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Date

Mr. Charles Gauvin
President, Chief Executive Officer
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Dear Mr. Gauvin

Thank you for your letter of March 19, 1997, letter reiterating Trout Unlimited's (TU) concerns regarding Forest Service (FS) responsibilities under the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA) relative to State fish stocking activities. Let me build on my remarks to the Board of Trustees and clarify FS statutory and regulatory responsibilities regarding State stocking and transplant activities on National Forest System (NFS) lands.

The first issue raised in your letter is whether the FS has nondelegable statutory responsibilities under NFMA to "manage native fish species in a manner consistent with those species' viability."

The NFMA ammended the Resource Planning Act of 1974 but did not alter State and Federal roles and responsibilities for management of fish and wildlife resources. NFMA (sec. 6 (g)(3)(B)) provides direction for the development and revision of land management plans, which "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives of a land management plan adopted pursuant to this section... ." There is no language within the act itself pertaining specifically to management of species, species viability, or providing for Federal oversight of State stocking or introduction activities.

Further guidance is found in the implementing regulations for NFMA in 36 CFR sec. 219.19. These regulations state that "[f]ish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native species in the planning area. In order to insure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area." Direction is provided in sec. 219.27(a)(6) to "[p]rovide for adequate fish and wildlife habitat to maintain viable populations of existing native vertebrate species... ." The intent is clearly for the FS to manage and maintain habitat in such condition and distribution that viability is not compromised. While the focus of responsibility by policy has been on habitats, the FS has, in the past, addressed populations where Federal interests, defined by law, regulation, or policy, were compromised (e.g., conservation of species protected under the Endangered Species Act (ESA)).

You also assert the FS has nondelegable statutory responsibilities under the NEPA requiring use of the NEPA process to demonstrate no adverse biological effects from State stocking of waters on the national forests.

The act itself is silent with respect to the issue of jurisdictional responsibility over fish and wildlife populations on NFS lands. The implementing regulations found in 40 CFR Parts 1500-1508 outline the requirement and process for preparing a NEPA analysis for major Federal actions, which are defined as "...actions with effects that may be major and which are potentially subject to Federal control and responsibility... . Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies..." (40 CFR sec. 1508.18). There is no authority for application of the NEPA process for activities which are not under FS jurisdiction, such as State stocking and tranplant programs.

Further clarification and guidance was provided by a September 6, 1996, letter to the Regional Foresters from Deputy Chief Gray Reynolds, a copy of which is enclosed. This letter affirms that the NEPA process is triggered only by Federal actions, that it is a State responsibility to manage most resident fish and wildlife populations, and that, in general, "...fish stocking activities by a State agency do not require FS approval or decisions, are not Federal actions, and thus are not subject to NEPA." It goes on to note that "[a]ctions are not Federal simply because FS personnel are consulted in the State's decision making or analysis process...or [the FS] has an interest in the State's decision...State transplants and stocking on NFS lands do not require NEPA unless there is a connected Federal action." As noted in the attached September 6 letter, the FS has the responsibility and authority to protect Federal interests defined by law, regulation, or policy. In order to meet these responsibilities, the FS may examine the effects of State proposals of stocking on or affecting NFS lands or resources, even if no Federal action is involved. Such an examination should be an ongoing part of coordination and does not, in and of itself, constitute an analysis leading to a decision under the NEPA.

While NEPA and NFMA do not address State responsibilities for fish and wildlife management, many other Federal statutes do. The Organic Act, the Multiple Use-Sustained Yield Act, the Federal Land Policy and Management Act, the Sikes Act, and the Wilderness Act all acknowledge State jurisdiction in management of resident fish and wildlife populations. U.S. Department of Agriculture policy (USDA Departmental Regulation 9500-4, August 22, 1983) for NFS lands emphasizes habitat management and "recognizes the rights of the individual States to manage fish and wildlife populations under their jurisdictions" (DR 9500-4, p.4). It is clear that States retain jurisdictional authority for the management of most fish and wildlife resources on NFS lands. Under most circumstances, the FS does not preclude the State from taking actions relative to stocking or transplanting, nor is FS authorization required for the State to pursue its management obligations. If, for example, a State action included ground disturbing activities, FS authorization would be required, and the associated NEPA document would need to disclose the effects of any connected actions such as use of toxicants or fish stocking.

A third concern raised by your letter is the introduction of whirling disease positive hatchery fish into waters on the national forests. You asked that an environmental impact statement be prepared prior to any further introductions of such fish. We share your concerns regarding introductions of fish with whirling disease. We have and will continue to work cooperatively with the States involved to resolve these concerns.

Forest Service Manual direction (FSM 2640) outlines Forest Supervisor responsibilities to "...[r]each joint agreement with the appropriate fish and wildlife agencies on proposals for National Forest System lands..." (FSM 2640.41(1)). Such an agreement does not trigger the provisions of NEPA. Therefore, a decision pursuant to NEPA is not required. The proper mechanism for reaching agreement is a Memorandum of Understanding (MOU) between the State and the FS to ensure that reintroduction efforts on National Forest System lands do not compromise Federal interests (FSM 2641). There are master MOU's with each State containing NFS lands which provide the framework for reaching such agreements.

We also share TU's concerns relative to the stocking of non-native salmonids in the habitat of native cutthroat trout. As described above, the appropriate mechanism for resolving these concerns is by mutual agreement consistent with the terms of existing interagency MOU's. The Interagency Guidelines for Fish and Wildlife Management in Wilderness, developed cooperatively with the International Association of Fish and Wildlife Agencies, provide further supporting direction for a cooperative approach to management of fish and wildlife within designated wilderness, addressing the issue of stocking non-indigenous fish.

For at least two native cutthroat subspecies, the Bonneville and the Colorado River, the FS is currently working cooperatively with the State, Bureau of Land Management, and the U.S. Fish and Wildlife Service biologists to prepare conservation agreements and strategies to address this and other threats to these populations. We expect and are encouraging many more of these efforts in the immediate future. Collaborative development of interagency strategies to reduce threats to sensitive aquatic species should more effectively address these types of concerns, and will help insure that viability and diversity of aquatic systems are maintained.

In closing, I assure you that we will continue to work cooperatively with State fish and wildlife agencies to resolve these and other aquatic issues. We recognize the need for consistent application of the provisions in the State/FS master MOU's including the development of FS/State agreements addressing specific concerns, and regarding notification of introductions and annual fish stocking. I am committed to examine ways to improve implementation of these MOU's. We will work with our regional offices to better define the extent of this concern, and will consider whether revision of some MOU's may be warranted.

I would be glad to meet with you to further discuss these or any other concerns you may have regarding management of fish and wildlife habitat on NFS lands.

Sincerely,

MIKE DOMBECK
Chief

HF 4/23/02

Enclosure