

September 20, 2018

The Honorable Ryan Zinke
Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

The Honorable Wilbur Ross
Secretary
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

RE: Proposed Revisions to Endangered Species Act § 4 Regulations for Listing Species and Designating Critical Habitat

Dear Secretary Zinke and Secretary Ross:

On behalf of our organizations and millions of members, we write to urge you to withdraw the proposed changes to the regulations that implement Section 4 of the Endangered Species Act.¹ This proposal would fundamentally alter the way the U.S. Fish and Wildlife Service and the National Marine Fisheries Service evaluate the listing of threatened and endangered species, and it would also substantially limit the circumstances in which the Services could designate critical habitat. If adopted, these changes would undermine the conservation of endangered and threatened species nationwide, weaken their critical habitat protections, and ultimately make recovery of endangered animals and plants far more costly and difficult.²

As an initial matter, the proposal to remove regulatory language that prohibits consideration of the possible economic impacts when listing a species as endangered or threatened is a radical departure from past practice and is not in keeping with the intent of the Act. The Endangered Species Act requires that listing decisions be made “*solely* on the basis of the best scientific and commercial data available.”³ Indeed, Congress added the word *solely* in the 1982 amendments to the Act to underscore that non-biological considerations should play no role in listing decisions.⁴ The administration’s proposal to remove the regulatory phrase “without reference to possible economic or other impacts”⁵ opens the door to cost-benefit analyses and other economic assessments that risk politicizing the listing process. Such assessments would be burdensome, costly, and ultimately irrelevant if listing decisions are to remain wholly scientific determinations.

¹ *Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation*, 83 Fed. Reg. 35,193 (July 25, 2018).

² Some of organizations that are signatories to this letter are also submitting comprehensive comment letters regarding the proposed changes to the Act’s implementing regulations. This letter reflects our collective concerns about the proposal and general recommendations from the environmental community.

³ 16 U.S.C. § 1533(b)(1)(A) (emphasis added); 50 C.F.R. § 424.11(b).

⁴ Pub. L. No. 97-304, 96 Stat. 1411.

⁵ 50 C.F.R. § 424.11(b).

We also oppose the administration's proposed definition of the term "foreseeable future." Although this term is not defined in the Act itself, the concept is extensively described in a 2009 opinion from the Department of the Interior's Solicitor.⁶ Rather than adopt the opinion's definition, however, the proposed additions to section 424.11 include a new yet undefined word, "probable," representing a change from current practice that could limit foreseeable future analyses for species threatened by climate change. The proposal further states that the Services can rely on their undefined "professional judgment" to ascertain what the foreseeable future is, and that the "foreseeable future can extend only as far as the Services can reasonably depend on the available data to formulate a reliable prediction."⁷ This "reliable prediction" standard sets a higher bar than using the best available science, flipping the Act's presumption in favor of conservation on its head. If the administration believes it is necessary to codify the Solicitor's Opinion, it should use the Solicitor's definition.⁸ We believe adding the term "probable" could create, rather than dispel, confusion as to how the Services consider what constitutes the foreseeable future.

Additionally, the proposal re-stating that the factors for delisting a species are the same for listing a species is unnecessary, and the proposed textual changes in fact place listed species at risk of premature delisting. Under current law, any listed species can be removed from the list upon a scientific determination that it is, in fact, recovered and that the previous threats to its survival have been appropriately abated. That determination must be made based upon the statutory five factors using the best available scientific and commercial data.⁹ The proposed changes eliminate the requirement that data "substantiate" that delisting is warranted and eliminate "recovery" as a ground for delisting (presumably in an attempt to divorce delisting from recovery criteria in recovery plans).¹⁰ No clarification of the delisting criteria is needed, and the other proposed changes violate the precautionary principle. If anything, under the precautionary principle, it is appropriate that once a species is protected by the Act, the burden of proof should be higher to remove it.

The Trump administration's proposed changes to the designation of critical habitat ignore the basic fact that the single largest driver of extinction here and around the world is habitat loss.¹¹ If we do not protect the last few places that endangered wildlife and plants call home, then those highly imperiled species simply have no future. Specifically, the proposal would limit the designation of critical habitat, particularly unoccupied critical habitat, that may be essential to the conservation and recovery of the species. First, the proposal sets forth a number

⁶ Department of the Interior, Office of the Solicitor, Opinion M-37021 (Jan. 16, 2009).

⁷ 83 Fed. Reg. at 35,195-35,196.

⁸ See Opinion M-37021, at 14 ("the foreseeable future describes the extent to which the Secretary can, in making determinations about the future conservation status of the species, reasonably rely on predictions about the future. Those predictions can be in the form of extrapolation of population or threat trends, analysis of how threats will affect the status of the species, or assessment of future events that will have a significant new impact on the species.").

⁹ 16 U.S.C. §§ 1533(a)(1)(A)-(E), 1533(b)(1)(A).

¹⁰ 83 Fed. Reg. at 35,201.

¹¹ 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

circumstances in which designation of critical habitat would automatically be designated “not prudent.” This automatic exemption runs counter to the statutory language and intent. The Act requires the designation of critical habitat at the time of listing for all species except when the designation would not be prudent.¹² Current regulations make clear that critical habitat “shall” be designated unless it “would not be beneficial to the species.”¹³ As the proposal notes, courts evaluating challenges to the Services’ failure to designate critical habitat have held the Services to an appropriately high standard.¹⁴ The administration’s proposal to categorically exempt habitat that is not necessarily under direct threat or when the threats cannot be readily “addressed through management actions” has no basis in the statute. Under the administration’s proposal, habitat would not be designated if the primary threat to a species derived from disease or climate change, or when designation would provide “negligible” benefits. None of these provisions will aid the conservation of species and indeed will likely contribute to loss of habitat that is vital to the species’ survival and recovery.

Similarly, we oppose efforts to limit designation of unoccupied habitat. The purpose of critical habitat is to identify those occupied areas that are currently “(I) essential to the conservation of the species and (II) which may require special management considerations or protection” as well as those unoccupied areas “essential for the conservation of the species.”¹⁵ The Service’s proposal to reinstate the “step-wise” approach to designating unoccupied habitat has no biological basis and will be detrimental to conservation. Unoccupied areas may be easier or more important to conserve than occupied areas for certain species.¹⁶ In such cases, it makes no sense to exhaust all occupied areas before designating unoccupied ones. Indeed, many species may need to expand their range in order to recover, and critical habitat designations may need to shift in response to climate change, making designating unoccupied habitat more important. Instituting a presumption against designating unoccupied critical habitat places political and cost considerations above best available science.

By the Services’ own admission, the proposed reversion to a “rigid step-wise approach” is not about improving conservation but rather alleviating alleged “continued perceptions” that the Services might designate “expansive” areas of unoccupied habitat. This perception is not reality; the Services rarely designate unoccupied areas. The proposed changes are unnecessary and will make critical habitat a less effective tool for recovering species.

In summary, the administration’s proposed regulatory changes to Section 4 of the Endangered Species Act would do nothing to improve the conservation of species and their habitats. To the contrary, the changes would undermine the listing process by opening the door to irrelevant economic concerns and hinder protection of listed species by substantially limiting the Services’ ability to protect habitats that are essential to species conservation. If finalized, these regulations would place threatened and endangered species at greater risk of extinction.

¹² 16 U.S.C. § 1533(a)(3)(A)

¹³ 50 C.F.R. § 424.12(a)(1)(ii).

¹⁴ See, e.g., *Natural Resources Def. Council v. U.S. Dept. of the Interior*, 113 F.3d 1121 (9th Cir. 1997); *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Haw. 1998).

¹⁵ 16 U.S.C. § 1532(5).

¹⁶ 81 Fed. Reg. 7415.

For these reasons, we strongly recommend that the proposed regulations for listing species and designating critical habitat be withdrawn.

Sincerely,

Center for Biological Diversity
Defenders of Wildlife
Earthjustice
Natural Resources Defense Council
350.org
Alaska Wilderness League
All-Creatures.org
Allegheny Highlands Alliance
Alliance for the Wild Rockies
Altamaha Riverkeeper
American Bird Conservancy
American Indian Mothers Inc.
American Rivers
Animal Legal Defense Fund
Animal Welfare Institute
Animals Are Sentient Beings, Inc.
Animas Valley Institute
Arkansas Audubon Society
Arkansas Valley Audubon Society
Atchafalaya Basinkeeper
Audubon Colorado Council
Audubon Society of Central Arkansas
Backcountry Fly Fishers Naples
BALANCE Edutainment
Basin and Range Watch
Battle Creek Alliance/Defiance Canyon Raptor Rescue
Bayou City Waterkeeper
Berkshire Environmental Action Team (BEAT)
Beyond Nuclear
Bird Conservation Network
Black Warrior Riverkeeper
Bold Alliance
Born Free USA
Boulder Rights of Nature, Inc.
Boulder Waterkeeper
Cahaba Riverkeeper
California Chaparral Institute
California Native Plant Society, San Diego Chapter
Californians for Western Wilderness
Cascades Raptor Center
Cascadia Wildlands

Center for a Sustainable Coast
Center for Food Safety
Central Valley Safe Environment Network
Citizens Campaign for the Environment
Citizens' Environmental Coalition
Climate Hawks Vote
Coalition for Sonoran Desert Protection
Columbia River Estuary Action Team
Conservancy of Southwest Florida
Conservation Congress
Conservation Law Foundation
Conservation Northwest
Coosa River Basin Initiative/Upper Coosa Riverkeeper
Coosa Riverkeeper
Cottonwood Environmental Law Center
Crawford Stewardship Project
DC Environmental Network
Delaware Ecumenical Council on Children and Families
Denver Audubon
Don't Waste Arizona
Earth Day Initiative
Earthworks
Eastern Coyote/Coywolf Research
EcoFlight
Endangered Habitats League
Endangered Small Animal Conservation Fund
Endangered Species Coalition
Environment America
Environmental Action Committee of West Marin
Environmental Center of San Diego
Environmental Defense Center
Environmental Protection Information Center
Evergreen Audubon
Fallbrook Land Conservancy
Food & Water Watch
Footloose Montana
Franciscan Action Network
Friends of Arthur R. Marshall Loxahatchee National Wildlife Refuge
Friends of Harbors, Beaches and Parks
Friends of Point Arena-Stometta Lands
Friends of the Bitterroot
Friends of Blackwater
Friends of the Earth
Friends of the Eel River
Friends of the Inyo
Friends of the WI Wolf & Wildlife

Friends of the Wild Swan
Fund for Wild Nature
GARDEN, Inc.
Georgia ForestWatch
Geos Institute
Golden West Women Flyfishers
Grand Valley Audubon Society
Great Old Broads for Wilderness
Greater Hells Canyon Council
Greater Yellowstone Coalition
Green Riverkeeper
GreenFaith
Greenpeace
Gulf Restoration Network
Gunpowder RIVERKEEPER®
Hands Across the Sand
Hilton Pond Center for Piedmont Natural History
Honor the Earth
Humane Society Legislative Fund
Humboldt Baykeeper
In Defense of Animals
International Fund for Animal Welfare (IFAW)
International Marine Mammal Project of Earth Island Institute
Juniata Valley Audubon Society
Kalmiopsis Audubon Society
Kentucky Heartwood
Kettle Range Conservation Group
Kickapoo Peace Circle
Klamath Forest Alliance
Kootenai Environmental Alliance
KS Wild
Lake Worth Waterkeeper
League of Conservation Voters
Los Padres ForestWatch
Lost Coast Interpretive Association
Lower Ohio River Waterkeeper
Madison Audubon Society
ManaSota-88, Inc.
Maryland Ornithological Society
Mass Audubon
Massachusetts Forest Watch
Matanzas Riverkeeper
Miami Waterkeeper
Milwaukee Riverkeeper
Missouri Coalition for the Environment
Mt. Diablo Audubon Society

National Parks Conservation Association
National Wolfwatcher Coalition
Native Fish Society
Nevada Wildlife Alliance
New Mexico Audubon Council
New Mexico Wilderness Alliance
Northeast Oregon Ecosystems
Northern Jaguar Project
NY4WHALES
Ocean Conservancy
Ocean Conservation Research
Oceana
One More Generation
Oregon Natural Desert Association
Our Children's Earth Foundation
Potomac Riverkeeper Network
Preserve Lamorinda Open Space
Protect Our Water
Protect Our Wildlife
Public Employees for Environmental Responsibility
Public Interest Coalition
Public Lands Project
Quad Cities Waterkeeper Inc.
Quality Parks
Rainier Audubon Society
Raptors Are The Solution
RE Sources for Sustainable Communities
Reef Relief
RESTORE: The North Woods
Rio Grande Waterkeeper
Riverkeeper, Inc.
Roaring Fork Audubon Society
Rocky Mountain Wild
Russian Riverkeeper
San Bernardino Valley Audubon Society
San Diego Coastkeeper
San Francisco Baykeeper
San Joaquin Raptor/Wildlife Rescue Center
San Luis Valley Ecosystem Council
Sanibel Captiva Conservation Foundation
Save Animals Facing Extinction
Save Our Allegheny Ridges
Save Our Sky Blue Waters
Save Our Wild Salmon Coalition
Save The Colorado
Save The Cumberland Inc.

SAVE THE FROGS!

Save the Manatee Club
Save the Scenic Santa Ritas
Save Wolves Now Network
Sea Shepherd Legal
Selkirk Conservation Alliance
Seneca Lake Guardian, A Waterkeeper Affiliate
Sequoia ForestKeeper®
Seven Generations Ahead
Sierra Club
Sisters of Charity of Nazareth Western Province Leadership
Snake River Waterkeeper
South Florida Audubon Society
South Yuba River Citizens League
Southern Environmental Law Center
Southern Utah Wilderness Alliance
Southwest Environmental Center
Spokane Riverkeeper
Students for the Salish Sea
Suncoast Waterkeeper
Surfrider Foundation
Swan View Coalition
Tampa Bay Waterkeeper
Tennessee Environmental Council
Tennessee Riverkeeper
The Humane Society of the United States
The Lands Council
The Otter Project
The Rewilding Institute
The Safina Center at Stony Brook University
Toxic Free NC
Tucson Audubon Society
Turtle Island Restoration Network
Urban Bird Foundation
Ventana Wilderness Alliance
Vet Voice Foundation
Waterkeeper Alliance
Waterkeepers Hawaiian Islands
WE ACT for Environmental Justice
West Virginia Highlands Conservancy
Western Watersheds Project
Whale and Dolphin Conservation
Whidbey Environmental Action Network
Wild and Scenic Rivers
Wild Fish Conservancy
Wild Horse Education

Wild Nature Institute
WildEarth Guardians
Wilderness Watch
Wilderness Workshop
Wildlife Rescue & Rehabilitation, Inc.
WildPlaces
WildWest Institute
Wishtoyo Foundation
Wolf Conservation Center
Wolf Hollow
Xun Biosphere Project
Yellowstone to Uintas Connection