

October 9, 2014

The Honorable Dan Ashe
Director
U.S. Fish and Wildlife Service
1849 C Street, NW
Washington, DC 20240

The Honorable Kathryn Sullivan
Administrator
National Oceanic & Atmospheric Administration
1401 Constitution Avenue, NW
Washington, DC 20230

Dear Director Ashe and Administrator Sullivan,

On behalf of our organizations and their millions of members, we are writing to urge you to make several important improvements to the proposed regulatory definition of the term “destruction or adverse modification” of critical habitat under the Endangered Species Act (“ESA” or “Act”). While some of our organizations will individually submit more comprehensive comment letters that recommends specific improvements to the proposed definition, this letter reflects our collective concerns about the proposal and general recommendations for improving it.

We are encouraged that the Fish and Wildlife Service and National Oceanic & Atmospheric Administration (“Services”) have finally recognized the vital role that critical habitat plays in the recovery of threatened and endangered species. However, several aspects of the Services’ proposal will likely undermine the long-term value of critical habitat for listed species by allowing harmful actions to occur without proper mitigation, thereby impeding species recovery.

The largest driver of extinction — both in the United States and around the world — continues to be human-caused habitat destruction and degradation.¹ In passing the Act, Congress recognized habitat destruction as the primary cause of species decline:

Man can threaten the existence of species of plants and animals in any of a number of ways, by excessive use, by unrestricted trade, by pollution or by other destruction of their habitat or range. The most significant of those has proven also to be the most difficult to control: the destruction of critical habitat.²

The challenge of addressing habitat loss is far greater today than it was in 1973. According to the National Resources Conservation Service, 43 million acres of land was newly developed between 1982 and 2010 — put another way, more than 37 percent of the developed land in the United States was developed in the last 30 years.³ The rate of development across the country continues to represent a substantial threat to biodiversity.

Controlling and preventing the destruction of critical habitat is not easy because most habitat loss occurs gradually and incrementally over time. Very rarely does a single project threaten an entire

¹ Pimm, S.L. and P. Raven, 2000. *Biodiversity: Extinction by numbers*. Nature, 403:853-858; Pimm, S.L. et al., 2014. *The biodiversity of species and their rates of extinction, distribution, and protection*. Science 344: DOI: 10.1126/science.1246752

² H.R. Rep. 43-412

³ U.S. Department of Agriculture. 2013. SUMMARY REPORT: 2010 NATIONAL RESOURCES INVENTORY, Natural Resources Conservation Service, Washington, DC, and Center for Survey Statistics and Methodology, Iowa State University, Ames, Iowa.

species, as was the case with the snail darter and Tellico Dam in *Tennessee Valley Authority v. Hill*.⁴ Instead, many species become endangered by hundreds or thousands of small independent actions and decisions. Minor impacts to critical habitat may not at first appear significant, but over time the cumulative impact of many, small changes can have a profound effect on endangered species habitats. These “death-by-a-thousand-cuts” scenarios drive species decline across the United States, and it is these scenarios that the proposed rule fails to address adequately.

The Service’s proposed regulatory definition for “destruction or adverse modification” fails to address incremental and cumulative impacts of small harms in two important and related ways. First, the proposed rule states that only those negative changes that “appreciably diminish” the conservation value of critical habitat will be addressed during the consultation process under the ESA. Second, the proposed rule specifies that in determining whether an impact does “appreciably diminish” critical habitat, the Services will only evaluate impacts at the scale of the *entire* critical habitat designation. These two aspects of the proposal are not supported by the best available science, and they undermine the spirit and intent of the ESA.

As an initial matter, when Congress passed the ESA in 1973 and amended the law in 1978, it did not require the destruction or adverse modification of critical habitat to be “appreciable.”⁵ Instead, it simply prohibited federal activities that resulted in the destruction or adverse modification of critical habitat.⁶ In contrast, in Section 10(a)(1)(B) of the ESA, Congress permitted private activities that could incidentally take listed species so long as those activities would not “appreciably reduce the likelihood of the survival and recovery of the species in the wild.”⁷ This crucial distinction recognizes that private entities should not be held to the same high standard of protection as federal agencies should in taking action that might harm listed species. By adding in the “appreciable” threshold, the Service is improperly raising the level of permissible harm to critical habitat in a manner contrary to the intent of Congress.

Second, the “appreciably” threshold proposed by the Service remains to a large extent vague and meaningless. The Services propose that “appreciably diminish” refer to situations where the Service “can recognize or grasp the quality, significance, magnitude, or worth of the diminishment” or where the Service can “appreciate the difference it will have to the recovery of the listed species.”⁸ This begs the question of what it means to “recognize,” “grasp,” or “appreciate” a diminishment of critical habitat. None of these inquiries are science-based, and will render most Section 7 consultations *ad hoc* and arbitrary as to when an action trips these thresholds. The “appreciably” threshold should be replaced with a clear standard that considers all non-trivial impacts to critical habitat during the consultation process. Doing so would not necessarily stop more projects from being approved, but instead would ensure that all federal actions that harm critical habitat are appropriately mitigated and addressed.

⁴ 437 U.S. 153 (1978).

⁵ *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434, 442 (2001) (“The legislative history of the ESA affirms the inconsistency of 50 C.F.R. § 402.02 with the statute...Although Congress was aware of this regulatory interpretation of the statute, it chose not to adopt this approach when it amended the ESA in 1978 to define critical habitat. Instead, Congress employed the current statutory definition, which is grounded in the concept of ‘conservation.’...The Services’ definition of the destruction/adverse modification standard in terms of survival and recovery is consequently an attempt to revive an interpretation that was rejected by Congress”)

⁶ 16 U.S.C. § 1536(a)(2)

⁷ 16 U.S.C. § 1539(a)(2)(B)(iv).

⁸ 79 Fed. Reg. 27060 at 27063 (May 12, 2014).

Finally, the Services propose that they will consider whether actions “appreciably diminish” critical habitat based on the effect to the conservation value of the designated critical habitat as a whole, rather than to the action area alone. This default rule neuters any remaining value that the Section 7 prohibition on critical habitat represents. If, for example, an endangered species has 50,000 acres of designated critical habitat, it will almost never be the case that any action adversely modifying one, or ten, or 100 acres of critical habitat will “appreciably diminish” the conservation value of the entire designation such that it can be “grasped” by the Services. Over time however, these cumulative small harms will have serious, negative implications for the recovery of species. While the Services may claim that they will consider these cumulative impacts, the Government Accountability Office found as recently as 2009 that the Fish and Wildlife Service almost universally lack the ability to track take and adverse modification of critical habitat authorized under Section 7 of the ESA.⁹ As such, the proposal’s approach for analyzing adverse modifications to critical habitat only as they relate to the entire designation lacks any scientific justification and will likely undermine the recovery of listed species.

The draft proposal appears designed to avoid making tough calls about the impact of projects on critical habitat. We urge the Services to replace the “appreciably diminish” threshold with a clear standard that considers all non-trivial impacts to critical habitat during the consultation process. And, we further urge the Services to consider adverse impacts to critical habitat at the most biologically relevant and appropriate scale to further the recovery of listed species. For example, if a species has a recovery plan that identifies the geographic recovery units wherein conservation goals must be met to recover that species, then assessing critical habitat at the scale of the recovery unit may be appropriate. Or if a recovery plan requires the establishment of a certain number of populations or meta-populations to achieve recovery, then one appropriate scale for assessing critical habitat could be at the population or meta-population level. Such an approach would reflect the mandate that all consultations under Section 7 be made solely on the best scientific information available for that species. While some of the organizations below will submit more specific recommendations on this issue, we appreciate your attention to these important principles.

Respectfully submitted,



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Center for Biological Diversity



Ya-Wei Li
Director of Endangered Species Conservation
Defenders of Wildlife

Also on behalf of:

Natural Resources Defense Council
Sierra Club

Humane Society of the United States
Public Employees for Environmental Responsibility

⁹ Government Accountability Office. 2009. THE U.S. FISH AND WILDLIFE SERVICE HAS INCOMPLETE INFORMATION ABOUT EFFECTS ON LISTED SPECIES FROM SECTION 7 CONSULTATIONS, Report #: GAO-09-550.

Alameda Creek Alliance
 Alaska Wildlife Alliance
 Alaska's Big Village Network
 Allegheny Defense Project
 Alliance for Appalachia
 Altamaha Riverkeeper
 American Bird Conservancy
 Animal Welfare Institute
 Animals are Sentient Beings
 Animas Valley Institute
 Antelope Valley Conservancy
 Apollo Kaua'i
 Arkansas Audubon Society
 Arkansas Wildlife Federation
 Audubon Society of Corvallis
 BALANCE Edutainment
 Bark
 Battle Creek Alliance
 Beyond Toxixs
 Big Wildlife
 Bird Conservation Network
 Biscayne Bay Waterkeeper
 Black Warrior Riverkeeper
 Blue Mountain Biodiversity Project
 Bold Visions Conservation
 Born Free USA
 Boulder Rights of Nature
 Brainerd Lakes Area Audubon Society
 Burnt Fork Watershed Alliance
 California Wildlife Foundation
 Californians for Western Wilderness
 Cascades Raptor Center
 Cascadia Wildlands
 Center for Food Safety
 Center for Sierra Nevada Conservation
 Cheesemans' Ecology Safaris
 Christians Caring for Creation
 Citizens Against Ruining the Environment
 Citizens Climate Lobby
 Clean Air Watch
 Cloud Foundation
 Coal River Mountain Watch
 Coastal Plains Institute and Land Conservancy
 Columbia Riverkeeper
 Community Conservation
 Community Environmental Defense Council
 Conservation Congress
 Conservation Northwest
 Cottonwood Environmental Law Center
 Cutthroat: A Journal of the Arts
 Delaware-Otsego Audubon Society
 Desert Tortoise Council
 District of Columbia Environmental Network
 Dogwood Alliance
 Earth Day Coalition
 Eastern Coyote/Coywolf Research
 Eastman Environmental
 Eco-Eating
 Ecology Party of Florida
 Endangered Habitats League
 Environmental Action Committee of West Marin
 Fairmont Minnesota Peace Group
 Federation of Western Outdoor Clubs
 Flint Riverkeeper
 Food & Water Watch
 Four Harbors Audubon
 Franciscan Sisters of Mary
 Free Soil Party
 Friends of Bumping Lake
 Friends of the Bitterroot
 Friends of the Blackwater
 Friends of the Clearwater
 Friends of the Ridgeland
 Friends of the Santa Clara River
 Friends of the Wild Swan
 Georgia Botanical Society
 Georgia Forest Watch
 Gifford Pinchot Task Force
 Grand Canyon Trust
 Great Old Broads for Wilderness
 Green Party of Tennessee
 Green Party of Washington State
 Greenlaw
 Hawk Mountain Sanctuary
 Hells Canyon Preservation Council
 Hilton Pond Center for Piedmont Natural History
 Howard County Bird Club
 Illinois Valley Sierra Club Activity Section
 Imagination Heals
 Independent Environmental Conservation &
 Activism Network
 Institute for Environmental Research and Education
 Intercommunity Ecological Council of Women Religious
 International Fund for Animal Welfare
 International Society for the Preservation of the
 Tropical Rainforest
 Iowa Environmental Council
 Juniata Valley Audubon Society
 Kentucky Heartwood
 Kettle Range Conservation Group
 Keystone Prairie Dogs
 Kickapoo Peace Circle
 Klamath-Siskiyou Wildlands Center
 KyotoUSA

Lake Merritt Institute
 Lane County Audubon
 Latina Lista
 Law Office of David H. Becker, LLC
 Life of the Land
 Los Padres Forest Watch
 Lower Neuse Riverkeeper
 Madrone Audubon Society
 Maricopa Audubon Society
 Maryland Ornithological Society
 Massachusetts Forest Watch
 Maui Forest Bird Recovery Project
 Maui Tomorrow Foundation, Inc
 Monterey CoastKeeper
 North Carolina Waste Awareness & Reduction
 North County Watch
 Northcoast Environmental Center
 Northeast Oregon Ecosystems
 Northern Arizona Audubon
 Northwest Environmental Advocates
 Northwest Environmental Defense Center
 Oasis Earth
 Occidental Arts and Ecology Center
 Ocean Conservation Research
 Oconee Rivers Audubon Society
 Ohlone Audubon Society
 One More Generation
 Oregon Natural Desert Association
 Oregon Wild
 Otter Project
 Pacifica Shorebird Alliance
 Peace and Freedom Party
 Preserve Lamorinda Open Space
 Preserve Wild Santee
 Protect All Living Species
 Protect Arkansas Wildlife
 Public Citizen Energy Program
 Rainier Audubon
 Renewable Energy Office for Cornwall
 Restore America's Estuaries
 Restore: The North Woods
 Rocky Mountain Wild
 Russian Riverkeeper
 Safe Energy Analyst
 San Bernardino Valley Audubon Society
 San Diego Coastkeeper
 San Luis Obispo Mothers for Peace
 Save Our Sky Blue Waters
 Save the Frogs
 Save the Scenic Santa Ritas
 Sea Turtle Conservancy
 Severn Riverkeeper
 Sisters of Charity of Nazareth Central Leadership
 Snorkel Bob Foundation
 South Carolina Coastal Conservation League
 South Florida Audubon Society
 South Florida Wildlands Association
 Southern Appalachian Mountain Stewards
 Southern Environmental Law Center
 Southern Utah Wilderness Alliance
 Surfrider
 Sustainable Sanctuary Coalition
 Sustainability, Parks, Recycling And Wildlife
 Legal Defense Fund
 Sustainable Midlands
 SustainUS
 Tennessee Clean Water Network
 Tennessee Forest Council
 Tennessee Ornithological Society
 The California Chaparral Institute
 The Empire-Fagan Coalition
 The Fund for Wild Nature
 The Idaho Sporting Congress, Inc.
 The Land Connection
 The Lands Council
 The Rewilding Institute
 Treviño TodaMedia
 Turtle Island Restoration Network
 Union of Concerned Scientists
 Upstate Forever
 Utah Native Plant Society
 Ventana Wilderness Alliance
 Waccamaw Riverkeeper
 Walden's Puddle Wildlife Rehabilitation & Education
 Center
 Walnut Creek Open Space Foundation
 West Virginia Highlands Conservancy
 Western Environmental Law Center
 Western Nebraska Resources Council
 Western North Carolina Alliance
 Western Watersheds Project
 Wild Horse Education
 Wild Nature Institute
 Wildcoast
 WildEarth Guardians
 Wilderness Workshop
 Wildlife Alliance of Maine
 Winyah Group, Sierra Club, South Carolina
 Wisconsin Council of Churches
 Wisconsin Resources Protection Council
 Yellow Dog Watershed Preserve