A F & P A®

American Forest & Paper Association

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August 15, 2006

Via e-mail

Robin Heard
Director, Easement Programs Division
Natural Resources Conservation Service
P.O. Box 2890
Washington, D.C. 20013-2890

Dear Ms. Heard:

Re: Interim Final Rule - Healthy Forests Reserve Program, 71 Fed. Reg. 28547 (May 17, 2006)

Please accept the following comments by the American Forest & Paper Association (AF&PA) on the interim final rule for the Healthy Forests Reserve Program, 71 Fed. Reg. 28547 (May 17, 2006). AF&PA is the national trade association of the forest, pulp, paperboard, and wood products industry. AF&PA represents approximately 200 member companies and related trade associations (whose memberships are in the thousands) which grow, harvest and process wood and wood fiber; manufacture pulp, paper and paperboard products from both virgin and recovered fiber; and produce solid wood products. AF&PA member companies, as a condition of membership, must also commit to conduct their business in accordance with the principles and objectives of the Sustainable Forestry Initiative® ("SFI") program. The 2005-2009 SFI® Standard requires participants to "supply regionally appropriate information or services to forest landowners" on several topics, including "conservation of critical wildlife habitat, threatened and endangered species, and critically imperiled and imperiled species and communities."

Congress established the Healthy Forests Reserve Program (HFRP) in Title V of the Healthy Forests Restoration Act of 2003, 16 U.S.C. §§ 6571-6578, and authorized funding for fiscal years 2004 through 2008. The HFRP is a voluntary program for the purpose of restoring and enhancing forest ecosystems to: 1) promote the recovery of threatened and endangered species, 2) improve biodiversity; and 3) enhance carbon sequestration. 16 U.S.C. § 6571(a).

The HFRP offers three enrollment options: 1) a 10-year cost-share agreement; for which the landowner may receive 50 percent of the cost of the approved conservation practices; 2) a 30-year easement, for which the landowner may receive 75 percent of the market value of the enrolled land plus 75 percent of the cost of the approved conservation practices; or 3) an easement of not more than 99-years, for which landowners may receive 100 percent of the

easement value of the enrolled land plus 100 percent of the cost of the approved conservation practices.

Comment 1. Why Single Out Clearcutting? The preamble to the interim rule singles out clearcutting as not compatible with the enrollment of land in the HFRP where it is conducted "for the purpose of achieving economic gain at the expense of the forest ecosystem or essential wildlife habitat." 71 Fed. Reg. at 28551. We question why clearcutting, a silvicultural practice long recognized by leading authorities as essential in certain circumstances, is singled out as incompatible. We have attached Appendix 1 to our comments listing some references supporting and explaining proper use of cleacrcutting.

The qualifying language is of little help, since it is open to considerable interpretation. For example, suppose the financing of the project relies in part on revenue from managing the forest resource and proper management demands some clearcutting. This could easily be viewed as inappropriate "economic gain" by NRCS or a court at some point in the future. A ban on clearcutting in this situation would have an adverse affect on long-term financing, which in turn would affect the viability of the project.

This is not to advocate wholesale clearcutting be allowed on HFRP projects. However, controlled clearcutting can be conducted in a manner that preserves the essential purposes of the project, while properly managing the forest for the benefit of threatened and endangered species, biodiversity or carbon sequestration. There is no reason to tie the hands of the on-the-ground manager with ambiguous, one-size-fits-all guidance on issues that should be dealt with clearly on a site-specific basis.

Comment 2. Embrace Cooperative Conservation. President Bush, in Executive Order 13352 (August 26, 2004), directed federal agencies, "to the extent permitted by law and subject to the availability of appropriations and in coordination with each other as appropriate," to "implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation." Congress established the HFRP on precisely the same principle – "The Secretary of Agriculture shall carry out the healthy forests reserve program in coordination with the Secretary of the Interior and the Secretary of Commerce." 16 U.S.C. § 6571(b). The HFRP requires substantial cooperation between NRCS, the Fish and Wildlife Service and the National Marine Fisheries Service. NRCS recognizes this requirement in the preamble to the interim rules. Nonetheless, in the over two and one-half years since enactment of the law and in the two years since issuance of the executive order, there should have been considerably greater "coordination" among the three agencies.

We recognize the importance of NRCS being the final decisionmaker with respect to the program. However, "cooperative coordination" is critical if this program is to provide the benefits to landowners, and the accompanying benefits to species. NRCS recognizes the need for incidental take protection under the two relevant provisions of the Endangered Species Act, sections 7(b)(4) and 10(a)(1), in the preamble. While NRCS offers landowners the use of any incidental take statement it might obtain in an ESA consultation, the preamble discussion lacks a sense of agency cooperation in developing an approach that would incorporate the safe harbor concept with the incidental take statement.

Essential terms of Safe Harbor Agreements or Candidate Conservation Agreements can be developed in coordination by all agencies prior to the announcement of a specific program sign-up and can included in the enrollment specifications. Required consultations for any specific enrollment might occur before or during the enrollment period, and any terms and conditions resulting from the biological opinion could be incorporated in habitat restoration plans that must accompany an enrollment. With coordination and section 7 consultation having occurred as early in the process as possible, any necessary conditions can be included in the restoration plans instead of requiring their amendment. We urge NRCS to pursue mutual agreements with the Fish and Wildlife Service and the National Marine Fisheries Service to establish guidelines in advance that will assure appropriate cooperation in processing landowner applications.

Comment 3. Assistance for Landowners. The law specifies that the restoration plan be developed jointly by NRCS and the landowner, "in coordination with the Secretary of the Interior." 16 U.S.C. § 6573(a). The interim rule, 625.12, provides little explanation how this "coordination" will occur. This seems to us to be an excellent opportunity to combine the directive in section 506(a), 16 U.S.C. § 6576(a), to the Secretary of Agriculture to "make available to the landowner safe harbor or similar assurances and protection" and achieve the President's goal of cooperative conservation. Instead, NRCS has described the availability of these assurances and protections under rule 625.10 entitled "Cost-share payments." No rule has a heading identifying these essential components nor does rule 625.12 specifically explain that ESA assurances and protections should be addressed in the development of the restoration plan. In contrast, the preamble to the interim rule does state that "NRCS will provide technical assistance to the HFRP program participant to enter into a Safe Harbor Agreement (SHA) with FWS or NMFS under section 10 of the ESA, 16 U.S.C. 1539." 71 Fed. Reg. at 28549. We urge NRCS to provide a similar assistance commitment *in the rules* and also to provide in the rules a clearer explanation how the agencies will cooperate to assure that landowners receive the proper assistance to include appropriate assurances and protections under the ESA in their restoration plans.

We note that while you included a reference to the National Marine Fisheries Service in 625.12(a), you refer only to the Fish and Wildlife Service in 625.12(c). While the law only refers to the Secretary of the Interior in section 503(a), common sense would indicate that both agencies have potential roles in development of restoration plans.

Section 505, 16 U.S.C. § 6575, directs NRCS to provide "technical assistance" to help landowners comply with the terms of their restoration plans. This statutory requirement does not seem to be addressed in the interim rule. The only reference to "technical assistance" is quoted above with regard to *developing* Safe Harbor Agreements, not implementing the restoration plan. Even though there are no existing plans at this time, there should be some indication how the agency will carry out this responsibility.

Comment 3. Confusion over Use of the Word "Consultation." NRCS defines the terms "consultation or 'consult with'" to mean basically to "talk things over" (with the ever-present declaration that NRCS has the final say). Use of this term, despite its use by Congress in section 507, raises confusion with the formal process of consultation under section 7 of the ESA. ESA consultation carries specific legal duties and can result in specific obligations and protections. Since it involves federal action, NRCS will be engaged in ESA consultation when

reviewing and approving restoration plans and enrollment, as you acknowledge in the preamble to the interim rule. We suggest that you use a word such as “confer” in place of “consult with” and provide the appropriate explanations in the definitions.

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Thank you for the opportunity to comment.

Very truly yours,

William R. Murray
Natural Resources Counsel

Attachment

Appendix 1 to Comments of AF&PA

1. **Society of American Foresters Council**. *Clearcutting: A Position of the Society of American Foresters.* September 23, 2002. Society of American Foresters [cited 29 June 2006] http://www.safnet.org/policyandpress/psst/clearcut1202.cfm.

The Society of American Foresters (SAF) is the national scientific and educational organization representing the forestry profession in the United States. In their position statement on clearcutting, SAF states:

> The clearcutting method of forest stand regeneration plays an important role in sustainable forest management and can be used effectively to produce desired forest conditions. It can be the best silvicultural method for regenerating shade-intolerant tree species, controlling forest insects and pathogens, and achieving other management objectives. As with any land management practice, it can have undesirable effects if it is improperly implemented or applied in the wrong location.
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> Situations where clearcutting is likely to be an appropriate regeneration method include:
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> - forest stands consisting primarily of suppressed or deformed trees of low value or desirability;
> - stands that are suffering damage due to insects, disease, windstorms, or fire, (Tainter et al. 1996);
> - areas where regenerating shade-intolerant tree species is an important management objective (Hicks 1998, Alexander 1986, Benzie 1977);
> - areas where a management objective is to increase the abundance of ecotones (i.e., edge habitat) or early successional habitat to support such species as bobwhite, woodcock, songbirds, ruffed grouse, and deer; (Bolen et al. 1995); and
> - areas where large-scale natural disturbances such as hurricanes, wildfires, or insect and disease outbreaks resulting in forest patches of at least several acres are the predominant processes of natural regeneration (Schmidt et al. 1984)."

Following are the full citations for the works citing by SAF in the above quotation:

Alexander, R.R. 1986. *Silvicultural systems and cutting methods for ponderosa pine forests in the front range of the central Rocky Mountains*. Gen. Tech. Report RM-128, US Dept. of Agriculture - Forest Service.

Benzie, J.W. 1977. *Manager's handbook for jack pine in the north central states*. Gen. Tech. Report NC-32, US Dept. of Agriculture - Forest Service.

Bolen, E.G., and W.L. Robinson. 1995. *Wildlife ecology and management*. 3rd ed. Prentice Hall, Englewood Cliffs, NJ.

Burns, R.M. and B.H. Honkala. 1990. *Silvics of North America*. Vols. 1 & 2. Agricultural Handbook 654, US Dept. of Agriculture - Forest Service.

Hicks, Jr., R.R. 1998. *Ecology and management of central hardwood forests*. Wiley, New York, NY.

Schmidt, D.M., D.G. Grimble, and J.L. Searcy. 1984. *Managing the spruce budworm*. Handbook No. 620, US Dept. of Agriculture - Forest Service.

Tainter, F.J., and F.A. Baker. 1996. *Principles of forest pathology*. John Wiley & Sons, New York, NY.

2. **Bonnicksen, PhD., Thomas.** "Nature's Clearcuts: Lessons from the Past." *Closer Look: An On the Ground Investigation of the Sierra Club's Book, Clearcut.* American Forest & Paper Association. 1994.

Prof. Bonnicksen states"

> Silvicultural clearcuts can approximate the effects of massive fires by also leaving behind remnants of the former forest, and by creating openings shaped to look as if they were formed by natural fires. The added cost of such clearcuts can be justified on public lands by the multiple values they provide."

> The best hope for America's forests rests on learning from the past and ensuring that professional foresters retain a complete set of silvicultural tools, including clearcutting, to apply what they learn.

3. **Smith, David M., Bruce C. Larson, Matthew J. Kelty, and P. Mark S. Ashton**. *The Practice of Silviculture: Applied Forest Ecology"* 9th Edition. New York, NY. John Wiley & Sons, Inc. 1997.

The professors state:

> Such simple kinds of stands are regenerated by true clearcutting, which simulated the natural catastrophic events that have led to regeneration of individual species that are shade-intolerant and exposure-tolerant.

> Clearcutting should also be seriously considered if the methods of partial cutting are substantially more costly or if this method provides the best means of replacinga poor stand with a good one."

> Clearcutting, instead of regeneration methods involving partial cutting, is logical when residual tress are not worthy of retention for further increase in value, source of seed, protection of the new crop, wildlife habitat, amenity, or other useful purposes.

4. **Michigan Department of Natural Resources.** *Questions and Answers about Clearcutting.* October 14, 2002. [cited 29 June 2006] http://www.michigan.gov/documents/IC4270_48581_7.pdf

The state DNR states:

> Clearcutting is used as a method of regenerating or rejuvenating certain kinds of trees that cannot tolerate shade.

5. **Belt, R.F, Kevin and Robert Campbell, R.F.** *The Clearcutting Controversy – Myths and Facts.* [cited 29 June 2006] http://www.wvu.edu/~agexten/forestry/clrcut.htm

The authors provide an historical perspective on term "clearcutting" and its use in silviculture. Among their observations on the role of this method:

- Modern, even-aged management is done to improve regeneration--actually planning for the future crop.
- Silvicultural clearcutting is both a harvest **and** a regeneration of the forest, and is done to **improve** future stand quality, growth, genetics, and species composition.
- In a clearcut stand of hardwoods, that regeneration is of excellent quality and species composition. The natural regeneration from clearcuts in West Virginia eventually ends up as some of the nation's finest quality hardwood timber.
- Clearcuts can actually be a part of sustainable forest management.
- Because a clearcut receives full sunlight, it actually provides a site for a huge number of sun-loving species to grow and thrive.
- …clearcuts **rearrange** habitat and wildlife population according to its age.
- A new clearcut is an excellent place for bear, deer, grouse, young turkey, or quail. As a clearcut ages and grows, it provides different structure and different browse and mast species suitable for different animals' habitat and food needs.

- …clearcutting can be used to improve forest health, forest productivity, and forest quality. Since clearcutting causes a timber stand to compete from ground level, the future stand will consist of the fastest-growing trees, the healthiest trees, the straightest and tallest trees, and the best quality trees. So long as a clearcut is done in conjunction with proper forestry practices and soil and water conservation practices, then that clearcut has been done with stewardship and sustainability in mind.