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REFORM COALITION
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Ms. Kelly Denit
Attn: NOAA-NMFS-2017-0067
National Marine Fisheries Service
Office of Sustainable Fisheries
1315 East-West Highway
Silver Spring, MD 20910

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

Re: NESARC Comments on Streamlining Regulatory Processes and Reducing Regulatory Burdens

Dear Ms. Denit:

On July 7, 2017, the National Oceanic and Atmospheric Administration ("NOAA") requested comments on the efficiency and effectiveness of current regulatory processes, and if current regulatory processes can be further streamlined or expedited in a manner consistent with applicable law.[1] The National Endangered Species Act Reform Coalition ("NESARC") respectfully provides the following comments and recommendations on improvements that should be made to regulations under the Endangered Species Act ("ESA").

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,[2] 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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[1] *Streamlining Regulatory Processes and Reducing Regulatory Burden*, 82 Fed. Reg. 31,576 (July 7, 2017).

[2] *See* Appendix A.

I. Recommendations for Regulatory Improvements to the ESA

The ESA was originally enacted in 1973, and the statute has remained largely unchanged and unauthorized for nearly a quarter of a century. The operative statutory provisions are implemented through regulations promulgated by the National Marine Fisheries Service ("NMFS") and the U.S. Fish and Wildlife Service ("FWS") (collectively, the "Services"). While there have been piecemeal revisions to these regulations over the years, implementation of the ESA would benefit significantly from a holistic review of the regulatory structure. By conducting this type of review, NMFS, in collaboration with FWS, can best identify and incorporate efficiencies and improvements that have been learned during the past 40 years of ESA implementation.

The listing of a species as threatened or endangered and the designation of critical habitat have significant regulatory, economic, and other consequences. Private landowners, state and local governments, commercial entities, and other parties are required to conduct Section 7 consultation on any Federal action that may affect a listed species or its critical habitat or seek a permit under Section 10 to avoid liability for a prohibited take of the species. While the goal of the ESA is to ultimately recover and delist these species, there has only been limited success to date. There are regulatory improvements that can and should be made to each of these ESA components to alleviate unnecessary economic impacts on the regulated community, reduce administrative inefficiency, and modernize implementation of the Act.

A. Improvements to the Section 7 Consultation Process

Revisions to the ESA Section 7 consultation regulations are necessary to improve the efficiency and nature of the process while maintaining the core protections of the ESA. The consultation process has proven to be unwieldly—too complex for simple permits and inadequate for application to complex regulatory actions, such as pesticide registrations under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The Services should improve the process by streamlining the existing procedures, clarifying certain regulatory definitions, and ensuring that the implementation of biological opinions is more cost effective and reliable. In addition, the Services should encourage greater collaboration with applicants so that reasonable, workable solutions can be identified and achieved, and that consultation can be concluded within the deadlines provided by statute. NESARC requests that NMFS, in collaboration with FWS, take the following actions:

- Promulgate regulations recognizing that consultation is not required for agency actions with discountable, insignificant, or beneficial effects on a species or its critical habitat. This guidance is currently contained in the Services' Consultation Handbook,[3] but should be formally adopted as regulations to provide certainty and further inform the "not likely to adversely affect" determination.

[3] FWS and NMFS, *Endangered Species Consultation Handbook, Procedures for Conducting Consultation and Conference Activities under Section 7 of the Endangered Species Act* at 3-12 (1998).

- Revise the definition of "environmental baseline" to focus on current environmental conditions.[4] The environmental baseline is intended to provide a "snapshot" of a species' health at the time of the consultation. Preapproved or preexisting activities, projects or facilities, and the associated operational effects on species and habitat, must be included in the baseline for any consultation on ongoing operations.

- Revise the definition of "effects of the action" to ensure that consideration of "direct effects" and "indirect effects" incorporates the principles of proximate causation and reasonable foreseeability.[5] There must be a close causal and measurable connection between the proposed action and any effects—i.e., the action must "directly produce" the resulting effect on the species or critical habitat. A direct or indirect effect should not be included if it will occur irrespective of the proposed action.

- Revise the definition of "cumulative effects" to exclude "future Federal activities that are physically located within the action area of the particular Federal action under consultation."[6] This is consistent with the Service's long-held policy which states that, because future Federal actions will be separately subject to Section 7 consultation, "their effects will be considered at that time and will not be included in the cumulative effects analysis."[7]

- Revise the definition of "biological assessment" to include other documents that contain an analysis of the potential effects of a proposed action on listed species and critical habitat.[8] Such documents may include environmental assessments or environmental impact statements prepared pursuant to the National Environmental Policy Act, pesticide registration assessments under FIFRA, or other similar documents that contain the information required to initiate consultation.

- Reconsider the definition of "destruction or adverse modification" to prevent the over-expansive and unduly burdensome application of this statutory concept.[9] Contrary to the Services' current interpretation, the regulatory phrase "appreciably diminishes" must be construed to mean a "considerable reduction" in the value of critical habitat. In addition, any adverse modification must be based on impacts to actual physical or biological features, and not encompass alterations that "preclude or significantly delay development" of features that do not currently exist. Finally, the focus on "conservation of a listed species" impermissibly converts the Section 7 consultation analysis into the imposition of a recovery standard.

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[4] 50 C.F.R. § 402.02.

[5] *Id*.

[6] *Id*.

[7] *Interagency Cooperation*, 51 Fed. Reg. 19,932, 19,933 (1986).

[8] 50 C.F.R. § 402.02.

[9] *Id*. For additional information, see NESARC's comments, dated October 9, 2014, submitted in Docket No. FWS-R9-ES-2011-0072.

- Establish deadlines for the completion of informal consultation and the timely issuance of any required concurrence by FWS or NMFS that a proposed action will not likely adversely affect a listed species or any critical habitat. ESA Section 7 provides statutory deadlines for the completion of formal consultation, and the Services should include corresponding deadlines for informal consultation to ensure that the entire consultation process proceeds in an expedient manner.

- Expand the use of informal consultation, programmatic consultation, and other consultation strategies to improve efficiency. The Services should more fully utilize the expertise of action proponents and consulting agencies to inform the consultation process. For each category of proposed actions, the Services should also develop standard operating procedures for consultations that draw on relevant, reliable, and qualified data.

B. Revisions to the Procedures for the Designation of Critical Habitat

The process for designating critical habitat needs to be further reformed to reduce the resulting economic and regulatory burdens placed on affected entities. While the Services recently revised these regulations,[10] additional changes are necessary to conform the regulations to Congressional intent and the explicit statutory criteria.[11] Critical habitat designations in occupied areas can only include those areas where essential physical or biological features are currently found. For unoccupied areas, the Services must first determine that the area is habitable, and then that the designation of occupied areas, alone, is insufficient for conservation of the species. Finally, the scale of any critical habitat designation must be limited to "specific areas" and not include broad expanses of lands and waters that extend "as far as the eyes can see and the mind can conceive."[12] NESARC requests that NMFS, in collaboration with FWS, take the following actions:

- Clarify that critical habitat can only be designated in areas that are already habitat for the species. Congress included a clear habitability requirement in the ESA, and this must be reflected in the regulations.[13]

- For both occupied and unoccupied habitat, ensure that the scope of any designation is limited to "specific areas." The Services have impermissibly expanded their discretion to designate areas "at a scale determined by the Secretary to be appropriate."[14] Instead, the scale of any critical habitat designation must be consistently applied and be at a level of specificity that ensures that homes, businesses, and other areas that do not contain

[10] *Implementing Changes to the Regulations for Designating Critical Habitat*, 81 Fed. Reg. 7,414 (February 11, 2016).

[11] For additional information, see NESARC's comments, dated October 9, 2014, submitted in Docket No. FWS–HQ–ES–2012–0096.

[12] 124 Cong. Rec. 38,131 (1978).

[13] 16 U.S.C. § 1533(a)(3)(A)(i) ("The Secretary . . . shall . . . designate any habitat of such species which is then considered to be critical habitat").

[14] 50 C.F.R. § 424.12(b)(1), (2).

essential physical or biological features (for occupied areas) or essential habitat (for unoccupied areas) are not broadly swept into a critical habitat designation.

- Revise the definition of "geographical area occupied by the species" to only include areas with sustained or regular use by the species.[15] Occupation of an area requires a level of residency or control over an area, not mere transient or temporary presence, and cannot be conflated with a species' range. Range is a broader concept that encompasses areas that are both occupied and unoccupied by the species.[16]

- Revise the definition of "physical or biological features" to reflect that an occupied area cannot be designated based upon "habitat characteristics that support ephemeral or dynamic habitat conditions."[17] The ESA is clear that occupied areas may be designated as critical habitat only where essential physical and biological features "are found."[18] The requisite features must actually exist in the specific area at the time of designation, and the Services cannot include areas merely because there is a possibility for such features to develop at some future time.

- Further revise the definition of "physical or biological features" to recognize that such features must have a greater biological significance than simply "support[ing] the life-history needs of the species."[19] Congress explicitly required that the identified physical or biological features must be "essential to the conservation of the species."[20] "Essential" is a higher standard (i.e., absolutely necessary or indispensable) that does not include any or all habitat features that support a species.

- A determination of whether physical or biological features "may require special management considerations or protection" must account for the existence of state, county, local and voluntary management and protection measures.[21] Areas with existing habitat management and protective measures (included those provided by habitat conservation plans, candidate conservation agreements with assurances, safe harbor agreements, etc.) render critical habitat redundant, and designation of those areas provides no added benefits for the species.

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[15] *Id*. § 424.02.

[16] 16 U.S.C. § 1533(c)(1) (requiring the Services to "specify with respect to each such [listed] species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range.") (emphasis added).

[17] 50 C.F.R. § 424.02.

[18] 16 U.S.C. 1532(5)(A)(i).

[19] 50 C.F.R. § 424.02.

[20] 16 U.S.C. § 1532(5)(A)(i).

[21] 50 C.F.R. § 424.12(b)(1)(iv).

- Revise the regulations to provide specific criteria for the designation of unoccupied habitat.[22] Without such standards, the Services cannot consistently determine whether an unoccupied area is essential for conservation of the species. The Services should also reinstate their previous requirement that a designation of unoccupied habitat will only occur "when a designation limited to its present range would be inadequate to ensure the conservation of the species."[23] This regulation is consistent with Congressional intent, and maintains the proper relationship between occupied and unoccupied habitat.

The Services must also revise how the economic and other impacts of a critical habitat designation will be determined and analyzed when considering whether to exclude an area from critical habitat.[24] Most importantly, the use of an incremental impacts analysis (i.e., "with and without the designation") is insufficient for fulfilling the economic impacts analysis required under ESA Section 4(b)(2).[25] By attributing almost all of the regulatory burdens and economic costs arising under the ESA to the listing decision, the Services incorrectly identify only those marginal costs that are "solely" attributed to a later designation of critical habitat. This approach ignores baseline economic conditions and fails to fully consider how a critical habitat designation will impact a particular area. In addition, rather than considering impacts at a scale that the Secretary determines to be appropriate, the Services should utilize a scale that ensures that such analysis can be relied upon in order to determine, consistent with the ESA, that a "particular area" may be excluded.[26] Finally, the Services should use quantitative assessment methodologies, to the maximum extent practicable, and only rely upon qualitative assessments of economic impacts when there is insufficient quantitative data available to conduct an economic impacts analysis consistent with the requirements of the ESA and the Data Quality Act.

C. Clarify the Listing Process and Increase State and Local Government Involvement

Species do not receive protection under the ESA until they are listed as either endangered or threatened.[27] These decisions are frequently dictated by petitions to list species, which trigger mandatory and inflexible statutory deadlines for the Services to act.[28] The Services have no ability to prioritize actions for imperiled species, lack the resources to act in a timely manner, and are often forced to make decisions without full and thorough consideration of scientific data.

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[22] *Id*. § 424.12(b)(2).

[23] *Id*. § 424.12(e) (2015).

[24] For additional information, see NESARC's comments, dated October 23, 2012, submitted in Docket Nos. FWS-R9-ES-2011-0073 & NOAA-120606146-2146-01.

[25] 50 C.F.R. § 424.19(b).

[26] 16 U.S.C. § 1533(b)(2).

[27] *Id*. § 1533(a)(1).

[28] *Id*. § 1533(b)(3).

These petition deadlines are enforced through litigation and settlements, without public involvement, which further perpetuates the underlying problem.[29]

To help alleviate these issues, the Services should identify opportunities for the greater involvement of, and collaboration with, state and local government agencies.[30] State and local governments have unique authorities and expertise on the management, protection, and conservation of species and habitat within their jurisdiction. However, other than requiring a petitioner to provide notice to State agencies prior to submitting a petition,[31] and notice to State agencies and counties of proposed regulations,[32] the expertise of these entities has been largely marginalized in the implementation of listing and critical habitat decisions. The Services should better utilize the expertise and abilities of State and local government agencies by providing a greater role in the listing and critical habitat designation process.

In addition, the Services should promulgate regulations to define the operative terms within the statutory definitions of "endangered species" and "threatened species."[33] The phrases "in danger of extinction," "foreseeable future," and "significant portion of its range" ("SPR") are vague and incapable of precise interpretation and consistent application. In addition, when a species is determined to be threatened or endangered within a SPR, the Services should limit the listing classification (and any designated critical habitat) to that identified portion of the species' range, and not apply it range-wide.[34] Finally, NMFS should reevaluate its policy on "evolutionary significant units" to ensure that it is consistent with the distinct population segment policy and the requirements of the Act. Further clarification of these terms is necessary to provide regulatory certainty to the ESA listing process.

D. Improve Recovery Planning to Achieve the Goal of Delisting Species

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.[35] 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

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[29] For revisions that could be made to improve the petition process, see NESARC's comments, dated September 18, 2015 and May 23, 2016, submitted in Docket No. FWS-HQ-ES-2015-0016.

[30] 16 U.S.C. § 1535(a) ("In carrying out the program authorized by this chapter, the Secretary shall cooperate to the maximum extent practicable with the States.").

[31] 50 C.F.R. § 424.14(b).

[32] 16 U.S.C. § 1533(b)(5)(A)(ii).

[33] *Id*. § 1532(6), (20).

[34] For additional information, see NESARC's comments, dated March 8, 2012, submitted in Docket No. FWS-R9-ES-2011-0031.

[35] 16 U.S.C. § 1533(f)(1).

criteria" for delisting species.[36] However, many species do not have recovery plans and, consequentially, no criteria for delisting.[37]

The Services' regulations state that "[a] species may be delisted on the basis of recovery only if the best scientific and commercial data available indicate that it is no longer endangered or threatened."[38] This provision should be revised to better link the recovery planning process with the actual delisting of species. Given that recovery plans are required to include "objective, measurable criteria," the regulations should require the establishment of meaningful and enforceable delisting criteria, with measures that are practicable and affordable to implement, and require the delisting of a species when those criteria are achieved.

E. Promote and Enhance the Use of Voluntary Conservation Measures

Voluntary conservation efforts have been at the heart of most species' recovery. NESARC strongly urges NMFS to promote and encourage these conservation efforts by creating new avenues for States, local governments, private property owners and other non-federal entities to proactively participate in species recovery efforts. For candidate conservation agreements with assurances and safe harbor agreements, NMFS should promulgate regulations formalizing the application, issuance, and revocation requirements along with the "no surprises" assurances provided to the permittee. Instead of continuing to rely upon policy documents, these regulations would provide potential applications with the regulatory certainty necessary to proceed. In addition, NESARC requests that NMFS, in collaboration with FWS, take the following actions:

- Identify opportunities to streamline the development and approval of habitat conservation plans (HCP) for incidental take permits. By reducing delays and minimizing the costs, the Services can further incentivize the use of HCPs as a conservation mechanism.

- Eliminate the policy currently followed in the Pacific Northwest regions that prohibits a single Service from issuing a Section 10 permit if it would cover lands and practices that may affect a listed species under the jurisdiction of the other Service.

- Issue guidance insisting on cooperation with the FWS in processing proposed HCPs and other conservation agreements, and further instruct NMFS staff to focus on the conservation benefits from working with landowners and other stakeholders.

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[36] *Id*. §§ 1533(f)(1)(A), 1533(f)(1)(B)(2).

[37] NMFS currently has jurisdiction over 94 domestic and 63 foreign species, and only 52 of those species have recovery plans. NMFS has delisted four species, and only two of those species were delisted due to recovery.

[38] 50 C.F.R. § 424.11(d)(2).

II. Conclusion

NESARC greatly appreciates the opportunity to provide these comments to NOAA. We respectfully request that you take these comments into full consideration when contemplating revisions to the ESA regulations.

Sincerely,

Tyson Kade
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