

## **Supplemental Findings and Recommendations for Issuance of a Section 10(a)(1)(A) Enhancement of Survival Permit for the Weyerhaeuser Company Candidate Conservation Agreement with Assurances for Fisher in Oregon**

The U.S. Fish and Wildlife Service (Service) developed a template Candidate Conservation Agreement with Assurances (CCA or Agreement) for the West Coast Distinct Population Segment (DPS) of the fisher (*Pekania pennanti*) in Oregon. The Service proposed to issue enhancement of survival (EOS) permits under the CCA, pursuant to section 10(a)(1)(A) and section 10(a)(2) of the Endangered Species Act of 1973, as amended (ESA). In order to receive a permit, each prospective enrollee submits to the Service a Federal Fish and Wildlife Permit application and agrees to implement the conservation measures identified in the template CCA, as well as an individual site plan for their enrolled lands. The Service also developed a draft Environmental Action Statement pursuant to the National Environmental Policy Act (NEPA) to address our Federal actions of issuance of the EOS permits associated with the CCA. The template CCA and the EAS were noticed for comment in the *Federal Register* (81 FR 15737; March 24, 2016). The Service finalized and signed the template CCA on June 20, 2018, after determining that permits under the CCA would meet the section 10(a)(1)(A) permit issuance criteria as set forth in 50 CFR § 17.32(d)(2). The Service analyzed the effects to fisher in a conference opinion (USFWS 2017), determined that issuance of future permits in the enrollment area would not jeopardize the continuing existence of fisher should they be listed, and, determined in a Findings document (USFWS 2018b) that adoption of the conservation measures contained in the template CCA would provide a net conservation benefit to fisher. We supplement the previous Findings document with the following that specifically addresses Weyerhaeuser Company's (WC) permit application.

WC submitted a permit application and site plan covering a total of about 647,190 acres that was announced in the Federal Register on July 3, 2019 (USFWS 2019) for adoption under the template CCA and made available for public comment for 30 days.

WC's site plan calls for ownership-specific measures to conserve fisher on their enrolled lands, including additional measures on about 53,645 acres they identified as being within the extant range of fisher. These measures are described below and further support our determination that the CCA provides a net conservation benefit to fisher. By the joint signing of the site plan, WC and the Service agree to implement the terms of the template CCA and the site plan, and form the basis for the Service to provide a section 10(a)(1)(A) permit to WC.

On the lands identified with the extant range, WC will conserve existing and future standing deadwood, and, where available, focus leave tree retention on damaged, decayed, or deformed trees that are likely to provide or promote decay processes and structures beneficial to fisher or their prey. Retention trees will be marked in the field and be maintained for the life of the CCA. WC will enhance structural retention efforts by leaving three leave trees per acre for every acre clearcut harvested. Where existing large down wood is present in a harvest unit WC

will leave these structures distributed throughout the unit instead of piling them into slash piles. For slash piles documented as being used by fishers for denning on the enrolled lands, WC shall not burn or otherwise mechanically alter such slash piles for a period of five years after the last year of known occupancy and use by a denning fisher. These piles will be marked on the ground to ensure protection. Average clearcut size is currently about 67 acres and will be kept below the Oregon Forest Practices Act (OFPA) maximum of 120 acres.

WC will avoid the use of rodenticides on lands enrolled in the permit area. WC will, to the maximum extent practical, maintain secure access to enrolled lands so as to minimize the occurrence of illegal drug growing operations and the associated risks posed by rodenticides that are frequently used in these operations.

On WC lands operated under a recreational lease program WC will prohibit lessees from recreational trapping. Where WY lands are open to non-motorized access, signs will indicate prohibition of recreational trapping.

WC will, over the first three years of the CCAA, make financial contributions that support research and conservation of fishers and their habitat and prey, not to exceed \$30,000.00, with \$15,000.00 of the financial support being in the form of cash. The balance will include materials (i.e., cameras, collars, etc.), and/or in-kind personnel time.

These conservation measure commitments will increase the amount of fisher habitat components across the enrolled lands, which will contribute to connectivity of habitat within and outside of the enrolled lands.

### Public Comment

We received a set of comments on WC's site plan from a group of commenters. In general, they had concerns about the amount of land protected for fisher, habitat retained for fisher, connections between habitat, and future management of the covered lands.

The commenters indicated that limiting timber harvest activities within 0.25 miles of known denning sites is too small of an area and suggested those restrictions be expanded out to 2.5 miles since that distance would be more reflective of fisher home ranges.

The limiting of timber harvest activities within 0.25 miles of known denning sites is specifically intended to protect the dens, adult females, and their young while they are using the den. The fisher are most vulnerable to direct impacts associated with destruction of an occupied den, although we assume that in some cases the adult female will be able to move young prior when disturbed. Harvest or other forest management activities are not likely to impact the entire

circumference of a 0.25 mile radius from a known den site and all surrounding available forest habitat is not likely to be removed at a given point in time. The use of an individual den is also temporary, as fisher typically move their young several times while denning. Even for unknown dens sites, some fisher are likely to be able to move to another den when timber harvest or other active forest management approaches the vicinity of a den. For these reasons, it is not necessary to protect a 2.5 mile radius around occupied dens in order to provide habitat for fisher at the time of denning.

The commenters stated that aerial application of herbicide would impact prey of fisher (squirrels, mice, and snowshoe hares) in particular, by clearing understory vegetation that these potential prey species rely upon. They indicated that application of herbicides could then be indirectly fatal to fisher through loss of prey species and that 75 percent of their foraging zone could be negatively impacted (taking into account the no spray zone of 0.25 miles around den sites and assuming 1.5 mile radius for female fisher home range). The commenters asked that WC disclose the herbicide(s) to be used and analyze its effects. They suggested not spraying within 2.5 miles of any fisher den. They also asked that WC create a map of all known fisher dens and each expected home range and then use this to not spray any more than one quarter of any single home range.

We do not believe it is likely that herbicides will ever be sprayed within the entire 1.5 mile radius (over 4,000 acres) of a fisher den sites (minus the 0.25 mile radius zone, or about 126 acres). Herbicides are most often used after clearcut harvest in order to assist the establishment of replanted trees. The OFPA limits clearcuts to 120 acres and WC will not be clearcutting more than 67 acres at a time. Thus, the application of herbicides is only going to affect a small portion of a fisher's home range. The application of herbicide does not mean that all prey will be eradicated from the application area. While we may not be able to say exactly to what extent prey will be impacted by herbicide application, we know that the area impacted will only be a small fraction of a typical fisher home range and there should be prey available within the non-treated area. Furthermore, fisher are mobile and can move to new locations to find additional prey. WC and the Service will be informed of any known fisher den sites and WC is required under their site plan to implement the conservation measures associated with den sites, including herbicide spray buffers. Since herbicide spraying is not likely to affect more than a small area of a typical fisher home range as explained above, we conclude that regardless of the herbicide used, any effects to the prey base are expected to pose a very low risk of incidental take of fisher.

The commenters stated importance of habitat connectivity and the need for high forest canopy cover and connected forest patches. They indicated that the three trees per acre would not contribute to connectivity. They also mentioned that fisher have poor dispersal capability.

The Service's conference opinion (USFWS 2017) said that no incidental take associated with forest cover removal was anticipated since timber harvest within any given year would only occur in a small fraction of a typical home range, and that fisher are expected to readily shift their habitat use to other areas of forested cover within or adjacent to their home range. We assumed that forest cover removal would occur at a rate of approximately 1.5 percent a year on all potential enrolled lands based on recent harvest levels which means that about 98.5 percent would not be harvested.

The commenters mentioned the two different populations in Oregon and that they were in "initial stages of convergence" and that it was important to maintain the existing 'land bridge.'

This existing levels of contiguity or connectivity are unlikely to significantly change with any enrolled lands. Most of WC's enrolled lands are north of the 'Cascade-Siskiyou land bridge'. The enrolled lands in this vicinity have been modelled as habitat that is generally not selected by fisher. Potential future enrolled lands in the vicinity of this area have been previously harvested and are being managed. Current conditions are allowing movement of fisher and future conditions will likely continue to allow movement based on levels of harvest and mixed Federal and non-federal land ownership. Most of the better quality habitat will occur on Federal lands and will continue to do so in the future. The CCAA will help monitor movement. The monitoring of enrolled lands would not be otherwise possible without the CCAA.

The commenters advocated for greater dispersal corridors in heavily logged sectors. The commenters recommended dispersal corridors of at least 10 meters between clearcuts and an extra five meters of width for every additional clearcut bordering two clearcuts. They also suggested no pesticide/herbicide treatment within these dispersal corridors. Forest cover, including that suggested for dispersal corridors, does not appear to be a limiting factor for fisher movement (see above response). Leaving 10 or 15 meters of trees between clearcuts would not likely provide forest-like conditions right after a clearcut and would not be easily implementable when adjoining clearcuts are conducted by landowners not enrolled in the CCAA. The OFPA does limit clearcut size to 120 acres and WC's clearcuts in the extant range should not exceed 67 acres, such that there should likely always be forest cover available for fisher movement within a typical home range throughout the year.

The commenters requested that any additional lands acquired with the same intent of use and same geographic vicinity fall under the CCAA automatically. They specifically listed the need to survey for man-made hazards to fisher as is called for under the CCAA.

CCAA's are voluntary agreements and it's up to the applicant to decide what lands they wish to enroll, especially lands that are not currently owned by them. Outside of voluntarily included

enrolled lands under this CCAA, there is no current obligation to survey for man-made hazards to fisher.

The commenters wanted the measures in the CCAA to be bound to the land itself such that if enrolled lands are sold to an unrelated third party, the conservation measures would have to continue. CCAA's are voluntary agreements and requiring this upon a new landowner would not bestow the voluntary nature of CCAAs. That in part is why this is not a requirement under the CCAA or conditions of the section 10 permit.

They commenters suggested retention of all fallen and dead logs, instead of the proposed two fallen logs per acre.

While generally there may be some additional benefits with more dead and fallen logs on the ground for many species, it is not necessary in the present case. In the identified extant range where existing large down wood is present in a harvest unit, WC will leave these structures, distributed throughout the unit instead of piling them into slash piles, will attempt to avoid mechanical damage or disturbance, and will locate skid trails around them where safety and operability considerations permit. This is more specific to the potential benefits to fisher than is required under the OFPA and contributes to providing a net benefit to fisher.

Comments related to the preparation of an Environmental Action Statement (EAS) and the use of a Categorical Exclusion under the National Environmental Policy Act (NEPA).

The commenters indicated that the Service has not conducted a NEPA analysis of potential effects and that the preparation by the Service of an environmental assessment for fisher in another state is a reason for the Service to prepare one in this case.

Under 40 CFR 1508.4, 'categorical exclusion' is defined as a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (40 CFR §1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in 40 CFR §1508.9 even though it is not required to do so. This is reiterated for the Department of Interior's adopted regulations in 40 CFR §46.205. The process of developing and adopting categorical exclusions and the environmental action statement provide the necessary NEPA review.

The commenters state that the Service ignores potential effects to fisher by allowing non-federal landowners to conduct forest management activities without the need to comply with the ESA's take prohibition should the fisher become listed in the future.

WC has applied for a section 10(a)(1)(A) enhancement of survival permit from the Service specifically to comply with the ESA and address potential incidental take of fisher associated with forest management activities should they be listed in the future. Part of the process of reviewing the application before determining whether to issue a permit is to assess the likely effects to fisher associated with the proposed site plan under the CCAA and to seek public comment. The Service also noticed the template CCAA and sought public comment as stated above. The Service completed a conference opinion (USFWS 2017) that analyzed the effects on the potential future issuance of EOS permits under the template CCAA.

The commenters say the Service is ignoring a potential effect to fisher when landowners may conduct forest management activities in areas where there are no known fisher, where they have not yet been located, or to which they may expand in the future but are considered to have suitable habitat.

*Harass* in the definition of "take" in the ESA means an 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. *Harm* in the definition of "take" in the ESA 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 essential behavioral patterns, including breeding, feeding or sheltering. Generally, if a species is not present and not using habitat considered to be potentially suitable, removal or alteration of those areas containing potential habitat would not fall within the definition of 'take'. The Service did analyze the potential effects of issuance of EOS permits for forest management activities likely to result in incidental take of fisher across the potential enrollment area of the template CCAA and addressed the current and potential future population expansion of fisher over the term of the template CCAA. This analysis attempted to account for an estimated number of fisher in the DPS area and did not rely only on the currently known fisher.

The Federal action here is an issuance of an EOS permit for those actions that may result in incidental take. Forest management actions that are not associated with incidental take and that could or would occur without the EOS permit are not considered part of the Federal action of issuing the permit. In this case, the Service is evaluating a permit application from WC. The Service is also evaluating other EOS permit applications under the template CCAA at this time. The Service's conference opinion (USFWS 2017) addressed potential effects to fisher across the entire enrollment area from an as yet unknown exact number of applicants and unknown enrolled

acres. It is extremely unlikely that all of the lands eligible for enrollment would actually be enrolled. However, we did analyze the effects across the entire area as they pertain to activities that may result in incidental take of fisher.

The commenters agreed that additional surveys and monitoring of fisher will contribute to needed information on the status of the species, but they also stated that the scientific information gained would not outweigh any adverse effects to fisher.

We did not indicate that any scientific information gained alone would outweigh adverse effects to fisher. The surveys and monitoring are intended to limit the potential impacts to fisher on the enrolled lands, to better understand the potential impacts that might be occurring, and to better understand habitat use and responses to forest management for future conservation recommendations and impact avoidance measures.

The commenters stated that just because many land management activities are ongoing does not mean that the effects of those activities do not need to be considered, and that should the fisher be listed under the ESA, these ongoing activities may need to be modified to avoid incidental take of fisher.

Past and current forest management activities have resulted in the current habitat conditions that exist on the landscape. In the majority of cases, non-federal forest lands have not been managed to retain or develop suitable fisher habitat and that is one reason fisher are not likely to be routinely using these lands due to their generally younger age and lack of structure in the form of larger trees, snags, and downed wood. There are currently no required protective or conservation measures for fisher associated with forestry on non-federal lands in Oregon. Therefore, fisher are not likely to be found on most non-federal lands and therefore not likely to be directly impacted or incidentally taken under ongoing forest management. As explained above, our Federal action under the ESA addresses the potential incidental take of fisher, and does not involve activities that don't pose a likelihood of incidental take. One of the purposes of the CCAA and the associated EOS permit is specifically to address the potential incidental take of fisher should they become listed in the future. The CCAA and individual site plan are intended to avoid and minimize the likelihood of take as well as to provide a net conservation benefit to fisher. A listing of fisher under the ESA would not require these landowners to develop habitat where it currently does not exist and would not restrict forest management where fisher do not occur. Forest management activities that don't involve the potential for incidental take of fisher that are being considered under the EOS permit, and that are not caused by or related to such a permit, are not part of our Federal action.

The commenters stated that there is a risk of incidental take where they have been undetected or not known to occur and that there is a risk that ongoing forest management activities will have a negative effect on fisher.

The Service has acknowledged this risk in our conference opinion (USFWS 2017)(including that of currently unknown fisher locations) and that is why we are evaluating the issuance of an EOS permit under section 10(a)(1)(A) that addresses this potential for take under the terms of the CCAA and the individual site plan, but also incorporates conservation measures to avoid or minimize the take such that there may be a net conservation benefit to fisher. CCAA's address non-listed species for which there is not current protection under the ESA. Measures undertaken by applicants under CCAAs prior to listing of a species under the ESA are entirely voluntary since there is no potential incidental take prohibition until that time.

The commenters stated that the Service's cumulative effects conclusion ignores certain activities and appears to limit its analysis to surveying and monitoring.

The Service did address the underlying activities associated with the CCAA, including forest management, in several portions of the EAS. We did reference surveying and monitoring when discussing cumulative effects, but only used that as an example of one of the specific activities. We also referred to other activities that were already discussed in other parts of the EAS.

The commenters referenced a Washington-based CCAA for fisher that is similar to the subject CCAA in Oregon. They indicated the similar effects should be considered in our case.

We did consider similar effects related to forest management associated with the permitted action. The environment assessment for the Washington-based CCAA also concluded that the cumulative effects were considered insignificant as well.

The commenters stated that the Service should state the specific legal citation for the categorical exclusion employed instead of "generic authorities."

Categorical exclusions are listed for Federal government Departments in the Code of Federal Regulations. Bureaus within the Departments may also have more specifically described categorical exclusions and we do refer to these as well in the EAS (e.g., 516 DM 3 and 8.5). There are no additional citations needed.

In summary, management of WC's enrolled lands will include: protecting den structures while being used; targeting larger trees for post-harvest retention that are likely to become suitable for denning/resting in the future; keeping average clearcut sizes to below 67 acres in the extant lands; limiting their use of herbicides; providing financial and non-financial contributions to

fisher research; and, allowing access to do surveys and potential future fisher releases on their properties. These voluntary measures go beyond the existing minimum requirements of the OFPA and facilitate greater potential fisher use of the landscape contribute to the net conservation benefit of the template fisher CCAA for Oregon (USFWS 2018).

### Incidental Take Permit Findings

We re-affirm our finding (USFWS 2018b) that issuance of a permit under the terms of the template CCAA meets the issuance criteria set forth in 50 CFR § 17.32(d)(2). WC's timber management activities and the conservation measures adopted in their site plan are consistent with those envisioned under the template CCAA and addressed in our Findings (USFWS 2018b). Specifically, for issuance of a permit to WC under their site plan and for reasons described in our Findings (USFWS 2018b) we have determined that: the taking will be incidental to an otherwise lawful activity; implementation of the terms of WC's site plan under the template CCAA complies with the requirements of the Service's Candidate Conservation Agreement with Assurances policy; implementation of the terms of the template Candidate Conservation Agreement with Assurances is consistent with applicable Federal, State, and Tribal laws and regulations; implementation of the terms of the Candidate Conservation Agreement with Assurances will not be in conflict with any on-going conservation programs for the covered species; and, the applicant has shown capability for and commitment to implementing all the terms of the Candidate Conservation Agreement with Assurances.

We also anticipate that the probable direct and indirect effects of any authorized take will not appreciably reduce the likelihood of survival and recovery in the wild of any species. The Service's conference opinion (USFWS 2017) assessed potential impacts to approximately 2.23 million acres of what was considered high quality fisher habitat in the potential enrollment area. While WC's enrolled lands comprise approximately 647,190 acres, the majority of those lands are not likely to be used by fisher due to the current standing timber age and lack of suitable den or rest sites. WC has included additional conservation measures on about 53,645 acres they identified as being within the extant range of fisher. With the protective measures in place for den sites, and the creation and maintenance of slash piles, the risk of incidental take is low, and there will be a net benefit to fisher provided by maintaining existing habitat structures that may be or are used by fisher.

### **General Criteria and Disqualifying Factors - Findings**

The Service has no evidence that the permit application should be denied on the basis of the criteria and conditions set forth in 50 CFR § 13.21(b) through (c). We have met the criteria for the issuance of the permit and approval of the individual site plan implemented under the

template CCAA, and do not have any disqualifying factor that we are aware of that would prevent the permit from being approved under current regulations.

### Recommendation On Permit Issuance

Based on the foregoing findings with respect to the proposed action, I endorse the approval and future issuance of an enhancement of survival permit to authorize the incidental take of the fisher in accordance with WC's site plan implemented under the template CCAA.



9/27/2019

SH

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Date

### Literature Cited

USFWS 2016. Proposed Template Candidate Conservation Agreement with Assurances for the Fisher in Oregon and a Draft Environmental Action Statement. Federal Register 81:15737.

USFWS 2017. Conference Opinion for the Template Candidate Conservation Agreement with Assurances for the Fisher in Oregon. Oregon Fish and Wildlife Office, Portland, Oregon.

USFWS 2018a. Template Candidate Conservation Agreement with Assurances for the fisher (*Pekania pennanti*) in Oregon. Oregon Fish and Wildlife Office, Portland, Oregon.

USFWS 2018b. Findings and recommendations for issuance of section 10(a)(1)(A) enhancement of survival permits associated with the template candidate conservation agreement with assurances for the fisher in Oregon. Oregon Fish and Wildlife Office, Portland, Oregon.

USFWS 2019. Proposed Weyerhaeuser Company Candidate Conservation Agreement with Assurances for the Fisher in Oregon and a Draft Environmental Action Statement. Federal Register 84:31903.