October 18, 2018

RE: Proposed Endangered Species Act Rulemaking

Dear Acting Director Kurth,

On July 25, 2018, the United States Fish and Wildlife (FWS) and National Oceanic and Atmospheric Administration Division of Fisheries (NOAA Fisheries) published in the *Federal Register* a set of three proposed rules to revise the implementing regulations of the Endangered Species Act (ESA; 16 U.S.C. § 1531 et seq.). Specifically, the rules focus on changes to the regulations for: listing species and designating critical habitats, prohibitions to threatened wildlife and plants, and interagency cooperation.

The National Association of Environmental Professionals (NAEP) is an interdisciplinary organization dedicated to developing the highest standards of ethics and proficiency in a wide variety environmental practices. We represent more than 800 public and private sector professionals across the country who promote excellence in decision-making in light of the environmental, social and economic impacts of those decisions. In addition to our national membership, we currently have 16 formally affiliated state and regional chapters with thousands of additional members who focus on both national and local environmental issues and challenges. The ESA has been a major focus of both our members and our organization for many years. On behalf of NAEP, we respectfully provide the attached comments regarding the proposed ESA revisions detailed in the 25 July *Federal Register*. We recognize that these comments are being submitted after the proposed comment due date; however, we hope that you will consider them.

As stated in the above-referenced announcement's background, since its 1973 inception, the ESA has not had comprehensive amendments since 1988 and no significant revisions to its implementing regulations since 1986. While NAEP supports updating the ESA to reflect and codify the Act's evolution, both formally (based on case law) and informally (based on public and private practitioner experience/interaction), we would like to emphasize the importance of, and our commitment to maintain the ESA's primary intent: "to halt and reverse the trend toward species extinction, whatever the cost" (*Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978)).

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We appreciate your thoughtful consideration and integration of NAEP's comments during/into your final rule making. Should you have questions or require further clarification, please contact us.

Respectfully,

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The National Association of Environmental Professionals (NAEP) is an interdisciplinary organization dedicated to developing the highest standards of ethics and proficiency in the environmental professions. Our members are public and private sector professionals who promote excellence in decision-making in light of environmental, social, and economic impacts of those decisions. As such, members of the Association work with threatened and endangered species, the necessary requirements of complying with the Endangered Species Act (ESA), and associated policies giving them special expertise in the application of the law and associated regulations and areas where the regulations work well or where they could be improved. The following provides NAEP comments of each proposed rule.

Docket Number: FWS-HQ-ES-2018-0006
Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat

50 CFR § 424.11 Factors for Listing, Delisting, or Reclassifying Species

Economic Impacts

The Services propose to remove the phrase, ``without reference to possible economic or other impacts of such determination'', from paragraph (b) to more closely align with the statutory language. Section 4(b)(1)(A) of the ESA requires the Secretary to make determinations based ``solely on the basis of the best scientific and commercial data available after conducting a review of the status of the species''.

Unlike the Environmental Protection Agency, which is required to conduct economic (e.g., cost-benefit) analyses for some rulemaking, such analyses are, by design, not part of the ESA listing process and adding information on economic impacts contributes little to the biological analysis. Providing evidence of adverse economic outcomes that, while not to be used in a listing decision, may nonetheless be used in a future challenge to such. The addition of such could therefore be adversarial to streamlining by encouraging future litigation. In addition, equating commercial data with more broad economic information seems like an expansive interpretation already considered and rejected by Congress. The inclusion of the term "commercial" in Section 4(b)(1)(A) of the ESA was initially a carry-over from earlier legislation and in response to the fur trapping industry (See *Bills to Prevent the Importation of Endangered Species of Fish or Wildlife into the United States: Hearings Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 91st Cong., 107 (1969) (statement of James R. Sharp, counsel to the Fur Merchants Association)). In fact, in 1982, Congress amended Section 4 specifically to focus listing decisions on the best available scientific and commercial data (1982 U.S.C.C.A.N 2807, 2820). Therefore, redefining by regulation "commercial" broadly to include "economic" would frustrate congressional intent.

Foreseeable future

The Services propose to amend 50 CFR § 424.11 to include a framework that sets out how the Services will determine what constitutes the foreseeable future when determining the status of species. Proposed section 424.11(d), as under current practice, would emphasize that the foreseeable future for a particular status determination extends only so far as predictions about the future are reliable, where ``[r]eliable predictions'' is used in a non-technical, ordinary sense and not necessarily in a statistical sense.

In the past, the term 'foreseeable future' has been applied with guidance from a 2009 legal opinion from the Department of the Interior, Office of the Solicitor (M37021, January 16, 2009), rather than following the formalized framework that is now being proposed. Often, the

foreseeable future is related both to the species being evaluated, and the circumstances that affect its habitat. The imposition of a framework is likely to limit the ability of the Services to adapt its analysis to accommodate recent threats such as climate change into its analysis.

Factors Considered in Delisting Species

The Services also propose to replace Section 424.11(d)(2), which referred to ``recovery,'' with language in new section 424.11(e)(2) that aligns with the statutory definitions of an endangered species or a threatened species. The term recovery would now be replaced with 'recovered' and the standards used for listing and delisting a species would be the same.

This approach is a shift away from assessing the five factors previously used for listing and recovery plan development, which could make the delisting process less time-consuming. A species is added to the list when it is determined to be endangered or threatened because of any of the following factors found in Section 4(a)(1) of the ESA:

- the present or threatened destruction, modification, or curtailment of its habitat or range;
- overutilization for commercial, recreational, scientific, or educational purposes;
- disease or predation;
- the inadequacy of existing regulatory mechanisms; or
- other natural or manmade factors affecting its survival.

It remains to be seen how this will affect delisting. In some instances where significant increases in population have been achieved, this will not have a marked effect on delisting decisions. In less clear-cut situations, particularly for taxa with limited range, low reproductive rates, or that are difficult to detect, this decision could make it easier to remove species from the list that would otherwise benefit from protections. In addition, the failure to consider the listing criteria in recovery could result in the need to re-list species as the stressor leading to their listing would not have been adequately addressed. For example, the recent lawsuits and judicial intervention on efforts to delist the gray wolf and grizzly bear suggest that population size alone do not justify delisting, but consideration needs to be given to the factors used for listing.

50 CFR § 424.12 – Criteria for Designating Critical Habitat
Not Prudent Determinations

The Agencies propose to revise section 424.12(a)(1) to set forth a non-exhaustive list of circumstances in which the Services may find it is not prudent to designate critical habitat as contemplated in section 4(a)(3)(A) of the ESA.

International Boundaries
Determination not to designate critical habitat for species with populations in adjacent countries should remain to be on a case-by-case basis depending upon the percent of the population within US territory, the degree of habitat protection afforded in the neighboring country, and the health

of the population in each country. It should not be assumed that habitat and species protections beyond US control will be sufficient for maintenance of US populations, particularly along the southern border given its current highly politicized environment. For example, the Sonoran pronghorn, a critically endangered species is found along the US southern border with Mexico and frequently crosses the international boundary as part of its home range. Failure to recognize and treat the larger population of the Sonoran pronghorn could further limit the ability to de-list the species in the future.

Unoccupied Habitat

The Services would only consider unoccupied areas to be essential in two situations: When a critical habitat designation 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. The application of a more restrictive approach would potentially favor designation of large area of occupied habitat that may provide fewer benefits than essential unoccupied habitat that would provide more benefit. The failure to plan for habitat shifts and the change in suitable habitat for listed species as the result of human encroachment and climatic factors could further inhibit species recovery and applying additional stresses to the listed species populations. It can also be beneficial to designate areas of unoccupied but otherwise apparently suitable areas that connect areas of occupied habitat to potentially increase the effective population size and promote recovery. It is unclear how the Services would apply the terms “inadequate” or “less-efficient” in terms of species conservation. This ambiguity should be clearly defined in any regulatory revision.

Docket Number: FWS-HQ-ES-2018-0007
Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants
50 CFR Part 17 (§§17.31 and 17.71)

The U.S. Fish and Wildlife Service (FWS) proposes to reverse their current approach of initially providing threatened species with most of the protections afforded endangered species, and instead issuing a subsequent 4(d) rule articulating specific protections and take prohibitions.

Currently, when a species is listed as threatened 50 CFR § 17.31 states that with a couple of exceptions, all of the provisions of 50 CFR § 17.21 apply—specifically the prohibitions associated with endangered species. However, Section 4(d) of the ESA directs agencies to issue regulations deemed "necessary and advisable" to provide for the conservation of threatened species. FWS states that NOAA Fisheries issues 4(d) rules for each threatened species it lists. FWS proposes to reverse its current approach of providing blanket protections to threatened species, to providing protections once a 4(d) rule is issued. Although this approach seems reasonable and consistent with the law, there are several issues that FWS should consider.

- Executive Order 13771, issued by the current administration in January 2017, requires agencies to repeal two existing regulations for each new regulation that is issued. This means that the issuance of any new regulations related to Section 4(d) would come under intense scrutiny and, in many circumstances, require the FWS to eliminate otherwise necessary regulations. A concurrent listing decision and 4(d) rulemaking would result in double the number of new rules compared to the current approach. However, the failure to issue a 4(d) rule would leave the newly listed threatened species without protection. The reduction in protection of threatened species would only allow them to continue to decline until up-listing to endangered is warranted. This approach would be counter to ESA and the public policy decision to not let species go extinct.

- Similar to the first comment, it is unclear that FWS will be allocated additional funding to complete 4(d) rules for each threatened listing. The FWS already has a listing decision backlog that has been the subject of settlement agreements in recent years. It is unclear as to how the agency will be able to double its rulemaking capacity associated with threatened species.

- The issuance of a 4(d) rule makes sense and would be more consistent with language of the ESA and the approach taken by its sister agency. However, the issuance of a 4(d) rule does not require a change to its existing regulations. 50 CFR § 17.31 sufficiently protects threatened wildlife and part C allows for the special rule to be developed, at which point 50 CFR § 17.31 would no longer apply. Therefore, we don't think that a revision to the regulations is warranted.

Docket Number: FWS-HQ-ES-2018-0009
Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation

The FWS and NOAA propose to revise their regulations describing the process for complying with Section 7 (a)(2) of the ESA, including how terms are applied.

50 CFR § 17.3 Definitions:

Destruction or Adverse Modification *The Services propose to revise the definition of ''destruction or adverse modification'' by adding the phrase ''as a whole'' to the first sentence and removing the second sentence of the current definition.*

Adding "as a whole" could diminish the protection given to designated critical habitat by expanding the effects analysis area to the entire designated critical habitat area, instead of the current interpretation, which assess effects to portions of the designated critical habitat area where the proposed action would occur.

Director *The Services propose to revise the definition of Director to refer to the Assistant Administrator for Fisheries for the National Marine Fisheries Service, or his or her authorized representative; or the Director of the U.S. Fish and Wildlife Service, or his or her authorized representative.*

Clarifying this definition seems appropriate.

Effects of the action *are all effects on the listed species or critical habitat that are caused by the proposed action, including the effects of other activities that are caused by the proposed action. An effect or activity is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include effects occurring outside the immediate area involved in the action. FWS seeks comment on:*

- *the extent to which the proposed revised definition simplifies and clarifies the definition of "effects of the action";*

We agree that this revised definition will simplify the term and reduce confusion.

- *whether the proposed definition alters the scope of effects considered by the Services;*

We do not expect that the revision would alter the scope of effects.

- *the extent to which the scope of the proposed revised definition is appropriate for the purposes of the Act;*

We believe that clearly defining the inclusivity of all effects of the action (i.e. direct, secondary and cumulative) in the Service's review will clarify applicants' considerations to avoid, minimize and mitigate impacts to listed species and designated critical habitat. The revisions should define foreseeable future actions to include those that are federal in order to fully understand the potential effects to the species. This approach would be consistent with NEPA.

- *how the proposed revised definition may be improved.*

Add "directly" to the last sentence (i.e. *Effects of the action may occur later in time and may include effects occurring outside the immediate area **directly** involved in the action.*)

Environmental baseline *includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.*

We suggest adding a definition of "contemporaneous" to clarify planned vs. existing conditions. For example, if an action is proposed within a location that has been re-zoned for high density residential development, but nothing has been constructed and no plans have been reviewed/approved by the local government, should the ultimate build out conditions be considered baseline conditions, or the mature forest that currently occupies the action area?

Programmatic Consultation *The Services propose to add a definition of "programmatic consultation." This term is included in revised § 402.14(c)(4) to codify an optional consultation technique that is being used with increasing frequency and to promote the use of programmatic consultations as effective tools that can improve both process efficiency and conservation in consultations.*

We think that adding this definition is appropriate and could increase the visibility and use of these consultations.

50 CFR § 402.03 – Applicability *The Services seek comment on the advisability of clarifying the circumstances upon which Federal agencies are not required to consult, specifically where take is not anticipated.*

Federal agencies are currently not required to seek Service concurrence on actions that will not result in effects to listed species or designated critical habitat. However, some Federal agencies are neither qualified, nor equipped to accurately evaluate potential adverse effects of their actions on listed species or critical habitat; therefore, the Services should be responsible for concurring with actions not likely to adversely affect species for habitat or independently assessing adverse effects and associated take. Informal consultation will facilitate and expedite this and should be encouraged. However, the requirement to consult on actions that would be wholly beneficial to the species should not be required.

The scope of consultation under section 7(a)(2) should be limited to only the activities, areas, and effects within the jurisdictional control and responsibility of the regulatory agency. Not doing so would unduly expand the agencies' regulatory authority.

50 CFR § 402.13 – Deadline for Informal Consultation *The Services' goal is to either complete the Letter of Concurrence for the project, or request additional information that is necessary to complete the consultation, within 30 days. The Services are considering whether to add a 60-day deadline, subject to extension by mutual consent, for informal consultations and seek comment on whether a deadline would be helpful in improving the timeliness of review.*

We think that by establishing a firm review timeline, project proponents will be able to more accurately plan project implementation timelines. However, the Services need to prioritize species protection over project implementation and should have the ability to extend the timeframe without mutual consent, but only in the cases of the potential need to consult formally. This extension should be approved at a regional level, rather than at the field office level.

- *the appropriate length for a deadline (if not 60 days*);

We believe that the Services should continue to use a 30-day informal review timeline.

- *how to appropriately implement a deadline (e.g., which portions of informal consultation the deadline should apply to [e.g., technical assistance, response to requests for concurrence, etc.], when informal consultation begins, and the ability to extend or "pause the clock" in certain circumstances, etc.).*

While setting and, by and large, adhering to a defined timeline, the regulated community will have better planning certainty. Applying the deadline to the Service's initial response (i.e. concurrence or request for additional information) will keep projects moving through the review process, while simultaneously providing the Service ample opportunity to conduct a more detailed review. Mutually agreed upon, project-specific ability to "pause the clock" will provide the flexibility when appropriate, for both the Service and consulting agency. However, since the Service has the statutory responsibility to implement the ESA, they should retain the authority to extend the compliance process without the mutual consent of other agencies driven by different statutory requirements.

50 CFR § 402.14 Formal consultation *The Services propose that 50 CFR § 402.14(g)(8) be revised "to clarify there is no requirement for measures that avoid, minimize, or offset the adverse effects of an action that are included in the proposed action to be accompanied by 'specific and binding plans,' 'a clear, definite commitment of resources', or meet other such criteria." Specifically, the following language is proposed:*

> *(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions as proposed or taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation. Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action and do not require any additional demonstration of specific binding plans or a clear, definite commitment of resources.*

It is also stated that "[i]f an incidental take statement includes reasonable and prudent measures and terms and conditions intended to minimize the impact of incidental take, the Federal agency must carry out those measures or risk losing the exemption afforded by the incidental take statement." Ultimately, as consulting and action agencies, the Act's statutory and regulatory provisions provide distinct responsibilities such that there is no requirement for the Service to independently evaluate whether the Federal agency is likely to carry out its commitments.

If the Services' ability to require specific and binding plans and actions to accompany a proposed action is eliminated, agencies' and/or applicants' motivation to complete and penalties for not completing the proposed efforts will be significantly reduced and/or eliminated. While, as stated, the applicant risks having an incidental take's exemption rescinded, the proposed changes give the Service the ability to neither "independently evaluate whether the proposed measures to avoid, minimize, or offset adverse effects will be implemented," nor hold the applicant responsible should commitments not be completed as proposed. Without providing the Service this enforcement ability, there is concern that proposed efforts to avoid, minimize and mitigate impacts to protected species and their critical habitats will not be completed.

Instead of codifying the Service's inability to enforce agreed upon alternatives and conditions, revisions to the regulations should formally establish and define that responsibility.

Biological Opinion *The Services propose to "add new paragraphs (h)(3) and (h)(4) to the current § 402.14(h) to allow the Services to adopt all or part of a Federal agency's initiation package in its biological opinion. Additionally, we propose to allow the Services to adopt all or part of their own analyses and findings that are required to issue a permit under section 10(a) of the Act in its biological opinion."*

Increasing project review efficiencies and timelines by integrating, rather than repeating research and evaluation efforts is an admirable and worthy goal for all parties. Care should, however, be taken during both the inter-agency collaborative process and procedure establishment, as well as individual project review, to ensure that the integration of "overlapping" information and the resultant conclusions drawn from it do not overlook key project, procedural, or other details that could compromise the conservation of listed species and/or their critical habitat. However, the lack of specific proposed language makes it difficult to analyze the effects of the language and provide substantive comment.

Expedited Consultation *is an optional formal consultation process that a Federal agency and the Service may enter into upon mutual agreement. To determine whether an action or a class of actions is appropriate for this type of consultation, the Federal agency and the Service shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat and other relevant factors. Conservation actions whose primary purpose is to have beneficial effects on listed species will likely be considered appropriate for expedited consultation.*

While increasing review efficiencies by establishing expedited processes is desirable, in order to maintain Service-wide consistencies, and thereby increased efficiencies, the Services should codify a more detailed and clearly defined protocol to do so. The creation/establishment of guidance and templates are mentioned in the announcement, but not in the proposed language. A primary concern is from the potential for inconsistent interpretation of similar project types.

Similarly, while shortened timeframes are the primary goal of the expedited review, the Services should ensure that levels of effort are accurately accounted for, both on project specific, as well as programmatic levels.

Section 402.16—Reinitiation of Consultation *The Services propose to remove the term "formal" from the title and text of this section to acknowledge that the requirement to reinitiate consultation applies to all section 7(a)(2) consultations. They also propose to make non-substantive redesignations and then revise § 402.16 by adding a new paragraph (b) to clarify that the duty to reinitiate does not apply to an existing programmatic land management plan prepared pursuant to the Federal Land Policy Management Act (FLPMA), 43 U.S.C. 1701 et seq., or the National Forest Management Act (NFMA), 16 U.S.C. 1600 et seq. when a new species is listed or new critical habitat is designated.*

We believe that the clarification that consultation must be reinitiated regardless of whether it was formal and informal provides added protection for the species. We agree that the additional listing of species should not by itself require the reinitiation of consultation for programmatic plans. Consultation should occur prior to the implementation of specific actions.

Section 402.17—Other Provisions *The Services propose to add a new § 402.17 titled "Other provisions." Within this new section, we propose a new provision titled "Activities that are reasonably certain to occur," in order to clarify the application of the "reasonably certain to occur" standard referenced in § 402.02 (defining effects of the action and cumulative effects) in two specific contexts.*

We agree with the premise of the section; however, the lack of specific language upon which to comment raises concern over what the provision would actually say and how it would define reasonable certainty.