



September 4, 2018

Ryan Zinke, Secretary
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U.S. Fish and Wildlife Service
Department of the Interior
1849 C Street, N.W.
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Sent VIA Certified and Electronic Mail

Re: Notice of Violations of the Endangered Species Act: Species Status Assessment Program

Dear Secretary Zinke and U.S. Fish and Wildlife Service:

The Center for Biological Diversity provides notice, pursuant to Section 11(g) of the Endangered Species Act (ESA), that the U.S. Department of the Interior and the U.S. Fish and Wildlife Service (FWS) are in violation of the ESA for failing to provide notice in the Federal Register and an opportunity for comment on the Species Status Assessment (SSA) program and its implementing guidelines.¹

The SSA program allegedly provides the “foundational science” informing all ESA decisions.² But while FWS claims that the SSA program separates science from policy considerations, the agency has used the SSA program to take decisions about imperiled species’ protections out of the hands of the scientist most familiar with the species. Instead, FWS has placed them in the hands of often politically-motivated “decision makers.”³

FWS also claims that the SSA process is supposed to improve transparency, yet it never provided the public with notice of or an opportunity to comment on the SSA program and its implementing guidelines. This has resulted in a program that is shrouded in secrecy and ambiguity. Far from being transparent, as the agency claims, many of the SSA program’s guidelines inject impermissible policy considerations into decisions that must be based on the

¹ 16 U.S.C. §§ 1533(h), 1540(g).

² U.S. FISH AND WILDLIFE SERVICE, SPECIES STATUS ASSESSMENT FRAMEWORK 4 (Aug. 2016) (SSA Framework or Framework).

³ *Id.* at 7.

best available science.⁴ FWS's failure to provide notice in the Federal Register and an opportunity to submit written comments on the SSA program and its implementing guidelines violates section 4(h) of the ESA.⁵

I. Statutory Background

The ESA is the world's strongest biodiversity-protection law, *see Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180, 184 (1978), setting forth a comprehensive statutory and regulatory scheme designed to halt species' trend toward extinction and to set them on the path to recovery. But to receive the ESA's protections—like the mandate that FWS develop and implement a science-based “recovery plan” for each endangered or threatened species, the affirmative duty to insure that federal actions are not likely to jeopardize endangered and threatened species' continued existence, and the prohibition against the unlawful “take” of endangered wildlife—species must first be listed “endangered” or “threatened” by the Secretary of the Interior, or FWS, to which the Secretary has delegated the authority to administer the ESA (for terrestrial species). As such, section 4, which governs listing, serves as a gateway to the ESA's substantive protections.

The FWS may list a species on its own or in response to a petition submitted by an interested person.⁶ Section 4(a) of the ESA requires FWS to list species as endangered or threatened because of any one or more 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

Moreover, FWS must make this determination “solely on the basis of the best scientific and commercial data available.”⁸ Concurrently with listing a species as endangered or threatened (to the maximum extent practicable), FWS must designate “critical habitat” for each endangered and threatened species.⁹ FWS must also develop and implement recovery plans for listed species, in accordance with section 4(f) of the ESA.¹⁰

⁴ *See, e.g.*, GREG SHEEHAN, ACTING DIRECTOR, U.S. FISH AND WILDLIFE SERVICE, AGENCY PRIORITY GOAL ACTION PLAN, SPECIES STATUS ASSESSMENTS (SSAs) FOR LISTINGS WITH STATE INPUT 2 (2018) (calling for state representatives to attend SSA team meetings and review draft SSA documents).

⁵ 16 U.S.C. § 1533(h).

⁶ *Id.* § 1533(a)(1), (b)(3)(A).

⁷ *Id.* § 1533(a)(1).

⁸ *Id.* § 1533(b)(1)(A).

⁹ *Id.* § 1533(a)(3)(A)(i).

¹⁰ *Id.* § 1533(f).

In implementing the requirements of section 4 of the ESA, the ESA requires the Secretary to “establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively. Such guidelines shall include, but are not limited to—

- (1) procedures for recording the receipt and the disposition of petitions submitted under subsection (b)(3) of [section 4];
- (2) criteria for making the findings required under such subsection with respect to petitions;
- (3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of [section 4]; and
- (4) a system for developing and implementing, on a priority basis, recovery plans under subsection (f) of [section 4].

The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.”¹¹

The notice-and-comment requirement in section 4(h) is intended both to (1) apprise the public of the guidelines FWS follows when carrying out the purpose of section 4, and (2) allow the public to comment on and advise the agency’s development of the guidelines underlying the actions the agency undertakes to fulfill its section 4 responsibilities. Section 4(h) applies to any agency guidelines, draft guidelines, or amendments of previously promulgated guidelines.¹²

II. The SSA Framework

Despite the ESA’s statutory command to publish and take public comment on agency guidelines that implement section 4, FWS has never published notice in the Federal Register of the SSA program or its implementing guidelines. It has only selectively provided a rough sketch of the SSA program in documents that FWS has made publicly available but never subjected to public comment. This has deprived the public of an opportunity to guide the agency’s development of a program that is intended to provide the “foundational science . . . informing all [ESA] decisions.”¹³

As the limited documents made publicly available illustrate, FWS intends the SSA program to provide the background scientific information informing FWS’s listing determinations and responses to listing petitions, status reviews, and more. The publicly available SSA Framework explains that specific SSAs are to provide “a single source for species’ biological information”—*i.e.*, the “information needed for all ESA decisions”—not just for listing determinations and recovery planning under section 4, but also for consultations, grant allocations, permitting, and

¹¹ *Id.* § 1533(h).

¹² *Id.*

¹³ SSA Framework 4.

habitat conservation plans under other sections of the ESA as well.¹⁴ Critically, however, an SSA does not make a recommendation for a decision, meaning the scientists tasked with compiling the best available science on the status of the species do not get a say in whether the species warrants protection. Instead, under the SSA program, the regional director, assistant regional director, and field office lead now make those decisions.¹⁵ This effectively takes the decision of whether a species needs the lifesaving protections of the ESA away from the scientists with the most knowledge of the species.

III. FWS’s Failure to Publish the Guidelines Creating and Implementing the SSA Program in the Federal Register and Seek Public Comment Violates the ESA.

FWS is in violation of section 4(h) of the ESA by failing to publish the guidelines creating and implementing the SSA program in the Federal Register and by failing to provide an opportunity for comment on the SSA program.¹⁶ This violation, in turn, shields the SSA program from public participation, understanding, and scrutiny.

Rather than resulting in “improved consistency and transparency,” the SSA program has shrouded many of FWS’s ESA decisions in secrecy. The public must divine what it can about the SSA program from specific SSAs and guidelines only selectively released to the public. Unfortunately, specific SSAs suggest that FWS has used the SSA program to marginalize the findings of the scientists closest to the species, leaving critical decisions in the hands of politically motivated decision makers when they should be based solely on the best scientific data available.

FWS’s failure to provide notice in the Federal Register and an opportunity for public comment also leaves many key questions about the SSA program unanswered. For instance, the qualifying criteria for SSA team members and the process for assembling specific data remain unclear, as do questions about how and whether meetings of SSA teams will be consistent or transparent. Having been applied to various ESA-related decisions in piecemeal fashion so far, there is no way to predict what new implementing guidelines may be forthcoming or what they may provide—or if they may be applied to specific decisions before the underlying agency guidelines are public. It is also unclear how the public may participate in the SSA program or specific SSAs, or how FWS would incorporate public comments received during a later rulemaking—such as a listing determination under section 4 or the issuance of a recovery plan—into an SSA.

FWS’s failure to publish the guidelines implementing the SSA program in the Federal Register prevents the Center from exhaustively specifying FWS’s section 4(h) violations with regards to the implementation of the SSA program. The SSA Framework is an example of a guideline that FWS should have published in the Federal Register. The Framework guides “the basic concepts and the minimal requirements for an SSA,” which are to serve as the “single source for [a]

¹⁴ *Id.*

¹⁵ EVAN COLLINS, U.S. FISH AND WILDLIFE SERVICE, SPECIES STATUS ASSESSMENTS POWER POINT 11–15 (Feb. 14, 2018).

¹⁶ 16 U.S.C. § 1533(h).

species' biological information needed for all ESA decisions[.]”¹⁷ There can be no serious dispute that, like many other agency guidelines implementing section 4 and other sections of the ESA, the SSA Framework guides FWS's process for making listing determinations, including in response to petitions submitted under section 4 of the ESA or in the development of recovery plans.¹⁸

A non-exhaustive list of guidelines that may violate section 4(h) includes the following:

- U.S. FISH AND WILDLIFE SERVICE, SPECIES STATUS ASSESSMENT FRAMEWORK (Aug. 2016);
- U.S. FISH AND WILDLIFE SERVICE, SPECIES STATUS ASSESSMENT FRAMEWORK, AN INTEGRATED FRAMEWORK FOR CONSERVATION (FACT SHEET) (Aug. 2016);
- U.S. FISH AND WILDLIFE SERVICE, RECOVERY PLANNING AND IMPLEMENTATION (Feb. 2017);
- PRINCIPAL DEPUTY DIRECTOR GREG SHEEHAN, U.S. FISH AND WILDLIFE SERVICE, STATE REPRESENTATION ON SPECIES STATUS ASSESSMENT TEAMS (Oct. 13, 2017);
- PRINCIPAL DEPUTY DIRECTOR GREG SHEEHAN, U.S. FISH AND WILDLIFE SERVICE, CLARIFICATION OF MEMORANDUM TITLED “STATE REPRESENTATION ON SPECIES STATUS ASSESSMENT TEAMS,” DATED OCTOBER 13, 2017 (Jan. 16, 2018);
- ACTING DIRECTOR GREG SHEEHAN, U.S. FISH AND WILDLIFE SERVICE, AGENCY PRIORITY GOAL ACTION PLAN, SPECIES STATUS ASSESSMENTS (SSAs) FOR LISTINGS WITH STATE INPUT (2018);
- ASSISTANT DIRECTOR—ECOLOGICAL SERVICES GARY FRAZER, GUIDANCE ON IMPLEMENTATION OF THE AGENCY PRIORITY PERFORMANCE GOALS (May 16, 2018); and
- Smith et al., *Development of a Species Status Assessment Process for Decisions under the U.S. Endangered Species Act*, in *Journal of Fish and Wildlife Management* (June 2018).

These are the guidelines the Center is currently aware of, but there is a multitude of ways in which SSAs are being developed and utilized and the interested public is only learning of them after the fact, without a clear set of guidelines to be implemented consistently across various specific SSAs. The Center intends to pursue section 4(h) claims against any substantially similar guidelines implementing the SSA program that are currently unknown to the Center but it discovers following the submission of this notice of intent.

¹⁷ SSA Framework, at 4.

¹⁸ See, e.g., *id.* at 7 (“The SSA Framework is, therefore, designed to be applicable to the full range of ES programs: determining appropriate ESA protections, developing the best conservation strategy, evaluating impacts from proposed projects and designing conservation measures targeted to reduce those impacts, permitting research, and allocating funds for partners and stakeholders to implement conservation actions[.]”); see also *id.* (Figure 2 demonstrating SSAs application to “recovery planning decisions,” “list/delist decisions,” and “[threatened]/[endangered] or not warranted decisions.”)

IV. Conclusion

If you do not act within 60 days to correct these violations, the Center for Biological Diversity will bring legal action and seek declaratory and injunctive relief as appropriate, as well as recovery of reasonable litigation costs pursuant to the ESA citizen suit provision and/or the Equal Access to Justice Act. If you would like to discuss these issues or believe that anything stated above is in error, please contact the undersigned.

We appreciate your prompt consideration of this letter and the issues raised herein.

Sincerely,

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