September 24, 2018

The Honorable Ryan Zinke
Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

The Honorable Wilbur Ross
Secretary
U.S. Department of Commerce
1401 Constitution Ave., N.W.
Washington, DC 20230

Re: Proposed changes to Regulations Guiding Implementation of Endangered Species Act (Docket Numbers: FWS-HQ-ES-2018-0006, FWS-HQ-ES-2018-0007 and FWS-HQ-ES-2018 0009)

To Secretary Zinke and Secretary Ross,

On behalf of the American Society of Mammalogists (ASM), the Society for Conservation Biology North America (SCBNA), and the American Ornithological Society (AOS),[1] please accept these comments regarding the proposed changes to the regulations guiding the implementation of Endangered Species Act, including the revisions to the regulations for interagency cooperation, revisions related to listing species and designating critical habitat, and the recession of the 4(d) regulations for threatened wildlife and plants. Our three societies have a long involvement in the conservation of biological diversity and endangered species in the United States and elsewhere in the world. We strongly believe that if these three proposals are enacted, they will severely weaken protections for endangered and threatened species and, counterproductively, could result in more extinctions of plants and animals in the United States. Accordingly, we respectfully urge withdrawal of the three rules.

The three proposed rules would: (1) weaken key parts of the regulations implementing Section 7 of the Endangered Species Act that require interagency consultations whenever a federal agency's activities could cause harm to threatened and endangered species; (2) rescind the U.S. Fish and Wildlife Service's blanket 4(d) rule, thereby substantially reducing protections for threatened animals and plants that are listed in the future; and (3) weaken the procedures under Section 4 of the Endangered Species Act relating to the listing of species and the designation of critical habitat by devaluing the importance of critical habitat in the recovery of endangered species and by injecting economic considerations into the listing process.

[1] The American Society of Mammalogists was established in 1919 for the purpose of promoting interest in the study of mammals worldwide. ASM, with over 2,400 members, has long provided information for public policy, education and natural resources management. We strongly support the conservation and responsible use of wild mammals based on current, sound, and accurate scientific knowledge.
SCBNA is the North American section of the Society for Conservation Biology, an international professional organization of over 3,000 members dedicated to advancing the science and practice of conserving the Earth's biological diversity.
Founded in 1883, the American Ornithological Society is an international professional society of 3,000 members. The AOS is dedicated to advancing the scientific understanding of birds, promoting a rigorous scientific basis for the conservation of birds and their habitats, and informing public policy on issues important to ornithology.

First, the removal of blanket 4(d) rule[2] would weaken protection for threatened species and encourage further political interference in the recovery process. By automatically applying the same prohibitions against "take" as given to endangered species (making it illegal to kill, injure, harm, or harass threatened animals), rescinding or restricting protections when and where advisable, this regulation has helped move threatened species towards recovery for nearly 40 years. If the 4(d) rule is rescinded, we are concerned that newly listed threatened species will be afforded little to no protections. Moreover we are concerned that political pressure may lead to more "threatened" designation of species that are truly "endangered" in order to facilitate industry and other development interests by removing requirements to minimize harm to threatened species. Accordingly, we urge the Services to retain the blanket 4(d) rule and maintain the existing practice of creating special rules on a case by case basis where more specific or tailored protections are needed.

Next, the proposed changes to the Section 7 regulations,[3] including the changes to the definition of "destruction or adverse modification" of critical habitat will significantly weaken the implementation of the Act, because it narrows the definition of critical habitat that is the basis for successful endangered species recovery. The Endangered Species Act currently requires the designation of critical habitat for threatened and endangered species in nearly all cases. Hence, federal agencies are prohibited from funding, permitting, or carrying out actions that destroy or adversely modify critical habitat. Through consultation with the National Marine Fisheries Service for marine and anadromous species, or the U.S. Fish and Wildlife Service for all other species, federal agencies avoid doing serious harm to the recovery of threatened and endangered species by not destroying or degrading critical habitat. Habitat loss and degradation remain the primary cause of species loss and endangerment, so loss or adverse modification of critical habitat should be avoided for successful endangered species recovery.

The proposed changes would redefine "destruction or adverse modification" as an "alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species." Because most federal agency activities cause incremental damage to habitat through relatively minor impacts, they are unlikely to impact an entire critical habitat designation; however, they comprise a number of small impacts that cumulatively may have substantial impacts on habitat suitability – death by a thousand cuts, so to speak. Consequently, we believe this revised definition will fail to ensure the protection of critical habitat necessary to sustain species survival and recovery.

We believe this revised definition of adverse modification is fundamentally inconsistent with the intent of the Endangered Species Act, which is to ensure the survival and recovery of threatened and endangered species. We urge the Service to withdraw this proposed revision, and to adopt a definition of adverse modification that focuses assessment at a biologically meaningful scale, such as recovery of critical habitat units.

The proposed regulatory changes to the listing and critical habitat designation process[4] contains many significant provisions that threaten to undermine conservation efforts. First, the proposed rule will significantly limit the designation of critical habitat for threatened and endangered species

[2] FWS-HQ-ES-2018-0007.
[3] FWS-HQ-ES-2018-0009.
[4] FWS-HQ-ES-2018-0006.

designated in the future. We are alarmed by the proposed large expansion of the circumstances when designating critical habitat would be "not prudent." If enacted, critical habitat would not be designated if an imperiled plant or animal was put at risk of extinction by threats other than habitat loss — such as climate change, disease, or other factors beyond direct destruction or modification of habitat. The incorrect premise of this loophole is that such species would not benefit from protection of habitat, but such an assertion is contradicted by most of the scientific literature. Indeed, it is clear that species facing threats such as climate change or disease may have *greater* needs for habitat protection to ensure that those few places where they are persisting in the face of these threats are not harmed, and to provide habitat for range adjustments in response to climate-change-driven habitat changes (e.g., shifting to higher elevations or latitudes). Therefore, we believe that restricting the criteria for designation of critical habitat will impede species conservation and could lead to the extinction of more animals and plants due to co-existing threats such as climate change and the spread of invasive species.

Further, we are deeply concerned that the proposed definition of "foreseeable future" could improperly limit consideration of climate change and other long-term threats in listing determinations for threatened species. In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The Services are proposing to limit the timeframe encompassed by the "foreseeable future" to extending only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction are "probable." This standard of certainty is likely to cause the Services to downplay threats to species from climate change and other long-term threats such as genetic inbreeding that are assessed using simulations of future system behavior that inevitably include substantial uncertainty.

The risk of this proposed definition of "foreseeable future" is exemplified by the 2014 decision not to protect the wolverine (*Gulo gulo*) under the Endangered Species Act even after FWS scientists had concluded that the species was threatened by climate change. In this case, the best available science necessarily incorporated predictive modeling approaches (e.g., projecting future effects of climate change on snow cover) that were well-supported in the scientific literature. However, in 2014 the FWS interpreted the "foreseeable future" clause to require "experimental evidence" before a threat could be reasonably determined to be probable. Such evidence is neither practical nor available for a rare free-living mammal such as the wolverine, but is inconsistent with the nature of climate change, which simply is not amenable to experimentation.

In this respect, the Proposed Rule resembles some earlier, unsuccessful legislative proposals, such as the 2004 "Sound Science for Endangered Species Act Planning Act" (H.R. 1662) that would have limited the use of predictive models in listing determinations. These proposals, as well as the Services current proposed definition of "foreseeable future," run counter to recommendations from the National Research Council in its report entitled "Science and the Endangered Species Act," which recommended greater use of predictive modeling techniques such as population viability analysis in decision-making under the Endangered Species Act.

In the 2014 decision on wolverine, the FWS characterized the evidence of threats from loss of snow cover under future climates as "speculative," setting a high threshold of proof for determining that climate change and other long-term factors threaten persistence of any species. Ultimately, this decision was overturned by a federal court, which concluded: "No greater level of certainty is needed to see the writing on the wall for this snow-dependent species standing squarely in the path

of global climate change."[5] The current proposal to define "foreseeable future" would codify what we believe to be an inappropriate approach, making the wolverine listing a template for all future reviews under the Act. This could result in many animals and plants being denied protections due to "uncertainty" regarding climate change effects. We agree with the Court when it stated, "if there is one thing required of the Service under the Endangered Species Act, it is to take action at the earliest possible, defensible point in time to protect against the loss of biodiversity within our reach as a nation." We therefore recommend the Services withdraw the proposed definition of foreseeable future and develop a definition consistent with the precautionary intent of the Endangered Species Act and the best available science regarding projection of climate change and other long-term threats.

Finally, we are very concerned with the proposal to allow the indirect consideration of economic factors into the listing process. This directly contravenes requirements of Section 4 the Endangered Species Act that all listings be based "solely on the basis of the best scientific and commercial data available." Despite this clear statutory requirement, the Proposed Rule would remove the phrase "without reference to possible economic or other impacts", with the specific intent of incorporating economic impacts into assessments of species status. Such a change would further politicize the listing process, limiting protection to numerous animals and plants because the short-term negative economic impacts are perceived to be too high. Such outcomes run directly counter to the primary purpose of the Act to save species from extinction.

In summary, our evaluation of the proposed regulatory changes strongly suggests that they will not further conservation of endangered species, but rather, will likely have negative impacts on their conservation. If enacted, the rule changes will fundamentally undermine the ability of science and scientists to help protect our nation's biodiversity. Therefore, we request in the strongest possible terms that all three proposed rule changes be withdrawn.

Sincerely,

Jessa Madosky, Ph.D
President, Society for Conservation Biology North America

Dr. Douglas A. Kelt,
President, American Society of Mammalogists

Dr. Kathy Martin,
President, American Ornithological Society

[5] *Defenders of Wildlife v. Jewell*, 9:14-cv-00246-DLC (D. Mont, April 4, 2016).