



August 21, 2023

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Dockets:

FWS-HQ-ES-2021-0107 (ESA § 4)¹

FWS-HQ-ES-2023-0018 (ESA § 4(d))²

FWS-HQ-ES-2021-0104 (ESA § 7)³

Re: Comments Regarding Proposed Changes to Endangered Species Act §§ 4 and 7
Regulations: 88 Fed. Reg. 40,742; 88 Fed. Reg. 40,753; 88 Fed. Reg. 40,764 (June 22, 2023)

Dear Secretary Haaland and Secretary Raimondo:

We are writing to provide comments on three proposed regulations under the Endangered Species Act (“ESA”) by the Fish and Wildlife Service and the National Marine Fisheries Service (“The Services”). Proposed rules to address harmful regulatory changes made in 2019 that undermined ESA implementation are long overdue, and we welcome this process to finally make needed revisions. The proposed rules would reverse some of the damage done to ESA implementation by the 2019 rules, and we urge you to quickly finalize those important changes. Disappointingly, the proposed rules fail to fully restore the ESA, and we urge the Services to make additional needed changes that have been detailed in public comments dating back to the original 2019 regulatory process, including those detailed below.

Over the past five decades, the ESA has been remarkably successful: 99% of species protected under the Act have not gone extinct. The ESA has also protected millions of acres of habitat: forests, beaches, rivers, and wetlands that species rely on to survive and recover. At the same time, we are facing a growing biodiversity crisis. Human activity has put [over a third](#) of the plants and animals in the U.S. at risk of extinction and biodiversity loss is [occurring at an unprecedented pace](#), underscoring why restoration of the ESA’s full potential is more important than ever. The biodiversity crisis means fewer pollinators for agriculture, depleted fisheries, and disappearing places like old-growth forests and wetlands that provide a long-term, low-cost source of clean air, water and carbon storage.

¹ *Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat*, 88 Fed. Reg. 40,764 (June 22, 2023).

² *Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants*, 88 Fed. Reg. 40,742 (June 22, 2023).

³ *Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation*, 88 Fed. Reg. 40,753 (June 22, 2023).

The Endangered Species Act is the best tool we have to fight the global extinction crisis and the key to protecting at-risk species in the U.S. With these proposed regulations, the Biden administration has taken a few steps toward restoring the purpose and power of the Endangered Species Act, including the return of default protections for threatened species within Fish and Wildlife Service jurisdiction under section 4(d) of the ESA. This is a common sense and efficient policy that has worked for decades and one that we urge the Fish and Wildlife Service to finalize quickly.

Disappointingly, the draft regulations fall short of restoring ESA implementation to its full strength. The Services must take this opportunity to ensure the final rules bring the ESA regulations back to where they were pre-2019, which means correcting a number of glaring failures in these proposed rules. ***Detailed comments submitted via the Federal Register notice will provide a full description of all needed changes to the draft regulations.*** Below are several key examples.

The Services must go back to the drawing board and fully restore section 7 of the ESA, which governs interagency consultation — how federal government agencies ensure that federal actions do not cause imperiled species to go extinct or destroy protected habitat. For 50 years it has been established that the federal government should not engage in activities that could jeopardize species' survival or destroy habitat they need to survive and recover.

Specifically, we ask that you rescind the addition of “as a whole” to section 402.02. This language created an enormous loophole, inconsistent with the intent of the ESA itself. The nefarious “as a whole” language is a free pass to destroy critical habitat as long as the total destruction of a species’ entire critical habitat is avoided. This is especially damaging for wide-ranging and migratory species, from piping plover to marbled murrelet, from salmon to lynx. This language also ignores the cumulative impact of various causes of habitat destruction over time. And it goes against the science-based establishment of critical habitat to ensure both the species survival *and* recovery, instead treating some areas of critical habitat as expendable.

Additional section 7 definition changes from the 2019 rules that need to be reversed include one that creates unnecessary confusion when examining an agency action that is ongoing, or a continuation of past activities (“environmental baseline” section 402.02).

Regarding the proposed regulations for Section 4 of the ESA, the Services also must reverse damaging changes made in section 424.11(e) that allow plants and animals to be prematurely delisted. It is essential that a species’ recovery meets all science-based standards before removing the backstop of ESA protections that have kept so many species alive.

Many of the changes to ESA regulations made in 2019 weakened protections for threatened and endangered species at a time when we must be doing everything in our power to fight the biodiversity crisis and recover species from the brink of extinction. Despite the broad

support for restoring and strengthening the rules that implement the Act, the Services failed to do everything within their authority to restore the ESA rules and protect endangered wildlife. These examples demonstrate just some of the additional changes that are needed before these proposed rules are finalized. Now is the time to get this right; we have no more time to waste.

Signed,

530 Rutland County
Alaska Wilderness League
American Bird Conservancy
Amigos for Monarchs
Animal Welfare Institute
Apalachicola Riverkeeper
Bat Conservation International
Bellingham Unitarian Fellowship
Buffalo Field Campaign
California Native Plant Society
Cascadia Wildlands
Center for Biological Diversity
Cetacean Society International
Colorado Wolf and Wildlife Center
Colorado Wolf Coalition
Conservation Council for Hawai'i
Conservation Law Foundation
Creation Justice Ministries
Earthjustice
Earthworks

Endangered Habitats League
Endangered Species Coalition
Environment America
Environmental Action
Environmental Center of San Diego
Environmental Confederation of Southwest Florida (ECOSWF)
Environmental Defense Center
Environmental Protection Information Center - EPIC
Faith action network
Forest Unlimited
FOUR PAWS USA
Friends of Ballona Wetlands
Friends of Blackwater, Inc.
Friends of the Earth U.S.
Friends of the Inyo
Friends of the San Juans
Friends of the Sonoran Desert
Great Lakes Wildlife Alliance
Great Old Broads for Wilderness Tucson Region

Greenpeace USA
Healthy Ocean Coalition
Heartwood
Howling For Wolves
Hui Ho'omalulu i ka Aina
Humane Action Pittsburgh
Indigenous Allies
Inland Ocean Coalition
International Marine Mammal Project of Earth Island Institute
International Primate Protection League
Justice Washington
Kalmiopsis Audubon Society
Kentucky Heartwood
Klamath Forest Alliance
Kulshan Cares
Large Carnivore Fund
League of Conservation Voters
Los Angeles Audubon Society
Los Padres ForestWatch
Madrean Archipelago Wildlife Center
Maine Audubon
Marine Conservation Institute
Marine Mammal Alliance Nantucket

MultiFaith Network for Climate Justice
National Parks Conservation Association
National Wolfwatcher Coalition
New Mexico Wild
North Central Washington Audubon Society
Northcoast Environmental Center
Northeast Oregon Ecosystems
Northern California Council, Fly Fishers International
Natural Resources Defense Council
NY4Whales
NYC Plover Project
Ocean Defense Initiative
Oceana
Oceanic Preservation Society
Oregon Natural Desert Association
Oregon Wild
Predator Defense
Project Coyote
Prutehi Litekyan Save Ritidian
Resource Renewal Institute
RESTORE: The North Woods
Rocky Mountain Wild
Safe Alternatives for our Forest Environment (SAFE)

Sage Steppe Wild
San Luis Valley Ecosystem Council
Save Animals Facing Extinction
Save Our Sky Blue Waters
Save the Manatee Club
Seattle Aquarium
Shedd Aquarium
Sierra Club
Sierra Foothills Audubon Society
Sierra Forest Legacy
Silvix Resources
Snowlands Network
Sonoma State University
Southern Environmental Law Center
St. Johns Riverkeeper
Standing Trees
Supporting and Promoting Ethics for the Animal Kingdom Inc.
The #RelistWolves Campaign
The 06 Legacy
The Conservation Cooperative

The Fire Restoration Group
The Humane Society of the United States
The Ocean Project
The Rewilding Institute
Trap Free Montana
Trap Free Montana Public Lands
Turtle Haven Sanctuary
Upper Gila Watershed Alliance
Justice Washington
Voices of Wildlife in NH
Western Nebraska Resources Council
Western Watersheds Project
Whidbey Life Media
WildEarth Guardians
Wolf Conservation Center
Wolf Hollow
Wyoming Wildlife Advocates
Yaak Valley Forest Council
Zero Hour