



September 20, 2018

[via regulations.gov](https://www.regulations.gov)

Public Comments Processing
Attn: FWS–HQ–ES–2018–0009
U.S. Fish and Wildlife Service, MS BPHC
5275 Leesburg Pike
Falls Church, VA 22041–3803

Craig Aubrey
U.S. Fish and Wildlife Service
Division of Environmental Review
5275 Leesburg Pike
Falls Church, VA 22041–3803

RE: U.S. Fish and Wildlife Service (FWS), Interior, National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce, Revision of the Regulations for Interagency Cooperation, **Docket No. FWS–HQ–ES–2018–0009; FXES1114090000–189–FF09E300000; Docket No. 180207140-8140-01**

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 Interagency Cooperation (Section 7 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

Title 50, part 402, of the Code of Federal Regulations establishes the procedural regulations governing interagency cooperation under Section 7 of the Act. Section 7 requires Federal agencies, in consultation with the Services, to insure that any action authorized, funded, or carried out by federal agencies is not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. The protection of critical habitat and ecosystem functions essential for the conservation of imperiled species is a core mechanism by which the Services implement the purpose of the Endangered Species Act, which is to “provide a means to conserve the ecosystems upon which listed species depend, and to develop a program for the conservation of listed species.”¹ Destruction and adverse modification determinations conducted during Section 7 consultations are likewise consistent with the stated policy of Congress that the Federal

^[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 Interagency Cooperation, 83 FR 35178 (July 25, 2018).

¹ 16 U.S.C. 1531 et seq.

Government will seek to conserve threatened and endangered species, and use its authorities to further the purposes of the Act.²

The extent to which the federal agencies limit project impacts to habitat, and avoid habitat loss, is an important component of species recovery. Habitat loss, degradation and fragmentation have been a contributing factor causing the decline of a majority of species listed as threatened or endangered species under the Act, and 80% of imperiled species worldwide.³ The present or threatened destruction, modification, or curtailment of a species' habitat or range is a factor the Services must evaluate during listing determinations.⁴ Due to the importance of habitat protection, the Services' evaluation of destruction or adverse modification can have important implications on the potential for species recovery and survival.

In its Section 7 Proposed Rule, the Services offer two revisions that directly reverse regulations promulgated in 2016, relating to the definition of destruction or adverse modification. EDF offers the following comments on proposed revisions to 50 CFR 402.2. These proposed revisions impact the Services' ability to accurately assess impacts to critical habitat, and therefore have important, negative implications for species recovery and survival.

Section 402.2 Definition of Destruction or Adverse Modification

The proposed rule revisions to section 402.2 are unnecessary, counter-productive, and attempt to remedy a problem that doesn't exist. As JW Malcom and Jake Li observed in their 2015 analysis of every Section 7 consultation between January 2008 and April 2015, misperception and inaccurate information regarding the implementation of controversial regulations can impede sensible regulatory reform.

Without accurate information about how the government implements a law, public perceptions of the law may be driven by anecdotes, unsupported generalizations, or misinformation. Controversial laws may be particularly susceptible to this problem because inaccurate information can solidify deeply held beliefs about those laws, impeding efforts to ground legal reforms in science.⁵

² Id.

³ Wilcove et. al. 1998; IUCN, *The IUCN Red List of Threatened Species. Version 2018-1*, available at <http://www.iucnredlist.org>.

⁴ 16 U.S.C. 1531(a)(1)(A).

⁵ Jacob W. Malcom and Jake Li, Data contradict common perceptions about a controversial provision of the U.S. Endangered Species Act, PNAS December 29, 2015. 112 (52) 15844-15849; published ahead of print December 14, 2015; available at: <https://doi.org/10.1073/pnas.1516938112>.

The Services' proposed revisions to the definition of adverse modification appear to be based not on a realistic assessment of adverse modification analysis, but rather misperceptions regarding the extent to which Section 7 consultations impinge on federal projects and permitting.

The definition revisions proposed by the Services will not reduce the likelihood of an adverse modification determination. Projects proposed by federal agencies or their permittees are almost never thwarted due to an adverse modification or jeopardy determination under the existing regulations. The 2015 Malcom-Li study of 90,000 Section 7 consultations found that "no project was stopped or extensively altered as a result of FWS finding jeopardy or adverse modification."⁶

Rather, in the vast majority of cases, the Services propose reasonable and prudent measures or reasonable and prudent alternatives to projects likely to impact critical habitat, and these measures or alternatives allow the project to continue. While the proposed rules theoretically make an adverse modification determination less likely, in practice such determinations are already nearly non-existent even under the current regulations and therefore cannot become less frequent.

Finally, we note that the Service will face a heightened burden, over and above the typical "rational basis" standard to justify this reversal of the definition of adverse modification promulgated in 2016.⁷

As a Whole

The Services propose to revise the definition of "destruction or adverse modification" by adding the phrase "as a whole" to the first sentence. The Services characterize this addition as a clarification that reflects existing practice in which the "emphasis [is] on the value of the designated critical habitat as a whole for the conservation of a species" and the "role the action area serves with regard to the function of the overall designation."⁸ However, the proposal is more than a clarification; it is a change.

This change is apparent from a comparison of the proposal with the Services' Consultation Handbook, which has guided agency practice since 1998:

The consultation or conference focuses on the entire critical habitat area designated **unless the critical habitat rule identifies another basis for analysis, such as discrete units and/or groups of units necessary for different life cycle phases, units representing distinctive habitat characteristics or gene pools, or units fulfilling essential geographic distribution requirements.**⁹

The Handbook makes clear that there are exceptions to the general "as a whole" rule, but the proposed revision of the regulations makes no such exceptions.

⁶ *Id.*

⁷ *Motor Vehicle Manufacturers Ass'n v State Farm Mutual Auto Ins.*, 463 U.S. 29 (1983).

⁸ Section 7 Proposed Rule at 35181.

⁹ U.S. Fish and Wildlife Service and National Marine Fisheries Services, *Endangered Species Consultation Handbook, Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act*, (March, 1988), at 4-41.

Unless those exceptions are reflected in the proposed rule, it will be difficult to implement; and, if applied literally, will result in adverse modification determinations that fail to consider and adequately protect the diverse suite of biological and physical features provided by critical habitat.

Critical habitat is not homogeneous across the “whole” designation. There are several reasons why critical habitat may be essential for conservation of the species and designated parcels may serve various purposes and contribute in different, equally meaningful ways. Many species depend on a physical or biological feature created by a specific biological process or dynamic ecosystem. For example, the critical habitat designation for the Coachella Valley Fringe-toed Lizard includes sandstone cliffs because the cliffs are necessary to supply sand essential for the lizard’s survival and recovery.¹⁰ Other species require very different and distinct locations and ecosystem features for breeding, feeding and sheltering. Comparison of impacts to these diverse components of critical habitat, and the essential behaviors they support “as a whole” will inadequately reflect and accommodate the various benefits of the designated parcels.

Instead of revising the definition of destruction or adverse modification to include “as a whole,” the Service should either incorporate the exceptions set forth in the Consultation Handbook or leave the definition unchanged and evaluate destruction or adverse modification at the smallest scale relevant to determining whether the species has met its recovery criteria.

Delay

The Services propose to revise the definition of “destruction or adverse modification” by removing the second sentence of the current definition. The second sentence, added in 2016, further clarifies the definition and circumstances under which the Services may use to evaluate project impacts, as follows:

Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.”¹¹

In the Section 7 Proposed Rule, the Services acknowledge that this sentence reflected longstanding practice in evaluating the effects of proposed projects, was consistent with statutory directives and essential to species recovery.

The intended purpose of the language about precluding or delaying “development of such features” was to acknowledge “that some important physical or biological features may not be present or are present in a sub-optimal quantity or quality. This could occur where, for example, the habitat has been

¹⁰ Endangered and Threatened Wildlife and Plants: Listing as Threatened with Critical Habitat for the Coachella Valley Fringe-Toed Lizard, 45 Fed. Reg. 63,812-20 (Sep. 25, 1980) (codified at 50 C.F.R. pt. 17).

¹¹ U.S. Fish and Wildlife Service, Interior; National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce, Interagency Cooperation-Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat, 81 FR 7214, February 11, 2016.

degraded by human activity or is part of an ecosystem adapted to a particular natural disturbance (e.g., fire or flooding), which does not constantly occur but is likely to recur.”¹²

...

For example, in some circumstances, recovery of the species may depend upon retaining the ability of a designated area to maintain or re-create the essential features, for instance through ecological succession, fluvial processes, active management, or other dynamic processes. This is a longstanding interpretation and agency practice, as reflected in the 2016 rule and in the 2004 and 2005 FWS and NMFS guidance documents regarding application of the destruction or adverse modification standard. This longstanding interpretation has never been meant to assert authority beyond that provided by the Act, nor to allow the Services to designate critical habitat or make adverse modification findings based merely on speculation or desire about future changes to the critical habitat. As required by the Act, such determinations must rely on the best scientific and commercial data available.¹³

EDF and Audubon concur with the Services in this assessment – both in providing a rational basis for the 2016 rule, and articulating the value of the practice in the Section 7 Proposed Rule. Project impacts that will delay or preclude altogether the development or enhancement of essential biological and physical features essential to species appreciably diminish the potential value of critical habitat. Because recovery may depend on the creation or re-construction of habitat – particularly likely for the majority of species imperiled primarily due to habitat loss – ignoring project impacts that preclude or significantly delay creation of physical or biological features will slow or significantly impair the chance for successful recovery.

Consideration of the extent to which project impacts would slow or significantly impair the creation or rehabilitation of essential biological or physical features is an incredibly important consideration in light of rapid changes in relevant climate, social and economic structures. As ecosystems and habitat values will be altered over time, conservation and recovery decisions cannot be made considering only the current circumstances or conditions. Likewise, conservation tools such as incentives used to generate additional habitat or improve habitat values on otherwise compromised land, continue to evolve to respond to economic and social demands. Efficient and cost-effective management must anticipate future conditions – including the status of the ecosystems, habitat, economic and social systems, particularly since critical habitat designations are infrequently revised.

The Services notably admits that the proposed rule revision, removing the second sentence of the definition of destruction or adverse modification, will not change agency practice or procedures for

¹² 79 FR at 27061 (May 12, 2014).

¹³ 16 U.S.C. 1536(a)(2).

Section 7 consultations. A rule revision that eliminates clarifying language, but does not change agency practice is unwise, confusing and unnecessary.

Appreciably Diminish

Based on the factors articulated by the Service in 2016,¹⁴ we concur with the Services in this Section 7 Proposed Rule that the phrase “appreciably diminish” does not need to be modified.

Conclusion

EDF and Audubon recognize that many of the revisions to Section 7 proposed by the Services 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 adverse modification determinations will significantly undermine the Services’ ability to deliver on the purpose of the Act, slow species recovery, prolong regulatory burdens, increase overall costs necessary to prevent extinction and invite litigation. We urge Interior to more thoroughly evaluate the legal and practical consequences of these revisions in order to these consequences.

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.

Holly Pearen

Senior Attorney, Ecosystems
Environmental Defense Fund
2060 Broadway Ave., Suite 300
Boulder, CO 80302
(303) 447-7227
hpearen@edf.org

Mark Rupp

Director, Wildlife Campaign
Environmental Defense Fund
1875 Connecticut Ave. NW, Suite 600
Washington, DC 20009
(202) 387-3500
mrupp@edf.org

Sarah Greenberger

Senior Vice President, Conservation Policy
National Audubon Society
1200 18th Street NW, Suite 500
Washington, DC 20036
(202) 600-7992
sgreenberger@audubon.org

¹⁴ U.S. Fish and Wildlife Service, Interior; National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce, Interagency Cooperation-Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat, 81 FR 7214, February 11, 2016.