

September 28, 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 Changes to Endangered Species Act § 7 Regulations

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 7 of the Endangered Species Act.¹ Section 7 consultation is the key check-and-balance on federal agency actions to ensure that those actions do not (1) jeopardize species' survival and recovery and (2) destroy or degrade critical habitat. The consultation provisions of the Act have ensured that the federal government's activities do not harm endangered species or their habitat by mandating review by the federal wildlife agencies. Unfortunately, the Trump administration's proposed changes would undermine the conservation of endangered and threatened species nationwide, weaken their critical habitat, delay their recovery, and ultimately make recovery of endangered animals and plants far more costly and difficult.²

Consultation is the heart of the Endangered Species Act. It has been instrumental to the ESA's remarkable success in preventing the extinction of imperiled animals and plants; 99% of species listed under the Endangered Species Act survive today. The Supreme Court explained that the Act represents "the institutionalization of caution," *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978), and Congress clearly intended the consultation process to give "the benefit of the doubt" to species based on the best available scientific information.³

Simply put, the Trump administration is considering fundamental changes to the way section 7 consultation works. Despite this, many portions of the proposal simply seek comment on broad concepts. Adopting any of these "unwritten yet announced" changes would be arbitrary and invalid. Given that endangered species already face numerous threats, the proposal to exempt the ongoing effects of federal projects from consideration in consultation would undermine protection.

¹ *Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation*, 83 Fed. Reg. 35,178 (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 Oliver A. Houck, *The "Institutionalization of Caution" Under § 7 of the Endangered Species Act: What Do You Do When You Don't Know?*, 12 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 15,001, 15,001 (1982)

Another change would limit § 7 consultation to actions within the jurisdiction of the regulatory agency – leaving out actual, concrete harms caused by a proposed action if those harms happened to fall outside that agency’s sphere. Both these proposals would put blinders on the expert wildlife agencies during the consultation process – the harm to species and habitat would still occur, but it would no longer be assessed as the Act requires.

Equally troubling, the Trump administration proposal would allow the Fish and Wildlife Service and National Marine Fisheries Service to ignore harm caused by federal actions if those harms are manifested through “global processes.”⁴ This proposal is clearly aimed at eliminating the need to consider the impacts of climate-change on imperiled species. While many federal actions do not contribute to climate change and its impacts on endangered species, those resulting in significant increases in greenhouse gas emissions should be the subject of Endangered Species Act consultation to ensure that polar bear, coral reefs, and other climate-sensitive species are not pushed towards extinction.

The Trump administration proposal also seeks to undermine mitigation measures to offset harmful impacts. By proposing to add language that mitigation measures require “no specific binding plans or a clear, definite commitment of resources,” the proposal would allow vague, undefined, and uncertain promises of mitigation to outweigh admitted adverse impacts.

The Trump administration’s proposed rollbacks to the Section 7 regulations also ignore the basic fact that the single largest driver of extinction here and around the world is habitat loss.⁵ If we do not protect the last few places that endangered wildlife and plants call home, then those highly imperiled species simply have no future. In passing the Endangered Species Act in 1973, Congress recognized how important it is to address and stem the tide of habitat loss if we are to save species from extinction:

Man can threaten the existence of species of plants and animals in any of a number of ways, by excessive use, by unrestricted trade, by pollution or by other destruction of their habitat or range. The most significant of those has proven also to be the most difficult to control: the destruction of critical habitat.⁶

To address habitat loss, Congress prohibited all federal agencies from taking action that would result in the “destruction or adverse modification” of critical habitat. Yet the proposal by the Trump administration would turn that firm prohibition against destroying critical habitat into nothing more than a paper tiger.

By only restricting federal agency actions that “diminish[] the value of critical habitat as a whole,” this proposal will ensure the wildlife agencies turn a blind-eye to the vast majority of actions that harm critical habitat.⁷ This change completely ignores that habitat loss occurs gradually and incrementally over time and will all but ensure species are driven extinct through *death-by-a-thousand-cuts*.

⁴ 83 Fed. Reg. at 35,185.

⁵ 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

⁶ H.R. Rep. 43-412

⁷ 83 Fed. Reg. at 35,179.

Finally, there is no need to impose a 60-day deadline on informal consultations when the factual data clearly demonstrate that the consultation process is overwhelmingly completed within the time-frames set forth under the Endangered Species Act. In fact, most informal consultations are already completed in less than 30 days. An arbitrary deadline for the rare consultations that require additional time because of the substantial impacts those projects could pose to endangered species could lead to hasty and ill-advised determinations.

The Administration's proposed regulatory changes thwart the plain meaning of the Act and the ignore the clear intent of Congress. If finalized, these regulations would give industry the benefit of the doubt in the consultation process and place endangered species at substantially greater risk of extinction.

For these reasons, we strongly recommend that the proposed Section 7 regulations be withdrawn.

Sincerely,

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