

September 24, 2018

The Honorable Ryan Zinke
Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

The Honorable Wilbur Ross
Secretary
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

RE: Proposed Revisions to Endangered Species Act § 4 Regulations for Listing Species and Designating Critical Habitat

Dear Secretary Zinke and Secretary Ross:

On behalf of our organizations and millions of members, we write to urge you to withdraw the proposed changes to the regulations that implement Section 4 of the Endangered Species Act.¹ This proposal would fundamentally alter the way the U.S. Fish and Wildlife Service and the National Marine Fisheries Service evaluate the listing of threatened and endangered species, and it would also substantially limit the circumstances in which the Services could designate critical habitat. If adopted, these changes would undermine the conservation of endangered and threatened species nationwide, weaken their critical habitat protections, and ultimately make recovery of endangered animals and plants far more costly and difficult.²

As an initial matter, the proposal to remove regulatory language that prohibits consideration of the possible economic impacts when listing a species as endangered or threatened is a radical departure from past practice and is not in keeping with the intent of the Act. The Endangered Species Act requires that listing decisions be made “*solely* on the basis of the best scientific and commercial data available.”³ Indeed, Congress added the word *solely* in the 1982 amendments to the Act to underscore that non-biological considerations should play no role in listing decisions.⁴ The administration’s proposal to remove the regulatory phrase “without reference to possible economic or other impacts”⁵ opens the door to cost-benefit analyses and other economic assessments that risk politicizing the listing process. Such assessments would be burdensome,

¹ *Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation*, 83 Fed. Reg. 35,193 (July 25, 2018).

² Some of organizations that are signatories to this letter are also submitting comprehensive comment letters regarding the proposed changes to the Act’s implementing regulations. This letter reflects our collective concerns about the proposal and general recommendations from the environmental community.

³ 16 U.S.C. § 1533(b)(1)(A) (emphasis added); 50 C.F.R. § 424.11(b).

⁴ Pub. L. No. 97-304, 96 Stat. 1411.

⁵ 50 C.F.R. § 424.11(b).

costly, and ultimately irrelevant if listing decisions are to remain wholly scientific determinations.

We also oppose the administration's proposed definition of the term "foreseeable future." Although this term is not defined in the Act itself, the concept is extensively described in a 2009 opinion from the Department of the Interior's Solicitor.⁶ Rather than adopt the opinion's definition, however, the proposed additions to section 424.11 include a new yet undefined word, "probable," representing a change from current practice that could limit foreseeable future analyses for species threatened by climate change. The proposal further states that the Services can rely on their undefined "professional judgment" to ascertain what the foreseeable future is, and that the "foreseeable future can extend only as far as the Services can reasonably depend on the available data to formulate a reliable prediction."⁷ This "reliable prediction" standard sets a higher bar than using the best available science, flipping the Act's presumption in favor of conservation on its head. If the administration believes it is necessary to codify the Solicitor's Opinion, it should use the Solicitor's definition.⁸ We believe adding the term "probable" could create, rather than dispel, confusion as to how the Services consider what constitutes the foreseeable future.

Additionally, the proposal re-stating that the factors for delisting a species are the same for listing a species is unnecessary, and the proposed textual changes in fact place listed species at risk of premature delisting. Under current law, any listed species can be removed from the list upon a scientific determination that it is, in fact, recovered and that the previous threats to its survival have been appropriately abated. That determination must be made based upon the statutory five factors using the best available scientific and commercial data.⁹ The proposed changes eliminate the requirement that data "substantiate" that delisting is warranted and eliminate "recovery" as a ground for delisting (presumably in an attempt to divorce delisting from recovery criteria in recovery plans).¹⁰ No clarification of the delisting criteria is needed, and the other proposed changes violate the precautionary principle. If anything, under the precautionary principle, it is appropriate that once a species is protected by the Act, the burden of proof should be higher to remove it.

The Trump administration's proposed changes to the designation of critical habitat ignore the basic fact that the single largest driver of extinction here and around the world is habitat loss.¹¹ If we do not protect the last few places that endangered wildlife and plants call home, then those

⁶ Department of the Interior, Office of the Solicitor, Opinion M-37021 (Jan. 16, 2009).

⁷ 83 Fed. Reg. at 35,195-35,196.

⁸ See Opinion M-37021, at 14 ("the foreseeable future describes the extent to which the Secretary can, in making determinations about the future conservation status of the species, reasonably rely on predictions about the future. Those predictions can be in the form of extrapolation of population or threat trends, analysis of how threats will affect the status of the species, or assessment of future events that will have a significant new impact on the species.").

⁹ 16 U.S.C. §§ 1533(a)(1)(A)-(E), 1533(b)(1)(A).

¹⁰ 83 Fed. Reg. at 35,201.

¹¹ Pimm, S.L. and P. Raven, 2000. *Biodiversity: Extinction by numbers*. Nature, 403:853-858; Pimm, S.L. et al., 2014. *The biodiversity of species and their rates of extinction, distribution, and protection*. Science 344: DOI: 10.1126/science.1246752

highly imperiled species simply have no future. Specifically, the proposal would limit the designation of critical habitat, particularly unoccupied critical habitat, that may be essential to the conservation and recovery of the species. First, the proposal sets forth a number of circumstances in which designation of critical habitat would automatically be designated “not prudent.” This automatic exemption runs counter to the statutory language and intent. The Act requires the designation of critical habitat at the time of listing for all species except when the designation would not be prudent.¹² Current regulations make clear that critical habitat “shall” be designated unless it “would not be beneficial to the species.”¹³ As the proposal notes, courts evaluating challenges to the Services’ failure to designate critical habitat have held the Services to an appropriately high standard.¹⁴ The administration’s proposal to categorically exempt habitat that is not necessarily under direct threat or when the threats cannot be readily “addressed through management actions” has no basis in the statute. Under the administration’s proposal, habitat would not be designated if the primary threat to a species derived from disease or climate change, or when designation would provide “negligible” benefits. None of these provisions will aid the conservation of species and indeed will likely contribute to loss of habitat that is vital to the species’ survival and recovery.

Similarly, we oppose efforts to limit designation of unoccupied habitat. The purpose of critical habitat is to identify those occupied areas that are currently “(I) essential to the conservation of the species and (II) which may require special management considerations or protection” as well as those unoccupied areas “essential for the conservation of the species.”¹⁵ The Service’s proposal to reinstate the “step-wise” approach to designating unoccupied habitat has no biological basis and will be detrimental to conservation. Unoccupied areas may be easier or more important to conserve than occupied areas for certain species.¹⁶ In such cases, it makes no sense to exhaust all occupied areas before designating unoccupied ones. Indeed, many species may need to expand their range in order to recover, and critical habitat designations may need to shift in response to climate change, making designating unoccupied habitat more important. Instituting a presumption against designating unoccupied critical habitat places political and cost considerations above best available science.

By the Services’ own admission, the proposed reversion to a “rigid step-wise approach” is not about improving conservation but rather alleviating alleged “continued perceptions” that the Services might designate “expansive” areas of unoccupied habitat. This perception is not reality; the Services rarely designate unoccupied areas. The proposed changes are unnecessary and will make critical habitat a less effective tool for recovering species.

In summary, the administration’s proposed regulatory changes to Section 4 of the Endangered Species Act would do nothing to improve the conservation of species and their habitats. To the contrary, the changes would undermine the listing process by opening the door to irrelevant economic concerns and hinder protection of listed species by substantially limiting the Services’

¹² 16 U.S.C. § 1533(a)(3)(A)

¹³ 50 C.F.R. § 424.12(a)(1)(ii).

¹⁴ See, e.g., *Natural Resources Def. Council v. U.S. Dept. of the Interior*, 113 F.3d 1121 (9th Cir. 1997); *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Haw. 1998).

¹⁵ 16 U.S.C. § 1532(5).

¹⁶ 81 Fed. Reg. 7415.

ability to protect habitats that are essential to species conservation. If finalized, these regulations would place threatened and endangered species at greater risk of extinction.

For these reasons, we strongly recommend that the proposed regulations for listing species and designating critical habitat be withdrawn.

Sincerely,

Center for Biological Diversity
Defenders of Wildlife
Earthjustice
Natural Resources Defense Council