

September 24, 2018

Secretary Ryan Zinke
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Secretary Wilbur Ross
U.S. Department of Commerce
1401 Constitution Ave., NW
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Dear Secretary Zinke and Secretary Ross,

As scientists with expertise in biological diversity and endangered species, we are writing to oppose proposed changes to the regulations guiding implementation of the Endangered Species Act, including revisions to the regulations for interagency cooperation, listing species and designating critical habitat and prohibitions to threatened wildlife and plants (Docket Numbers: FWS-HQ-ES-2018 0006, 0007 and 0009). If enacted, these proposed regulatory changes will severely erode protections for endangered species and ensure more species are lost to extinction. We respectfully request withdrawal of the three rules.

THE PROPOSED DEFINITION OF ADVERSE MODIFICATION FAILS TO PROTECT CRITICAL HABITAT NECESSARY FOR ENDANGERED SPECIES RECOVERY

With limited exceptions, the Endangered Species Act requires the designation of critical habitat for threatened and endangered species. Federal agencies are prohibited from funding, permitting or carrying out actions that destroy or adversely modify critical habitat. They avoid adverse modification through consultation with the National Marine Fisheries Service for marine and anadromous species and the U.S. Fish and Wildlife Service for all other species. Because destruction of habitat remains the predominant cause of species endangerment, these provisions are paramount to endangered species recovery.

The proposed regulations for interagency cooperation define adverse modification as an “alteration that appreciably diminishes the value of critical habitat *as a whole* for the conservation of a listed species.” Based on our extensive experience with endangered species recovery, we do not believe this definition will ensure the maintenance of critical habitat necessary to sustain species survival and recovery. The definition will allow activities to destroy or modify critical habitat so long as they don’t affect “the whole” of critical habitat, which particularly for species with large ranges will allow most if not all destructive actions to move forward. This in turn allows for the possibility of destructive actions that cumulatively impact the entirety of a species’ critical habitat.

We know of many species that are threatened by such cumulative impacts and thus do not believe this definition of adverse modification comports with the purposes of the Endangered Species Act to ensure the survival and recovery of threatened and endangered species. We thus

request this proposed revision be withdrawn and the Services adopt a definition of adverse modification that focuses the analysis of what constitutes adverse modification of critical habitat at a biologically meaningful scale, such as recovery or critical habitat units.

THE PROPOSED REGULATIONS WILL SHARPLY LIMIT THE DESIGNATION OF CRITICAL HABITAT FOR THREATENED AND ENDANGERED SPECIES

Given the importance of protecting habitat to the survival and recovery of endangered species, we are concerned about provisions in the proposed regulations that will expand the circumstances under which species do not receive designated critical habitat. The Services propose to not designate critical habitat when the primary threats to a species are climate change, disease or other factors besides direct destruction or modification of habitat based on the premise that such species would not benefit from protection of habitat. This premise has no basis in the scientific literature and is unsupportable. Species facing such intractable threats as climate change or disease, need habitat protection to ensure that those places where they are managing to survive in the face of threats are not destroyed and to provide habitat for species migration in response to climate change driven habitat changes. Failure to provide such habitat protection will almost certainly result in more species going extinct as our world undergoes the rapid changes projected under global warming or because of rapid spread of novel pathogens related to globalization.

In addition to limiting the circumstances under which species receive critical habitat, the Services propose to limit designation of unoccupied areas as critical habitat. Under the proposed regulations, critical habitat would only be designated in unoccupied habitat, if the currently occupied range of a species was found to be inadequate to ensure the conservation of a species and if “there is a reasonable likelihood that the area will contribute to the conservation of the species.” The Services already rarely designate unoccupied areas as critical habitat and these restrictions will only make it rarer. The requirement that the Services first determine that occupied areas are insufficient to conserve species will encourage a reductionist view in which only species viability is considered and other factors, such as the ecological role of species in ecosystems, are ignored. The requirement that an area has a likelihood of contributing to the conservation of a species will give private landowners opposed to endangered species conservation veto power over designation on their lands simply by stating opposition to recovering species.

Designation of unoccupied habitat is the only mechanism in the Act that protects historic habitat for species, which because most endangered species have lost substantial ground, is critically important. As such, these proposals are clearly not in the interest of conserving species and we ask they be withdrawn.

REMOVAL OF THE BLANKET 4(D) RULE WOULD WEAKEN PROTECTION FOR THREATENED SPECIES AND EXPOSE THE LISTING PROGRAM TO FURTHER POLITICAL INTERFERENCE

We have serious concerns about the U.S. Fish and Wildlife Service’s proposal to rescind what is known as the blanket 4(d) rule, which for 40 years, has provided essential protections to threatened species. This rule automatically applied the prohibition against take afforded

endangered species to threatened species, which includes killing, harm, harassment and habitat destruction. In the absence of this rule, we're concerned threatened species will in many cases, be afforded little to no protections and that political pressure will lead to endangered species being listed as threatened in order to exempt specific threats. We're also concerned that having to create an individual rule specifying prohibited activities for every threatened species will further burden the Service's already over-burdened listing program, which faces a backlog of more than 500 species and has consistently fallen short of statutory deadlines intended to ensure species receive timely protection. We request the Service retain the blanket 4(d) rule and instead create individual special rules for species on a case by case basis where more specific or tailored protections are needed.

THE PROPOSED REGULATIONS WOULD INTRODUCE IMPROPER CONSIDERATION OF ECONOMIC FACTORS IN DETERMINATIONS OF SPECIES STATUS

In direct contravention of the statute, the proposed regulations would allow consideration of economic impacts when determining if species warrant protection as threatened or endangered species. In 1982, Congress clarified that when determining the status of a species, the Services must rely "solely" on the "basis of the best scientific and commercial data available." Despite this clear Congressional direction, the administration now proposes to remove the regulatory phrase "without reference to possible economic or other impacts" with the specific intent of including discussion of economic impacts into assessments of species status. We are concerned that such a move will have a similar adverse effect to the removal of the blanket 4(d) rule, further burden the Service's listing program and result in species not receiving protection because the short-term economic impacts are considered too high. Such outcomes run directly counter to the primary purpose of the Act to save species from extinction.

In sum, the proposed regulatory changes will do nothing to further conservation of endangered species and much to undermine it. If enacted, the rule changes will fundamentally undermine the ability of science and scientists to protect our nation's biodiversity and we thus ask that all three be rescinded.

Sincerely,

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