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REPORT ON LEGISLATION BY THE ANIMAL LAW COMMITTEE

H.R. 4348 **Rep. Grijalva**

AN ACT to terminate certain rules issued by the Secretary of the Interior and the Secretary of Commerce relating to endangered and threatened species, and for other purposes.

Protect America's Wildlife and Fish in Need of Conservation Act of 2019

THIS LEGISLATION IS SUPPORTED

I. SUMMARY OF PROPOSED LEGISLATION

The proposed legislation (H.R. 4348, the Protect America's Wildlife and Fish in Need of Conservation Act of 2019, or the PAW and FIN Conservation Act of 2019) would void the following three rules under the Endangered Species Act ("ESA"), covering endangered and threatened wildlife and plants:

(1) "Regulations for Prohibitions to Threatened Wildlife and Plants," 84 Fed. Reg. 44753 (Aug. 27, 2019), promulgated by the Secretary of the Interior, Docket # FWS–HQ–ES–2018–0007.

(2) "Regulations for Interagency Cooperation," 84 Fed. Reg. 44976 (Aug. 27, 2019), promulgated by the Secretary of the Interior and the Secretary of Commerce, Docket # FWS–HQ–ES–2018–0009.

(3) "Regulations for Listing Species Designating Critical Habitat," 84 Fed. Reg. 45020 (Aug. 27, 2019), promulgated by the Secretary of the Interior and the Secretary of Commerce, Docket # FWS–HQ–ES–2018–0006.

(Individually, we refer to each new rule as a "Rule" and, collectively, the "Rules.")

During the public comment period for the Rules in 2018, the Animal Law Committee of the New York City Bar Association submitted a comment opposing the Rules as they were proposed because they weaken the United States' protection of endangered and threatened species of wildlife.[1] The U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service

[1] Letter from Christopher Wlach, Chair, Animal Law Committee, to Secretaries Zinke and Ross, re: Docket Nos. FWS–HQ–ES–2018–0006; FWS–HQ–ES–2018–0007; FWS–HQ–ES–2018–0009 (Opposed) (Sept. 20, 2018), https://s3.amazonaws.com/documents.nycbar.org/files/2018428-EndangeredSpeciesActRules.pdf. The letter was limited in scope to wildlife; the rules also affect plants, which are not within the scope of the letter and this report. (All websites listed in this report were last visited on December 16, 2019.)

("NMFS") (FWS and NMFS collectively, the "Services") did not adequately address our concerns in the final Rules. Accordingly, we support the proposed legislation to void the Rules.

II. BACKGROUND

Enacted in 1973, the ESA 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.[2]

As explained below, the Rules would stand in many ways at odds with the goals of the ESA. The ESA enjoys broad public support, demonstrated by the outcry during the Rules' public comment period. Tens of thousands of concerned entities and individuals submitted comments opposing the Rules, including the ten State Attorneys General of Massachusetts, California, Maryland, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia;[3] the National Congress of American Indians;[4] the Southern Environmental Law Center, co-signed by 57 non-profit organizations;[5] Earth Justice on behalf of 15 environmental organizations;[6] a coalition of roughly 275 university affiliated scientists and other scientists;[7] and thousands of citizens concerned about wildlife and the environment.

III. JUSTIFICATION

a. The Committee Supports Voiding "Regulations For Prohibitions To Threatened Wildlife And Plants," 84 Fed. Reg. 44753, Because The New Rule Weakens The Protections For Threatened Species Of Wildlife.

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

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[2] 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.

[3] Comments of the Attorneys General of Massachusetts, California, Maryland, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia (Sept. 24, 2018), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-ES-2018-0009-56447&attachmentNumber=1&contentType=pdf.

[4] Letter from the National Congress of American Indians (Sept. 24, 2018), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-ES-2018-0009-58142&attachmentNumber=1&contentType=pdf.

[5] Letter from Southern Environmental Law Center (Sept. 24, 2018), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-ES-2018-0009-56155&attachmentNumber=4&contentType=pdf.

[6] Letter from Kristen Boyles, Earthjustice (Sept. 24, 2018), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-ES-2018-0009-55394&attachmentNumber=1&contentType=pdf.

[7] Letter from John A. Vucetich, *et al*. (Sept. 24, 2018), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-ES-2018-0009-56506&attachmentNumber=1&contentType=pdf.

portion of its range."[8] 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."[9]

Prior to the Rule's effective date, the former rules provided default protections to threatened species; in particular, threatened species received almost all of the same protections as endangered species under 50 C.F.R. § 17.21.[10] Formerly, section 17.21 protected both endangered and threatened species by prohibiting (i) their import or export into the United States,[11] (ii) their "take,"[12] (iii) the possession of unlawfully taken wildlife,[13] (iv) the delivery, receipt, carrying, transporting, or shipping in interstate or foreign commerce of such species,[14] and (v) selling or offering for sale of such species.[15]

Under the old rule, FWS had authority to supersede the default protections by promulgating a "species-specific rule" (also known as a "special rule") that replaced the default protections for a specific species.[16] Generally, species-specific rules resulted in reduced protections and, for that reason, were sometimes met with opposition from environmental and animal welfare organizations.[17] FWS exercised its authority to promulgate species-specific rules dozens of times: of the 240 species of threatened wildlife under the jurisdiction of FWS, around half are currently covered by species-specific rules.[18]

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[8] 16 U.S.C. § 1532(20).

[9] 16 U.S.C. § 1533(d).

[10] 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).

[11] 50 C.F.R. § 17.21(b).

[12] 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).

[13] 50 C.F.R. § 17.21(d).

[14] 50 C.F.R. § 17.21(e).

[15] 50 C.F.R. § 17.21(f).

[16] 50 C.F.R. § 17.31(c).

[17] 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 Cmties. 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.

[18] FWS ECOS Environmental Conservation Online System, Generate Species List, https://ecos.fws.gov/ecp0/reports/ad-hoc-species-report-input (listing 240 threatened vertebrates and invertebrates under FWS's jurisdiction); FWS ECOS Environmental Conservation Online System, Species with 4d Rules, https://ecos.fws.gov/ecp0/reports/species-fourd-report (listing 124 threatened species under FWS's jurisdiction that are covered by a species-specific 4(d) rule); *see also* Ya-Wei Li, Defenders of Wildlife, Section 4(d) Rules: The Peril and the Promise, note 17 above, at 5 (showing that, as of May 2016, 116 of 238 species under FWS's jurisdiction were covered by a species-specific 4(d) rule).

Conversely, over four decades, FWS made a choice to apply the default protections to roughly half of threatened species. Implicitly, this means the FWS determined that threatened species largely require the same protections as endangered species to further the goals of the Endangered Species Act.[19] 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."[20]

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.[21] Also, the old rule ensured that threatened species were protected while FWS gathered data to determine if a species-specific rule was appropriate.[22]

The new Rule turns the former rule on its head: threatened species now have no protection *unless* FWS issues a species-specific rule. And the Rule provides no guidance on what standards FWS will use to create a species-specific rule. This will affect all wildlife that is classified as threatened on and after September 26, 2019, 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, under the old rule, they were almost always afforded the same protections as endangered species.

Specifically, the new Rule amends section 50 CFR § 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 List of Endangered and Threatened Wildlife in § 17.11(h) on or prior to September 26, 2019, unless the Secretary has promulgated species-specific provisions (see paragraph (c) of this section).

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[19] 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.

[20] Eighty-five percent of threatened birds receive the default protections under 50 CFR § 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, note 17 above, at 6.

[21] *Id*. at 11.

[22] 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.

The U.S. Fish and Wildlife Service Species states that it "intend[s] to finalize the species-specific rule concurrent with the final listing or reclassification determination" but reserves the right to promulgate a species-specific rule "at any time."[23]

FWS has not given a compelling reason why such a dramatic change to the existing system was 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 purpose of the ESA, nor does it address how differences in the species and their ranges that are covered by the NMFS could be relevant.[24] (According to one analysis, NMFS's species-specific rules are similar to the current FWS approach because the NMFS species-specific rules work by incorporating the default protections provided to endangered species and carving out exceptions.[25])

FWS also argues that it has experience promulgating species-specific rules.[26] 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."[27] But this reason did not require the FWS to turn the previous rule on its head — it already had the authority to issue species-specific rules for any threatened species.

Instead of protecting threatened species, the Rule has the potential to cause serious harm. During the comment period, dozens of governmental, environmental and animal welfare organizations expressed concern that the Rule would cause critical delays in the process of listing wildlife as threatened — delays that could cause extinction.[28] For example, the State Attorneys General of Massachusetts *et al*. cite a Government Accountability Office report stating that 141 lawsuits were filed between fiscal years 2005 and 2015 alleging that the U.S. Fish and Wildlife

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[23] In its notice of final rulemaking (84 Fed. Reg. 44753), FWS stated:

> Species listed or reclassified as a threatened species after the effective date of this rule would have protective regulations only if the Service promulgates a species-specific rule (also referred to as a special rule). In those cases, we intend to finalize the species-specific rule concurrent with the final listing or reclassification determination. Notwithstanding our intention, we have discretion to revise or promulgate species-specific rules at any time after the final listing or reclassification determination.

[24] FWS, Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44753 (Aug. 27, 2019), https://www.regulations.gov/contentStreamer?documentId=FWS-HQ-ES-2018-0007-0001&contentType=pdf.

[25] Ya-Wei Li, Defenders of Wildlife, Section 4(d) Rules: The Peril and the Promise, note 17 above, at 5.

[26] 84 Fed. Reg. 44754. 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, note 17 above, at 6.

[27] 84 Fed. Reg. 44756.

[28] *E.g.*, Comments of the Attorneys General of Massachusetts *et al*., note 3 above, at 35; Comment from Earthjustice, note 6 above, at 8.

Services failed to take actions within the deadlines mandated by ESA section 4.[29] In its notice of final rulemaking, the FWS did not directly address the frequent litigation; instead, it hypothesized that it has the capacity to promulgate species-specific rules in a timely manner based on historical numbers of species-specific rules issued in recent years.[30] But this does not factor in the probability that the numbers of species needing protection — and demanding the resources of the Fish and Wildlife Service — will likely increase in the near future as climate change continues to drive more and more species to the precipice of extinction.

b. The Committee Supports Voiding "Regulations For Interagency Cooperation," 84 Fed. Reg. 44976, Because The Rule Narrows The Activities That Would Trigger The Interagency Consultation Requirement.

ESA Section 7(a)[31] requires every federal agency to consult with either FWS or NOAA, as applicable,[32] to "insure" that actions authorized, funded or carried out by such agency are not likely to (i) jeopardize the existence of any endangered or threatened species or (ii) "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.[33] Under 16 USC § 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." While FWS seems to lack sufficient funding to consistently produce high-quality consultations, Section 7 remains a "key reason" for the ESA's strength.[34]

The ESA does not define the phrase "destruction or adverse modification," but agency regulations do.[35] The new Rule narrows the prior definition of "destruction or adverse modification" to tie no longer to the species' "critical habitat" but instead to the species' "critical

[29] Comments of the Attorneys General of Massachusetts et al., note 3 above, at 35, *citing* U.S. Gov't Accountability Office, Gao-17-304, Environmental Litigation: Information on Endangered Species Act Deadline Suits, pp. 5-18 (Feb. 2017) (reporting that 141 lawsuits involving 1,441 species were filed from fiscal year 2005 through 2015 alleging that Fish and Wildlife Service and the National Marine Fisheries Service failed to take actions within deadlines mandated by ESA section 4, largely on petitions to list species), https://www.gao.gov/assets/690/683058.pdf.

[30] 84 Fed. Reg. 44755.

[31] 16 USC § 1536(a) ("Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . ." (emphasis added)).

[32] 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.

[33] The critical habitats for fish and wildlife are listed in 50 CFR § 17.95 and 50 CFR Part 226 (for species under NOAA's jurisdiction).

[34] 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.

[35] 50 C.F.R. § 402.02, "Destruction or adverse modification."

habitat as a whole": "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."

According to the notice of final rulemaking, the addition of "as a whole" to the definition is intended to clarify that the scale of the effect of the destruction or adverse modification is the "entire critical habitat designation."[36] By evaluating impacts on a species' *entire* critical habitat designation, the new Rule dilutes the importance of impacts to a portion of a species' designated critical habitat that may jeopardize a species' chances of recovery or survival. As a result of this dilution, fewer activities will trigger the Section 7(a) consultation requirement, clashing with the statutory mandate that all federal agencies in consultation with the Services "insure" that "any" actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of any listed species or adversely affect critical habitat.[37]

c. The Committee Supports Voiding "Regulations For Listing Species Designating Critical Habitat," 84 Fed. Reg. 45020, Because Several Key Rule Changes Collectively Weaken Protections For Endangered And Threatened Species And Their Habitats.

i. The Rule risks letting economic impacts improperly influence listing determinations and may delay the listing process.

The Rule deletes regulatory language that previously prohibited the Secretary[38] from referencing economic and other impacts in determining whether to list, reclassify, or delist a species, so that it now reads: "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.~~" According to the Services, this deletion simply lets the Services compile and provide additional information to the public

[36] FWS and NMFS, Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44976, 44986 (Aug. 27, 2019), https://www.govinfo.gov/content/pkg/FR-2019-08-27/pdf/2019-17517.pdf. The Services explain:

> After effects are determined to be adverse at the action-area scale, they are analyzed with regard to the critical habitat as a whole. That is, the Services look at the adverse effects and evaluate their impacts when added to the environmental baseline and cumulative effects on the value of the critical habitat for the conservation of the species, taking into account the total and full extent as described in the designation, not just in the action area. It is at this point that the Services look to whether the effects diminish the role of the entire critical habitat designation. As discussed further above in our discussion of the phrase ''as a whole,'' the Services must place impacts to critical habitat into the context of the overall designation to determine if the overall value of the critical habitat is likely to be reduced.

[37] 16 U.S.C. § 1536(a)(2).

[38] "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.

regarding listing determinations; the determinations themselves, however, would continue to be based on only biological considerations.[39]

According to the Services, "most commentators" disagreed with removing the phrase "without reference to economic or other impacts of such determinations," and many stated that the change violates the ESA.[40] The ESA acknowledges that the Services' decisions about listing species must be made "solely on the basis of the best scientific and commercial data available" about the status of the species.[41] Yet the Services argued that compiling economic data about listing decisions is not expressly precluded by the ESA — and therefore, it would be permitted.[42] But it is unclear how the Services will prevent economic data from unintentionally influencing listing decisions, or "what purpose it could serve for the Services to spend time and resources generating economic impact information if they were not going to consider the data."[43]

The change also 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.[44] That battle, together with the resources necessary for the FWS to evaluate economic data, is likely to slow down the listing process and expose species to greater risk of extinction.

ii. The new Rule makes it easier for the Services to withhold designating critical habitats for listed species.

The Rule puts endangered and threatened species at risk by making it easier for the Services to decide not to designate species' habitat as "critical," a federal designation aimed at protecting occupied and unoccupied areas necessary to conserve a species.[45] 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.[46]

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[39] 84 Fed. Reg. 45024.

[40] *Id.*

[41] 16 U.S.C. § 1533(b)(1)(A). Whereas the ESA authorizes consideration of economic impacts in determining what areas to designate as critical habitat, 16 USC § 1533(b)(2), it expressly requires that all listing decisions center exclusively on the biological threats to the species, such as habitat destruction, disease, and predation, without regard to the economic effects of listing.

[42] 84 Fed. Reg. 45024 ("Because neither the statute nor the legislative history indicates that Congress intended to prohibit the Services from compiling economic information altogether, we removed the language at issue.").

[43] Comments of the Attorneys General of Massachusetts *et al*., note 3 above, at 11.

[44] WilmerHale, *Trump Administration Proposes Major Revisions to ESA Regulations,* JD Supra (July 27, 2018), https://www.jdsupra.com/legalnews/trump-administration-proposes-major-56787.

[45] 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").

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

As background, the ESA previously required the Secretary to designate, concurrently with a species' listing, "any habitat of such species which is then considered to be critical habitat."[47] The former rule allowed for just two exceptions to designating critical habitat, both of which were 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."[48] In these cases a designation was deemed "not prudent."[49]

The new Rule replaces the former standard with a non-exhaustive list of circumstances in which a critical habitat designation would be "not prudent."[50] While the Services may still intend to designate critical habitats "in most cases,"[51] 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 exception (v) of the new Rule, for instance, the Secretary may find a designation not prudent simply "[a]fter analyzing the best scientific data available."[52] 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.[53]

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."[54] This ground could effectively limit critical habitat designations where the threat at issue stems from climate change effects.[55] Indeed, the examples cited by Services include "threats stemming from melting glaciers, sea level rise, or reduced snowpack but no other habitat-based threats."[56] Even if a critical habitat designation in such cases may not alone stop climate

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[47] 16 U.S.C. § 1533(a)(3)(A).

[48] 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.*

[49] *Id.*

[50] 84 Fed. Reg. 45053 (modifying 50 C.F.R. § 424.12(a)(1)).

[51] *Id.* at 45041.

[52] *Id.* at 45053.

[53] *See* 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").

[54] 84 Fed. Reg. 45053.

[55] *E.g.*, Comments of the Attorneys General of Massachusetts *et al.*, note 3 above, at 18.

[56] 84 Fed. Reg. 45042.

change threats[57] — which, though grave, are unpredictable[58] — withholding a designation solely on these grounds would deny species protection from other, non-climate threats — which may be grave *and* predictable.[59] Moreover, the Rule fails to account for the possibility of designating critical habitat where species might move to avoid climate change-related threats.[60] And the Rule ignores the other benefits from a critical habitat designation outside of the consultation requirements, including educating the public and state and local governments about the importance of certain areas to endangered and threatened species.[61]

In addition to broadening the grounds for not-prudent determinations, the Rule further limits 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."[62] While the former rules gave the Services broad discretion in such determinations, the new Rules deem such a designation essential in just one circumstance: when limiting the designation to just occupied areas would be "inadequate to ensure the conservation of the species."[63]

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.[64] 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.[65]

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[57] 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.").

[58] *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.

[59] *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.").

[60] *Id.*

[61] Comments of the Attorneys General of Massachusetts *et al*., note 3 above, at 18.

[62] 16 U.S.C. § 1532(5)(A).

[63] 83 Fed. Reg. 35201.

[64] 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/.

[65] Center for Biological Diversity, Press release: Trump Administration Aims Wrecking Ball at Endangered Species Act, note 59 above; 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.

IV. CONCLUSION

For the above reasons, the Animal Law Committee of the New York City Bar Association supports the proposed legislation.

Animal Law Committee
Christopher Wlach, Chair

December 2019