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Ryan Zinke, Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Wilbur Ross, Secretary
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

cc: Senators Kamela Harris and Diane Feinstein
Representatives Jared Huffman and Nancy Pelosi

Re: Proposed Revisions to Endangered Species Act
§ 4 Regulations for Listing Species and Designating Critical Habitat
§ Proposed Rescission of the Blanket 4(d) Rule for Protection of Threatened Species
§ 7 Regulations and Consultation

Dear Secretaries Zinke and Ross,

We will be submitting our critiques of all three sections with proposed modifications to the Endangered Species Act (Hereinafter "ESA" or "The Act") under this cover, with our comments on the respective sections below.

It was ironic that when Mr. Zinke came riding into the Department of the Interior on his first day of work that he was alluding to Theodore Roosevelt, who expanded the Department of the Interior over a century ago. I would like to remind him that for Mr. Roosevelt, the Department was tasked with conservation of the lands under Federal jurisdiction. In Theodore Roosevelt's words:

Nature
There is delight in the hardy life of the open.
There are no words that can tell the hidden spirit of the wilderness
that can reveal its mystery, its melancholy, and its charm.
The nation behaves well if it treats the
Natural Resources
as assets which it must turn over to
The Next Generation
Increased and not impaired in value
Conservation means Development,
as much as it means Protection

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Asked 20 years ago whether the Endangered Species Act should be modified, I would have agreed. The original Act was crafted when, due largely to industrial exploitation of habitat, resources, and wildlife; reckless extraction and enclosure practices; unchecked chemical pollution through dumping and chemical applications; and outright slaughter of marine mammals, we were seeing the extinction of countless individual species of animals. Congress, expressing the will of the people, saw fit to create a body of regulations that would keep industrial destruction of animals and their habitats in check. And to a great extent The Act has been successful – seeing the recovery of many iconic species, including the treasured national bird, the Bald Eagle – which, if left to the fate of industrial wishes, would have gone extinct. It is in light of the many successes of The Act that any revisions should be considered.

But when the act was crafted there was not a holistic, systematic view of animals in their habitat all being part of the larger fabric of Nature. As a consequence, individual animals became proxies for their habitats. So while clear-cutting old growth forests (for example) would imperil the Spotted Owl, the owl took the burden of conservation efforts, not the old growth forests. And while predicating the regulations in the Act on individual species has been effective from a sentimentalist standpoint, by offering up animals as "mascots" for conservation efforts - but they also become pariahs for preventing "development" and habitat exploitation. In the spotted owl case it placed the owl at the center of the controversy, while keeping the old growth forests in the cross-hairs of the lumber industry.

So in less rapacious times I would have suggested that the Act broaden out the definitions of "threatened" and "endangered" to be descriptions of natural biological systems upon which all life on our planet depends. Unfortunately, the spirit of the current proposed changes run against any reasonable argument for making the act more efficient and effective for the sustainable managements of our common habitat; rather the proposed changes tend toward reductionist views of plant and animal species' relationships with their surroundings, and the "streamlining" of the regulations are aimed toward greasing the wheels of industrial habitat exploitation.

And it is clear that the aims of the current Administration favor industry over nature, exploitation over conservation, and privatization of our public commons at the expense of life; threatened, endangered, or not. It is also clear that Mr. Zinke is not particularly interested in what the public has to say about how our natural resources are managed.[1] We will, nonetheless provide comments and input into the proposed revisions in good faith that they will at least be included into the record.

§ 4 Regulations for Listing Species and Designating Critical Habitat

Section 424.11—Factors for Listing, Delisting, or Reclassifying Species: Economic Impacts. Perhaps the most concerning proposed revision in this chapter is the proposal under Section 424.11 to remove the phrase "without reference to possible economic

[1] Rebecca Worbly, July 24, 2018 *Public Lands Advocates Respond to New Revelations from the DOI's 'Sham Review' of National Monuments* Pacific Standard

or other impacts of such determination" from paragraph (b). This proposal is unwise, reductionists, and completely contrary to the intent of The Act. Even while there are assurances that inclusion of economic considerations is merely to inform any proposed listings, and not to put any economic values into the decisions to list or not, it is anathema to an informed decision to include data in an argument, and then not use it.

So then why include the data? So someone can make a note about the economic value of the proposed listing? And if an economic consideration is put into the argument, who is doing the value calculus? Biologists or accountants? Would these functionaries be accountable to the public, or only to the Agency? What metric would be used to establish value of a potential extinction of an animal, and by inference, as noted above, the destruction of the habitat of the animal?

And contrary to the "Regulatory Streamlining" argument used to justify the proposed changes, adding an economic consideration would actually increase the burden of applying The Act - by politicizing the economic considerations, and exposing the Agency to endless lawsuits on the "value" argument.

In light of the above, the phrase "without reference to possible economic or other impacts of such determination" should remain in The Act.

We are also concerned with the proposed redefinition of "foreseeable future" to "extend[s] only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable."

Given that the environment is changing rapidly due to the impacts of fossil fuel use (and this administration's reckless denial of these impacts), redefining this term would provide a cynical wedge to dismiss a listing because the habitat may be changing too fast to predict where it will be within very short time windows. This would allow the Agency to not list a species due to the unpredictability of the future and get the Agency off the hook in proposing any realistic mitigation against extinction.

This proposed change could also open up the "death by a thousand cuts" scenario, whereby the impacts of any proposed action are considered only in the context of a specific action in a particular scenario within a "predictable" time frame. It is quite possible that successive actions, or adjacent – also isolated from any specific action would not be taken into consideration of a determination. Meanwhile we have seen this applied in actions whereby a complete project – such as running a trans-boundary pipeline and permitting in in a hundred small sections so as to evade consideration the long-term and larger environmental impacts of the complete project. Partitioning time with this idea of "foreseeable future" would provide another tool for a proposed action to be approved by not establishing a more meaningful time consideration.

This is particularly in light of the inclusion of "reliance on the exercise of professional judgment by experts where appropriate" where the "experts" are not defined, and there is no clear direction on the meaning or threshold of "appropriate."

If the term "foreseeable future" is to be defined, it would make sense to use a definition already in place and used by many indigenous people – the next seven generations of human life. This is because – as Theodore Roosevelt stated "The nation behaves well if it treats the Natural Resources as assets which it must turn over to The Next Generation *increased and not impaired in value*." Should we adopt this philosophy, we could reliably predict that there will be seven generations in the future who will be able to enjoy the species and habitats that we have not despoiled.

Regarding the criteria for delisting (section 424.11), it is evident that a lot of thought has gone into this section with the only rationale being "streamlining" and no other evidence as to how the current delisting criteria is somehow "burdening" the Agencies. With the Agency backlog on listing species, it seems that efforts would be better spent on substantiating recovery on a case-by-case basis as the needs arose in the context of Incidental Harassment and Incidental Take Authorizations. Revising the delisting process in the context of "streamlining" only invites trouble.

Under current law, any listed species can be removed from the list upon a scientific determination that it is, in fact, recovered and that the previous threats to its survival have been appropriately abated. That determination must be made based upon the statutory five factors using the best available scientific and commercial data.[2] No additional clarification is required here. The move to delist only implies that the habitat – recovered or otherwise, has become subject to exploitation – which would again put the species at risk.

Summarizing our recommendations under § 4:

- The phrase ""without reference to possible economic or other impacts of such determination" should not be struck from The Act.
- The term "foreseeable future" should not be redefined as proposed, but broadened in the context of management and actions that turn or assets to the next generation "increased and not impaired in value."
- Criteria for delisting a species should not be modified from the current criteria.

§ Proposed Rescission of the Blanket 4(d) Rule for Protection of Threatened Species

The 4(d) rule provides the Agencies with flexibility under Section 9 of the statute while deferring to precaution – allowing the same protective measures afforded to endangered species to be extended to threatened species. While this may seem burdensome to industries navigating around The Act, section 4(d) provides for individual treatment of species on a case-by-case difference. There are enough provisions for flexibility while

[2] 16 U.S.C. §§ 1533(a)(1)(A)-(E), 1533(b)(1)(A).

defaulting to protection when an activity is not directly interfering with a listed species. This "blanket rule" also allows for a raft of species whose determination has not been established to be protected unless and until there is a determination on the species. This seems to provide the best of both worlds – inasmuch as species and habitats are protected, and individual cases can be brought into focus as needed.

Given the backlog of determinations under the management of the Fish and Wildlife Service, rescinding 4(d) would either usher in an immediate need to classify these undetermined species, or more than likely, allow for habitat-compromising activities to occur before the subject species are classified and listed.

The stated rationale behind rescinding section 4(d) is to harmonize FWS and NMFS protocols. But as this section provides flexibility as well as precautionary protection it would be better to harmonize Section 4(d) by applying it to both agencies.

§ 7 Regulations and Consultation

In the preamble of the proposed revisions there is the comment "Based on comments received and on our experience in administering the Act, the final rule may include revisions to any provisions in part 402 that are a logical outgrowth of this proposed rule, consistent with the Administrative Procedure Act." Given the current administration's incentive behind the proposed revisions of The Act, this concerns us. If additional revisions are made prior to publishing the final ruling, a final public review would be required.

Consultations

Proposed revisions include adopting "programmatic consultations" in lieu of project specific consultations. The problem with this is that while each project may be categorized under an encompassing rubric, all habitats and the populations of species residing within them are unique. Using "programmatic consultations" runs the risk of "consultation by way of boilerplate." We have already seen much of this in, for example, permits for the Deepwater Horizon project in the Gulf of Mexico including mitigation plans for walrus protection.[3] In efforts to "streamline" regulations, providing any opportunity expedite a "consultation" by way of a stapler is a bad idea.

On the other hand, where a project intersects the jurisdiction of both agencies, providing a single, project specific biological consultation may in a more efficient. If this consultation combines the resources of both agencies it may also provide a more thorough process.

[3] Holbrook Mohr, Justin Pritchard, Tamara Lush *BP's gulf oil spill response plan lists the walrus as a local species. Louisiana Gov. Bobby Jindal is furious.* Christian Science Monitor, June 9, 2010

Definition of Destruction or Adverse Modification

The Agencies should not place the phrase "as a whole" into the definition of "destruction or adverse modification.'' This would lead to permitting the destruction of portions of habitat, and threaten the survival of site-specific species that may not be threatened globally, but are threatened regionally. A prime example is the global habitat of the Bald Eagle – which is quite successful in Alaska, but us still recovering in Northern California. The phrase "as a whole" could be used to construe the "global success" of the Bald Eagle on permitting the decimation of critical California Bald Eagle habitat.

Section 402.03—Applicability

Under this section the proposed ruling would preclude consultations in circumstances that "have effects that are manifested through *global processes* and… cannot be reliably predicted or measured at the scale of a listed species' current range." Given the current Administration's backward, unscientific position on the fossil fuel industry's role in global climate disruption, it is unwise to preclude consultations and biological opinions on effects that are manifested through global processes. Establishing this criterion would preclude the consideration of the very industry that is at cause for a global habitat destruction that is endangering ALL life on the planet, not just the few we have designated as threatened or endangered, and can determine are at risk from location-specific actions.

While there are modifications recommended for The Act that seem to have been well considered, I suspect that within these are a number of "Trojan Horses" that will compromise the efficacy of the act. Given that our organization is not expert in the application of the Endangered Species Act, we can only comment on the provisions, criteria, and definitions we have included in this critique. We trust that more capable organizations are providing comments and input at a more scoured level, but our over-arching request is that any proposed changes should be made under the original intent of The Act to preserve global biodiversity and the health of the global habitats we all depend on to thrive – with the intent to not favor industry and expediency over life, to not assess life on an economic scale, and to treat our Natural Resources as assets which it must turn over to the Next Generation increased, and not impaired in value.

Sincerely,

Michael Stocker
Director