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**Comments regarding the Revision of
Regulations for Listing Species and
Designating Critical Habitat**

Submitted by:

Energy and Wildlife Action Coalition

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Public Comments Processing
Attn: FWS-HQ-ES-2018-0006
U.S. Fish and Wildlife Service
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Office of Protected Resources
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The Energy and Wildlife Action Coalition (“EWAC”)¹ submits these comments in connection with the U.S. Fish and Wildlife Service (“USFWS”) and National Marine Fisheries Service’s (“NMFS”) (collectively, the “Services”) July 25, 2018 notice (“Notice”) of proposed Revision of the Regulations for Listing Species and Designating Critical Habitat (“Proposed Regulations”).²

I. General Comments of Support

EWAC appreciates the time and effort the Services have expended in formulating the Proposed Regulations and believes they will benefit the Services, the regulated community, and, ultimately, species conservation efforts. The Proposed Regulations would result in clearer and more efficient administration of the Endangered Species Act (“ESA”) as well as decision-making processes that may be better able to withstand challenge by third parties.

For example, the Services’ proposal to revise 50 C.F.R. § 424.12 to more clearly identify situations in which designating critical habitat would not be prudent, including where a designation would “create a regulatory burden without providing any conservation value to the species concerned,”³ would reduce the cost of ESA implementation on the regulated community, while at the same time allow the Services greater time and resources to focus on actual threats to the listed species at issue. The Notice provides as an illustration situations where species experience threats due to events unrelated to habitat or that cannot be addressed through consultation, such as melting glaciers or disease.⁴ EWAC agrees that where a species is threatened or endangered due to factors that are unrelated to habitat or cannot be addressed by management actions developed through consultation, the Services’ resources are better expended pursuing research and other opportunities to find a resolution rather than processing consultations to assess and address potential impacts to “critical” habitat that, in fact, neither are “essential to the conservation of the species” nor require “special management...or protection.”⁵

The purpose of the comments set forth in the following sections is to provide the Services with a handful of recommended modifications to the Proposed Regulations that will further the Services’ efforts to improve the efficiency and effectiveness of ESA implementation.⁶

II. The Services’ Listing Regulations Should Provide Additional Clarification on the Meaning of “Foreseeable Future”

Section 3 of the ESA defines “threatened species” as a species “which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.”⁷ The Services’ existing regulations do not further elaborate on the degree of analysis required by the Services to determine that a species is threatened.⁸ The proposed revisions to 50 C.F.R. § 424.11 would establish that, in determining whether a species is threatened, the Services must “analyze whether the species is likely to become an endangered species within the foreseeable future” and then set forth a

¹ EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner.

² 83 Fed. Reg. 35,193 (July 25, 2018).

³ *Id.* at 35,197.

⁴ *Id.* at 35,197.

⁵ 16 U.S.C. § 1532.

⁶ 83 Fed. Reg. at 35,194.

⁷ 16 U.S.C. § 1532(20).

⁸ See, generally, 50 C.F.R. § 424.11.

loose, basic framework for undertaking the analysis. EWAC appreciates the Services' recognition that the agencies' regulations should provide a more specific framework for "threatened" determinations.

EWAC disagrees with the Services' proposed language that the agencies "need not identify the foreseeable future in terms of a specific period of time." While EWAC understands the Services may not want to constrain their listing analysis to a particular timeframe, we also are keenly aware that there are a significant number of species awaiting listing, downlisting, and delisting. Narrowing the scope of the Services' listing determination with respect to the "foreseeable future" would assist the Services in focusing the agencies' efforts on those species with more urgent needs, would allow agency staff to concentrate on higher priority issues, and would provide the regulatory community with much-needed predictability concerning species listings.

III. Additional Suggestions Concerning Critical Habitat

A. Clarify the role of already managed areas in critical habitat designations

EWAC recommends 50 C.F.R. § 424.12 be further revised to indicate specifically that the Services may determine that designation of critical habitat is not prudent for areas that are already under management for the benefit for the listed species, such as areas within species conservation banks or areas set aside and/or managed pursuant to the terms of a properly implemented, USFWS- or NMFS-approved habitat conservation plan, candidate conservation agreement with assurances, safe harbor agreements, or other such plans, including mitigation lands managed as a condition to a federal approval. With respect to areas that are occupied by listed species, section 3 of the ESA defines "critical habitat" as those areas "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."⁹ Areas already under management specifically for the benefit of listed species, in some cases, would not meet the second prong of the definition of "critical habitat" —that such areas require special management considerations.

Despite the fact that already-managed lands may not meet the second prong of the definition of critical habitat, in some cases landowners may be in favor of having mitigation lands or other lands already managed for the benefit of listed species included in a critical habitat designation. The Services should provide a process by which landowners can propose that the Services include these areas in the critical habitat designation. This process should be voluntary and at the discretion of the landowner.

B. Revise critical habitat regulations to further discourage designating unoccupied areas

EWAC supports the revisions set forth in the Proposed Regulations limiting the degree to which the Services may designate as critical habitat areas that are not occupied by the species at the time of their listing. However, language in the preamble suggests that, under the Proposed Regulations, the Services believe that critical habitat could be designated where the area is not, at the time, "usable habitat for the species."¹⁰ Designation of unusable habitat would be inconsistent with the plain meaning of ESA section 4 of the ESA, which requires the Services to designate, to the maximum extent prudent and determinable, "*habitat* of such species which is then considered to be critical habitat..."¹¹ The plain language of ESA section 4 simply does not contemplate that the Services would designate as critical habitat areas that do not contain habitat. In addition, as a practical matter, it is not feasible or workable for the Services to attempt to discern the future intentions of non-federal landowners as the basis for a critical habitat designation. Designations must be based on actual conditions of the area in question, not conjecture about future conditions. Therefore, EWAC recommends that the Services consider including an additional requirement for designating critical habitat within unoccupied areas: that any such unoccupied areas must, at the time of designation, contain areas presently capable of supporting the relevant listed

⁹ 16 U.S.C. § 1532.

¹⁰ 83 Fed. Reg. at 35,198.

¹¹ 16 U.S.C. § 1533(a)(A)(i) (emphasis added).

species. In other words, for an unoccupied area to be a candidate for critical habitat designation, that area must currently contain the functions and values necessary to support the listed species. Such a requirement would be in keeping with the plain meaning of section 4 of the ESA, which requires the Services to designate, to the maximum extent prudent and determinable, “habitat of such species which is then considered to be critical habitat...”¹² ESA section 4 simply does not contemplate that the Services would designate as critical habitat areas that do not contain habitat.

This issue is currently being reviewed by the U.S. Supreme Court in *Weyerhaeuser Co. v. United States Fish and Wildlife Service*.¹³ Oral argument is scheduled for October 1, 2018, and the Supreme Court could render a decision before the end of the year or early 2019. Given the imminence of a Supreme Court decision on the propriety of designating “unoccupied” habitat, it is EWAC’s recommendation that the Services should not finalize the portion of the Proposed Regulations addressing unoccupied critical habitat until the Supreme Court provides clarity on this point. EWAC, however, does not recommend the Services delay finalization of the other aspects of the Proposed Regulations.

IV. General Suggestion Concerning 50 C.F.R. pt. 424

In the Notice, the Services indicated that in addition to the specific revisions contained in the Proposed Regulations, the Services also seek “public comments recommending, opposing, or providing feedback on specific changes to any provisions in part 424 of the regulations, including...revising or adopting as regulations existing practices or policies...”¹⁴ In response to the Services’ general request for comments on improving the processes established in 50 C.F.R. pt. 424, EWAC notes that due to the agencies’ other obligations under the ESA and other statutes they administer, the Services often are unable to meet statutorily required deadlines applicable to petitions for listing, downlisting, and delisting. EWAC notes that neither downlistings nor delistings currently reside in USFWS’s National Listing Workplan, and, USFWS’s Methodology for Prioritizing Status Review and Accompanying 12-Month Findings on Petitions for Listing under the Endangered Species Act (“Listing Methodology”) means that USFWS’s decisions on downlisting and delisting petitions likely will be delayed and postponed. EWAC recommends that USFWS update its National Listing Workplan to include delisting and downlisting activities, as well as the agency’s Listing Methodology. In so doing, EWAC believes that the downlisting and delisting processes would become more efficient, and result in a benefit to the USFWS in their administration of the ESA, and to the regulated community, to whom predictability is paramount.

EWAC also recommends that 50 C.F.R. pt. 424 be revised to require peer review of all listing and critical habitat proposals. Peer review panels should include qualified, but disinterested third parties and represent a broad range of perspectives. The “charge” questions given to the peer reviewers should be carefully framed to ensure that the peer reviews focus on the appropriate considerations for a given species. The names of peer reviewers, the questions posed to them, and their responses to those particular questions should be published alongside any final listing or critical habitat designation rule, and where applicable, the Services must provide in any final listing or critical habitat rule the reasons why peer recommendations were not followed. These revisions would address the issues identified in the 2014 the Majority Staff Report of the House of Representatives’ Committee on Natural Resources titled, “Under the Microscope: An examination of the questionable science and lack of independent peer review in Endangered Species Act listing decisions.”¹⁵

¹² 16 U.S.C. § 1533(a)(A)(i).

¹³ *Markle Interests, L.L.C. v. United States Fish & Wildlife Serv.*, 827 F.3d 452 (5th Cir. 2016), cert. granted sub nom. *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 138 S. Ct. 924, 200 L. Ed. 2d 202 (2018).

¹⁴ 83 Fed. Reg. at 35,194.

¹⁵ Found at: https://naturalresources.house.gov/uploadedfiles/esa_peer_review_science-staff_report.pdf.

V. Summary

As noted above, the Proposed Regulations would greatly increase the efficiency with which the Services list threatened and endangered species and designate critical habitat. The efficiency gained by the proposals, if made final, would allow the Services to focus on and protect species that are in greatest need of conservation, reduce the Services' workload, and increase predictability for the regulated community. EWAC appreciates the opportunity to comment on the Services' Proposed Regulations, and looks forward to continuing to work with the Services in their efforts to improve the processes associated with listing and delisting endangered and threatened species, and designating critical habitat.

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