CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

1615 H STREET, NW
WASHINGTON, DC 20062
(202) 463-5310

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VIA ELECTRONIC FILING

Ms. Bridget Fahey
U.S. Fish and Wildlife Service, Division of Conservation and Classification
U.S. Department of the Interior
5275 Leesburg Pike
Falls Church, VA

Mr. Samuel D. Rauch, III
National Marine Fisheries Service, Office of Protected Resources
National Oceanic and Atmospheric Administration
U.S. Department of Commerce
1315 East-West Highway
Silver Spring, MD 20910

RE: Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35,193 (July 25, 2018); Docket No. FWS-HQ-ES-2018-0006

Dear Ms. Fahey and Mr. Rauch:

The U.S. Chamber of Commerce submits these comments in support of the Fish and Wildlife Service's (FWS) and National Marine Fisheries Service's (NMFS) (collectively, the Services') proposed revisions to portions of those regulations that implement section 4 of the Endangered Species Act of 1973 (ESA or Act).[1] The Chamber recognizes the need to protect species threatened with extinction, but the Services must also avoid unnecessary impediments to land and natural resources development. The Services can balance endangered species protection with property rights and compliance costs using sound science.

[1] Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35,193 (July 25, 2018).

I. Background

Congress enacted the ESA[2] in 1973 to conserve the ecosystems upon which endangered and threatened species depend, to provide a program for the conservation of endangered and threatened species, and achieve the purposes of certain treaties and conventions.[3] The Federal Government must seek to conserve threatened and endangered species and use its authorities to further the purposes of the Act.[4]

The ESA "represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[5] The distinct difference between endangered and threatened species creates two separate levels of protection for plants, fish, and wildlife.[6]

On February 24, 2017, President Trump published Executive Order 13,777, "Enforcing the Regulatory Reform Agenda," which aimed to reduce the regulatory burden on citizens and facilitate innovation and economic growth.[7] The U.S. Department of the Interior (DOI) solicited comments as to how it could "improve implementation of regulatory reform initiatives and policies and identify regulations for repeal, replacement, or modification."[8] The U.S. National Oceanic and Atmospheric Administration (NOAA) within the U.S. Department of Commerce (DOC) also solicited comments from stakeholders on the same issue.[9] Officials from DOI and DOC then met with FWS and NMFS officials in December 2017 to discuss improvements to the ESA, deciding to focus on sections 4 and 7 of the Act.

Section 4 of the ESA addresses the criteria used to list, delist, or reclassify endangered and threatened species, as well as that used for designating critical habitat.[10] These procedures are

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[2] The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (ESA).

[3] *Id.* at § 1531(b).

[4] *Id.* at § 1531(c)(1).

[5] *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).

[6] Congress defined "endangered species" as any species of plant, fish or wildlife "which is in danger of extinction throughout all or a significant portion of its range" (16 U.S.C. § 1532(6)), and defined "threatened species" as "any species of plant, fish, or wildlife which is likely to become endangered species within the foreseeable future throughout all or a significant portion of its range" (*Id.* at § 1532(20)).

[7] Exec. Order 13,777, Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12,285 (Mar. 1, 2017).

[8] Regulatory Reform, 82 Fed. Reg. 28,429 (June 22, 2017).

[9] Streamlining Regulatory Processes and Reducing Regulatory Burden, 82 Fed. Reg. 31,576 (July 7, 2017).

[10] *See* 16 U.S.C. § 1533.

considered the "keystone" of the ESA, and trigger several important duties and prohibitions included elsewhere in the Act.[11] Among other things, the implementing regulations require that species must be listed or reclassified based on the best scientific and commercial data available, after conducting a review of the species' status, if at least one of the following factors exist:

1. The present or threatened destruction, modification, or curtailment of its habitat or range;
2. Overutilization of the species for commercial, recreational, scientific, or educational purposes;
3. Disease or predation;
4. The inadequacy of existing regulatory mechanisms; or
5. Other natural or manmade factors affecting its continued existence.[12]

The regulations also address specific requirements for designating critical habitat, including proposing and finalizing habitats concurrently with listing determinations.[13] The Services must designate critical habitat using the best scientific data available, after taking into consideration the economic, national security, and other effects of making such a designation.[14]

In regards to the listing, delisting, or reclassifying of species, the Services are now proposing to create a regulatory framework for the phrase "foreseeable future," clarifying that the standard for the listing and delisting of species is the same, and removing reference to economic or other effects in classification. As for the criteria for designating critical habitat, the Services are also proposing to clarify when the designation of critical habitat may not be prudent and to revise the process and standards for designation of unoccupied critical habitat.

The Chamber supports the Services' actions, and offers the following comments to further improve the proposal. The Chamber believes that these revisions, if finalized, would make the implementation of section 4 requirements more transparent and efficient, reduce costs, streamline the listing, delisting, and reclassification processes, and provide the regulated community with increased certainty.

II. Factors for Listing, Delisting, or Reclassifying Species

The Chamber generally supports the measures included in the Services' proposal. The Services are proposing three main changes to the listing, delisting, or reclassifying of species under the Act:

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[11] *See* H.R. Rep. No. 567, 97th Cong., 2d Sess. 8, *reprinted in* 1982 U.S.C.C.A.N. 2807, 2810. Section 4 procedures can trigger section 7 interagency consultation requirements and section 9 "take" prohibitions.

[12] 50 C.F.R. § 424.11(c).

[13] 50 C.F.R. § 424.12(a).

[14] *Id. See also* 50 § C.F.R. 424.19 ("Impact analysis and exclusions from critical habitat").

1. Remove the phrase, "without reference to possible economic or other impacts of such determination," from the regulatory language;[15]
2. Add a framework to the implementing regulations that lays out the term "foreseeable future;" and[16]
3. Clarify that the standard for the listing and delisting of a species is the same and the situations when it is appropriate to delist a species.[17]

a. Economic Effects

The Chamber supports the Services' proposed action regarding the consideration of economic and other effects in listing determinations under the Act. The Services propose to remove the phrase, "without reference to possible economic or other impacts of such determination," from 50 C.F.R. 424.11(b), which requires that the Secretary of either Service "make any determination…on the basis of the best available scientific and commercial information regarding a species' status, without reference to possible economic or other impacts of such determination."[18]

The Services believe that this change would more closely align the regulatory text with the ESA's statutory language. In regards to listing decisions, the ESA requires that Secretary of either Service "make determinations…*solely* on the basis of the best scientific and commercial data available…after conducting a review of the status of the species…" and makes no reference to the economic consequences of those determinations.[19] According to the Services, the addition of the word "solely" was meant to "clarify that the determination of endangered or threatened status was intended to be made 'solely upon biological criteria and to prevent non-biological considerations from affecting such decisions'" and to address Congress' concerns regarding the potential introduction of economic and other factors into the basis for determinations.[20] However, the text of the statute does not prohibit the Services from providing economic data to better inform stakeholders.

This action would strengthen the regulations and align the regulatory text more closely with the statutory language. This increase in transparency is also in the best interest of the public, as

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[15] 83 Fed. Reg. 35,194.

[16] *Id.* at 35,195.

[17] *Id.* at 35,196.

[18] *See* 50 C.F.R. § 424.11(b).

[19] 16 U.S.C. § 1533(b)(1)(A).

[20] 83 Fed. Reg. 35,194 (referencing H.R. Rep. No. 97-567 at 19-20, May 17, 1982) (the Regulatory Flexibility Act, Paperwork Reduction Act, and Executive Order 12,291 all require the potential introduction of such data).

economic and other effects would better inform stakeholders as they work to comply with regulatory requirements. For example, the proposal notes that when stakeholders comply with EPA's National Ambient Air Quality Standard (NAAQS) requirements, the cost-benefit analysis informs stakeholders, but is not part of the standard selection process.[21]

The Services are *not* suggesting that they address economic and other effects in *every* determination made under the Act. Rather, the Services intend that this action inform stakeholders when the inclusion of such information would better inform the public, while ensuring that biological considerations remain the sole basis for listing determinations. As such, the Chamber agrees with the Services' proposal in an effort to further increase regulatory transparency and certainty.

b. Foreseeable Future

The Chamber agrees with the decision to address the term "foreseeable future," but believes that the Services could further improve this proposal. The Services propose a framework for how they would consider the "foreseeable future" when making listing determinations under the ESA. This term is used when determining if a species is threatened, but neither the ESA nor the implementing regulations define the term.[22]

The Services' proposal builds on widely applied 2009 guidance that addresses "foreseeable future," and would codify the Services' current case-by-case practice for making listing determinations.[23] The Services' proposed framework would analyze "whether the species is likely to become an endangered species within the foreseeable future…extending only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable."[24] The proposed revisions would not require the Services to identify "foreseeable future" in terms of a specific period of time, but would allow them to "explain the extent to which they can reasonably determine that both the future threats and the species' responses to those threats are probable."[25]

The benefit of further narrowing the scope of the Services' listing determination, with respect to the "foreseeable future," would assist the Services in prioritizing the urgency of a specific

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[21] 83 Fed. Reg. 35,194-95.

[22] *See* 16 U.S.C. § 1532(20) (a "threatened species" under the ESA is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range").

[23] *See* U.S. Department of the Interior, Office of the Solicitor, *The Meaning of "Foreseeable Future in Section 3(20) of the Endangered Species Act* (Jan. 16, 2009), *available at* https://www.fws.gov/endangered/esa-library/pdf/M-37021%20Foreseeable%20future.pdf.

[24] 83 Fed. Reg. 35,195.

[25] *Id.*

species protection. In addition, it would allow agency staff to prioritize resources in correlation to the degree of peril that species are facing. The regulated community would also be provided some degree of needed predictability concerning species listings. For these reasons, the Services should consider an even more detailed definition of "foreseeable future" than the one proposed.

In describing the "foreseeable future," the Services would use the best available data and consider the species' life history characteristics, threat-projection timeframes, environmental variability, and other issues.[26] This would align the implementing regulations with the ESA's rules on the basis for listing determinations. The ESA requires that the Services make their determinations based *solely* on the best available scientific and commercial data.

The Services should improve this framework by clarifying what constitutes the "best available scientific and commercial information" or "best available data." These terms are vague and unclear, creating uncertainty and problems in interpreting the text. These terms have been misinterpreted to allow overreliance on the precautionary principle,[27] and on unvetted data possibly leading to unnecessary species protection. States also often collect detailed species data that the Services have neglected to use in the decision process. It is important that the Services always include objective scientific and biological opinions including data from both state and federal sources. Such information or data does not necessarily need to be the most recent data, and should be peer-reviewed and generally accepted in the applicable scientific community.

c. Factors Considered in Delisting Species

The Chamber supports the Services' proposal to clarify the process for delisting a species. The Services propose to clarify that the standard for the listing and delisting of species is the same and to clarify when delisting is appropriate.[28] When none of the five factors leading to species reclassification is present, the Services should not list a species as endangered or threatened.[29] This is consistent with longstanding practice and judicial precedent. In *Friends of Blackwater v. Salazar*, the U.S. Court of Appeals for the D.C. Circuit held that "Section 4(a)(1) of the Act provides the Secretary `shall' consider the five statutory factors when determining whether a species is

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[26] *Id.*

[27] *See, e.g.*, *Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and the Natural Resource Management (As approved by the 67th meeting of the IUCN Council)*, (May 14-16, 2007), *available at* https://cmsdata.iucn.org/downloads/ln250507_ppguidelines.pdf (An element common to the various formulations of the Precautionary Principle is the recognition that lack of certainty regarding the threat of environmental harm should not be used as an excuse for not taking action to avert that threat).

[28] 83 Fed. Reg. at 35,196.

[29] 50 C.F.R. § 424.11(c). Those five factors are: the present or threatened destruction, modification, or curtailment of its habitat or range; over utilization for commercial, recreational, scientific, or educational purposes; disease or predation; the inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting its continued existence.

endangered, and section 4(c) makes clear that a decision to delist 'shall be made in accordance' with the same five factors."[30]

The Services are also proposing to clarify that it is appropriate to delist a species when it is extinct, when it does not meet the definition of an endangered or threatened species, or when the listed entity does not meet the definition of a species.[31]

The Chamber supports making both proposed changes to streamline the listing and delisting process for threatened and endangered species and to provide increased certainty and transparency to the regulated community. It may be unclear what standard the Services are using to make their decisions. Applying the same standard in both processes more readily aligns the regulations with Congressional intent and ensures that the Services will not hold one process to a higher standard.

III. Criteria for Designating Critical Habitat

The Chamber supports the Services' proposed changes of the criteria for designating critical habitat. The Services propose a list of the circumstances in which it may not be prudent to designate critical habitat and propose to remove certain language.[32] The Services also propose to revise the regulations addressing the designation of unoccupied critical habitat by restoring language requiring that the Secretary first evaluate areas occupied by the species when designating critical habitat, and to clarify when the Secretary may determine that unoccupied areas are essential for the conservation of a species.[33] The Chamber agrees with these actions but believes that the Services can further revise the regulatory language in order to better reflect the statute.

a. Not Prudent Determinations

The Chamber supports the Services' proposed revisions regarding non-prudent critical habitat determinations. Specifically, the Services are proposing to revise the list of circumstances in which it may not be prudent to designate critical habitat. The ESA requires that the Secretary designate any critical habitat of the species when determining that a species is endangered or threatened.[34]

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[30] *Friends of Blackwater v. Salazar*, 691 F.3d 428, 432 (D.C. Cir. 2012).

[31] 83 Fed. Reg. at 35,196.

[32] *Id.* at 35,197.

[33] *Id.* at 35,197-98.

[34] 16 U.S.C. § 1533(a)(3)(A).

Under the current regulations, the Services have the authority to find that a designation would not be prudent in two circumstances.[35] The Services are proposing a more expansive list dictating that a designation is not prudent when:

1. There is an increased degree of threat;
2. Habitat impacts are not a threat, or threats to habitat stem solely from causes that section 7(a)(2) of the ESA cannot address;
3. Areas within U.S. jurisdiction provide no more than negligible conservation value for species occurring primarily outside of U.S. jurisdiction;
4. No areas meet the definition of critical habitat; and
5. The best scientific data available leads the Secretary to determine that the designation of critical habitat would not be prudent.[36]

This list is not exhaustive. Notably, the proposal removes the language that it would not be prudent to designate critical habitat when "designation of critical habitat would not be beneficial to the species."[37]

The Chamber supports the proposed revisions. Courts have repeatedly determined that a "would not be beneficial" finding did not comport with what the Services had intended. Several courts have rejected FWS non-prudent determinations as unreasonable, simply because most or all of the proposed areas would not be subject to section 7 consultations under the ESA.[38] The Services have misapplied this language, which has led to unclear enforcement against the regulated community.

Removing this language allows for the Services to make determinations on whether particular circumstances are present, rather than an open-ended judgment as to whether a designation would be "beneficial." This provides for a more direct, clear, and transparent interpretation of the circumstances surrounding non-prudent determinations. A non-exhaustive list like the one proposed would diminish the likelihood that the Services impose a regulatory burden without providing any conservation value to the species.

b. Designating Unoccupied Areas

The Chamber supports the Services' proposed revisions regarding the designation of unoccupied areas as critical habitat, but the Services should further improve the revisions to

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[35] 50 C.F.R. § 424.12(a)(1)

[36] 83 Fed. Reg. at 35,201.

[37] *Id.* at 35,197.

[38] *Id.* (citing *Natural Resources Defense Council v. U.S. Dept. of Interior*, 113 F.3d 1121 (9th Cir. 1997); *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Haw. 1998).

streamline the currently open-ended, unclear designation process. The Services are proposing to restore the requirement that the Secretary first evaluate areas that the species occupy when designating unoccupied areas as critical habitat.[39] The Services originally removed this language in a 2016 final rule, as it may not be the best conservation strategy may lead to less efficient conservation.[40]

The Services also propose to stipulate how the Services determine whether unoccupied areas are essential. Unoccupied areas would only be deemed essential when occupied areas would be inadequate to ensure conservation, or would result in less efficient conservation.[41] Efficient conservation is when the conservation is effective, societal conflicts are minimal, and the costs are commensurate with the benefit to the species.[42]

The Services propose to clarify that the Secretary must determine that an unoccupied area is *essential* to the conservation of a species. The Secretary would only consider an area essential if there is a reasonable likelihood that the area will contribute to the conservation of a species.[43]

These proposed changes are a step in the right direction. The Services, however, should consider revising the regulatory language to more closely mirror the restrictions imposed by the ESA. The ESA requires that the designation of critical habitat be made based on the best available and objectively evaluated scientific data "to the maximum extent prudent and determinable."[44] As such, the Chamber would support revisions 50 C.F.R. section 424.12(b)(2) to require the Secretary to make critical habitat designations "to the maximum extent prudent and determinable using the best available and objectively scientific and commercial information regarding a species' status."

The Services should consider adding an additional section to the implementing regulations that would address coordination and cooperation between the Services and affected states. Critical habitat should be relevant to the habitat needs of the species and the Services should demonstrate that the physical or biological features are actually found in each "specific area" of occupied habitat. For example, in response to NOAA's request for stakeholder comment regarding regulatory reform measures,[45] the State of Alaska suggested language that would revise 50 C.F.R. section 424.12(c) to

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[39] 83 Fed. Reg. at 35,197-98.

[40] Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7,413, 7,439, 7415 (Feb. 11, 2016).

[41] 83 Fed. Reg. at 35,198.

[42] *Id.*

[43] *Id.*

[44] 16 U.S.C. § 1533(a)(3)(A).

[45] *See supra*, note 9.

require that the Secretary consult with affected States prior to completing the designation of any area as critical habitat, and to include the fact of such a consultation in the final rulemaking for the designation.[46]

The Services should also consider revising the term "reasonable likelihood." This term is unclear and leaves the regulation to interpretation. These suggested revisions would undoubtedly lead to the more efficient and effective designation of unoccupied areas as critical habitat.

IV. Other Considerations

The Services should modify the definitions of "geographical area occupied by the species" and "physical or biological features" to align them with the text of the ESA. The implementing regulations define "geographical area occupied by the species" as "an area that may generally be delineated around species' occurrences, as determined by the Secretary (i.e., range)," which may include those areas used throughout all or part of the species' life cycle, even if not on a regular basis.[47]

The implementing regulations also define "physical or biological features" as "the features that support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features."[48] These may be a single habitat characteristic, or a more complex combination of characteristics.[49] These features may also include characteristics that support ephemeral or dynamic habitat conditions, and may be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.[50]

The Act constrains critical habitat designations to "specific areas within the geographical area occupied by the species…on which are found those physical and biological features…essential to the conservation of the species."[51] Given those constraints, the implementing regulations should not go beyond what the statute requires.

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[46] State of Alaska Comments on NOAA Streamlining Regulatory Processes and Reducing Regulatory Burden (Aug. 21, 2017), *available at* https://www.regulations.gov/document?D=NOAA-NMFS-2017-0067-0086.

[47] 50 C.F.R. § 424.02

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] 16 U.S.C. § 1532(5)(a)(i).

As such, the Chamber supports revisions to the regulatory definitions of "geographical area occupied by the species" and "physical or biological features."[52] In regards to "geographical area occupied by the species," the regulatory definition should only account for an area that a species regularly or consistently inhabits to the maximum extent prudent and determinable by the Secretary, including such portions of the range used throughout all or part of the species' life cycle.

As for "physical or biological features," the Services should consider removing reference to habitat characteristics that support ephemeral or dynamic habitat conditions, or, in the alternative, return to the pre-2016 definition that relies on "principal biological or physical constituent elements within the defined area that are essential to the conservation of the species."

V. Conclusion

The Chamber appreciates the Services' consideration of these comments and urges them to act in an expeditious and thorough manner**.** If you have questions regarding these comments, please contact me at (202) 463-5558 or at kharbert@uschamber.com.

Sincerely,

Karen A. Harbert

[52] *See supra*, note 45.