



September 24, 2018

U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041

Attn: FWS-HQ-ES-2018-0006; FWS-HQ-ES2018-0007; FWS-HQ-ES2018-0009

Re: Proposed Rules; Endangered and Threatened Wildlife and Plants; Revisions of the Regulations for Prohibitions to Threatened Wildlife and Plants, Interagency Cooperation, and Listing Species and Designating Critical Habitat

To Whom It May Concern:

Thank you on the opportunity to comment on the proposed amendments to the Endangered Species Act (ESA) regulations published in the Federal Register on July 25, 2018.¹ The Sabin Center for Climate Change Law submits the following recommendations on the scope and content of the proposed amendments.

First, as a general matter, we note that the overall thrust of these proposed amendments is to weaken ESA protections, particularly for threatened species, and to make it easier for projects to gain federal approvals despite the potential for adverse impacts on species. This weakening of ESA protections could undermine efforts to maintain biodiversity and ensure species survival in the context of rapidly changing climatic and biological conditions. Many scientists believe that a mass extinction event (the “Holocene extinction”) is already underway as a result of habitat loss, climate change, and other anthropogenic drivers.² In this context, there is an urgent need to improve species protections, especially for species that are imperiled by climate change, and to clarify how existing tools like the ESA can be used to address and mitigate the existential threat that climate change poses to many species.

Unfortunately, the proposed amendments do not offer useful guidance on how the U.S. Fish and Wildlife Service (FWS) and NOAA Marine Fisheries (NMFS) should use the ESA to protect species imperiled by climate change. To the contrary, the proposed amendments contain

¹ FWS & NMFS, Proposed Rule; Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 83 Fed. Reg. 35174 (July 25, 2018); FWS & NMFS, Proposed Rule; Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Interagency Cooperation, 83 Fed. Reg. 35178 (July 25, 2018); FWS & NMFS, Proposed Rules; Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35193 (July 25, 2018).

² See, e.g., Gerardo Ceballos et al., *Biological Annihilation Via the Ongoing Sixth Mass Extinction Signaled by Vertebrate Population Losses and Declines*, 114(3) PNAS E6089 (2017).

provisions which appear to be aimed at limiting the extent to which observed and projected climate change impacts can serve as a basis for listing decisions, critical habitat designations, and interagency consultations. Granted, the proposal does not contain any express prohibitions on the utilization of climate change observations and projections in ESA management decisions. But it does introduce several new standards for evaluating global impacts and future impacts in ESA management decisions. These standards are so vague that they confuse rather than clarify agency obligations, and could be used, contrary to the language and purpose of the ESA, as a justification for withholding ESA protections for species imperiled by climate change even where there is compelling evidence that granting such protections would help ensure the survival of the species. For this same reason, the standards could also be used by opponents of ESA rulemakings to challenge lawful and necessary protections issued for species affected by climate change. We identify and discuss these standards below.

1. Constraints on Critical Habitat Designations for Species Imperiled by Climate Change

FWS and NMFS have proposed language providing that the designation of critical habitat for a threatened or endangered species is not prudent in situations where “threats to a species habitat stem solely from causes that cannot be addressed by management actions that may be identified through consultation under section 7(a)(2) of the Act.”³ The rationale for this proposed amendment is that designating critical habitat in this context “could create a regulatory burden without providing any conservation value to the species concerned.”⁴ The services note that this provision may apply to “species experiencing threats stemming from melting glaciers, sea level rise, or reduced snowpack” because “a critical habitat designation and any resulting section 7(a)(2) consultation or conservation effort identified through such consultation, could not prevent glaciers from melting, sea levels from rising, or increase the snowpack.”⁵

What the administration fails to acknowledge is that the designation of critical habitat and the protections afforded by such designation can help to alleviate *other stressors* associated with human activities that can compound the sorts of risks described above by providing a refuge from those stressors. Once an area has been designated as critical habitat, the ESA requires Federal agencies to ensure that their actions and authorizations do not “result in the destruction or adverse modification” of that habitat. Thus, for a species like the Polar Bear – which is primarily threatened by climate change, but also threatened by other human activities – the designation of critical habitat in the arctic is useful insofar as it triggers the requirement to evaluate federal proposals that affect the area (e.g., oil and gas drilling) and either reject those proposals or incorporate mitigation measures to prevent jeopardy to the species. Granted, protecting the polar bear’s critical habitat will not stop the climate from changing or sea ice from melting – but it gives the bear a better chance of surviving and adapting to changing conditions.

³ 83 Fed. Reg. at 35197.

⁴ *Id.*

⁵ *Id.*

We recognize that the proposed standard does not automatically preclude FWS or NMFS from designating critical habitat for species that are threatened by climate change, since there are almost always more localized management actions that can be taken to help alleviate other human stressors and improve species viability. However, in light of the examples cited in the proposal, it appears that FWS and NMFS believe this provision would justify a decision not to designate critical habitat for species imperiled by global processes such as climate change – an approach which would almost certainly contribute to the imperilment of those species. For this reason, we recommend that FWS and NMFS remove this proposed language from any final amendments issued pursuant to this rulemaking.

2. New Definition of “Foreseeable Future” for Threatened Species Determinations

The ESA defines a “threatened species” as “any species which is likely to become endangered within the foreseeable future throughout all or a significant portion of its range.”⁶ The term “foreseeable future” is not defined in the Act. FWS and NMFS are proposing to add a new definition for this term:

*The foreseeable future extends only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable.*⁷

On its face, this new definition does very little (if anything) to clarify statutory requirements. The ESA already specifies that the endangerment must be “likely” within the “foreseeable” future. The proposed new “probable” standard does not introduce anything useful or new to the analysis, since the plain meaning of “probable” is “likely to happen.”⁸

This new definition, like the other provisions discussed herein, appears to be primarily intended to serve as a justification for withholding ESA protections despite evidence of climate change-related threats (primarily projected threats in this context). For example, NMFS or FWS could argue that the language precludes them from making listing decisions based on future threats to the species that are not individually “probable” even if the cumulative effect of those future threats creates a high likelihood of endangerment. We therefore recommend that this language also be removed from the ESA amendments.

3. Constraints on Designating Critical Habitat in Presently Unoccupied Areas

The ability to designate critical habitat in areas presently unoccupied by species may prove very important for the conservation of species imperiled by climate change, insofar as their range will likely shift due to changes in temperature, precipitation, sea level rise, and other climate-related phenomena. The proposed amendments would impose an additional constraint on when presently unoccupied areas could be designated as critical habitat. The current standard is that such areas

⁶ ESA § 3(2).

⁷ 83 Fed. Reg. 35201 (updating 40 CFR 424.11).

⁸ <https://dictionary.cambridge.org/us/dictionary/english/probable>; <https://www.merriam-webster.com/dictionary/probable>.

must be “essential” for the conservation of the species, and the proposal would add that FWS and NMFS “would only consider unoccupied areas to be essential in two situations: When a critical habitat designated limited to geographical areas occupied would (1) be inadequate to ensure the conservation of the species, or (2) result in less-efficient conservation for the species.”⁹

This is another example of language that is not, on its face, a serious modification to the existing standard, since the statute already specifies that unoccupied areas only constitute critical habitat where they are “essential” for the species recovery – the plain meaning of which is “absolutely necessary” or “extremely important”. But there is an important distinction between a finding that the unoccupied habitat is “extremely important” to species recovery and the finding that occupied habitat is “inadequate” for species recovery. In effect, this revision changes the type of evidence that is needed to support an unoccupied critical habitat designation, placing emphasis on the ability of occupied areas rather than unoccupied areas to support species conservation. Such a provision could be used to justify the exclusion of unoccupied areas from critical habitat designations even where those areas are of considerable value to species recovery, or to support opposition groups challenging critical habitat designations that encompass unoccupied areas. For these reasons, we recommend that this language also be removed.

4. Elimination of Section 7 Consultations for Federal Actions that Imperil Species by Contributing to Climate Change

FWS and NMFS are also seeking comment on revising section 7 consultation rules to preclude the need to consult regarding federal actions that “have effects that are manifested through global processes and (i) cannot be reliably predicted or measured at the scale of a listed species’ current range, or (ii) would result at most in an extremely small and insignificant impact on a listed species or critical habitat, or (iii) are such that the potential risk of harm to a listed species or critical habitat is remote.”¹⁰

There is no doubt that this revision is intended to preclude ESA consultations for federal actions that may imperil species by contributing to global climate change (i.e., through greenhouse gas emissions or changes in carbon sequestration). This same language was briefly incorporated into the ESA regulations through amendments passed by the Bush administration to reflect the understanding that ESA consultation “is not an appropriate or effective mechanism to assess individual Federal actions as they related to global issues such as global climate change and warming,”¹¹ and subsequently revoked by the Obama administration.¹²

We recognize that there has been some debate about whether and to what extent section 7 consultations should be used to evaluate the effect of federal proposals on global climate change and corresponding impacts on species, and that initiating a consultation for every federal proposal that generates greenhouse gas emissions or otherwise contributes to climate change would be extremely cumbersome and infeasible. But there is no need for a regulatory

⁹ 83 Fed. Reg. at 35198.

¹⁰ 83 Fed. Reg. at 35185.

¹¹ FWS & NMFS, Interagency Cooperation Under the Endangered Species Act, 73 Fed. Reg. 76287 (Dec. 16, 2008).

¹² FWS & NMFS, Interagency Cooperation Under the Endangered Species Act, 74 Fed. Reg. 29423 (May 4, 2009).

amendment here: operating under the existing regulations, FWS and NMFS have carved out a reasonable approach to addressing climate change in interagency consultations. In most cases, the incremental effect of a proposed action on global climate change would not, on its own, jeopardize the continued existence of a species – and thus it does not trigger the requirement to initiate consultation. But where consultation is initiated for other reasons, the impact of the proposal on greenhouse gas emissions and species imperiled by climate change is typically discussed.¹³

Again, the proposed amendment would not clearly prohibit agencies from initiating section 7 consultations based on the contribution of federal proposals to climate change or from evaluating climate change impacts in consultations. But it would establish a slightly higher standard for consultations which could be used to justify a decision not to initiate consultation or to ignore climate change impacts in a consultation that is already initiated. This is particularly problematic insofar as there is a compelling need for comprehensive environmental assessments of federal actions with major greenhouse gas impacts and the section 7 consultation process could be one way of facilitating such assessment. Thus we also recommend eliminating this language from the ESA amendments.

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Thank you for considering our comments on the aspects of the proposed amendments to the ESA regulations which pertain to the management of species affected by climate change. Going forward, FWS and NMFS must ensure that they adequately account for climate change impacts and projections when implementing their duties under the ESA. For guidance on what data to use, FWS and NMFS can refer to section 2805(c) of the defense appropriations bill that was enacted by Congress and signed by President Trump last month, which affirms that the reports issued by the National Academies of Science and the U.S. Global Change Research Office are appropriate sources of climate projections.¹⁴

We hope that you will carefully consider these comments. Please do not hesitate to contact us if you have any questions.

Sincerely,



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¹³ Steven Quarles & Thomas Lundquist, *The Endangered Species Act and Greenhouse Gas Emissions: Species, Projects, and Statute at Risk*, Proceedings of the Rocky Mountain Mineral Law Fifty-Fifth Annual Institute (2009)

¹⁴ Pub. L. No. 115-232, § 2805(c).