**Proposed Changes to Language & Policy In The Endangered Species Act**

*\*\*Please note: black text is truncated text for each proposal. Red text is initial comments.*

*\*\*Message from author Aaron Haines PA TWS CAC: I have greatly truncated the text for each proposal to focus on the sections I responded to.  I welcome others to provide edits and add-on to this document beyond what I have focused on.  Please send your edits/comments directly to me at* [Aaron.Haines@millersville.edu](mailto:Aaron.Haines@millersville.edu)

*Once I receive feedback from others in PA, I will update the document and send it forward to The Wildlife Society’s Headquarters.*

1. **Revision of regulatory definitions in Section 7 for interagency cooperation.**

<https://www.federalregister.gov/documents/2018/07/25/2018-15812/endangered-and-threatened-wildlife-and-plants-revision-of-regulations-for-interagency-cooperation>

Services seek comment regarding revising § 402.03 to preclude the need to consult when the Federal agency does not anticipate take and the proposed action will: (1) Not affect listed species or critical habitat; or (2) have effects that are manifested through global processes and (i) cannot be reliably predicted or measured at the scale of a listed species' current range, or (ii) would result at most in an extremely small and insignificant impact on a listed species or critical habitat, or (iii) are such that the potential risk of harm to a listed species or critical habitat is remote, or (3) result in effects to listed species or critical habitat that are either wholly beneficial or are not capable of being measured or detected in a manner that permits meaningful evaluation.

The service needs guidance on how these preclusions will be determined. I believe consultation would be needed to determine the details for #2 (ii) and (iii) above.

1. **Revision of regulations for listing species and designating critical habitat.**

<https://www.federalregister.gov/documents/2018/07/25/2018-15810/endangered-and-threatened-wildlife-and-plants-revision-of-the-regulations-for-listing-species-and>

Propose to remove the phrase, “without reference to possible economic or other impacts of such determination”, from paragraph (b) to more closely align with the statutory language. Section 4(b)(1)(A) of the Act requires the Secretary to make determinations based “solely on the basis of the best scientific and commercial data available after conducting a review of the status of the species”. The word “solely” was added in the 1982 amendments to the Act (Pub. L. 97-304, 96 Stat. 1411) 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.” In removing the phrase, “without reference to possible economic or other impacts of such determination”, the Services are not suggesting that all listing determinations will include a presentation of economic or other impacts. Rather, there may be circumstances where such impacts are referenced while ensuring that biological considerations remain the sole basis for listing determinations.

If the goal is to ensure that biological considerations remain the sole basis for listing determinations, why is this not stated in Sec 4 (b) Basis for Determinations? Currently, there is no language in the act itself that states that considerations are made based solely on biological considerations. Because of this, it would be best to keep the phrase ‘without reference to possible economic or other impacts of such determination’. This statement helps ensure that scientific data (mainly biological) is the sole basis for listing determinations. Without it, ‘possible economic impacts’, under ‘commercial data’, will carry just as much weight as ‘best scientific data’. This will take away assurances that listing determinations will be based solely on biological considerations. In addition, keeping the above phrase will allow the Act to continue to follow the primary intent of Congress when they adopted the ESA, which was to prevent species from being rendered extinct by ‘economic growth and development untampered by adequate concern’.

Proposing to retain text at the beginning of the new section 424.11(e) that states; “The Secretary will delist a species if the Secretary finds that, after conducting a status review based on the best scientific and commercial data available:” we are proposing to replace the current section 424.11(d)(1) with a new section 424.11(e)(1) that simply states the first reason for delisting a species as, “The species is extinct.” we are replacing current section 424.11(d)(2), which referred to “recovery,” with language in new section 424.11(e)(2) that aligns with the statutory definitions of an endangered species or a threatened species. Although we are proposing to remove the word “recovery” from the current section 424.11(d)(2), we intend the proposed language to continue to refer, among other things, to species that have been recovered, because species that have been recovered no longer meet the definition of either an endangered species or a threatened species. we are proposing to add a new provision, section 424.11(e)(3), clarifying that listed entities will be delisted if they do not meet the definition of “species” as set forth in the Act. This could occur if new information, or new analysis of existing information, leads the Secretary to determine that a currently listed entity is neither a taxonomic species or subspecies, nor a “distinct population segment.”

In the new section, 424.11(e)(2), it is stated that the language will continue to refer to species that have been recovered as no longer meeting the definition of an endangered or threatened species. In order to meet this definition, section 424.11(e)(2) should maintain the current language of section 424.1(d)(2), that a recovered species is one ‘in which it has returned to a point where protection under the Act is no longer required and that this delisting is warranted only if the best scientific and commercial data indicate that it is no longer endangered or threatened.’ This language protects against inopportune delisting which risks species extinction or an expensive re-listing process.

In our 2016 revision of section 424.12(a)(1)(ii) ([81 FR 7414](https://www.federalregister.gov/citation/81-FR-7414), February 11, 2016), we clarified that, in determining whether designation may not be prudent, the Services could consider whether the present or threatened destruction, modification, or curtailment of a species' habitat or range (*i.e.,* considerations under section 4(a)(1)(A) of the Act (Factor A)) is not a threat to the species. In the 2016 revision, we provided an example of a designation that would not be prudent due to the lack of habitat-based threats: A species is threatened primarily by disease, but the habitat upon which it relies remains intact without threat and would support conservation of the species if not for the threat of disease. Since then, we have encountered situations in which threats to the species' habitat stem solely from causes that cannot be addressed by management actions that may be identified through consultation under section 7(a)(2) of the Act. In those situations, a designation could create a regulatory burden without providing any conservation value to the species concerned. Examples would include species experiencing threats stemming from melting glaciers, sea level rise, or reduced snowpack but no other habitat-based threats. In such cases, a critical habitat designation and any resulting section 7(a)(2) consultation, or conservation effort identified through such consultation, could not prevent glaciers from melting, sea levels from rising, or increase the snowpack. Thus, we propose in section 424.12(a)(1)(ii) that designation of critical habitat in these cases may not be prudent because it would not serve its intended function to conserve the species.

This section above speaks directly on how to avoid the issue of climate change, which by the definition of ‘best available science’, is negatively impacting listed species and non-listed species overall. Many models are showing where future ranges of species will occur. How are the current amendments to the Act addressing where currently unoccupied, but potential future occupied sites will occur? Many habitat restoration efforts and establishment of corridors are planned for currently unoccupied sites. How will these efforts be addressed in the current amendments? Habitat is the number one threat causing species listings, how do the current amendments to the ESA address this threat more effectively? The current amendments do not outline a way to expand the designation of critical habitat for effective species recovery. Currently, critical habitat has not been designated for a majority of listed species. Also, current funding for the ESA is greatly inefficient to complete species recovery tasks. This hinders the ability of the ESA to recover species for delisting. It needs to be explained how these amendments can help expand voluntary cooperative conservation agreements and expand support for recovery efforts, rather than limiting the establishment of critical habitat.

1. **Revision of regulations for prohibitions to threatened wildlife and plants.**

<https://www.federalregister.gov/documents/2018/07/25/2018-15811/endangered-and-threatened-wildlife-and-plants-revision-of-the-regulations-for-prohibitions-to>

This change would make our regulatory approach for threatened species parallel with the approach that the National Marine Fisheries Service (NMFS) has taken since Congress added section 4(d) to the Act, as discussed below. The prohibitions set forth in ESA Section 9 expressly apply only to species listed as endangered under the Act, as opposed to threatened. [16 U.S.C. 1538](https://api.fdsys.gov/link?collection=uscode&title=16&year=mostrecent&section=1538&type=usc&link-type=html)(a). ESA Section 4(d), however, provides that the Secretaries may by regulation extend some or all of the Section 9 prohibitions to any species listed as threatened. Our existing regulations in §§ 17.31 and 17.71, extending most of the prohibitions for endangered species to threatened species unless altered by a specific regulation, is one reasonable approach to exercising the discretion granted to the Service. NMFS did not adopt regulations that extended most of the prohibitions for endangered species to threatened species as we did. Rather, for each species that they list as threatened, NMFS promulgates the appropriate regulations to put in place prohibitions, protections, or restrictions tailored specifically to that species. In more than 40 years of implementing the Act, NMFS has successfully implemented the provisions of the Act using this approach. Nothing in these proposed revised regulations is intended to require (now or at such time as these regulations may become final) that any previous listing, delisting, or reclassification determinations or species-specific protective regulations be reevaluated on the basis of any final regulations. The existing protections for currently-listed threatened species are within the discretion expressly delegated to the Secretary by Congress.

Approximately 4 in 5 Americans support the ESA while only 1 in 10 oppose. The American public wants to avoid species extinction. Species avoid extinction and improve biologically while being protected by the ESA. However, recovery is still low. There are a number of reasons for this. The listing petitions for taxa greatly exceeds the current number of listed species. Therefore, thousands of species that warrant listing are unlisted. By the time species are listed, their population size and number of populations are greatly reduced to the point where Section 9 protections are warranted for all listed species. For example, more species have gone extinct waiting to be listed compared to the number that have gone extinct once listed. The ESA is a last resort for many species. Late listing hinders recovery potential for species once it is finally listed. Even for species that are listed, the severe lack of financial support for the ESA forestalls recovery efforts. In short, the majority of species listed as threatened require major protections.

Based on the scenario outlined above, parallel regulatory authority for threatened species should follow the model of the USFWS, not NMFS. The NMFS has jurisdiction over a fraction of the total number of listed species, and these are marine species. Very few listed marine species occur on private property. The USFWS has jurisdiction over the vast majority of listed species with ≈ 80% occurring on private land. Section 9 protections for threatened species are required to protect against species take, this is especially important in regards to private property. Also, once a species is listed, section 10 of the ESA allows for individuals to apply for take permits to circumvent section 9 protections. It would be more prudent to expand flexibility in the section 10 permit process in regards to threatened species compared to endangered species. This would be a better option for species recovery compared to simply removing protections under Section 9 for threatened species.

Many have argued that by taking Section 9 protections away from newly listed threatened species, that this will incentivize private individuals to work with the government to prevent threatened species from becoming endangered, especially since 80% of listed species occur on private lands. However, we should take this philosophy one step back. The best way to use the ESA, is to prevent species from requiring its protection. This can best be done by labeling species as Candidate Species for Listing and developing consultations and conservation agreements with private landowners and businesses to prevent listing. The consultation process may be one of the few ways to improve species conservation performance and would best be used before listing is required. As currently implemented, species that are listed as threatened, require Section 9 protections under the ESA to improve their chances of avoiding extinction and to eventually recover.