EARTHJUSTICE

October 8, 2020

Via Federal eRulemaking Portal
www.regulations.gov
Docket FWS–HQ–ES–2019–0115

Re: Comments on Proposed Endangered Species Act Regulation Regarding Exclusions from Critical Habitat Designation, 85 Fed. Reg. 55,398 (Sept. 8, 2020)

To Whom It May Concern:

Earthjustice submits these comments on behalf of American Bird Conservancy, Center for Biological Diversity, Coalition to Protect America's National Parks, Conservation Council for Hawai'i, Defenders of Wildlife, Environmental Protection Information Center, Humane Society Legislative Fund, Humane Society of the United States, National Parks Conservation Association, Oregon Wild, Sierra Club, and WildEarth Guardians (collectively, "Organizations") in response to the U.S. Fish and Wildlife Service's ("FWS's") request for input on its proposed regulation governing the process for excluding areas of critical habitat under section 4(b)(2) of the Endangered Species Act ("ESA"). *See* 85 Fed. Reg. 55,398 (Sept. 8, 2020). The Organizations each work to protect and preserve the environment, including the preservation of threatened and endangered species and their designated critical habitat. We submit these comments to ensure the ESA's continued effectiveness and protections for species and habitat are not undermined.

We strongly oppose the proposed regulation, which would create unnecessary and illegal obstacles to achieving the ESA's goal to conserve "the ecosystems upon which endangered species and threatened species depend." 16 U.S.C. § 1531(b). As discussed more fully below, the proposal would unlawfully prevent FWS from exercising statutorily conferred discretion to make decisions whether to designate "particular area[s] as critical habitat" on a case-by-case basis. *Id.* § 1533(b)(2). The proposed regulation would impermissibly grant economic considerations outsized weight in decisions about habitat that should prioritize species' recovery needs and be driven by the best available science. Moreover, it would make it easier to strip protection from essential habitat located on federal lands, where designation confers the greatest conservation benefits.

I. BACKGROUND

When Congress enacted the ESA, it understood that habitat protection was key to saving species from extinction and allowing for their eventual recovery:

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> Man can threaten the existence of species of plants and animals in any of a number of ways. … The most significant of those has proven also to be the most difficult to control: the destruction of critical habitat. ... There are certain areas which are critical which can and should be set aside. It is the intent of this legislation to see that our ability to do so, at least within this country, is maintained.

H.R. Rep. No. 412, 93d Cong., 1st Sess. 5 (1973). Consistent with that understanding, Congress identified as the first of the ESA's purposes "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b).

Section 4 of the ESA, 16 U.S.C. § 1533, requires the listing of species as endangered or threatened when they meet the statutory listing criteria. Further evidencing Congress's understanding of habitat's vital role in species conservation, the first listing criterion is "the present or threatened destruction, modification, or curtailment of [the species'] habitat or range." *Id.* § 1533(a)(1)(A).

An "examination of the language, history, and structure [of the ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978). Once a species is listed, various safeguards apply to prevent activities that will cause harm to members of the species or that will jeopardize the survival and recovery of the species.

The key safeguard that is threatened by the proposed regulation is ESA Section 7's prohibition on agency actions that are "likely to … result in the destruction or adverse modification of habitat of [listed] species which is determined by the Secretary ... to be critical." 16 U.S.C. § 1536(a)(2). The ESA defines "critical habitat" to include both:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed …, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed … upon a determination by the Secretary that such areas are essential for the conservation of the species.

Id. § 1532(5)(A).

The ESA establishes an interagency consultation process to assist federal agencies in complying with their duty to avoid jeopardy to listed species or destruction or adverse modification of critical habitat. *See generally id.* § 1536; 50 C.F.R. §§ 402.13, 402.14. Because critical habitat must be designated outside of a species' currently inhabited range under certain circumstances, the "adverse modification" analysis provides habitat protection even in situations where the "jeopardy" analysis does not apply. *See Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434, 441 (5th Cir. 2001); *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1069-71 (9th Cir. 2004).

In 1976, Congress reiterated the distinct importance of critical habitat and the prohibition on adverse modification:

> It is the Committee's view that classifying a species as endangered or threatened is only the first step in insuring its survival. Of equal or more importance is the determination of the habitat necessary for that species' continued existence. Once a habitat is so designated, the Act requires that proposed federal actions not adversely affect the habitat. If the protection of endangered and threatened species depends in large measure on the preservation of the species' habitat, then ***the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat***.

H.R. Rep. No. 887, 94th Cong., 2d Sess. 3 (1976) (emphasis added).

For the ESA's first five years, FWS was authorized, but not obliged, to designate critical habitat. Congress amended the ESA in 1978 to require that, at the time a species is listed as endangered or threatened, FWS generally must also "concurrently … designate any habitat of such species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3). In making critical habitat designation mandatory, Congress reaffirmed that "[t]he loss of habitat for many species is universally cited as the major cause for the extinction of species worldwide." H.R. Rep. No. 1625, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S.C.C.A.N. 9453, 9455.

II. THE PROPOSED REGULATION WOULD UNLAWFULLY STRIP THE FISH AND WILDLIFE SERVICE OF STATUTORILY CONFERRED DISCRETION

When Congress amended the ESA in 1982 to specify procedures for designating critical habitat, it provided in section 4(b)(2) that:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any

> other relevant impact, of ***specifying any particular area as critical habitat***. The Secretary ***may exclude any area from critical habitat*** if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2) (emphasis added).

Section 4(b)(2)'s command that the Secretary must, when designating the "habitat of [each listed] species which is then considered to be critical habitat," *id.* § 1533(a)(3), consider the costs and benefits "of specifying ***any particular area*** as critical habitat" reflects congressional intent that FWS make individualized designation decisions, based on the specific facts relevant to the species under consideration. *Id.* § 1533(b)(2) (emphasis added). Moreover, Congress's deliberate choice of "may" rather than "shall" before "exclude" makes clear that Congress intended for the Secretary to retain the discretion to designate a "particular area as critical habitat" for an imperiled species, even where the evidence before the Secretary at the time of designation indicates that the costs of designating that "particular area" outweigh the benefits. *Id.*; *see also Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 139 S. Ct. 361, 371 (2018) ("The use of the word 'may' certainly confers discretion on the Secretary"); *Bennett v. Spear*, 520 U.S. 154, 172 (1997) (noting Secretary's "discretion as to the substance of the ultimate decision" whether to exclude areas from critical habitat). As FWS has previously affirmed, "the decision to exclude is always discretionary," and, "[u]nder no circumstances is exclusion required under the second sentence of section 4(b)(2)." 81 Fed. Reg. 7,226, 7,229 (Feb. 11, 2016).

The proposed regulation unlawfully seeks to rewrite the statute, replacing "may exclude" with "shall exclude." In place of the individualized determinations that Congress mandated regarding whether "any particular area" should be designated as critical habitat for the specific species under consideration, 16 U.S.C. § 1533(b)(2), FWS would substitute a blanket rule—applicable to all future designation decisions—that would require FWS automatically to exclude an area from critical habitat if it deems the benefits of exclusion to outweigh the benefits of inclusion, regardless of circumstances. *See* 85 Fed. Reg. at 55,407 (proposed 50 C.F.R. § 17.90(e)).[1] The statutory text is not susceptible to the proposed regulatory construction, which would illegally deprive FWS of its discretion to tailor its decision-making to a species' unique circumstances, contravening congressional intent to afford imperiled species "the highest of priorities." *Tenn. Valley Auth.*, 437 U.S. at 174.

[1] The only exception to this proposed blanket rule—an exception that is mandated by statute—is that FWS may not exclude an area if "the failure to designate that area as critical habitat will result in the extinction of the species concerned." *Id.*; *see also* 16 U.S.C. § 1533(b)(2) (same).

III. THE PROPOSED REGULATION WOULD SUBVERT CONGRESSIONAL INTENT

In compliance with the ESA's requirement to "tak[e] into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat," FWS routinely solicits input from developers, ranchers, extractive industries, states, tribes, and others on the economic analyses that are prepared to inform critical habitat designations for each listed species. 16 U.S.C. § 1533(b)(2). In the past, FWS has independently evaluated claims by critical habitat opponents that designation would impose exorbitant costs, often dismissing those claims as speculative or otherwise unsupported. *See, e.g.*, 79 Fed. Reg. 54,782, 54,829 (Sept. 12, 2014) (rejecting speculation that designating critical habitat for Canada lynx would "result in disproportionate economic impacts to snowmobiling interests"); 68 Fed. Reg. 39,624, 39,640-41 (July 2, 2003) (rejecting allegedly "substantial costs associated with conservation management actions" on lands designated as critical habitat for imperiled Hawaiian plants as "not reasonably foreseeable"); *id.* at 39,643 ("the methodology used by the commenter to derive the estimated economic impact of $390 million [from designation] is not consistent with the methodology presented in [FWS's draft economic analysis]"). Retaining FWS's discretion to reject questionable claims by critical habitat opponents is essential to comply with the ESA's command to base critical habitat decisions on "the best scientific data available," 16 U.S.C. § 1533(b)(2), a requirement that Congress imposed to "give the benefit of the doubt to the species." H.R. Conf. Rep. No. 697, 96th Cong., 1st Sess., at 12, *reprinted in* 1979 U.S.C.C.A.N. 2572, 2576.

Instead of giving the benefit of any doubt to listed species, as Congress intended, the proposed regulation would make it extremely difficult for FWS to reject self-interested claims of severe economic impacts, placing a heavy thumb on the scale in favor of those seeking free rein to destroy habitat that is essential to listed species' conservation. Under the proposed regulation, when assessing alleged impacts from designation involving "areas that are outside the scope of the Service's expertise" (which are broadly defined to include anything "[n]onbiological"), FWS would be obliged to "assign weight to those [impacts] consistent with the … information" provided by opponents of designation, no matter how flimsy the support for their claims, unless FWS can affirmatively "rebut[] that information." 85 Fed. Reg. at 55,407 (proposed 50 C.F.R. § 17.90(d)(1)); *see also id.* at 55,402 ("Proposed subparagraphs in paragraph (d)(1) identify a non-exhaustive list of categories of impacts that are outside the scope of FWS' expertise").

The proposed regulation would place a heavy burden on FWS to debunk questionable claims of costs of designation, even if the evidence offered is weak. Paired with the new, blanket mandate to exclude areas whenever costs of designation exceed benefits, the proposed regulation would flip on its head Congress's policy of "institutionalized caution," affording "the highest of priorities" to those seeking to destroy essential recovery habitat rather than to the endangered species whose conservation depends on that habitat. *Tenn. Valley Auth.*, 437 U.S. at 194.

IV. THE PROPOSED REGULATION WOULD ILLEGALLY DELEGATE STATUTORY AUTHORITY TO OUTSIDE, NONFEDERAL PARTIES

The proposed regulation runs afoul of the prohibition on subdelegating statutory authority to outside, nonfederal parties. Section 4(b)(2) mandates that the Secretary designate critical habitat based on the best available science and evaluate the costs and benefits of designation to determine whether to "specify[] any particular area as critical habitat. 16 U.S.C. § 1533(b)(2). The Secretary of the Interior has delegated this statutory duty to the Director of FWS. *See* 85 Fed. Reg. at 55,398. The proposed regulation would add an additional, illegal step, delegating to outside, nonfederal parties the authority to determine the "weight" FWS must assign to "the benefits of including or excluding any particular area" whenever alleged impacts involve a broad range of "areas that are outside the scope of the Service's expertise." *Id.* at 55,407 (proposed 50 C.F.R. § 17.90(d)(1)).

In general, "subdelegations" of authority that Congress vests in an agency "to outside parties are assumed to be improper absent an affirmative showing of congressional authorization." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004). This is because, "when an agency delegates power to outside parties, lines of accountability may blur, undermining an important democratic check on government decision-making." *Id.* "Also, delegation to outside entities increases the risk that these parties will not share the agency's 'national vision and perspective,' and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme." *Id.* at 565–66 (citation omitted).

All of these concerns are present here, precluding FWS from subdelegating its statutorily mandated fact-finding to outside, nonfederal parties. While the notice-and-comment process is an important democratic feature within the administrative state, presumptively assigning weight and deference to a subset of parties who claim adverse impacts from critical habitat designations, as the proposed regulation requires, would impermissibly skew the process in favor of protecting narrow economic interests, rather than conserving "the ecosystems upon which endangered species and threatened species depend," as Congress commanded in enacting the ESA. 16 U.S.C. § 1531(b). Additionally, the entities whose assessments of impacts the proposed regulation deems presumptively correct—state and local governments, permittees, lessees, and those applying for contracts on federal lands—have all historically been hostile to critical habitat designation. *See* 85 Fed. Reg. at 55,407 (proposed 50 C.F.R. § 17.90(d)(1)). These entities do not share FWS's national vision and perspective regarding species conservation. Moreover, unlike FWS, these nonfederal actors are not required to "utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1).

V. REVERSING CURRENT POLICY REGARDING DESIGNATION ON FEDERAL LANDS WOULD DEPRIVE IMPERILED SPECIES OF VITAL PROTECTIONS

The proposed regulation would reverse FWS's existing policy that generally disfavors excluding federal lands from critical habitat designation. *See* 85 Fed. Reg. at 55,402. FWS adopted that policy in recognition that "Federal land managers have unique obligations under the Act." 81 Fed. Reg. at 7,231. "First, Congress declared its policy that 'all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.'" *Id.* (quoting 16 U.S.C. § 1531(c)(1)). "Second, all Federal agencies have responsibilities under section 7 of the Act to carry out programs for the conservation of listed species and to ensure their actions are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat." *Id.*; *see also* 16 U.S.C. § 1536(a)(1), (2).

In further support of its policy, FWS has noted that, "while the benefits of excluding non-Federal lands include development of new conservation partnerships, those benefits do not generally arise with respect to Federal lands, because of the independent obligations of Federal agencies under section 7 of the Act." *Id.* FWS further understood that "the benefits of including Federal lands in a designation are greater than non-Federal lands because there is a Federal nexus for projects on Federal lands." *Id.* Accordingly, when potentially harmful activities occur on federal lands that have been designated as critical habitat, there is always a trigger for section 7 consultation to ensure those activities will not jeopardize listed species' continued existence or result in the destruction or adverse modification of their essential recovery habitat. *See id.* at 7,238 ("Because the section 7 consultation requirements apply to projects carried out on Federal lands where there is discretionary Federal involvement or control, designation of critical habitat on Federal lands is more likely to benefit species than designation of critical habitat on private lands without a Federal nexus").

There has been no change in circumstances that would justify abandoning FWS's policy that "Federal lands should be prioritized as sources of support in the recovery of listed species" and that "designation of critical habitat [should focus] on Federal lands." *Id.* at 7,231-32.[2] In the past, FWS has successfully rebuffed attempts by private interests seeking to carry out destructive activities on federal lands to strip critical habitat protection for imperiled species such as the polar bear and Gunnison sage-grouse. *See, e.g.*, 75 Fed. Reg. 76,086, 76,097 (Dec. 7, 2010) (refusing to exclude from polar bear critical habitat federal lands "in which oil and gas exploration, development, production, and transportation activities are occurring or are

[2] Note that FWS prioritized federal lands for critical habitat designation long before adopting its formal policy in 2016. *See, e.g.*, 77 Fed. Reg. 71,875, 72,006 (Dec. 4, 2012) (in designating northern spotted owl critical habitat, FWS "prioritized the inclusion of Federal lands over other land ownerships").

planned in the future"); 79 Fed. Reg. 69,312, 69,324, 69,346 (Nov. 20, 2014) (declining to exclude from Gunnison sage-grouse critical habitat federal lands used for ranching and for oil and gas development). Particularly when coupled with the proposed mandate for FWS to accept as presumptively correct the assessment of "[n]onbiological impacts identified by a permittee, lessee, or contractor applicant for a permit, lease, or contract on Federal lands," the proposed regulation would threaten to deprive these and countless other imperiled species of habitat protection that is vital for their continued survival and eventual recovery. 85 Fed. Reg. at 55,407 (proposed 50 C.F.R. § 17.90(d)(1)(iv)).

VI. PROMULGATION OF THE PROPOSED REGULATION IS NOT EXEMPT FROM ENVIRONMENTAL REVIEW PURSUANT TO THE NATIONAL ENVIRONMENTAL POLICY ACT

In its Federal Register notice, FWS states that it expects to conclude that promulgating its proposed regulation falls under a categorical exclusion to the requirement to prepare a National Environmental Policy Act ("NEPA") analysis. *See* 85 Fed. Reg. at 55,406. We strongly disagree with that preliminary conclusion.[3]

NEPA requires all federal agencies, including FWS, to prepare a "detailed statement" that discusses the environmental effects of, and reasonable alternatives to, all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). A "major federal action" for which an environmental impact statement ("EIS") may be required includes "new or revised agency rules [or] regulations." 40 C.F.R. § 1508.1(q)(2); *see also id.* § 1508.1(q)(3)(i) ("Major federal actions" include "[a]doption of official policy, such as rules [and] regulations"). The environmental effects that must be considered in an EIS include "changes to the human environment from the proposed action … that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action," including "effects that are later in time or farther removed in distance from the proposed action." *Id.* § 1508.1(g); *see also id.* §§ 1502.15, 1502.16. The purpose of an EIS is to inform agency decision-makers and the public of

[3] We cite here to the NEPA regulations that are currently in effect. *See* 40 C.F.R. § 1506.13; 85 Fed. Reg. 43,304, 43,304 (July 16, 2020). We note that several pending lawsuits challenge the legality of these recently promulgated regulations, including lawsuits brought by some of the Organizations. *See, e.g.*, Complaint, *Envtl. Justice Health All., et al. v. Council on Envtl. Quality, et al.*, Case No. 1:20-cv-06143 (S.D.N.Y. Aug. 6, 2020); Complaint, *Alaska Community Action on Toxics, et al. v. Council on Envtl. Quality, et al.*, Case No. 3:20-cv-05199 (N.D. Cal. July 29, 2020); *Wild Virginia, et al. v. Council on Envtl. Quality, et al.*, Case No. 3:20-cv-00045 (W.D. Va. July 29, 2020). The earlier version of the NEPA regulations would likewise preclude FWS from invoking a categorical exclusion to avoid its obligation to prepare a NEPA analysis for its proposed regulation.

the significant environmental impacts of the proposed action, means to mitigate those impacts, and reasonable alternatives that would have lesser environmental effects. *Id.* § 1502.1.

NEPA requires federal agencies, including FWS, to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(E). This requires FWS to "evaluate reasonable alternatives to the proposed action," 40 C.F.R. § 1502.14(a), as well as to "specify the underlying purpose and need for the proposed action." *Id.* § 1502.13. The mandated discussion of alternatives, "including the proposed action," is intended to allow reviewers to "evaluate their comparative merits." *Id.* § 1502.14.

"NEPA's purpose is … to provide for informed decision making and foster excellent action." *Id.* § 1500.1(a). NEPA therefore requires FWS to use high quality, accurate scientific information and ensure the "scientific integrity" of the analysis in its EIS. *Id.* § 1502.23.

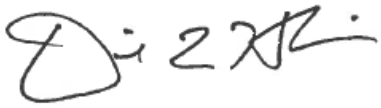
The regulations promulgated by the Council on Environmental Quality ("CEQ")—the federal agency responsible for overseeing implementation of NEPA—authorize agencies to specify categories of actions "[w]hich normally do not require either an [EIS] or an environmental assessment and do not have a significant effect on the human environment (categorical exclusions (§ 1501.4 of this chapter))." *Id.* § 1507.3(e)(2)(ii)). The CEQ regulations define "categorical exclusion" as "a category of actions that the agency has determined … normally do not have a significant effect on the human environment," and each federal agency must identify those categories in its NEPA procedures. *Id.* § 1508.1(d); *see also id.* § 1501.4(a).

The CEQ regulations provide that, even when "an agency determines that a categorical exclusion … covers a proposed action," the agency still must "evaluate the action for extraordinary circumstances in which a normally excluded action may have a significant effect." *Id.* § 1501.4(b). "If an extraordinary circumstance is present" and the agency cannot conclude that "there are circumstances that lessen the impacts or other conditions sufficient to avoid significant effects," i*d.* § 1501.4(b)(1), the agency must "prepare an environmental assessment or [EIS], as appropriate." *Id.* § 1501.4(b)(2).

In its Federal Register notice, FWS identified as potentially applicable its categorical exclusion for "[p]olicies, directives, regulations, and guidelines: That are of an administrative, financial, legal, technical, or procedural nature." 85 Fed. Reg. at 55,406 (quoting 43 C.F.R. § 46.210(i)). As discussed above, the regulation that FWS proposes to promulgate would remove important protections for habitat that is essential for the conservation of endangered and threatened species. This would significantly and adversely affect imperiled species and the ecosystems on which they depend, precluding the application of a categorical exclusion and necessitating preparation of an EIS.

Thank you for your consideration of these comments. Please feel free to contact me via email (dhenkin@earthjustice.org) or telephone (808-599-2436, ext. 6614) if you would like to discuss our concerns.

Sincerely,



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