

August 21, 2017

Ms. Kelly Denit  
Company Name  
1315 East-West Highway  
Silver Spring, MD 20910

**Attn: Streamlining Regulatory Process and Reducing Regulatory Burdens, NOAA Docket # NOAA-NMFS-2017-0067**

Dear Ms. Denit:

On behalf of the National Association of Home Builders (NAHB), I am pleased to submit the following recommendations regarding which National Marine Fisheries Service (NMFS) regulations, policies, guidance documents, and permitting programs under the Endangered Species Act (ESA) impact the U.S. residential home building industry and warrants consideration as the Agency formulates its response to Executive Order (E.O.) 13777, "Enforcing the Regulatory Reform Agenda."

NAHB is a federation of more than 700 state and local associations representing more than 140,000 member firms nationwide. NAHB's members are involved in home building, remodeling, multifamily construction, land development, property management, and light commercial construction. Collectively, NAHB's members employ more than 1.26 million people and construct about 80 percent of all new housing units constructed within the U.S. each year. Due to the wide range of activities NAHB members conduct to house the nation's residents, they are often required to comply with the regulatory requirements of the ESA. Specifically, this happens if the U.S. Fish and Wildlife Service (FWS) or the NMFS (hereafter referred to collectively as the Service) determines the activity will result in the "take" of a listed species, or is likely to jeopardize the continued existence of a listed species or result in destruction or adverse modification of its designated critical habitat.

Once the Service determines a project triggers ESA compliance, the project proponent must obtain an incidental take authorization through either the ESA Section 10 Incidental Take Permit if the project consists of wholly private actions where no federal permit (or federal nexus) is required, or the ESA Section 7 Consultation if the activity requires a federal permit, funding, or authorization. According to a 2015 study conducted by the Defenders of Wildlife that purported to have examined all of the Section 7 consultations performed between 2008 and 2015, the industry triggering the most ESA compliance obligations was the land development and construction industry.<sup>1</sup> This finding comes as no surprise to NAHB, since our members are required under federal law to obtain many of the federal wetlands permits issued on an annual basis by the U.S. Army Corps of Engineers (Corps) and the U.S. Environmental Protection Agency (EPA) under Section 404 the Clean Water Act (CWA). Therefore,

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<sup>1</sup> Jacob W. Malcom and Ya-Wei Li, (2015) Data contradict common perceptions about a controversial provision of the US Endangered Species Act. Proceedings of the National Academy of Science (PNAS). December 2015.

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

## Introduction

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

2017.<sup>2</sup> This Order, among other things, directs the agencies, for each new regulation issued, to identify at least two prior regulations to be modified or eliminated so that the net cost of the regulation is zero. Recognizing the challenges associated with this Order's implementation, on February 24, 2017, the President signed Executive Order (E.O.) 13777, "Enforcing the Regulatory Reform Agenda," which provided additional guidance as to how the agencies are to "alleviate unnecessary regulatory burdens" on the American people.<sup>3</sup>

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

Directing federal agencies to periodically review existing regulations for potential repeal or modification and asking for public input is not a new concept. The idea of presidentially-directed regulatory review was introduced by President Clinton in 1993 through Executive Order 12866 and most succeeding presidents have tweaked these provisions or added new ones to ensure systematic and periodic review of most regulations. In addition, Congress, under Section 610 of the Regulatory Review Act (RRA), requires all federal agencies to periodically review existing regulations. NAHB

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<sup>2</sup> 82 Fed. Reg. §9339 (February 3, 2017)

<sup>3</sup> 82 Fed. Reg. §12285 (March 1, 2017)

does not view these two retrospective review processes as redundant or duplicative. Rather, they underscore the importance both Congress and the Administration place on ensuring federal regulations, policies, and programs remain relevant, efficient, and accomplish their stated objectives, while imposing the least possible burdens upon the regulated community. Unfortunately, while compelling in concept, these efforts, to date, have resulted in arguably minimal impacts on the small businesses that feel the brunt of the regulatory bite.

President Trump's most recent initiatives recognize this problem and are intended, in part, to help get struggling industries back on their feet. In an effort to provide necessary relief to the residential construction industry, NAHB strongly urges the Administration to use this opportunity to make housing a priority. By focusing its retrospective review and oversight responsibilities for new rules on those policies that impact builders and developers, this Administration has an opportunity to create jobs and restore a broken segment of the economy. By examining the cumulative impacts and burdens placed by the myriad of federal regulations – many of which are duplicative, overlapping, or contrary to one another– along with assessing their performance, NAHB is certain that the agency will find sufficient room for efficiencies and streamlining.

#### *Regulatory Burdens on Residential Construction are Untenable*

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

<sup>3</sup> E.O. 13771, "Reducing Regulations and Controlling Regulatory Costs" Section 4.

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

NAHB estimates that, on average, regulations imposed by government at all levels account for nearly 25 percent of the final price of a new single-family home built for sale.<sup>4</sup> The significant cost of

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<sup>4</sup>[http://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=250611&channelID=311&\\_ga=1.255452874.](http://www.nahbclassic.org/generic.aspx?sectionID=734&genericContentID=250611&channelID=311&_ga=1.255452874.)

regulations reflected in the final price of a new home has a very practical effect on housing affordability. According to NAHB research, approximately 14 million American households are priced out of the market for a new home by government regulations.<sup>5</sup> Given the outsized impact of regulations on the final price of a newly built single-family home, it is critically important that each existing regulation, whether found at the federal, state, or local level, actually addresses the problem it was created for, avoids duplication with identical or similar regulation, and is designed in a manner to impose the least possible burden on the regulated entities. Further, because the cumulative burdens associated with layers of regulations can be overwhelming, NMFS is strongly urged to also be cognizant of the challenges that will continue to remain if the cumulative impacts from complying with regulations at all levels of government are not considered.

*NAHB Recommended Service Regulations for Repeal, Replacement or Modification*

E.O. requires the agencies to gather input from a variety of sources and sets the baseline criteria that each Regulatory Reform Task Force is to consider when reviewing and making recommendations for repeal, replacement, or modification. Specifically, agencies are to attempt to identify existing federal regulations that:

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

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

While NOAA could fulfill its obligations under E.O. 13777 by simply identifying a subset of federal regulations that cost the most and thereby focus its deregulatory actions on those specific regulations, following such an approach would only benefit a few sectors of the economy (i.e., electric utilities or energy production). Furthermore, it is unclear under such an approach how other sectors of the economy, in particular the residential construction sector that is dominated by small businesses, would benefit. NAHB believes it is imperative for NOAA to provide the public and

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<sup>5</sup> <http://eyeonhousing.org/2016/05/14-million-households-priced-out-by-government-regulation/>

the regulatory community with some indication of the criteria the Agency will use to identify federal regulations that will be addressed under the E.O. At a minimum, NAHB suggests the Agency should consider the following criteria when assessing existing regulations (including guidance documents, interpretive memoranda and other related actions) for potential deregulatory action:

- **Impacts.** What sector(s) of the economy are impacted; what types of businesses are impacted; how many entities are impacted (direct and indirect); and what is the nature of the impact(s)?
- **Economics.** What are the costs, benefits and cost/benefit ratio; who incurs the costs and reaps the benefits; how do costs impact small vs large entities?
- **Need.** Is the regulation required by statute; does the regulation confer authorization (such as a permit) that is needed for the lawful operation of certain businesses?
- **Data & Technology.** Is there new, publicly available information that would impact the underlying rule or the underlying assumptions; does new data impact the rule's achievability, efficacy, cost or value; does a change in technology impact costs or achievability?
- **Redundancy.** Are there similar regulations within any agency or at any level of government that address the same or similar issue(s); are those rules duplicative or inconsistent with one another?
- **Other Rules.** Do more current regulations surpass the need for an existing rule; can rules be combined to meet the same outcome?

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

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

repeal, replacement, or modification.

## **Category A: NMFS Regulations**

### ***1. Listing Endangered and Threatened Species and Designating Critical Habitat; Implementation (50 C.F.R. Part 424)***

On February 11, 2016, the Service finalized revisions to its regulations governing the designation of critical habitat. The changes made under this final rule focused on two key areas; regulatory definitions and changes to the regulatory criteria the Service uses for designating areas as critical habitat. With regard to regulatory definitions, the final rule both amended existing definitions such as the definition of “*conserve, conserving, and conservation,*” while also creating entirely new definitions for key terms that previously had only existed under the statute. These include “*geographical areas occupied by the species,*” and “*physical or biological features.*” These definitions are important because they form the basis for the Service’s designation of any particular area as occupied critical habitat. The Service’s final rule also changed the regulatory criterion used for designating critical habitat, including the addition of a new criterion that provides the Service the discretion to “designate critical habitat a scale determined by the Secretary (i.e., Service) as appropriate.” According to the Service, the purpose of this change is to relieve it from having to demonstrate every square inch, square acre, or even square mile of designated critical habitat actually meets the Service’s new regulatory definition of occupied critical habitat for a specific species. Instead, this new language allows the Service to designate critical habitat at a scale where it determines sufficient. Taken together, these changes dramatically expand the scope and legal effect of future critical habitat designations.

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

Further, since the ESA prohibits activities that result in *jeopardizing the continued existence of the species* or the *destruction or adverse modification of critical habitat*, the Service and the federal action agency must identify specific project restrictions or modifications to the proposed activity that, if adopted by the landowner, would avoid a *jeopardy* or *adverse modification* determination. These restrictions on proposed activities, such as seasonal land clearing prohibitions or reduced lot coverage, become binding permit conditions of the underlying federal permit, (e.g., federal wetlands permit) and enable the Service to authorize the proposed activity by issuing an incidental take statement under the ESA’s Section 7 consultation process.

The economic impact of critical habitat designations on the homebuilding industry can be very significant. In situations where the species or the critical habitat being designated is located in or near metropolitan areas, or in areas experiencing growth, the brunt of the designation is even more acute<sup>6</sup>

Equally problematic is the fact that species don't even have to present in areas that are designated as critical habitat, yet permitting restrictions and prohibitions still apply. Unlike the ESA's Section 9 "take" prohibitions, where the Service must first determine the species is actually present and that the proposed activity will directly result in the death or injury of the species, once critical habitat is designated, any proposed activity needing a federal permit, funding, or authorization can trigger a *likely to adversely affect* determination. A landowner whose property has been designated as critical habitat only needs to seek a federal permit or approval, as typically occurs when land developers or builders seek to improve or develop a property, to trigger the ESA's Section 7 consultation process. Given the outsized impact of critical habitat designations on land developers, builders, and landowners whether they be private citizens or states or local governments, NAHB is keenly interested in any changes instituted by the Service regarding how and where critical habitat is designated.

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

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

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

The Service's final rule created a new regulatory definition for a phrase that previously only appeared within the statutory definition of "critical habitat".<sup>7</sup> Within the ESA, the phrase "geographical areas occupied by the species," appears in the statutory definition of occupied critical habitat and serves to require the Service, when designating critical habitat, to identify specific areas occupied by the species

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<sup>6</sup> U.S. Fish and Wildlife (FWS) Economic Analysis of Critical Habitat Designation for Four Central Texas Salamanders. Industrial Economics. January 1, 2013. Exhibit ES-4 on page ES-7 found 97.7 percent (97.7%) of all of the costs resulting from critical habitat designation will occur on the residential construction industry.

<sup>7</sup> 16 U.S.C. 1532 5(a)

at the same time of a species' listing under the Act. Furthermore, the statutory definition of critical habitat requires that occupied critical habitat contain those specific "physical or biological features" which the Service has determined to be essential for the species' conservation (i.e., continued survival). Therefore, Congress intended the statutory definition of occupied critical habitat to be narrowly focused on those specific areas actually "occupied" by the species at the time of listing and containing specific "physical or biological features" that are necessary for the species' survival.

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

Such a broad expansion is not only unlawful, it is severely problematic for landowners. Not only are they now subject to the ESA's permits and conditions, they have limited recourse. For impacted landowners, the only effective way for determining whether or not their property has been correctly designated as "occupied critical habitat" is to hire qualified biologists who follow Service-approved species surveying techniques to actually document occupancy by the species in question. For its part, the Service has, in the past, relied upon the results of such property surveys to confirm the presence or absence of species and revised prior critical habitat designations when surveys failed to determine a species occupancy. However, under the Service's expansive regulatory definition of "geographical areas occupied by the species" which allows the Service to "generally be delineated around species' occurrences," it seems unlikely the Service would accept the results of such property surveys – even those conducted using the Service's own species survey protocols, as sufficient evidence of a given area not meeting the definition. Given this limitless discretion, it would not be unusual to assume the Service will be under pressure to designate ever larger landscapes as critical habitat. NAHB urges the Service to withdraw the regulatory definition of "geographical areas occupied by the species" as being inconsistent with the statutory definition of "critical habitat" and contrary to Congress' intent. Instead, the Service should rely on the statutory definition, which is clear cut and easily understood.

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

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

## **2. Definition of Destruction or Adverse Modification of Critical Habitat [81 Fed. Reg. §7214 (February 11, 2016)]**

Under a different rulemaking, the Service recently finalized a new regulatory definition of the phrase "*destruction or adverse modification*" of critical habitat. The definition of "adverse modification" determines what types of land development or construction activities can occur within areas designated as unoccupied critical habitat. It has very real economic and legal implications for states, local governments, and private landowners whose property has been designated as critical habitat. A study of land values in northern California conducted by economists from the University of California Berkeley found that relative land values following a critical habitat designation declined over fifty percent (50%) as compared to land values prior to the critical habitat designation.<sup>8</sup>

The designation of critical habitat also has direct implications for the effectiveness of the Act in conserving listed species and their designated critical habitat. The Service's recently finalized definition of "adverse modification" is significantly different from the prior regulatory definition that was invalidated by the federal courts.<sup>9,10</sup> Under these two rulings, the federal courts found that the prior regulatory definition of "adverse modification" was insufficient under the Act, since it required a proposed activity to diminish of the value of critical habitat to such degree that both the survival and recovery of a listed species were at risk. In their rulings the federal courts stated such a regulatory definition of "adverse modification" focused too heavily on the potential impacts to a species survival and not enough focus on the ultimate recovery of the species. NAHB and many other stakeholders believe the federal courts that invalidated the prior regulatory definition of "adverse modification" failed to consider Congress' clear intent that the role of critical habitat is to focus on the immediate survival needs of the species and not the long term recovery needs of the species.

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<sup>8</sup> Affhammer, M., Oren, M. and Sunding D. (2009) The Economic Impact of Critical Habitat Designation: Evidence from the Markets for Vacant Land, *Journal of Law & Economic*.

<sup>9</sup> *Sierra Club v. Fish and Wildlife Service*, 245 F.3d 434 (5<sup>th</sup> Cir 2001)

<sup>10</sup> *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, No. 03-35279 and *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F. 3d (5<sup>th</sup> Cir. 2001)

Despite this admonition, the Service's new regulatory definition of "adverse modification" also includes a recovery standard, as it includes a modified regulatory definition of "conservation." The inclusion of a recovery standard within the regulatory definition of "adverse modification" significantly expands the Service's existing regulatory and permitting authority over private landowners. Prior to the revised "adverse modification" definition, the Service was required under the ESA Section §4(f) to prepare recovery plans for each listed species. However, the Service and federal courts had taken identical positions that the specific contents of recovery plans were not binding on either the Service or private landowners. In fact, the Service has repeatedly stated that private landowners have no obligation to implement the contents of recovery plans under either the Section 7 consultation process or Section 10 Incidental Take Permitting process. Furthermore, federal courts have repeatedly ruled that recovery plans are non-enforceable planning documents and cannot be used to compel either the Service or private landowners to take specific actions for a species' recovery.<sup>11</sup>

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

NAHB is not alone in expressing strong opposition to the Service's revised "adverse modification" definition. Several states, key state agencies, and other stakeholders have also cautioned against the revision. According to comments submitted by the State of Idaho, for example, the Service's revised regulatory definition, "*makes a fundamental change in the interpretation of the Endangered Species Act, whereby the Services are enlisting the non-federal (i.e., private) landowners into participating in species recovery, which currently is a federal agency responsibility.*"<sup>12</sup> NAHB agrees. NAHB urges the Service to withdraw the recently revised definition of "adverse modification" as being inconsistent with the intent of the ESA and placing overly burdensome requirements on affected states, local governments and private landowners.

### **3. Final Rule Economic Impact Analyses under the Endangered Species Act [78 Fed. Reg. §53058 (August 28, 2013)]**

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<sup>11</sup> See *Defenders of Wildlife v. Lujan* 792 F. Supp. 834 (D.D.C. 1992)

<sup>12</sup> See comments submitted by Mr. Patrick Seymour, Endangered Species Program Manager, Idaho Department of Lands. October 3, 2014. Docket Number FWS-R9-ES-2011-0072

In 2013, the Service issued a final rule clarifying how and when the Service will consider economic impacts stemming from the designation of critical habitat.<sup>13</sup> The final rule codifies changes to the existing regulations found at 50 CFR 424.19 governing the process the Service follows during the critical habitat designation and the preparation of the statutorily required economic analysis under the ESA §4(B)(2). Importantly, under the final rule, that Agency announced its decision to officially abandon the “co-extensive” approach, which allowed the Service to consider all the economic costs impacting landowners in areas designated as critical habitat, regardless of whether those costs could be attributable to the species listing. Instead, the final rule lets the Agency only consider the “incremental costs” resulting from a critical habitat designation.<sup>14</sup> Under an incremental approach, the Service excludes any economic costs that can be attributed to the species’ listing rather than the designation of critical habitat. NAHB strongly opposes the use of the “incremental cost” approach because it allows the Service to avoid considering the full costs of critical habitat designation and thereby reduces the likelihood that areas may be excluded from the final critical habitat designation because of the economic impact.

The Service’s requirement to perform an economic analysis when designating critical habitat is vital for NAHB’s membership for two reasons: (1) it represents the only time the Service is required to quantify and report the regulatory costs the ESA imposes upon landowners; and (2) based on the results of the economic analysis, the Service may decide to exclude specific areas from the final critical habitat designation. Specifically, Congress provided the Service with the discretion under ESA§4(b)(2) to “exclude any particular area from a final critical habitat designation if the costs/impacts (i.e., economic, national security, policy issues) outweigh the benefits to the species.” The only limitation placed on the use of this discretion is if, upon the Service’s discretion to exclude geographical areas from a final critical habitat designation is based on the “best scientific and commercial data available,” the Service determines failure to designate a specific area as critical habitat will result in the extinction of the species as a whole.<sup>15</sup>

The Service, therefore, enjoys broad statutory discretion to reduce the geographic size of critical habitat designations. Under the previous administration, NAHB noted significant reductions (typically 40% to 60%) between “proposed” and “final” critical habitat designations based in part upon the results of the 4(b)(2) economic analyses. One example was the *California Red Legged Frog*, where the Service had originally designated over 737,000 acres as critical habitat, however, following the economic analysis, nearly 40% (283,000 acres) of the proposed critical habitat designation was excluded at a cost savings of nearly \$400 million to private landowners.<sup>16</sup> NAHB is concerned that similar exclusions from future critical habitat designations will be significantly curtailed under the co-extensive approach. NAHB urges the Service to revisit the changes to its regulations found at 50 CFR 424.19(a) and instead follow a co-extensive approach when conducting the required economic analysis.

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<sup>13</sup> 78 Fed. Reg. §53058 (August 28, 2013)

<sup>14</sup> 78 Fed. Reg. §53076 (August 28, 2013) 50 C.F.R. §424.19(a)

<sup>15</sup> 16 U.S.C. §1533(b)(2)

<sup>16</sup> 71 Fed. Reg. §§19244-19346 (April 13, 2006)

## **Category B: Service Guidance Documents**

### **1. Policy Regarding Implementation of Section 4(b)(2) of the ESA [81 Fed. Reg. §7226 March 14, 2016]**

The Service's purpose in issuing the 4(b)(2) policy was to help implement the revised regulations under 50 CFR §424.19 governing how the Service performs the required economic impact analyses on all proposed critical habitat designations. Under this revised policy, the Service states that, consistent with the revised regulations, the Service will base its discretionary authority to exclude a given area from a final critical habitat designation upon on the results of "the probable incremental economics of designating a particular area as critical habitat."<sup>17</sup> NAHB strongly opposed the use of the incremental approach when it was proposed by the Service.<sup>18</sup> Specifically, NAHB believes the incremental approach effectively (and inappropriately) shifts the economic costs of critical habitat designations to the ESA listing process where the Service is prohibited under the statute from considering any economic costs.<sup>19</sup>

Ultimately, the Service's use of the incremental approach will result in fewer costs being attributed to final critical habitat designation, which will greatly reduce the likelihood of the Service using its discretionary statutory authority under ESA 4(b)(2) to exclude any given area from a final critical habitat designation. Instead, NAHB supports the co-extensive approach, which requires the Service to consider both the direct and indirect costs attributable to a critical habitat designation. NAHB believes the co-extensive approach, which the Service has successfully utilized in the past, better reflects the true costs of proposed critical habitat designations and provides the Service with a more accurate picture of the potential economic impact of any final critical habitat designation. With a more accurate understanding of the potential economic costs resulting from a final critical habitat designation, NAHB believes the Service will be far more likely to use its statutory discretion under 4(b)(2) to exclude areas from a final designation. NAHB urges the Service to withdraw this policy regarding the 4(b)(2) process as well as revise the current regulations found at 50 CFR §424.19 to require the Service use an co-extensive approach when determining the economic costs resulting from a critical habitat designation.

### **2. Final Policy on Interpretation of the Phrase "Significant Portion of Its Range" under the ESA [79 Fed. Reg. §37578 (July 1, 2014)]**

Under the Service's final "Significant Portion of Its Range" (SPR) policy, issued in 2014, the Service creates an independent basis for protecting a "species" across its entire range (e.g., species, subspecies, or distinct population segment "DPS").<sup>20</sup> However, unlike the traditional ESA listing process, where the Service makes a determination that threats impacting a species occur across the

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<sup>17</sup> 77 Fed. Reg. §27057 (May 12, 2014)

<sup>18</sup>See NAHB's comments on the Service's Revisions to the Regulations for Impact Analyses of Critical Habitat; Proposed Rule Docket Number FWS-R9-ES-2011-0104

<sup>19</sup> 16 U.S.C. §1533

<sup>20</sup> 76 Fed. Reg. §77002 (December 9, 2011)

species' entire range, the SPR policy allows the Service to determine a species warrants ESA protections based upon threats that only occur within a portion of that species' range, provided the Service concludes those threats are so "significant" as to warrant protecting the species' range-wide. NAHB's comments on the proposed SPR policy praised the Service for established a high-bar for triggering the "significance test" under the SPR policy.<sup>21</sup> However, the Service's final SPR policy still creates inequalities for landowners whose property is located outside a species' SPR, but still within that species range. Specifically, the Service's final SPR policy would impose all of the ESA restrictions and permitting obligations upon these landowners despite the fact their activities pose no threats to the species or its habitat.<sup>22</sup> Given that any species' range can extend over several states or even span across international boundaries, the potential impact of the Service's final SPR policy becomes clearer.

NAHB urges the Service to revisit its final SPR policy to identify existing flexibilities under the Act that would allow it to avoid imposing the ESA's restrictions across the entire range of a species. For example, §4(c)(1) of the statute allows the Service to identify specific portions of a species' range that are experiencing threats that should be subject to the ESA's statutory and regulatory protections while allowing similar actions occurring in areas outside of the SPR to be unregulated. NAHB had urged the Service to utilize its authority under §4(c)(1) to avoid having to impose the ESA's regulatory restrictions upon states, local governments, and landowners whose activities occur outside of areas identified by the Service as SPR for a given species. The Service previously had rejected NAHB's suggestion based upon two court rulings that directed the Service to apply the ESA protections range wide.<sup>23</sup> NAHB believes Congress's recognition under §4(c)(1) that a species' entire habitat range need not be protected under the Act should be acknowledged by the Service under the final SPR policy. Furthermore, the Service has selectively applied the ESA's restrictions and protections to only those areas where the species actually experienced threats in past species listings (e.g., American Alligator, Grizzly Bear, Marble Murrelet), so there is precedent in continuing this practice.. Finally, allowing the Service to impose the ESA's restrictions upon landowners whose properties are located outside of SPR areas and whose activities have no detrimental impact upon the species seems counter to the intent of E.O. 13777. NAHB urges the Service to revise the final SPR policy.

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<sup>21</sup> See NAHB's comments on Service's draft SPR policy, docket number FWS-R9-ES-2011-0031, submitted March 8, 2011.

<sup>22</sup> 76 Fed. Reg. §76990 (December 9, 2011)

<sup>23</sup> See court decisions *Defenders of Wildlife v. Salazar* and *WildEarth Guardians v. Salazar*

## Conclusion

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

Sincerely,

A handwritten signature in black ink, appearing to read "Susan Asmus". The signature is fluid and cursive, with the first name "Susan" and last name "Asmus" clearly distinguishable.

Susan Asmus, Senior Staff Vice President