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Public Comments Processing
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RE: U.S. Fish and Wildlife Service Revision of the Regulations for Listing Species and Designating Critical Habitat, Proposed Rule, **Docket No. FWS–HQ–ES–2018–0006; Docket No. 180202112-8112-01**

On behalf of the Environmental Defense Fund (EDF) and its over 2 million members and supporters, and the National Audubon Society (Audubon) and its one-million plus members, 23 states offices, and 462 chapters, EDF and Audubon submit these comments in response to the joint U.S. Fish and Wildlife Service and National Marine Fisheries Service Proposed Revision of the Regulations for Listing Species and Designating Critical Habitat (Section 4 Proposed Rule).[1] EDF is an international non-partisan, non-profit organization dedicated to protecting human health and the environment by effectively applying science, economics, and the law. The National Audubon Society protects birds and the places they need, today and tomorrow.

Introduction

Section 4 of the Endangered Species Act (ESA) and its implementing regulations in Title 50 of the Code of Federal Regulations at 50 CFR part 424 set forth the procedures for adding, removing, or reclassifying species to the Federal Lists of Endangered and Threatened Wildlife and Plants and designation of critical habitat. The ESA requires that the Services, to the maximum extent prudent and determinable, designate critical habitat when determining that a species is either an endangered species or a threatened species.[1]

[1] U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 FR 35193 (July 25, 2018).
[1] 16 U.S.C.1533(a)(3)(A).

In this Section 4 Proposed Rule, the Services propose certain changes that codify existing practices in that may streamline the listing, delisting and critical habitat designation processes. The Services also propose certain regulations that would conflict with statutory mandates and legislative history of the Endangered Species Act, and have dire consequences for species recovery and ecosystem protection. EDF and Audubon comment specifically on the latter category of proposals below, focusing on the Services' consideration of economic impacts during listing, the definition of foreseeable future and criteria for designation of critical habitat.

Section 424.11 – Factors for Listing, Delisting, and Reclassifying Species

Economic Impacts

The Services propose to remove the phrase, "without reference to possible economic or other impacts of such determination" from section 424.11 (b).[2] The Services improbably and inaccurately suggest that this revision will adjust the listing regulations "to more closely align with the statutory language," and allow the Services to perform cost-benefit analysis to accompany listing decisions.[3] The plain language of the Act, and accompanying legislative history, could not be more clear that consideration of economics during listing, as the Services now propose, is illegal and antithetical to the purposes of the Act.

The ESA specifies that listing decisions must be made "solely on the basis of the best scientific and commercial data available." [4] Congress added this provision in the 1982 amendments, in part because of unintended consequences stemming from the 1978 amendments, which required the Secretary to designate critical habitat concurrently with listing, and evaluate economic impacts of critical habitat designation. The 1978 amendments had, contrary to the intent of Congress, "indirectly introduced economic considerations into the listing process."[5] In adding this strong and unambiguous language, Congress made clear that the Secretary may not consider economics in connection with listing decisions, and must instead base decisions on "biological information alone."[6]

In this Section 4 Proposed Rule, the Services attempt to directly and intentionally contradict this statutory mandate to avoid consideration of economic factors in connection with listing decisions. The Services cannot amend or erase statutory directives through regulatory changes. Even if the Services adopt this proposed revision to 424.11 (b), the language of the Act prohibits the Services from making

[2] Section 4 Proposed Rule.
[3] *Id.*
[4] 96 Stat. 141 1 (1982) (16 U.S.C. § 1533(b)(1)(A) (emphasis added), See, H.R. Rep. No. 97-567, at 12 (1982) reprinted in 1982 U.S.C.C.A.N. 2812.
[5] S. Rep. No. 97-418 (1982) at 4.
[6] H.R. Rep. No. 97-567, at 12 (1982) reprinted in 1982 U.S.C.C.A.N. 2812.

listing decisions based on anything but biological factors supported by the "best scientific and commercial data available."

Despite acknowledging that "Congress precludes the consideration of economic and other impacts from the basis of a listing decision," the Services suggest that they will, in certain circumstances, "reference" and "present" information regarding the economic impacts of listing to the public. In 2008, serving as the Solicitor General of the U.S. Department of the Interior, Deputy Secretary David Bernhardt issued Solicitor's Opinion M-37016 which directly contradicts the Services assertion that such "reference" and "presentation" constitutes anything but "consideration."

> "Consideration" is typically defined as "careful thought" or "deliberation," or "something that is considered as a ground of opinion or action." Webster's Third New International Dictionary 484 (1993). "Consider" is defined as to "reflect on" or "think about with a degree of care or caution." Id. at 483. See Davis v. Coleman, 521 F.2d 661, (9 Cir. 1975) ("Thus, we think 'consider' in this context [a requirement to consider impacts of highway construction] means to investigate and analyze…."[7]

The Services do not explain how they will distinguish between their proposed consideration of economic factors during the listing decision and "basing" the decision on such factors. This will be extraordinarily difficult, if not impossible, and will inevitably invite effective legal challenges.

Additionally, because the Services do not propose to perform a regulatory impact analysis for all species, they create the appearance (and realistic likelihood) that economic impacts will be considered when necessary to justify a politically-motivated decision. This inconsistency will increase the likelihood of success for any litigation challenging the Services' evaluation of economic impacts during the listing decision-making process.

We remind the Services that this proposed rule revision is not only illegal, but entirely unnecessary. The ESA explicitly provides for the analysis and evaluation of economic impacts during critical habitat designation.[8] Existing rules require the Services to publish for public comment a draft economic analysis with each critical habitat proposal.[9] Economic impacts of critical habitat must be distinguished from impacts associated with listing,[10] providing ample opportunity for the interested public to understand the potential ramifications of listing. Consideration of economic impacts at this separate, and often later, stage of agency decision-making more adequately removes the appearance of agency consideration of economic factors during the listing decision.

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[7] U.S. Department of the Interior, Office of the Solicitor, Secretarial 4(b)(2) Exclusion Authority, M-37016 (Oct 3, 2008)(emphasis added).

[8] 16 U.S.C 1553(a)(3)(A).

[9] U.S. Fish and Wildlife Service, Interior; National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce, Endangered and Threatened Wildlife and Plants, Revisions to the Regulations for Impact Analysis of Critical Habitat, 78 FR 53058 (Aug. 28, 2013).

[10] *Id., See Ariz. Cattlegrowers' Ass'n. v. Salazar,* 606 F.3d 1160 (9th Cir. 2010), cert denied.

Foreseeable Future

The Services propose a framework for defining foreseeable future that is largely a restatement of the 2009 M-Opinion, *The Meaning of 'Foreseeable Future' in Section 3(20) of the Endangered Species Act*, and reflects current agency practice.[11] In the Foreseeable Future M-Opinion, which has guided FWS decision-making for listings including several climate-change impacted species, then-Solicitor Bernhardt concluded that

> Congress intended the term "foreseeable future" to describe the extent to which the Secretary can reasonably rely on predictions about the future in making determinations about the future conservation status of the species.

This conclusion is consistent with language in Section 4 Proposed Rule regulatory language and preamble.

Relying on the proposed definition, the Services may, and should continue to, rely on models, including climate models, as best available science to identify and evaluate the severity and likelihood of future threats to species. A robust line of federal case law affirms this.[12] For example, in *Alaska Oil and Gas Association v. Pritzker*, the Ninth Circuit affirmed the D.C. Circuit's holding that IPCC climate models constituted the "best available science" and reasonably supported a listing for species threatened by the impacts of climate change.[13] These cases also affirm the Services' authority to rely on models that may not be perfect, as long as they represent best available science.[14]

However, as drafted, the proposed rule is unlikely to provide additional clarity to the evaluation process. The Services suggest in the preamble that they will interpret "foreseeable future" to extend "only as far as the Services can reasonably depend on the available data to formulate a reliable prediction and avoid speculation and preconception,"[15] and alternatively, in the proposed definition, "only so far into the

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[11] U.S. Department of the Interior, Office of the Solicitor, M-37021, The Meaning of "Foreseeable Future" in Section 3(20) of the Endangered Species Act (Jan. 16, 2009), available at: https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37021.pdf

[12] See, Safari Club Int'l v. Salazar (In re Polar Bear ESA Listing &Section 4(d)Rule Litig.), 709 F.3d 1, 15–16 (D.C. Cir.2013) ("In re Polar Bear Litig."); Alaska Oil and Gas Association v. Jewell, 815 F.3d 544, at 558–59 (9th Cir. 2016); Alaska Oil and Gas Ass'n, et al, v. Pritzker, (9th Cir. 2016);; Defenders of Wildlife v. Jewell, 176 F. Supp. 3d 975 (D. Mont. 2016).

[13] Alaska Oil and Gas Ass'n, et al, v. Pritzker, 840 F.3d 671 (9th Cir. 2016)(" Although Plaintiffs frame their arguments as challenging long-term climate projections, they seek to undermine NMFS's use of climate change projections as the basis for ESA listings. Plaintiffs' contention is unavailing; in Alaska Oil and Gas Association v. Jewell, we adopted the D.C. Circuit's holding that the IPCC climate models constituted the "best available science" and reasonably supported the determination that a species reliant on sea ice likely would become endangered in the foreseeable future.")

[14] *Id.* See San Luis & Delta-Mendota Water Auth., 747 F.3d 581, at 602 (9th Cir. 2014).

[15] Section 4 Proposed Rule, emphasis added.

future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable." The terms "reasonably" and "reliable" significantly undermine the clarity of this definition and introduce unnecessary uncertainty into the Services' threatened determination process.

To assess the whether extinction is "probable" the Services must use quantitative methods such as statistical prediction and modeling to measure the degree to which an event, such as extinction, the development of threats or species responses, are likely to occur. This is the only way to evaluate what is "probable."

The additional qualifying terms (reasonable and reliable) may have one or more effects on agency listing determinations. At best, the terms will be superfluous and redundant in light of the Services' obligation to rely solely on best available science in listing decision making. At worst, the additional terms will undermine the Services' reliance on quantitative risk assessment, invite political interference and make the Services' listing decisions vulnerable to legal challenges.

The vagueness these terms introduce is compounded by the Services' insistence that "reliable" may have alternative interpretations within the agency, including both scientific and statistical, and colloquial meanings. Unhelpfully, the Services muddy the intended import of the regulatory definition:

> "Reliable" does not mean "certain"; it means sufficient to provide a reasonable degree of confidence in the prediction. "Reliable predictions" is also used here in a non-technical, ordinary sense and not necessarily in a statistical sense.[16]

We remind the Services that the ESA does not require best available science to be 'ironclad and absolute' in order to serve as the basis for listing decisions.[17] This is consistent with the first sentence of this explanation, but the meaning of the second sentence is unclear. The language in the proposed rule is thus both unenlightening, and potentially in conflict with the Services' obligation to make listing decisions solely based on "best scientific and commercial data available."[18]

Rather than incorporate vague and unhelpful terms such as reasonably and reliable, the Services could make science-based decision-making more transparent in two ways. First, for each listing decision, the Services should describe the process used to evaluate risk, and weigh data incorporated into decision making and models. Where possible, the Services can articulate the qualities of models or information ultimately selected by the Services as best available science, covering one or more important considerations: peer review; clear and transparent data collected using unbiased methods; timeliness;

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[16] Section 4 Proposed Rule.

[17] See San Luis & Delta-Mendota Water Auth., 747 F.3d at 602 ("[W]here the information is not readily available, we cannot insist on perfection: [T]he best scientific . . . data available, does not mean the best scientific data possible.")

[18] 16 U.S.C. § 1533(b)(1)(A)

etc. Where the Services make assumptions, particularly in the absence of desired prediction or species data, those assumptions should be clearly stated.

Second, the Services should clarify their approach to listing decisions by using, whenever possible, a quantitative approach to defining risk of extinction and uncertainty in existing data and any analysis.[19] The Intergovernmental Panel on Climate Change (IPCC), for example, has defined terms for translating statistical and probabilistic outcomes into terms understandable by laypeople, such as "unlikely" and "very likely."[20] As defined by the IPCC for the purposes of communicating working group and panel findings, an "unlikely" event is one which has 0-33% probability of occurring; a "very likely" event is on which has 90-100% probability of occurring.[21] Adopting these definitions or other guidelines for addressing uncertainty will help the Services communicate with stakeholders about risk, and translate quantitative findings into actionable decisions.

Section 424.12 – Criteria for Designating Critical Habitat

Not Prudent Determinations

In 1973, a bi-partisan and nearly unanimous Congress recognized that loss of species habitat was the most important factor leading to species extinction.[22] To address the threat, Congress embedded in the ESA strong directives for habitat and ecosystem protection. Section 2 articulates that the purpose of the Act is to provide "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species."[23] Section 4 requires that the Secretary shall designate critical habitat "to the maximum extent prudent" concurrently with listing a species as endangered or threatened.[24] The statutory language makes clear that Congress, through the provisions of the ESA, sought to ensure the protection of essential ecosystems and thus the protection of imperiled species.

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[19] National Audubon Society does not join EDF in this recommendation.

[20] Stocker, T.F., D. Qin, G.-K. Plattner, L.V. Alexander, S.K. Allen, N.L. Bindoff, F.-M. Bréon, J.A. Church, U. Cubasch, S. Emori, P. Forster, P. Friedlingstein, N. Gillett, J.M. Gregory, D.L. Hartmann, E. Jansen, B. Kirtman, R. Knutti, K. Krishna Kumar, P. Lemke, J. Marotzke, V. Masson-Delmotte, G.A. Meehl, I.I. Mokhov, S. Piao, V. Ramaswamy, D. Randall, M. Rhein, M. Rojas, C. Sabine, D. Shindell, L.D. Talley, D.G. Vaughan and S.-P. Xie, 2013: Technical Summary. In: Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Stocker, T.F., D. Qin, G.-K. Plattner, M. Tignor, S.K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex and P.M. Midgley (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA. at 36, available at: http://www.ipcc.ch/pdf/assessment-report/ar5/wg1/WG1AR5_TS_FINAL.pdf

[21] Id., at 36.

[22] See H.R. REP. No. 95-1625, at 5 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9455 (declaring that major cause for extinction of species worldwide is habitat loss).

[23] 16 U.S.C. § 1531.

[24] 16 U.S.C. § 1533(a)(3)(A).

Today, habitat loss remains the greatest threat to species; habitat loss and fragmentation is identified as a main threat to 85% of all species described in the International Union for Conservation of Nature and Natural Resource (IUCN)'s Red List.[25] Despite the importance of habitat preservation to species survival, the Services now propose to revise section 424.12(a)(1) to "set forth a non-exhaustive list of circumstances in which the Services may find it is not prudent to designate critical habitat as contemplated in section 4(a)(3)(A) of the Act."[26] Revisions to the regulations that define the prudency exception so that the Services may refuse to designate critical habitat for threatened and endangered species in anything other than extremely rare circumstances will undermine the purposes of the ESA, contradict Congressional intent and statutory language, and result in longer and more expensive recovery.

Legislative history of the ESA confirms the value Congress placed on the preservation of critical habitat and expectation that critical habitat would be designated for the vast majority of listed species. [27]

> The committee intends that in most situations the Secretary will . . . designate critical habitat at the same time that a species is listed as either endangered or threatened. It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species.[28]

Senator Garn (R-UT) made clear that that because critical habitat is habitat "necessary for [the species'] continued existence," it should be designated when the species is listed to reduce resource conflicts, and opined that critical habitat designation was more important than listing.[29]

Citing unambiguous statutory language ("maximum extent prudent") and legislative history, federal courts have consistently held that the Secretary must designate critical habitat absent extraordinarily rare circumstances.[30] Although the Services acknowledge in the preamble to Section 424.12 proposed revisions that federal courts have restricted the Services' authority to decline to designate critical habitat based on the prudency clause, the Services fail to acknowledge that statutory language, not existing regulatory language, provides that basis for those decisions.[31] Removing existing regulatory

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[25] IUCN, *The IUCN Red List of Threatened Species. Version 2018-1*, available at http://www.iucnredlist.org.
[26] Section 4 Proposed Rule.
[27] See, H.R. Rep. No. 93-412, at 5, 9 (1973), reprinted in Cong. Research Office, 97th Cong., A Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1977, 1978, 1979, and 1980, at 144, 148 (1982).
[28] H.R. Rep. No. 95-1625, at 17, (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9467.
[29] 124 CONG. REC. 21,575 (1978) (statement of Sen. Jake Garn asserting that critical habitat designation is more important than listing species); H.R. REP. No. 95-1625 at 17 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9467.
[30] *Enos v. Marsh*, 769 F.2d 1363, 1371 (9th Cir.1985) (holding that the Secretary "may only fail to designate a critical habitat under rare circumstances"); *Northern Spotted Owl v. Lujan*, 758 F.Supp. 621, 626 (W.D.Wash.1991) ("This legislative history leaves little room for doubt regarding the intent of Congress: The designation of critical habitat is to coincide with the final listing decision absent extraordinary circumstances.").
[31] *Natural Resources Defense Council* v. *U.S. Dept. of Interior*, 113 F.3d 1121 (9th Cir. 1997)(overturning the Service's failure to designate critical habitat because the Service improperly expanded "the narrow statutory exemption for imprudent designations into a broad exemption for imperfect designations.")

language and replacing it with “discretionary factors” does not eliminate or alter in any way the Congressional mandate to designate critical habitat in all but rare circumstances.

In a 2008 M-Opinion interpreting the Secretary’s discretion to make determinations regarding critical habitat based on the two-sentence structure of Section 4(b)(2),[32] then-Solicitor Bernhardt determined that the ESA requires that the Secretary designate critical habitat based on biological and physical needs of the species, and consider the costs of such designation only as part of the exclusion analysis balancing test.

> The second sentence clarifies the meaning of the first sentence in two ways. First, it **narrows the Secretary's discretion** by providing specific guidance as to how the information considered under the first sentence may be used to adjust the area to be designated. Because the second sentence sets a standard for how critical habitat can be adjusted, it clarifies that the **first sentence does not provide the Secretary with an independent authority to reduce the amount of critical habitat designated** (which it would if there were no second sentence). Any reductions of the area to be designated must be made pursuant to the exclusion process of the second sentence. **While the Secretary must "take into consideration" the costs of his decision, he must base his designation of critical habitat on the criteria set forth in 50 C.F.R. 424.12, which focus on the biological and physical needs of the species, and not on the costs that will be imposed on human activities by the designation**.[33]

As Deputy Secretary Bernhardt has determined, the Secretary has broad discretion to exclude specific parcels of potential habitat from the designation based on the consideration of economic and other factors. But this broad discretion does not extend to the prudency analysis, for which the legislative history is clear that Congress expects the Secretary to designate critical habitat in the vast majority of cases. The proposed regulations incorrectly attempt to expand the scope of the prudency analysis, which the Secretary has little discretion over, rather than exemption analysis which pertains to the exclusion of specific parcels.

In M-37016, then-Solicitor Bernhardt also concluded that the use of the word “may” in Section 4(b)(2) “reflects the intent of Congress that exclusions are never required.”[34] To the extent that the proposed

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[32] The basis for determinations articulated in Section 4(b)(2) applies to both the Secretary’s prudency determination and exemption analysis. *See,* Witney B. Pitkanen, Natural Resources Defense Council v. United States Department of the Interior; Defining the Boundaries of Government Discretion under the Endangered Species Act, *Tulane Environmental Law Journal,* Vol. 11, No. 1 (Winter 1997), pp. 143-153, available at: https://www.jstor.org/stable/43292175.

[33] U.S. Department of the Interior, Office of the Solicitor, Secretarial 4(b)(2) Exclusion Authority, M-37016 (Oct 3, 2008)(emphasis added).

[34] *Id.* (“In the debate on the House bill that led to the adoption of the exclusion language, a number of representatives made statements suggesting their understanding that although the bill would mandate

regulations would impose an obligation on the Services, or create the appearance of an obligation for administrative procedure purposes, to decline to designate critical habitat if the condition is satisfied, the proposed regulations are inconsistent with statutory language and legal opinions previously articulated by the Department and are misleading.

EDF and Audubon understand that the Services, through these proposed regulations, desire to reduce conflict associated with critical habitat designations. We share that desire. However, reducing the number or size of designations will not reduce conflict in the long term. Instead, policy makers should identify ways to lessen the real and perceived burdens on landowners that host species or critical habitat, or are willing to restore habitat. Rather than rules that artificially constrain the Services' articulation of the ecosystems essential for species survival, more meaningful and durable solutions will include programs and financial allocations to provide technical support and funding for landowners that create economic opportunities to incentivize conservation.

When Section 7(a)(2) Consultation Would Not Stem Threats to Habitat

The Services specifically propose to define "not prudent" when Section 7(a)(2) consultation would not stem threats to habitat, and propose that critical habitat designation is not beneficial when "threats to the species' habitat stem solely from causes that cannot be addressed by management actions that may be identified through consultation under Section 7(a)(2) of the Act."[35] The proposed rule is inconsistent with the ESA and legislative history, based on inaccurate assumptions and inadvisable.

First, as discussed above, critical habitat must be designated in all but rare circumstances. Climate change will be the fastest growing cause of species extinction by 2050.[36] Recent reports indicate that under a "business-as-usual" trajectory, and accounting for other threats such as habitat loss, the effects of climate change will result in the extinction of 40% of species indigenous to North America by midcentury, and 50% worldwide.[37] The Services' proposed rule would result in a failure to designate

consideration of impacts, it would not limit the Secretary's authority to designate critical habitat. See 124 Cong. Rec. HI2872 (daily ed. Oct. 14, 1978) (statement of Rep. Buchanan) ("I believe that the Congress should state specifically that the Secretary of the Interior should at least consider the economic impact of the designation of any area as critical habitat."); *id.* at H12873 (statements of Rep. Bevill and Buchanan) ("[Q:] On the invertebrate animal amendment that the gentleman has introduced, am I correct that this amendment does not limit the Secretary's power to designate critical habitat? [R:] Yes, that is correct . . . . That is that the Secretary of the Interior is required to consider economic impact in the designation of a critical habitat. However, the amendment does not encroach upon the Secretary's authority to designate critical habitat for any species . . . ."); *id.* at HI2898 (statement of Rep. Buchanan) (speaking in support of successful amendment to expand the exclusion authority to all species, not just invertebrates.")

[35] Proposed Section 4 Rule.

[36] Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), *Regional Assessment Report on Biodiversity and Ecosystem Services for the Americas* (2018), available at: https://www.ipbes.net/system/tdf/ipbes-6-inf-4-rev.1.pdf?file=1&type=node&id=16517

[37] Id.

critical habitat for a vast majority of imperiled species, contrary to the Secretary's clear legislative mandate.

Second, the Services incorrectly assume that for species threatened by "melting glaciers, sea level rise, or reduced snowpack but no other habitat-based threats" designation of critical habitat would provide no conservation benefit. This assertion overlooks the many benefits of critical habitat designation outside the Section 7 consultation process. Critical habitat designations serve many benefits other than guiding federal agency actions, as the Services articulated in the 2016 rule revising the regulations establishing criteria for designating critical habitat.[38]

> Once critical habitat is designated, it can contribute to the conservation of listed species in several ways. Specifying the geographic location of critical habitat facilitates implementation of section 7(a)(1) of the Act by identifying areas where Federal agencies can focus their conservation programs and use their authorities to further the purposes of the Act. Designating critical habitat also helps focus the conservation efforts of other conservation partners, such as State and local governments, nongovernmental organizations, and individuals. Furthermore, when designation of critical habitat occurs near the time of listing, it provides a form of early conservation planning guidance (*e.g.,* identifying some of the areas that are needed for recovery, the physical and biological features needed for the species' life history, and special management considerations or protections) to bridge the gap until the Services can complete recovery planning.[39]

Declining to designate critical habitat due to the presumed efficacy of Section 7(a)(2) consultations overlooks all of the other conservation and recovery benefits provided through other channels, such as conservation activity facilitated by private and/or non-governmental organizations. The Secretary is required to consider all factors – including all benefits – in designating critical habitat.[40] Contravening this mandate, the proposed regulation would restrict the Secretary's consideration to benefits associated with Section 7(a)(2) consultation.

Third, while climate change may be the primary driver of habitat loss, it is not the only one. For example, the Fish and Wildlife Service has determined that the polar bear is threatened due to habitat loss caused by the dramatic decline of sea ice in the foreseeable future, as well as development directly impacting locations essential for hunting, fishing and breeding. The proposed rule is inappropriate in cases where the "majority" of threats to the species would not be resolved through Section 7(a)(2) consultation, as this approach has been explicitly rejected by the court in *NRDC vs. U.S. Department of the Interior* as inconsistent with statutory language in Section 4. In rejecting the Service's failure to designate critical

[38] U.S. FWS, Final Rule, Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat, 81 FR 7439 (Feb. 11, 2016).
[39] *Id.* at, 7415.
[40] *Natural Resources Defense Council v. U.S. Dept. of Interior*, 113 F.3d 1121 (9th Cir. 1997).

habitat because the majority occurred on private land, the 9th Circuit held that the Service must consider any and all benefits associated with critical habitat designations.

> By rewriting its "beneficial to the species" test for prudence into a "beneficial to most of the species" requirement, the Service expands the narrow statutory exception for imprudent designations into a broad exemption for imperfect designations. This expansive construction of the "no benefit" prong to the imprudence exception is inconsistent with clear congressional intent.[41]

The proposed rule improperly attempts to codify a similar approach by restricting the Secretary's consideration of the benefits of critical habitat designation to only those associated with management activities affected by a Section 7(a)(2) consultation.

Finally, the Services' proposal is unworkable and would likely lead to litigation. At the time a species is listed and critical habitat is designated, the Services cannot fully anticipate the future actions that may trigger federal agency consultation under Section 7(a)(2).[42] Without a clear understanding of the types of projects likely to be proposed, it is impossible to determine what effects the project will have, or what reasonable and prudent measures or alternatives are available. The Services will be unable to provide a rational basis for any determination that consultation for undetermined and unidentified future projects would stem threats to critical habitat.[43] Without a reasonable basis for its decision to designate critical habit, the decision is vulnerable to legal challenge.

Congress intended that in most situations the Secretary would designate critical habitat for listed species.[44] Congress did not intend for the Secretary to refuse to designate critical habitat based on an incomplete and artificial assessment of the benefits of designation. The proposed not prudent determination factors in the proposed Section 424.12 revisions contravenes statutory requirements, Congressional intent and legislative history.

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[41] Id.

[42] While some federal actions or activities may be "reasonably likely" and easily anticipated in the context of assessing cumulative impacts, this does not represent a complete prediction of all future federal actions or activities. In the NEPA context, federal actions which have not been subject to analysis under a cumulative action analysis must be analyzed separately. Such a structure for assessing the prudency of critical habitat designation is inappropriate and would lead to critical habitat loss and prolonged uncertainty.

[43] In the preamble to the 1980 regulations, the Service articulated this difficulty in predicting impacts of critical habitat designation and determined that a case-by-case basis identification of impacts was more appropriate. 45 Fed. Reg. at 1301. ("Since the rules comprehensively include all economic and other impacts for consideration, the detailed application of this standard to particular factors is better left to a case-by-case analysis rather than being placed in these general rules….Other types of impacts, which may take many forms, will depend upon the specific circumstances surrounding a critical habitat designation, and are to a considerable extent unpredictable at this time.") See also, Bernhardt, M—37016 ("it would be impossible to list in advance all the other impacts that might qualify for consideration.").

[44] See H.R. REP. No. 95-1625 at 17 (1978), reprinted in 1978 U.S.C.C.A.N. 9453, 9467 (stating that Congress intended Secretary to designate critical habitat in most situations, and only rarely would designation not benefit species).

If the Services finalize this proposed rule and decline to designate critical habitat, the Services are not relieved of their obligations to protect essential habitat. The Services are statutorily required to exercise their authorities under the ESA to provide "a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] a program for the conservation of such endangered species and threatened species." In lieu of a critical habitat designation, this may entail the concerted and thoughtful deployment of efforts to stimulate and guide conservation activities, target information collection and analytical work, and assist with early and adaptive recovery planning.

Criteria for Designating Unoccupied Critical Habitat

Occupied First, Then Unoccupied

Prior to February 2016, the Services' regulations provided that areas outside the geographic area occupied by a species would be designated as critical habitat "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. 424.12(e) (2015). In 2016, however, the Services revised it regulations to eliminate this limitation on the designation of unoccupied areas. They explained that the "rigid step-wise approach" taken under its prior regulations was not optimal because, among other reasons, it could result in a geographically larger but less effective critical habitat designation.[45] Now, the Services propose an about-face, returning to the rigid step-wise approach it abandoned only two years earlier, with only a minor and inadequately explained modification. In reversing the 2016 rule, as is proposed here, especially in such a short time frame, the Services will face a heightened burden to explain their new position, over and above the normal "rational basis standard."[46]

Under the proposed rule, the Services must first evaluate occupied areas. If those are adequate to ensure the conservation of the species, the designation of critical habitat must be limited to those areas. The single exception to this restriction is if the designation of only occupied areas "would result in less efficient conservation."[47] Then, and only then, may the designation include unoccupied areas. However, a comparison of the efficiency of alternative critical habitat designations presumes that the Service – facing strict statutory deadlines and tight budgets, and after already concluding that designation of only occupied areas would adequately conserve the species – will have the time and resources to undertake a separate analysis of unoccupied areas. That presumption is highly questionable.

Unoccupied habitat is often essential for recovery, and its protection provides species with opportunities to adapt to a changing climate and ecosystem functions, and the Services with flexibility in designing recovery plans. For example, unoccupied habitat may be essential to provide geographic distance from extant populations to provide protection from environmental stochasticity (such as

[45] 81 Fed. Reg. 7414, 7415 (Feb. 11, 2016).
[46] *Motor Vehicle Manufacturers Ass'n v State Farm Mutual Auto Ins.,* 463 U.S. 29 (1983).
[47] Section 4 Proposed Rule.

disease or drought that only affect one geographic area). Unoccupied habitat may also protect physical or biological features that are necessary for recovery but difficult to artificially create.

Importantly, protection of unoccupied habitat is increasingly important in light of climate change.

> Species' range shifts and behavioral changes based on climate change impacts are well-documented. Rising temperatures are forcing many endangered and threatened species to migrate away from their home ranges. Critical habitat designations must be able to respond to the increasing threats listed species face, and future listed species will face, as a result of climate change.[48]

Designation of unoccupied habitat that will support species' migrations and essential breeding, feeding and sheltering behaviors as climate change impacts evolve will become increasingly important to the survival of the 40% of North American species threatened by climate change.[49]

A concurrent analysis of occupied and unoccupied areas is more likely to result in not only better conservation outcomes. The mandating of a sequential process requires that the Service must first blind itself to the potential benefits of designating unoccupied areas. Evaluating a range of critical habitat values and options concurrently is the best way to leverage the benefits of unoccupied habitat in the context of available occupied habitat, and thus achieve "efficient conservation" outcomes. The Services' proposal to revert back to the pre-2016 rigid, two-step approach, will ultimately frustrate their stated objectives.

Unoccupied habitat must demonstrate a "reasonable likelihood" of serving as habitat

To designate unoccupied habitat, the ESA requires that the Secretary determine "that such areas are essential for the conservation of the species."[50] In the Proposed Section 4 Rule, the Services attempt to define when the Secretary may determine that an unoccupied area is "essential" for the conservation of the species by specifying that "the Secretary must determine that there is a reasonable likelihood that the area will contribute to the conservation of the species."[51] In making this determination, the Services propose to consider "whether the area is currently or is likely to become usable habitat for the species."[52]

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[48] Brief of *Amici Curiae* Environmental Law Professors in Support of Federal Respondents and Intervenor-Respondents, Weyerhaeuser v. U.S. Fish and Wildlife Service (No. 17-71)(citations omitted); available at: https://www.supremecourt.gov/DocketPDF/17/17-71/52174/20180703141012737_FINAL%202018-07-02_Weyerhaeuser%20Co.%20v.%20FWS%20Amicus%20Brief-PDFA.pdf.

[49] Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), *Regional Assessment Report on Biodiversity and Ecosystem Services for the Americas* (2018), available at: *https://www.ipbes.net/system/tdf/ipbes-6-inf-4-rev.1.pdf?file=1&type=node&id=16517.*

[50] 16 U.S.C. § 1532(5)(A)(ii)

[51] Proposed Section 4 Rule

[52] Id.

The proposed definition is inappropriate because it overlooks and undervalues the extent to which unoccupied areas that need to be restored, or are of suboptimal quality at the time of designation, can be essential for species survival. Critical habitat often includes areas that, after some intervention, can be restored to a state that serves threatened or endangered species more effectively. Restoration may include reconstruction of habitat, which entails "reconstitut[ing] ecosystems at alternative sites," or rehabilitation, which seeks to restore degraded habitat to "an ecologically superior state," through management interventions.[53]

Often habitat restoration and rehabilitation are the only tools to effectively mitigate habitat loss and degradation, the most significant driver of species extirpation. In many cases, recovery will necessarily require that the species can reoccupy some portion of the former range, even if that portion may not currently be entirely suitable. Where this is true, broader protection of unoccupied habitat is essential to ensure that the species can reoccupy these areas in the future, either through natural dispersal or through managed reintroductions. A failure to affirmatively and proactively plan for reintroduction into currently unoccupied areas will impede species' recovery, especially in cases where the habitat loss caused the species' decline.

Landowners frequently make management changes to enhance habitat values on their properties after – sometimes decades after - listing and critical habitat designation occurs. For example, the Weyerhaeuser Corporation and the Louisiana Department of Wildlife and Fisheries executed a Safe Harbor Management Agreement for the red-cockaded woodpecker (RCW), under which Weyerhaeuser actively and voluntarily manages pine timberlands for the benefit of the RCW. The RCW Safe Harbor Management Agreement was executed in 2010, forty years after the species was listed as threatened. In June of 2016, twenty-six years after the Service listed as threatened the northern spotted owl, and twenty-four years after critical habitat for the species was first designated, the Weyerhaeuser Corporation executed a Safe Harbor Agreement "to test benefits to the threatened northern spotted owl (Strix occidental is caurina) ("spotted owl")"[54] by implementing activities identified in the species recovery plan. These Safe Harbor Agreements will directly facilitate species recovery by implementing habitat restoration and testing the efficacy of threat deterrence activities, and should be pursued and promoted by the Service rather than discounted and ignored at the time of critical habitat designation.

The Weyerhaeuser northern spotted owl SHA demonstrates another important benefit of critical habitat designation that does not depend on "whether the area is currently or is likely to become usable habitat for the species." Where landowners in unoccupied critical habitat areas are not willing at the time of listing to undertake restoration activities, those areas may still provide the Services with valuable data about listed species' population status and trends.

[53] Nat'l Research Council, Science and the Endangered Species Act 72 (1995).
[54] U.S.FWS, Safe Harbor Agreement for the Northern Spotted Owl in the Oregon Coast Ranges Study Area for the Barred Owl Removal Experiment (June 2016);
https://www.fws.gov/oregonfwo/documents/SafeHarbor/WeyerhaeuserSHAfinal.pdf

Additionally, in designating all critical habitat, whether occupied or unoccupied, the ESA directs the Services to rely on the "best scientific data available."[55] The Services lack sufficiently usable data regarding the "reasonable likelihood" of the future state of unoccupied territory to make a supportable determination under this proposed definition. Hypothetical, prospective assessments of individual behavior and willingness to undertake management or restoration activities will not rise to the level of best scientific data available, and is therefore inappropriate for Services to rely on in making determinations. A non-scientific, ambiguous determination of present circumstances and attitudes, particularly without consideration of the application of incentives that can be used to motivate conservation activities in the future, is neither helpful nor appropriate in determining whether unoccupied habitat is essential to species.

Conclusion

EDF and Audubon recognize that many of the revisions to Section 4 proposed by the Service in this rulemaking are restatements or clarifications of existing policy and established practice. However, despite the Services' stated intention to improve and streamline implementation of the Act, the proposed revisions of section 424.11 and 424.12 discussed in these comments will have significant and lasting consequences on species, their survival and ecosystem conservation. We urge the Services to more thoroughly evaluate the legal and practical consequences of these revisions in order to avoid prolonging recovery and inciting needless litigation.

If the Services would like further clarification of any of the considerations raised in these comments, please do not hesitate to reach out to the undersigned EDF and Audubon representatives.

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[55] 16 U.S.C. § 1533 (b)(2).