



NATIONAL ENDANGERED SPECIES ACT  
REFORM COALITION

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May 24, 2017

The Honorable Ryan Zinke  
Secretary  
U.S. Department of the Interior  
1849 C Street, NW  
Washington, DC 20240

Dear Mr. Secretary:

On behalf of the National Endangered Species Act Reform Coalition (NESARC), I would like to offer our recommendations to the Department as you and your staff consider regulatory improvements to implementation of the Endangered Species Act (ESA).

While the original intent of the ESA was to conserve and protect species that are threatened with extinction, the law has been increasingly used to block projects and to deter the legal use of privately owned land. NESARC and its members are committed to promoting effective and balanced legislative and administrative improvements to the ESA that support the protection of fish, wildlife and plant populations as well as responsible land, water and resource management.

NESARC respectfully suggests the following regulatory actions:

❖ ***Reverse “Critical Habitat” Regulations***

In February 2016, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services) published two rules and a final policy that significantly expand the ability of the federal government to broadly designate critical habitat and increase the likelihood of an “adverse modification” finding for actions with a federal nexus, with substantial economic implications for landowners and the regulated community.

Final Rule on Critical Habitat Designation Procedures, 81 FR 7414 (February 11, 2016)

- The final rule does not require the presence of physical or biological habitat features; removes the presumption that unoccupied areas are not designated; reserves broad discretion to determine the scope and scale of designations; weakens the distinction between occupied and unoccupied areas; and assumes that physical or biological features require special management.

Final Rule on Adverse Modification, 81 FR 7214 (February 11, 2016)

- The final rule lowers the threshold for an action to “appreciably diminish” critical habitat; includes alterations that preclude or delay the development of features that do not currently exist; and incorporates a recovery standard which will result in higher mitigation ratios.

Final Policy on Critical Habitat Exclusions, 81 FR 7226 (February 11, 2016)

- The final policy emphasizes that the Secretaries have discretion not to exclude any areas from critical habitat; provides factors that limit when exclusions will be made for lands/waters subject to general conservation measures, as well as for Habitat Conservation Plans, Candidate Conservation Agreements with Assurances, and Safe Harbor Agreements; includes a presumption against excluding federal lands; and limits the economic analysis to incremental economic impacts.

**RECOMMENDATION:** The Services should:

- (i) Propose policies and revised regulations that allow for a reasonable approach to the designation of critical habitat--including measures to ensure that economic impacts of such designations are fully disclosed and considered, and that require science-based, empirical evidence of species use and reliance on habitat features;
- (ii) Consider interim actions--such as guidance, policies and opinions--that ensure that the regulations, as finalized, are narrowly interpreted; and
- (iii) Work with stakeholders to identify a path forward on an appropriate definition of “adverse modification.”

❖ *Withdraw ESA Mitigation Policies Finalized During the Obama Administration*

On March 28, 2017, President Trump issued an Executive Order entitled “Promoting Energy Independence and Economic Growth,” which includes language that that revokes the November 3, 2015 Presidential Memorandum “*Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment.*” Subsequent directives have called for a review of the following actions that have a direct effect on implementation of the ESA:

Final Revisions to FWS Mitigation Policy, 81 FR 83440 (November 21, 2016)

- The final policy reverses the previous policy’s exclusion of species under the ESA; the goal of net conservation gain or no net loss and landscape-scale approach exceed ESA statutory authority; and the conservation objectives are vague and capable of very broad interpretation and application.

Final ESA Compensatory Mitigation Policy, 81 FR 95316 (December 27, 2016)

- The final policy includes a net gain/no net loss standard for compensatory mitigation and preference for landscape-level conservation which are inconsistent with the ESA; and impermissibly attempts to use other statutes to supplement its authority.

**RECOMMENDATION:** The Department should:

- (i) Withdraw the FWS Mitigation Policy and ESA Compensatory Mitigation Policy that were issued as a result of the 2015 Presidential Memorandum.

❖ *Dedicate Agency Resources to the Review and Revision of ESA Regulations and Policies*

The Administration should dedicate staff from both Services on a full-time basis to review existing regulations and policies and to implement and incorporate the necessary revisions to ESA policy. In addition to reversing the regulatory actions noted above, the Services should:

- (i) Review and revise the final rule on revisions to the regulations for economic impact analysis of critical habitat – 78 FR 53058 (August 28, 2013);
- (ii) Review and revise the final rule on revisions to the regulations for petitions – 81 FR 664762 (September 27, 2016);
- (iii) Create and/or modify regulations covering species delistings; and
- (iv) Reform and streamline the informal/formal Section 7 consultation process, and strengthen Section 6 to require consultation between the Services and state wildlife agencies, and concurrence of governors to listing and habitat determinations.

NESARC and its members stand ready to assist you and your staff as you review regulations to better implement the ESA. We also remain committed to advancing changes to the Act through Congress by encouraging lawmakers to pursue legislative improvements to make the law work better for species and people alike.

On behalf of the agricultural interests, cities and counties, commercial real estate developers, conservationists, electric utilities, energy producers, farmers, forest product companies, home builders, landowners, oil and gas companies, ranchers, water and irrigation districts, and other businesses and individuals throughout the United States that NESARC represents, we look forward to offering our assistance as you identify opportunities to advance improvements to ESA implementation.

Please do not hesitate to contact me at (202) 406-3664 or [ryany@fb.org](mailto:ryany@fb.org), or NESARC's Executive Director, Jordan Smith, at (202) 298-1914 or [jas@vnf.com](mailto:jas@vnf.com) if we can provide additional information or be of assistance.

Sincerely,



Ryan R. Yates  
Chairman



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