

**From:** [Charisa Morris](#)  
**To:** [Thomas Irwin](#); [Roslyn Sellars](#)  
**Subject:** Fwd: ESA Policy and Regulations Workshop - NCTC 12/12 -12/13  
**Date:** Monday, December 11, 2017 9:10:12 AM  
**Attachments:** [ATT00001.htm](#)  
[ESA Policy and Regulations Workshop agenda v2 \(1\).docx](#)  
[Workshop Attendees.docx](#)  
[ATT00002.htm](#)  
[DOI-2017-0003-0221 \(1\).pdf](#)  
[ATT00003.htm](#)  
[DOI-2017-0003-0214 \(1\).pdf](#)  
[ATT00004.htm](#)  
[DOI-2017-0003-0128 \(1\).pdf](#)  
[ATT00005.htm](#)

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Hey there! Is Greg attending on the evening of the 12th?

Sent from my iPhone

Begin forwarded message:

**From:** "Sellars, Roslyn" <[roslyn\\_sellars@fws.gov](mailto:roslyn_sellars@fws.gov)>  
**To:** Greg J Sheehan <[greg\\_j\\_sheehan@fws.gov](mailto:greg_j_sheehan@fws.gov)>  
**Cc:** "Morris, Charisa" <[Charisa\\_Morris@fws.gov](mailto:Charisa_Morris@fws.gov)>, Thomas Irwin <[thomas\\_irwin@fws.gov](mailto:thomas_irwin@fws.gov)>  
**Subject:** ESA Policy and Regulations Workshop - NCTC 12/12 -12/13

Greg

Gary mentioned you may be attending this workshop. Is that correct?

Roslyn

----- Forwarded message -----

**From:** **Frazer, Gary** <[gary\\_frazer@fws.gov](mailto:gary_frazer@fws.gov)>  
**Date:** Fri, Dec 8, 2017 at 4:23 PM  
**Subject:** Materials for ESA Policy and Regulations Workshop  
**To:** David Bernhardt <sup>(b) (6) David Bernhardt</sup> <[REDACTED]>, "Willens, Todd" <[todd\\_willens@ios.doi.gov](mailto:todd_willens@ios.doi.gov)>, Downey Magallanes <[downey\\_magallanes@ios.doi.gov](mailto:downey_magallanes@ios.doi.gov)>, Greg Sheehan <[Greg\\_J\\_Sheehan@fws.gov](mailto:Greg_J_Sheehan@fws.gov)>, Gina Shultz <[Gina\\_Shultz@fws.gov](mailto:Gina_Shultz@fws.gov)>, Bridget Fahey <[Bridget\\_Fahey@fws.gov](mailto:Bridget_Fahey@fws.gov)>, Craig Aubrey <[craig\\_aubrey@fws.gov](mailto:craig_aubrey@fws.gov)>, Jeff Newman <[jeff\\_newman@fws.gov](mailto:jeff_newman@fws.gov)>, "White, Rollie" <[rollie\\_white@fws.gov](mailto:rollie_white@fws.gov)>, Ted Koch <[Ted\\_Koch@fws.gov](mailto:Ted_Koch@fws.gov)>, Lori Nordstrom <[lori\\_nordstrom@fws.gov](mailto:lori_nordstrom@fws.gov)>, "Miranda, Leopoldo" <[Leopoldo\\_Miranda@fws.gov](mailto:Leopoldo_Miranda@fws.gov)>, Paul Phifer <[Paul\\_Phifer@fws.gov](mailto:Paul_Phifer@fws.gov)>, Michael Thabault <[Michael\\_Thabault@fws.gov](mailto:Michael_Thabault@fws.gov)>, "Colligan, Mary" <[mary\\_colligan@fws.gov](mailto:mary_colligan@fws.gov)>, Michael Fris <[Michael\\_Fris@fws.gov](mailto:Michael_Fris@fws.gov)>, Richard Goeken <[richard.goeken@sol.doi.gov](mailto:richard.goeken@sol.doi.gov)>, Peg Romanik <[Peg.Romanik@sol.doi.gov](mailto:Peg.Romanik@sol.doi.gov)>, BENJAMIN JESUP <[benjamin.jesup@sol.doi.gov](mailto:benjamin.jesup@sol.doi.gov)>, [ecomstock@doc.gov](mailto:ecomstock@doc.gov), "Uthmeier, James (Federal)" <[JUthmeier@doc.gov](mailto:JUthmeier@doc.gov)>, [jroberson@doc.gov](mailto:jroberson@doc.gov), [Chris.W.Oliver@noaa.gov](mailto:Chris.W.Oliver@noaa.gov), Sam Rauch <[samuel.rauch@noaa.gov](mailto:samuel.rauch@noaa.gov)>,

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Christopher D. Prandoni - Exemption 6  [gov](mailto:gov)>  
Cc: Roslyn Sellars <[Roslyn\\_Sellars@fws.gov](mailto:Roslyn_Sellars@fws.gov)>, Catherine Gulac  
<[catherine\\_gulac@ios.doi.gov](mailto:catherine_gulac@ios.doi.gov)>, "Rees, Gareth" <[gareth\\_rees@ios.doi.gov](mailto:gareth_rees@ios.doi.gov)>,  
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Galst <[Carey\\_Galst@fws.gov](mailto:Carey_Galst@fws.gov)>, Lois Wellman <[lois\\_wellman@fws.gov](mailto:lois_wellman@fws.gov)>

Attached are some materials for your use in preparing for next week's workshop  
at our National Conservation Training Center (NCTC) in Shepherdstown, WV:

- a draft agenda
- the current list of workshop participants
- some selected letters from outside parties that commented comprehensively  
on our ESA regs and policies. These, of course, are by no means all of the  
comments received by the DOI Regulatory Task Force. They are offered  
simply as a sample of some of the most thorough comments.

If you have not yet made your reservation at NCTC, need directions, or have any  
other questions about NCTC, here's a link to everything you need to know about  
NCTC: <https://training.fws.gov/> For those of you new to NCTC, it's a  
comfortable, casual atmosphere. Ties and other typical Washington, DC uniform  
components are discouraged,

The meeting will be held in The Gallery, which is to the left as you enter the main  
floor of the Commons building, located on the east side of the pedestrian bridge.  
The Commons houses both the cafeteria and the bar, so all your nutritional needs  
will be close at hand.

Look forward to seeing you next week. -- Gary

*Gary Frazer*  
*Assistant Director -- Ecological Services*  
*U.S. Fish and Wildlife Service*  
*(202) 208-4646*

**ESA Policy and Regulations Workshop  
National Conservation Training Center  
The Gallery, first floor of the Commons Building  
December 12-13, 2017**

**Goals and Intent of Workshop:** Understand policy objectives of political leadership, identify opportunities for improving delivery of the Endangered Species Act, and chart a path forward for revision of FWS/NMFS interagency regulations and policies for implementation of the Act.

**Tuesday, December 12**

**8:00 – 9:00p**

Introductions

Setting the stage for discussions

- Goals and intent of the workshop (Willens)
- Remarks from senior leadership (Willens, Comstock)
- Review the agenda
- Adjourn for the evening

**Wednesday, December 13**

**8:00 – 8:30a**

Introduction of any new participants

Identify ground rules and review the agenda (facilitator)

**8:30 – 9:00a**

Overarching principles and shared objectives (group discussion, led by facilitator)

- Input from participants on big picture objectives for reg/policy revision

**9:00 – 10:00a**

Petitions, listing, critical habitat, delisting

- Ideas for policy or reg revision
- Discussion

**10:00 – 10:30a**

Break

**10:30 – 11:30a**

Recovery, Cooperation with the States

- Ideas for policy or reg revision
- Discussion

**11:30a – 1:00p**

Lunch

**1:00 – 2:00p**

Section 7 consultation

- Ideas for policy or reg revision
- Discussion

**2:30 – 3:15p**

Section 10 permitting

- Ideas for policy or reg revision
- Discussion

**3:15 – 3:30p**

Break

**3:30 – 4:30p**

Comprehensive review of issues identified for action

- Identify issues more appropriate for policy or guidance than regulation
- Scope of the regulation revision effort (comprehensive or surgical?)
- Priorities

**4:30 – 4:45p**

Next steps

**4:45 – 5:00p**

Closing remarks (Bernhardt, Comstock)

## Workshop Participants

David Bernhardt (DOI, Deputy Secretary)  
Todd Willens (DOI, Assistant Deputy Secretary)  
Downey Magallanes (DOI, Deputy Chief of Staff)  
Greg Sheehan (FWS, Principal Deputy Director)  
Gary Frazer (FWS, Assistant Director – Ecological Services)  
Gina Shultz (FWS, Deputy Assistant Director – Ecological Services)  
Bridget Fahey (FWS, Division Chief, Conservation and Classification)  
Craig Aubrey (FWS, Division Chief, Environmental Review)  
Jeff Newman (FWS, Division Chief, Restoration and Recovery)  
Rollie White (FWS, Assistant Regional Director (ARD) - Pacific Northwest)  
Ted Koch (FWS, ARD - Southwest)  
Lori Nordstrom (FWS, ARD - Midwest)  
Leo Miranda (FWS, ARD - Southeast)  
Paul Phifer (FWS, ARD - Northeast)  
Mike Thabault (FWS, ARD – Rocky Mountains)  
Mary Colligan (FWS, ARD – Alaska)  
Mike Fris (FWS, ARD – Pacific Southwest)  
Rick Goeken (DOI, SOL)  
Peg Romanik (DOI, SOL)  
Ben Jesup (DOI, SOL)  
Earl Comstock (DOC)  
James Uthmeier (DOC)  
Jeff Roberson (DOC-EDA)  
Chris Oliver (NMFS AA)  
Sam Rauch (NMFS DAA for Regulatory Programs)  
Donna Wieting (NMFS, Director, Office of Protected Resources)  
Cathy Tortorici (NMFS, Division Chief, Endangered Species/Interagency Cooperation, Office of Protected Resources)  
Lisa Manning (NMFS, Endangered Species Division, Office of Protected Resources)  
Jennifer Schultz (NMFS, Endangered Species Division, Office of Protected Resources)  
Kristan Gustafson (NOAA GC)  
Rod Vieira (NOAA GC)  
Ruth Ann Lowery (NOAA GC)  
Katie Renshaw (NOAA GC)  
Chris Prandoni, CEQ

Drew Burnett, facilitator  
Patrice Ashfield, note taker  
Carey Galst, note taker




## Document Details

<b>Docket ID:</b>	DOI-2017-0003
<b>Docket Title:</b>	Regulatory Reform Executive Order 13777 *
<b>Document File:</b>	
<b>Docket Phase:</b>	Advance Notice of Proposed RuleMaking
<b>Phase Sequence:</b>	1
<b>Original Document ID:</b>	DOI-2017-0003-DRAFT-0223
<b>Current Document ID:</b>	DOI-2017-0003-0221
<b>Title:</b>	FWS-0075
<b>Number of Attachments:</b>	1
<b>Document Type:</b>	PUBLIC SUBMISSIONS *
<b>Document Subtype:</b>	
<b>Comment on Document ID:</b>	DOI-2017-0003-0009
<b>Comment on Document Title:</b>	Comment on This Document for U.S. Fish and Wildlife Service (FWS) Regulatory Reform
<b>Status:</b>	Posted
<b>Received Date:</b>	11/16/2017 *
<b>Date Posted:</b>	11/17/2017
<b>Posting Restriction:</b>	No restrictions
<b>Submission Type:</b>	Web
<b>Number of Submissions:</b>	1 *

## Document Optional Details

<b>Status Set Date:</b>	11/17/2017
<b>Current Assignee:</b>	NA
<b>Status Set By:</b>	Calhoun, John (DOI)
<b>Comment Start Date:</b>	06/22/2017
<b>Comment Due Date:</b>	
<b>Tracking Number:</b>	1k1-8zty-gt3a
<b>Total Page Count Including Attachments:</b>	1

Accept Comments after the  
Comment Due Date: No 

## Submitter Info

Comment: See attached file(s) \* 


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Organization Name: Western Governors Association 

Submitter's  
Representative:

Government Agency Type:

Government Agency:

Category:

Cover Page: 

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November 16, 2017

Honorable Ryan Zinke  
Secretary  
U.S. Department of the Interior  
1849 C Street, N.W., Room 6151  
Washington, D.C. 20240

Dear Secretary Zinke:

The Western Governors' Association (WGA) respectfully submits these comments in response to the notice issued by the U.S. Department of the Interior (DOI) seeking comments on regulatory reform for the U.S. Fish and Wildlife Service (FWS or Service) [[DOI-2017-0003](#)]. We appreciate the opportunity to provide input on means of improving how the Service implements the Endangered Species Act (ESA) through regulatory and administrative actions.

WGA represents the Governors of the 19 western states and 3 U.S.-flag territories in the Pacific Ocean. The association is an instrument of the Governors for bipartisan policy development, information-sharing and collective action on issues of critical importance to the western United States.

Over the past two years, WGA – through the Western Governors' Species Conservation and Endangered Species Act Initiative (Initiative) – has conducted “big-tent” stakeholder discussions focused on: identifying means of incentivizing voluntary conservation; elevating the role of states in species conservation; and improving the efficacy of the ESA. Through a series of public workshops, intimate work sessions, webinars and myriad other tools, WGA has engaged a wide range of interested parties in substantive, transparent and expansive discussions on proactive species conservation and the ESA.

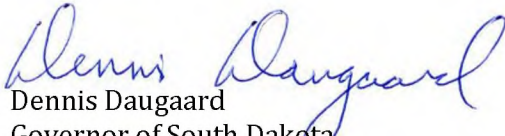
One result of this effort is WGA Policy Resolution [2017-11](#), *Species Conservation and the Endangered Species Act*, which incorporates by reference the Species Conservation and the ESA Initiative Year Two Recommendations. To inform your deliberations on regulatory and administrative actions to improve species conservation and the ESA, WGA respectfully submits those recommendations.

The FWS has remained a steadfast partner of WGA throughout the Initiative. We appreciate the many contributions of the Service to this work and look forward to continuing our cooperative efforts. Governors also sincerely appreciate the recognition of WGA efforts to improve the efficacy

Honorable Ryan Zinke  
November 16, 2017  
Page 2

of species conservation and the ESA through the Initiative in the final report, "[Review of the Department of the Interior Actions that Potentially Burden Domestic Energy](#)." As WGA enters the third year of efforts under the Initiative, we look forward to working in partnership with the Service and DOI to discuss opportunities to implement the Governors' bipartisan administrative recommendations to improve the ESA. Please do not hesitate to contact us if we can be of further assistance.

Respectfully,

  
Dennis Daugaard  
Governor of South Dakota  
Chair, WGA

  
David Ige  
Governor of Hawaii  
Vice Chair, WGA

cc: David Bernhardt, Deputy Secretary, U.S. Department of the Interior  
Greg Sheehan, Acting Director, U.S. Fish and Wildlife Service

Attachment (WGA Species Conservation and ESA Initiative Year Two Recommendations)



## WGA Species Conservation and the Endangered Species Act Initiative Year Two Recommendations

### Preamble

The Western Governors' Association (WGA), under the leadership of then-Chairman Wyoming Governor Matt Mead, launched the Western Governors' Species Conservation and Endangered Species Act Initiative (Initiative) in 2015. Since the Initiative's inception, WGA has hosted numerous workshops, webinars, and work sessions to create a forum for a diverse coalition of stakeholders to share best practices in species management, promote the role of states in species conservation, and explore options to improve the efficacy of the Endangered Species Act (ESA).

While the Initiative has closely examined the ESA, the effort goes well beyond consideration of the Act alone. Governors also are seeking to encourage voluntary conservation – through early identification of sensitive species and establishment of institutional frameworks that incentivize collaborative voluntary conservation – thus avoiding the need to list species in the first place.

The first year of the Initiative (2015-2016) resulted in approval of WGA Resolution [2016-08: Species Conservation and the Endangered Species Act](#) – an expansive resolution encapsulating Governors' principles informed by the Initiative. The Resolution instructs WGA staff to develop a multi-year workplan to further Governors' policy principals on Species Conservation and the ESA. What followed in the first year of workplan implementation (2016-2017) was a continuation of the transparent, inclusive, and stakeholder driven process to refine and examine avenues for implementation of Governors' policy statements expressed in the Resolution.

A suite of recommendations addressing proactive and incentive based voluntary conservation species and ESA implementation emerged from year two work sessions. Work session participants were not expected to reach full consensus on recommendations forwarded by the Governors. However, comity among work session participants gave rise to significant progress toward conceptual agreement and helped inform the Governors' deliberations on the recommendations contained in this document.

As interest within Congress and the Administration in examining the ESA builds, Western Governors' submit these bipartisan statutory, regulatory and funding-related recommendations consistent with implementation of the principles forwarded in WGA Resolution 2016-08, *Species Conservation and the Endangered Species Act*.

Importantly, with respect to statutory recommendations, Western Governors' acknowledge any Congressional effort to amend the ESA will be complicated and spark diverse opinions. WGA's ESA initiative enjoyed diverse stakeholder input and broad consensus; these resulting

recommendations represent bipartisanship at this stage. Each governor reserves judgment on whether to support Congressional action, based upon unknown future legislative language.

## Statutory

1. A) Amend Section 4 of the Endangered Species Act to create flexibility for the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, "Services") to create a prioritization schedule for petitions received. The Services must assign a petitioned species a listing priority within 12 months of a positive 90-day finding. Species in immediate risk of extinction will receive highest priority, while species with ongoing conservation efforts or species for which listing would provide limited conservation benefit within the foreseeable future will be placed in a lower priority category.  
  
B) Amend Section 4 of the Endangered Species Act to create a statutory exception for the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, "Services") to defer 12 month findings for a species under the ESA when: 1) a conservation plan is either being developed or implemented to meet the conservation needs of the species. In the case of species that range across multiple states, this refers to a plan in each state or a range-wide plan. The Services may renew the deferral every five years so long as they have worked with states to complete a determination that the conservation plan continues to meet the conservation needs of the species; 2) a delay will allow time to complete data collection or complete studies relating to the petitioned species; 3) species for which listing would provide limited conservation benefit within the foreseeable future.
2. Require the Secretary to make a determination on whether or not to designate critical habitat for a species. The Secretary shall designate critical habitat if he or she determines such a designation is necessary to recover the species. If the Secretary determines that such designation is not critical to recovery of the species, the Secretary may decline to designate critical habitat for a species. If the Secretary designates critical habitat, it must link such designation to recovery objectives and plans. For many species, recovery planning cannot occur until years after a listing, leaving a lot of time for critical habitat to be compromised in the meantime. When necessary, critical habitat should continue to be designated at the time of listing, and re-evaluated as part of the recovery planning process. The Secretary will retain current authority to permit exclusions from critical habitat designations for discrete purposes.
3. Upon listing, the Services will convene a recovery team within 12 months. States will have the option to lead and develop that team. The Recovery Team shall create a recovery plan, and lead its implementation. The recovery plan shall include criteria, that when met, would require the Recovery Team to recommend delisting or downlisting to

the Services. Whenever necessary, the recovery plan should be updated to include the best available science and strategies to address all recognized threats to recovering the species. Upon receipt of the recommendation to delist or downlist a species from the Recovery Team, the Service shall initiate a status review of the species for purposes of considering delisting or downlisting. Once the Services issue a delisting rule, they shall develop a post-delisting monitoring plan in a timely fashion, and judicial review of the delisting rule will be delayed until the completion of the post-delisting monitoring review period so long as a federally endorsed conservation plan is in place.

## Regulatory/Administrative

1. Examine the possibility of providing assurances on public land to minimize the disincentive to enrolling in Candidate Conservation Agreements with Assurances (CCAAs) for permitted public land users with operations spanning both federal and private land. Assurances provided may not come in the form of incidental take permit associated with CCAAs, but rather a suite of assurances such as increased AUMs or extended grazing lease renewal periods for operators providing conservation actions on public lands, providing the assurances would not compromise the intent of the CCAA to recover the species to the point that ESA listing is not necessary.
2. When a landowner implements conservation measures as a part of a federally endorsed conservation agreement, The Services may exclude private land covered under the agreement from any critical habitat designation. This authority currently exists under the ESA, but needs further clarification and guidance.
3. When making listing determinations, the Secretary must take into account conservation efforts to protect species, including efforts by states, federal agencies, and private landowners.
4. The Services should work with states to develop templates for voluntary conservation programs and conservation tools that are intended to incentivize voluntary conservation for a variety of species and habitats. These templates would provide a more streamlined process of implementing voluntary conservation programs for candidate and listed species.
5. Encourage the Service to develop Species Status Assessments to help inform a listing determination. If listing is deemed warranted, use this same assessment to inform development of a recovery plan blueprint so stakeholders are able to implement effective recovery actions prior to the release of a formal species recovery plan.
6. Given the Services' new policy of using Species Status Assessments (SSAs) as a routine part of listing and recovery decisions made under the ESA, recommend the Services promulgate regulations to ensure the SSAs serve their intended function of collecting

and analyzing foundational science on a species and updating that information promptly when new data or analysis becomes available. Give state wildlife agencies a leadership role on SSA teams commensurate with their position as the repository of the bulk of the data and expertise on many species. Most critically, provide an adequate internal appeals process for challenging the conclusions of an SSA, either to Ecological Services leadership or to the Regional Director, to ensure that a misguided determination does not become embedded in multiple future decisions about a species.

7. Develop a national policy for the implementation of 4(d) rules that details best practices and incentivizes strong local input.
8. Clarify or emphasize existing authority under the ESA for states to exercise concurrent jurisdiction with the Services to implement the ESA, including management of threatened species and issuance of Section 10 take permits, if states demonstrate a desire and capacity to do so.
9. If states decline to develop and lead a recovery team, as described in Statutory Recommendation #3, the Services shall still seek sufficient participation from states to assemble recovery teams. States maintain strong wildlife management expertise, relationships with their regulated communities, and are able to better identify those individuals and entities that can best contribute to the recovery planning process.
10. Establish an informative “playbook” to inform citizens on how to engage throughout various steps of the ESA process.
11. In the case of species which are listed as threatened or endangered where listing provides limited conservation benefit within the foreseeable future, concurrent with the listing, Services should issue a 4(d) rule that emphasizes regulatory flexibility. Services should also consider delaying critical habitat designations, as well as modify the way in which they conducts consultations.

## Funding

1. Pair economic incentives with critical habitat and priority conservation designations on private land and public land permitted users to alleviate the burden of critical habitat designations on private land while rewarding stewardship of quality habitat. Incorporate a scoring system – similar to, but not duplicative of, farm bill incentive scoring system – developed by stakeholders and including states, for private land conservation priority to assign varying economic incentives.
2. The Services’ budget should include specific line items directing funding to assist stakeholders interested in seeking assurance agreements and other voluntary conservation efforts.

3. The Services currently allocate very little of their recovery budget to delisting or downlisting recovered species, which causes species to remain listed as threatened or endangered longer than the ESA intends. Congress should allocate money to the Services through a specific line-item in their budgets to enable the Services to timely delist or downlist species.
  
4. Congress should allocate additional funding to the Services' to implement the ESA. Western Governors believe that adoption of these recommendations will improve the efficacy of the ESA, but recognize that the Services and states require adequate funding to ensure successful implementation of the Act. Governors will work with Congress to identify priorities for funding that will facilitate voluntary species conservation efforts and improve the efficacy of the ESA.




## Document Details


<b>Docket ID:</b>	DOI-2017-0003
<b>Docket Title:</b>	Regulatory Reform Executive Order 13777 *
<b>Document File:</b>	
<b>Docket Phase:</b>	Advance Notice of Proposed RuleMaking
<b>Phase Sequence:</b>	1
<b>Original Document ID:</b>	DOI-2017-0003-DRAFT-0216
<b>Current Document ID:</b>	DOI-2017-0003-0214
<b>Title:</b>	FWS-0071
<b>Number of Attachments:</b>	1
<b>Document Type:</b>	PUBLIC SUBMISSIONS *
<b>Document Subtype:</b>	
<b>Comment on Document ID:</b>	DOI-2017-0003-0009
<b>Comment on Document Title:</b>	Comment on This Document for U.S. Fish and Wildlife Service (FWS) Regulatory Reform
<b>Status:</b>	Posted
<b>Received Date:</b>	11/01/2017 *
<b>Date Posted:</b>	11/02/2017
<b>Posting Restriction:</b>	No restrictions
<b>Submission Type:</b>	Web
<b>Number of Submissions:</b>	1 *

## Document Optional Details

<b>Status Set Date:</b>	11/02/2017
<b>Current Assignee:</b>	NA
<b>Status Set By:</b>	Calhoun, John (DOI)
<b>Comment Start Date:</b>	06/22/2017
<b>Comment Due Date:</b>	
<b>Tracking Number:</b>	1k1-8zjv-rp0j
<b>Total Page Count Including Attachments:</b>	1

Accept Comments after the Comment Due Date: No 

## Submitter Info

**Comment:** Attached please find comments from the National Endangered Species Act Reform Coalition (NESARC) providing recommendations to the Department of the Interior on improving implementation of regulatory reform initiatives and policies and identifying regulations for repeal, replacement, or modification. The attached comments provide recommendations on improvements that the U.S. Fish and Wildlife Service should make to regulations under the Endangered Species Act. \* 


**First Name:** Tyson 

**Middle Name:** 

**Last Name:** Kade 

**ZIP/Postal Code:**

**Email Address:**


**Organization Name:** National Endangered Species Act Reform Coalition (NESARC) 

**Submitter's Representative:**

**Government Agency Type:**

**Government Agency:**

**Category:**

**Cover Page:** 



NATIONAL ENDANGERED SPECIES ACT  
REFORM COALITION

1050 Thomas Jefferson Street, NW, 6th Floor  
Washington, DC 20007  
tel. 202.333.7481 fax 202.338.2416  
www.nesarc.org

November 1, 2017

Mr. Mark Lawyer  
Office of the Executive Secretariat  
Attn: Reg. Reform, DOI-2017-0003-0009  
U.S. Department of the Interior  
1859 C Street NW  
Mail Stop 7328  
Washington, DC 20240

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

**Re: NESARC Comments on Regulatory Reform and Reducing Regulatory Burdens**

Dear Mr. Lawyer:

On June 22, 2017, the Department of the Interior (“DOI”) requested comments on improving implementation of regulatory reform initiatives and policies and identifying regulations for repeal, replacement, or modification.<sup>1</sup> The National Endangered Species Act Reform Coalition (“NESARC”) respectfully provides the following comments and recommendations on improvements that the U.S. Fish and Wildlife Service (“FWS”) should make 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,<sup>2</sup> NESARC includes agricultural interests, cities and counties, commercial real estate developers, conservationists, electric utilities, energy producers, farmers, forest product companies, home builders, landowners, oil and gas companies, ranchers, realtors, water and irrigation districts, and other businesses and individuals throughout the United States. NESARC and its members are committed to promoting effective and balanced legislative and administrative improvements to the ESA that support the protection of fish, wildlife, and plant populations as well as responsible land, water, and resource management.

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<sup>1</sup> *Regulatory Reform*, 82 Fed. Reg. 28,429 (June 22, 2017).

<sup>2</sup> 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 FWS and the National Marine Fisheries Service (“NMFS”) (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, FWS, in collaboration with NMFS, can best identify and incorporate efficiencies and improvements that have been learned during the past 40 years of ESA implementation.<sup>3</sup>

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 unwieldy—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. 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.<sup>4</sup> NESARC requests that FWS, in collaboration with NMFS, 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,<sup>5</sup> but should be formally adopted as regulations to provide certainty and further inform the “not likely to adversely affect” determination.

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<sup>3</sup> On August 21, 2017, NESARC submitted similar comments to NMFS in Docket No. NOAA-NMFS-2017-0067.

<sup>4</sup> See, e.g., Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, § 4004, 130 Stat. 1628, 1858 (2016).

<sup>5</sup> 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.<sup>6</sup> The environmental baseline is intended to provide a “snapshot” of a species’ health at the time of the consultation. Preapproved and preexisting activities, projects and facilities, and the associated operational effects on species and habitat, must be included in the baseline for any consultation that may be required for ongoing operations or proposed new actions carried out, authorized, or funded by federal agencies.
- 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.<sup>7</sup> 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.”<sup>8</sup> 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.”<sup>9</sup>
- 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.<sup>10</sup> Such documents may include environmental assessments or environmental impact statements prepared pursuant to the National Environmental Policy Act 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.<sup>11</sup> 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

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<sup>6</sup> 50 C.F.R. § 402.02.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Interagency Cooperation*, 51 Fed. Reg. 19,932, 19,933 (1986).

<sup>10</sup> 50 C.F.R. § 402.02.

<sup>11</sup> *Id.* For additional information, see NESARC’s comments, dated October 9, 2014, submitted in Docket No. FWS-R9-ES-2011-0072.

of a listed species” impermissibly converts the Section 7 consultation analysis into the imposition of a recovery standard.

- 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. For example, the Services should establish a “categorical approval” for various types of activities undertaken with certain species-protective best management practices. 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,<sup>12</sup> additional changes are necessary to conform the regulations to Congressional intent and the explicit statutory criteria.<sup>13</sup> 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. The Services cannot rely on speculative effects of climate change to designate areas that currently lack essential habitat features in an attempt to anticipate future changes in habitat or species distribution. 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.”<sup>14</sup> NESARC requests that FWS, in collaboration with NMFS, take the following actions:

- Clarify that critical habitat can only be designated in areas, whether occupied or unoccupied, that already contain the elements necessary to provide habitat for the species.

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<sup>12</sup> *Implementing Changes to the Regulations for Designating Critical Habitat*, 81 Fed. Reg. 7,414 (February 11, 2016).

<sup>13</sup> For additional information, see NESARC’s comments, dated October 9, 2014, submitted in Docket No. FWS–HQ–ES–2012–0096.

<sup>14</sup> 124 Cong. Rec. 38,131 (1978).

Congress included a clear habitability requirement in the ESA, and this must be reflected in the regulations.<sup>15</sup>

- 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.”<sup>16</sup> 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 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.<sup>17</sup> 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.<sup>18</sup>
- 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.”<sup>19</sup> The ESA is clear that occupied areas may be designated as critical habitat only where essential physical and biological features “are found.”<sup>20</sup> 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.”<sup>21</sup> Congress explicitly required that the identified physical or biological features must be “essential to the conservation of the species.”<sup>22</sup> “Essential” is a higher standard (i.e., absolutely necessary or indispensable) that does not include any or all habitat features that support a species.

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<sup>15</sup> 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”).

<sup>16</sup> 50 C.F.R. § 424.12(b)(1), (2).

<sup>17</sup> *Id.* § 424.02.

<sup>18</sup> 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).

<sup>19</sup> 50 C.F.R. § 424.02.

<sup>20</sup> 16 U.S.C. 1532(5)(A)(i).

<sup>21</sup> 50 C.F.R. § 424.02.

<sup>22</sup> 16 U.S.C. § 1532(5)(A)(i).

- Account for the existence of state, county, local and voluntary management and protection measures when determining whether physical or biological features “may require special management considerations or protection.”<sup>23</sup> Areas with existing habitat management and protective measures (included those provided by habitat conservation plans, candidate conservation agreements with assurances, safe harbor agreements, etc.) may render critical habitat redundant, and designation of those areas may provide no added benefits for the species. The Services should consult with and take input from the managers of the voluntary conservation plans before designating critical habitat.
- Revise the regulations to provide specific criteria for the designation of unoccupied habitat.<sup>24</sup> 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.”<sup>25</sup> This regulation is consistent with Congressional intent, and maintains the proper relationship between occupied and unoccupied habitat.

### **C. Revisions to Economic Analysis of Critical Habitat Designations**

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.<sup>26</sup> 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).<sup>27</sup> 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, such as the effect on future property values and lost conservation opportunities on private land. In addition, rather than considering impacts at a scale that the Secretary determines to be appropriate, the Services should use a scale that ensures that the economic analysis can be relied on to determine, consistent with the ESA, that a “particular area” may be excluded.<sup>28</sup> Finally, the Services should use quantitative assessment methodologies, to the maximum extent practicable, and only rely on 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.

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<sup>23</sup> 50 C.F.R. § 424.12(b)(1)(iv).

<sup>24</sup> *Id.* § 424.12(b)(2).

<sup>25</sup> *Id.* § 424.12(e) (2015).

<sup>26</sup> For additional information, see NESARC’s comments, dated October 23, 2012, submitted in Docket Nos. FWS-R9-ES-2011-0073 & NOAA-120606146-2146-01.

<sup>27</sup> 50 C.F.R. § 424.19(b).

<sup>28</sup> 16 U.S.C. § 1533(b)(2).

#### **D. 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.<sup>29</sup> These decisions are frequently dictated by petitions to list species, which trigger mandatory and inflexible statutory deadlines for the Services to act.<sup>30</sup> 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. These petition deadlines are enforced through litigation and settlements, without public involvement, which further perpetuates the underlying problem.<sup>31</sup>

To help alleviate these issues, the Services should identify opportunities for the greater involvement of, and collaboration with, state and local government agencies.<sup>32</sup> 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 petitioners to provide notice to State agencies prior to submitting petitions,<sup>33</sup> and notices to State agencies and counties of proposed regulations,<sup>34</sup> the expertise of these entities has been largely marginalized in the implementation of listing and critical habitat decisions. The Services should better use the expertise and abilities of State and local government agencies by providing a greater role in the listing and critical habitat designation process.<sup>35</sup>

The Services should also promulgate regulations to define the operative terms within the statutory definitions of “endangered species” and “threatened species.”<sup>36</sup> The phrases “in danger of extinction,” “foreseeable future,” and “significant portion of its range” (“SPR”) are vague and demand codification through the rulemaking process. 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.<sup>37</sup> Further clarification of these terms is necessary to provide regulatory certainty to the ESA listing process.

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<sup>29</sup> *Id.* § 1533(a)(1).

<sup>30</sup> *Id.* § 1533(b)(3).

<sup>31</sup> 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.

<sup>32</sup> 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.”).

<sup>33</sup> 50 C.F.R. § 424.14(b).

<sup>34</sup> 16 U.S.C. § 1533(b)(5)(A)(ii).

<sup>35</sup> For example, the Services should ensure that the best scientific and commercial data available is provided to state and local governments and is also publicly available on the internet. *See* State, Tribal, and Local Species Transparency and Recovery Act, H.R. 1274, 115th Cong. § 2 (as amended and reported by H. Comm. on Nat. Res., Oct. 4, 2017).

<sup>36</sup> *Id.* § 1532(6), (20).

<sup>37</sup> For additional information, see NESARC’s comments, dated March 8, 2012, submitted in Docket No. FWS-R9-ES-2011-0031.

### **E. 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 FWS, with limited exceptions, to develop and implement recovery plans for listed species.<sup>38</sup> FWS is required, to the maximum extent practicable, to prioritize the recovery of those listed species most likely to benefit from such plans, and to also include “objective, measurable criteria” for delisting species.<sup>39</sup> However, many species do not have recovery plans and, consequentially, no criteria for delisting.

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.”<sup>40</sup> 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.

### **F. Promote and Enhance the Use of Voluntary Conservation Measures**

Voluntary conservation efforts have been at the heart of most successful species recovery efforts. NESARC strongly urges FWS 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. In addition, NESARC requests that FWS, in collaboration with NMFS, take the following actions:

- Identify opportunities to streamline the development and approval of habitat conservation plans (“HCPs”) for incidental take permits.<sup>41</sup> 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 NMFS in processing proposed HCPs and other conservation agreements, and further instruct FWS staff to focus on the conservation benefits from working with landowners and other stakeholders.

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<sup>38</sup> 16 U.S.C. § 1533(f)(1).

<sup>39</sup> *Id.* §§ 1533(f)(1)(A), 1533(f)(1)(B)(2).

<sup>40</sup> 50 C.F.R. § 424.11(d)(2).

<sup>41</sup> For additional information, see NESARC’s comments on the Services’ draft HCP Handbook, dated August 29, 2016, submitted in Docket Nos. FWS-HQ-ES-2016-0004 & NOAA-NMFS-2016-0004.

- Encourage agency staff to pursue conservation partnerships through voluntary projects with private landowners and others and increased the use of candidate conservation agreements with assurances and Section 4(d) rules for threatened species.
- Revoke Section 9 of the HCP Handbook adopted in December 2016.<sup>42</sup> This section establishes agency policy on applying the “maximum extent practical” mitigation standard for HCPs. It requires detailed economic analysis of the applicant’s financial books and implies that if the applicant would still make a profit from its intended lawful activities, there is not sufficient mitigation. The concept of practicality needs to be applied to both the applicant and the agency, and must account for limited agency resources and maintain incentives for the applicant to implement the HCP.

## II. Rescission of Mitigation and Compensatory Mitigation Policies

In a 2015 Presidential Memorandum entitled “Mitigating Impacts on Natural Resources,” DOI and other agencies were directed to implement a “net benefit goal” for mitigating impacts to natural resources. In response, FWS published two policies that established a net conservation gain or no net loss standard for mitigation and ESA compensatory mitigation, and adopted a preference for a landscape-scale approach to conservation.<sup>43</sup> As NESARC explained previously, these policies impermissibly exceed FWS’s statutory authority under the ESA, include vague and overly broad conservation objectives, and unnecessarily burden the regulated community.<sup>44</sup> When applied to voluntary conservation efforts for at risk and listed species, they discourage participation and create substantial impediments to such projects.

On March 26, 2017, the President issued Executive Order 13783, entitled “Promoting Energy Independence and Economic Growth,” which revoked the 2015 Presidential Memorandum and generally directed the suspension, revision, or rescission of existing agency actions related to or arising from it. Following the Executive Order, Secretary Zinke issued Secretarial Order 3349 which initiated a review of all such agency actions, and established deadlines for the completion of the review and identification of subsequent measures to address the covered policies. In accordance with these directives, NESARC requests that FWS act expeditiously to rescind both the Mitigation Policy and the ESA Compensatory Mitigation Policy.

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<sup>42</sup> *Joint U.S. Fish and Wildlife Service and National Marine Fisheries Service Habitat Conservation Planning Handbook*, 81 Fed. Reg. 93,702 (Dec. 21, 2016).

<sup>43</sup> *Mitigation Policy*, 81 Fed. Reg. 83,440 (Nov. 21, 2016); *ESA Compensatory Mitigation Policy*, 81 Fed. Reg. 95,316 (Dec. 27, 2016).

<sup>44</sup> For additional information, see NESARC’s comments on the Mitigation Policy, dated June 13, 2016, submitted in Docket No. FWS-HQ-ES-2015-0126; and NESARC’s comments on the ESA Compensatory Mitigation Policy, dated October 17, 2016, submitted in Docket No. FWS-HQ-ES-2015-0165.

### **III. Conclusion**

NESARC greatly appreciates the opportunity to provide these comments to DOI. We respectfully request that you take these comments into full consideration when contemplating revisions to FWS's ESA regulations and policies.

Sincerely,

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

Tyson Kade  
NESARC Counsel




## Document Details



<b>Docket ID:</b>	DOI-2017-0003
<b>Docket Title:</b>	Regulatory Reform Executive Order 13777 *
<b>Document File:</b>	
<b>Docket Phase:</b>	Advance Notice of Proposed RuleMaking
<b>Phase Sequence:</b>	1
<b>Original Document ID:</b>	DOI-2017-0003-DRAFT-0127
<b>Current Document ID:</b>	DOI-2017-0003-0128
<b>Title:</b>	FWS-0033
<b>Number of Attachments:</b>	1
<b>Document Type:</b>	PUBLIC SUBMISSIONS *
<b>Document Subtype:</b>	
<b>Comment on Document ID:</b>	DOI-2017-0003-0009
<b>Comment on Document Title:</b>	Comment on This Document for U.S. Fish and Wildlife Service (FWS) Regulatory Reform
<b>Status:</b>	Posted
<b>Received Date:</b>	08/31/2017 *
<b>Date Posted:</b>	09/01/2017
<b>Posting Restriction:</b>	No restrictions
<b>Submission Type:</b>	Web
<b>Number of Submissions:</b>	1 *

## Document Optional Details

<b>Status Set Date:</b>	09/01/2017
<b>Current Assignee:</b>	NA
<b>Status Set By:</b>	Calhoun, John (DOI)
<b>Comment Start Date:</b>	06/22/2017
<b>Comment Due Date:</b>	
<b>Tracking Number:</b>	1k1-8yej-rwhk
<b>Total Page Count Including Attachments:</b>	1

Accept Comments after the Comment Due Date: No 

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**Comment:** Attached please find comments submitted on behalf of the Energy and Wildlife Action Coalition.  

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**Organization Name:** Energy and Wildlife Action Coalition

**Submitter's Representative:** Nossaman LLP

**Government Agency Type:**

**Government Agency:**

**Category:**

**Cover Page:** 



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August 31, 2017

**Comments regarding the June 21, 2017, Information Request  
Department of the Interior Regulatory Reform Initiative  
U.S. Fish and Wildlife Service (DOI-2017-0003-0009)**

Agency/Docket Number:  
**133D5670LC DS10100000 DLCAP0000.000000 WBS DX.10120**

Document Number:  
**2017-13062**

Submitted by:

**Energy and Wildlife Action Coalition**

Filed electronically to the attention of:

Office of the Executive Secretariat  
U.S. Department of the Interior  
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The Energy and Wildlife Action Coalition (“EWAC”) submits this summary in response to **Executive Order 13783, “Promoting Energy Independence and Economic Growth,”** Secretarial Order 3349, “American Energy Independence,” and the resulting U.S. Department of the Interior (“DOI”) request for public comments (Document No. 2017-13062) regarding how DOI can improve implementation of regulatory reform initiatives and policies and identifying regulations for repeal, replacement, or modification.<sup>1</sup>

EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, renewable energy entities operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner.

Since its inception, EWAC has provided extensive comments to the U.S. Fish and Wildlife Service (“USFWS”) in response to numerous rulemakings, guidance documents, and policy statements that have shaped federal wildlife regulation in recent years. While the majority of EWAC’s previous public comments addressed the proposed versions of rules, policies, and guidelines, in most instances our comments/recommendations were not addressed, and the final versions of these rules, policies, and guidance documents remained largely consistent with the proposed versions. Given the lack of meaningful change between proposed and final versions of rules and policies with respect to EWAC’s concerns, we believe EWAC’s prior comments remain relevant to the current DOI regulatory reform initiative and ask that they be given additional consideration at this time. We have endeavored to make this public comment letter a short summary of prominent regulatory issues that have arisen—primarily under the Endangered Species Act and the Bald and Golden Eagle Protection Act—and to provide DOI and USFWS with a toolbox to consider our complete comments on these issues (see individual links to lengthier comments and papers provided within the table below).

We appreciate the opportunity to raise these persistent concerns and to assist DOI in a targeted reconsideration of prior regulatory and administrative actions. Should any questions arise, please feel free to contact the following EWAC representatives:

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<sup>1</sup> 82 Fed. Reg. 28,429 (June 22, 2017).

**USFWS Regulations, Policies, and Practices in Need of Modification as Identified by the Energy and Wildlife Action Coalition**

USFWS Regulation, Policy, or Practice	Summary of EWAC Concerns	Recommended USFWS Actions
<i>Endangered Species Act – Section 10 Incidental Take Permitting</i>		
1.	<p>Joint U.S. Fish and Wildlife Service and National Marine Fisheries Service Habitat Conservation Planning and Incidental Take Permit Processing Handbook, 81 Fed. Reg. 93,702 (Dec. 21, 2016) (“HCP Handbook”)</p>	<p>The original HCP Handbook has proved helpful to the regulated community since its publication in 1996. However, the 2016 revisions to the HCP Handbook create unnecessary complexity and are geared primarily to large-scale HCPs, neglecting the project-scale or low-effect HCPs that make up the majority of HCPs. Further, the revised HCP Handbook contains inconsistent language regarding the compensatory mitigation standards under the Endangered Species Act (“ESA”).</p> <p>EWAC recommends that the U.S. Fish and Wildlife Service (“USFWS”) and National Marine Fisheries Service (“NMFS”) (together, “Services”) withdraw, refine, and re-propose the December 21, 2016, revision of the HCP Handbook. The Services should revise the HCP Handbook to be consistent with foundational ESA requirements (including the appropriate mitigation standard) and to be less fixated on complex, large-scale HCPs, which could perhaps be addressed in a separate chapter or appendix covering special considerations for large-scale HCPs. As currently written, the HCP Handbook at least implies that ordinary HCPs will be burdened with procedures and analyses that should be reserved only to large-scale HCPs.</p> <p>The Services should also ensure that a final Handbook clearly delineated the need for national consistency on similarly situated issues and should establish a clear chain of command for addressing the key issues that frequently arise.</p> <p><i>See prior EWAC comments, “2015-09-16 EWAC Review of ESA Handbooks” and “2016-08-29 EWAC Comments on Draft HCP Handbook,” both available at <a href="https://nossaman.sharefile.com/d-s70a59f495274af49">https://nossaman.sharefile.com/d-s70a59f495274af49</a>.</i></p>

USFWS Regulation, Policy, or Practice		Summary of EWAC Concerns	Recommended USFWS Actions
2.	ITP monitoring costs	Over the past decade, USFWS has increasingly focused on seeking an unattainable level of precision and predictability when advising on monitoring programs for HCPs. This has led to excessive costs, and, in some instances, the costs of monitoring exceed mitigation/conservation costs. Often, data generated through compliance monitoring is of little value in informing permit management or assisting with future agency decision making. Project proponents do not possess boundless budgets to implement HCPs. In many instances, by increasing the costs of monitoring, funds are diverted away from potential conservation actions.	Through either guidance or rulemaking, USFWS should establish a policy that simplifies monitoring to be commensurate with the impacts of the authorized incidental take. Monitoring requirements for HCPs should be reasonable in terms of both the type and amount of data USFWS seeks to collect as well as the costs of the monitoring effort. EWAC members would prefer that permitting costs prioritize species conservation over monitoring precision.
3.	Low-effect HCPs	Under even the best circumstances, the process to obtain an ITP often takes two to 10 years. USFWS has created a mechanism—the “low-effect HCP”—to streamline projects that seek an ITP where impacts to the environment are low. However, this mechanism is used inconsistently across USFWS Regions. A nationwide policy that encourages the use of low-effect HCPs could decrease some existing disincentives for seeking incidental take authorization and would help to reduce the burden on the regulated community and USFWS resources.	USFWS should issue a policy to provide guidance to Service Regions and to the regulated community regarding the use of low-effect HCPs. USFWS should emphasize increased deployment of this permitting mechanism.

USFWS Regulation, Policy, or Practice	Summary of EWAC Concerns	Recommended USFWS Actions
<i>Endangered Species Act - Various</i>		
<p>4. Services' joint 2016 critical habitat rules and policy:</p> <p>Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7,414 (Feb. 11, 2016) (codified at 50 C.F.R. §§ 424.01, 424.02, 424.12)</p> <p>Definition of Destruction or Adverse Modification of Critical Habitat, 81 Fed. Reg. 7,214 (Feb. 11, 2016) (codified at 50 C.F.R. § 402.02)</p> <p>Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 Fed. Reg. 7,226 (Feb. 11, 2016)</p>	<p>The 2016 critical habitat rules and policy greatly expand USFWS' authority to designate critical habitat, including the asserted authority to designate unoccupied habitat prior to designating occupied habitat and to designate areas that do not now contain physical or biological features of suitable habitat for a given species but could potentially gain the features needed by the species in the future. Under the Services' new interpretation of what is "essential" for the conservation of a species (i.e., critical habitat), unoccupied habitat may now be designated as critical habitat where it is unoccupied, unsuitable habitat at the time of designation. Courts have previously held that each of the elements of the ESA section 3 definition of critical habitat must be satisfied for a critical habitat designation to be valid. <i>See, e.g., Cape Hatteras Access Preservation Alliance v. U.S. Dep't of the Interior</i>, 344 F.Supp.2d 108 (D.D.C. 2004); <i>Home Builders Ass'n of N. Cal. v. U.S. Fish and Wildlife Serv.</i>, 268 F.Supp.2d 1197 (E.D. Cal. 2003). The rulemakings and policy appear designed to counteract these decisions and to provide the Services with greater flexibility to designate critical habitat that is not consistent with the statutory criteria. The previous critical habitat rules were faithful to the structure, language, and longstanding USFWS interpretation of the ESA sections 3 and 4 critical habitat provisions.</p>	<p>USFWS should initiate a new rulemaking to rescind the 2016 critical habitat rules and policy and to reinstate the critical habitat rules that were previously in place.</p> <p><i>See prior EWAC comments</i>, "2014-10-09 EWAC Comments re CH Proposed Rules and Policy," <i>available at</i> <a href="https://nossaman.sharefile.com/d-s70a59f495274af49">https://nossaman.sharefile.com/d-s70a59f495274af49</a>.</p>

	USFWS Regulation, Policy, or Practice	Summary of EWAC Concerns	Recommended USFWS Actions
5.	Threatened species designations	<p>While the language of ESA section 9(a)(1) applies the “take” prohibition only to endangered wildlife species, USFWS in 1978 promulgated what is referred to as a “blanket rule” that extended the “take” prohibition to all threatened wildlife species, whether already designated or designated at any time in the future, unless a “special” 4(d) rule is promulgated for a particular threatened species. 43 Fed. Reg. 18,181 (Apr. 28, 1978), amended 44 Fed. Reg. 31,580 (May 31, 1979) and 70 Fed. Reg. 10,493 (Mar. 4, 2005), codified at 50 C.F.R. § 17.31. USFWS adopted the blanket rule under its discretionary authority, found in ESA section 4(d), to extend some or all of the section 9 “take” prohibition to a threatened species. NMFS takes the opposite approach; the ESA section 9 “take” prohibition does not extend to threatened species unless NMFS promulgates a species-specific 4(d) rule to apply some or all of the “take” prohibition to that species.</p>	<p>USFWS should amend its regulations to no longer apply the “take” prohibition universally to all threatened species through the “blanket rule” and, instead, to require USFWS to make a decision whether the “take” prohibition should apply to each individual threatened wildlife species. If the determination is yes, then USFWS can promulgate a species-specific rule that tailors the “take” prohibition to that particular species’ characteristics and risk factors. This approach would align with the approach taken by NMFS.</p>

	USFWS Regulation, Policy, or Practice	Summary of EWAC Concerns	Recommended USFWS Actions
6.	ESA status reviews on delisting petitions	<p> Oftentimes USFWS does not meet its statutorily-required deadlines for downlisting and delisting petitions (e.g., for the Ute ladies' tresses orchid, USFWS made a positive 90-day finding back in 2004, but has yet to complete and publish the status review and the 12-month finding).</p> <p> USFWS' exclusion of downlistings and delistings in its National Listing Workplan and its Methodology for Prioritizing Status Reviews and Accompanying 12-Month Findings on Petitions for Listing Under the Endangered Species Act means that USFWS decisions on downlisting and delisting petitions likely will be delayed and postponed. Downlisting and delisting petitions, in instances where the best available science is clear that the species merits downlisting or delisting, should be given high priority and receive prompt attention.</p>	<p> USFWS should update its National Listing Workplan to include delisting activities. The USFWS Methodology for Prioritizing Status Reviews and Accompanying 12-Month Findings on Petitions for Listing Under the Endangered Species Act should also be amended to incorporate factors relevant to delistings.</p> <p> As part of this proposed exercise, USFWS should also consider updating its recovery planning processes by incorporating criteria for downlistings and delistings into recovery plans. By including this information in the recovery plans, transparent goals will be established at the outset for all stakeholders to work towards in removing species from the ESA lists.</p> <p> Further, as many species do not have recovery plans, USFWS should establish a methodology to ensure that a recovery plan for each ESA-listed species is prioritized and completed in order to move towards recovery goals.</p>

USFWS Regulation, Policy, or Practice	Summary of EWAC Concerns	Recommended USFWS Actions
<b><i>Bald and Golden Eagle Protection Act – Incidental Take Permitting</i></b>		
1.	<p>Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests, 81 Fed. Reg. 91,494 (Dec. 16, 2016) (codified at 50 C.F.R. part 22)</p> <p>Since inception of the BGEPA eagle incidental take permit program in 2009, USFWS has issued a limited number of eagle incidental take permits (e.g., only a few for wind energy facilities). Currently, over 60 permit applications are pending, with other developers/operators waiting for the process to improve before filing an application. The USFWS-approved method of modeling calculates a measure of risk at nearly every wind energy facility, suggesting the need for each to seek an eagle permit. Absence of a streamlined eagle incidental take permitting process remains a significant disincentive for project proponents that may otherwise seek permits for projects that pose a moderate or low risk to eagles. Industry is supportive of an eagle incidental take permit program so long as it provides a reasonable and efficient permitting process and so long as mitigation is based on the degree of risk and is commensurate with impacts.</p>	<p>USFWS should establish a low-risk permit pathway for bald eagles and golden eagles under the BGEPA eagle incidental take permit program through which the vast majority of facilities (e.g., wind energy, electric transmission/distribution, etc.) can receive incidental take coverage under a general permit.</p> <p><i>See prior EWAC comments, “2014-09-22 EWAC Comments re NOI to Prepare Eagle Permit EA or EIS” and “2016-07-05 EWAC comments re Revisions to Eagle Rule,” both available at <a href="https://nossaman.sharefile.com/d-s70a59f495274af49">https://nossaman.sharefile.com/d-s70a59f495274af49</a>.</i></p>

USFWS Regulation, Policy, or Practice	Summary of EWAC Concerns	Recommended USFWS Actions
<p>2. Implementation of the eagle incidental take permit program (50 C.F.R. part 22)</p>	<p>USFWS' December 16, 2016, revisions to the rules governing the eagle incidental take permit program ("2016 Rule") include requirements that significantly increase the cost of the program for the regulated community. On several occasions, EWAC has heard that USFWS has not determined how to implement several aspects of the revised eagle permit program regulations. This acknowledged gap in effective USFWS administration of the program creates delays and uncertainties, posing a significant problem for the regulated community.</p>	<p>In general, USFWS should prioritize reducing the burden under the eagle incidental take permit program through guidance and/or amendment of 50 C.F.R. § 22.26 in order to:</p> <ul style="list-style-type: none"> <li>• Update the USFWS collision risk model to more realistically predict eagle incidental take for bald eagles and golden eagles, distinctly. The agency's current approach significantly overestimates mortalities. Erring on the extreme conservative end of estimates dramatically increases the minimization and mitigation costs for the regulated community.</li> <li>• Remove the third-party monitoring requirement.</li> <li>• Clarify the availability of waivers for preconstruction survey requirements. Waivers should be available to: (1) existing projects; (2) projects with pending applications for eagle incidental take permits; and (3) projects that had coordinated survey efforts with USFWS prior to December 2016.</li> </ul> <p>Please note that EWAC members are not suggesting that the 2016 Rule be rescinded. Rather, EWAC seeks improvements to the 2016 Rule and the implementation of the eagle permit program that would result in a reduction of burden on the regulated community and USFWS staff and resources.</p>

USFWS Regulation, Policy, or Practice	Summary of EWAC Concerns	Recommended USFWS Actions
<i>General Administrative Issues</i>		
1.	Permitting administration issues	<p>Permitting delays, excessive permit conditions, and related permit processing issues are largely caused by the lack of adequate program funding, personnel shortages, and the tasking of field staff with administration of permit programs where those staff, in many instances, are not incentivized to issue permits and are not formally trained in project management. These deficiencies can prolong permitting timelines by years and create inconsistencies in analyses of applications, interpretation of regulations, and permit conditions between offices and regions.</p> <p>In order to address this, USFWS should: (1) ensure that adequate funding and resources are provided to effectively manage the permitting programs; and (2) establish a Permitting Office both at Headquarters and at each of the regional offices to serve as a centralized clearinghouse for ESA and BGEPA permits. This Permitting Office would oversee, prioritize, and ensure uniformity in permit processing, thereby increasing consistency and predictability for the regulated community in, and the efficacy of, the permitting programs. Under this recommended Permitting Office organization, the permitting officers would serve the role of managing processes, ensuring consistencies across offices and regions, and expediting permit processing. Field staff would continue to serve as valuable technical experts during the permitting process, analyzing information provided by the applicant and providing recommendations to the permitting officer(s).</p> <p><i>See prior EWAC comments, “2017-04-26 EWAC Comments re Migratory Birds Eagles OBM Information Collection,” available at <a href="https://nossaman.sharefile.com/d-s70a59f495274af49">https://nossaman.sharefile.com/d-s70a59f495274af49</a>.</i></p>

USFWS Regulation, Policy, or Practice	Summary of EWAC Concerns	Recommended USFWS Actions
<p>2. Use of guidance as <i>de facto</i> regulation</p>	<p>EWAC believes that voluntary guidance is often very beneficial to the regulated community; EWAC members have a long history working with the Services and other appropriate stakeholders on the development of voluntary guidance documents such as the Land-Based Wind Energy Guidelines. However, EWAC is particularly concerned that either at the time guidance is adopted, or subsequent to its adoption, what may have initially been considered by the Services to be voluntary guidance in effect becomes mandatory, <i>de facto</i> regulation although it has not undergone any public notice and comment process.</p>	<p>EWAC suggests the following key principles for the Services' consideration:</p> <ol style="list-style-type: none"> <li>1. The Services should create and maintain consistent approaches across its regions and field offices for developing all regulatory guidance.</li> <li>2. Field personnel should be trained that voluntary guidance is just that and shall not to be treated as mandatory either through informal assertion or other regulatory processes, such as a condition to unrelated permitting.</li> <li>3. The relative level of outside involvement in the development of guidance should depend on the degree of potential impacts to protected wildlife and the relative burdens the guidance may place on the regulated community.</li> <li>4. There should be a national point of contact within both NMFS and USFWS to review instances in which guidance may have been inappropriately developed or applied.</li> <li>5. Any proposal by the Services to develop written guidance should always receive review by and input from the offices of the Solicitor (USFWS) or the General Counsel (NFMS) concerning the process through which any such guidance is planned to be developed and applied.</li> </ol>

	USFWS Regulation, Policy, or Practice	Summary of EWAC Concerns	Recommended USFWS Actions
3.	<p>U.S. Fish and Wildlife Service Mitigation Policy, 81 Fed. Reg. 83,440 (Nov. 21, 2016) (revising the 1981 USFWS Mitigation Policy)</p> <p>U.S. Fish and Wildlife Service Endangered Species Act Compensatory Mitigation Policy, 81 Fed. Reg. 95,316 (Dec. 27, 2016)</p>	<p>Both policies adopt standards that exceed USFWS authority. The revised Mitigation Policy stresses use of full mitigation hierarchy (i.e., first avoid, then minimize, then mitigate), expresses a preference for deployment of “advance mitigation,” and incorporates the new “net benefit” (or at least “no net loss”) mitigation standard (to the extent these do not conflict with specific statutory authorities). USFWS also incorporates the new, heightened mitigation standard of “net benefit” or “no net loss” in the ESA Compensatory Mitigation Policy and seeks to require mitigation sequencing, both of which are inconsistent with the ESA’s own mitigation standards and courts’ interpretations of ESA “minimize and mitigate” language.</p>	<p>While DOI Secretarial Order 3349 (issued March 29, 2017) pulled back the Obama-era mitigation policies, no such policies are currently in place to replace them. Yet, fundamental issues associated with these policies remain, and USFWS staff often seeks to apply the 1981 Mitigation Policy despite its express statement of inapplicability to mitigation under the ESA. Therefore, USFWS should revisit, rework, and reissue these policies to ensure consistency throughout all permit programs that rely on these policies. A refined and re-proposed ESA Compensatory Mitigation Policy that is consistent with the statutory language and limitations of the ESA could be helpful to both the regulated community and USFWS.</p> <p><i>See prior EWAC comments</i>, “2016-06-13 EWAC comments re Proposed Revisions to FWS Mitigation Policy” and “2016-10-17 EWAC Comments on ESA Compensatory Mitigation Policy,” <i>both available at</i> <a href="https://nossaman.sharefile.com/d-s70a59f495274af49">https://nossaman.sharefile.com/d-s70a59f495274af49</a>.</p>