

**CHAMBER OF COMMERCE  
OF THE  
UNITED STATES OF AMERICA**

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September 24, 2018

**VIA ELECTRONIC FILING**

Mr. Craig Aubrey  
U.S. Fish and Wildlife Service, Division of Environmental Review  
U.S. Department of the Interior  
5275 Leesburg Pike  
Falls Church, VA

Ms. Cathy Tortorici  
ESA Interagency Cooperation Division, Office of Protected Resources  
National Oceanic and Atmospheric Administration  
U.S. Department of Commerce  
1315 East-West Highway  
Silver Spring, MD 20910

**RE: Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation, 83 Fed. Reg. 35,178 (July 25, 2018); Docket No. FWS-HQ-ES-2018-0009**

Dear Mr. Aubrey and Ms. Tortorici:

The U.S. Chamber of Commerce submits these comments in support of the Fish and Wildlife Service's (FWS) and National Marine Fisheries Service's (NMFS) (collectively, the Services') proposed revisions to portions of those regulations that implement section 7 of the Endangered Species Act of 1973 (ESA).<sup>1</sup> The Chamber recognizes the need to protect species threatened with extinction, but the Services must also avoid unnecessary impediments to land and natural resources development. The Services can accomplish this balance by using sound science when establishing endangered species protection.

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<sup>1</sup> Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation, 83 Fed. Reg. 35,178 (July 25, 2018).

## I. Background

Congress enacted the ESA<sup>2</sup> in 1973 to conserve the ecosystems upon which endangered and threatened species depend, to provide a program for the conservation of endangered and threatened species, and to achieve the purposes of certain treaties and conventions.<sup>3</sup> The Federal Government must seek to conserve threatened and endangered species and use its authorities to further the purposes of the Act.<sup>4</sup>

The ESA “represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.”<sup>5</sup> The distinct difference between endangered and threatened species creates two separate levels of protection for plants, fish, and wildlife.<sup>6</sup>

On February 24, 2017, President Trump published Executive Order 13,777, “Enforcing the Regulatory Reform Agenda,” which aimed to reduce the regulatory burden on citizens and facilitate innovation and economic growth.<sup>7</sup> The U.S. Department of the Interior (DOI) solicited comments as to how it could “improve implementation of regulatory reform initiatives and policies and identify regulations for repeal, replacement, or modification.”<sup>8</sup> The National Oceanic and Atmospheric Administration (NOAA) within the Department of Commerce (DOC) also solicited comments from stakeholders on the same issue.<sup>9</sup> Officials from DOI and the DOC then met with FWS and NMFS officials in December 2017 to discuss improvements to the ESA, deciding to focus on sections 4 and 7 of the Act.

Section 7 of the ESA addresses the requirements and procedures for federal interagency cooperation and consultation.<sup>10</sup> Section 7 requires that federal agencies, in consultation with and

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<sup>2</sup> The Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (ESA).

<sup>3</sup> *Id.* at § 1531(b).

<sup>4</sup> *Id.* at § 1531(c)(1).

<sup>5</sup> *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978).

<sup>6</sup> Congress defined “endangered species” as any species of plant, fish or wildlife “which is in danger of extinction throughout all or a significant portion of its range” (16 U.S.C. § 1532(6)), and defined “threatened species” as “any species of plant, fish, or wildlife which is likely to become endangered species within the foreseeable future throughout all or a significant portion of its range” (*Id.* at § 1532(20)).

<sup>7</sup> Exec. Order 13,777, Enforcing the Regulatory Reform Agenda, 82 Fed. Reg. 12,285 (Mar. 1, 2017).

<sup>8</sup> Regulatory Reform, 82 Fed. Reg. 28,429 (June 22, 2017).

<sup>9</sup> Streamlining Regulatory Processes and Reducing Regulatory Burden, 82 Fed. Reg. 31,576 (July 7, 2017).

<sup>10</sup> *See* 16 U.S.C. § 1536.

with the assistance of the Secretaries of the Interior and Commerce, “insure that any action authorized, funded, or carried out by such agencies is not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species.”<sup>11</sup>

The Services are now proposing to revise the regulations that implement section 7 of the ESA.<sup>12</sup> The proposed changes would not affect any previous consultations under section 7(a)(2).<sup>13</sup> The revisions would address alternative consultation mechanisms, revise the definitions of “destruction or adverse modification” and “effects of the action,” address certainty of mitigation proposed by the Services; and otherwise improve the consultation process.

The Chamber supports the Services’ actions, and offers the following comments in an effort to further improve the proposal. The Chamber believes that the Services’ proposed actions would make interagency consultation more efficient and consistent, reduce overall consultation times and cost, streamline the consultation process, and increase predictability and consistency for action agencies and permittees. Furthermore, it would achieve these goals without compromising conservation of listed species.

## **II. Definition of Destruction or Adverse Modification**

The revised definition of “destruction or adverse modification” is a positive change. The current regulatory text defines “destruction or adverse modification” as “a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. 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.”<sup>14</sup> The Services propose to revise that definition to add the phrase “as a whole” to the first sentence of the definition and remove the second sentence of the definition in its entirety.<sup>15</sup>

Originally proposed in 1978 and updated in 1986, the Services have long relied on a definition of that term that multiple U.S. courts of appeal have invalidated.<sup>16</sup> In 2001, the U.S. Court

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<sup>11</sup> 83 Fed. Reg. at 35,179.

<sup>12</sup> *See* 50 C.F.R. § 402.

<sup>13</sup> 83 Fed. Reg. at 35,179.

<sup>14</sup> 50 C.F.R. § 402.02.

<sup>15</sup> 83 Fed. Reg. at 35,179.

<sup>16</sup> *See* Interagency Cooperation-Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,926 (June 3, 1986) (defining “destruction or adverse modification” as “a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited

of Appeals for the Fifth Circuit found that the Services' definition set too high a threshold for triggering adverse modification.<sup>17</sup> It found that the definition's requirement that the value of critical habitat for both survival and recovery be appreciably diminished before adverse modification would be the appropriate conclusion was inconsistent with the ESA's definition of conservation, which "speaks to the recovery" of listed species.<sup>18</sup>

In 2004, the U.S. Court of Appeals for the Ninth Circuit likewise invalidated the regulation.<sup>19</sup> It agreed with the Fifth Circuit's decision, and noted that "Congress viewed conservation and survival as 'distinct, though complementary, goals and the requirement to preserve critical habitat is designed to promote both conservation and survival.'"<sup>20</sup>

Following those decisions, the Services each issued guidance to discontinue the use of the 1986 definition and to apply the definition of "conservation" as set out in the Act.<sup>21</sup> This resulted in an analysis as to whether that action would result in the critical habitat remaining "functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species."<sup>22</sup>

Ultimately, the Services promulgated and finalized the current definition of "destruction or adverse modification."<sup>23</sup> This definition was not meant to affect the existing section 7 consultation requirements. However, the second sentence of the definition attempted to elaborate upon the first, rendering it vague, confusing, and unnecessary. The Services' proposed action remedies that issue and refrains from altering the current section 7 consultation process. It is not necessary to include the confusing second sentence of the definition in the current regulatory text.

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to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical").

<sup>17</sup> 83 Fed. Reg. at 35,180 (citing *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001)).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (citing *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004)).

<sup>20</sup> *Id.* (citing *Gifford Pinchot Task Force*, 378 F.3d at 1070).

<sup>21</sup> 83 Fed. Reg. at 35,180 (citing FWS Acting Director Marshall Jones Memorandum to Regional Directors, "Application of the 'Destruction or Adverse Modification' Standard under Section 7(a)(2) of the Endangered Species Act 2004;" NMFS Assistant Administrator William T. Hogarth Memorandum to Regional Administrators, "Application of the 'Destruction or Adverse Modification' Standard under Section 7(a)(2) of the Endangered Species Act, 2005").

<sup>22</sup> *Id.*

<sup>23</sup> Interagency Cooperation-Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat, 81 Fed. Reg. 7,214 (Feb. 11, 2016).

However, the Services could improve the proposal in a number of areas. For instance, the Services should concurrently determine and disclose the “value of critical habitat for the conservation of a species,” as it is important that the Services use an area’s conservation value to inform a critical habitat designation and for evaluations of adverse modification.

The proposal makes multiple references to the Services’ joint Consultation Handbook when referring to the definition of “destruction or adverse modification.”<sup>24</sup> That document is nearly 20 years old, and should be updated. The Services should include sections of the updated handbook in the regulatory language, to provide certainty for stakeholders. The Services should also clarify that the regulations take precedent over the handbook whenever there is a conflict.

### III. Consultation Procedures

The Services seek comment on modifications to 50 C.F.R. § 402.03 regarding circumstances where Federal agencies are not required to consult under ESA section 7, including if the Federal agency does not anticipate “take”<sup>25</sup> and the proposed action would:

- 1) Not affect listed species or critical habitat;
- 2) Manifest effects through global processes that cannot be reliably predicted or measured at the scale of a species range or would have only minor effects, or pose only remote risk; or
- 3) Have only beneficial effects or effects that cannot be measured in a manner that permits meaningful evaluation.

The Chamber supports these proposals. The regulations should state explicitly that a consultation is *not* required for actions that are not likely to adversely affect species. The Consultation Handbook states this very condition, and then clarifies that this includes effects that are “completely beneficial,” “insignificant,” or “discountable.” Therefore, the Services should clarify the regulatory text in 50 C.F.R. sections 402.03 and 402.14(b)(1) to account for those effects that are effects that are “completely beneficial,” “insignificant,” or “discountable.”

The Services should also use this proposal as an opportunity to further incorporate affected states into the consultation process. The Act requires that each agency use the best scientific and commercial data available when engaging in the section 7 consultation process.<sup>26</sup> Affected states often have better data than federal agencies for areas where the consultation process is taking place. As the Western Governors’ Association (WGA) Policy Resolution 2017-11 states:

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<sup>24</sup> See 83 Fed. Reg. at 35,182-87.

<sup>25</sup> A “take” is any action meant to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” See 16 U.S.C. at § 1532(19).

<sup>26</sup> See 16 U.S.C. § 1536.

State agencies often have the best available science, expertise and other scientific and institutional resources such as mapping capabilities, biological inventories, biological management goals, state wildlife action plans and other important data. This wealth of resources is highly valuable; the federal government should recognize, consult, and employ these vast resources in developing endangered species listing, recovery and delisting decisions.<sup>27</sup>

DOI Secretary Ryan Zinke recently announced that DOI will begin to defer to state hunting and fishing practices in many areas.<sup>28</sup> As part of this process, DOI agencies must, within 45 days, compile any “regulations, policies, or guidance that pertain to public recreational use and enjoyment of fish and wildlife...that are more restrictive than otherwise applicable State provisions” and then, within 90 days after that, recommend steps “to better align its regulations, policies, and guidance with State provisions.”<sup>29</sup> These actions reflect the Department’s commitment to incorporating states into the consultation process.

The Chamber agrees with the WGA and DOI, and feels that increased consultation and cooperation between affected states and federal agencies would undoubtedly bring increased expertise, more feasible solutions, and better conservation outcomes to the consultation process.

It is also important that a consultation be limited to the activities, areas, and effects within the jurisdictional control and responsibility of the regulatory agency. Attempts to usurp jurisdiction from another agency may lead to conflicting, burdensome, and overlapping regulation. An agency should defer areas outside of their expertise to the agency with jurisdiction, and the Services should amend the regulatory text to reflect that.<sup>30</sup>

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<sup>27</sup> Western Governors’ Association Policy Resolution 2017-11, *Species Conservation and the Endangered Species Act*, 6 available at [http://westgov.org/images/editor/2017-11\\_Species\\_Conservation\\_and\\_the\\_ESA\\_for\\_web.pdf](http://westgov.org/images/editor/2017-11_Species_Conservation_and_the_ESA_for_web.pdf).

<sup>28</sup> See News Editor, *Zinke Cedes Federal Wildlife Protection to the States*, Environment News Service (Sept. 11, 2018), available at <http://ens-newswire.com/2018/09/11/zinke-cedes-federal-wildlife-protection-to-the-states>.

<sup>29</sup> *Id.*

<sup>30</sup> See *supra* note 27.

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#### **IV. Conclusion**

The Chamber appreciates the Services' consideration of these comments and urges them to act in an expeditious and thorough manner. If you have questions regarding these comments, please contact me at (202) 463-5558 or at [kharbert@uschamber.com](mailto:kharbert@uschamber.com).

Sincerely,

A handwritten signature in black ink, appearing to read "K A Harbert". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Karen A. Harbert