U.S. House of Representatives
Committee on Natural Resources
Oversight Hearing on "Recent Changes to Endangered Species Critical Habitat Designation and Implementation"
Longworth House Office Building Room 1324
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My name is Karen Budd-Falen. I grew up as a fifth generation rancher and have an ownership interest in a family owned ranch west of Big Piney, Wyoming. I am also an attorney emphasizing private property and environmental litigation (including the Endangered Species Act). I represent the citizens, local businesses, private property owners and rural counties and communities who will bear the brunt of these new critical habitat regulations and the significant litigation costs that will follow.

The U.S. Fish and Wildlife Service ("FWS") characterizes the purpose of the Endangered Species Act ("ESA") "to protect and recover imperiled species and the ecosystems upon which they depend." According to the FWS website, last visited on April 4, 2016, there are a total of 2258 plant and animal species on the threatened or endangered species list. Specifically there are 898 U.S. plants, 694 U.S. animals, 3 foreign plants and 663 foreign animals on the list. Of these, only 791 currently have designated critical habitat. There are also 59 species on the "candidate species" list; 72 more species proposed to be listed; and 1377 species that have been petitioned for listing, uplisting or critical habitat designation and the petition is under review. On the pending petitions, the Center for Biological Diversity ("CBD") is responsible for filing 44 of them including 583 species; WildEarth Guardians ("WEG") is responsible for filing 32 petitions including 716 species, and other environmental groups such as the Defenders of Wildlife, Natural Resources Defense Council, Friends of Animals and others have filed 31 petitions including 44 species. Although the mega-species settlement agreement of July 12, 2011 was supposed to curb listing petitions to allow the FWS to catch-up on its backlog, just since the mega-species settlement agreement was signed, 65 new listing petitions have been filed including 135 species. Since the mega species settlement agreement was signed on July 12, 2011, the CBD has filed 24 listing petitions including 92 species, and the WEG has filed 12 listing petitions including 13 species.

Although the language of the ESA has not significantly changed since 1979, the totality of the new regulatory mandates for critical habitat designation and management has significantly expanded the FWS's jurisdiction over private property. While many members of Congress and private property owners were vehemently protesting the Environmental Protection Agency's expansion of jurisdiction under the Clean Water Act with the "Ditch Rule," the FWS and NOAA-Fisheries (collectively "FWS") were bit-by-bit expanding the federal government's overreach on private property rights and federal land uses through the new critical habitat and "adverse modification" regulations. 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. According to the FWS, all of these new requirements conform to President Obama's Executive Order 13563, "Improving Regulation and Regulatory Review."

I. OVERVIEW OF THE ENDANGERED SPECIES ACT PRE-2012, 2013, 2014, 2015 AND 2016 REGULATIONS

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted." See Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978). The goal of the Act is "to provide for the conservation, protection, restoration, and propagation of species of fish, wildlife, and plants facing extinction." Wyoming Farm Bureau Federation v. Babbitt, 199 F.3d 1224, 1231 (10th Cir. 2000), citing S. Rep. No. 93-307, at 1 (1973) and 16 U.S.C. § 1531(b). Under the ESA, a threatened species means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant part of its range, see 16 U.S.C. § 1532 (20), and an endangered species means any species which is in danger of extinction throughout all or a significant portion of its range other than insects that constitute a pest whose protection would present an overwhelming and overriding risk to man. 16 U.S.C. § 1532(6).

Anyone can petition the FWS or NOAA to have a species listed as threatened or endangered. 16 U.S.C. § 1533. Listing decisions are to be based on the "best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). However, there is no requirement that the federal government actually count the species populations prior to listing. There are no economic considerations included as part of the listing of a threatened or endangered species.

The listing process is also based on very specific time frames as set forth in the Act. If the FWS fails to meet any of these time frames, litigation can occur. See Exhibit 1. In the listing and critical habitat designation process, there are eight different points at which federal court litigation can be filed.

Once a species is listed as threatened or endangered, prohibitions against "take" apply. 16 U.S.C. § 1540. "Take" means to harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect, or attempt to engage in such conduct. 16 U.S.C. § 1532(19). "Harm" within the definition of "take" means an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing breeding, sheltering or feeding. 50 C.F.R. § 17.3. Harass in the definition of "take" means intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering. 50 C.F.R. § 17.3. "Take" may include critical habitat modification. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995). If convicted of "take," a person can be liable for civil penalties of $10,000 per day and possible prison time. 16 U.S.C. § 1540(a), (b).

Once a species is listed as threatened or endangered, the FWS or NOAA must "to the maximum extent prudent and determinable," concurrently with making a listing determination, designate any habitat of such species to be critical habitat. Id. at § 1533(a)(3). By definition, critical habitat ("CH") are "specific areas" see 16 U.S.C. § 1532(5)(A) and must be "defined by specific limits using reference points and lines found on standard topographic maps of the area." 50 C.F.R. § 424.12(c); see also § 424.16 (CH must be delineated on a map). For "specific areas within the geographical area occupied by the [listed] species," the FWS may designate CH, provided such habitat includes the species' "primary constituent elements ("PCEs") which are the 1) "physical or biological features;" 2) that are "essential to the conservation of the species;" and 3) "which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(I); 50 C.F.R. § 424.12(b).

CH must also be designated on the basis of the best scientific data available, 16 U.S.C. § 1533(b)(2), after the FWS considers all economic and other impacts of proposed CH designation. New Mexico Cattle Growers Assoc. v. United States Fish and Wildlife Service, 248 F.3d 1277 (10th Cir. 2001) (specifically rejecting the "baseline" approach to economic analyses) but see Arizona Cattle Growers Association v. Salazar, 606 F.3d 1160 (9th Cir. 2010) (adopting the baseline or incremental impacts approach). CH may not be designated when information sufficient to perform the required analysis of the impacts of the designation is lacking. 50 C.F.R. § 424.12(a)(2). The FWS may exclude any area from CH if it determines that the benefits of such exclusion outweigh the benefits, unless it determines that the failure to designate such area as CH will result in extinction of the species concerned. 16 U.S.C. § 1533(b)(2). This is called the "exclusion analysis."

Once a species is listed, for actions with a federal nexus, ESA section 7 consultation applies. Section 7 of the ESA provides that "[e]ach Federal agency [must] in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical . . . ." 16 U.S.C. § 1536(a)(2). The first step in the consultation process is to name the listed species and identify CH which may be found in the area affected by the proposed action. 50 C.F.R. § 402.12(c-d). If the FWS or NOAA determines that no species or CH exists, the consultation is complete, otherwise, the FWS must approve the species or habitat list. Id. Once the list is approved, the action agency must prepare a Biological Assessment or Biological Evaluation ("BA"). Id. The contents of the BA are at the discretion of the agency, but must evaluate the potential effects of the action on the listed species and critical habitat and determine whether there are likely to be adverse effects by the proposed action. Id. at § 402.12(a, f). In doing so, the action agency must use the best available scientific evidence. 50 C.F.R. § 402.14(d); 16 U.S.C. §1536(a)(2). Once complete, the action agency submits the BA to the FWS or NOAA. The FWS or NOAA uses the BA to determine whether "formal" consultation is necessary. 50 C.F.R. § 402.12(k). The action agency may also request formal consultation at the same time it submits the BA to the FWS. Id.

at § 402.12(j-k). During formal consultation, the FWS will use the information included in the BA to review and evaluate the potential effects of the proposed action on the listed species or CH, and to report these findings in its Biological Opinion ("BO"). 50 C.F.R. § 402.14(g-f). Unless extended, the FWS or NOAA must conclude formal consultation within 90 days, and must issue the BO within 45 days. Id. at § 402.14(e); 16 U.S.C. § 1536(b)(1)(A).

If the BO concludes that the proposed action will jeopardize any listed species or adversely modify critical habitat, the FWS's BO will take the form of a "jeopardy opinion" and must include any reasonable and prudent alternatives which would avoid this consequence. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h). If the BO contains a jeopardy opinion with no reasonable and prudent alternatives, the action agency cannot lawfully proceed with the proposed action. 16 U.S.C. § 1536(a)(2). If the BO does not include a jeopardy opinion, or if jeopardy can be avoided by reasonable and prudent measures, then the BO must also include an incidental take statement ("ITS"). 16 U.S.C. § 1536(b)(4); 50 C.F.R.§ 402.14(I). The ITS describes the amount or extent of potential "take" of listed species which will occur from the proposed action, the reasonable and prudent measures which will help avoid this result, and the terms and conditions which the action agency must follow to be in compliance with the ESA. Id.; see Bennett v. Spear, 520 U.S. 154, 170 (1997). See Exhibit 2.

While most private property owners do not think that the activity on their private property has a "federal nexus" to trigger an ESA section 7 consultation, the courts have held otherwise. For example, the courts require FEMA to complete section 7 consultation prior to providing flood insurance; U.S. Department of Agriculture Farm Service Agency to complete section 7 consultation related to farm conservation measures, issuing farm operating loans and completing nutrient management plans; Bureau of Reclamation when developing flood control plans, and others.

Once a species is listed, ESA section 10 also applies on private land, even if there is no federal nexus. In order to avoid the penalties for "take" of a species, and still allow the use and development of private land, the ESA also authorizes the FWS to issue ITSs to private landowners upon the fulfillment of certain conditions, specifically the development and implementation of habitat conservation plans ("HCPs"). 16 U.S.C. § 1539. A HCP has to include (a) a description of the proposed action, (b) the impact to the species that will result from the proposed action, (c) the steps that the applicant will take to minimize any negative consequences to the listed species by the proposed action, (d) any alternatives the applicant considered to the proposed action and why those alternatives were rejected, and (e) any other measures that the FWS may deem necessary for the conservation plan. 16 U.S.C. § 1539(a)(2)(A). Once an HCP is presented, the FWS must make certain findings before it can issue an ITS. Those findings include (a) that the taking of the species is incidental to the proposed action, (b) that the proposed action implements a lawful activity, (c) that the applicant, to the maximum extent possible, will minimize and mitigate any negative impacts to the listed species, (d) that the HCP is adequately funded, (e) that the taking will not appreciably reduce the survival and recovery of the species, and (f) any other measures deemed necessary will be carried out. 16 U.S.C. § 1539(a)(2)(B). As a practical matter, mitigation

means that the applicant will either fund programs supporting the listed species or will provide or set aside land. See Exhibit 3.

II. CHANGES CAUSED BY THE FOUR NEW REGULATIONS AND TWO NEW POLICIES PROMULGATED IN 2012, 2013, 2014, 2015 AND 2016

As stated above, according to the FWS, the new critical habitat regulations were adopted to comply with President Obama's Executive Order 13563, "Improving Regulation and Regulatory Review" ("E.O. 13563"). That Executive Order, signed on January 18, 2011, "supplement[s] and reaffirm[s]" the requirements of Executive Order 12866 dated September 30, 1993. That E.O. stated that:

> each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

Based upon the principals in the Obama Executive Order, each federal agency was to present a list of proposed regulatory reforms to the Office of Information and Regulatory Affairs within 120 days of the signing of E.O. 13563.

While the FWS and NOAA may have complied with the 120 day requirement in the Executive Order, I do not believe that the rest of the Order presented any guidance to the regulatory changes in critical habitat designation and management.

First, the FWS and NOAA issued four new regulations and two new policies in the space of four and ¼ years. These new regulations all concern the same subject: critical habitat designations. These new regulations were issued as draft rules at different times, making it extremely difficult for the public to understand the regulatory changes in their totality. Certainly issuing rules and policies in a piecemeal fashion cannot be said to provide adequate public notice and understanding of the working of the FWS and NOAA in implementing the ESA. In fact Executive Order 13563 directs the FWS and NOAA to consider the costs of the "cumulative regulations," see (2), but this cumulative cost of four new regulations and two new policies has not been assessed.

The E.O. also commands the agencies to "tailor its regulations to impose the least burden on society," id., and "to the maximum extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt." Id. (5). As described below, I do not believe that any of these requirements have been—or can be—met.

Starting with a new 2012 rule and extending to the 2015 rules and policy, designation of critical habitat, including the amount of both private land and federal land that will be included as, and managed for, critical habitat have changed, and 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 can also look outside occupied and unoccupied habitat to decide if the potential 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.

Seventh, the problem with these new rules is what it means if private property (or federal lands) are designated as critical habitat even if 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 (including the 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 believe 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.