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Public Comments Processing
Attn: FWS-HQ-ES-2018-0006
U.S. Fish and Wildlife Service
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Falls Church, VA 22041-3803

National Marine Fisheries Service
Office of Protected Resources
1315 East-West Highway
Silver Spring, MD 20910

Submitted electronically at: regulations.gov

Re: Proposed Rule Revising ESA Section 4 Implementing Regulations re: Listing and Critical Habitat; FWS-HQ-ES-2018-0006

Dear Secretaries Zinke and Ross:

On behalf of Trout Unlimited (TU) and our more than 300,000 members and supporters across the country, we offer the following comments on Proposed Rule Revising Endangered Species Act (ESA or Act) Section 4 Implementing Regulations re: Listing and Critical Habitat (*FWS-HQ-ES-2018-0006*). TU's mission is to conserve, protect and restore North America's coldwater fisheries and their watersheds. The ESA is and has been a critical tool in protecting and supporting the recovery of numerous populations of fish and wildlife, including populations of trout and salmon that are so important to our members.

The ESA requires that the best available scientific information guide species' listing and recovery actions. This helps ensure that decisions are transparent, objective and consistent with the intent of ESA. The proposed rule would modify the factors for listing, delisting or reclassifying a species and the criteria for designating critical habitat in a manner that is inconsistent with the statutory language of ESA. The proposed rule also seeks to make additional modifications that are not described with sufficient specificity to constitute appropriate notice to the public of the proposed amendments. Accordingly, the proposed rule constitutes an invalid rulemaking and should be withdrawn. TU recommends that the rules be re-published to comply with the statutory language of ESA and ensure that all components are specifically described. Additionally, TU recommends that the comments below inform the rulemaking effort.

Background

Generally, Section 4 of ESA prescribes standards for listing, delisting and reclassifying species as threatened or endangered and for designating critical habitat for listed species.

A mission to conserve, protect, & restore North America's coldwater fisheries and their watersheds.

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The Act defines an endangered species as any species that is “in danger of extinction throughout all or a significant portion of its range” and a threatened species as any species “that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. 1532(6); (20). The Act requires the United States Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) (collectively “Services”) to determine whether species meet either of these definitions. 16 U.S.C. 1533(a); 1532(15). Section 4 of the Act and its implementing regulations in Title 50 of the Code of Federal Regulations (CFR) at 50 CFR part 424 set forth the procedures for adding, removing, or reclassifying species to the Federal Lists of Endangered and Threatened Wildlife and Plants (lists). The lists are in 50 CFR 17.11(h) (wildlife) and 17.12(h) (plants). Section 4(a)(1) of the Act sets forth the factors that we evaluate when we issue rules for species to list (adding a species to one of the lists), delist (removing a species from one of the lists), and reclassify (changing a species' classification or its status).

One of the tools provided by the Act to conserve species is the designation of critical habitat. The purpose of critical habitat is to identify the areas that are essential to the conservation of the species. The Act generally requires that the Services, to the maximum extent prudent and determinable, designate critical habitat when determining that a species is either an endangered species or a threatened species. 16 U.S.C. 1533(a)(3)(A).

Comments

Scope of the Proposed Rule (Modifications referenced, but not proposed).

In the preamble to the proposed rule, the Services announce that they are “comprehensively reconsidering the processes and interpretations of statutory language set out in part 424” and that the public should consider the rulemaking to apply to all the regulations in part 424. This broad statement is legally insufficient to constitute valid public notice of any change that is not specifically described in the proposed rule. Accordingly, if the Services elect to pursue any revisions not expressly proposed in this rule, it is appropriate for the Services to initiate a new rulemaking process to identify proposed language and solicit feedback directly on those changes.

Listing and De-Listing.

Listing Criteria: ESA requires that listing decisions be made “solely on the basis of the best scientific and commercial data available.” See 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(b). The use of the word “solely” effectively limits consideration of other factors in the listing process. This is appropriate as a species listing status should properly reflect their biological status irrespective of economics, politics or any other factor. However, the proposal seeks to elevate the consideration of other factors into the listing discussion by removing the regulatory phrase “without reference to possible economic or other impacts.” In effect, this proposal will require the Services to develop an analysis of the anticipated economic impact of any listing decision. The Services suggest that this

change will allow economic impacts to be identified but not considered in the listing decision. It is unclear how this information will be siloed once developed and if that is the case, significant resources will be expended to compile information that should not (and legally cannot) be used to inform the regulatory decision. This is costly, confusing, burdensome to implement and contrary to the intent of ESA.

Delisting criteria: The proposal requires that the standard used for delisting a species mirror the standard used for listing a species. To effectuate this change, the proposal eliminates the requirement that data “substantiate” that delisting is warranted and eliminates “recovery” as a ground for delisting. In effect, these changes will lower the bar for delisting a species. Given the precarious state of listed species, it is advisable that decisions to remove ESA protections be made with the utmost caution. Accordingly, TU recommends the use of the existing regulatory language.

Listing Definitions - Foreseeable Future: The proposal includes a definition of “foreseeable future” to help determine when the listing of a species as “threatened” is warranted. There is currently no definition for this term in statute or regulation, however as noted in the preamble, detailed guidance on the term was provided in a 2009 legal opinion from the Department of Interior, Office of the Solicitor (M-37021, January 16, 2009, “Opinion”). The Services note that the conclusions found in the Opinion are “well-founded” yet do not fully incorporate them into their proposed definition. The effect is a more restrictive definition that is at odds with the intent of ESA. The most problematic deviation from the Opinion is the injection of the word “probable” into the “foreseeable future” definition. “Probable” is undefined in the proposal yet suggests more certainty of outcome than the Opinion supported. The Opinion noted that speculative information should not be relied upon but sanctioned the use of all information “sufficient to provide a reasonable degree of confidence in the prediction, in light of the conservation purposes of the Act.” (Opinion, p. 13). TU suggests that the language of the Opinion be utilized in lieu of the proposed language.

Critical Habitat Designations.

Critical habitat areas are essential to the conservation and recovery of listed species. Despite this, the proposal would limit the designation of critical habitat, particularly unoccupied critical habitat. In doing so, the Services discount the basic fact that the single largest driver of species’ extinction is habitat loss. TU provides comments on the specific regulatory changes below.

Unoccupied Habitat: The proposed rule limits the Services’ authority to designate unoccupied critical habitat, which is crucial to supporting species recovery. Specifically, the proposed rule would require the Services to first evaluate areas currently occupied by listed species before considering unoccupied areas. This proposed approach is a reversal of regulations established in 2016 that required occupied and unoccupied areas to be considered simultaneously. 81 Fed. Reg. 7439, (February 11, 2016).

The 2016 regulation recognized that a “rigid step-wise approach,” as is proposed by the Services here, is not the best conservation strategy for the species. Rather, in many cases, it may make little sense to exhaust all occupied areas before designating unoccupied ones. For instance, species may need to shift or expand their range to account for climate change, drought conditions, projected population growth etc. Further, unoccupied habitat may be in much better condition than currently occupied habitat; de-emphasizing the value of unoccupied habitat and focusing only on occupied habitat may be much costlier and potentially less effective. The 2016 Rule recognized that it may be most effective and efficient to designate a combination of occupied and unoccupied areas, or an area that is predominately unoccupied as critical habitat.

The Services appear to recognize these points, but express concern about perceptions that the 2016 regulation “intended to designate as critical habitat expansive areas of unoccupied habitat.” That perception appears to factor strongly in the Services’ decision to reverse the 2016 regulation. Unfortunately, the outcome is a proposal that does not constitute the best conservation strategy for the species. Accordingly, TU does not support the proposal.

Expanded Not Prudent Determinations: ESA requires the designation of critical habitat for listed species “to the maximum extent prudent and determinable.” The proposal expands the list of circumstances where the secretary may determine that critical habitat designation would not be prudent, including instances where:

- Threats to the species’ habitat stem solely from causes that cannot be addressed through management actions resulting from Section 7 consultations (i.e., threats stemming from melting glaciers, sea level rise or reduced snowpack);
- No areas meet the definition of critical habitat; or
- After analyzing the best scientific data available, the Secretary otherwise determines that designation would not be prudent.

As noted above, the ESA requires that critical habitat be designated to the “maximum” extent prudent. The use of the term “maximum” suggests that the default is critical habitat designation absent well-justified determination that it would not be prudent. This is consistent with the goal of ESA to protect habitat that is essential to the conservation and recovery of listed species. The current rule language properly reflects this weighted analysis and makes clear that critical habitat “shall” be designated unless it “would not be beneficial to the species.” 50 CFR section 424.12(a)(1)(ii). The addition of whole categories of exemptions included in the proposed rule, however, does not produce the narrowly tailored style of analysis that the statute seems to warrant. For instance, the proposal to categorically exempt all 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. The exemptions are over-broad and may have the effect of excluding more

habitat than is necessary from a critical habitat designation. This is detrimental to achieving the conservation and recovery of listed species and certainly is not consistent with statutory direction that the “maximum” extent of critical habitat be designated.

Summary

In summary, TU is concerned that the proposed rule undermines the intent of ESA and lacks important detail necessary to constitute valid public notice of all the proposed changes. We request that the Services withdraw the proposed rule and republish a revised rule that is consistent with the statutory language of ESA. Additionally, we request that these comments inform that effort. Thank you for considering our comments on the proposed rule.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kate Miller".

Kate Miller
Director of Government Affairs
Trout Unlimited