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Submitted Electronically

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Re: Docket Nos. FWS–HQ–ES–2018–0006; FWS–HQ–ES–2018–0007; FWS–HQ–ES–2018–0009 (Opposed)

Dear Secretaries Zinke and Ross:

The Animal Law Committee of the New York City Bar Association writes in response to the proposed rules implementing the Endangered Species Act (“ESA”) in the three docket numbers cited above. We oppose amendments to existing laws that would weaken the United States’ protection of endangered and threatened species¹ and we urge the United States Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”; together with FWS, the “Services”): (i) not to adopt FWS–HQ–ES–2018–0006: Revision of the Regulations for Listing Species and Designating Critical Habitat; (ii) not to adopt FWS–HQ–ES–2018–0007: Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, and (iii) not to change the definition of “destruction or adverse modification” in the ESA.

The New York City Bar Association is an independent non-governmental organization of more than 24,000 lawyers, law professors, and government officials, principally from New York City but also from throughout the United States and 50 other countries. Its Animal Law Committee is the first committee of its kind in the United States and has a history of commenting on the Endangered Species Act and its implementing regulations.²

¹ The scope of this comment is limited to the rules as they apply to marine animals, fish, and wildlife. The proposed rules also affect threatened plants, which are not within the scope of this report.

² E.g., Report in Opposition to the Native Species Protection Act (May 10, 2018), <http://s3.amazonaws.com/documents.nycbar.org/files/2017369-NativeSpeciesProtection.pdf>; Report in Opposition

Enacted in 1973, the Endangered Species Act aims to (i) “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,” (ii) “provide a program for the conservation of such endangered species and threatened species,” and (iii) take steps to further the United States’ participation in treaties and conventions covering plants and wildlife.³ As explained below, the proposed rules stand in many ways at odds with the goals of the ESA, which enjoys broad public support across the political spectrum.⁴

I. FWS–HQ–ES–2018–0006: Revision of the Regulations for Listing Species and Designating Critical Habitat

The Committee opposes the proposed rule in Docket No. FWS–HQ–ES–2018–0006⁵ because it proposes several key changes that collectively weaken protections for endangered and threatened species and their habitats. We address three of these key changes in turn.⁶

a. The Proposed Rule May Delay the Listing Process and Risks Letting Economic Impacts Improperly Influence Listing Determinations

The proposed rule would delete regulatory language that currently prohibits the Secretary⁷ from referencing economic and other impacts in determining whether to list, reclassify, or delist a species: “The Secretary shall make [such determinations] *solely* on the basis of the best available scientific and commercial information regarding a species’ status; ~~without reference to possible economic or other impacts of such determination.~~”⁸ According to

to the Saving America’s Endangered Species (SAVES) Act (Feb. 16, 2018), [http://s3.amazonaws.com/documents.nycbar.org/files/2017310-Opposition to SAVES Act Final 2.15.18.pdf](http://s3.amazonaws.com/documents.nycbar.org/files/2017310-Opposition%20to%20SAVES%20Act%20Final%202.15.18.pdf); Letter to US Fish and Wildlife Service Urging Uplisting of African Elephant to Endangered Species List (May 18, 2016), <https://www2.nycbar.org/pdf/report/uploads/20073097-ElephantESAUplistingCommentANIMALS5162016.pdf>; Comments to US Fish and Wildlife Service re: downlisting West Indian manatee to threatened under Endangered Species Act (Mar. 31, 2016), <https://www2.nycbar.org/pdf/report/uploads/20073074-ResponsetoUSFishandWildlifedowngradeManateeStatusANIMALS33016.pdf> (all websites last visited Sept. 9, 2018).

³ Endangered Species Act (Public Law 93-205 (Dec. 28, 1973)), § 2(a). The full text of the ESA is available at <https://www.fws.gov/endangered/esa-library/pdf/ESAall.pdf>.

⁴ Jeremy T. Bruskotter et al., *Support for the U.S. Endangered Species Act over Time and Space: Controversial Species do not Weaken Public Support for Protective Legislation*, CONSERVATION LETTERS (July 19, 2018), <https://doi.org/10.1111/conl.12595>.

⁵ Endangered and Threatened Species: Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35193 (proposed July 25, 2018) (to be codified at 50 C.F.R. Part 424), <https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-ES-2018-0006-0001&contentType=pdf>.

⁶ The structure that follows relies largely on the analysis in WilmerHale, Trump Administration Proposes Major Revisions to ESA Regulations, JD Supra (July 27, 2018), <https://www.jdsupra.com/legalnews/trump-administration-proposes-major-56787/>. While FWS–HQ–ES–2018–0006 proposes other changes to existing law, we do not address them or take a position on them here.

⁷ “Secretary” in the ESA refers to, with respect to marine species, the Secretary of Commerce, and, with respect to plants and other animals, the Secretary of the Interior. See 16 U.S.C. § 1532(15); 50 C.F.R. §§ 17.2, 17.11, 402.01. (The regulations referenced in this subsection are available at <https://www.law.cornell.edu/cfr/text/50/part-424/subpart-B>.) Throughout this report we use the term “Secretary” to refer to the applicable responsible Secretary.

⁸ 83 Fed. Reg. 35200 (modifying 50 C.F.R. § 424.11(b)). “Solely” is emphasized in the original.

the Services, this deletion would simply let the Services provide additional information to the public regarding listing determinations; the determinations themselves, however, would continue to be based on only biological considerations, as is the current practice.⁹

The change risks spurring a “battle of the economists” for each new listing, where interested parties use the listing process — rather than the broader public sphere — to weigh and dispute the commercial costs and benefits of determinations.¹⁰ That in turn may not only slow down the listing process; it also increases the likelihood that economic factors influence determinations in practice, even if that result is unintended.¹¹ Moreover, while the practical impacts of listing determinations are important and, indeed, have long been studied and publicized,¹² it is unclear why the *Services* should reference such impacts in their determinations: as the proposed rule acknowledges, the Services would not take these impacts into account.¹³

b. The Proposed Rule Makes It Easier for the Services to Withhold Designating Critical Habitats for Listed Species

The proposed rule also puts listed species at risk by making it easier for the Services to not designate species’ habitat as “critical,” a federal designation aimed at protecting occupied and unoccupied areas necessary to conserve a species.¹⁴ The effect may be fewer critical habitat designations, a particularly troubling result as federal law is often the only law protecting such habitats: 38 states provide no legal authority for designating critical habitats for endangered and threatened species.¹⁵

⁹ 83 Fed. Reg. 35194-95.

¹⁰ WilmerHale, Trump Administration Proposes Major Revisions to ESA Regulations, JD Supra, *supra*.

¹¹ And, indeed, a number of commentators and conservationists believe the practical effect of this proposed change would be to bring economic considerations into the determination process. *See, e.g.*, Lisa Friedman, Kendra Pierre-Louis & Livia Albeck-Ripka, *Law That Saved the Bald Eagle Could Be Vastly Reworked*, N.Y. TIMES (July 18, 2018), <https://www.nytimes.com/2018/07/19/climate/endangered-species-act-changes.html>; Brian Resnick, *How the Trump Administration Wants to Weaken the Endangered Species Act*, VOX (July 23, 2018), <https://www.vox.com/energy-and-environment/2018/7/20/17594908/endangered-species-act-trump-proposal-change-weaken>; Darryl Fears, *Endangered Species Act Stripped of Key Provisions in Trump Administration Proposal*, WASHINGTON POST (July 19, 2018), <https://www.washingtonpost.com/news/animalia/wp/2018/07/19/endangered-species-act-stripped-of-key-provisions-in-trump-administration-proposal/>.

¹² *See, e.g.*, Gardner M. Brown Jr. and Jason F. Shogren, “Economics of the Endangered Species Act,” 12 J. OF ECON. PERSP. 3-20 (1998), available at <https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.12.3.3>; Robert Gordon, “Whatever the Cost” of the Endangered Species Act, It’s Huge, COMPETITIVE ENTERPRISE INSTITUTE (Aug. 21, 2018), https://cei.org/sites/default/files/Robert_Gordon_-_%E2%80%9CWhatever_the_Cost%E2%80%9D_of_the_Endangered_Species_Act%2C_It%E2%80%99s_Huge.pdf.

¹³ 83 Fed. Reg. 35194-95.

¹⁴ FWS, *Critical Habitat: What is it?*, (March 2017), https://www.fws.gov/endangered/esa-library/pdf/critical_habitat.pdf; *see also* 16 U.S.C. § 1533(5)(A) (defining “critical habitat”).

¹⁵ Alejandro E. Camacho et al., *Assessing State Laws and Resources for Endangered Species Protection*, 47 ENVTL L. R. 10837, 10840 (Oct. 2017), <https://www.law.uci.edu/academics/centers/cleanr/images/cleanr-esa-report.pdf>.

As background, the ESA currently requires the Secretary to designate, concurrently with a species' listing, "any habitat of such species which is then considered to be critical habitat."¹⁶ Existing regulations allow for just two exceptions to designating critical habitat, both of which are tied to the species' welfare: (i) when naming the critical habitat could increase threats to the species (for instance, by identifying the habitat to poachers) and (ii) when designating habitat "would not be beneficial to the species."¹⁷ In these cases a designation is deemed "not prudent."¹⁸

The revised regulations, however, would replace the current standard with a non-exhaustive list of circumstances in which a critical habitat designation would be not prudent.¹⁹ While the Services may still intend to designate critical habitats "in most cases,"²⁰ the revised grounds give them more grounds for not doing so. Further, some of these new grounds are particularly concerning for listed animals.

For instance, the new grounds are open-ended enough to allow for a not-prudent determination even when designating critical habitat would be affirmatively *beneficial* to the species. Under the revised rules, for instance, the Secretary may find a designation not prudent simply "[a]fter analyzing the best scientific data available."²¹ This catch-all exception — which, by its terms, could even refer to scientific data unrelated to animals — potentially lets the Services withhold critical habitat designations for reasons at odds with the aims of critical habitat designations.²²

Another, similarly concerning new ground for a not-prudent determination is where the threat to the species or habitat stems "solely from causes that cannot be addressed through management actions."²³ This ground could effectively limit critical habitat designations where the threat at issue stems from climate change effects.²⁴ Indeed, the examples cited by Services include "threats stemming from melting glaciers, sea level rise, or reduced snowpack but no other habitat-based threats."²⁵ Even if a critical habitat designation in such cases may not alone

¹⁶ 16 U.S.C. § 1533(a)(3)(A).

¹⁷ 50 C.F.R. § 424.12(a)(1), available at <https://www.law.cornell.edu/cfr/text/50/424.12>. In making the determination of whether a designation would not be beneficial, the Services may consider various non-exhaustive factors, including "[w]hether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or whether any areas meet the definition of 'critical habitat.'" *Id.*

¹⁸ *Id.*

¹⁹ 83 Fed. Reg. 35201 (modifying 50 C.F.R. § 424.12(a)(1)).

²⁰ *Id.* at 35196-97.

²¹ 83 Fed. Reg. 35201.

²² See note 14 above.

²³ 83 Fed. Reg. 35201.

²⁴ WilmerHale, Trump Administration Proposes Major Revisions to ESA Regulations, JD Supra, *supra*; see also Lisa Friedman, Kendra Pierre-Louis & Livia Albeck-Ripka, *Law That Saved the Bald Eagle Could Be Vastly Reworked*, N.Y. TIMES (July 18, 2018), *supra*.

²⁵ 83 Fed. Reg. 35197.

stop climate change threats²⁶ — which, though grave, are unpredictable²⁷ — withholding a designation solely on these grounds would deny species protection from other, non-climate threats — which may be grave *and* predictable.²⁸ Moreover, the proposed regulations fail to account for the possibility of designating critical habitat where species might move to avoid climate change-related threats.²⁹

In addition to broadening the grounds for not-prudent determinations, the proposed rule would further limit critical habitat designations by making it more difficult to designate areas not currently occupied by listed species. Currently, the ESA allows the Secretary to designate unoccupied areas as critical habitat where the Secretary determines that such areas are “essential for the conservation of the species.”³⁰ While existing regulations give the Services broad discretion in such determinations, the revised regulations would deem such a designation essential in just two cases: when limiting the designation to just occupied areas would be (i) “inadequate to ensure the conservation of the species” or (ii) “result in less-efficient conservation for the species,”³¹ with “efficient conservation” referencing “situations where the conservation is effective, societal conflicts are minimized, and resources expended are commensurate with the benefit to the species.”³²

Limiting the reasons for designating these unoccupied areas — which could include historically occupied areas and habitats capable of being restored — would in practice make it more difficult to designate them.³³ Yet such areas may be necessary to ensure a listed species’ recovery, especially when many, if not most, endangered species occupy just a portion of their historic range.³⁴

²⁶ 83 Fed. Reg. 35197 (“In such cases, a critical habitat designation ... could not prevent glaciers from melting, sea levels from rising, or increase the snowpack. Thus, ... designation of critical habitat in these cases may not be prudent because it would not serve its intended function to conserve the species.”).

²⁷ See generally Gerard H. Roe & Marcia B. Baker, *Why Is Climate Sensitivity So Unpredictable?*, 318 SCIENCE 629-32, available at <http://environnement.ens.fr/IMG/file/DavidPDF/Roe-Baker2007.pdf>.

²⁸ See Center for Biological Diversity, Press release: Trump Administration Aims Wrecking Ball at Endangered Species Act (July 19, 2018), https://www.biologicaldiversity.org/news/press_releases/2018/endangered-species-attacks-07-19-2018.php (“The proposal will also prohibit designation of critical habitat for species threatened by climate change, even though in many cases these species are also threatened by habitat destruction and other factors.”).

²⁹ *Id.*

³⁰ 16 U.S.C. § 1532(5)(A).

³¹ 83 Fed. Reg. 35201.

³² *Id.*

³³ Jason Rylander, *Death by One Thousand Cuts: How the Trump Administration Is Using Rulemaking to Kill the Endangered Species Act*, AMERICAN CONSTITUTION SOCIETY (Aug. 1, 2018), <https://www.acslaw.org/acsblog/death-by-one-thousand-cuts-how-the-trump-administration-is-using-rulemaking-to-kill-the-endangered-species-act/>.

³⁴ Center for Biological Diversity, Press release: Trump Administration Aims Wrecking Ball at Endangered Species Act (July 19, 2018); Gerardo Ceballos & Paul R. Ehrlich, *Mammal Population Losses and the Extinction Crisis*, 296 SCIENCE 904-07 (2002), <http://science.sciencemag.org/content/296/5569/904.full?ijkey=xGbbekvZ4TS1o&keytype=ref&siteid=sci>.

c. By Codifying the Services’ Interpretation of “Foreseeable Future,” the Proposed Rule Risks Minimizing Longer-Term Threats to Species in Making Listing Determinations

The proposed rule would clarify the Services’ interpretation of “foreseeable future,”³⁵ an undefined term in the ESA relevant to listing determinations. Under the ESA, a species is “threatened” if it “is likely to become an endangered species within the *foreseeable future* throughout all or a significant portion of its range.”³⁶ In line with current agency practice, the revised regulations would interpret “foreseeable future” as extending “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.”³⁷ Making this “foreseeable” determination would, in turn, call for a fact-specific analysis of the species and threats at issue, along with other available information.³⁸ Given that this interpretation reflects established agency practice, the Committee believes the marginal effects of codifying it into regulation are likely small. Even so, we are concerned that this change could be interpreted in a way that minimizes longer-term threats to species — in particular those relating to climate change.³⁹

II. FWS–HQ–ES–2018–0007: Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants

The Committee opposes the proposed rule in Docket No. FWS–HQ–ES–2018–0007⁴⁰ because it weakens the protections for “threatened” species of wildlife. As noted above, the Endangered Species Act defines a “threatened species” as any species that “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its

³⁵ 83 Fed. Reg. 35200-01 (adding a new paragraph (d) to 50 C.F.R. § 424.11).

³⁶ 16 U.S.C. § 1532(20) (emphasis added); *see also* 16 U.S.C. § 1533(b)(1)(B). An “endangered species” is “any species which is in danger of extinction throughout all or a significant portion of its range . . .” except certain designated insects. 16 U.S.C. § 1532(6).

³⁷ 83 Fed. Reg. 35195-96. *See also* U.S. Department of the Interior, Office of the Solicitor, Memorandum re: Meaning of “Foreseeable Future” in Section 3(20) of the Endangered Species Act (Jan. 16, 2009), <https://www.fws.gov/endangered/esa-library/pdf/M-37021%20Foreseeable%20future.pdf>.

³⁸ 83 Fed. Reg. 35195; Holland & Hart LLP, Proposed ESA Revisions—Implications for Energy and Natural Resource Interests, JD Supra (July 30, 2018), <https://www.jdsupra.com/legalnews/proposed-esa-revisions-implications-for-89614/>; WilmerHale, Trump Administration Proposes Major Revisions to ESA Regulations, JD Supra, *supra*.

³⁹ *See* Amelia Urry, *The Fate of Future Endangered Species Could Hinge on a Semantic Argument*, POPULAR SCIENCE (July 30, 2018), <https://www.popsoci.com/endangered-species-act-future-walruses> (noting that many environmental organizations and scientists view this change as potentially limiting protections for new species); Holland & Hart LLP, Proposed ESA Revisions—Implications for Energy and Natural Resource Interests, JD Supra, *supra*.

⁴⁰ Endangered and Threatened Species: Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35174 (proposed July 25, 2018) (to be codified at 50 C.F.R. Parts 17 and 402), <https://www.fws.gov/policy/library/2018/2018-15811.pdf>.

range.”⁴¹ The ESA requires the Secretary of the Interior to issue “regulations as [the Secretary] deems necessary and advisable to provide for the conservation of such [threatened] species.”⁴²

Current ESA regulations provide default protections to threatened species — as written, these species receive almost all of the same protections as endangered species under 50 C.F.R. § 17.21.⁴³ Section 17.21 protects endangered and threatened species by prohibiting (i) their import or export into the United States,⁴⁴ (ii) their “take,”⁴⁵ (iii) the possession of unlawfully taken wildlife,⁴⁶ (iv) the delivery, receipt, carrying, transporting, or shipping in interstate or foreign commerce of such species,⁴⁷ and (v) selling or offering for sale of such species.⁴⁸

Under current regulations, FWS has authority to supersede these default protections by promulgating a “species-specific rule” (also known as a “special rule”) that replaces the default protections for a specific species.⁴⁹ Generally, species-specific rules result in reduced protections and, for that reason, they have sometimes been met with opposition from environmental and animal welfare organizations.⁵⁰ FWS has exercised its authority to promulgate species-specific rules dozens of times — of the 237 threatened wild animal species under the jurisdiction of FWS, 80 (or one third) are currently covered by species-specific rules.⁵¹ Critics who believe the current regulatory scheme is too restrictive often downplay or fail to acknowledge the number of times FWS has exercised its option to promulgate species-specific rules.⁵²

⁴¹ 16 U.S.C. § 1532(20).

⁴² 16 U.S.C. § 1533(d).

⁴³ 50 C.F.R. § 17.31. The protection that applies to endangered species and not threatened species relates to activities of an employee or agent of a state conservation agency that is a party to a cooperative agreement. 50 C.F.R. § 17.21(c)(5).

⁴⁴ 50 C.F.R. § 17.21(b).

⁴⁵ 50 C.F.R. § 17.21(c). The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. 16 U.S.C. § 1532(19).

⁴⁶ 50 C.F.R. § 17.21(d).

⁴⁷ 50 C.F.R. § 17.21(e).

⁴⁸ 50 C.F.R. § 17.21(f).

⁴⁹ 50 C.F.R. § 17.31(c).

⁵⁰ Ya-Wei Li, DEFENDERS OF WILDLIFE, SECTION 4(D) RULES: THE PERIL AND THE PROMISE 1-3 (Jan. 2017), <https://defenders.org/sites/default/files/publications/section-4d-rules-the-peril-and-the-promise-white-paper.pdf>. In theory, a species-specific rule could provide enhanced protections. See *Sweet Home Chapter of Cmities. for a Great Oregon v. Babbitt*, 1 F.3d 1, 8 (D.C. Cir. 1993), modified on other grounds on reh'g, 17 F.3d 1463 (D.C. Cir. 1994), rev'd on other grounds, 515 U.S. 687 (1995), available at <https://openjurist.org/1/f3d/1/sweet-home-chapter-of-communities-for-great-oregon-v-babbitt>.

⁵¹ We arrived at this number by using the FWS ECOS Environmental Conservation Online System and selecting threatened animal species under the jurisdiction of FWS to generate a report showing the threatened species that are covered by a species-specific rule as of August 5, 2018. FWS, ECOS: Environmental Conservation Online System, Species Search Results, <https://ecos.fws.gov/ecp0/reports/ad-hoc-species-report>.

⁵² For example, in December 2017, the Heritage Foundation urged the Services to “[r]escind the rule generally applying the take prohibition to threatened species” without mentioning the fact that roughly a third of the time, threatened species are covered by a species-specific rule. Rob Gordon, *Take It Back: Extending the Endangered*

Still, over four decades, FWS has chosen to apply the default protections to roughly two thirds of threatened species, which implies that the FWS has determined that most threatened species require the same protections as endangered species to further the goals of the Endangered Species Act.⁵³ Particularly with respect to birds, clams, crustaceans, and snails, the FWS has rarely determined that anything less than the default protections are “necessary and advisable to provide for the conservation of the species.”⁵⁴

The determination to protect most threatened species with the same protections as endangered species as a default makes sense because the line between them is often blurry. Different scientists can come to different conclusions about whether the risk to a species justifies a listing as endangered or threatened and, given the irreversible nature of extinction, it makes sense to lean toward more rather than less protection in such cases.⁵⁵ Also, the existing regulation ensures that threatened species are protected while FWS gathers data to determine if a species-specific rule is appropriate.⁵⁶

Yet under the proposed rule, the FWS would turn existing law on its head—threatened species will have *no* protection unless FWS issues a species-specific rule. And the proposed rule provides no guidance on what standards FWS will use to create a species-specific rule. This will affect all wildlife that becomes classified as threatened after the effective date of the rule, including wildlife that is reclassified from endangered to threatened. And it will have its most dramatic effects on threatened birds, clams, crustaceans, and snails because currently they are almost always afforded the same protections as endangered species.

Specifically, the proposed rule amends section 50 C.F.R. § 17.31(a) as follows (bracketed text deleted; underlined text added):

(a) Except as provided in [subpart A of this part] §§ 17.4 through 17.8, or in a permit issued under this subpart, all of the provisions in § 17.21 [shall apply to threatened wildlife], except § 17.21(c)(5), shall apply to threatened species of wildlife that were added to the

Species Act's "Take" Prohibition to All Threatened Animals Is Bad for Conservation, THE HERITAGE FOUNDATION BACKGROUNDER (Dec. 2017), <https://www.heritage.org/sites/default/files/2017-12/BG3267.pdf>.

⁵³ In prior rulemaking, FWS stated: “It is the position of the Service that these prohibitions are clearly necessary for the conservation of threatened species of fish or wildlife. Furthermore, the Service contends that the absence of these protective regulations creates a significant risk to the well being of threatened species of fish or wildlife.” FWS, Protection for Threatened Species of Wildlife, 50 Fed. Reg. 46539 (Sept. 16, 1977), <https://www.govinfo.gov/content/pkg/FR-1977-09-16/pdf/FR-1977-09-16.pdf>.

⁵⁴ Eighty-five percent of threatened birds receive the default protections under 50 C.F.R. § 17.21. Of the 39 bird species listed as threatened, only six (yellow-billed parrot, white cockatoo, elfin-woods warbler, salmon-crested cockatoo, streaked horned lark, and the coastal California gnat-catcher) are covered by a species-specific rule. And 93% of clams, crustaceans, and snails receive the default protections. Ya-Wei Li, DEFENDERS OF WILDLIFE, SECTION 4(D) RULES: THE PERIL AND THE PROMISE 6 (Jan. 2017), <https://defenders.org/sites/default/files/publications/section-4d-rules-the-peril-and-the-promise-white-paper.pdf>.

⁵⁵ *Id.* at 11.

⁵⁶ Kenneth J. Warren, *Proposed Changes to Endangered Species Act Regulations*, LEGAL INTELLIGENCER (Aug. 10, 2018), <https://www.law.com/thelegalintelligencer/2018/08/10/proposed-changes-to-endangered-species-act-regulations>.

List of Endangered and Threatened Wildlife in § 17.11(h) on or prior to [EFFECTIVE DATE OF THE FINAL RULE], unless the Secretary has promulgated species-specific provisions (see paragraph (c) of this section).

FWS explains that this means that “[s]pecies listed or reclassified as a threatened species after the effective date of this rule, if finalized, would have protective regulations only if the Service promulgates a species-specific rule (also referred to as a special rule).”⁵⁷ (Emphasis added.)

FWS has not given a compelling reason why such a dramatic change to the current system is necessary to carry out the purposes of the Endangered Species Act. It explains that it wishes to follow the system used by the National Marine Fisheries Service (NMFS). Yet FWS does not explain why the NMFS system better promotes the purposes of the ESA. Nor does the FWS address how differences in the species and their ranges that are covered by the NMFS could be relevant.⁵⁸ (According to one analysis, NMFS’s species-specific rules are similar to the current FWS approach because the NMFS’s species-specific rules work by incorporating the default protections provided to endangered species and carving out exceptions.)⁵⁹

FWS also argues that it has experience promulgating species-specific rules.⁶⁰ And it explains that some benefits of species-specific rules are “removing redundant permitting requirements, facilitating implementation of beneficial conservation actions, and making better use of our limited personnel and fiscal resources by focusing prohibitions on the stressors contributing to the threatened status of the species.” But this reason does not require the FWS to turn the existing rule on its head — it already has the authority to issue species-specific rules for any threatened species.

Instead of protecting threatened species, this rule has the potential to cause serious harm. Dozens of environmental and animal welfare organizations have expressed concern that the proposed rule will cause critical delays in the process of listing wildlife as threatened — delays

⁵⁷ FWS, Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants 83 Fed. Reg. 35174, 35175 (July 25, 2018), <https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-ES-2018-0007-0001&contentType=pdf>.

⁵⁸ FWS, Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants 83 Fed. Reg. 35174, 35175 (July 25, 2018), <https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-ES-2018-0007-0001&contentType=pdf>.

⁵⁹ Ya-Wei Li, DEFENDERS OF WILDLIFE, SECTION 4(D) RULES: THE PERIL AND THE PROMISE 5 (Jan. 2017), <https://defenders.org/sites/default/files/publications/section-4d-rules-the-peril-and-the-promise-white-paper.pdf>.

⁶⁰ *Id.* President Obama’s administration covered more species with species-specific rules than any other presidential administration. Ya-Wei Li, DEFENDERS OF WILDLIFE, SECTION 4(D) RULES: THE PERIL AND THE PROMISE 6, *supra*.

that could cause extinction.⁶¹ They observe that the current listing process already takes roughly 12 years due to backlogs, and argue that this rule will make delays worse.⁶²

Accordingly, we urge the FWS not to adopt this proposed rule.

III. FWS–HQ–ES–2018–0009: Revision of Regulations for Interagency Cooperation

Section 7(a) of the ESA, 16 U.S.C. § 1536(a), requires every federal agency to consult with either FWS or NOAA, as applicable,⁶³ to ensure that actions authorized, funded or carried out by such agency (i) are not likely to jeopardize the existence of any endangered or threatened species or (ii) do not “result in the destruction or adverse modification” of habitat of such species that is critical. Section 7(a)(4) also requires federal agencies to confer with FWS or NOAA with respect to species proposed to be listed and the destruction or adverse modification of their critical habitats. Section 7 is a “key reason” for the ESA’s strength, but FWS seems to lack sufficient funding to consistently produce high-quality consultations.⁶⁴

The ESA does not define the phrase “destruction or adverse modification.” The ESA regulations do and the Services propose amending the definition of “destruction or adverse modification” to add the phrase “as a whole” as follows: “Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.” Under 16 U.S.C. § 1533(a), the Services determine what a species’ critical habitat is “on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact.” The critical habitats for fish and wildlife are listed in 50 C.F.R. § 17.95 and 50 C.F.R. Part 226 (for species under NOAA’s jurisdiction).

According to the Services’ proposal, the addition of “as a whole” to the definition is intended to clarify that the appropriate scale of the effect of the destruction or adverse modification is the “entire critical habitat.” Thus if an agency action would cause adverse effects to a portion of the critical habitat, it may not rise to the level requiring consultation with the Services. In turn, this would result in fewer activities triggering the Section 7(a) consultation requirement.

But in issuing this proposed rule, the Services have provided little guidance about how to determine whether some significant impact on a portion of the activity would rise to the level of affecting the entire critical habitat. The Services give the example of an agency activity

⁶¹ Letter from Adventure Scientists et al. to Secretary Ryan Zinke, Re: Opposition to the Proposed Rule to Withdraw the Blanket 4(d) Rule for All Threatened Species Protected by the Endangered Species Act (Apr. 30, 2018), <https://www.biologicaldiversity.org/campaigns/esa/pdfs/NGO-sign-on-letter-4d-repeal-proposal.pdf>.

⁶² *Id.* The proposed regulation would likely increase the time it takes to list a species as threatened because, FWS would issue the species-specific rule (if any) at the time of the listing.

⁶³ Generally, NOAA has jurisdiction over marine species while FWS manages terrestrial and freshwater species, but the Services have joint jurisdiction over some species such as sea turtles.

⁶⁴ Megan Evansen et al., *Same Law, Different Results: Comparative Analysis of Endangered Species Act Consultations by Two Federal Agencies*, BIORXIV (July 19, 2017), <https://www.biorxiv.org/content/biorxiv/early/2017/11/15/165647.full.pdf>.

occurring in the species' primary breeding site within the critical habitat as an action that would diminish the value of the critical habitat as a whole, even though the activity occurs only in a portion of the critical habitat.⁶⁵ But that seems like a relatively straightforward, uncomplicated hypothetical, particularly because it involves a species' occupied habitat.

In reality, there are likely to be potential agency actions that have far more complicated or less obvious effects on an endangered or threatened species' critical habitat. Critical habitat may include areas occupied by an endangered or threatened species as well as unoccupied areas that are critical for its conservation. Because unoccupied areas may be included in the region defined as "critical habitat," climate change could complicate even straightforward questions like the Services' example described in the previous paragraph. Suppose the agency action will affect an area 50 miles north of the existing primary breeding site, and there is evidence that an endangered species' primary breeding site is shifting north within the critical habitat to currently unoccupied habitat due to climate change.⁶⁶ How does that possibility factor into the "as a whole" calculation? Without sufficient guidance that addresses climate change — one of the biggest perils facing endangered and threatened species today — the proposed rule creates uncertainty, invites litigation, and puts species at risk.⁶⁷

IV. Summary

For the reasons explained above, we urge the Service to withdraw or revise the proposed regulations as requested.

Respectfully,



Christopher Wlach
Chair, Animal Law Committee

Cc: Sen. John Barrasso

⁶⁵ 83 Fed. Reg. 35181. The Services explain:

Even if a particular project would cause adverse effects to a portion of critical habitat, the Services must place those impacts in context of the designation to determine if the overall value of the critical habitat is likely to be reduced. This could occur where, for example, a smaller affected area of habitat is particularly important in its ability to support the conservation of a species (e.g., a primary breeding site). Thus, the size or proportion of the affected area is not determinative; impacts to a smaller area may in some cases result in a determination of destruction or adverse modification, while impacts to a large geographic area will not always result in such a finding.

⁶⁶ The shifting of breeding sites due to climate change has affected many species. For example, bull shark nursery habitats are moving northward. Charles W. Bangley et al., *Increased Abundance and Nursery Habitat Use of the Bull Shark (Carcharhinus leucas) in Response to a Changing Environment in a Warm-Temperate Estuary*, SCIENTIFIC REPORTS (Apr. 16, 2018), <https://www.nature.com/articles/s41598-018-24510-z>.

⁶⁷ Kenneth J. Warren, *Proposed Changes to Endangered Species Act Regulations*, LEGAL INTELLIGENCER (Aug. 10, 2018), <https://www.law.com/thelegalintelligencer/2018/08/10/proposed-changes-to-endangered-species-act-regulations>.

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