



NATIONAL ENDANGERED SPECIES ACT  
REFORM COALITION

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August 28, 2017

Ms. Therese Conant  
Attn: NOAA-NMFS-2017-0020  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910

Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

**Re: NESARC Comments on the National Marine Fisheries Service's Proposed Revisions to the Listing and Recovery Priority Guidelines**

Dear Ms. Conant:

On May 31, 2017, the National Marine Fisheries Service ("NMFS") proposed revisions to its guidelines for prioritizing the listing and recovery of species ("Guidelines") under the Endangered Species Act ("ESA").<sup>1</sup> The revised Guidelines are intended to better prioritize the development of recovery plans for ESA-listed species under NMFS's jurisdiction based upon considerations of the immediacy of the species' extinction risk, information on major threats, and certainty of successful implementation of management or protective actions. The National Endangered Species Act Reform Coalition ("NESARC") respectfully provides its comments and recommendations on the Guidelines.

NESARC is the country's oldest broad-based, national coalition dedicated solely to achieving improvements to the ESA and its implementation. As detailed in the membership list attached to these comments,<sup>2</sup> NESARC includes 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. 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.

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<sup>1</sup> *Listing and Recovery Priority Guidelines*, 82 Fed. Reg. 24,944 (May 31, 2017).

<sup>2</sup> See Appendix A.

## I. General Comments

The primary purpose of the ESA is to identify threatened and endangered species and to undertake efforts to protect, and ultimately, recover such species. Section 4(f) of the ESA directs NMFS, with limited exceptions, to develop and implement recovery plans for listed species.<sup>3</sup> NMFS is required, to the maximum extent practicable, to prioritize the recovery of those listed species most likely to benefit from such plans, and to also include “objective, measurable criteria” for delisting species.<sup>4</sup> Currently, NMFS has jurisdiction over 94 domestically listed marine species and 63 foreign species. For the domestic species, it appears that NMFS has only finalized recovery plans for 52 of the listed species. Further, since the enactment of the ESA, NMFS has only delisted four species, and only two of those species were delisted because they had reached recovery goals.<sup>5</sup> These data underscore the need for NMFS to develop and implement recovery plans in a more efficient and timely manner. The development of prioritization criteria is an important step in this process, but should not detract from efforts to prepare and implement recovery plans that will actually achieve the recovery of species.

NESARC wholeheartedly supports the goal of recovering listed species, and appreciates NMFS's efforts to improve the prioritization of recovery planning and implementation. However, it is important to stress that the causes of NMFS's delay in finalizing recovery plans are not driven by the lack of prioritization criteria, but by other root causes—such as the slow pace of recovery plan development and the inability of NMFS's recovery teams to reach agreement on the elements of recovery plans—which also must be addressed. Recovery planning must not be an academic exercise. NMFS needs to adopt measures that go beyond prioritizing the order in which recovery planning is conducted for certain species, and focus on practically and timely identifying and implementing recovery measures that lead to the delisting of species.

Recovery planning should not be limited to a scientific inquiry that informs the allocation of scarce agency resources.<sup>6</sup> In some circumstances, there will be States, local governments, or other entities who are willing to fund or conduct activities that will promote recovery. NMFS must recognize the important role these non-Federal partners have in achieving recovery of listed species and prioritize the recovery planning for species where there are such partners who will contribute to the effort. By taking this broader approach to prioritization, and making the process more practical and streamlined, NMFS can better ensure that recovery planning is more effective and actually results in the recovery and delisting of threatened and endangered species.

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<sup>3</sup> 16 U.S.C. § 1533(f)(1).

<sup>4</sup> *Id.* §§ 1533(f)(1)(A), 1533(f)(1)(B)(2).

<sup>5</sup> The eastern distinct population segment (DPS) of the Steller sea lion and eastern North Pacific DPS of gray whale were delisted due to recovery. The Caribbean monk seal was delisted because of extinction, and the canary rockfish was delisted based on a data error.

<sup>6</sup> *See, e.g., Leah R. Gerber, Conservation Triage or Injurious Neglect in Endangered Species Recovery*, 113 Proc. Nat'l Acad. Sci. 3563 (Mar. 29, 2016).

## II. Specific Comments on Proposed Guidelines

### A. Identification of Magnitude of Threat

NMFS proposes to revise the magnitude of threat criterion to include a demographic risk rank based on the species listing status and consideration of the species' productivity, spatial distribution, diversity, abundance, and trends.<sup>7</sup> NMFS explains that its intent is to provide greater emphasis on the species' risk and more detail on the factors considered in assigning the risk rank. NESARC does not object to the consideration of demographic risks within the threat criterion; however, NMFS should further refine this criterion to match the magnitude of the threat to the immediacy of actions that can be taken for the species.

The inclusion of a demographic risk assessment, without placing this element within the context of recovery measures, will not meaningfully improve the recovery planning process. NMFS typically conducts an analysis of several demographic risks (abundance, productivity, spatial distribution, diversity) when determining whether to list a species. Thus, a listed species would presumably exhibit one of these demographic risk conditions, either presently or in the foreseeable future, by nature of it being listed as endangered or threatened. To the extent that these risk conditions already are captured by the species' listing status, they do not further inform the priority ranking process or allow for ranking distinctions within the endangered or threatened classifications.

Several other improvements to the magnitude of threat criterion are warranted. First, NMFS should ensure that the magnitude of threats analysis does not consider population trends in isolation. Rather, a population trend analysis must be distilled and informed by the immediacy of effects to the species from identified threats as well as the role of habitat and ecosystem functions in relationship to those population trends. Second, data quality is an important consideration when developing population trend assessments. Species for which there are limited or uncertain data should not default to the highest prioritization.<sup>8</sup> Rather, this category of trend estimation should be classified as moderate and low for endangered and threatened species, respectively. Finally, NMFS should include an assessment of whether a fluctuation in population is temporary (and may self-correct) or is indicative of a long-term trend, and prioritize species accordingly.

NESARC encourages NMFS to adopt a more simplified assessment framework that captures the severity of the risk within the context of the potential and immediacy of conservation measures for the species.

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<sup>7</sup> 82 Fed. Reg. at 24,946.

<sup>8</sup> *Id.* at 24,946.

## B. Identification of Recovery Potential

NMFS proposes to redefine the recovery potential by splitting the criterion into three components—(1) whether major threats are known and the species response is well understood; (2) whether the United States has jurisdiction, authority, or influence to implement management or protective actions; and (3) the certainty that management or protective actions will be effective. NMFS is creating a framework that is overly complicated, includes components that are unnecessary or redundant, and ultimately detracts from a meaningful assessment of recovery potential.

NMFS should revise the Guidelines to streamline the assessment of recovery potential by simplifying the components that are considered:

- For component 1, NMFS proposes to make a ranking distinction based on whether the natural or man-made threat has been identified and whether the species' responses to these threats are well understood. However, this determination is already made by NMFS as part of the decision on whether to list the species. If NMFS lacks the requisite data on identifiable threats or the species' response to those threats in the recovery potential context, the species should not have been listed as a threshold matter.
- The criteria for components 2 and 3 are sufficiently related that they do not need to be considered separately. The certainty that a management or protective action will be effective will depend, in part, on whether the United States has jurisdiction, authority, or influence to abate the identified threat. NMFS could simplify the proposed Guidelines by merging components 2 and 3.
- Both component 2 and 3 assign a high priority when there are management or protective actions that would offset the impacts of climate change. NMFS states, “[w]here climate change impacts are a major threat and necessary actions to abate the threat are global in nature, management or protective actions under U.S. authority to address a threat that would help offset the impacts of climate change would fall into this category.”<sup>9</sup> The application of this factor is unclear, and appears to subvert the purpose of the Guidelines by automatically elevating priority whenever there is an action that addresses a threat to a species that is affected by climate change. As an initial matter, NMFS's authority and jurisdiction is not coincident to “U.S. jurisdiction” and the treatment of threats, under the ESA, must remain focused on addressing those threats and conserving species. NMFS's criterion seemingly implies that it will place the needs of the species secondary to “actions that offset climate change impacts.” This order should be reversed with species protection and conservation measures being prioritized without respect to whether there are perceived secondary benefits to other NMFS programs or priorities, not related to

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<sup>9</sup> *Id.* at 24,947.

ESA implementation. Given the large uncertainties associated with climate change, this climate priority factor is simply inconsistent with the better logic of focusing recovery on known, manageable threats where recovery actions are more effective.

- As part of component 3, NMFS should assign a high priority when management or protective measures are technically and economically feasible and capable of timely implementation. NMFS explains that “technically feasible” means “the scientific, engineering, and operational aspects of management or protective actions that are capable of being implemented.”<sup>10</sup> While technical feasibility is an important consideration, without a corresponding assessment of economic feasibility and timeliness, there is no way to fully assess the certainty of whether a particular action will be effective. NMFS should include consideration of economic feasibility and the timing of implementation to prioritize the recovery of those species for which there are practical conservation measures that will be effective.
- NMFS also should add a component that assigns priority based on the degree of certainty associated with the implementation of management or protective actions. For example, as noted above, NMFS should consider whether there are State, local government, or other parties that will assist in recovery efforts when prioritizing recovery potential. These non-Federal partners may have more current and better data regarding species conservation and may be undertaking or considering voluntary actions to promote species recovery.

Ultimately, the priority for preparing and implementing recovery plans should go to those species where there is a combination of opportunities that have the greatest potential for success and the ability for early or immediate implementation of recovery measures. As the ESA dictates, NMFS must give priority to those species “that are most likely to benefit” from recovery plans.<sup>11</sup> This can only be effectuated by focusing the recovery potential prioritization criterion on the certainty of both the effectiveness and implementation of management or protective actions.

### C. Conflict Criterion

NMFS proposes to revise the Guidelines to no longer consider the criterion associated with prioritizing the recovery of species that are in conflict with certain anthropogenic activities. NMFS states that it will consider “all ESA-listed marine and anadromous species to be in conflict with activities related to construction or other developmental projects, or other forms of economic activity.”<sup>12</sup> NMFS’s assumption that all species may be in conflict to some degree,

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<sup>10</sup> *Id.* at 24,950.

<sup>11</sup> 16 U.S.C. § 1533(f)(1)(A).

<sup>12</sup> 82 Fed. Reg. at 24,945.

either directly or indirectly, with some form of economic activity does not justify removing this criterion.

The ESA explicitly requires NMFS to prioritize the recovery of those species that are “most likely to benefit from such [recovery] plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity.”<sup>13</sup> The Act can be no clearer on this point, and NMFS’s decision to remove this criterion and “assume” that all species have the same magnitude of risk or conflict with economic activity is a blatant disregard for this statutory prioritization.

Instead, there are identifiable variations in the scope (global, regional, or local), nature (direct or indirect), and degree of potential conflicts between listed species and economic-related activities. NMFS should retain this criterion and develop a prioritization framework that reflects these variations in any anthropogenic conflicts that may occur. Further, where appropriate, NMFS should ensure that it clearly identifies and explains the magnitude of risk or conflict with economic activity and identifies recovery measures that facilitate species conservation while ensuring that economic activities can continue. This balancing of interests is key to ensuring an effective recovery program, and would benefit both listed species and the regulated community by speeding recovery and delisting and ensuring that ongoing economic activities can continue.

#### D. Recovery Action Priority

NMFS proposes to expand the current number of recovery task priorities by adding two additional categories—priority number 4 would include actions necessary to facilitate post-delisting monitoring, and priority number 0 would include actions that advance broader goals beyond delisting.<sup>14</sup> NMFS acknowledges that these proposed categories are not linked to downlisting or delisting criteria and are not needed for ESA recovery. Accordingly, they should not be characterized as recovery actions for inclusion in recovery plans. Instead of identifying bureaucratic oversight mechanisms, NMFS should emphasize the development of better and more achievable delisting criteria. By excluding extraneous criteria, NMFS can remain focused on making recovery planning more efficient and expeditious.

Furthermore, NMFS should not strictly adhere to implementation based on priority number. In some cases, it may be necessary in order to prevent extinction. In other cases, there may be lower priority actions that, if taken, would achieve the recovery and delisting of species. These actions should not be deemphasized simply because the species is threatened or has a lower demographic risk ranking. Given that recovery and delisting is the ultimate goal, NMFS should encourage the implementation of recovery actions that will achieve that goal irrespective of species status or action priority.

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<sup>13</sup> 16 U.S.C. § 1533(f)(1)(A) (emphasis added).

<sup>14</sup> 82 Fed. Reg. at 24,948.

#### E. Reassessment of Recovery Priority

NMFS states that recovery priority will be assessed on a biennial basis, through the Section 4(f)(3) report to Congress, and during the five-year status review process.<sup>15</sup> NMFS anticipates that recovery prioritization will be a dynamic process, and that species can move up or down the priority scale depending on whether there are management or protective actions that can be implemented and be effective at recovering the species.

NESARC agrees that recovery prioritization should be reassessed and revised on a periodic basis. However, NMFS must ensure that the reprioritization of a species' recovery ranking is dictated by the goal of recovery and delisting, and does not simply perpetuate the maintenance of the species' listing status. For example, if recovery actions are being implemented and are effective, a species' demographic risk rank may decrease if population trends stabilize or increase. Under the Guidelines, this could correspond to a lower future recovery priority, deemphasized recovery actions, and delayed progress towards delisting. This result is contradictory to the purpose of the ESA. NMFS must ensure that successful recovery actions are recognized, encouraged, and prioritized so that species can be recovered and delisted in an efficient and timely manner.

#### F. Definitions

For purposes of the Guidelines, NMFS proposes to define several terms.<sup>16</sup> Several of these terms—i.e., endangered species, foreseeable future, and threatened species—have broader ESA application and are either defined or referenced in the ESA. It is highly inappropriate for NMFS to unilaterally modify these long-standing ESA definitions. Moreover, the agency cannot change the meaning of the terms from that set forth in the statute itself. If NMFS nonetheless feels that re-writing these definitions is necessary, the agency should engage with the U.S. Fish and Wildlife Service to propose the changes with an appropriate explanation in a separate notice and comment rulemaking to amend the joint regulations on listing at 50 C.F.R. § 424.02.

In defining “endangered species” and “threatened species,” NMFS proposes to distinguish the terms based on the proximity of extinction. NMFS states that “[t]he primary statutory difference between a threatened species and an endangered species is the timing of when a species is in danger of extinction, either presently (endangered) or in the foreseeable future (threatened).”<sup>17</sup> NESARC generally agrees that this temporal distinction is the primary difference between the two listing classifications.

NMFS explains that the “foreseeable future” describes “the extent to which the Secretary can, in making determinations about the future conservation status of the species, reasonably rely

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<sup>15</sup> *Id.* at 24,949.

<sup>16</sup> *Id.* at 24,949-50.

<sup>17</sup> *Id.* at 24,950.

on predictions about the future.”<sup>18</sup> If NMFS retains this definition, it must also clarify that the duration of the foreseeable future only extends as far as NMFS can make “reliable predictions” about the future.<sup>19</sup> This is consistent with the Supreme Court’s statement that the best available scientific and commercial data standard prevents the ESA from being “implemented haphazardly, on the basis of speculation or surmise.”<sup>20</sup> The requisite ability to make reliable predictions about the future applies to both threats to the species and the species’ response to those threats.

NMFS proposes to distinguish between “major” and “non-major” threats, with recovery planning focused on addressing the former. NMFS defines a “major threat” as “a threat whose scope, immediacy, and intensity results in a response by the species that prevents the improvement of its status to the point that such species may not be reclassified or delisted based on the factors set out in section 4(a)(1) of the ESA.”<sup>21</sup> If these definitions are retained in the Guidelines, NMFS must provide additional clarification on the distinction between the two threat categories, and how they will be identified and considered during the recovery planning process.

NMFS proposes to assign a higher priority when there are management or protective actions that are “technically feasible.” In assessing technical feasibility, NMFS should encourage the implementation of actions that rely upon existing or proven technology. Conversely, NMFS should not prioritize actions that use new technologies with no demonstrated likelihood of success or effectiveness. Further, as explained above, this definition must be revised and expanded to also include an assessment of economic feasibility and the timing of implementation. NMFS should include, for example, consideration of the cost of the management or protective action, available sources of funding, and implementation commitments from Federal and non-Federal partners.

#### G. Failure to Incorporate Existing Conservation Programs

After listing a species and before development of a recovery plan, NMFS often engages in numerous conservation efforts with other federal agencies, states, and private stakeholders. These take the form of consultations under ESA section 7, take permits issued under ESA section 10 with accompanying habitat conservation plans, and safe harbor agreements or other plans and agreements, often at a landscape scale. These actions usually contain well-conceived conservation programs that are in place. To ensure that these efforts are recognized by the recovery team, the guidelines must establish the presumption that these programs are contributing to species conservation and be incorporated into the recovery plan.

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<sup>18</sup> *Id.* at 24,949.

<sup>19</sup> Department of the Interior Solicitor’s Memorandum M-37021, “The Meaning of ‘Foreseeable Future’ in Section 3(20) of the Endangered Species Act” at 8 (Jan. 16, 2009).

<sup>20</sup> *Bennett v. Spear*, 520 U.S. 154, 176 (1997).

<sup>21</sup> 82 Fed. Reg. at 24,950.



### **III. Conclusion**

NESARC greatly appreciates the opportunity to provide these comments to NMFS. We respectfully request that you take these comments into full consideration before finalizing the Guidelines.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tyson Kade", with a long horizontal flourish extending to the right.

Tyson Kade  
NESARC Counsel



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