



# THE WILDLIFE SOCIETY

*Leaders in Wildlife Science, Management and Conservation*

24 September 2018

Attn: FWS-HQ-ES-2018-0006  
U.S. Fish & Wildlife Service, MS: BPHC  
5275 Leesburg Pike, Falls Church, VA 22041-3803

Re: Docket No. FWS-HQ-ES-2018-0006; Endangered and Threatened Species: Listing Species and Designating Critical Habitat

Dear Secretary Zinke and Secretary Ross,

Thank you for the opportunity to submit comments on the proposed rule “Endangered and Threatened Species: Listing Species and Designating Critical Habitat.”

The Wildlife Society (TWS; [wildlife.org](http://wildlife.org)) was founded in 1937 and is a non-profit professional society representing over 15,000 wildlife biologists and managers, dedicated to excellence in wildlife stewardship through science and education. Our mission is to inspire, empower, and enable wildlife professionals to sustain wildlife populations and habitat through science-based management and conservation.

The Wildlife Society and our membership work to ensure that science plays an active role in policy and regulatory decision-making processes. Within this proposed rule, there are several provisions that our organization finds concerning or requests clarification on to ensure their effects on wildlife, science-based wildlife conservation, and wildlife professionals are correctly understood.

## **Economic Impacts**

The U.S Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) have proposed to remove the language that listing decisions be made “without reference to possible economic or other impacts of such determination.”

The USFWS has made clear their intentions for economic factors to not be considered in listing decisions or presented for public comment in Federal Register notices, but the Service did not provide examples or assurances as to how or when these economic indicators will be used, and how they will benefit science-based decision making. Although TWS does not oppose the inclusion of information on the economic effects of listing decisions when that information is useful to understand the context of such decisions, we will be monitoring this process to ensure that listings continue to be made “solely on the basis of the best scientific and commercial data available” as required by the Act.

Our organization also cautions that any economic analyses the Services perform concurrently and separately alongside the listing process has the potential to increase the workload of USFWS and NMFS employees. Depending on the framework of this process, employees could be faced

with a lack of resources to complete these tasks without a commensurate increase in budget and staff time.

### **Definition of “foreseeable future”**

It is our understanding that the proposed creation of a definition for the term “foreseeable future” is intended to bring regulation in line with current practice. As proposed, the definition is aimed at providing intentional ambiguity to allow for the best available science to be used within the confines of each case. However, this ambiguity could provide for continued uncertainty as to how this definition will be interpreted with a change in Administration. Given the diverse life histories of the species that USFWS and NMFS manage, it is understandable that they want to continue the practice of not placing clearly defined metrics, such as number of years, around the definition. It is important that the Services add additional context to these rules to allow a clear understanding of how significant environmental shifts, such as climate change and sea ice depletion, will be factored into these questions using the same level of scientific rigor.

### **Factors Considered in Delisting Species**

The Wildlife Society recommends the reinsertion of language in § 424.11 that provides flexibility to USFWS and NMFS to consider as evidence the status conferred upon a species by a state fish and wildlife agency or a foreign body such as CITES. This provision is in line with the current Administration’s practice of empowering state fish and wildlife agency research, management and authority. The Wildlife Society supports modifying regulations that would allow the same five factors considered in listing decisions to be considered in delisting decisions. This section as revised will provide more clarity within the regulation and brings the statute in line with current practice.

### **Not-prudent Determinations**

The Wildlife Society requests clarification on the addition of language that will allow the Secretary to designate unoccupied critical habitat “only when the occupied areas are inadequate to ensure the conservation of the species or if inclusion of unoccupied areas would yield certain other specified benefits.”

Unoccupied habitat warrants appropriate inclusion and consideration within the critical habitat designation process. Realistically, suitable but unoccupied habitat is the “currency” upon which conservation investments can be made in threatened and endangered species recovery.

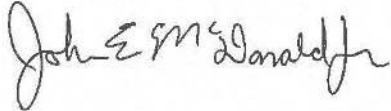
Additionally, occupied habitat may not always be in the most appropriate context to designate as critical. Certain unoccupied areas may provide more resources to the species and lead to a higher likelihood of recovery. Would this likelihood of recovery qualify as a “certain other specified benefit?” The Wildlife Society **requests clarification in the language to reflect an approach of designating critical habitat with the highest likelihood of achieving recovery goals.**

The Wildlife Society thanks you for the opportunity to submit comment on this proposed rule. Please contact Caroline Murphy, AWB®, government relations program coordinator at The

Wildlife Society (cmurphy@wildlife.org, 301-897-9770 x 308), with any follow up questions regarding these comments.

Please see The Wildlife Society's [technical review](#) for additional information on improving effectiveness of the Endangered Species Act for wildlife conservation.

Sincerely,

A handwritten signature in black ink that reads "John E. McDonald, Jr." in a cursive script.

Dr. John E. McDonald, Jr.

President



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U.S. Fish & Wildlife Service, MS: BPHC  
5275 Leesburg Pike, Falls Church, VA 22041-3803

Re: Docket No. FWS-HQ-ES-2018-0006; Endangered and Threatened Species: Revision of Regulations for Prohibitions to Threatened Wildlife and Plants

Dear Secretary Zinke,

Thank you for the opportunity to submit comments on the proposed rule “Endangered and Threatened Species: Revision of Regulations for Prohibitions to Threatened Wildlife and Plants.”

The Wildlife Society (TWS; [wildlife.org](http://wildlife.org)) was founded in 1937 and is a non-profit professional society representing over 15,000 wildlife biologists and managers, dedicated to excellence in wildlife stewardship through science and education. Our mission is to inspire, empower, and enable wildlife professionals to sustain wildlife populations and habitat through science-based management and conservation. TWS and our membership work to ensure that science places an active role within policy and regulatory decision-making processes.

The Wildlife Society has several concerns regarding the effects that this proposed rule will have on the workload and output of the U.S. Fish and Wildlife Service (USFWS) Ecological Services employees.

In 1978, USFWS implemented the “blanket 4(d) rule,” extending endangered species-level protections to threatened species, unless a “special 4(d) rule” was created. The National Marine Fisheries Service (NMFS) has never had this blanket 4(d) rule and relied on species-specific 4(d) rules to apply protections to threatened species. Absent a Section 4(d) rule, threatened species are not afforded any protections specific to take under the Endangered Species Act.

In the past several years, approximately 40% of new threatened listings received special 4(d) rules; the other species listed by the USFWS relied upon the “blanket 4(d) rule” for regulatory protections against take of the species. Species-specific rules are an important mechanism for incentivizing proactive, voluntary conservation work with both traditional and non-traditional USFWS partners to ultimately work towards species recovery.

However, removing the blanket 4(d) rule could either 1) prevent newly listed threatened species from receiving any protection from take under the ESA, or 2) mandate USFWS to more than double its output of species-specific rules. A lack of regulatory protections could hinder recovery of the species, and increased output of species-specific rules will require a significant increase in funding and staff time. The Wildlife Society **requests that this proposed rule be rescinded**. We are concerned that staff time will not be prioritized to create scientifically rigorous 4(d) rules.

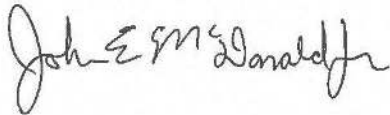
The existences of a blanket 4(d) rule does not prevent the USFWS from issuing species-specific 4(d) rules, as noted above, and we encourage the Service to do so when appropriate.

As the Service explores options for creating a more structured process and timeline in issuing 4(d) rules, TWS also **recommends that species-specific rules not be required at the time of final listing decision**. Species-specific rules often result from Section 7 and Section 10 consultations and reviews completed in coordination with other federal agencies. Mandating completion of these rules concurrent with final listing decisions would restrict the means by which USFWS employees can evaluate and reevaluate how other federal actions will impact threatened species. This, along with inadequate funding as outlined above, may result in incomplete final 4(d) rules which will need to be revisited as new information is obtained through consultations. A mandate such as this could also open up the USFWS to additional litigation due to funding and staff restrictions resulting in missed deadlines for final rulemaking.

The Wildlife Society thanks you for the opportunity to submit comment on this proposed rule. Please contact Caroline Murphy, AWB®, government relations program coordinator at The Wildlife Society ([cmurphy@wildlife.org](mailto:cmurphy@wildlife.org), 301-897-9770 x 308), with any follow up questions regarding these comments.

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Sincerely,

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5275 Leesburg Pike, Falls Church, VA 22041-3803

Re: Docket No. FWS-HQ-ES-2018-0009; Endangered and Threatened Wildlife and Plants:  
Revision of Regulations for Interagency Cooperation

Dear Secretary Zinke and Secretary Ross,

Thank you for the opportunity to submit comments on the proposed rule “Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation.”

The Wildlife Society (TWS; [wildlife.org](http://wildlife.org)) was founded in 1937 and is a non-profit professional society representing over 15,000 wildlife biologists and managers, dedicated to excellence in wildlife stewardship through science and education. Our mission is to inspire, empower, and enable wildlife professionals to sustain wildlife populations and habitat through science-based management and conservation.

The Wildlife Society and our membership work to ensure that science plays an active role in policy and regulatory decision-making processes. After reviewing the contents of this proposed rule, our organization and membership have several questions regarding its feasibility and impacts.

## **Destruction or Adverse Modification Definition**

The Wildlife Society is concerned about the modification to the definition of “Destruction or Adverse Modification” within 50 CFR Part 402.

While the addition of “as a whole” to the first sentence and the removal of the second qualifying sentence is an attempt to clarify current practices in deciding adverse modification determinations, TWS is concerned this framing may be inadequate to properly determine if an alteration - or the cumulative effect of many alterations – will diminish the value of critical habitat for the conservation of a listed species.

Section 7 consultations to determine if an action will cause “destruction or adverse modification” to critical habitat often occur at the field office level. It is unclear how the U.S. Fish and Wildlife Service and National Marine Fisheries Service track these effects to determine the cumulative effect threshold of destruction or adverse modification to critical habitat “as a whole”. This is especially a concern when dealing with a listed migratory species whose wintering habitat, breeding habitat, and migratory habitat fall within different jurisdictions. The Wildlife Society **requests a reevaluation of this definition within the broader consultation process to ensure agency practices are adequate in protecting listed species range-wide and account for cumulative, non-federal effects on critical habitats.**

## **Applicability of Section 7 Consultation**

The Wildlife Society has concerns with the suggested changes in regulatory language considered in §402.03 that would allow federal agencies to forgo the consultation process for projects deemed of little relevance to listed species.

Federal agencies already have the ability to make “no effect” determinations on these types of projects. Additionally, the example situations proposed in which federal agencies would not have to consult, including having “an extremely small and insignificant impact on a listed species or critical habitat”, and “have effects that are manifested through global processes” appear to provide more of a regulatory burden to the determining federal agency by further restricting the use of “no effect” determinations. **The Wildlife Society does not recommend the Services further consider action on this language.**

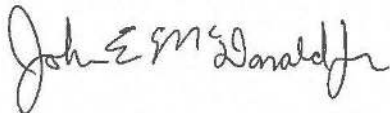
## **Informal Consultation**

The Wildlife Society is also concerned that the addition of an informal consultation deadline will put a strain on already limited USFWS staff resources. Any informal consultation process deadline would need to be accompanied by concomitant increases in staff time and budgets to avoid incomplete products and the risk of litigation. **The Wildlife Society does not recommend a structured timeline be implemented.**

The Wildlife Society thanks you for the opportunity to submit comment on this proposed rule. Please contact Caroline Murphy, AWB®, government relations program coordinator at The Wildlife Society (cmurphy@wildlife.org, 301-897-9770 x 308), with any follow up questions regarding these comments.

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