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MEMORANDUM

**FROM: KAREN BUDD-FALEN
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DATE: MARCH 15, 2016

**RE: MAJOR REGULATORY EXPANSION OF ESA LISTING AND
CRITICAL HABITAT DESIGNATIONS**

While private property owners were vehemently protesting the EPA's expansion of jurisdiction under the Clean Water Act, the U.S. Fish and Wildlife Service and NOAA-Fisheries (collectively "FWS") were bit-by-bit expanding the federal government's overreach on private property rights and federal grazing permits through the Endangered Species Act ("ESA"). This expansion is embodied in the release of four separate final rules and two final policies that the FWS admits will result in listing more species and expanding designated critical habitat.

In order to understand the expansiveness of the new policies and regulations, a short discussion of the previous regulations may help. Prior to the Obama changes, a species was listed as threatened or endangered based upon the "best scientific and commercial data available."¹ With regard to species that are potentially threatened or endangered "throughout a significant portion of its range" but not ALL of the species' range, only those species within that "significant portion of the range" are listed, not all species throughout the entire range.

Once the listing was completed, the FWS is mandated to designate critical habitat. Critical habitat is generally habitat upon which the species

¹ This discussion only includes requirements to which there have been changes in the last four years.

depends for survival. Importantly critical habitat can include both private and/or federal land and water. Critical habitat is to be based upon the “best scientific and commercial data available” and is to include the “primary constituent elements” (“PCEs”) for the species. PCEs are the elements the species needs for breeding, feeding and sheltering. Final critical habitat designations are to be published with legal descriptions so that private landowners would know whether their private property or water was within or outside designated boundaries. Critical habitat designations are also made with consideration of the economic impacts. Under the ESA, although the FWS cannot consider the economic impacts of listing a species, all other economic impacts are to be considered when designating critical habitat, and if the economic impacts in an area are too great, the area could be excluded as critical habitat as long as the exclusion did not cause extinction of the species.

With regard to the critical habitat designation itself, critical habitat determinations were made in two stages. First, the FWS considers the currently occupied habitat and determine if that habitat (1) contains the PCEs for the species and (2) is sufficient for protection of the species. Second, the FWS looks at the unoccupied habitat for the species and makes the same determinations, i.e., (1) whether areas of unoccupied habitat contain the necessary PCEs and (2) if including this additional land or water as critical habitat was necessary for protection of the species. The FWS then considers whether the economic costs of including some of the areas are so high, that the areas should be excluded from the critical habitat designation. In simplest terms, the FWS would weigh or balance the benefits of designation of certain areas of critical habitat against the regulatory burdens and economic costs of designation, and could exclude discreet areas from a critical habitat designation so long as exclusion did not cause species extinction. This was called the “exclusion analysis.”

Starting with a new 2012 rule and extending to the 2015 rules and policy, those considerations have all changed, and in fact the FWS has admitted that the new rules will result in more land and water being included in critical habitat designations. The first major change is the inclusion of “the principals of conservation biology” as part of the “best scientific and commercial data available.” Conservation biology was not created until the 1980s and has been described by some scientists as “agenda-driven” or “goal-oriented” biology. See Final Rule, Implementing Changes to the Regulations for Designating Critical Habitat, February 11, 2016.

Second, the new Obama policy has changed regarding a listing species “throughout a significant portion of its range.” Now rather than listing species within the range where the problem lies, all species throughout the entire range will be listed as threatened or endangered. See Final Policy, Interpretation of the Phrase “Significant Portion of its Range,” July 1, 2014.

Third, based upon the principals of conservation biology, including indirect or circumstantial information, critical habitat designations will be greatly expanded. Under the new regulations, the FWS will initially consider designation of both occupied and unoccupied habitat, including habitat with POTENTIAL PCEs. In other words, not only is the FWS considering habitat that is or may be used by the species, the FWS will consider habitat that may develop PCEs sometime in the future. There is no time limit on when such future development of PCEs will occur, or what types of events have to occur so that the habitat will develop PCEs. The FWS will then look outside occupied and unoccupied habitat to decide if the habitat will develop PCEs in the future and should be designated as critical habitat now. The FWS has determined that critical habitat can include temporary or periodic habitat, ephemeral habitat, potential habitat and migratory habitat, even if that habitat is currently unusable by the species. See Final Rule, Implementing Changes to Regulations for Designating Critical Habitat, February 11, 2016.

Fourth the FWS has also determined that it will no longer publish the text or legal descriptions or GIS coordinates for critical habitat, rather it will only publish maps of the critical habitat designation. Given the small size of the Federal Register, I do not think this will adequately notify landowners whether their private property is included or excluded from a critical habitat designation. See Final Rule, “Revised Implementing Regulations for Requirements to Publish Textual Description of Boundaries of Critical Habitat,” May 1, 2012.

Fifth, the FWS has significantly limited what economic impacts are considered as part of the critical habitat designation. According to a Tenth Circuit Court of Appeals decision, although the economic impacts are not to be considered as part of the listing process, once a species was listed, if the FWS could not determine whether the economic impact came from listing OR critical habitat, the cost should be included in the economic analysis. In other words, only those costs that were solely based on listing were excluded from the economic analysis. In contrast, the Ninth Circuit Court took the opposite view and determined that only economic costs that were SOLELY attributable to

critical habitat designations were to be included. Rather than requesting the U.S. Supreme Court make a consistent ruling among the courts, the FWS simply recognized this circuit split for almost 15 years. However, on August 28, 2013, the FWS issued a final rule that determined that the Ninth Circuit Court was “correct,” and regulatorily determined that ONLY economic costs attributable SOLELY to the critical habitat designation would be analyzed. This rule substantially reduces the determination of the cost of critical habitat designation because the FWS can claim that almost all costs are based on the listing of the species because if not for the listing, there would be no need for critical habitat. See Final Rule, Revisions to the Regulations for Impact Analysis of Critical Habitat, August 28, 2013.

Sixth, the FWS has determined that while completing the economic analysis is mandatory, the consideration of whether habitat should be excluded based on economic considerations is discretionary. In other words, under the new policy, the FWS is no longer required to consider whether areas should be excluded from critical habitat designation based upon economic costs and burdens. See Final Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, February 11, 2016.

The problem with these new rules is what it means if private property (or federal lands) are designated as critical habitat or the designated habitat only has the potential to develop PCEs. Even if the species is not present in the designated critical habitat, a “take” of a species can occur through “adverse modification of critical habitat.” For private land, that may include stopping stream diversions because the water is needed in downstream critical habitat for a fish species, or that haying practices (such as cutting of invasive species to protect hay fields) are stopped because it will prevent the area from developing PCEs in the future that may support a species. It could include stopping someone from putting on fertilizer or doing other crop management on a farm field because of a concern with runoff into downstream designated habitat. Designation of an area as critical habitat (even if that area does not contain PCEs now) will absolutely require more federal permitting (i.e. section 7 consultation) for things like crop plans, or conservation plans or anything else requiring a federal permit. In fact, one of the new regulations issued by Obama concludes that “adverse modification of critical habitat” can include “alteration of the quantity or quality” of habitat that precludes or “significantly delays” the capacity of the habitat to develop PCEs over time. See Final Rule, “Definition of Destruction or Adverse Modification of Critical Habitat,” February 11, 2016.

While the agriculture community raised a huge alarm over the “waters of the U.S.,” the FWS was quietly implementing these new rules, in a piecemeal manner, without a lot of fanfare. Honestly I think these new habitat rules will have as great or greater impact on the private lands and federal land permits as does the Ditch Rule and I would hope that the outcry from the agriculture community, private property advocates, and our Congressional delegations would be as great.

Should you have any questions, please do not hesitate to contact me.