September 24, 2018

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

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

Re: Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat [Docket No. FWS-HQ-ES-2018-0006]

Dear Secretary Zinke and Secretary Ross:

The following comments are submitted by the Environmental Defense Center ("EDC") regarding the U.S. Fish and Wildlife Service ("USFWS") and National Marine Fisheries Service's ("NMFS") (collectively, "Services") proposed rule to revise portions of the regulations that implement Section 4 of the Endangered Species Act ("ESA"), entitled *Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat* at 83 Fed. Reg. 35,193, *et seq.* (July 25, 2018).

EDC is a non-profit, public interest law firm that represents community organizations in environmental matters affecting California's south-central coast. EDC's service area includes Santa Barbara, Ventura, and San Luis Obispo Counties. EDC protects and enhances the environment through education, advocacy, and legal action. EDC has members who live, visit, work, and recreate in areas that would be significantly affected by the proposed regulatory changes.

As set forth in detail in our comments below, we request that the proposed changes to the implementing regulations for ESA Section 4 be withdrawn to ensure that ESA Section 4 regulations are consistent with statutory requirements and well-established case law. This proposal is an unprecedented departure from the long-standing protections in place for listing threatened and endangered species, and designating critical habitat. The proposal includes a host

906 Garden St. Santa Barbara, CA 93101
PHONE (805) 963-1622 FAX (805) 962-3152
www.EnvironmentalDefenseCenter.org

of revisions that will severely weaken the conservation of endangered and threatened species, and decimate critical habitat protections in contravention of the intent of the ESA. If adopted, the proposal will heighten the risk of extinction rather than promote the recovery of species and their habitat.

I. Economic Considerations must not be Assessed when Listing a Species.

The ESA requires that listing decisions be made "*solely* on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1). Congress added the word *solely* in the 1982 amendments to the Act to underscore that non-biological considerations, such as economic factors, must not be assessed in listing decisions.[1] See *N.M. Cattle Growers Ass'n v. U.S. Fish &Wildlife Serv.*, 248 F.3d 1277, 1282 (10th Cir. 2001) ("Thus, economic analysis is not a factor in the listing determination); *Arizona Cattle Growers' Ass.n v. Salazar*, 606 F.3d 1160, 1172 (9th Cir. 2010) (differentiating between decisions to designate critical habitat, which may consider economic impacts, and decisions to list a species, which must be made "without reference to the economic effects of that decision"). The ESA Regulations similarly require that listing decision must be based solely on the best available scientific and commercial data, and not on the "possible economic or other impacts of such determination." 50 C.F.R. § 424.11(b).

The Administration proposes to remove the regulatory phrase "without reference to possible economic or other impacts," thus apparently allowing such considerations when making listing decisions. 50 C.F.R. § 424.11(b). Removal of this phrase would violate the statute and thus is unlawful.

In conclusion, listing decisions must be made as solely scientific determinations. The proposed regulatory change must be withdrawn.

II. The Proposed Definition of "Foreseeable Future" is Impermissibly Narrow and Inconsistent with the ESA.

The ESA defines "threatened species" as "any species which is likely to become endangered within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

"Foreseeable future" is not defined in the ESA, however, the phrase is expressly discussed in a 2009 opinion from the Department of the Interior's Solicitor.[2] The opinion concluded that "Congress intended the term 'foreseeable future' to describe the extent to which the Secretary can reasonably rely on predictions[3] about the future in making determinations about the future conservation status of the species."[4] Nevertheless, the proposal does not adopt

[1] Pub. L. No. 97-304, 96 Stat. 1411.
[2] Department of the Interior, Office of the Solicitor, Opinion M-37021 (Jan. 16, 2009).
[3] The opinion clarifies that "for the purposes of this memorandum, a prediction is reliable if it is reasonable to depend upon it in making decisions." *Id.* at 1.
[4] *Id.* at 1.

the opinion's definition, even though "[t]he Services have found the reasoning and conclusions expressed in this document to be well-founded, and this guidance has been widely applied by both Services." 83 Fed. Reg. 35,195.

Instead, the Administration proposes an entirely new framework:

> In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The term foreseeable future extends only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable. 83 Fed. Reg. 35,195.

The proposed additions to Section 424.11 are problematic for two reasons. First, the framework includes a new, undefined term: "probable." 83 Fed. Reg. 35,195. The addition of this term could interfere with the Services' actions to list a species as threatened and may create, rather than dispel, confusion as to what qualifies as the "foreseeable future." Moreover, the proposed change is unnecessary because listing decisions do not typically include impacts which are not probable to occur in the future. For example, in listing the California red-legged frog ("CRLF") as threatened, the USFWS based its listing decision in large part on prior and ongoing "habitat loss and alteration," which the Service determined are "the primary factors that have negatively affected the California red-legged frog."[5]

Second, the framework violates the ESA because it would result in determinations of whether a species is threatened based on the danger of the species becoming extinct, rather than whether the species is in danger of becoming endangered (the "foreseeable future extends only so far into the future as the Services can reasonably determine that the conditions potentially posing a *danger of extinction* in the foreseeable future are probable"). 83 Fed. Reg. 35,195 (emphasis added). However, "threatened species" are defined under the ESA as "any species which is *likely to become an endangered species* within the foreseeable future," not extinct. 16 U.S.C. § 1532(20) (emphasis added). "Endangered species" are "any species which is in danger of extinction." 16 U.S.C. § 1532(6). This issue was addressed in *In re Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation*, 709 F.3d 1, 9-10 (D.C. Dir. 2013), in which the court noted that the legal standard for determining whether a species is threatened is not whether the species is "in danger of extinction," but rather whether it is "likely to become endangered." The court upheld the lower court's ruling that a 45-year time frame for finding the polar bear to be threatened was reasonable. *In re Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation*, 794 F.Supp.2d 65, 95 (D.D.C. 2011), *affirmed* 709 F.3d 1 (2013), *certiorari denied* 134 S. Ct. 310 (2013).

The proposed framework does not align with the express definitions of endangered and threatened species under the ESA and thus must be withdrawn.

[5] 61 Fed. Reg. 25,824.

III. The Proposed Regulations Governing Delisting a Species could Jeopardize Recovery and May in Fact Increase the Risk of Premature Delisting.

The proposal seeks to modify Section 424.11 to clarify the situations in which to delist. 83 Fed. Reg. 35,200-01. Under the current statutory and regulatory scheme, a listed species may be removed from the list upon a scientific determination that it is recovered and that the previous threats to its survival have been appropriately abated. This scientific determination must be made based upon the five statutory factors set forth under Section 4(a)(1) using the best available scientific and commercial data. 16 U.S.C. § 1533(a)(1); § 1533 (b)(1); 50 C.F.R. § 424.11(b). *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015, 1024 (9th Cir. 2011) ("Delisting requires a determination that none of the above five factors threatens or endangers the species 50.C.F.R. § 424.11(d). Both listing and delisting determinations must be made 'solely on the basis of the best available scientific and commercial information regarding a species' status, without reference to possible economic or other impacts of such determination.' *Id.* § 424.11(b).")

Application of these factors may lead to delisting if (1) the species has become extinct; (2) the species has recovered to the point that it is no longer endangered or threatened; or (3) the original listing was made based on an error in data. 50 C.F.R. § 424.11(d). As noted in *Greater Yellowstone Coalition*, "[a] major role of the ESA's protections is recovery of threatened and endangered species such that they can be removed from the list." 665 F.3d at 1024, citing 16 U.S.C. § 1533(f); 50 C.F.R. § 424.11(d)(2).

A. The Proposed Delisting Factors do not Adequately take into Consideration the Species' Recovery Criteria, which Reflect the Most Recent and Accurate Data.

The proposed addition of new subsection (e) to Section 424.11 would circumvent the requirement that delisting decisions must be made based on the best science and data available at the time of the decision. Instead, the proposed revisions would allow for delisting based solely upon achieving the criteria identified at the time of listing, even if this occurs prior to the attainment of the plan's recovery criteria and without regard to current information. If the Service(s) are not required to analyze the objective, measurable recovery criteria in making a delisting determination, the risk of premature delisting and harm to the species increases.

Recovery plans are developed and implemented "for the conservation and survival of endangered species and threatened species listed." 16 U.S.C. § 1533(f)(1). Developing recovery criteria is a statutory requirement in the ESA and must be "objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list." 16 U.S.C. § 1533(f)(1)(B)(ii). "[R]ecovery criteria

comprise the standards upon which the decision to reclassify or delist a species should be based."[6] 50 C.F.R. § 424.11(d)(2).

Not only is this a legal requirement, but it is also necessary to ensure that delisting decisions are based on "the best scientific and commercial data available…" 50 C.F.R. § 424.11(d). This is because recovery criteria are based on up-to-date, detailed studies of the species, and its current status and viability. To the contrary, the reasons for listing are often based on the available science at the time of listing and are less specific.

Recovery plans often follow listing by several years. For example, Southern California Steelhead were listed in 1997, but the Recovery Plan was not published until 2012.[7] Moreover, the Santa Barbara California tiger salamander ("CTS") was emergency listed in 2000, but the Recovery Plan was just recently adopted in 2016.[8]

For the foregoing reasons, the proposed change would result in delisting decisions that are not based on the best available science and is therefore not an adequate substitute for delisting based on quantifiable, current, and science-based recovery criteria.

B. The Proposal to Delist if a Species No Longer Meets the Definition of "Species" places Listed Species at Risk.

The proposed rule would allow for delisting if a species does not meet the definition of "species" under the ESA. 83 Fed. Reg. 35,196. The statutory definition of the term "species" supports an interpretation of the ESA which protects distinct, isolated population segments of endangered or threatened species. "The term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). Distinct population segments are entitled to the full ESA protections accorded to separate species, as the ESA's definition of species, as well as sound biology, makes clear.

> "Distinguishing between distinct population segments makes a great deal of sense biologically. Isolated populations of a species may contain genetic resources crucial to the long term survival of the species as a whole. It therefore is important to safeguard the continued existence of every isolated population segment of a species."[9]

---

[6] National Marine Fisheries Service and U.S. Fish & Wildlife Service, *Interim Endangered and Threatened Species Recovery Planning Guidance Version 1*.3, available at: https://www.fws.gov/endangered/esa-library/pdf/NMFS-FWS_Recovery_Planning_Guidance.pdf (June 2010).
[7] West Coast Region National Marine Fisheries Service, *South-Central California Steelhead Recovery Plan* (December 2013).
[8] U.S. Fish & Wildlife Service, *Recovery Plan for the Santa Barbara County Distinct Population Segment of the California Tiger Salamander* (2016).
[9] Daniel J. Rohlf, *The Endangered Species Act; A Guide to Its Protections and Implementation*, Standard Environmental Law Society at 39, FN 9 (1989).

The aforementioned reasoning is especially true for three listed species in EDC's region: the Western Snowy Plover, CTS, and Southern California steelhead DPS/ESU. Each separate population constitutes a distinct listed species entitled to the full substantive protection of the ESA.

Santa Barbara County hosts a large, unlisted inland population of Western Snowy Plovers, which are reproductively isolated from the threatened coastal population of Western Snowy Plovers, for the most part. Efforts to delist the Western Snowy Plover are based on the claim that the coastal population is part of the larger "species," which includes the inland population. Fortunately, due to current regulatory protections and scientific data demonstrating that the two populations are reproductively isolated, efforts to delist the coastal population have been unsuccessful in previous years.

Additionally, three distinct populations of the CTS are listed under the ESA: (1) CTS are listed as "endangered" in Sonoma County; (2) CTS are listed as "endangered" in Santa Barbara County; and (3) CTS are listed as "threatened" in Central California.[10] However, the proposed provision at Section 424.11(e)(3) may open the door for attacks on CTS recovery efforts by requiring these listed species to be delisted if they do not meet the definition of "species" as set forth under the ESA.

Finally, according to NOAA Fisheries data, fifteen steelhead DPS/ESU exist in the west coast region.[11] In our region, the Southern California steelhead DPS is listed as endangered, and elsewhere, such as in Idaho, Oregon, and Washington, distinct population segments of the species are listed as threatened.[12] "Multiple factors have contributed to the decline of *individual* populations."[13] Moreover, the "risk of status of the Southern California Coast Steelhead DPS is greater than previously thought."[14] Despite the extensive research and scientific data to the contrary, arguments have been made (albeit, unsuccessfully) that steelhead are part of the same species and as such, the population is larger and more widespread. If the fifteen Steelhead DPS/ESU were combined into one "species," under the new proposed language, it would be easier to argue for delisting of the species altogether, which would be violate the ESA and preclude species recovery.

For these reasons, the proposed rule must be withdrawn.

---

[10] U.S. Fish & Wildlife Service, *ECOS Environmental Conservation Online System; California tiger Salamander (Ambystoma californiense)*, available at: https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=D01T.
[11] National Oceanic and Atmospheric Administration, West Coast Region, *Species Maps & Data*, available at: https://www.westcoast.fisheries.noaa.gov/maps_data/Species_Maps_Data.html.
[12] U.S. Fish & Wildlife Service, *ECOS Environmental Conservation Online System; Steelhead (Oncorhynchus (+Salmo) mykiss)*, available at: https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=E08D.
[13] National Oceanic and Atmospheric Administration, West Coast Region, *Status Reviews*, available at: https://www.westcoast.fisheries.noaa.gov/publications/status_reviews/salmon_steelhead/steelhead/steelhead_status_reviews.html. (emphasis added).
[14] *Id.*

IV. The Proposal will Severely Limit the Ability of the Services to Protect Habitats and will make Critical Habitat a Less Effective Tool for Recovery of the Species.

In passing the ESA, Congress recognized that the primary threat to endangered species is destruction of habitat. *Tenn. Valley Auth. V. Hill*, 437 U.S. 153, 179 (1978). One of the stated purposes of the ESA is the conservation and preservation of the ecosystems upon which endangered species depend. 16 U.S.C. § 1531(b). "It is clear, then, that Congress intended to prohibit habitat destruction that harms an endangered species." *Palila v. Hawaii Dep't of Land & Nat. Res.*, 649 F. Supp. 1070, 1076 (D. Haw. 1986), aff'd, 852 F.2d 1106 (9th Cir. 1988).

The ESA defines "critical habitat" to mean areas that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i)-(ii). Critical habitat can be designated in "area[s] occupied by the species," as well as "areas outside the geographic area occupied by the species." *Id.* The statute makes unambiguously clear that both occupied and unoccupied areas may qualify as critical habitat as long as the area is "essential to the conservation of the species." *Id.* (See also *Alaska Oil and Gas Ass'n v. Jewell*, 815 F.3d 544, 555-556 (9th Cir. 2016) (court held that the FWS should have included denning areas in the designation of critical habitat, even if such areas were not currently occupied)).

The proposal imposes a number of limitations on designating critical habitat, particularly unoccupied critical habitat, that will hinder the conservation and recovery of listed species. 83 Fed. Reg. 35,201. First, the proposal improperly limits the designation of unoccupied critical habitat by requiring the Service(s) to "only consider unoccupied areas to be essential where a critical habitat designation limited to geographic areas occupied would be inadequate to ensure the conservation of the species or would result in less efficient consideration for the species." 83 Fed. Reg. 35,201. The Service(s) must also "determine that there is a reasonable likelihood that the area will contribute to the conservation of the species." 83 Fed. Reg. 35,201.

The proposed language will significantly impair the success of species recovery by limiting areas designated as critical habitat. In EDC's region, for example, unoccupied areas designated as critical habitat have provided crucial steps towards recovery of the endangered Southern California Steelhead. Steelhead critical habitat includes unoccupied areas in the Sespe Creek, throughout many of Santa Barbara County's creeks, and in the areas above dams, even though anadromous steelhead cannot currently access these areas.[15] Nevertheless, these areas collectively contribute to the overall survival and recovery of this listed species.

Furthermore, the proposal may harm species that require unoccupied habitats to recover, making designating unoccupied habitat more important. 83 Fed. Reg. 35,201. For example, unoccupied areas were not removed from the critical habitat designation for the California

[15] National Oceanic and Atmospheric Administration, West Coast Region, *Critical Habitat; Southern California Steelhead*, map available at: https://www.westcoast.fisheries.noaa.gov/publications/gis_maps/maps/salmon_steelhead/critical_habitat/steelhead/steelhead_sc_ch.pdf. *See also* Federal Register Notice for detailed description of critical habitat at 70 Fed. Reg. 52,488.

gnatcatcher even after fires burned these areas because the USFWS still considered the areas essential to the conservation of the species.[16] In addition, the USFWS designated critical habitat for the tidewater goby in areas unoccupied at the time of listing, but which were nonetheless considered essential to the conservation of the species.[17] Finally, critical habitat was designated for the California Condor in the unoccupied Blue Ridge National Wildlife Refuge due to the area's importance for condors even though the species was not presently occupying that area. The habitat was deemed "critical" "because of its importance as a historical roost for condors and its proximity to areas where condors once foraged and nested in the western Sierras."[18]

Second, the proposed revisions to Section 424.12(a)(1) include an expanded list of circumstances that would trigger a "not prudent" determination; all of which have the likely intended effect of precluding the designation of critical habitat. 83 Fed. Reg. 35,201. For example, the proposal would allow the Service(s) to make a "not prudent" determination in "situations where critical habitat areas under the jurisdiction of the United States provide negligible conservation value for a species which occurs primarily in areas outside of U.S. jurisdiction." *Id.* This circumstance is specifically designed to undermine critical habitat designations for species like the endangered jaguar, whose habitat is primarily in Mexico, but the species is known to migrate into the United States at the border. Nevertheless, the critical habitat designations in the U.S. are important conservation tools for the species and have been designated as such because the areas are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A). The Services' proposal could lead to the incorrect assumption that the areas' benefits are negligible because only a portion of the critical habitat area is in the U.S.

The courts have held the Services to a high standard where they have failed to designate critical habitat. *Natural Resources Def. Council v. U.S. Dept. of the Interior*, 113 F.3d 1121 (9th Cir. 1997) (court found that FWS's failure to designate critical habitat for the gnatcatcher based on various factors was unjustified); *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Haw. 1998) (failure to designate critical habitat for several endangered and threatened plants violated the ESA). To the contrary, the proposed regulatory changes at Section 424.12(a)(1)(i)-(v) will serve to expand the grounds upon which the Service may find that designating critical habitat is not prudent.

Therefore, the proposed rule will make critical habitat a less effective tool for recovering species and undermine the protections afforded under the ESA.

[16] 72 Fed. Reg. 72,013.
[17] 78 Fed. Reg. 8751.
[18] US Fish and Wildlife Service, *Endangered California condors roosting in western Sierras for first time in nearly 40 years*, https://www.fws.gov/news/ShowNews.cfm?_ID=36120 (August 16, 2017).

V. Conclusion

For the foregoing reasons, the proposed regulations for listing species and designating critical habitat must be withdrawn.

Sincerely,

Tara C. Messing

Tara C. Messing
Staff Attorney

September 24, 2018

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

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

Re: Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants [Docket No. FWS-HQ-ES-2018-0007]

Dear Secretary Zinke:

The following comments are submitted by the Environmental Defense Center ("EDC") regarding the U.S. Fish and Wildlife Service's ("USFWS" or "Service") proposal to rescind regulations that extend the prohibitions for activities involving endangered species to threatened species under Section 4(d) of the Endangered Species Act ("ESA") ("Blanket 4(d) Rule" or "Rule"), entitled *Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants* at 83 Fed. Reg. 35,174, *et seq.* (July 25, 2018).

EDC is a non-profit, public interest law firm that represents community organizations in environmental matters affecting California's south-central coast. EDC's service area includes Santa Barbara, Ventura, and San Luis Obispo Counties. EDC protects and enhances the environment through education, advocacy, and legal action. EDC has members who live, visit, work, and recreate in areas that would be significantly affected by the proposed regulatory changes.

As set forth in detail in our comments below, the proposed rescission to the Blanket 4(d) Rule must be withdrawn. Section 4(d) of the ESA directs the Service to issue regulations deemed "necessary and advisable to provide for the conservation of [threatened] species." 16

906 Garden St. Santa Barbara, CA 93101
PHONE (805) 963-1622 FAX (805) 962-3152
www.EnvironmentalDefenseCenter.org

U.S.C. § 1533(d). In 1978, the USFWS used its authority pursuant to Section 4(d) to extend the prohibition of take (including "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect"[1]) under the ESA to all threatened species. 50 C.F.R. §§ 17.31(a). Since then, the Blanket 4(d) Rule has become a critical tool within the ESA that extends the protections afforded to endangered species to threatened species to ensure that no harm happens while the USFWS considers a species-specific regulation. *See* 50 C.F.R. §§ 17.31(a) and 17.71(a). By prohibiting take of threatened species, the Blanket 4(d) Rule has prevented harm to numerous species in our practice area, such as the threatened Southern California sea otters. Elimination of the Blanket 4(d) Rule will strip protections for threatened species, thus heightening the risk that these species will become endangered rather than recovered.

I. The Blanket 4(d) Rule is a Reasonable and Permissible Construction of the ESA, And Must Not Be Stricken or Weakened.

The USFWS' proposed rule expressly acknowledges that the Blanket 4(d) Rule "is one reasonable approach to exercising the discretion granted to the Service by section 4(d) of the Act." 83 Fed. Reg. 35,175. This conclusion is consistent with the intent of the ESA and well-established case law.

Congress' goal in enacting the ESA unquestionably was to safeguard *both* endangered and threatened species. 16 U.S.C. § 1531(c)(1) ("It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species *and threatened species* and shall utilize their authorities in furtherance of the purposes of this chapter." (emphasis added)). Consistent with the spirit of the ESA, Section 4(d) of the ESA expressly directs the Services to conserve threatened species. 16 U.S.C. § 1533(d). The ESA defines "conserve" to "mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3). Thus, the regulations issued by the Services pursuant to Section 4(d) must be evaluated on the basis of whether the regulations promote the recovery of threatened species within the statutory meaning of conservation. As explained below, the courts have confirmed that the USFWS' protective regulations for threatened species do just that.

In *Sweet Home Chapter of Communities for a Great Oregon*, the court concluded that the USFWS regulation automatically extending to all threatened species the prohibitions established for endangered species was a reasonable and permissible construction of Section 4(d) of the ESA. *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d 1, 5-6 (D.C. Cir. 1993), *opinion modified on other grounds in reh'g*, 17 F.3d 1463 (D.C. Cir. 1994), *rev'd*, 515 U.S. 687 (1995). In upholding 50 C.F.R. § 17.31(a), the court explained that Section 4(d) of the ESA "grants the FWS the discretion to extend the maximum protection to all threatened species at once, if guided by its expertise in the field of wildlife protection, it finds it expeditious to do so." *Id.* at 7. The court wholly disagreed with the appellants' contention that Section 1533(d) required the USFWS to extend endangered species' prohibitions to threatened

[1] 16 U.S.C. § 1532(19).

species only on a species-by-species basis. *Sweet Home Chapter of Communities for a Great Oregon*, 1 F.3d at 5-6.

No logical basis is offered in the proposal for departing from the well-established practice under the Blanket 4(d) Rule. Requiring the USFWS to now promulgate species-specific rules for every threatened species is a substantial departure from the long-standing policy of the ESA that is neither advisable nor necessary to ensure the conservation of threatened species.

II. The Proposal Places Threatened Species at Greater Risk Of Extinction Where the USFWS Must Develop Individual, Special Rules for Each Threatened Species.

If the proposal is adopted, newly-listed threatened species will not be afforded take protections unless and until the USFWS issues a special rule specifying prohibited activities. Such a proposal presents a substantial risk to the conservation of threatened species. As compared to the National Marine Fisheries Service ("NMFS"), the USFWS is responsible for more than twice the number of threatened species; as of May 2016, the USFWS had 238 animal species listed as threated as compared to NMFS, which had control over a mere seventy-one threatened species.[2] Given the sheer number of threatened species under the USFWS's control, it is critical to have a default 4(d) rule in place for a threatened species while the Service develops a species-specific 4(d) rule, if needed, so that the species receives the necessary protections during the lapse in time between listing and the issuance of a special 4(d) rule. Without these protections, the USFWS risks violating the ESA's clear directive to conserve threatened species using "all methods and procedures which are necessary to bring any … threatened species to the point at which the measures … are no longer necessary." 16 U.S.C. § 1532(3).

The USFWS's proposal claims that "[w]here we have developed species-specific 4(d) rules, we have seen many benefits." 83 Fed. Reg. 35,175. Even if we are to assume the truth of this statement, the proposal fails to account for situations where no special 4(d) rule is developed or where a 4(d) rule is promulgated years after the species is initially listed as threatened. As of 2016, only 49% of the threatened species that the USFWS has authority over had a specific 4(d) rule.[3] NMFS's record was not much better: only 61% of threatened species under its control had a 4(d) rule.[4] The failure or delay in promulgating special 4(d) rules for threatened species directly affects conservation efforts and is a problem that we have experienced in our service area specifically. For example, the Vernal Pool Fairy Shrimp was listed as threatened in 1994, yet no 4(d) Rule for this species was ever promulgated.[5] In 1993, the USFWS listed the Western Snowy Plover as threatened and while a proposed special rule pursuant to Section 4(d) of the ESA was released on April 21, 2006, no final 4(d) rule has been issued.[6] The California Red

[2] Defenders of Wildlife White Paper Series, *Section 4(d) Rules: The Peril and the Promise* (2017), at 5, https://defenders.org/sites/default/files/publications/section-4d-rules-the-peril-and-the-promise-white-paper.pdf.
[3] *Id.*
[4] *Id.*
[5] U.S. Fish & Wildlife Service, *ECOS Environmental Conservation Online System; Vernal pool fairy shrimp (Branchinecta lynchi)*, available at https://ecos.fws.gov/ecp0/profile/speciesProfile?spcode=K03G.
[6] 71 Fed. Reg. 20,625.

Legged Frog was listed as federally-threatened in 1996, but ten years passed before its 4(d) rule was approved.[7] Finally, the South-Central California Steelhead was listed as threatened in 1997, but NMFS failed to issue a 4(d) rule for the species until July 10, 2000.[8]

Thus, to conserve threatened species in a manner consistent with the requirements under the ESA, the USFWS must continue to automatically extend the full protections of Section 9 of the ESA to threatened species and carve out exemptions on a species-by-species basis.

III. If the Services' Respective Regulatory Approaches to Section 4(D) of the ESA Need to be Aligned, NMFS Should Adopt the USFWS' Blanket 4(D) Rule.

The USFWS's proposal claims that the rescission of the Blanket 4(d) Rule is necessary in order to align its practices with NMFS rules, which "put in place prohibitions, protections, or restrictions tailored specifically to that species." 83 Fed. Reg. 35,175. However, no reasonable justification exists for the USFWS to eliminate its long-standing Blanket 4(d) Rule in order to harmonize the two regulatory approaches. Instead, NMFS should adopt a similar default 4(d) rule. Automatically affording threatened species the same ESA-mandated protections imposed on endangered species prior to the issuance of a species-specific rule aligns with the statutory purpose of the ESA as well as the directive under Section 4(d) of the ESA to conserve threatened species.

IV. Conclusion

For the foregoing reasons, USFWS's proposal to eliminate the Blanket 4(d) Rule should be withdrawn.

Sincerely,

Tara C. Messing

Tara C. Messing
Staff Attorney

[7] 71 Fed. Reg. 19,244.
[8] 65 Fed. Reg. 42,422.

environmental
DEFENSE CENTER

September 24, 2018

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

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

Re: Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation [Docket No. FWS-HQ-ES-2018-0009]

Dear Secretary Zinke and Secretary Ross:

The following comments are submitted by the Environmental Defense Center ("EDC") regarding the U.S. Fish and Wildlife Service ("USFWS") and National Marine Fisheries Service's ("NMFS") (collectively, "Services") proposed rule to revise portions of the regulations that implement Section 7 of the Endangered Species Act ("ESA"), entitled *Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Interagency Cooperation* at 83 Fed. Reg. 35,178, *et seq.* (July 25, 2018).

EDC is a non-profit, public interest law firm that represents community organizations in environmental matters affecting California's south-central coast. EDC's service area includes Santa Barbara, Ventura, and San Luis Obispo Counties. EDC protects and enhances the environment through education, advocacy, and legal action. EDC has members who live, visit, work, and recreate in areas that would be significantly affected by the proposed regulatory changes.

The Services must withdraw the proposed changes to the implementing regulations for Section 7 of the ESA. 83 Fed. Reg. 35,178. The proposed rules include a multitude of changes to the statutorily-mandated consultation process, most of which have the effect of limiting or completely eliminating the agencies' consultation obligations. The proposal seeks to expedite interagency consultation at the expense of species recovery and preservation of critical habitat.

906 Garden St. Santa Barbara, CA 93101
PHONE (805) 963-1622 FAX (805) 962-3152
www.EnvironmentalDefenseCenter.org

The purpose of the ESA is to ensure the recovery of endangered and threatened species, not merely the survival of their existing numbers. 16 U.S.C. §§ 1531(b), 1532(3). The goal of species recovery is paramount. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). As recognized by the U.S. Supreme Court, "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *Id.*

Section 7 consultation is the heart of the ESA and involves critical processes for ensuring conservation of listed species and protection of critical habitat. The proposed changes ignore the clear intent of Congress in enacting Section 7 of the ESA. Couched as increasing efficiency and streamlining the consultation process, the proposal will delay recovery of endangered and threatened species throughout the U.S., weaken critical habitat protections, and overall increase the risk of extinction for listed species.

I. The Addition of the Phrase "As A Whole" to the Proposed Definition of "Destruction or Adverse Modification" Violates the ESA.

The ESA clearly mandates that each federal agency "insure that any action authorized, funded, or carried out by such agency… is not likely to … result in the *destruction or adverse modification* of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical." 16 U.S.C. § 1536(a)(2). Thus, once an area is designated as critical habitat, federal agencies are required under the ESA to consult with the Service(s) prior to taking any action that may negatively impact the habitat. 16 U.S.C. § 1533(a)(3)(A); 16 U.S.C. § 1536(a)(2).

Section 7 refers to "the destruction or adverse modification *of habitat of such species* which is determined by the Secretary, after consultation as appropriate with affected States, *to be critical*" without any caveat regarding how much habitat must be affected for this standard to be met. 16 U.S.C. § 1536(a)(2) (emphasis added). Therefore, the Services are under a duty to ensure their actions do not destroy or adversely modify *any* critical habitat. Critical habitat, after all, is not just any habitat—it is that which the expert wildlife agencies have determined is "*essential* to the conservation of the species." 16 U.S.C. § 1532.

The Fifth Circuit has rejected a prior regulatory attempt to narrow this standard in *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001). In that case, the court concluded "[r]equiring consultation only where an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits." *Id.* at 442. The court pointed to the definition of critical habitat as habitat that is essential to "conservation" and concluded that conservation is a "much broader concept than mere survival." *Id.* at 441. Thus, narrowing the destruction/adverse modification standard was inconsistent with the ESA.

The proposal sets forth a new definition of "destruction or adverse modification" under Section 402.02 that would limit consultation requirements to "a direct or indirect alteration that appreciably diminishes the value of critical habitat *as a whole* for the conservation of a listed

species." 83 Fed. Reg. 35,191 (emphasis added). The proposal notice states that "[t]he analysis thus places an emphasis on the value of the designated critical habitat as a whole for the conservation of a species." 83 Fed. Reg. 35,181. This proposed change will directly impact the existing Section 7(a)(2) consultation process because the addition of the phrase "as a whole" drastically raises the bar for when a proposed action would likely result in the destruction or adverse modification of critical habitat, thus diminishing an agency's statutorily-required consultation obligations.

The proposal would also gut Section 7's substantive mandate that agencies must ensure their actions avoid destruction or adverse modification of critical habitat, by improperly narrowing what it would mean for this standard to be met.

In addition, the proposed definition would encourage piecemeal destruction of critical habitat because consultation could be avoided where destruction of a particular area would not diminish the critical habitat as a whole. It is well-recognized that the vast majority of actions that harm critical habitat are gradual and occur incrementally over time. The proposed definition, however, will not account for such impacts. Therefore, these activities would escape consultation despite their clear destruction or modification of critical habitat.

Allowing the destruction of habitat that is essential to listed species, which the proposed revision would do, would contravene not only Section 7 but also the statute's definition of critical habitat and, in turn, its underlying conservation purpose.

Finally, the proposal erroneously claims that "[j]ust as the determination of jeopardy under Section 7(a)(2) of the Act is made at the scale of the entire listed entity, a determination of destruction or adverse modifications is made at the scale of the entire critical habitat designation." 83 Fed. Reg. 35,181. However, courts have consistently and appropriately distinguished between the two standards. The Fifth Circuit in *Sierra Club v. U.S. Fish & Wildlife Serv.* explained that "[t]he destruction/adverse modification standard focuses on the action's effects on critical habitat. In contrast, the jeopardy standard addresses the effect of the action itself on the survival and recovery of the species. The language of the ESA itself indicates two distinct standards; the regulation does not efface this distinction." 245 F.3d at 441*; See also Greenpeace v. National Marine Fisheries Serv.*, 55 F.Supp.2d 1248, 1265 (W.D.Wash.1999) ("Although there is considerable overlap between the two, the Act established two separate standards to be considered."); *Conservation Council for Hawai'i v. Babbitt*, 2 F.Supp.2d 1280, 1287 (D.Haw.1998) ("[T]he ESA clearly established two separate considerations, jeopardy and adverse modification, but recognizes ... that these standards overlap to some degree."). The proposal cannot rely on this rationale as a legal basis to support the proposed definition for "destruction or adverse modification."

Adoption of the proposed definition would severely undermine protections for listed species, especially species in our focus area. For example, critical habitat for the Santa Barbara California Tiger Salamander ("CTS") was designated for six metapopulations and recovery of all

six metapopulations is needed to achieve recovery of the species.[1] Destruction or adverse modification of any of these metapopulation's critical habitat units, even in part, would prevent conservation of the species. Nevertheless, under the Services' proposal, destruction of critical habitat for an entire metapopulation would still not rise to "destruction or adverse modification" of critical habitat because five other critical habitat units would remain, even though these units are dispersed throughout Santa Barbara County. Similarly, under the proposal, if CTS breeding ponds (i.e., critical habitat) were destroyed, but other areas of critical habitat, such as upland refuge areas, were not, this scenario would not qualify as "destruction or adverse modification" of critical habitat, even though the loss of CTS breeding ponds would lead to the extinction of the species because the species requires these ponds to breed.

Furthermore, the lower Santa Ynez River and its tributaries located below Bradbury Dam in Santa Barbra County were designated critical habitat for the Southern California steelhead.[2] Bradbury Dam diminishes mainstem flows needed for species migration, spawning, rearing, and emigration, and traps and blocks gravel and woody debris (which are essential habitat constituents for southern steelhead) from flowing into the Lower Santa Ynez River mainstem. The effect of the Dam on steelhead critical habitat presents a direct threat to the species' survival. However, although the Dam adversely modifies a substantial portion of the designated critical habitat in the Lower Santa Ynez River, not all critical habitat is affected. Specifically, flows in the tributaries located below the Dam, which are also designated critical habitat, are not negatively impacted. Thus, since the entirety of the critical habitat designated for the Southern California steelhead in our area is not adversely modified by the Dam, the proposed definition would improperly exclude the above-described habitat degradation from qualifying as "destruction or adverse modification" of critical habitat. The recovery of Southern California steelhead would be severely impaired by the proposal.

For the foregoing reasons, the proposed definition for "destruction or adverse modification" must be withdrawn.

II. The Proposal's Blatant Attempt to Avoid Considering the Impacts of Climate Change on Species Must be Withdrawn.

The Services propose to revise Section 402.03 to outright preclude consultation, even informally, if the effects are manifested through "global processes." 83 Fed. Reg. at 35,185. This proposal is clearly aimed at eliminating the need to consider the impacts of climate change on imperiled species during the consultation process. However, "[t]he ESA imposes a procedural consultation duty whenever a federal action may affect an ESA-listed species." *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985). Essentially, the proposal would create a presumption of "no effect" for "global processes," like climate change. Such a presumption would be inconsistent with the consultation requirements under Section 7 of the ESA. It would

[1] U.S. Fish & Wildlife Service, *Recovery Plan for the Central California Distinct Population Segment of the California Tiger Salamander (Ambystoma californiense)* (June 6, 2017).
[2] 70 Fed. Reg. 52,580.

also lead to results inconsistent with the intent of the ESA: "to halt and reverse the trend toward species extinction, whatever the cost." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

Impacts from climate change have already proven to imperil the survival of species, as evidenced by recent listing decisions and critical habitat designations upon determining that climatic changes jeopardize the species. For example, the FWS's Listing Rule for the Polar Bear concluded that "the polar bear is dependent upon sea ice for its survival; sea ice is declining; and climatic changes have and will continue to dramatically reduce the extent and quality of Arctic sea ice to a degree sufficiently grave to jeopardize polar bear populations." *In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Listing*., 709 F.3d 1, 8 (D.C. Cir. 2013). If the Services must examine these "global processes" during the listing process, it follows that the Services must consider climatic impacts, where relevant, when evaluating whether federal agency actions may jeopardize the species or negatively impact critical habitat.

Moreover, the court in *Wild Fish Conservancy v. Irving* held that NMFS' failure to consider the effects of climate change on stream flows in connection with its analysis of the effects of a hatchery's operations and water use on endangered fish species and critical habitat in its Biological Opinion ("BiOp") was arbitrary and capricious under the Administrative Procedure Act ("APA"). *Wild Fish Conservancy v. Irving*, 221 F. Supp. 3d 1224, 1233 (E.D. Wash. 2016), appeal dismissed, No. 17-35295, 2017 WL 3124201 (9th Cir. June 9, 2017). The court determined that "NMFS failed to consider an important aspect of the problem," even though NMFS had discussed "the effects of climate change generally," but "then proceed[ed] with analysis on the apparent assumption that there will be no change to the hydrology of Icicle Creek." *Id.* at 1233-34. The court determined that "NMFS does not necessarily need to conduct a study or build a model addressing the impacts of climate change on the Icicle Creek watershed … [b]ut its analysis must consider that the best available science, which it discusses elsewhere in the BiOp, suggests that baseline historical flow averages may not be effective predictors of future flows." *Id.* at 1234. If adopted, the proposed language would result in a continual failure "to consider an important aspect of the problem" during consultations going forward. *Id.* (See also *Alaska Oil and Gas Ass'n v. Jewell*, 815 F.3d 544, 558-559 (9th Cir. 2016) (court upheld the USFWS's consideration of climate change impacts in designating critical polar bear habitat); *Alaska Oil and Gas Ass'n v. Pritzker*, 840 F.3d 671, 679-681 (9th Cir. 2016) (court upheld USFWS's consideration of effects of global climate change on sea ice and the viability of the bearded seal)).

Federal actions resulting in significant increases in greenhouse gas emissions, sea level rise, and other climate change-related impacts should be the subject of ESA Section 7 consultation to ensure climate-sensitive species in our area are not pushed towards extinction. For example, the threatened Western Snowy Plover is a small shorebird that nests adjacent to tidal waters on the Pacific Ocean. However, climate change is projected to cause sea level rise of a foot or more on the West Coast within this century, which would surely threaten the survival of this beach-nesting bird. Increased storm surges as a result of climate change may also threaten nests. "Whether ideal habitat—extensive open regions in immediate proximity to open water—becomes available will be the chief determinant of the Snowy Plover's ability to adjust to

changing climate."[3] Additionally, chronic droughts and increased wildfires in this area decrease habitat areas and thus threaten the viability of the endangered Southern California Steelhead, as well as the threatened California Red Legged Frog.

Thus, the proposed addition of language pertaining to "global processes" within Section 402.03 must be stricken.

III. The Proposed Rule Violates the ESA by Allowing Reliance on Non-Binding Plans to Avoid, Minimize, or Offset the Adverse Effects of an Action.

The Services propose to revise Section 402.14(g)(8) "to clarify there is no requirement for measures that avoid, minimize, or offset the adverse effects of an action that are included in the proposed action to be accompanied by 'specific and binding plans,' 'a clear, definite commitment of resources,' or meet other such criteria." 83 Fed. Reg. 35,187. In addition, the Services would not even be required to "independently evaluate whether the proposed measures to avoid, minimize, or offset adverse effects will be implemented. *Id.* This revision would make the consultation process a meaningless formality. If agencies can propose measures that are designed to avoid the issuance of a jeopardy determination with inadequate assurance that the measures will occur, there will be no means to ensure that the substantive mandates of Section 7 are met. The result would be expert wildlife agencies rubber stamping agency actions as not threatening to cause jeopardy or the destruction or adverse modification of critical habitat, without any certainty for ensuring such will be the case. The proposal states that if such measures are not implemented as anticipated the action agency must "continue to ensure compliance with the Act," for example, through reinitiation of consultation or complying with terms of an incidental take statement. *Id.* However, this response would be too little too late. Reinitiation would not ensure that implementation of the action up until the point at which the agency determines it will not implement a measure avoids jeopardy. The second option mentioned, complying with an incidental take statement, would provide no assurance that the measure is implemented, unless it is actually included as a reasonable and prudent measure as part of the incidental take statement.

Moreover, this proposed textual change is inconsistent with well-reasoned case law. As the proposal notes, the court in *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.* held that future "improvements may not be included as part of the proposed action without more solid guarantees that they will actually occur." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 935 (9th Cir. 2008). The court was "not persuaded that even a sincere general commitment to future improvements may be included in the proposed action in order to offset its certain immediate negative effects, absent specific and binding plans." 524 F.3d at 936. The proposal disregards the court's reasoning, claiming that "[t]his judicially created standard is not required by the Act or the existing regulations." 83 Fed. Reg. 35,187. However, the discussion in the case can properly be read as interpreting the statute's Section 7 consultation requirement and the triggering requirement that there be an agency action. The court was unwilling to find that the Section 7 consultation process could proceed in reliance on measures without assurance

[3] Audubon, *Climate Threatened Snowy Plover*, available at: http://climate.audubon.org/birds/snoplo5/snowy-plover.

those measures will occur. This is a common-sense interpretation of the ESA. The reverse approach adopted in the proposed language would thwart the duty to ensure that agency actions avoid jeopardy under Section 7.

The proposal offers no logical basis to support departing from current practice, whereas the courts have set forth logical reasoning for requiring specific plans or a definite commitment of resources for measures that avoid, minimize, or offset the adverse effects of an action. This requirement is necessary to comply with Section 7 of the ESA.

IV. The Proposed Definition of "Effects of The Action" Under Section 402.02 Improperly Narrows the Scope of "Effects" to be Considered by the Services During Consultation.

During formal consultation, the Service is responsible for "[e]valuat[ing] the effects of the action and cumulative effects on the listed species or critical habitat." 50 C.F.R. § 402.14(g)(3). Under the current definition of "effects of the action" pursuant to Section 402.02, "[e]ffects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline." 50 C.F.R. § 402.02. The regulation also expressly defines "indirect effects," "environmental baseline," "interrelated actions," and "interdependent actions." 50 C.F.R. § 402.02.

The proposal, however, does away with these distinctions and redefines "effects of the action" to "include all effects caused by the proposed action." 83 Fed. Reg. 35,183. The proposal claims that "confusion" necessitates that the definition of "effects of the action" be revised in a manner "that applies to the entire range of potential effects." 83 Fed. Reg. 35,183. This proposal, however, could lead to the unintended omission of certain effects that must be considered during the consultation process.

Additionally, to determine when an effect or activity is caused by the proposed action, the new definition proposes a two-part test: (1) the effect or activity would not occur but for the proposed action, and (2) the effect or activity is reasonably certain to occur. *Id.* The second prong of this test extends the "reasonably certain" standard to not only apply to *indirect* effects, but to all other categories of effects. This proposed change is a significant departure from current practice and if implemented, would hinder the Services' evaluation of effects of the action on listed species or critical habitat during consultation by severely limiting the scope of the analysis. Additionally, the proposed change is unnecessary given that Section 7 of the ESA requires that the best scientific and commercial data available be used to ensure "an adequate review of the effects that an action may have upon listed species or critical habitat." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d). This statutorily-imposed requirement to use the best scientific and commercial data is the criteria that must guide the analysis of "effects."

Thus, the proposal to impose a requirement that <u>all</u> effects must be "reasonably certain" goes well beyond what is required under the statute, and will add more delay and confusion.

V. The Administration Must Not Limit the Scope of Consultation Under Section 7(A)(2) to Only the Activities, Areas, and Effects Within the Jurisdictional Control of the Regulatory Agency.

The purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C.A. § 1531(b). The use of the term "ecosystems" in the stated purpose of the ESA implies that the statute mandates a holistic approach to ensuring the conservation and recovery of listed species.

To fragment species recovery based on arbitrary jurisdictional boundaries contravenes the stated purpose of the ESA. The proposal may cause agencies to leave out actual, concrete harms caused by a proposed action if those harms occurred outside that agency's sphere. The harm to listed species and designated critical habitat would still occur, without any of the protections mandated by the ESA. This severe limitation of the geographic scope of consultation would render the substantive protections deemed necessary for species that have undergone the listing process meaningless. For example, effects on a species from a federal agency operating a dam may extend well beyond the dam and yet, the proposed language would allow the agency to limit its examination during consultation to only those "activities, areas, and effects within the jurisdictional control and responsibility" of the agency. 83 Fed. Reg. 35,185. Thus, harms resulting downstream or in areas other than at the dam would not be analyzed during consultation.

VII. Conclusion

For the foregoing reasons, the proposed Section 7 regulations must be withdrawn.

Sincerely,

Tara C. Messing

Tara C. Messing
Staff Attorney

Maggie Hall

Maggie Hall
Staff Attorney