Docket No. FWS-HQ-ES-2018-0006

Memorandum Presenting Comments On Proposed Rule Changes

To: United States Fish and Wildlife Service
National Oceanic and Atmospheric Administration

From: Eric Biber, Professor of Law, University of California, Berkeley
436 North Addition, Berkeley CA 94720 (510) 643-5647
ebiber@law.berkeley.edu

Alejandro E. Camacho, Professor of Law and Director, Center for Land, Environment, and Natural Resources, University of California, Irvine
401 E. Peltason Dr., 4500-A, Irvine, CA 92697 (949) 824-4160
acamacho@law.uci.edu

Robin Craig, James I. Farr Presidential Chair in Law, University of Utah, S.J. Quinney College of Law, 383 South University St.,
Salt Lake City, UT 84112 (801) 581-6897
robin.craig@law.utah.edu

Robert Fischman, George C. Smith, II Distinguished Professor of Law, Indiana University Maurer School of Law, 211 S. Indiana Ave.,
Bloomington, IN 47505 (812) 855-4565
rfischma@indiana.edu

Dave Owen, Professor of Law, University of California, Hastings College of the Law, 200,McAllister Street, San Francisco, CA 94102 (415) 703-8285
ownedave@uchastings.edu

W. William Weeks, Clinical Professor of Law, Scolnik Chair of Conservation Law, and Director Conservation Law Center, Indiana University Maurer School of Law, 211 S. Indiana Ave, Bloomington, IN 47405 (812) 855-0615
wwweeks@indiana.edu

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Introduction

In response to the notice posted in the Federal Register July 25, 2018 seeking comments on specific proposed changes and certain other matters associated with regulations promulgated under the Endangered Species Act, the above listed law

professors offer the following comments in light of our respective scholarly and practical expertise with the Endangered Species Act.

We wish to begin by acknowledging many conservation successes of the Fish and Wildlife Service and the National Marine Fisheries Service, and the commendable efforts of many employees of both Services. We call for increased funding so that the Services can fully address the many critical responsibilities of administering the Endangered Species Act.

That said, as our comments below explain, we think many of the revisions that have been proposed will result in less effective, rather than more effective, administration of the Endangered Species Act.

Comments

The Fish and Wildlife Service and the National Oceanic and Atmospheric Administration (together, the "Services") are proposing changes in the regulations promulgated under the Endangered Species Act (the "Act"). We have presented our comments on certain of these changes in the order in which those changes are discussed in the Services' official notice of them: Docket No. FWS-HQ-ES-0006.

Comment 1. Economic considerations have no place in the listing process, and the proposal to revise 50 C.F.R. §424.11 to include economic analysis at the Service's discretion would unwisely waste limited agency resources, divert the Services from the legal obligation of listing species, and confuse the public.

The Services, explaining that discussing the economic implications of listing may be useful to the public, propose to eliminate from §424.11 the language that paraphrases the statutory requirement that economic issues may not be considered in the listing process. It is simply incorrect to state that eliminating the prohibition on economic impact evaluation "more closely align[s] with the statutory language," which baldly prohibits consideration of cost in listing decisions.

There are two reasons that the proposed modification of the regulation is problematic. First, the statutorily relevant issues associated with determining the status of a species proposed for listing present adequate evaluation challenges. Given scarce resources, there is no good reason for adding the consideration of economic factors to the process. Second, with respect to the asserted justification that including economic factors may be useful to the public, the precise opposite is

true: adding economic factors may confuse the public, leading people to believe that the biological science-driven listing process is also supposed to make a judgment about the cost of conserving a listed species. By contrast, Congress required listing to be based solely on an honest scientific assessment of the imperiled status of a species. Designation of critical habitat and other elements of the response our nation makes to species imperilment is a more complex problem for which Congress requires consideration of economics.

Providing economic analyses for listing species is not analogous to the EPA providing economic analyses under the Clean Air Act. First, in the Clean Air Act, Congress *ordered* the EPA to produce such an analysis. 42 U.S.C. §7612(a). As a result, Congress directly supported the EPA's expenditure of the funds necessary to complete such an analysis. The FWS and NMFS enjoy no similar congressional support for engaging in economic analyses for species listings under the Endangered Species Act. Expending money to perform an economic impact analysis for any species being considered for listing would be an unsupportable usurpation of funds meant to be devoted to the biological questions properly associated with the listing analysis.

Second, under the Clean Air Act, both benefits and costs are relatively easy to monetize. The primary goal of National Ambient Air Quality Standards and emissions limitations under the Clean Air Act is to protect public health, and—as the EPA has demonstrated repeatedly—public health benefits are often possible to monetize, making for a fairly straightforward comparison between those benefits and the costs of industry compliance. In contrast, as has also been demonstrated repeatedly, the economic benefits of protecting species and ecosystems, while real, are much more difficult to monetize than public health benefits. Experience under CERCLA and the Oil Pollution Act with natural resource damages shows how difficult it can be to put a dollar figure on the value of species and ecosystems, even when the goal is restoration. See, Ohio v. Dep't of Interior, 880 F.2d 432 (D.C. Cir. 1989). In the context of the Endangered Species Act, time and budget constraints would be likely to dictate a truncated effort to determine the full economic value of the benefits of species conservation, thus distorting the public perception of the benefits of listing species and of protecting ecosystem functions and services. The cost of conservation, in contrast, will be forcefully quantified in hard dollars by industry, development interests, and property owners.

Finally, if the Services analyze the economic dimension of species listings on a species-by-species basis, they are likely to ignore or undervalue the cumulative benefits of multiple species listings that lead to programs for recovering functions and services throughout a larger ecological system, such as the Snake River in Washington and Idaho. See, e.g., https://www.rco.wa.gov/documents/salmon/Regional_Summary_Snake%20River.pdf;

https://www.deq.idaho.gov/media/60176959/snake-river-restoration-restoring-processes-native-habitats-presentation-071515.pdf. Especially in aquatic systems, early listings serve as harbingers of broader risks to ecosystems. People and their communities stand to lose many beneficial ecosystem services that may not be evident in a single listing decision. In such situations any economic analysis, to be truly useful, must occur at the ecosystem or social-ecological system scale. Species-specific economic analyses will either undervalue the benefits of a listing or overtax the already limited capacity of the Services to engage in economic valuations.

Comment 2. The Services' proposal to add language to 50 C.F.R. §424.11 that expands upon the meaning of the term "foreseeable future" does not usefully clarify the term and is likely to discourage the Services from appropriately considering threats that are important but difficult to quantify.

The Services attempt to define a "probable" standard as the proper touchstone for determining that a species should be listed threatened because it is likely to become endangered in the foreseeable future. The proposal seems to ultimately require the determination that "predictions about the future are reliable." There are two problems with the proposed change: first, the proposal doesn't take into account the seriousness of a future threat in determining how reliable or probable a prediction should be to be considered; however, that is a fairly basic risk assessment concept (and a common theme in environmental law—see, e.g., Reserve Mining Co. v. Environmental Protection Agency, 514 F. 2d 492 (8th Cir. 1975; Ethyl Corp. v. Environmental Protection Agency, 541 F. 2d 1 (D,C. Cir. 1976)). If the magnitude of a possible harm is more serious, we should act even if there is a lower probability the risk might occur. Indeed, the Services apply this risk assessment concept in the discussion of designating unoccupied habitat as critical: "where the potential contribution of the unoccupied area to the conservation of the listed species is extremely valuable, a lower threshold than "likely' [to become usable habitat] may be appropriate."

Second, a basic purpose of the Act is to be precautionary in protecting species. Tennessee Valley Authority v. Hill, 437 U.S. 153, 194 (1978). A "probable" standard sets too high a bar on the likelihood of endangerment in this circumstance where Congress sought to avoid all extinctions. *Tennessee Valley Authority* at 177-78. The proposed probable standard also undermines the effectiveness of recovery measures because earlier intervention is almost always cheaper and easier than later intervention.

In justifying the proposed interpretation of "foreseeable future" the Services properly discuss both biological considerations and the known external conservation

threats. The Services propose to consider both, but suggest that listing depends upon a finding that both biological threats and external threats are "probable" over a relevant time period. This standard does not provide enough guidance. In keeping with the conservation purposes of the Act, we suggest a more specific standard. We propose that the Service evaluate currently known threats to a species under consideration for listing in light of the biology of the species. Thus a species with a lifespan that indicates five generations in ten years merits a foreseeable future defined to be a shorter period of time, while a long-lived, slow-reproducing species requires an extended number of years over which foreseeable future must be adjudged. Once the biological factors are evaluated, the Services should turn to external threats. *Any currently known threat should be considered a threat in the foreseeable future unless* the weight of credible evidence shows that it is not likely to remain a threat in the foreseeable future. If there are potential future threats that are not current threats, the Services must determine, in more or less the manner it now proposes, whether such threats are probably going to be important during a time period that is relevant to the species, applying in addition the probability standards we have discussed above (i.e., that more serious harms should be considered even when it may not be possible to predict that they are likely to occur.).

The change the Services have proposed would also discourage consideration of climate change effects in listing decisions for threatened species. In our view, the regulations should be explicit that the best available science regarding the "foreseeable future" must include climate change and ocean acidification projections as well as any studies regarding what those projections will mean for both specific species and larger ecosystems. Such projections generally present a range of probabilities based on different assumptions about uncertainty. The Services must consider those ranges as best science even though they do not present a single likelihood of any particular impact.

Comment 3. The Services propose to emphasize that when considering, under 50 C.F.R. §424.11, de-listing or down-listing a listed species, the proper approach is to simply review a species status as if it were unlisted. A better approach, more in keeping with the goals and language of the Act, would be to shift the burden. The burden at the time of listing is to show that a species is in danger of extinction. Down-listing ought to require a showing that the species is *not* any longer endangered and will remain non-endangered without the Act's protections for endangered species. De-listing a threatened species ought to require a showing that the species is *no* longer likely to become endangered in the foreseeable future, even without the Act's protections.

A precautionary standard is advisable when the Services consider down-listing or de-listing a species. Among the principal purposes of the Act is "to provide a program for the conservation of such endangered and threatened species." Similarly, Section 4(d) of the Act requires that the Secretary issue the regulations necessary to conserve threatened species. "Conservation" is defined as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." When conservation efforts have succeeded in resolving only immediate threats (which would result in a possibly short-term population increase) halting them as a consequence of down-listing or de-listing would be premature. Medium-term threats, left unattended after delisting, could quickly make the danger of extinction imminent again. Down-listing an endangered species while extinction is still an active and present threat is not only inconsistent with the conservation purposes of the Act but might well cause the ultimate conservation of the species to be inefficient and costly.

Under the proposed regulation, a threatened species could be de-listed at the moment conservation efforts on behalf of a threatened species have resulted in a movement of its status from "likely" to become extinct in the foreseeable future to "as likely as not" to become extinct in the foreseeable future. Few, however, would say that the protective measures of the Act are no longer required for the species at that point.

An endangered species, because of the purposes of the Act, should not be down-listed at the moment it would not, at that point, qualify for listing, but rather only upon a showing that it is *not* in danger of extinction and will continue to not be in danger even without the Act's protections for endangered species. Further, a species-specific plan for its conservation should have been prepared in advance that can accompany its down-listing to threatened. A threatened species, because of the purposes of the Act, should not be de-listed until a showing can be made that it is *not* likely to become endangered in the foreseeable future even without the Act's protections. This formulation is consistent with the Act's definition of recovery. And it is entirely consistent with Blackwater v Salazar, 691 F.3d 428 (D.C. Cir. 2012), which is both less definitive than the Services' citation of it suggests and focused on a different question. *Blackwater* simply sets forth the statutory requirement that de-listing decisions be made in accordance with the factors set forth for listing. Our comment calls for the most natural way to apply the factors for de-listing: the law requires that we list a species when we can show that it is endangered or likely to become endangered in the foreseeable future. We down-list when we are able to show that the species is not endangered or likely to become endangered. Our position is also consistent with basic principles of administrative law, which require rulemakings that undo previous rules to specifically show why the rationales for the

previous rule are no long rational. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 453 U.S. 29 (1983).

Likewise, the Services should be clear that, under 16 U.S.C. §1533(a)(1)(D) ("the inadequacy of existing regulatory mechanisms"), a species should *not* be delisted if the only or main factor keeping the species in a stable or even recovered state is the ESA itself and its protections.

Comment 4. The Services propose to revise 50 C.F.R. §424.12 to expand the circumstances in which they may decline to designate critical habitat because doing so would not be prudent. The proposal strays too far from the requirements of the Act.

The Services provide an extended discussion of the question of when designating critical habitat may not be required because doing so would not be prudent. The issue receives undue emphasis; it appears to be an attempt to armor an inclination to stray from the statutory language—a point made in several of the cases cited in the discussion.

Under 16 U.S.C. §1533(b)(2), in deciding what to designate as critical habitat, the Services can consider the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. However, the Services can actually exclude any area from the critical habitat designation ***only*** if they determine "that the benefits of such exclusion outweigh the benefits of specifying such area are part of the critical habitat" and even then ***only*** if the failure to designate will not result in the extinction of the species. Congress has created a fairly clear presumption that all habitat that qualifies as critical habitat should be designated. The presumption can be overcome only if the Services complete the rigorous cost-benefit analysis required in this section and even then only if they can prove that extinction will not occur if the habitat at issue is excluded. The Services' proposed revisions are also contrary to the relevant legislative history and case law, which state that critical habitat should be designated for all listed species except "in rare circumstances." Conservation Council for Hawaii v. Babbitt, 2 F. Supp. 2d 1280, 1284 (D. Hawaii 1998) (quoting H.R. Rep. No. 95-1625 at 17 (1978)).

Comment 5. Further revisions of the "not prudent" rules would link critical habitat designation to the likely outcome of consultation. The Service has no authority under the Act to promulgate the proposed revision of the regulation.

The Services propose to revise the critical habitat designation standards by revising the standards for deciding that designation would not be beneficial to the listed species. The proposal would allow the agency to avoid designating critical habitat where the Service predicts that consultation would not address the threats to the habitat. Circumstances in which the Services know that Section 7 consultation would not protect a species will be exceedingly rare. When the Services designate critical habitat, they will rarely be certain about all the future threats to a species, and they therefore will not know whether future federal actions affecting the species are possible. If any such uncertainty exists, critical habitat still must be designated. Moreover, Congress may create new programs that generate new kinds of federal actions that might trigger consultation even if they do not exist at the time of listing/determinations.

In addition, the Services use examples of climate change to illustrate the proposed revision. We believe this proposed revision suffers from the same problems that plague the companion proposed revision to the scope of consultation. First, an agency action that significantly contributes to climate change can jeopardize listed species and can adversely modify their critical habitat, and consultation can help reduce those threats. Climate change is an important driver of species stress, and ignoring it because it is difficult to resolve is a disservice to the purposes of the Act.

Comment 6. The Services propose to revise 50 C.F.R. §424.12 to preclude designation of habitat in the United States when habitat in the United States would provide "negligible conservation value" for a species that occurs primarily outside of the United States. This proposed revision fails to account for the Act's stated acknowledgment of the "esthetic, ecological, educational historical, recreational, and scientific value to the Nation" of its fish, wildlife and plants, and it dismisses too easily the importance of this nation's resources and commitment to avoiding extinction.

When a species occurs primarily in other countries, the Services propose, under 50 C.F.R. §424.12(a)(1)(iii), that they may decline to designate critical habitat in the United States because, it is asserted, doing so would not contribute in an important way to the conservation of the species. It takes no more than a quick reading of the Section 2(a) of the Act to conclude that the proposal is contrary to the purposes of the Act. Section 2(a)(5) of the Act summarizes references made in sub-sections one and three: the Act is "key to …better safeguarding the *Nation's* heritage in fish, wildlife and plants." See, e.g. Center for Biological Diversity v. Kempthorne, 607 F. Supp.2d 1078 (D. Arizona 2009). The Act is concerned, in significant part, with conserving the biological heritage of this country. Thus, it is of vital concern, under the Act, when a species that is part of this nation's biota is lost from this country, even when that species is still found, rarely or commonly, in other countries. The United States' population of an endangered species—that is,

the exemplars of the species that are part of this nation's biological heritage—ought to be conserved as a priority for this nation's conservation efforts. Habitat in the United States for listed species is the habitat over which we have the most control and the best knowledge. Such United States habitat ought to be a priority for listing as critical whatever the status of the habitat for the species in other countries. Charismatic species that are emblematic of our efforts under the Act, expensive though their conservation has been, make the point; bald eagles, grey wolves, and grizzly bears are all species that might not even have been listed had we not been committed to retaining their populations in the lower 48 states. Had those species been rare throughout their range but most economically protected in Canada or Russia, it would still have been important to consider designating critical habitat for them in this country, rather than to categorically decline to do so because the bulk of their population or their best habitat was beyond the boundaries of the United States.

Further, in practice, if a species is in such dire condition that it is threatened or endangered, yet it is still present in the United States, it is highly unlikely that its United States habitat will be of negligible importance to the species' conservation.

Comment 7. The Services, in an extended discussion, propose to revise 50 C.F.R. §424.12 by changing the standard for designating habitat currently unoccupied by the listed species. The artful definition of "essential" that is proposed unduly complicates the plain meaning of "essential" as used in the Act.

The proposed restoration of the "rigid step-wise approach" to designation of unoccupied critical habitat basically depends on the Services' assertion that there have been "continued perceptions" that the Services intend to designate "expansive areas of unoccupied habitat." However, there is no support for this assertion in the proposal, and the Services never rebut the reasoning that they put forward to justify the 2016 change: that the step-wise approach was inefficient.

The Act evidences congressional recognition that resolving a species' endangerment may well require listing critical habitat that is "outside of the geographical area the area occupied by the species at the time it is listed." Congress included this provision because species are not in danger of extinction until their populations, and usually the habitat those populations occupy, is seriously compromised. The Services should designate whatever critical habitat is "essential for the conservation"—that is, survival and recovery—"of the species," just as Congress has authorized them to do. Consideration of efficiency and effectiveness, however defined, are important but not primary. The primary consideration is what

is required for the conservation of the species, and it would not be surprising at all if a species that merited listing had—by the time it was listed—already receded from habitat that is essential to its recovery.

The proposed regulation, by contrast, most strongly reflects a consideration that is not present in the Act. Its eccentric definition of what is "essential" with regard what constitutes habitat essential to the conservation of the species is dominated by its concern for "efficiency," by which it means, in part, avoiding trouble with private landowners. The statutory concern, however, is effectiveness. Only Congress can relieve the Services of the duty to administer the law, even when there is local, and—experience shows—often transitory resistance to a critical habitat designation.

Finally, the new rules should explicitly recognize that unoccupied areas can constitute critical habitat if the species is likely to need to move into them in order to adapt to climate change impacts on its current habitat

Comment 8. The proposed revisions are not categorically exempt from the requirement that the Services prepare an environmental analysis under NEPA.

Finally, the proposed regulations are not, in our view, fundamentally administrative or otherwise categorically exempt from the NEPA requirement that an environmental impact statement or and environmental assessment be prepared.

The National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 et seq., imposes procedural requirements on all federal agencies to consider the impacts of their actions on the environment. In particular, NEPA requires federal agencies to prepare a detailed environmental impact statement (EIS) for "all major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). The issuance, repeal, or revision of agency rules and regulations falls within the scope of "Federal actions" pursuant to NEPA. 40 C.F.R. § 1508.18(a).[1] The Council of Environmental Quality (CEQ) has issued a series of regulations implementing the procedural requirements of NEPA. Two of those regulations are particularly relevant here. One, CEQ has listed a series of factors that an agency should consider in determining whether there will be a significant impact on the environment from an agency action. Included in those factors are:

> (1) the degree to which the proposed action affects public health or safety; (2) the degree to which the effects will be highly controversial; (3)

[1] *See* Daniel R. Mandelker, *NEPA Law and Litigation* § 8:27 (2005 Suppl.) ("Federal agency rules and regulations are federal actions that may require the preparation of an impact statement."); *see also Citizens* for Better Forestry v. U.S. Dep't of Agriculture, 481 F. Supp.2d 1059, 1080 (N.D. Cal. 2007).

> whether the action establishes a precedent for further action with significant effects; and (4) whether the action is related to other action which has individually insignificant, but cumulatively significant impacts. *Citizens for Better Forestry*, 481 F. Supp. 2d at 1080 (citing 40 C.F.R. § 1508.27(b)).

Two, CEQ has established a procedure by which federal agencies must decide whether an agency action will have "significant" impacts such that an EIS must be prepared. In general, a federal agency that has not decided to prepare a full EIS must prepare an Environmental Assessment (EA) to determine whether the environmental impact of the proposed action is significant. 40 C.F.R. § 1508.9. An agency may avoid conducting an EA, but only if it determines that a categorical exclusion (CE) identified in prior agency rulemaking appropriately applies to the proposed federal action. *See* 40 C.F.R. §§ 1508.4 and 1507.3(b)(2)(ii). In making that determination, an agency must use a "scoping process" to "determine the scope of the issues to be addressed and for identifying the significant issues related to a proposed action." *See Citizens for Better Forestry*, 481 F. Supp. 2d at 1081 (citing *Alaska Ctr. for the Env't v. United States*, 189 F.3d 851, 859 (9th Cir. 1999)).

In determining whether or not a CE should apply to a proposed federal action, the courts have held that the agency must specifically cite to the specific categorical exclusion that the agency is relying upon. *Citizens for Better Forestry*, 481 F. Supp. 2d at 1082. Moreover, courts have held that "[a]pplication of a CE is inappropriate if there is the possibility that an action *may have* a significant environmental effect." *Id.* at 1087.

Given the discussion earlier in these comments, there is no question that the Services should at the very least conduct an EA to determine whether an EIS might be appropriate for these changes to the ESA regulations. The regulations – by the Services' own admission – are intended to affect the applicability of the ESA to the impacts of climate change on threatened and endangered species. By reducing consideration of climate change for listing and critical habitat designation decisions, the proposed regulations may have a direct effect on "public health and safety" by reducing protections for threatened and endangered species. Moreover, by reducing the scope of the applicability of the ESA in the federal government's response to climate change, the proposed regulations will reduce the government's overall ability to respond to climate change, with potential impacts on public health and safety broader than just the impacts on threatened and endangered species.

The proposed revisions to the critical habitat provisions would decrease the role that uncertain harms play in the listing of species. Thus, species faced with uncertain threats will receive less protection, which in turn may result in more actions that will have a harmful impact on threatened or endangered species.

The detailed comments provided above illustrate that there is significant controversy over the potential effects of the proposed regulatory changes on the environment.[2]

The proposed regulations establish a procedural and substantive framework for the listing of species and designation of critical habitat in the future. Accordingly, the regulations set a "precedent for further action with significant effects." *Citizens for Better Forestry*, 481 F. Supp. 2d at 1089 (concluding that proposed changes to Forest Service planning regulations warranted at least review pursuant to EA).

Even if the Services believe that the proposed regulations may be beneficial for listed species as a whole – perhaps by allowing more actions that will be beneficial to listed species to occur without the paperwork burden of consultation – it must nonetheless conduct environmental review. The CEQ regulations make clear that a "significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." 40 C.F.R. § 1508.27(b)(1).

Likewise, even if the Services believe that the future impact of the proposed regulations on the protection of listed species is highly uncertain, that would also cut in favor of preparing at least an EA. *See* 40 C.F.R. § 1508.27(b)(5) (one factor determining whether a proposed action might be significant is the "degree to which the possible effects on the human environment are highly uncertain").

Finally, the CEQ regulations make clear that if the proposed federal action "may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the" ESA, it is more likely that the action will be considered significant such that full environmental review should take place. 40 C.F.R. § 1508.27(b)(9). Given that the proposed regulations could fundamentally change the listing, delisting, and critical habitat designation process for a range of listed species, this factor strongly suggests preparation of at least an EA may be necessary.

The proposed regulatory changes may be programmatic in nature, rather than authorizing specific projects, but that does not change the applicability of NEPA. The CEQ regulations implementing NEPA state that "[e]nvironmental impacts statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations." 40 C.F.R § 1502.4(b). The courts have consistently required federal agencies to conduct NEPA analysis, including EAs and EISs, for a wide range of programmatic and regulatory changes similar to the proposed revisions to the ESA listing process. *See, e.g.*, *California ex*

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[2] *See* National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722 (9th Cir. 2001) (holding EA for agency management plan was inadequate because, in part, controversy over potential impacts from the plan indicated significance of environmental impacts); *see also Citizens for Better Forestry,* 481 F. Supp. 2d at 1089 (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)).

rel. Lockyer v. U.S. Dep't of Agriculture, 459 F. Supp. 2d 874 (N.D. Cal. 2006) ((striking down Forest Service planning rules for failure to comply with NEPA)); *Wyoming v. U.S. Dep't of Agriculture*, 277 F. Supp. 2d 1197 (D. Wyo. 2003) (same); *Citizens for Better Forestry*, 481 F. Supp. 2d 1059 (striking down Forest Service planning regulations for failure to comply with NEPA). Moreover, the fact that numerous agencies have been able to conduct environmental review for programmatic regulatory changes shows that such review is feasible. *See, e.g.*, 73 Fed. Reg. 21468 (April 21, 2008) (finalizing regulatory changes to Forest Service planning regulations after preparation of EIS); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (agency prepared EIS for national coal leasing program).

Nor does the fact that elements of the proposed regulatory changes might be characterized as "procedural" mean that NEPA review is not required. For instance, the fact that the proposed changes to planning regulations for the National Forests might be characterized as procedural did not prevent the courts from concluding that, at the very least, an EA must be prepared for review. *See Citizens for Better Forestry,* 481 F. Supp. 2d 1059.

It would also be inappropriate for the Services to rely on a claim of categorical exemption to avoid NEPA review where, as here, there is "the possibility that an action *may have* a significant environmental effect." *See Citizens for Better Forestry*, 481 F. Supp. 2d at 1087.

We would add that, in this context, the preparation of at least an EA, if not a full EIS, will not be a fruitless and meaningless exercise in paperwork. The changes that the agency has proposed to the ESA regulations are significant, and they will likely have significant impacts on how federal agencies conduct their activities and on the level of protection for endangered species.

As the comments above make clear, there are serious questions about the agencies' analyses. Additional data about a range of factors would help narrow the uncertainty about the possible impacts of the proposed changes. Those factors include (but are not limited to): public perceptions of the critical habitat designation process; the ability of the Services to quantify the benefits of protecting endangered species; the role that cost-benefit analysis for listing might play in informing or confusing the public; the ability of the Services to determine which risks to species are quantifiable or probable; how likely it is that designated critical habitat will not produce consultation that might benefit a species; how many species would not have critical habitat designated because better habitat is located outside the United States; etc.

We conclude by noting that, if the Services should decide to prepare an EA, rather than an EIS, they should nonetheless provide an opportunity for public comment in that process. *See Citizens for Better Forestry v. U.S. Dep't of Agriculture*,

341 F.3d 961, 970-71 (9th Cir. 2003) (noting importance of public participation in the entire NEPA process, including preparation of EAs). The CEQ regulations specify that federal agencies preparing EAs "shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments." 40 C.F.R. § 1501.4(b). The regulations add that a 30-day comment period should be provided by agencies after a decision not to prepare an EIS where the proposed action is one in which an EIS would normally be prepared or is "without precedent." 40 C.F.R. § 1501.4(e)(2). Given the substantial revisions proposed by the Services to the regulations – the first comprehensive revisions in over 20 years – and the analysis above, the proposed revisions would normally warrant preparation of an EIS and are "without precedent." Even if the specific provisions in §§ 1501.4(e)(2) do not apply, given the primary importance of public participation in the NEPA process and the significance of the proposed regulatory changes, public participation in the EA process is appropriate and necessary. *See Citizens for Better Forestry*, 341 F.3d at 970-71 (agency failure to allow public comments on EA for revisions to National Forest planning regulations violated NEPA regulations).

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From: Eric Biber, Professor of Law, University of California, Berkeley
436 North Addition, Berkeley CA 94720 (510) 643-5647
ebiber@law.berkeley.edu

Alejandro E. Camacho, Professor of Law and Director, Center for Land, Environment, and Natural Resources, University of California, Irvine
401 E. Peltason Dr., 4500-A, Irvine, CA 92697 (949) 824-4160
acamacho@law.uci.edu

Robin Craig, James I. Farr Presidential Chair in Law, University of Utah, S.J. Quinney College of Law, 383 South University St.,
Salt Lake City, UT 84112 (801) 581-6897
robin.craig@law.utah.edu

Robert Fischman, George C. Smith, II Distinguished Professor of Law, Indiana University Maurer School of Law, 211 S. Indiana Ave.,
Bloomington, IN 47505 (812) 855-4565
rfischma@indiana.edu

Dave Owen, Professor of Law, University of California, Hastings College of the Law, 200,McAllister Street, San Francisco, CA 94102 (415) 703-8285
ownedave@uchastings.edu

W. William Weeks, Clinical Professor of Law, Scolnik Chair of Conservation Law, and Director Conservation Law Center, Indiana University Maurer School of Law, 211 S. Indiana Ave, Bloomington, IN 47405 (812) 855-0615
wwweeks@indiana.edu

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Introduction

In response to the notice posted in the Federal Register July 25, 2018, seeking comments on specific proposed changes and certain other matters associated with regulations promulgated under the Endangered Species Act, the

above listed law professors offer the following comments in light of our respective scholarly and practical expertise with the Endangered Species Act.

We wish to begin by acknowledging many conservation successes of the Fish and Wildlife Service and the National Marine Fisheries Service, and the commendable efforts of many employees of both Services. We call for increased funding so that the Services can fully address the many critical responsibilities of administering the Endangered Species Act.

That said, as our comments below explain, we think many of the revisions that have been proposed will result in less effective, rather than more effective administration of the Endangered Species Act.

Comments

The Fish and Wildlife Service and the National Oceanic and Atmospheric Administration (together, the "Services") are proposing changes in the regulations promulgated under the Endangered Species Act (the "Act"). They have provided public notice of certain of those changes in an announcement styled "Docket No. FWS-HQ-ES-2018-0007, and these comments address those changes.

Comment 1: The proposed revision, if promulgated, is likely to poorly serve the purposes of the Act because it will likely result in fewer species being listed as threatened in a timely manner, and/or result in a significant decline in the protection and survival of species that are listed as threatened. The budget FWS has proposed for FY 2019 will exacerbate the problems with the proposed revision.

The Services propose to offer a newly listed threatened species no Section 9 protection unless protections are included in a rule developed and custom-tailored for that species as part of the listing process. This proposal would replace the current approach under which threatened species qualify for the same protections as endangered species under the Endangered Species Act (the "Act") unless or until the FWS prepares a special rule narrowing the statutory prohibitions. The Act expressly limits the FWS discretion by allowing only special rules that are "necessary and advisable to provide for the conservation" of listed species. 16 U.S.C. 1533(d). The proposed rule fails to adequately explain how a new default of "no Section 9 protection" rather than "full protection" meets the statutory conservation standard under section 4(d). In particular, the proposed revisions clearly would require meaningful increases in the FWS listing budget. FWS, however, has

proposed a substantially decreased listing budget. This strongly suggests that the FWS will be unable to promulgate timely customized protective prohibitions to prevent threatened species from slipping closer to extinction.

In support of the proposed rule, the Services suggest that the Department of Commerce has routinely promulgated customized protections for threatened species. However, the Act-related programs of NOAA are of significantly smaller than those of FWS. For example, the FWS deals with about 1600 listed species while NOAA deals with fewer than 100. Further, the NOAA species may be subject to a narrower range of threats than the FWS species. We think NOAA's experience is not a persuasive argument for changing the current rule, particularly as it applies to FWS.

At best, FWS funding is barely sufficient for meeting its current responsibilities under the Act. For confirmation, one need only look at the list of species for which listing decisions await, or for which listing is warranted but precluded because of funding. In 2016 there were nearly 50 such species. 81 Fed. Reg. 232 (Dec. 2, 2016.) We look forward to the day full funding is available. Until that time, the FWS is not prepared to thoroughly consider, propose, and promulgate custom rules for each threatened species that it should and must list.

The Administration, however, has not even planned to maintain current funding levels. It proposed a FY 2019 FWS budget that cuts planned listing expenditures by about 50% and reflects fewer FTE's dedicated to listing. Adoption of the proposed change in the regulations in conjunction with much reduced listing resources is nearly certain to result in fewer deserving species being listed as threatened. And it will be similarly harder to muster the resources for well-developed analyses that identify what is necessary and advisable to provide for conservation under 16 U.S.C. 1533(d). Moreover, the FWS even at current funding levels, is behind on preparing recovery plans, which are the best tool for determining what prohibitions are "necessary and advisable to provide for the conservation" of listed species under 16 U.S.C. 1533(d). The last posted FWS report on recovery stated that 330 listed species lacked recovery plans. (Report to Congress on the Recovery of Threatened and Endangered Species, Fiscal Year 2013-2014.) Thus the vision of implementing a threatened species listing process like that used by NOAA seems unlikely to be realized.

Threatened plant species are even more likely than other threatened species to be harmed under the proposed regulatory revision. The FWS, as far as we can determine, has never issued a special 4(d) rule for any plant species. Rather, it has relied upon general 4(d) rule for plants to protect all plant species listed as threatened.

The adoption of the proposed revision would undermine the rationale for creating the category of threatened species. Among the goals was to provide advance warning of species imperilment: "We are convinced that it is far sounder to take the steps necessary to keep a species…from becoming endangered than to attempt to save it after it has reached that critical point." Rogers Morton, Secretary of the Interior to Rep, Carl Albert, Speaker of the House, Feb. 16, 1973. Implementing that "far sounder" approach is not possible without an effective listing program. Moreover a listing program that anticipates, as the Services appear to, the development of specific rules that include customized conservation programs for threatened species would surely require a greater, rather than a significantly smaller budget. 4(d) rules have to be "necessary and advisable to provide for the conservation" of listed species. That necessarily requires taking into account the on-the-ground implications of those rules for the conservation of listed species. And that necessarily requires taking into account the reality of FWS' ability to do case-by-case protection rules, rather than a default rule.

The current default of extending the full protections of Section 9 of the Act to threatened species promotes efficiency in the listing process. The Service has always been able to promulgate a tailored Section 4(d) rule when appropriate, and it has done so on many occasions. Nonetheless, in about half of threatened listings, according to a 2017 report by Defenders of Wildlife, the Service has opted for the standard protections of the Act. That has been a reasonably efficient way to promulgate the necessary listing rules. Under either the current or the proposed regulation, beneficial tailoring only occurs if a special 4(d) rule is promulgated. With either default, an agency would need to promulgate a special rule in order to take advantage of the tailoring.

The implication, however, of the current default rule is that the Service has believed that absent an affirmative decision otherwise, all of the protections of the Act are appropriate for threatened species. In our view, the implication of the proposed rule is that the Service believes that absent an affirmative action otherwise, none of the Act's Section 9 protection are necessary. Such a turnabout is indefensible.

The proposed switch to the "no prohibitions" default would also undermine the effectiveness of tailored rules because it would reward delay by stakeholders that may suffer economic losses associated with the restrictions being considered in a species-specific rule. Currently, stakeholders who attempt to stave off listing by agreeing to habitat plans, best practices, etc. have an incentive to lobby the agency to list with a special, tailored rule if the attempt to avoid listing appears to be failing. That is one reason that the tailored rules have grown in detail and number in recent years. Changing the default from full protection to no protection eliminates that incentive to cooperate on a tailored rule. That will make tailored rules harder to promulgate.

The special rule promulgated in 1993 for the coastal California gnatcatcher is cited in the proposal for a change in the regulations. That rule exempted activities covered by a state National Communities Conservation Plan from ESA liability. Under the existing, full-protection default, powerful real-estate developers had a strong incentive to push for a tailored rule so that the plans they had negotiated with San Diego and the state would not be upset by federal prohibitions. In essence, real-estate developers agreed to some restrictions under the NCCP in order to avoid greater restrictions under a FWS listing. The proposed change to the no-prohibition default would provide weaker incentives to agree to a special protection regime because, without a specially tailored rule, there would be no restrictions rather than the full protection. Even worse, the original San Diego NCCP may never have gotten off the ground if real-estate developers sensed that they had little to gain from agreeing to even some restrictions. The best way for FWS to reward effective area-wide conservation planning is to maintain the current all-prohibition default and work with willing plan participants as appropriate to carve out an exception to the Section 9 incidental take prohibitions.

As Yaffee and others have pointed out "the specter of enforcement, though unlikely, does motivate collaborative conservation by landowners, their lenders, and others whose businesses create habitat degradation or otherwise impede recovery…The ESA, in particular, served as the "regulatory driver" of stakeholder cooperation in about half of the hundreds of conservation collaborations…studied." STEVEN L. YAFFEE ET AL., ECOSYSTEM MANAGEMENT IN THE UNITED STATES: AN ASSESSMENT OF CURRENT EXPERIENCE 21, 27 (1996); *see also* JULIA M. WONDOLLECK & STEVEN L. YAFFEE, MAKING COLLABORATION WORK: LESSONS FROM INNOVATION IN NATURAL RESOURCE MANAGEMENT 102, 240 (2000) (describing more case studies).

Comment 2. We believe the proposed revision will have a significant effect on the human environment and therefore does not qualify for a categorical exception from NEPA environmental analysis.

The proposed rule states that the Interior Department's NEPA counterpart regulation's categorical exclusion for NEPA environmental analysis "likely applies" to this rulemaking. The categorical exception cited is for rules that "are of an administrative, financial, legal, technical, or procedural nature." While aspects of this proposal are administrative and procedural, the exclusion does not apply in the "extraordinary circumstances" outlined in 43 CFR 46.215. One of the listed "extraordinary circumstances" is for actions that have "significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species". 43 CFR 46.215(h). We believe that in these comments we have explained how implementation of the proposed regulations would have just such significant impacts

on newly listed threatened species. The National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 et seq., imposes procedural requirements on all federal agencies to consider the impacts of their actions on the environment. In particular, NEPA requires federal agencies to prepare a detailed environmental impact statement (EIS) for "all major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). The issuance, repeal, or revision of agency rules and regulations falls within the scope of "Federal actions" pursuant to NEPA. 40 C.F.R. § 1508.18(a).[1]

The Council of Environmental Quality (CEQ) has issued a series of regulations implementing the procedural requirements of NEPA. Two of those regulations are particularly relevant here. One, CEQ has listed a series of factors that an agency should consider in determining whether there will be a significant impact on the environment from an agency action. Included in those factors are:

> (1) the degree to which the proposed action affects public health or safety; (2) the degree to which the effects will be highly controversial; (3) whether the action establishes a precedent for further action with significant effects; and (4) whether the action is related to other action which has individually insignificant, but cumulatively significant impacts. *Citizens for Better Forestry*, 481 F. Supp. 2d at 1080 (citing 40 C.F.R. § 1508.27(b)).

Two, CEQ has established a procedure by which federal agencies must decide whether an agency action will have "significant" impacts such that an EIS must be prepared. In general, a federal agency that has not decided to prepare a full EIS must prepare an Environmental Assessment (EA) to determine whether the environmental impact of the proposed action is significant. 40 C.F.R. § 1508.9. An agency may avoid conducting an EA, but only if it determines that a categorical exclusion (CE) identified in prior agency rulemaking appropriately applies to the proposed federal action. *See* 40 C.F.R. §§ 1508.4 and 1507.3(b)(2)(ii). In making that determination, an agency must use a "scoping process" to "determine the scope of the issues to be addressed and for identifying the significant issues related to a proposed action." *See Citizens for Better Forestry*, 481 F. Supp. 2d at 1081 (citing *Alaska Ctr. for the Env't v. United States*, 189 F.3d 851, 859 (9th Cir. 1999)).

In determining whether or not a CE should apply to a proposed federal action, the courts have held that the agency must specifically cite to the specific categorical exclusion that the agency is relying upon. *Citizens for Better Forestry*, 481 F. Supp. 2d at 1082. Moreover, courts have held that "[a]pplication of a CE is inappropriate if

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[1] *See* Daniel R. Mandelker, *NEPA Law and Litigation* § 8:27 (2005 Suppl.) ("Federal agency rules and regulations are federal actions that may require the preparation of an impact statement."); *see also Citizens* for Better Forestry v. U.S. Dep't of Agriculture, 481 F. Supp.2d 1059, 1080 (N.D. Cal. 2007).

there is the possibility that an action *may have* a significant environmental effect." *Id.* at 1087.

Given the discussion earlier in these comments, there is no question that the Services should at the very least conduct an EA to determine whether an EIS might be appropriate for these changes to the ESA regulations. The regulations – by the Services' own admission – are intended to affect the applicability of the ESA to threatened species. Accordingly, the proposed regulations may have a direct effect on "public health and safety" by reducing protections for threatened species.

The detailed comments provided above show that there is significant controversy about the potential effects of the proposed regulatory changes on the environment.[2]

The proposed regulations establish a substantive framework for the development of rules protecting threatened species from take in the future. Accordingly, the regulations set a "precedent for further action with significant effects." *Citizens for Better Forestry*, 481 F. Supp. 2d at 1089 (concluding that proposed changes to Forest Service planning regulations warranted at least review pursuant to EA).

Even if the Services believe that the proposed regulations may be beneficial for listed species as a whole, it must nonetheless conduct environmental review. The CEQ regulations make clear that a "significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." 40 C.F.R. § 1508.27(b)(1).

Likewise, even if the Services believe that the future impact of the proposed regulations on the protection of listed species is highly uncertain, that would also cut in favor of preparing at least an EA. *See* 40 C.F.R. § 1508.27(b)(5) (one factor determining whether a proposed action might be significant is the "degree to which the possible effects on the human environment are highly uncertain").

Finally, the CEQ regulations make clear that if the proposed federal action "may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the" ESA, it is more likely that the action will be considered significant such that full environmental review should take place. 40 C.F.R. § 1508.27(b)(9). Given that the proposed regulations could fundamentally change Section 9 protections for threatened species, this factor strongly suggests preparation of at least an EA may be necessary.

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[2] *See* National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722 (9th Cir. 2001) (holding EA for agency management plan was inadequate because, in part, controversy over potential impacts from the plan indicated significance of environmental impacts); *see also Citizens for Better Forestry,* 481 F. Supp. 2d at 1089 (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)).

The proposed regulatory changes may be programmatic in nature, rather than authorizing specific projects. That does not change the applicability of NEPA. The CEQ regulations implementing NEPA state that "[e]nvironmental impacts statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations." 40 C.F.R § 1502.4(b). The courts have consistently required federal agencies to conduct NEPA analysis, including EAs and EISs, for a wide range of programmatic and regulatory changes similar to the proposed revisions to the ESA consultation process. *See, e.g.*,) *California ex rel. Lockyer v. U.S. Dep't of Agriculture*, 459 F. Supp. 2d 874 (N.D. Cal. 2006) (striking down national Forest Service rules regarding roadless area management for failure to comply with NEPA); *Wyoming v. U.S. Dep't of Agriculture*, 277 F. Supp. 2d 1197 (D. Wyo. 2003) (same); *Citizens for Better Forestry*, 481 F. Supp. 2d 1059 (striking down national Forest Service planning regulations for failure to comply with NEPA). Moreover, the fact that numerous agencies have been able to conduct environmental review for programmatic regulatory changes shows that such review is feasible. *See, e.g.*, 73 Fed. Reg. 21468 (April 21, 2008) (finalizing regulatory changes to Forest Service planning regulations after preparation of EIS); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (agency prepared EIS for national coal leasing program).

Nor does that fact that elements of the proposed regulatory changes might be characterized as "procedural" mean that NEPA review is not required. For instance, the fact that the proposed changes to planning regulations for the National Forests might be characterized as procedural did not prevent the courts from concluding that, at the very least, an EA must be prepared for review. *See Citizens for Better Forestry,* 481 F. Supp. 2d 1059.

It would also be inappropriate for the Services to rely on a CE to avoid NEPA review where, as here, there is "the possibility that an action *may have* a significant environmental effect." *See Citizens for Better Forestry*, 481 F. Supp. 2d at 1087.

We would add that, in this context, the preparation of at least an EA, if not a full EIS, will not be a fruitless and meaningless exercise in paperwork. The changes that the agency has proposed to the ESA regulations are significant, and they will likely have significant impacts on how federal agencies and private parties conduct their activities and on the level of protection for threatened species.

As the comments above make clear, there are serious questions about the agencies' analyses. Additional data about a range of factors would help narrow the uncertainty about the possible impacts of the proposed changes. Those factors include (but are not limited to): the feasibility of preparing species-specific 4(d) rules for all of the threatened species to be listed by FWS in the future; the impacts of changes to the 4(d) rules on the willingness of private parties to proactively advance species conservation; the impacts of proposed future budget cuts on FWS's ability to conduct species-specific 4(d) rules; etc.

We conclude by noting that, if the Services opts for preparing an EA rather than an EIS they should also provide an opportunity for public comment in that process (unless they subsequently proceed to prepare a full EIS). *See Citizens for Better Forestry v. U.S. Dep't of Agriculture*, 341 F.3d 961, 970-71 (9th Cir. 2003) (noting importance of public participation in the entire NEPA process, including preparation of EAs). The CEQ regulations specify that federal agencies preparing EAs "shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments." 40 C.F.R. § 1501.4(b). The regulations add that a 30-day comment period should be provided by agencies after a decision not to prepare an EIS where the proposed action is one in which an EIS would normally be prepared or is "without precedent." 40 C.F.R. § 1501.4(e)(2). Given the substantial revisions proposed by the Services to the regulations – the first comprehensive revisions in over 20 years – and the analysis above, the proposed revisions would normally warrant preparation of an EIS and are "without precedent." Even if the specific provisions in §§ 1501.4(e)(2) do not apply, given the primary importance of public participation in the NEPA process and the significance of the proposed regulatory changes, public participation in the EA process is appropriate and necessary. *See Citizens for Better Forestry*, 341 F.3d at 970-71 (agency failure to allow public comments on EA for revisions to National Forest planning regulations violated NEPA regulations).

Docket Number FWS-HQ-ES-2018-009

Memorandum Presenting Comments On Proposed Rule Changes

To: United States Fish and Wildlife Service
National Oceanic and Atmospheric Administration

From: Eric Biber, Professor of Law, University of California, Berkeley
436 North Addition, Berkeley CA 94720 (510) 643-5647
ebiber@law.berkeley.edu

Alejandro E. Camacho, Professor of Law and Director, Center for Land, Environment, and Natural Resources, University of California, Irvine
401 E. Peltason Dr., 4500-A, Irvine, CA 92697 (949) 824-4160
acamacho@law.uci.edu

Robin Craig, James I. Farr Presidential Chair in Law, University of Utah, S.J. Quinney College of Law, 383 South University St.,
Salt Lake City, UT 84112 (801) 581-6897
robin.craig@law.utah.edu

Robert Fischman, George C. Smith, II Distinguished Professor of Law, Indiana University Maurer School of Law, 211 S. Indiana Ave.,
Bloomington, IN 47505 (812) 855-4565
rfischma@indiana.edu

Dave Owen, Professor of Law, University of California, Hastings College of the Law, 200,McAllister Street, San Francisco, CA 94102 (415) 703-8285
ownedave@uchastings.edu

W. William Weeks, Clinical Professor of Law, Scolnik Chair of Conservation Law, and Director Conservation Law Center, Indiana University Maurer School of Law, 211 S. Indiana Ave, Bloomington, IN 47405 (812) 855-0615
wwweeks@indiana.edu

Date: September 24, 2018

Introduction

In response to the notice posted in the Federal Register July 25, 2018 seeking comments on specific proposed changes and certain other matters related to regulations promulgated under the Endangered Species Act, the above listed law

professors offer the following comments in light of our respective scholarly and practical expertise with the Endangered Species Act.

We wish to begin by acknowledging many conservation successes of the Fish and Wildlife Service and the National Marine Fisheries Service, and the commendable efforts of many employees of both Services. We call for increased funding so that the Services can fully address the many critical responsibilities of administering the Endangered Species Act.

That said, as our comments below explain, we think many of the revisions that have been proposed will result in less effective, rather than more effective administration of the Endangered Species Act.

Comments

The Fish and Wildlife Service and the National Oceanic and Atmospheric Administration (together, the "Services") are proposing changes in the regulations promulgated under the Endangered Species Act (the "Act"). We have presented our comments on certain of these changes in the order in which those changes are discussed in the Services' official notice of them: Docket No. FWS-HQ-ES-0009.

Comment 1. The Services propose to revise the definition of adverse modification of critical habitat in 50 C.F.R. §402.02 by adding the words "as a whole." Because the standard for designating habitat as critical is that it must be "essential" to the conservation of a listed species, the proposal to permit chipping away at habitat designated critical is inconsistent with the language and purposes of the Act.

The Services propose to revise the definition in 50 C.F.R. §402.02 of "adverse modification" of critical habitat. The heart of the statutory definition of critical habitat is habitat that is "essential to the conservation of the listed species." The definition leads to the conclusion that the loss of any such essential habitat is adverse modification requiring consultation. If the habitat is essential, as the definition specifies, loss of it would reduce, lessen, or weaken the value the habitat has for the species.

The proposed addition of the words "as a whole" to the regulatory definition of destruction or adverse modification of critical habitat frames the issue differently. It tacitly asks how much of the habitat that has been defined as critical, that is, essential, may be compromised without reducing the value of the habitat as a whole

for the species. Because that framing is inconsistent with the definition of critical habitat, adding "as a whole" to the regulatory definition of adverse modification would be unlawful.

The proposed change is also inconsistent with the plain meaning of "adverse modification." The ESA prohibits the destruction or adverse modification of critical habitat. It does not accompany that prohibition with any exemption for modest habitat degradation; it does not carve out an exception for "minor" or "insubstantial" adverse habitat modification, or say that an adverse change to habitat only counts as "adverse modification" if it is noticeable when viewed at landscape scale. Notably, when Congress intended to include such size modifiers in the requirements of environmental law, it explicitly included them. See, e.g., 43 U.S.C. § 4332(C) (requiring environmental impact statements for "major federal actions significantly affecting" the environment). The statute prohibits habitat destruction and adverse modification regardless of scale. The proposed regulations' attempt to create such an exemption therefore would effectively amend the statutory text.

The statute's literal meaning is consistent with the ESA's goals, and the proposed change is not. The statute is designed to reverse species' trends toward extinction, and achieving that goal is often incompatible with allowing continued whittling away of protected species' habitats. The inconsistency is particularly stark for the many species that are threatened primarily by incremental habitat loss. Consequently, the addition of the "as a whole" language would undermine the statute's core purposes as well as its literal meaning.

Instead of adding "on the whole" to the regulatory definition for critical habitat consultation purposes the Services should strike language stating that adverse modification only occurs if the change "considerably reduces" the value of critical habitat for survival or recovery.

We understand that the services may want to focus their regulatory efforts on larger harms, and that they do not want to impose procedural and substantive burdens on relatively small impacts. However, there are three problems with those rationales (which we are just inferring; the proposal does not make them explicit). One is that, as the United States Court of Appeals for the D.C. Circuit has warned, "all the policy goals in the world cannot justify reading a substantive provision out of a statute." North Carolina v. EPA, 531 F.3d 896 (D.C. Cir. 2008). Second, the proposed language is vague and overly broad. It could be applied—and, in fact, similar language has been applied—to exempt harms that rise above any reasonable de minimis threshold. Dave Owen, Critical Habitat and the Challenge of Regulating Small Harms, 64 Florida L. Rev. 141, 168-69 (2012). Third, the proposal overlooks multiple ways in which the Services could efficiently address

small instances of habitat degradation. In other contexts, agencies have used measures like general permits and compensatory mitigation to address small increments of harm, often in ways that create relatively small administrative burdens. Eric Biber & J.B. Ruhl, The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State, 64 Duke L.J. 133 (2014). The same should be done here.

Comment 2. The Services, in their explanation of the proposal to amend the regulatory definition in 50 C.F.R. §402.02, argue that in deciding whether an action "appreciably diminishes" the value of critical habitat, they need not take into account the particularly dire status of a species that is perilously rare. This position is inconsistent with the language and purposes of the Act.

The Services argue that for purposes of determining the effects of an agency's action, they should not consider whether a species is already in jeopardy in determining whether a proposed agency action itself would cause or contribute to jeopardy. This position is inconsistent with the statute and the regulations (even as revised). The action agency and the Services are obliged to take into account the environmental baseline in the consultation process. National Wildlife Federation v. National Marine Fisheries Serv., 524 F.3d 917 (9th Cir. 2008). If a species is already on the edge of extinction, then harms that would be trivial if the population were more numerous (for example) are much more serious. Further jeopardizing the prospect of a rare species, it must be made clear, is, for Section 7 purposes, jeopardizing its prospects for continued existence just as clearly as the first action that had that effect.

Comment 3. The Services assert that they need not consider identifying a "tipping point" for a listed species. We believe that considering whether there is an identifiable tipping point would improve the process of designating critical habitat and consulting with action agencies.

The claim that the action agency and the Services do not need to consider tipping points for jeopardy is inconsistent with the law and basic ecology/biology. While the Services point to "success in the recovery of several listed species" that had low numbers, that claim does not prove that the recovery of many other species may not be possible when their numbers reach a critical breaking point. Sometimes the goal of efficient and effective conservation can best be reached through available analyses (including modeling) that would identify population tipping points for listed species.

Comment 4. We oppose the proposal to amend the 50 C.F. R. §402.02 definition of environmental baseline and the proposed criteria for

deciding whether certain federal actions should be considered part of the baseline or evaluated in the Section 7 consultation. Consultation should be re-initiated when there is a significant change in management or operation plans or environmental context.

In conjunction with its proposed revisions regarding the environmental baseline, the Services have requested comment on how "on-going activities" should be defined. In our view, ongoing actions come in two basic flavors. One is really a single action that just takes a while to implement (e.g., dam building and dam removal). For these types of actions, the existing case law for both the ESA and NEPA have got it basically right: the initial consultation should evaluate impacts over the realistically expected duration of the action, taking account of other expected changes (human, climate change, etc.) that are likely to be occurring over that same time. At that point, consultation is finished unless there is a significant change either in the plan for the project or in the environmental context. Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989).

The other type of ongoing action is basically ongoing federal management--operating one or a series of dams, managing a forest, etc. Section 7 consultation for these types of ongoing actions should occur initially and take account of the action's long-term nature. However, re-consultation should be required every time there is a change in management or operation plans and whenever the environmental context has significantly changed--listing of a new species, drought, flood, the ecosystem(s) involved cross a threshold, etc. We understand the frustrations of all parties with drawn-out consultations over such federal actions as operation of the Columbia River dams. But the Services would improve and quicken the process if they were somewhat less determined that consultations should result in "no jeopardy" decisions. Better and faster consultation is possible under the existing rule, but only with more candor about the difficult trade-offs among objectives.

Comment 5. The Services propose to revise 50 C.F.R. 402.03 to preclude the need to consult when the action at issue would "have effects that are manifested through global processes and (i) cannot be measured at the scale of a listed species' current range." We think that the Act's mandate to agencies that they use their authorities to conserve listed species and other Act provisions requires consultation regarding the consequences of a federal action for global processes known to have effects on listed species.

The Services have requested comment on whether 50 C.F.R. §402.03 ought to be revised to relieve an action agency of the requirement to consult when the action would "have effects that are manifested through global processes and (i) cannot be measured at the scale of a listed species' current range." In our view, this

proposed revision would be unwise. A wiser course would be to propose revisions that acknowledge, include, and reflect the best available scientific efforts to account for the effects of such global processes as climate change and ocean acidification. The courts have made it clear that climate change and ocean acidification data ought not to be excluded when the Services are implementing the Act. In determining whether a proposed activity is likely to jeopardize the species or damage or destroy critical habitat for Section 7 consultation purposes, for example, the activity must be evaluated in the context of what climate change (and for marine species, ocean acidification) is doing to that species in that location. An agency proposal to bring machinery that runs hot or might spark a blaze into endangered species habitat might need to be evaluated in light of the increased likelihood of fire in an area that has become increasingly dry because local summers have become warmer and drier.

In addition, the failure to consider climate change and ocean acidification complicates the whole effort of determining an environmental baseline against which to measure a project's effects. For example, if a proposed federal action would reduce the likelihood that a species can survive by adapting to climate change, the consultation analysis should incorporate reasonably prudent measures to ameliorate its effects on the listed species. Impairing a species' adaptation potential may well have the same consequences for recovery as conventional, local causes of jeopardy.

In our view, the Act obliges the Services to consider, as part of the consultation process, the best available science and include a determination, even if doing so is difficult, of the effects in light of global processes of a proposed agency action on a listed species in its current range. At the least, the broader expected effects of global processes such as climate change represent necessary context in which to consider the effects of a proposed action. The science of down-scaling global climate change to local impacts is progressing rapidly. See, IPCC, 2014: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Barros, V.R., C.B. Field, D.J. Dokken, M.D. Mastrandrea, K.J. Mach, T.E. Bilir, M. Chatterjee, K.L. Ebi, Y.O. Estrada, R.C. Genova, B. Girma, E.S. Kissel, A.N. Levy, S. MacCracken, P.R. Mastrandrea, and L.L.White (eds.)], Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 1137-38. The Services should avoid regulatory changes that will isolate their analyses from the best science in this emerging area.

Comment 6. The Services have requested comment on whether consultation should be restricted to matters within the action agency's jurisdiction or control. Placing such boundaries on consultation would not serve the purposes of the Act, because an agency may be in a position to

counteract forces beyond its immediate jurisdiction and control with prudent measures it may be tasked with carrying out as a result of the consultation.

In response to the Services' request for comments on whether consultation should be restricted to matters within the jurisdiction and control of the consulting agency, we advise that doing so would be a mistake. For examples of instances of limited agency jurisdiction and control, we need look no further than climate change and other global processes. Limiting consultation to matters within the authority of the particular action agency exacerbates agencies' inclination to act as if they are not all part of one government enterprise, an enterprise mandated in all of its divisions to use its authorities to conserve species. Further, to paraphrase our comment number 5 above, an action that would be benign except for the effect of global processes might well contribute additional stresses. Additional conservation measures conducted at the federal agency action level might provide the margin that a species needs to survive in the face of the effects of global processes or other factors not closely within the control of the consulting agency.

The material prepared for the consultation will be incomplete if it does not include consideration of matters that represent threats to the species that cannot be resolved by the immediately consulting agencies alone. Inclusion of an analysis of such threats, along with estimates of what they may mean for mortality of the species at the center of the consultation is necessary for evaluating cumulative impacts. Only such an encompassing analysis can properly guide the process of establishing reasonable and prudent measures for the consulting agency to take in order to fulfill the statutory mandate to use its authorities to conserve listed species. More extensive or effective actions to reduce listed species mortality may be required precisely because of the existence of threats that the agency participating in the consulting process is not in a position to resolve.

Comment 7. The Services seek advice on setting deadlines for responses in informal consultation. In this and other aspects of the docket posting, the Agency has not provided enough information to permit useful public comment. Similarly, the Services have claimed that because they have announced proposed changes in this posting and others posted the same day, they have met the requirement of providing adequate public notice and opportunity for comment to make changes in the regulations not announced here. We disagree.

The agency asks for advice on deadlines for informal consultation. It is hard to know what to make of this without knowing what the consequences for missing the deadline would be. With respect to any proposed revision arising out of this request, or arising out of any other matter not detailed in the official notice of proposed revisions, we assert that no final rule may be promulgated because there

has not yet been sufficient notice and opportunity to comment. Any proposed new rule emerging generally from an open ended request for advice, or a broad notice that some sort of change to the regulations under the Act are being considered must be published in a new notice in order to provide statutorily sufficient opportunity to comment under the Administrative Procedure Act.

Comment 8. The "optional collaborative consultation process," as described, is too ambiguous to provide sufficient assurance that the proposal will be effective. As presented, the proposal would likely allow other federal agencies without expertise in species conservation to play the lead role in analysis. Without more resources to ensure analyses adequately consider the best available science, streamlining only raises the risk of pro forma consultation.

While we are interested in any proposal to increase the efficiency of decision-making under the Act without compromising conservation goals, this particular proposal is so vague that we do not know how to meaningfully comment upon it. We also recommend that the Services discuss ways in which their field staff are already working to expedite consultations, particularly when working with repeat-player agencies like the Army Corps of Engineers. Discussion of those efforts might reveal that a new expedited consultation process is unnecessary, or, alternatively, it might provide valuable information for the development of an expedited consultation process—as well as facilitating more meaningful comments than we can presently provide.

Comment 9. The Services propose to add a new provision to 50 C.F.R. §402.14 that would allow action agencies to use material prepared for other purposes in consultation submissions. We think the idea needs refinement in order to avoid an unacceptable lowering of standards for the information available to the Services in consultation.

The Services describe a qualified willingness to allow action agencies to use material prepared for other purposes as a substitute for material otherwise required to be prepared for the Section 7 consultation process. With due regard for the important goal of reducing inefficiency and redundancy, action agencies and the Services must do more than blindly copy and paste material prepared for purposes other than the one currently at hand. Such a practice appears to have contributed to the inadequate analysis of the risks to the Gulf of Mexico in the NEPA compliance in developing the Macondo well, which led to the 2010 Deepwater Horizon blowout. National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Final Report (2011). To avoid arbitrary and capricious decision-making, action agencies and the Services must: (1) identify exactly what material from different government processes they have adopted; (2) independently evaluate the value of

the adopted analyses; and (3) explain in detail why adopting that analysis is warranted and appropriate. Moreover, exceptionally careful analysis is warranted when the materials were prepared long ago or far away from the proposed action. The Services and action agencies have a continuing duty to update older analyses with the best available science.

Comment 10. The Services propose that 50 C.F.R. 404.14 should be "clarified" to relieve the Services of any duty to verify or evaluate the credibility of measures an agency proposes to take to avoid, minimize or mitigate the effects of its action. The immunity the Services propose to grant themselves on this question is too broad.

The proposed revisions in the regulations assert that the Services may rely on action agencies' statements that avoidance or mitigation measures will be faithfully executed. In our view, the Services must adhere to a more demanding mandate than that. As the Services have indicated, more attentive review appears to be required by law in the Ninth Circuit (National Wildlife Federation v. National Marine Fisheries Service, 524 F. 3d 917 (9th Cir. 2008)). The Services have cited no Circuit Court cases that have ruled otherwise, and we are aware of none. The Services must at least determine that the plan to avoid, minimize or mitigate the effects of a proposed action is credible, that the plan for funding such measures is reasonable, and that are no known obstacles that may keep the measures from being carried out. The consultation is a two party process. The Services cannot serve their statutory role unless they do more than merely to assume that the proposed plan is adequate with regard to mitigation commitments, any more than they can take the documentation on faith with respect to other elements of the consultation. Moreover, the Services should identify measurable standards for the action agency to monitor the effectiveness of mitigation. The Services should require re-initiation of consultation if the monitoring of the standards indicates that the mitigation is not performing as expected.

Comment 11. The Services propose to amend 50 C.F. R. § 402.16 to make it unnecessary for BLM and the Forest Service to re-initiate consultation on a management plan when a species that exists in the area subject to the plan is listed. The asserted justification for the change—that plans will come up for review within five to fifteen years--is unpersuasive. A listed species is likely to require action in much shorter periods, and may require a re-ordering of priorities established in management plans.

Agency actions associated with management plans are among those consultations the Services propose to exempt from re-initiation upon the occurrence of some events that had previously been thought to require it. The Services have not provided persuasive justification for this proposed revision. As the Services have stated, the range of times for agency review of plans ranges from 5-15 years; those

periods may be essential for survival of an endangered species. In addition, BLM and the Forest Service have regularly missed the statutory deadlines for revising their plans, meaning that plans may be in place for far more than 5-15 years without any updating. The periodic planning processes that many action agencies use establish frameworks that incorporate activity and resource priorities for agency action. The listing of an endangered species changes the conditions in which such policy priorities were determined. Such a change requires a review of the soundness of the framework, and a re-initiation of consultation is the vehicle by which that review can best be done: consultation is the process by which the Services can help other federal agencies meet the mandate to use their authorities to conserve endangered species. The Services have the information needed to facilitate that process, and both their own mandates and the general mandate of the Act as it applies to other agencies require that the Services make that information available to other federal agencies in a timely way.

We also note that this proposal is at odds with the services' suggestion, elsewhere in the proposal, that programmatic consultations should be used more often.

Comment 12. Finally, the proposed regulations require the preparation of an environmental impact statement. They are not fundamentally administrative. Implementation of the regulations will have an immediate and significant effect on the human environment. For example, the failure to consider effects of global processes as part of the consultation will result in substantively different consultation agendas and results and the failure to re-initiate consultation on management plans when an affected species is listed is likely to result in fewer opportunities to do advance planning to conserve listed species, lower numbers of recovered species, and more costly emergency efforts to make up for putting blinders on the planning processes.

The National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 et seq., imposes procedural requirements on all federal agencies to consider the impacts of their actions on the environment. In particular, NEPA requires federal agencies to prepare a detailed environmental impact statement (EIS) for "all major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). The issuance, repeal, or revision of agency rules and regulations falls within the scope of "Federal actions" pursuant to NEPA. 40 C.F.R. § 1508.18(a).[1]

[1] *See* Daniel R. Mandelker, *NEPA Law and Litigation* § 8:27 (2005 Suppl.) ("Federal agency rules and regulations are federal actions that may require the preparation of an impact statement."); *see also Citizens* for Better Forestry v. U.S. Dep't of Agriculture, 481 F. Supp.2d 1059, 1080 (N.D. Cal. 2007).

The Council of Environmental Quality (CEQ) has issued a series of regulations implementing the procedural requirements of NEPA. Two of those regulations are particularly relevant here. One, CEQ has listed a series of factors that an agency should consider in determining whether there will be a significant impact on the environment from an agency action. Included in those factors are:

> (1) the degree to which the proposed action affects public health or safety; (2) the degree to which the effects will be highly controversial; (3) whether the action establishes a precedent for further action with significant effects; and (4) whether the action is related to other action which has individually insignificant, but cumulatively significant impacts. *Citizens for Better Forestry*, 481 F. Supp. 2d at 1080 (citing 40 C.F.R. § 1508.27(b)).

Two, CEQ has established a procedure by which federal agencies must decide whether an agency action will have "significant" impacts such that an EIS must be prepared. In general, a federal agency that has not decided to prepare a full EIS must prepare an Environmental Assessment (EA) to determine whether the environmental impact of the proposed action is significant. 40 C.F.R. § 1508.9. An agency may avoid conducting an EA, but only if it determines that a categorical exclusion (CE) identified in prior agency rulemaking appropriately applies to the proposed federal action. *See* 40 C.F.R. §§ 1508.4 and 1507.3(b)(2)(ii). In making that determination, an agency must use a "scoping process" to "determine the scope of the issues to be addressed and for identifying the significant issues related to a proposed action." *See Citizens for Better Forestry*, 481 F. Supp. 2d at 1081 (citing *Alaska Ctr. for the Env't v. United States*, 189 F.3d 851, 859 (9th Cir. 1999)).

In determining whether or not a CE should apply to a proposed federal action, the courts have held that the agency must specifically cite to the specific categorical exclusion that the agency is relying upon. *Citizens for Better Forestry*, 481 F. Supp. 2d at 1082. Moreover, courts have held that "[a]pplication of a CE is inappropriate if there is the possibility that an action *may have* a significant environmental effect." *Id.* at 1087.

Given the discussion earlier in these comments, there is no question that the Services should at the very least conduct an EA to determine whether an EIS might be appropriate for these changes to the ESA regulations. For example, the regulations – by the Services' own admission – are intended to affect the applicability of the ESA to the impacts of climate change on threatened and endangered species. By reducing or eliminating consideration of climate change in the consultation process, the proposed regulations may have a direct effect on "public health and safety" by reducing protections for threatened and endangered species. Moreover, by reducing the scope of the applicability of the ESA in the federal government's response to climate change, the proposed regulations will reduce the government's overall ability

to respond to climate change, with potential impacts on public health and safety broader than just the impacts on threatened and endangered species.

The proposed revisions to the consultation process would decrease the role that uncertain harms play in the listing of species – for instance, by eliminating protection for some losses of critical habitat, and by eliminating consideration of tipping points in the consultation process. Thus, species faced with uncertain threats will receive less protection, which in turn may result in more actions that will have a harmful impact on threatened or endangered species.

The detailed comments provided above show that there is a serious amount of controversy over the potential effects of the proposed regulatory changes on the environment.[2]

The proposed regulations establish a procedural and substantive framework for the consultation process in the future. Accordingly, the regulations set a "precedent for further action with significant effects." *Citizens for Better Forestry*, 481 F. Supp. 2d at 1089 (concluding that proposed changes to Forest Service planning regulations warranted at least review pursuant to EA).

Even if the Services believe that the proposed regulations may be beneficial for listed species as a whole – perhaps by allowing more actions that will be beneficial to listed species to occur without the paperwork burden of consultation – it must nonetheless conduct environmental review. The CEQ regulations make clear that a "significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." 40 C.F.R. § 1508.27(b)(1).

Likewise, even if the Services believe that the future impact of the proposed regulations on the protection of listed species is highly uncertain, that would also cut in favor of preparing at least an EA. *See* 40 C.F.R. § 1508.27(b)(5) (one factor determining whether a proposed action might be significant is the "degree to which the possible effects on the human environment are highly uncertain").

Finally, the CEQ regulations make clear that if the proposed federal action "may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the" ESA, it is more likely that the action will be considered significant such that full environmental review should take place. 40 C.F.R. § 1508.27(b)(9). Given that the proposed regulations could fundamentally change the consultation process for all listed species, this factor strongly suggests preparation of at least an EA may be necessary.

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[2] *See* National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722 (9th Cir. 2001) (holding EA for agency management plan was inadequate because, in part, controversy over potential impacts from the plan indicated significance of environmental impacts); *see also Citizens for Better Forestry,* 481 F. Supp. 2d at 1089 (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)).

The proposed regulatory changes might be programmatic in nature, rather than authorizing specific projects. That would not change the applicability of NEPA. The CEQ regulations implementing NEPA state that "[e]nvironmental impacts statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations." 40 C.F.R § 1502.4(b). The courts have consistently required federal agencies to conduct NEPA analysis, including EAs and EISs, for a wide range of programmatic and regulatory changes similar to the proposed revisions to the ESA listing process. *See, e.g.*,); *California ex rel. Lockyer v. U.S. Dep't of Agriculture*, 459 F. Supp. 2d 874 (N.D. Cal. 2006) (striking down national Forest Service rules regarding roadless area management for failure to comply with NEPA); *Wyoming v. U.S. Dep't of Agriculture*, 277 F. Supp. 2d 1197 (D. Wyo. 2003) (same); *Citizens for Better Forestry*, 481 F. Supp. 2d 1059 (striking down national Forest Service planning regulations for failure to comply with NEPA). Moreover, the fact that numerous agencies have been able to conduct environmental review for programmatic regulatory changes shows that such review is feasible. *See, e.g.*, 73 Fed. Reg. 21468 (April 21, 2008) (finalizing regulatory changes to Forest Service planning regulations after preparation of EIS); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (agency prepared EIS for national coal leasing program).

Nor does that fact that elements of the proposed regulatory changes might be characterized as "procedural" mean that NEPA review is not required. For instance, the proposed changes to planning regulations for the National Forests might be characterized as procedural, but that did not prevent the courts from concluding that, at the very least, an EA must be prepared for review. *See Citizens for Better Forestry,* 481 F. Supp. 2d 1059.

It would also be inappropriate for the Services to rely on a CE to avoid NEPA review where, as here, there is "the possibility that an action *may have* a significant environmental effect." *See Citizens for Better Forestry*, 481 F. Supp. 2d at 1087.

We would add that, in this context, the performance of at least an EA, if not a full EIS, will not be a fruitless and meaningless exercise in paperwork. The changes that the agency has proposed to the ESA regulations are significant, and they will likely have significant impacts on how federal agencies conduct their activities and on the level of protection for endangered species.

As the comments above make clear, there are serious questions about the agencies' analyses. Additional data about a range of factors would help narrow the uncertainty about the possible impacts of the proposed changes. Those factors include (but are not limited to): the importance of the loss of small segments of critical habitat for listed species; the existence and prevalence of tipping points in the conservation of listed species; the importance of critical habitat for species already in a state of jeopardy; the importance of climate change for species conservation and the practicability of undertaking analyses at the level of the range

of individual species; the impact on species conservation of limiting consultation to matters within the action agency's jurisdiction or control; the feasibility and impact of setting deadlines for informal consultation; the extent to which action agency proposals to avoid, minimize, or mitigate the impacts of actions on endangered species are actually implemented; etc.

We conclude by noting that if the Services decide to prepare an EA rather than an EIS, they should also provide an opportunity for public comment in that process (unless they subsequently proceed to prepare a full EIS). *See Citizens for Better Forestry v. U.S. Dep't of Agriculture*, 341 F.3d 961, 970-71 (9th Cir. 2003) (noting importance of public participation in the entire NEPA process, including preparation of EAs). The CEQ regulations specify that federal agencies preparing EAs "shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments." 40 C.F.R. § 1501.4(b). The regulations add that a 30-day comment period should be provided by agencies after a decision not to prepare an EIS where the proposed action is one in which an EIS would normally be prepared or is "without precedent." 40 C.F.R. § 1501.4(e)(2). Given the substantial revisions proposed by the Services to the regulations – the first comprehensive revisions in over 20 years – and the analysis above, the proposed revisions would normally warrant preparation of an EIS and are arguably "without precedent." Even if the specific provisions in §§ 1501.4(e)(2) do not apply, given the primary importance of public participation in the NEPA process and the significance of the proposed regulatory changes, public participation in the EA process is appropriate and necessary. *See Citizens for Better Forestry*, 341 F.3d at 970-71 (agency failure to allow public comments on EA for revisions to National Forest planning regulations violated NEPA regulations).