Conservation Northwest
Keeping the Northwest Wild

Comments on ESA Regulatory Changes – Part 1

ID: FWS-HQ-ES-2018-0006-0001

Conservation Northwest respectfully submits the following comments on proposed rule changes.

Section 424.11

Economic Impacts: We believe changing the language as proposed will be unnecessarily confusing to the listing process. The law (Pub. L 97-304, 96 Stat. 1411) clearly intends for listing decisions to be made without reference to economic data. The rationale used in the proposal that this will still be the case even if the Services decide to present economic data is illogical and could either intentionally or unintentionally taint the decision-making process, in addition to adding more burdens on staff.

We recommend that this change not be made. Economic analyses can be undertaken after the listing decisions are made in order to figure out how to protect a species in an economically efficient manner.

Factors Considered in Delisting Species: The proposed changes in 424.11 (e)(3) on de-listing that are no longer considered a species, sub-species or DPS could open the door to inconsistent decision-making based on policy preferences of particular Department of Interior administrations. We are concerned that this could lead to less than scientifically-based decisions.

Designation of Critical Habitat: The language describing situations in which designation of critical habitat would not be prudent under Section 424.12(a)(1)(ii) appear to unnecessarily limit the ability of the Services to secure protection through the consultation process. The example used is of designating habitat for species threatened by sea-level rise, melting glaciers, or reduced snowpack. We disagree that these are not habitat related as many animals directly depend on certain ocean conditions, glacially influenced areas, or snow pack conditions. In addition, sea-level rise can affect habitats that would make them more vulnerable to other sorts of adverse modifications. The same logic holds true for melting glaciers or loss of snowpack. Glaciers and snowpack themselves are habitat components for species and federal actions that affect these fall squarely within the purpose of designating critical habitat for the Section 7 consultation process. For example, the wolverine depends on snow pack for part of its life history needs.

We therefore request that this interpretative language which would guide implementation of Section 424.12(a)(1)(ii) be stricken from the rule language.

Proposed changes to Section 424.12(a)(1)(iii) regarding unoccupied habitat appear to have the potential to restrict flexibility by adding more interpretations of imprudence, for example, in designating unoccupied habitat on private lands. While we understand that the consultation process which critical habitat triggers only comes into play if there is an authorized federal action, such a nexus does occur in enough instances that private lands should not be discounted.

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Private lands that do not have owners willing to restore habitat at the time of designation should not be excluded *a priori* because ownership can change. In addition, habitat banking can be used to provide private owners with value for restoring habitat. A critical habitat designation can be a benefit and not a detriment to a private landowner, and can signal to current or future landowners that their property is valuable for conservation.

Thank you for considering our comments.

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Regulation for Prohibitions to Threatened Wildlife and Plants

Changes to Blanket 4(d) rule: We find this proposal very problematic. Having blanket protections for threatened species allows for immediate changes to be made after listing to decrease likelihood that a species will further decline to an Endangered status. The use of blanket protections also allows for protections when not at all stressors to a species can be identified. In a world of increasing interacting stressors and complexity, and intensity of pressures on the natural world, this change moves us in the wrong direction. Allowing for tailoring of take prohibitions through a specific 4(d) rule later is a more preferable and conservative approach.

Building a 4(d) rule from scratch without the backstop of blanket protections will take considerable time and effort. Congress has chronically underfunded the U.S. Fish and Wildlife Service to the detriment of proper implementation of the Act. This change would likely worsen the workload burden on staff while decreasing the ability of the listing process to deliver needed protections to threatened species.

Finally, the goal of aligning the regulatory approaches of USFWS and the National Marine Fisheries Service seems irrelevant given they deal with very different species. In addition, the number of listings that USFWS has to process are far larger than what NMFS typically faces. The proposed change would, as noted above, cause burdensome workloads for staff. If alignment is desirable, we recommend that the NMFS adopt the practices of USFWS on the use of the blanket 4(d) rule until tailored rules can be developed.

We therefore request that this rule change not be pursued.

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FWS-HQ-ES-2018-0009-0001

Conservation Northwest respectfully submits the following comments on proposed rule changes.

Regulations on Interagency Cooperation

General: We are concerned with the proposition described in the preamble material (FR p. 35179, bottom left and top middle columns) that the Services are considering a comprehensive revision to Section 402 and may make changes to rules based on comments received pertaining to any part of that section and your experience administering the Act. Such an approach could conceivably result in drastic changes that the public did not have a chance to see or comment on prior to those changes being made. We strongly oppose such an approach to rule-making and think it is in contradiction to the intent of statutes governing public review. You would likely create more delay and work by inviting legal challenges and that is not an efficient use of government resources. Any proposed changes to rules need to be clearly specified in a Federal Register Notice with proper public comment periods prior to changes being made.

Definition changes in Section 402.02: We are concerned about the change in definition of "effects of the action". The phrase "caused by" and "reasonably certain to occur" both appear to limit the scope of actions that the Services could consult on, thereby creating the possibility that important negative effects of federal agency actions on listed species would be missed. The interactions of natural events and human actions on the environment are complex though potentially knowable with proper analysis. Direct causation may not be the "effect" that harms a species, but an effect could be the result of an action that interacts with another phenomenon that may be human or natural in origin. For example, harvesting trees adjacent to a marbled murrelet nest stand: The actual harvesting of trees is not the direct cause of nest predation, but based on research, we know it can create conditions that increase forage for nest predators and allows increased access to the nest. The predators are the direct cause of an impact to nest failure, but nest predation is an indirect effect of harvesting trees adjacent to a nest stand. It appears to us that your proposed change in definition could make it harder to identify effects that are one or a few steps removed in the causal chain of events that lead to a negative impact.

The other part of the change, "reasonably certain to occur" appears to raise the threshold from current analysis practices that we are aware of. Again, in a complex world, reasonable certainty is not always possible. There may be events which have a lower likelihood to occur than "reasonably" certain, but if they were to occur, could have very negative consequences to a species. Low likelihood events can still happen. The assessment of likelihood can be due to insufficient understanding at the time of an analysis, to the current conditions in a dynamic system that could change, or could just have a low frequency of occurrence but still happen. We think the Services should have the ability to consult under these scenarios and that limiting their ability to do so reduces the protections to species intended by Section 7 of the ESA.

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Based on the above concerns, we recommend that the phrase "or result from" be added to the definition after "caused by" to avoid confusion and restricted analyses. This would be consistent with your Section 7 consultation Handbook. In addition, we recommend deleting the phrase "and it is reasonably certain to occur."

Section 402.03 – Applicability:

In response to the request for comment on the proposal that would allow action agencies to decide for themselves whether an action would not anticipate take of a species, not negatively affect a species or have adverse modification of critical habitat and thus not require consultation: we find this proposal alarming in that it reverses the intended oversight responsibility from the Services to action agencies, who have a built-in incentive to underestimate impacts. We strongly disagree with this proposal and recommend that it not be carried into a rule change.

Other changes proposed on page 35185 that waive requirements to consult on actions whose effects are manifested through global processes appears to arbitrarily limit the ability of the Services to contribute to reducing the impacts of climate change on listed species. Such a limitation, especially combined with other proposed changes limiting the ability of the Services to address effects of climate change in the listing process or designation of critical habitat, is wholly in the wrong direction. The enormity of the challenges posed by climate change to survival of many species would seem to us to require more consultation, not less, and an "all hands on deck" approach rather than the retreat that these proposed changes suggest. We recommend not implementing this proposed waiver.

We have concerns about language on page 35185, top of right column, eliminating the requirement to consult on impacts that are "not capable of being measured or detected in a manner that permits meaningful evaluation." Our understanding of the informal consultation process is that this change may reduce the number of informal consultations and that such consultations can achieve significant accumulated benefits for listed species. We would ask that you consult with your field offices on our interpretation that this change could potentially reduce needed informal consultations.

The FR Notice also asks whether the scope of consultations should be limited to the activities, areas, and effects within the jurisdictions of regulatory agencies involved in the consultation (P. 35185, middle right column). We do not think such a limitation should be placed on the scope. Actions carried out by an agency can have effects beyond their jurisdictional boundaries. For instance, an activity permitted by the Army Corps of Engineers can affect species and habitats on other properties over which the Corps has no jurisdiction because wetlands are connected through hydrological processed to other parts of watersheds. This seems like another limitation that would reduce the effectiveness of the consultation requirements of the Act. We think a credible argument could be made that this change would prevent the Services from carrying out their duty to prevent jeopardy of a species or adverse modification of critical habitat.

Section 402.16: Duty to Re-initiate Consultation

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We are concerned with the proposed changes that would eliminate a requirement for re-initiation of consultation for programmatic land plans under FLPMA or NFMA when a new species is listed or new critical habitat is designated. First, given that plans under these laws take a long time to be updated, a new listing or critical habitat designation could indeed cause the actions authorized under such plans to be in violation of Section 7(a)(2) of the Act. We think that this change could lead to large inconsistencies of agency actions with needs of newly listed species and therefore potential harm to these species. We recommend that instead the regulations are clarified to read that land management plans under the two federal planning statutes are indeed subject to re-initiation of consultations when new species are listed or new critical habitat is designated.

Thank you for considering our comments.

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