



Animal Welfare Institute

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Via Federal eRulemaking Portal

Public Comments Processing
Attn: FWS-HQ-ES-2019-0115
United States Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Proposed Regulations for Designating Critical Habitat, Docket No. FWS-HQ-ES-2019-0115

Dear Secretary Bernhardt:

On behalf of the Animal Welfare Institute (“AWI”), we submit the following comments in opposition to the proposal of the U.S. Fish and Wildlife Service (“USFWS”) to amend aspects of the agency’s regulations that implement section 4 of the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544, (“ESA” or “Act”). 85 Fed. Reg. 55,398 (Sept. 8, 2020).

AWI is a nonprofit charitable organization founded in 1951 and dedicated to reducing animal suffering caused by people. AWI engages policymakers, scientists, industry, and the public to achieve better treatment of animals everywhere—in the laboratory, on the farm, in commerce, at home, and in the wild. This is accomplished through public education, research, collaborations with like-minded organizations, media relations, outreach to agencies, engaging its members and supporters, advocating for stronger laws both domestically and internationally, and through litigation.

I. The Proposed Revision of the 2016 Policy is Arbitrary and Capricious

USFWS seeks to improperly reverse a 2016 policy issued jointly by USFWS and the National Marine Fisheries Service (collectively “the Services”). *See* Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (“Policy”). 81 Fed. Reg. 7,226 (Feb. 11, 2016). The Policy articulated how the Services intended to implement their authority to exclude certain areas from being designated as critical habitat. *Id.* at 7,226-27. The Services acknowledged the duties that federal agencies have to conserve species on the public lands they manage as follows:

Federal land managers have unique obligations under the Act. 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.” (section 2(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. at 7,231.

Based on these responsibilities, the Services found that “Federal lands should be prioritized as sources of support in the recovery of listed species. To the extent possible, we will focus designation of critical habitat on Federal lands in an effort to avoid the real or perceived regulatory burdens on non-Federal lands.” *Id.* at 7,231-32. Numerous scientific studies have articulated the importance of federal public lands in the United States for protection of wildlife populations, including threatened and endangered species, due to the habitat those lands provide.¹ Species found exclusively on federal land are more likely to be improving in status than those located on private land or a mix of private and federal land.²

Despite the Services’ emphasis on prioritizing habitat located on federal lands, and the science supporting that decision, USFWS now seeks to reverse that aspect of the Policy. 85 Fed. Reg. at 55,402 (“we are reversing the 2016 Policy’s prior position that we generally do not exclude Federal lands from designations of critical habitat”). USFWS does not adequately explain the rationale for this reversal, which renders the decision arbitrary and capricious. It is a well-settled principle of administrative law that a federal agency may not adopt a position that abruptly changes direction from prior agency regulations without providing a reasoned explanation for the change. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *see also Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (“adjudication is subject to the requirement of reasoned decisionmaking”), *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (an agency has a duty to “explain its departure from prior norms”). Courts reviewing abrupt agency changes of direction apply this principle when an agency formally rescinds or revises an existing regulation, *id.* at 42, 46, 57, and when it alters a prior interpretation of its own rules or governing statute. *See, e.g., N.Y. Pub. Interest Research Group v. Johnson*, 427 F.3d 172, 182–83 (2d Cir. 2005);

¹ Stein, B. et al., Federal Land and Endangered Species: the role of military and other federal land in sustaining biodiversity, 58 *BioScience* 339 (2008). Available at: <https://academic.oup.com/bioscience/article/58/4/339/310322>; Strittholt, J. and D. Dellasala, Importance of Roadless Areas in Biodiversity Conservation in Forest Ecosystems: case study of the Klamath-Siskiyou ecoregion of the United States, 15 *Conservation Biology* 1742 (2001); Rieman, B. et al., Status of Native Fishes in the Western United State and Issues for Fire and Fuels Management, 178 *Forest Ecology and Mgmt.* 197 (2003). Available at: https://www.fs.fed.us/rm/pubs_other/rmrs_2003_rieman_b001.pdf; Burnett, K.M., et al., Distribution of salmon-habitat potential relative to landscape characteristics and implications for conservation, 17 *Ecological Applications* 66 (2007). Available at: https://www.fs.fed.us/pnw/pubs/journals/pnw_2007_burnett001.pdf.

² Hatch, L, et al., Jurisdiction Over Endangered Species’ Habitat: the impacts of people and property on recovery planning. 12 *Ecological Applications* 390 (2002). Available at: [https://esajournals.onlinelibrary.wiley.com/doi/abs/10.1890/1051-0761\(2002\)012\[0690:JOESHT\]2.0.CO;2](https://esajournals.onlinelibrary.wiley.com/doi/abs/10.1890/1051-0761(2002)012[0690:JOESHT]2.0.CO;2)

Lal v. INS, 255 F.3d 998, 1008–09 (9th Cir. 2001) (invalidating an agency interpretation of a regulation because the agency changed course from its settled policies).

In administrative rulemaking, the rationality requirement extends from the principle that changes to regulatory law should be founded on reasoned analysis based on agency experience and expertise. Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763, 820 (1994). According to a recent Supreme Court decision, when changing a policy, “the agency must at least ‘display awareness that it is changing position’ and ‘show that there are good reasons for the new policy.’” *Encino Motorcars LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (citing *FCC v. Fox Television Stations Inc.*, 556 U.S. 502, 515 (2009)). “In explaining its changed position, an agency must also be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account.” *Id.* (citation omitted). “In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Fox Television Stations*, 556 U.S. at 515–16. “It follows that an ‘[u]nexplained inconsistency’ in agency policy is ‘a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.’” *Encino Motorcars*, 136 S. Ct. at 2126 (citing *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)).

Here, USFWS has failed to provide a reasoned explanation for disregarding the facts and circumstances that gave rise to the 2016 Policy relating to the prioritization of designating federal lands as critical habitat. In particular, the proposal fails to acknowledge the myriad threats to habitat that will only make federal lands more – not less – vital to species’ recovery in the future. In recent decades, climate change has exacerbated and accelerated the loss and fragmentation of habitat, including designated critical habitat, forcing species to rapidly adapt behaviorally, ecologically, and genetically to changing conditions, or to shift their distribution or range to find suitable habitat to meet their biological needs.³ Natural disasters, including hurricanes, floods, and wildfires, can also damage habitat and are becoming more frequent and more severe due to climate change. Numerous studies indicate that hurricanes and tropical storms have increased in frequency and strength due to climate change, leading to increased levels of flooding and other damage, a trend that will continue in the future.⁴ Similarly, wildfires

³ Mantyka-Pringle, C.S., et al. 2015. Climate change modifies risk of global biodiversity loss due to land-cover change. *Biological Conservation*, 187: 103-111; Travis, J.M.J. 2003. Climate change and habitat destruction: a deadly anthropogenic cocktail. *Proc. R. Soc. Lond. B.*, 270:467-473; USGCRP. 2019. Impacts, Risks, and Adaptation in the United States. Fourth National Climate Assessment, volume II. Reidmiller, D.R. et al. (editors). US Global Change Research Program, Washington, DC, USA. 1515 pp. Available at: https://nca2018.globalchange.gov/downloads/NCA4_2018_FullReport.pdf.

⁴ See, e.g., Risser, M.D. and Wehner, M.F. 2017. Attributable human-induced changes in the likelihood and magnitude of the observed extreme precipitation during Hurricane Harvey, 44 *Geophysical Research Letters* 12,457. Available at: <https://agupubs.onlinelibrary.wiley.com/doi/full/10.1002/2017GL075888>; Lin, N. et al., 2012. Physically based assessment of hurricane surge threat under climate change. 2 *Nature Climate Change* 462. Available at: <https://dspace.mit.edu/bitstream/handle/1721.1/75773/kerry%20paper%204.pdf?sequence=1&isAllowed=y>; Bjarnadottir, S. et al., 2011. A probabilistic-based framework for impact and adaptation assessment of climate change on hurricane damage risks and costs. 33 *Structural Safety* 173. Available at: <https://doi.org/10.1016/j.strusafe.2011.02.003>.

destroy habitat that protected species rely on,⁵ and are becoming more frequent, severe, and destructive due to climate change.⁶ Wildfires often reduce species diversity and abundance and adversely impact physical and chemical properties of the soil, including pH, nutrient availability, and soil biota. Such effects influence habitat recovery time, successional stages, species composition, and productivity.⁷ Due to USFWS's failure to consider these important facts and circumstances, and its failure to adequately explain this abrupt change in policy, this aspect of the proposal is arbitrary and capricious and should therefore be withdrawn.

II. The Proposal Is More Restrictive than the Plain Language of the ESA and Will Reduce Conservation of Species' Habitat

In enacting the ESA, Congress was very clear that it found the protection of habitat to be central to the conservation of imperiled species, and that designation of critical habitat was to play an essential role in ensuring species' recovery. The proposed rule, however, would limit the designation of critical habitat by adopting a more restrictive standard for when habitat may be excluded than what Congress set forth in the Act itself. Specifically, section 4(b)(2) of the ESA states 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 [s]he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [s]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.

Emphasis added.

In contrast, the proposed rule states as follows:

If the Secretary conducts an exclusion analysis under paragraph (c) of this section, and if the Secretary determines that the benefits of excluding a particular area from critical habitat outweigh the benefits of specifying that area as part of the critical habitat, then the Secretary shall exclude that area, unless the Secretary determines, based on the best scientific and commercial data available, that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

85 Fed. Reg. at 55,407 (emphasis added).

⁵ Jhariya, M.K., and Raj, A. 2014. Effects of wildfires on flora, fauna and physic-chemical properties of soil. *Journal of Applied and Natural Science*, 6 (2): 887 – 897.

⁶ Flannigan, M.D. et al. 2000. Climate Change and Forest Fires. *Science Total Env.* 262: 221-229.

⁷ Jhariya, M.K., and Raj, A. 2014. Effects of wildfires on flora, fauna and physic-chemical properties of soil. *Journal of Applied and Natural Science*, 6 (2): 887 – 897.

The proposed adoption of the word “shall” is clearly at odds with Congress’s unambiguous intent that the Secretary retain discretion to designate critical habitat regardless of the outcome of the exclusion analysis. This proposal conflicts with the broader purpose of the ESA. Congress passed the ESA in 1973 to “provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species” 16 U.S.C. § 1531(b). At the same time as a species is listed as threatened or endangered, the Services must designate and protect critical habitat for the species, subject to certain exceptions. 16 U.S.C. § 1533(a)(3), (b)(2). The listing and designation of critical habitat provisions are contained in Section 4 of the ESA – the section Congress labeled the “cornerstone of effective implementation” of the Act. S. Rep. No. 97-418, at 10 (1982). Congress expressly recognized the value of protecting critical habitat when it enacted the ESA, stating:

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).

In 1976, Congress again articulated the importance of designating critical habitat and prohibiting adverse modification of critical habitat:

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).

The U.S. Supreme Court has also long recognized the great importance of habitat to species recovery. In the landmark case *Tennessee Valley Authority v. Hill*, the Court held that the intent of Congress in drafting the ESA was to “halt and reverse the trend toward species extinction, whatever the cost.” 437 U.S. 153, 184–85 (1978). The Court upheld protection of the endangered snail darter and its habitat over other “primary missions” of federal agencies. *Id.* Key to the Court’s decision was the fact that the completion of the Tellico Dam would destroy not just the population of snail darters, but its critical habitat as well. *Id.* at 171. Despite more than \$100 million taxpayer dollars having been invested in the project, the Court reasoned that operation of the dam would clearly not “insure that [federal actions] do not *jeopardize*” a species’ continued existence or “*result* in the destruction or modification” of its habitat. *Id.* at

173 (emphasis in original) (*citing* 16 U.S.C. § 1536). The Court declared that “[t]his language admits no exception.” *Id.*

Because adopting the word “shall” would be more restrictive than the language of the Act, and is at odds with Congress’s unambiguous intent, this aspect of the proposal is arbitrary and capricious and should therefore be withdrawn.

III. The Proposal Will Provide Extractive Industries With Undue Influence In the Critical Habitat Designation Process

USFWS proposes to “assign weights of benefits of inclusion and exclusion based on who has the relevant expertise[.]” 85 Fed. Reg. at 55,401. This opens the door for extractive industries that profit from the use of public and private lands, as well as state and local governments with an interest in tax revenue from economic development, to have undue influence in the critical habitat designation process. The proposed rule provides little insight into how much weight USFWS would assign to information provided by those outside the agency, saying only that the “Secretary would assign weights to benefits consistent with expert or firsthand information[.]” *Id.* It is unclear what the agency means by “firsthand information.” Additionally, this reliance on outside information appears to assume that economic analyses provided by extractive industries and state and local governments that are associated with land valuations or with development and resource extraction projects are valid.

Along these lines, the proposal does not indicate whether, or how, USFWS would investigate the evidence provided to the agency and collect further data regarding such claims. The proposal simply states that weight would be afforded the information “unless the Secretary has knowledge or material evidence that rebuts that information.” *Id.* at 55,401, 55,407. The proposal does not make clear what is meant by the word “has.” If “has” means information already in the Secretary’s possession, then this would eliminate the agency’s ability to verify the information presented and conduct additional research, which would be an abrogation of USFWS’s duty to make decisions based on the best scientific and commercial data available. Ending habitat destruction is critical to advancing the ESA’s recovery goal, and to “ignore the link between designated habitat and species recovery whenever an opposing party demonstrates a compelling interest in rendering habitat uninhabitable would be incongruous and serve to frustrate the ESA’s primary purpose.” Dashiell Farewell, *Revitalizing Critical Habitat: The Ninth Circuit’s Pro-Efficiency Approach*, 46 ENVTL. L. 653, 676 (2016). It is crucial for science to remain the main driver of policymaking in achieving the ESA’s goal of species recovery, and therefore this aspect of the proposal should be withdrawn.

IV. Critical Habitat Designations Do Not Significantly Reduce Private Development

One justification for the adoption of certain aspects of the proposed rule appears to be USFWS’s concern about the impact of critical habitat designations on private landowners and developers. However, as will be discussed further in this section, studies show that critical habitat designations do not substantially limit private development. The ESA only restricts federal actions destroying or adversely modifying critical habitat; private activities that do not require federal permits are unaffected. 7 U.S.C. § 1536(a)(2). As such, private individuals need

only comply with the provisions of section 9 of the Act, which affects land use activities through its ban on the “take” of endangered species. *Id.* at § 1538 (“it is unlawful for any person . . . to . . . take any such species”), *see also* 16 U.S.C. § 1532 (definition of “take” is to “harass, harm, pursue, hunt, shoot, wound kill, trap, capture, or collect, or attempt to engage in any such conduct”). USFWS interprets “harm” and “harass” to include actions that adversely modify or destroy habitat of protected species, *see* 50 C.F.R. § 17.3, which means that private actors could be found in violation of the act based on how they use private lands.

However, according to a recent study analyzing data from 88,290 informal and formal consultations recorded by USFWS from January 2008 to April 2015, only two of the 6,829 formal consultations resulted in a jeopardy finding (0.0023 percent), one of which also resulted in a finding of adverse modification of critical habitat.⁸ It is worth noting that this consultation did not involve a private landowner; it covered a U.S. Forest Service proposal that resulted in jeopardy and/or destruction or adverse modification of critical habitat for 45 species.⁹ The biological opinion for that consultation was struck down in court and redone in 2011, with a subsequent finding of no jeopardy or destruction or adverse modification to critical habitat. The only remaining consultation with a jeopardy determination was allowed to proceed with implementation of reasonable and prudent alternatives designed to minimize and or offset the project’s effects.¹⁰ The study also found that no actions were stopped or extensively altered because of a finding of destruction or adverse modification of critical habitat.¹¹

The same study found that projects are also only slightly delayed by the consultation process. The ESA’s implementing regulations allow the Services 60 days to complete informal consultation, or 135 days to complete formal consultation and finalize a biological opinion, unless an extension is agreed upon. 50 C.F.R. § 402.13(c)(2), § 402.14(e). For informal consultation, where the relevant agency determines that the activity is “not likely to adversely affect” a species, *id.* § 402.13, the median duration was only 13 days.¹² The median duration of formal consultations was 62 days—less than half of the maximum permitted timeframe.¹³ Only

⁸ Jacob W. Malcom and Ya-Wei Li, Data contradict common perceptions about a controversial provision of the US Endangered Species Act, 112 Proceedings of the National Academy of Sciences 15844 (2015). Available at: <https://www.pnas.org/content/112/52/15844>.

⁹ *Id.*

¹⁰ *Id.* This project also did not involve a private landowner: The project related to implementation of a water management project in California affecting the delta smelt.

¹¹ *Id.* Even older studies found that projects requiring consultation rarely result in jeopardy or destruction or adverse modification determinations. A U.S. House of Representatives report to Congress on the 1982 amendments reported that of 8,817 informal and 1,945 formal USFWS consultations from 1979 to 1981, only 1.82 percent resulted in jeopardy and only two were stopped. U.S. House of Representatives (1982) H.R. Report 97-567, Part 1. House of Representatives, Committee on Merchant Marine and Fisheries, Endangered Species Act Amendments (U.S. Government Printing Office, Washington, DC). A later study by the World Wildlife Fund examined 71,560 informal and 2,000 formal USFWS consultations from 1987 to 1991 and found that only 0.47 percent of consultations resulted in jeopardy and only 0.02 percent were stopped due to section 7. DONALD BARRY ET AL., FOR CONSERVING LISTED SPECIES, TALK IS CHEAPER THAN WE THINK: THE CONSULTATION PROCESS UNDER THE ENDANGERED SPECIES ACT (1992). Finally, a study of 4,048 biological opinions completed by USFWS and NOAA between 2005 and 2009 found jeopardy and destruction or adverse modification determinations in only 7.2 percent and 6.7 percent of formal consultations, respectively. Dave Owen, *Critical Habitat and the Challenge of Regulating Small Harms*, 64 FLA. L. REV. 141 (2012).

¹² *Id.*

¹³ *Id.*

about 20 percent of formal consultations exceed the 135-day limit.¹⁴ Overall, the only recent scientific evaluation of the USFWS's implementation of section 7 demonstrates that data contradict the common perception that the provision severely impedes economic development. Therefore, to the extent that USFWS issued the proposed rule in response to such a misperception, the proposal is unsupported by data and therefore arbitrary and capricious.

V. Conclusion

Thank you for your consideration of these comments. If you have any questions or there is any additional information we can provide, please do not hesitate to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "Johanna Hamburger". The signature is written in a cursive style with a large initial "J".

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¹⁴ *Id.*