

September 24, 2018

Public Comments Processing
Attention: FWS-HQ-ES-2018-0006,
FWS-HQ-ES-2018-0007, and FWS-HQ-ES-2018-0009
U.S. Fish and Wildlife
MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Comments on Proposed Regulatory Revisions to Endangered Species Act Implementation

Dear Sir or Madam:

The City of Austin's Wildland Conservation Division has reviewed the proposed changes to 50 CFR 424, 17, and 40 and is submitting our comments for all three sections of the CFR. As a permit-holder of one of the first regional habitat conservation plans in the nation, the Balcones Canyonlands Conservation Plan, we have firsthand experience of how the ESA can work to protect endangered species while promoting a healthy economy and desirable place to live. We are very concerned about the proposed regulatory revisions, which we believe would significantly weaken the ESA and put species at an unnecessary increased risk. Any changes to the ESA's regulations should be to strengthen its ability to protect species from going extinct and to help them recover so they are no longer at risk of extinction. We urge USFWS and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NOAA Fisheries) to reject the current proposals.

Please find attached our comments on the proposed revisions.

Thank you,



Sherri L. Kuhl, Division Manager
Wildland Conservation Division

cc: Kimberlee Harvey, Balcones Canyonlands Conservation Plan Secretary

Attachment



**Comments on Proposed Regulatory Revisions
To Endangered Species Act Implementation**

**City of Austin
Wildlands Conservation Division
September 24, 2018**

The City of Austin and Travis County jointly hold a section 10(a)(1)(B) permit under the Endangered Species Act (ESA), which was issued by the U.S. Fish and Wildlife Service (USFWS) in 1996. Our permit represents one of the first regional habitat conservation plan in the nation, where local partnerships resulted in a balance between endangered species conservation and economic development. Since its inception, the Balcones Canyonlands Conservation Plan (BCCP) has been a major economic engine in our community by providing regulatory certainty and a streamlined, cost-effective way to mitigate for the construction of houses, schools, roads, and other infrastructure under the ESA as our population grows. At the same time, the BCCP assures we are protecting and enhancing the most ideal habitat for endangered and rare species through the creation of the Balcones Canyonlands Preserve (BCP). The BCP is a tremendous asset for our community, providing over 32,000 acres of valuable ecosystem services, including clean air and water, cooler temperatures, carbon sequestration, biodiversity, and hiking trails and other recreational opportunities, which make Austin one of the best places to live in the country. This balancing of endangered species conservation with economic growth has made the BCCP a model for other areas in Texas and across the nation, and contributed to Austin being one of the fastest growing cities in the United States.

The City of Austin values its long-standing relationship with USFWS and remains dedicated to implementing the ESA along with Travis County and our other managing partners. In light of our commitments and years of experience, we are deeply concerned about the regulatory changes being proposed to 50 CFR 424, 17, and 402. We have reviewed these proposed changes within the stated goals of “modernizing” the implementation of the ESA to improve collaboration, efficiency, and effectiveness (Executive Orders 13771 and 13777); Executive Orders 12866 and 13563, which call for improvements in the nation's regulatory system to promote predictability, reduce uncertainty, and use the best, most innovative, and least burdensome tools for achieving regulatory objectives; and Executive Orders 12866 and 12988, which require that all rules be written in plain language.

We submit our comments on the proposed changes to each of the three sections of the CFR, below. In sum, we believe the proposed regulatory changes would at best significantly weaken, and at worst nullify, key provisions of the ESA; are more ambiguous than the current regulatory language; and would be more time-consuming, costly, and burdensome for achieving regulatory objectives. We urge USFWS and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NOAA Fisheries) to reject the current proposals.

50 FR 424.11 and 424.12

Listing Decisions - To reduce uncertainty that listing decisions are to be made *solely* on the basis of the best scientific and commercial data, we recommend leaving intact the entire sentence as

currently written. Removing “without reference to possible economic or other impacts of such determination” implies that short-term, and potentially questionable, economic issues are as or more important than species’ survival. Further, some may consider economics as a science and commercial data as integral to economics. Including economic information would complicate and increase regulatory processes and costs. By adding economics to listing decisions, we believe the USFWS and NOAA Fisheries will also be more vulnerable to litigation, further increasing costs and associated tax burdens on the public. Retaining language to ensure that economic impact does not hinder species listings is not redundant, but ensures that species get the protections necessary to ensure their continued survival. Economic considerations can continue to be addressed in critical habitat designations and recovery plans.

Delisting Decisions – The removal of recovery as a factor in delisting decisions gives the appearance of circumventing Section 4(f)(1) of the ESA – Recovery Plans. We have found that recovery plans provide an invaluable tool to promote the best available science and provide a road map for partners to guide conservation efforts for listed species, thereby improving collaboration, efficiency, and effectiveness. Recovery plans also include economic considerations by identifying costs associated with recovery implementation. However, the proposed change would render recovery plans meaningless. We recommend that regulatory language tying delistings to recovery plans be left as is or strengthened, not eliminated.

Foreseeable Future – We recommend that regulatory language clarify that foreseeable future must be based solely on the best available science, consistent with the listing decision process. For example, scientific models often project scenarios over a 100-year time period or longer. The proposed changes add vague terms such as “reasonably determine” and “probable,” which do not help to define the “foreseeable future” timeframe. We also recommend adding “climate change” to “environmental variability” to clarify that the foreseeable future may include broad-scale and long-term impacts such as drought, flooding, melting glaciers, and rising sea levels.

Critical Habitat – We believe the proposed wording in section 424.12(a)(1)(ii) is more confusing than the existing language. What types of management actions resulting from consultations under section 7(a)(2) of the ESA would not address threats to the species’ habitat? The supplemental information provided with the proposed rule includes “melting glaciers, sea level rise, or reduced snowpack” as examples, which would exclude critical habitat designations for species threatened by climate change. The implication is also that management actions, such as measures to reduce greenhouse gas emissions, will not be taken to ameliorate threats from climate change. The current language should be left as is to protect all species and their habitats, or “modernized” to include those at risk from climate change.

We are also concerned about the proposed revision to exclude areas outside the geographical area occupied by the species. This contradicts the ESA, which explicitly states that critical habitat includes “specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of the ESA, upon a determination by the Secretary that such areas are essential for the conservation of the species.” Further, many species exist only in small portions of their historic range, and species threatened by climate change may need to migrate to new areas if their currently occupied habitat is destroyed. Allowing for protection of these historic and new locations may be critical for the conservation of some species, and thus should be included in critical habitat. “Modernizing” the ESA without taking into account

effects of climate change ignores best available science needed for long-term protection and recovery of listed species.

50 CFR 17.31 and 17.71

Prohibited Acts (Section 9 of the ESA) - We are concerned that the proposed revisions would eliminate protections, including Section 9 take prohibitions, for threatened species that are listed in the future. Requiring species-specific rules for every new species listed as threatened will be time and cost-intensive, and thus more burdensome for achieving regulatory objectives. Under the current 4(d) rule, threatened species are afforded full ESA protections, allowing USFWS and NOAA Fisheries adequate time to determine whether species-specific rules are appropriate. Under the proposed rule, threatened species would remain unprotected indefinitely while species-specific rules are developed, making it more difficult and costly to reverse ensuing population declines. To let species remain unprotected for any amount of time would be irresponsible and undermines the intent of the ESA. We believe the existing language is more effective, efficient, and less burdensome than the proposed revisions.

50 FR 402.02, 402.14, 402.16, and 402.40

Definition of critical habitat destruction or adverse modification – The language in the current regulation is clear and consistent with the ESA, which defines critical habitat as areas that are essential to the conservation of the species. However, the proposed addition of “*as a whole*” following critical habitat, and eliminating the next sentence “Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features” effectively negate the protections afforded by the ESA and diminish the importance of the areas that have been designated as critical habitat as less than “essential”. These changes imply that unless an action impacts the entire critical habitat, no destruction or adverse modification would occur. This represents a major departure from the current definition and would increase threats to listed species by allowing more projects that modify portions of critical habitat to proceed.

Definition of Director – The proposed language would remove decision-making at the regional level. We believe this will be more time-consuming and burdensome, requiring all approvals to be issued from the Washington office, and thus delay issuance of permits, biological opinions, and other decisions needed for projects to proceed in an expedited manner.

Definition of effects of the action – We believe the current language referencing direct, indirect, interrelated, and interdependent actions is clear and should be left as is. The proposed revisions are hard to understand and interpret, particularly the criteria that the effects must satisfy the criteria that (1) would not have occurred “but for” the proposed action and (2) they are reasonably certain to occur. This also appears to negate threats such as climate change that are inherently uncertain but potentially catastrophic. We recommend that the language be left as is or be expanded to include such scenarios based on best available science.

Definition of effects of environmental baseline – This language is clear and remains unchanged; we agree that it makes sense to list it as its own definition rather than imbedded in the effects of the action definition.

Jeopardy – We are concerned about revising the existing regulation to add effects of the action and cumulative effects to the environmental baseline, especially for species that are already at risk of jeopardy or adverse modification of critical habitat. The proposed revisions do not describe under what circumstances additional adverse effects would be allowed for such severely at-risk species. We recommend that the language be left as is or clarify that a precarious environmental baseline is sufficient evidence to determine that additional adverse effects would result in jeopardy or adverse modification of critical habitat.

Biological Opinion – The proposed revisions would allow for projects to proceed without requiring “any additional demonstration or specific binding plans or a clear, definite commitment of resources.” We are greatly concerned about the implications of this language, which appears to signal that Federal agencies and applicants do not have to honor their commitments to mitigate their impacts, greatly increasing the occurrence of uncompensated losses. We urge USFWS and NOAA Fisheries to strengthen requirements to mitigate damages and threats to listed species and their habitats.

Programmatic and Expedited Consultations – Since these options are already available, we are unclear why revising the regulations to include them is necessary. We also question whether producing a biological opinion in less than the 90-day timeframe is a realistic scenario given staffing and funding constraints, especially if they have to be signed by the Washington office rather than the regional office (based on the proposed redefinition of Director).

Reinitiation of Consultation – The language in the addition to 50 CFR 402.16, section b, is ambiguous and confusing. Because the meaning is unclear, we are unable to provide constructive comment except to request that it be clarified and submitted again for public comment.

We appreciate the opportunity to comment on these three proposed rules. We have firsthand experience of how the ESA can work to protect endangered species while promoting a healthy economy and desirable place to live. The ESA has wide public support, and any changes to the ESA’s regulations should be to strengthen its ability to protect species from going extinct and to help them recover so they are no longer at risk of extinction. The proposed regulatory revisions weaken the ESA and put species at an unnecessary increased risk. The City of Austin again urges the USFWS and NOAA Fisheries to reject the revisions currently being proposed to 50 CFR 424, 17, and 402.