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Public Comments Processing
U.S. Fish and Wildlife Service, MS BPHC
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Attn: FWS-HQ-ES-2018-0007, FWS-HQ-ES-2018-0009, FWS-HQ-ES-2018-0006

Dear Ms. Fahey and Mr. Aubrey:

Thank you for considering these comments from American Bird Conservancy regarding Endangered Species Act regulatory reform, and recommendations for advancing the conservation and recovery of listed birds. We are commenting on the three proposed rules in one letter, because it is important to note that each would have significant negative effects that collectively put species at much greater risk of endangerment than if only one major change to implementing the Endangered Species Act were being considered.

The overall impact of the proposed rules would potentially make it more difficult to list species that the best science indicates should be listed, to conserve and restore habitat due to restrictions on critical habitat and the loss of Sec. 7 consultation for management of federal lands, or to ensure that threatened species are not put at risk of endangerment due to the loss of the blanket rule's protection against take.

Loss of Blanket Protection Threatens Newly Listed Species

Providing a threatened species with this take protection will require the inclusion of a 4d rule. This second rulemaking to establish a specific 4d rule will substantially increase the workload for the Service, and it may not address all of the threats that are included in a blanket rule. The agency could in fact cherry pick which threats will be addressed, while others could be allowed to continue taking the species. The existing blanket rule provides listed species protection from all sources of take, not just the ones the agencies decide to include.

The current NOAA procedure providing a specific 4d rule with each threatened listing could still render a species at risk from newly emergent threats until a new 4d rule could be promulgated. For example, the National Oceanic and Atmospheric Administration is concerned about the effects of the disease toxoplasmosis on endangered Hawaiian monk seals, and has released a [new fact sheet](#) in an attempt to shine a light on the disease in Hawaii. If the Monk Seal were instead listed as threatened, it could potentially require additional protection from toxoplasmosis.

Citizens concerned about the lack of adequate protection could file an Administrative Procedures Act petition for a special 4d rule, or file an uplisting petition for endangered status; a potentially significant expansion in listing process activities. Similarly, the Service could be placed under political pressure to list a species as threatened instead of endangered.

The overall effect would be substantially delayed protection, continued take and an increased risk of endangerment. We recommend extending the full protection of Section 9 to threatened species, and carving out any exceptions on a case by case basis.

Loss of Critical Habitat Protection Puts Species at Greater Risk

Another proposed definition change to the ESA would make it easier to eliminate critical habitat, because any loss would have to be considered “as a whole.” Critical habitat is essential for maintaining and recovering species, but this change would allow the loss of habitat to occur drip by drip. If only few, or no projects are at a scale that would impact “the whole”, critical habitat is effectively rendered useless to conserve a listed species’ habitat.

This is particularly relevant to wide-ranging species with large critical habitat designations. Several listed species, the Northern Spotted Owl and Marbled Murrelet have suffered the loss of a high percentage of their habitat due to past federal agency decisions. A lawsuit brought under the National Forest Management Act proved that land management agencies had knowingly overcut the forest and put a species at risk. This resulted in the Northwest Forest Plan, creation of protected reserves and adoption of a passive restoration strategy to regrow an interconnected and redundant network of large blocks of old growth necessary to recover the owl and murrelet.

The proposal also adds inappropriate obstacles to the designation of critical habitat. Automatic not prudent exemptions are contrary to the law’s requirement to designate all habitat unless it would “not be beneficial to the species.” Exempting areas deemed currently not under threat or that cannot readily be addressed by management action are not allowed under the law.

We are opposed to these changes as well as the proposal to limit designation of unoccupied habitat. Some listed species, such as the Northern Spotted Owl and Marbled Murrelet saw the overwhelming majority of their habitat on federal lands clearcut, resulting in their extirpation from many areas. Designating unoccupied areas is therefore necessary to provide sufficient habitat to maintain the existing populations and provide habitat for recovery.

Additionally, the proposed rule changes make invalid statements that threats to species from climate change result in “**regulatory burden** without providing any **conservation value**”. The administration’s proposal states that “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.”

This qualifies as a non sequitur because it is illogical, flawed, and misleading. It mentions threats related only to climate change without evidence that such threats “would create a regulatory burden without providing any conservation value to the species concerned.”

On the contrary, there are several management actions and conservation actions that can be identified through consultation to prevent glaciers from melting, sea levels from rising, or snowpack from decreasing. For example, designating critical habitat paves the way for implementation of Habitat Conservation Plans, Safe Harbor Agreements, or Candidate Conservation Agreements to aid in recovery efforts.

Engaging renewable energy developers to adopt such a plan reduces the nation's dependence on greenhouse gas-emitting energy sources. Such a management action **will** help prevent glaciers from melting, sea levels from rising, and snowpack from decreasing. Contrary to what is stated in the proposed rule changes, these regulatory strategies are not a "burden" but already implemented efficiently and reliably, and provide extremely high conservation value to species susceptible to climate change.

Furthermore, while preventing climate change is of utmost priority, effective mitigation strategies help to reduce the effects of climate change. For example, sea level rise is designated as a threat to the federally endangered Roseate Tern under Factor A of the 5-year Review (present or threatened destruction, modification or curtailment of its habitat or range; Amaral and Saliva 2010).

A state agency, with the support of the USFWS, has since restored one of the three predominant breeding colonies of Roseate Terns with a higher retaining wall to increase its resilience to the threat of overwash from storms, tides, and sea level rise. This sets an important precedent for management agencies to initiate comprehensive mitigation efforts that will be needed to minimize impacts to Roseate Terns from climate change. The USFWS and NMFS are charged with the **duty** to list and recover endangered species, regardless of any erroneously perceived "regulatory burden".

Increased Politicization of the Listing Process Hinders Species Protection and Recovery

Maintaining the existing science-based listing process is also crucial to conserve declining bird populations. Just this decade, seven new populations of birds were listed. If a proposed rule allows economic considerations for listing, it is quite possible that some of these species such as the Western Yellow-billed Cuckoo, Red Knot, and Gunnison Sage-Grouse would not have been granted ESA protection. Economic considerations do not change the science-based assessment that an endangered species is at risk of extinction, therefore they should play no role in the listing process. We strongly advise that the existing science-based listing process be retained and that economic considerations only be addressed during the designation of critical habitat and development of mitigation requirements.

The proposed changes could undermine the listing process by allowing for misleading economic analysis to be included in the listing rule. The benefits of wildlife conservation, which provides billions of dollars in economic value, are undervalued or not even included in these analyses. Endangered species deserve fundamental protections: they are invaluable to our natural heritage due to the key services that they perform in maintaining a healthy ecosystem. The existing science-based listing process needs to be retained.

Furthermore, the description of what constitutes the "foreseeable future" as stated in the proposed rule changes is inadequate and opens up the ESA listing process to arbitrary politicization rather than basing it on the best available science. The administration's proposal mentions population viability analysis - this is the action of modeling the probability that a species will become extinct, under a

future time horizon. It is common practice and used widely to assess whether a species should be listed as endangered. As with all statistical modeling exercises, such projections include uncertainty, by nature, which is usually illustrated by estimated confidence intervals. As such, the probability of extinction is inherently linked to the time horizon, such that a linearly declining population has higher probability of extinction farther into the future, given uncertainty bounds.

It is possible to reduce this uncertainty by “including relevant environmental variability, such as hydrological cycles or oceanographic cycles”, as stated in the proposed rule changes. For example, climate data have been used to explain environmental effects on long-term (i.e., 40-year) changes in the population size of seabirds in Alaska, of which Tufted Puffins are currently under review for ESA listing (Goyert et al. 2018). In that study, significantly increasing sea surface temperature negatively affected the carrying capacity of seabird species. It is critically important that the USFWS continue to consider information and analyses that take into account projected future changes in climate, so as to reduce such uncertainty into the future.

As stated in the proposed rule changes, Executive Order 13563 calls “for improvements in the nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends.” The proposed rule changes also state that “the term foreseeable future extends only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable.”

However, no adequate definition is given of the “foreseeable future” (e.g., 100 years? 500?) or what constitutes “probable” (e.g., a probability of 51%? 99%). Such terminology is therefore arbitrary and may be used unpredictably on a case-by-case basis, adding to the uncertainty that the USFWS is mandated to reduce under Executive Order 13563. Thus, Executive Order 13563 conflicts with these proposed rule changes to the ESA.

Maintain Interagency Checks and Balances to Conserve Species

Several threatened bird populations, the Marbled Murrelet and Northern Spotted Owl likely owe their current existence to the blanket 4d rule on take, and on Sec. 7 consultation which helped provide a necessary check on harmful management activities negatively impacting critical habitat. The goal of Sec. 7 is to minimize the impacts of a project on a listed species. It has proven to be an important check on inappropriate federal land management.

It is crucial that the wildlife experts of the U.S. Fish and Wildlife Service (or NOAA) provide an independent review. The typical outcome of this process is to improve, rather than to halt projects. For example, Biological Opinions typically require certain reasonable and prudent mitigation measures or management constraints to help avoid negative outcomes. The agencies also must be able to continue considering global processes such as climate change in their analysis and decision making.

In addition, federal land management agencies have indicated that they are considering major changes to the Sec. 7 consultation process that have not yet been released for public review and comment. As a result, the public cannot fully assess the potential impact of the Service’s proposed rule.

Application of the mitigation hierarchy is a smart way to balance conservation needs with development, but the administration has been taking steps to weaken or eliminate requirements for best management practices. Proposed language stating that mitigation requires “no specific binding plans or a clear, definite commitment of resources,” undermines its potential effectiveness by allowing for unproven processes and plans lacking any binding commitment of resources to outweigh or counteract real adverse impacts. We recommend removing this language and reinstating the mitigation policies of the last administration.

The ESA Works – Increasing Recovery Funding is the Top Priority

The ESA is effectively working to recover birds. Seventy-eight percent of mainland birds listed as threatened or endangered under the ESA have populations that are now stable, increasing, or have recovered enough to be delisted, according to a 2016 report published by ABC. [The Endangered Species Act: A Record of Success](#) analyzed population trends and recovery success for all U.S. listed birds, including those in the Hawaiian Islands and U.S. territories where the recovery success rate is lower due to the high degree of threats.

Added ESA funding can help continue the upward trend of 41 listed U.S. bird populations and make possible their eventual recovery. Three listed birds are now on a pathway towards delisting, Black-capped Vireo, Kirtland’s Warbler and Nene. We are supportive of this goal, provided that adequate conservation measures are assured moving forward.

Documents supporting this comment are attached, including a 2016 report on ESA Recovery Success, the data chart underlying that analysis, the 2016 State of the Birds Report, and the 2016 recreation report on wildlife watching.

Thank you for considering these comments.

Sincerely,



Steve Holmer
Vice President of Policy
American Bird Conservancy

References

Goyert, H.F., Garton, E.O., Poe, A.J., 2018. Effects of climate change and environmental variability on the carrying capacity of Alaskan seabird populations. *The Auk*, 975-991.

Amaral, M., Saliva, J.E., 2010. Caribbean Roseate Tern and North Atlantic Roseate Tern (*Sterna dougallii dougallii*): 5-Year Review: Summary and Evaluation. U.S. Fish and Wildlife Service, Concord, NH, USA. https://ecos.fws.gov/docs/five_year_review/doc3588.pdf