



WCS
GLOBAL CONSERVATION PROGRAMS
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September 24, 2018

The Honorable Ryan Zinke
Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

The Honorable Wilbur Ross
Secretary
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Dockets No. FWS-HQ-ES-2018-0007; 4500030113, FWS-HQ-ES-2018-0006; 180202112-8112-01; 4500030113, FWS-HQ-ES-2018-0009; FXES11140900000-189-FF09E300000; 180207140-8140-01; 4500090023.

Dear Secretary Zinke and Secretary Ross:

I am writing on behalf of the Wildlife Conservation Society (WCS) in response to a rule proposed by the U.S. Fish and Wildlife Service (FWS) and two rules proposed jointly by FWS and the National Marine Fisheries Service (NMFS) (“the Services”) that would significantly change the implementation of the Endangered Species Act (ESA).

WCS saves wildlife and wild places worldwide through science, conservation action, education, and inspiring people to value nature. Headquartered at the Bronx Zoo, WCS achieves its mission by harnessing the power of its Global Conservation Program—in nearly 60 countries and throughout the world’s ocean—and its five wildlife parks in New York City, visited by four million people annually.

In the United States, WCS’s conservation work spans the country, from the eastern seaboard, through the Rocky Mountain region, to the Arctic. In the Atlantic, WCS’s New York Seascape Program is the New York Aquarium’s local marine conservation program, working to restore healthy populations of local marine species and protect coastal and offshore habitats, which are vital to wildlife and key to the area’s economic and cultural vitality. The program covers the

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New York Bight, a 16,000-square-mile region stretching from Montauk, N.Y., to Cape May, N.J., as well as the waters of Long Island Sound. WCS's Ocean Giants Program informs conservation management and policies for marine mammals in the U.S. and worldwide as these species face a growing number of threats, including increased ocean noise in biologically important habitats for marine species. In the Rocky Mountain Region, WCS is working to address the intensifying human footprint, which includes energy development, exurban sprawl, and increasing recreation, to reduce habitat fragmentation, and support landscape connectivity. In the American West, WCS applies high-quality science to inform conservation decisions that impact wildlife at scale, across boundaries, and through partnerships with the increasingly diverse cultures and communities of the West. In Alaska, WCS's Arctic Beringia Program and its field efforts are working on the ground with local partners to implement conservation solutions to mitigate impacts of transportation and industrial activities in the quickly changing Arctic that support wildlife and their habitats, as well as the food and economic security of local communities.

WCS works on the ground on the conservation of wildlife species, many of which are listed as threatened or endangered under the ESA. This includes field conservation on tigers, snow leopards, other Asian big cats, Asian and African elephants, African and Asian great apes, all of which are protected by the ESA. WCS also prioritizes work in the field on sharks and rays, cetaceans, and tortoises and freshwater turtles, many of which are ESA-listed. Finally, WCS works closely with the U.S. government, other government partners, and other stakeholders on international wildlife trade (including combating wildlife trafficking); the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is critical to these efforts, and is implemented by the U.S. government under the authority of the ESA.

WCS is very concerned with the process through which the Services are making these proposed rule changes to one of the most important pieces of legislation for threatened and endangered wildlife in the world. By releasing far-reaching changes affecting the ESA in three separate rules, the Services are preventing a full consideration of the cumulative effects of the proposed changes on the implementation of Act. WCS also notes that given the scope and complexity of changes proposed, a 60-day comment period is not sufficient for adequate public review and comment on the proposed changes. Below are responses to all three proposed rules, focusing on the following:

- FWS should withdraw its proposed rule to repeal the blanket 4(d) rule for threatened species;
- The Services should withdraw its proposal to allow analysis of economic impacts in listing decisions and ensure that any changes to listing and critical habitat regulations do not undermine the ability of the Services to protect species and critical habitat in accordance with the requirements of the ESA; and

- The Services should ensure that any revisions to interagency cooperation regulations do not narrow the scope of review under section 7 of the ESA.

WCS urges the Services to withdraw several provisions of the proposed rules, and if they do proceed with this rulemaking, to reconsider proposed changes that would undermine the core goals of the ESA, as articulated by Congress.

I. Withdraw the Blanket 4(d) Rule Repeal

In 1978, FWS finalized a rule that extended to all species listed as threatened under the ESA the same protection from a taking of the species provided to endangered species under section 9. In general, this so-called “blanket 4(d) rule” makes it illegal, with respect to threatened wildlife, to:

- Import any such species into, or export any such species from the United States;
- Take any such species within the U.S. or the territorial sea of the U.S.;
- Take any such species on the high seas;
- Possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken;
- Deliver, receive, carry, transport, or ship in interstate or foreign commerce and in the course of commercial activity; or,
- Sell or offer for sale in interstate or foreign commerce any such species.¹

Exceptions to this general rule are outlined in the existing regulations and a similar rule applies to threatened plants. FWS, at its discretion, retains the authority to publish a specific rule pursuant to section 4(d) of the ESA allowing some take of a threatened species or, potentially, entirely exempting a threatened species from the taking prohibition.² As of 2016, about half of species listed by FWS as threatened have a species-specific 4(d) rule currently in place.³

In its proposed rule, FWS seeks to eliminate the blanket 4(d) rule for wildlife and plants for species listed as threatened, or downlisted from endangered status, on or after the date of the final rule.⁴ Species newly listed as threatened would only gain the protections from taking enumerated under section 9 of the ESA if a species-specific 4(d) rule were finalized by the agency.

¹ USFWS, Region 6, Mountain-Prairie Region, Endangered Species Act Special Rules, Questions and Answers (Feb. 2014), available at https://www.fws.gov/mountain-prairie/factsheets/ESA%20SpecialRules%20Factsheet_020714.pdf.

² *Id.*

³ Ya-Wei Li, Defenders of Wildlife Policy White Paper Series, Section 4(d) Rule: The Peril and Promise (Jan. 2017), available at <https://defenders.org/sites/default/files/publications/section-4d-rules-the-peril-and-the-promise-white-paper.pdf>.

⁴ Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 83 Fed. Reg. 35,174, 35,175 (July 25, 2018) (Docket No. FWS-HQ-ES-2018-0007; 4500030113).

WCS strongly opposes this proposed rule. As noted earlier, in about half of all threatened listings, FWS has not proposed a species-specific 4(d) rule, effectively concluding that no taking of the listed species should be permitted to best ensure that the decline of the population is arrested before the species becomes endangered. For those species for which there is a specific 4(d) rule, most are granted at least some of the protections provided by section 9 of the law. In those circumstances, where protections differ from those provided in section 9, they are detailed and tailored to the species in the relevant species-specific 4(d) rule.

Eliminating the blanket 4(d) rule would create a substantial—and unnecessary—burden on FWS to promulgate a species-specific 4(d) rule for almost every species that is listed as threatened or downlisted from endangered. The Administration’s budget request for FY19 does not indicate that the FWS would be sufficiently prepared to undertake the additional work that preparing species-specific 4(d) rules would entail. Indeed, the FWS has requested a 46% cut to the budget for listing activities, stating that slashing these funds will allow the Agency to address “other priorities.”⁵ Not only is repealing the blanket 4(d) rule unwise, proposing to do so without requesting sufficient resources to prepare for the inevitable increase in workload risks the future of all of the species that the ESA is intended to protect.

Data show that a number of species on which WCS works, such as walruses and wolverines are currently thought to be in decline, or at risk of decline, due to a number of factors and may soon be re-considered for listing.⁶ Should the best science and data available show the need for one of these species to be listed as threatened, it is critical that the blanket 4(d) rule be maintained, with appropriate consideration of subsistence takes, to ensure that they are protected from unnecessary takings until such a time that a species-specific rule can be promulgated.

In addition, the proposed rule seeks to eliminate the blanket 4(d) rule for wildlife and plants listed as threatened, or downlisted from endangered to threatened, on or after the date of the final rule. This would create a complicated, expensive two-tier system, with some threatened species gaining little or no protection until there is a species-specific 4(d) rule and others protected as previously.

Furthermore, the blanket 4(d) rule enables the U.S. to prohibit importation into the country of species listed on the CITES Appendices and listed as threatened on the ESA. CITES allows

⁵ U.S. Fish and Wildlife Service, Budget Justifications and Performance Information: Fiscal Year 2019, ES 1-3, available at https://www.doi.gov/sites/doi.gov/files/uploads/fy2019_fws_budget_justification.pdf.

⁶ See, e.g., James G. MacCracken et al., U.S. Fish and Wildlife Service, Marine Mammals Management, Final Species Status Assessment for the Pacific Walrus (*Odobenus rosmarus divergens*) May 2017 (Version 1.0), available at <https://www.fws.gov/alaska/fisheries/mmm/walrus/pdf/final-pacific-walrus-species-status-assessment.pdf>; Robert M. Inman et al., *The Wolverine's Niche: Linking Reproductive Chronology, Caching, Competition, and Climate*, 83 J. Mammalogy 634-644 (2012), available at <https://academic.oup.com/jmammal/article/93/3/634/834407>.

countries to have such so-called “stricter domestic measures.” Without the blanket 4(d) rule, a threatened species that is on CITES Appendix I or II could still be imported into the U.S. with CITES permits but without the added scrutiny and benefit of the ESA. Unfortunately, due to limited capacity, weak governance, and even corruption, some CITES Parties are challenged in implementing the treaty effectively. Because of this, the conservation of the species necessitates this “double check” scrutiny by the United States. CITES is implemented and enforced in the U.S. under the authority of the ESA, and as such it benefits CITES implementation to retain the blanket 4(d) rule. If the blanket 4(d) rule is eliminated, the resulting double standard would make CITES implementation, importation, and permits issuance, exceedingly complicated, such that an import permit would be needed for a threatened, Appendix II species listed before the rule is finalized, but not after. That would be unnecessarily confusing for the regulated community.

For the reasons stated above, the USFWS should withdraw this proposed rule.

II. Proposed Changes to Listing and Critical Habitat Regulations Would Undermine the ESA

Section 4 of the ESA outlines the requirements for listing species for protection under the Act, as well as designating critical habitat for threatened and endangered species. It directs the Services to determine whether a species is threatened or endangered because of the following factors:

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms; or
- (E) other natural or manmade factors affecting its continued existence.⁷

Listing decisions must be made “solely on the basis of the best scientific and commercial data available,”⁸ and cannot include consideration of the economic impacts of a listing decision.

The law further directs the Services, “to the maximum extent prudent and determinable,” to designate critical habitat for a threatened or endangered species, concurrently with the listing determination.⁹ Critical habitat areas within the geographical area occupied by the species at the time of listing are described as those that are “essential to the conservation

⁷ 16 U.S.C. § 1533(a)(1).

⁸ 16 U.S.C. § 1533(b)(1)(A).

⁹ 16 U.S.C. § 1533(a)(3)(A).

of the species and . . . which may require special management considerations or protection.”¹⁰ Critical habitat also includes “specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.”¹¹ Critical habitat designations must be made 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, of specifying any particular area as critical habitat.”¹²

The changes proposed to the listing and critical habitat regulations¹³ threaten to undermine core principles of the ESA and its ability to protect species at danger of extinction. WCS opposes any changes to existing regulations that would undermine or limit the listing of species that meet the description of threatened or endangered in the Act or the designation of critical habitat for those species. WCS’s comments below focus first on the proposed changes to listing regulations and then address the critical habitat provisions.

A. Withdraw Language to Allow Economic Analyses in Listing Decisions

The ESA states clearly that, when making a decision to list a species, “[t]he Secretary shall make determinations...solely on the basis of the best scientific and commercial data available.”¹⁴ Under the law, economic data for or against the listing is not allowed to factor into the decision. To reflect the law, the existing rules state that a determination shall be made “without reference to possible economic or other impacts of such determination.”¹⁵ Despite the clear requirements of the ESA, the Services are proposing to strike this language, thus allowing the analysis of economic impacts of a potential listing to be collected and released with the listing decisions.

WCS strongly opposes this proposal. Listing decisions should be made as the law demands—solely on the basis of the best scientific and commercial data available.

The listing process and resulting decision whether to list a species as endangered or threatened has been, since the 1982 amendments to the law by Congress, strictly based on scientific information. Indeed, in 1982, Congress explicitly rejected the notion of injecting economic considerations into this process, with the House Committee report

¹⁰ 16 U.S.C. § 1532(5).

¹¹ *Id.*

¹² 16 U.S.C. § 1533(b)(2).

¹³ Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35,193 (July 25, 2018) (Docket No. FWS-HQ-ES-2018-0006; Docket No. 180202112-8112-01; 4500030113).

¹⁴ 16 U.S.C. § 1533 (b)(1)(A).

¹⁵ 50 C.F.R. § 424.11(b).

stating “that economic considerations have no relevance to determinations regarding the status of species.”¹⁶ WCS considers the language in the proposed rule to be violative of the terms of the statute and the clear intent of Congress.

Furthermore, while economic considerations are not allowed to be taken into account in the listing determinations, there are many other provisions in the ESA that explicitly allow or require economic considerations, thus obviating the need to include them in the listing process. This includes rulemakings relating to critical habitat designations, section 4(d) rulemakings, recovery planning, the development of incidental take statements accompanying the Service’s biological opinions under Section 7 consultations, and the development of incidental take permits under Section 10.

Lastly, economic development and direct exploitation have often been primary drivers of species declines, subsequently leading to listings due to over-exploitation, habitat loss, degradation, habitat fragmentation, or overfishing, in the case of marine species. The allowance of economic factors to be considered in the context of a listing determination would only exacerbate the political factors that complicate ESA implementation, and likely either delay listing determinations or lead to fewer listing determinations even when the scientific information alone would warrant a listing.

FWS and NMFS should withdraw this proposed revision.

B. “Foreseeable Future” Considerations in ESA Listings Must Continue to Be Long Term and Analyzed Across Multiple Generations of a Species

When making a determination for listing under the ESA, the law directs the respective Secretary to consider whether a species is in danger of extinction or likely to become so within the “foreseeable future.”¹⁷ No further definition to the term is provided either in the Act or in implementing regulations. FWS and NMFS propose to clarify that the term “foreseeable future extends only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable.”¹⁸ Further, they note that “[t]he Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species’ life-history characteristics, threat-projection timeframes, and environmental variability.”¹⁹

¹⁶ H.R. Rep. No. 97-567, Pt. 1 at 20 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2820 *quoted in* Michael J. Bean & Melanie J. Rowland, *The Evolution of National Wildlife Law* 206 (3d ed. 1997).

¹⁷ 16 U.S.C. § 1533(b)(1)(B)(ii).

¹⁸ Revision of the Regulations for Listing Species and Designating Critical Habitat. 83 Fed. Reg. at 35,201.

¹⁹ *Id.*

Although we understand the value of clarifying this term, WCS urges the agencies to explicitly articulate a cautious approach to ensure that the net result of this proposed change does not artificially reduce the time frame under consideration, particularly for long-lived species and for impacts over the long-term, such as climate change or changes in the marine environment. Viable population analysis often takes into consideration changes over the course of 50 to 100 years and one factor can have a delayed effect that results in an abrupt tipping point. For some species, a single generation can span 20 to 30 years, and recovery for these long-lived species may take several decades. The Services need to continue to consider conditions over a period of time that is scaled to both the life history of the species and long-term changes in climate and environment to ensure the impacts of all the factors affecting a species over multiple generations are examined and addressed when making a listing decision.

The agencies note that “environmental variability” will be a consideration that will be taken into account when making determinations.²⁰ WCS has found that warming ocean temperatures have had a serious effect on pagophilic marine mammals such as walruses and ringed seals in Arctic and mountain ecosystems. For species such as wolverines, which in the lower 48 U.S. states occur at the southernmost extent of their range globally, climate variability and change can have disproportionate impacts. For example, wolverines in this range rely heavily on patches of persistent snowpack for caching food resources and reproduction.²¹ With many areas of the Western U.S. and North America predicted to have increasing levels of aridity, more frequent droughts, and more moisture falling as rain versus snow, the loss of or extreme variability in persistent snowpack could have important consequences for these animals.

In many areas, environmental changes are happening rapidly, and it can be difficult to predict with certainty how pronounced an effect they will have on species. But it is clear that environmental variability is having a very serious effect on many species. It is imperative that the Services’ consideration of environmental variability—and the uncertainty around related predictions—not be used as a reason to shorten time frame that is being considered for determining whether to list a species.

C. Services Must Maintain Discretionary Authority Over Listing Decisions

Current regulations state that a species “may be delisted on the basis of recovery only if the best scientific and commercial data available indicate that it is no longer endangered or threatened.”²² The agencies propose revising the rules to make it mandatory that a

²⁰ *Id.*

²¹ Inman et al., *supra* note 6.

²² 50 CFR § 424.11(d)(2).

species be delisted when it no longer meets the listing requirements. WCS opposes these changes.

The current regulations allow the agencies to have some discretion when making a determination to delist a species, such as when the Services determine that a species will likely require relisting soon after the protections afforded to it under the ESA are removed. Indeed, in 2016 comments responding to the FWS proposal to delist the grizzly bear population in the Greater Yellowstone Ecosystem, WCS noted that grizzly bears have limited biological resiliency to recover quickly from management errors and encouraged FWS to use its discretionary authority to maintain the listing until improvements were made to the conservation strategy to be instituted post-listing.²³

The primary goal of the ESA is—and should continue to be—recovering a species so that its listing is no longer needed. However, it is important that the agencies retain the discretionary authority to keep species listed when mitigating factors necessitate.

D. The Services Must Not Expand the Conditions Under Which it is “Not Prudent” to Designate Critical Habitat

For many species, habitat loss is one of the biggest threats to their survival. As the human footprint expands, habitat is further fragmented, and conditions change, ensuring that key areas are protected is essential to ensuring the success of species conservation. The proposed changes could undermine the evaluation of areas that are essential to the conservation of species for designation as critical habitat, especially species that are threatened by changing environmental conditions.

The Services propose to change the conditions under which they will determine that it is not prudent to designate critical habitat. The current regulations outline two circumstances under which designating critical habitat is not prudent: 1) “[t]he species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species” or 2) “[s]uch designation of critical habitat would not be beneficial to the species.”²⁴ The regulations further guide that “[i]n determining whether a designation would not be beneficial, the factors the Services may consider include but are not limited to: Whether 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.’”²⁵

²³ Letter from the Wildlife Conservation Society to the U.S. Fish and Wildlife Service (Oct. 7, 2016), (Comments Concerning USFWS Proposed De-listing of Greater Yellowstone Ecosystem Grizzly Bear Population, Docket # FWS-R6-ES-2016-0042), available at <https://www.regulations.gov/document?D=FWS-R6-ES-2016-0042-9532>.

²⁴ 50 C.F.R. § 424.12(a)(1).

²⁵ 50 C.F.R. § 424.12.

The proposed rule would change the regulations to allow, but not require, a finding that the designation isn't prudent when one of five circumstances are met. The Services note that they expect these determinations to continue to be rare if the proposed regulation were to be enacted and that although they intend to "reduce the burden of regulation in rare circumstances in which designation of critical habitat does not contribute to the conservation of the species, the Services recognize the value of critical habitat as a conservation tool and expect to designate it in most cases."²⁶ Although some of these circumstances are already outlined in existing regulations, other proposed changes risk improperly limiting critical habitat designations.

Specifically, proposed section 424.12(a)(1)(ii) would permit the Secretaries to determine that a critical habitat designation is not prudent if "threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act."²⁷ The examples of this provided in the proposed rule include threats such as melting glaciers, reduced snowpack, or rising sea level.²⁸ The Services reason that in these circumstances, a critical habitat designation and section 7 consultation "could not prevent glaciers from melting, sea levels from rising or increase the snowpack" and would not support the conservation of the species.²⁹ This description unnecessarily limits the analysis of critical habitat value and could truncate consideration of the impacts due to changing conditions and global processes on species. Even if the management action cannot prevent sea level rise or sea ice decline in a case where they are driving habitat loss, it can address other factors that could accelerate the habitat loss, increase the ability of the species to adapt to a changing climate, or identify other areas that could provide critical habitat as conditions change.

The language permitting not prudent determinations for species occurring primarily outside the United States when "[a]reas within the jurisdiction of the United States provide no more than negligible conservation value, if any"³⁰ is also of concern. There are circumstances in which an area within the United States may be "essential to the conservation of a species"³¹ even when the species occurs primarily outside the United States. For example, although jaguars were not initially present in the United States when they were first listed for protection under the ESA, there are still areas within the United States that are appropriately designated as critical habitat. As habitats recover due management and conservation efforts, species, like jaguars, can and will re-colonize

²⁶ Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. at 35,197.

²⁷ *Id.* at 35,201.

²⁸ *Id.* at 35,197.

²⁹ *Id.*

³⁰ *Id.* at 35,201.

³¹ 16 U.S.C. § 1532(5).

historical range. This also applies to species like ocelots, which are now re-colonizing in the United States, and the jaguarundi, or Eyra cat, which ranges from Mexico to central Argentina and had likely been extinct in the U.S.³² but was recently detected in New Mexico. Further, due to climate change, areas outside species' current core ranges may be important refugia remaining for them in the future. For some species, areas further north and across the U.S. border could become important. The Services must ensure that the final regulations do not prevent designations of critical habitat in the U.S. when that habitat can provide conservation value to a species even if it currently occurs primarily outside the U.S., taking into account factors such as the historic range of a species and changing ranges due to climate change.

Finally, the proposed rule gives the Secretary discretion to “otherwise” determine that a critical habitat designation “would not be prudent” “after analyzing the best scientific data available.”³³ This language gives the Secretary a large amount of discretion to determine that critical habitat should not be designated. Given that the ESA already allows economic and non-biological factors to be considered in critical habitat designations, there should be some limits to the Secretary’s discretion to ensure that political factors do not override ecological ones. The Services have an affirmative duty to designate critical habitat that is essential to the conservation of listed species. In the rare circumstances that designating critical habitat truly is not prudent given the requirements of the ESA, the Services should continue to have the burden of demonstrating those circumstances in light of clearly articulated criteria and conditions with analysis based on the best available science.³⁴

E. Areas Currently Unoccupied by a Species Must Be Considered for Critical Habitat Designations

The Services’ 2016 critical habitat rule amended the regulations relating to designating areas currently unoccupied by the species as critical habitat.³⁵ WCS wrote in support of those changes, as it appropriately elevated consideration of areas that may currently be unoccupied by a species but are essential to the conservation of the species.³⁶ The Services now propose that the Secretary “will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species or would result in less

³² A. Caso, T. de Oliveira & S.V. Carvajal, IUCN Red List of Threatened Species, *Herpailurus yagouaroundi*, <http://www.iucnredlist.org/details/9948/0> (2015).

³³ Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. at 35,201.

³⁴ See 50 C.F.R. § 424.12(a).

³⁵ Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414 (Feb. 11, 2016).

³⁶ Letter from Jodi Hilty to Director Ashe and Administrator Sullivan (Oct. 9, 2014), available at <https://www.regulations.gov/document?D=FWS-HQ-ES-2012-0096-0088>.

efficient conservation for the species.”³⁷ The Services propose to clarify that “[e]fficient conservation for the species refers to situations where the conservation is effective, societal conflicts are minimized, and resources expended are commensurate with the benefit to the species.”³⁸ The proposed regulations further qualify that “[i]n addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable likelihood that the area will contribute to the conservation of the species.”³⁹ The ESA already requires that the Services’ consider the best scientific data available, economic impacts, impacts to national security and any other relevant impact when designating critical habitat.⁴⁰ It also gives the Secretary discretion to exclude areas when the benefits of doing so outweigh the benefits of designating the critical habitat, as long as the decision will not result in the extinction of the species.⁴¹

Habitat that is currently unoccupied can be critical to the success of conserving a species. As environmental conditions change, it will become increasingly important for many species. For example, wildlife like walrus or polar bears that are facing a rapidly changing environment in the Arctic may move to other areas that maintain or begin to exhibit characteristics habitable to them as their existing habitat becomes less supporting—either from sea ice to land or to areas where sea ice persists longer such as in the Canadian Arctic Archipelago. Some species of nectarivorous bats occur in both Mexico and the U.S., including the endangered Mexican long-nosed bat (*Leptonycteris nivalis*), and there are areas of habitat further north that could become important in the near future. As climate changes, their biotic envelopes may necessitate their northward expansion into regions of the U.S. that have the correct columnar cacti, agave plants, and habitat which are not utilized by the bats under current climates but could be in the near future.⁴² Other species that are threatened by changing ocean temperatures, reduced snow cover, or sea ice loss similarly will have different habitat needs over time as climate changes occur. These shifting habitats are already being observed. For example, highly migratory species of marine mammals and fishes in the Atlantic may already be shifting their patterns based on changing ocean conditions in the Atlantic.

When the best available science includes information on the future habitat needs of a species, those areas should be considered for critical habitat designations, with the appropriate balancing of interests as required by the Act. Analytical approaches exist for identifying areas that may become suitable for specific species in the future, as climate

³⁷ Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. at 35,201.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 16 U.S.C. § 1533(b)(2).

⁴¹ *Id.*

⁴² Claudia S. Polo-Urrea & Jon P. Beckmann, Delineating a Landscape-level Corridor for Threatened and Endangered Nectarivorous Bats in the Southwest USA and Northern Mexico, WCS Working Paper no. 48 (2018).

conditions change. There are also areas that may not be currently occupied by a species, but that may play a role in helping that species move and adapt in response to changing conditions, including wildlife corridors. Areas like these that are identified using best available science should be considered for protection under the Act.

WCS recognizes that designating areas currently unoccupied by the species must be done in a way that carefully balances many often competing needs. However, it is concerning that the proposed changes will shift the balance away from fully considering the value of these areas as critical habitat. Therefore, the current legislative and regulatory framework for designating areas currently unoccupied by listed species must be maintained and not be altered.

F. The Definitions of “Geographical area occupied by the species” and “Physical or biological features” Must Not Be Amended

In 2016, the Services added definitions for “geographical area occupied by the species” and “physical or biological features.”⁴³ In comments submitted on the proposed rule, WCS noted that these new definitions were consistent with the importance of wildlife connectivity in identifying and designating critical habitat, including for protection of migratory corridors and connecting populations to maintain genetic interchange.⁴⁴ Without these considerations of wildlife connectivity, the ability of species to reproduce or ensure genetic diversity within the species will be limited. These well contemplated definitions must be maintained without modification at this time.

III. The Services Must Not Narrow the Scope of Review under Section 7 of the ESA

Section 7 of the ESA’s requirement that federal agencies, in consultation with FWS and NMFS, ensure that an action “authorized, funded, or carried out” by the agency “is not likely to jeopardize the continued existence” of any endangered species or threatened species “or result in the destruction or adverse modification” of critical habitat⁴⁵ is one of the core principles of the ESA. This consultation process ensures that the federal government is not supporting actions that undermine the goals of the ESA. WCS has significant concerns that the Services’ proposed rule⁴⁶ would significantly narrow the scope of review in the consultation process and we oppose changes that would prevent a full and scientifically grounded analysis of the impacts of federal actions on threatened and endangered species. Specific issues of concern discussed below are

⁴³ Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414 (Feb. 11, 2016).

⁴⁴ Letter from Jodi Hilty to Director Ashe and Administrator Sullivan (Oct. 9, 2014), *available at* <https://www.regulations.gov/document?D=FWS-HQ-ES-2012-0096-0088>.

⁴⁵ 16 U.S.C. § 1536(a)(2).

⁴⁶ Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation, 83 Fed. Reg. 35,178 (July 25, 2018) (Docket No. FWS-HQ-ES-2018-0009; FXES1114090000-189-FF09E300000; Docket No. 180207140-8140-01; 4500090023).

changes to the definitions of “destruction or adverse modification” and the “effects of an action,” and changes to consultation and mitigation requirements. WCS also includes a response to the Services’ request for comments on potential regulatory changes to preclude consultation in certain circumstances.

A. Proposed Changes to Definitions Reduce the Range of Impacts Considered in Section 7 Consultations and Must Be Rejected

WCS has concerns regarding the proposed changes to the definitions of “destruction or adverse modification” and “effects of an action.” Regarding the first of these, the Services are proposing to add the phrase “as a whole” to clarify the scope of analysis for section 7 consultations and to remove the second sentence of the definition which provides examples of what could qualify as destruction or adverse modification.⁴⁷ Although the Services state they do not intend for this definitional revision to change their existing practices for section 7 consultations,⁴⁸ WCS cautions that this change should not be interpreted to reduce the weight given to small scale impacts to critical habitat.

One of the core principles of conservation biology is that a species has a better chance of survival if it is well distributed across its range. Jeopardizing an area within a species’ range, even a small part of its range, can have an impact on its chances of survival and recovery. The proposed definitional changes risk increasing habitat fragmentation and reducing the ability of the Services to consider the cumulative effects of multiple, seemingly small, impacts. Additionally, especially for wide ranging species, sections of critical habitat, such as the core of the range, may be proportionally more important to the conservation of the species. For areas like migration corridors, animals may only be present in these regions twice yearly, during spring and fall migrations, but loss or alteration of habitat in these areas may have disproportionate impacts on long-term survival of some populations. The Services should ensure that its analysis of the impact of an activity on the value of the critical habitat as a whole includes a thorough consideration of not only the physical area affected, but also the impacts on important ecological functions or values that the area of critical habitat provides for the species.

The Services are also proposing changes to the definition of the “effects of the action” to removing reference to “direct and indirect effects” and “interrelated and interdependent actions.”⁴⁹ Instead, the proposed definition would refer to “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.”⁵⁰ The Services also propose adding a new section 402.17 describing factors to consider in determining whether an activity caused by a proposed action is

⁴⁷ *Id.* at 35,179-35,181.

⁴⁸ *Id.* at 35,181.

⁴⁹ *Id.* at 35,183.

⁵⁰ *Id.* at 35,191.

reasonably certain to occur.⁵¹ These include past experience, existing plans, and remaining requirements necessary for the activity.⁵² Again, the Services note that they do not anticipate this revision changing their existing practices.⁵³

Interrelated and interdependent impacts must be considered as part of the effects of an action. For example, where energy extraction activities occur, roads and other infrastructure leading into the development or an increased human footprint around new development should be considered an effect of an action and appropriately analyzed. In particular, where a road or other infrastructure is built in previously undisturbed areas to support energy development, other activity, such a logging, often follows. WCS urges the Services to ensure that interrelated or interdependent impacts are still considered in determining the scope of effects, and that the regulations continue to clearly reflect this standard.

B. Section 7 Consultation Processes Must Not Be Streamlined in a Way That Prevents Full Analysis of Impacts

WCS has concerns about several proposals aimed at streamlining consultation processes. Although creating efficiencies and clarifying processes can lead to better implementation of the Act, the Services must ensure that any changes made do not limit the analysis required by Section 7 of the ESA. Several changes are highlighted below.

First, the Services' propose to establish procedures for an optional expedited formal consultation process. WCS does not oppose the option of expedited consultation as long as it is implemented in a way that ensures that the same standards of analysis apply as for other formal consultations and that reduced timeline doesn't impact the quality or scope of analysis or create an appearance of prejudice towards a "no jeopardy" finding.

The Services also propose to "clarify that the duty to reinitiate [consultation] does not apply to an existing programmatic land management plan prepared pursuant to the Federal Land Policy Management Act . . . or the National Forest Management Act . . . when a new species is listed or new critical habitat is designated."⁵⁴ The Services should withdraw this proposal. It is necessary for agencies to reinitiate consultations when new species listings or critical habitat designations are made, given the length of time for which these plans are in place. The Forest Service and BLM are required to ensure compliance with other laws, including the ESA, as they develop their land management plans and it is a general principle of these planning processes that amendments will be made to plans if there are substantive changes in policy or their operating environment. In the case of new species being listed under the ESA, these agencies should be

⁵¹ *Id.* at 35,193.

⁵² *Id.*

⁵³ *Id.* at 35,184.

⁵⁴ *Id.* at 35,189.

able, and required, to amend the plan to address that change. This would be consistent with existing agency practice and the responsibility to comply with other laws, as well as avoid circumstances where ten or more years could pass between a species listing or critical habitat designation and the update of a land management plan.

Finally, without proposing specific regulatory changes, the Services requested comment on section 402.03, which currently reads: “Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.”⁵⁵ The Services ask whether they should revise that language to preclude consultation requirements when:

[T]he Federal agency does not anticipate take and the proposed action will: (1) Not affect listed species or critical habitat; or (2) have effects that are manifested through global processes and (i) cannot be reliably predicted or measured at the scale of a listed species’ current range, or (ii) would result at most in an extremely small and insignificant impact on a listed species or critical habitat, or (iii) are such that the potential risk of harm to a listed species or critical habitat is remote, or (3) result in effects to listed species or critical habitat that are either wholly beneficial or are not capable of being measured or detected in a manner that permits meaningful evaluation.⁵⁶

The Services should not make this revision. Although regulatory language is not proposed, as described, this change would allow Federal agencies to decide that an action is not likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat without the consultation required by Section 7 of the ESA. Additionally, the second condition described could allow federal agencies to avoid consultation on actions that impact global processes, such as climate change. These large scale changes to the environment are a major threat to many listed species and the analysis of federal actions impacting these actions should not be exempted. Further, given the impact that this change could have on the scope of section 7 of the ESA, the Services should not move forward with these revisions without making proposed regulatory language available for public review and comment.

C. Changes to Mitigation Measures Requirements Must Be Withdrawn

The Services’ current regulations on the formal consultation process direct them to consider beneficial actions taken by the action agency when developing a biological opinion, alternatives or mitigation measures.⁵⁷ The Services propose to clarify that they will not require that measures “intended to avoid, minimize, or offset the effects of an action are considered like other portions

⁵⁵ 50 C.F.R. § 402.03.

⁵⁶ Endangered and Threatened Wildlife and Plants: Revision of Regulations for Interagency Cooperation, 83 Fed. Reg. at 35,185.

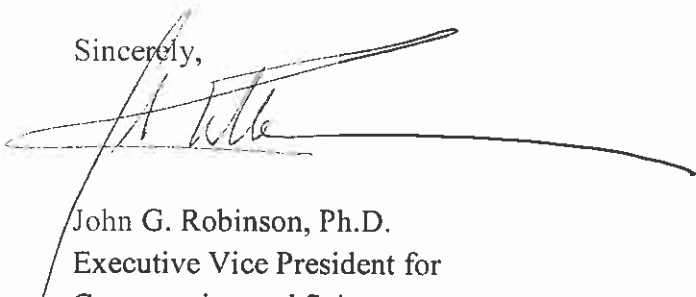
⁵⁷ 50 C.F.R. § 402.14(g)(8).

of the action and do not require any additional demonstration of specific binding plans or a clear, definite, commitment of resources.”⁵⁸ The Services’ proposed changes must be rejected. Measures to avoid, minimize, or offset impacts of actions, such as changes in seasonal timing or slight changes in operating procedures, that are identified during the section 7 consultation process factor into the Services’ analysis and can provide the basis for a finding that the action will not result in jeopardy, destruction or adverse modification. That finding is often dependent on the avoidance, mitigation, and offset measures being completed and without “specific binding plans” or “a clear, definite, commitment of resources,” there is a substantial risk that budgetary limitations or other constraints on agency action can prevent the implementation of these measures that were essential to the biological opinion. The Services must withdraw this proposed rule change.

Conclusion

For 45 years, the Endangered Species Act has been one of the most effective tools to protect and recover endangered and threatened species, and has demonstrated the United States’ leadership in saving vulnerable species and habitats. As one of the most powerful wildlife laws in the world, the ESA serves as a model for other countries to conserve their species and balance development opportunities in key wildlife habitats. Taken as a whole, the regulatory changes proposed by the Services will serve to weaken the ESA and hinder effective management of threatened and endangered species, and thereby also hinder species recovery. WCS urges the Services to reconsider their proposals and ensure that the ESA continues to serve its purpose of preventing the extinction of species in need of protection.

Sincerely,

A handwritten signature in black ink, appearing to read "John G. Robinson", is written over a horizontal line. The signature is stylized and extends above and below the line.

John G. Robinson, Ph.D.
Executive Vice President for
Conservation and Science

⁵⁸ Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation, 83 Fed. Reg. at 35,192.