Furthermore, the hardwood industry agrees with regulators’ rationale when adopting the 2019 standard to address “concerns that the Services would inappropriately designate overly expansive areas of unoccupied critical habitat.” (See 88 FR 40769, referencing 84 FR 35193 at 35197). That said, the hardwood sector agrees with the National Alliance of Forest Owners (NAFO) that the agencies’ proposal to remove regulators’ primary focus on occupied areas during the listing process contradicts the congressional intent of the ESA. The black letter of the statute states clearly, as NAFO points

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<sup>1</sup> WoodWorks. Carbon Footprint. <https://www.woodworks.org/why-wood/carbon-footprint>

<sup>2</sup> National Alliance of Forest Owners, Forests and Climate Change for Policy Makers 101. <sup>2</sup> National Alliance of Forest Owners, Forests and Climate Change for Policymakers 101. [Forests and Climate Change for Policymakers 101 | National Alliance of Forest Owners \(nafoalliance.org\)](#).

out, that, except as determined by the Secretary, “critical habitat shall not include the entire geographical areas which can be occupied by the threatened or endangered species” (See 16 U.S.C. Section 1532(5)). The hardwood industry is also concerned that the practice of over-designation would undermine active forest management, which is essential for forest health. Responsible forest stewardship includes, for example, deploying tactics such as tree thinning to reduce wildfire risk, among other threats to the environment. By needlessly imposing limits on access to more acreage as designated critical habitat, the agencies will be undercutting the goals of [Executive Order 13990](#) “Protecting the Public Health and Environments to Tackle the Climate Crisis, which serves as a key pillar for the policy justification of the current rulemaking.

### **3. Economic Impacts - Factors for Listing, Delisting or Reclassifying Species**

Because active forest management has a demonstrated track record as a win-win for the environment and the economy, the hardwood industry is concerned that federal regulators are proposing to remove economic impacts as a consideration when weighing ESA determinations. Specifically, the USFWS proposes “to clarify and affirm that ... the economic impacts and any other impacts that might flow from a listing decision must not be taken into account when making listing, reclassification and delisting determinations” (See 88 FR at 40765). Stepping back four years, in 2019, the USFWS chose to remove the requirement that regulators act “without reference to possible economic or other impacts” for purposes of inserting more flexibility into ESA requirements. At that time, the USFWS reasoned that the ban on economic considerations “was not necessary because neither the [ESA] nor legislative history indicates that Congress intended to completely prohibit the Services from compiling economic information about potential listings ... which would be informative to the public” (See 88 FR at 40765). The Hardwood Federation supports the agency’s 2019 determination and sees no compelling reason, whether driven by litigation or legislation, to change the rules of the road and undermine regulatory certainty by upending processes followed during the past four years.

### **4. Forest Products Industry Supports Balanced Regulation**

The forest products industry, along with the broader manufacturing sector, supports efforts to reform and modernize federal regulatory processes, which includes consideration of economic impacts of federal rules, especially as they relate to job creation. In late June, the National Association of Manufacturers (NAM) launched a new coalition, Manufacturers for Sensible Regulations, to address a barrage of red tape emanating from federal agencies, including the USFWS. According to a 2023 NAM survey, nearly two-thirds of manufacturers “report spending 2000 hours per year complying with federal rules.” This is equivalent to having at least one full-time attorney or other professional on staff to manage the permitting process, a premium few small businesses can afford. The American Forest & Paper Association (AF&PA) issued a statement commenting on the new coalition. The group points out that the wood products sector can only achieve sustainability objectives when the Administration “works with – not against – manufacturers to craft achievable and balanced regulations that address environmental challenges without threatening ... jobs.” As a general matter, the hardwood sector also supports broad principles outlined in AF&PA’s regulatory policy. These include

“balancing costs and benefits” to promote “the most cost-effective regulatory option” consistent with the relevant statute, ... consideration of the economic circumstances” of the impacted parties, and “the need for long-term business certainty.”

The case for including economic impacts within the context of regulatory analysis transcends current policy debates and is supported by federal case law. The Hardwood Federation agrees with [legal analysis](#) performed by AF&PA, which cites Supreme Court decisions in [Entergy Corp. v. Riverkeeper](#) (2009) and [Michigan v. EPA](#) (2015) to support its conclusions. Referencing the Supreme Court cases, AF&PA states that “agencies have broad discretion to interpret statutes that are silent or ambiguous on benefit-cost analysis as” allowing, “not forbidding, this type of smarter regulation.” The ESA, in this case, by the USFWS’s own admission is at best ambiguous with respect to the issue of economic impacts, as demonstrated by its 2019 conclusion that the Act does “not completely prohibit the Services from compiling economic information about potential listings” (See 88 FR 40765). Absent a stated prohibition on such considerations, agencies have the discretion to take them into account. Within the context of this particular rulemaking, the USFWS’s proposed reversal of policy implemented in 2019 illustrates, at best, the ambiguity of ESA requirements, thereby not compelling implementation of an outright ban on economic data to be “consistent with the plain meaning of the statute,” which is the stated intent of the USFWS (See 88 FR 40765).

## **Conclusion**

The Hardwood Federation appreciates the opportunity to submit these comments, as well as your careful consideration of them. In addition to the comments outlined above, the Hardwood Federation incorporates by reference those comments made by the American Forest & Paper Association, through its role in the National Endangered Species Act Reform Coalition, and the National Alliance of Forest Owners, especially as they relate to the role of active forest management in promoting resilient forests.

Sincerely,

A handwritten signature in cursive script that reads "Dana Lee Cole".

Dana Lee Cole, Executive Director  
Hardwood Federation