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

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COMMENTS

of

**WASHINGTON LEGAL FOUNDATION**

to the

**FISH AND WILDLIFE SERVICE and  
NATIONAL MARINE FISHERIES SERVICE**

on

**Endangered and Threatened Wildlife and Plants;  
Revision of the Regulations for Listing Species  
and Designating Critical Habitat**

**IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED  
AT 83 FED. REG 35193 (July 25, 2018)**

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September 24, 2018

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September 24, 2018

**Submitted Electronically** ([www.regulations.gov](http://www.regulations.gov))  
U.S. Fish and Wildlife Service, Department of the Interior  
5275 Leesburg Pike  
Falls Church, VA 22041

National Marine Fisheries Service, National Oceanic and Atmospheric Administration,  
Department of Commerce  
1315 East-West Highway  
Silver Spring, MD 20910

**Re: Endangered and Threatened Wildlife and Plants; Revision of the  
Regulations for Listing Species and Designating Critical Habitat;  
Proposed Rule; Docket No. FWS-HQ-ES-2018-0006; 83 Fed. Reg. 35193  
(July 25, 2018)**

Dear Sir or Madam:

Washington Legal Foundation (WLF) is pleased to submit these comments in response to the Fish and Wildlife Service's (FWS) and the National Marine Fisheries Service's (NMFS) (collectively, Services) proposed rule regarding revisions to the Endangered Species Act of 1973 (ESA) concerning the procedures and criteria used for listing or removing species from the Lists of Endangered and Threatened Wildlife and Plants and designating critical habitat.

WLF's comments focus on the Service's considerations of the economic impact of listing decisions and critical habitat designations (CHD). We conclude that the economic factors associated with listing a species as endangered or threatened should always be provided to the public. This will facilitate the future actions of actually working to protect the species, as the Services and stakeholders alike will be able to understand and analyze the costs and benefits of conservation efforts.

As the proposed rule recognizes, Congress, while amending the Act, expressed concerns with introducing economic and other factors into the basis for listing determinations under the Act. H.R. Rep. No. 97-567 at 19-20 (May 17, 1982). Despite this legislative directive, it is important that each listing, delisting, or reclassification be accompanied by an economic impact statement. These determinations can remain based

“solely on the basis of the best scientific and commercial data available,” but economic impact statements will provide transparency to stakeholders that are directly affected by these decisions. It will also assist in subsequent critical habitat designation, for which Congress requires the Services to take cost considerations into account.

## **I. Interests of WLF**

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center based in Washington, DC, with supporters throughout the United States. WLF devotes much of its resources to defending free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often appears before federal courts to urge that judicial interpretations of environmental laws strike a proper balance between environmental safety and economic well-being. *See, e.g. Weyerhaeuser Co. v. United States Fish and Wildlife Service, cert. granted*, 138 S. Ct. 924 (2018) (challenging FWS designation of private property as a critical habitat for endangered species of frog); *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007) (challenging notion that ESA supercedes all other federal laws).

In addition, WLF’s Legal Studies Division, the publishing arm of WLF, often produces and distributes articles on a wide array of legal issues related to ESA regulation. *See, e.g. Kevin T. Haroff, Can Constitutional Standing Arguments Restrain Citizen-Suit Enforcement of Federal Environmental Laws?*, WLF LEGAL BACKGROUNDER (Sept. 8, 2017); Joshua A. Bloom & Thomas J. Boer, *Endangered Species Act Requires Enforceable Mitigation and Consideration of Climate Change*, WLF LEGAL BACKGROUNDER (May 2, 2008).

WLF believes it is important and necessary to assess the costs and benefits of any regulatory action, whether or not those assessments are dispositive in the final agency decision. Providing information regarding the economic impacts of listing decisions will ensure the process is transparent. Having access to economic impact information will foster predictability and consistency in later designating critical habitats, a process that *requires* an analysis of the economic impacts of those decisions.

## **II. The Services Can Best Roll Back Overregulation by Openly Acknowledging the Economic Impact of Listing Determinations and Critical Habitat Designations**

Removing the phrase “without reference to possible economic or other impacts of such determination” from paragraph (b) of Section 424.11 is an important first step to reducing regulatory burdens. Referencing economic and other impacts of listing decisions not only will be informative to the public, but will help facilitate FWS and NMFS in

designating critical habitats in order to protect these endangered species. When enacting amendments to the ESA, Members of Congress were wary of taking a pure cost-benefit analysis approach to listing endangered species. H.R. Rep. No. 97-567, at 19-20. As such, the Services must make determinations of endangered or threatened status “solely on the basis of the best available scientific and commercial information regarding a species’ status.” 16 U.S.C. § 1533(b)(1)(A) (2003). This approach is understandable, as economic factors do not determine whether a species is endangered or not.

Yet listing a species as endangered does little to help protect that species. Rather, the Services must also issue regulations “necessary and advisable to provide for the conservation of such species.” § 1533(d). One of these approaches involves designating critical habitat, essential for that species’ conservation. When designating a critical habitat, the ESA requires the Secretary to take into consideration “the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.” § 1533(b)(2).

Although the ESA requires the Services to make listing decisions “solely” on the basis of scientific and commercial information, the Services are later required to consider economic impacts when designating critical habitats. The final clause of Section 424.11(b), by prohibiting the Services from even “referenc[ing]” economic impact when making listing decisions, may lead to confusion when (soon afterwards) the Services must begin the critical habitat designation process for those species. Unless the Services are fully apprised of economic impacts at the time of listing, they may fail to account for those impacts during the designation process. In fact, “the FWS has typically put off [making a critical habitat designation] until forced to do so by court order.” *See New Mexico Cattle Growers Ass’n v. U.S. Fish and Wildlife Service*, 248 F.3d 1277, 1283 (10th Cir. 2001) (citing S. Rep. No. 106-12, at 2 (1999) (noting FWS has a “long held policy position that [critical habitat designations] are unhelpful, duplicative, and unnecessary” despite the Tenth Circuit holding that the FWS must make a critical habitat designation once a species is listed).

The Services ought to take steps to adopt an approach that places economic considerations on equal footing with scientific and biological analyses during the designation process. This begins with considering the economic impacts of listing decisions and providing those statistics to the public at the time of listing. Analyzing economic impacts and providing the results of those analyses will not appreciably limit the discretion the Services have to designate areas as critical habitats. Courts still afford agencies much discretion in articulating such rules, as their “task is simply to ensure that the agency considered the relevant factors and articulated a rational connection between the facts and the choices made.” *Building Industry Ass’n of the Bay Area v. U.S. Dept. of Commerce*, 792 F.3d 1027, 1034 (9th Cir. 2015) (internal citations omitted). Providing

details of economic impact assessments, however, will allow the Services to work toward rolling back overregulation, making only decisions that are economically rational. It will also give the public a better understanding of the costs (and benefits) of government regulatory action.

### **III. Federal Courts Have Acknowledged the Merits of Considering Economic Impacts when Enacting Rules for Protecting Species**

Federal courts reviewing FWS and NMFS critical habitat designations acknowledge the importance of providing information about the economic impacts of such decisions. *See New Mexico Cattle Growers Ass'n*, 248 F.3d at 1284. In *New Mexico Cattle Growers*, the Tenth Circuit considered whether the FWS properly analyzed economic impacts when designating a critical habitat for the southwestern willow flycatcher. In order to comply with the ESA and perform an economic analysis of a critical habitat designation, the FWS adopted a “baseline approach,” premised on the idea that listing species may have an economic impact that is not to be considered. *Id.* at 1280. Under this baseline approach, any economic impact due to listing was placed below the baseline and not considered. The FWS concluded that its critical habitat determination would “result in no additional protection for the flycatcher nor have any additional economic effects beyond those that may have been caused by listing and by other statutes.” *Id.* (citing Division of Economics, U.S. Fish and Wildlife Service, *Economic Analysis of Critical Designation for the Southwestern Flycatcher*, S3 (1997)). The FWS argued it only needed to consider those impacts that are a “but-for” result of a critical habitat designation. The court explicitly rejected this “baseline” approach, saying “the fact that the FWS says that no real impact flows from the CHD does not make it so.” *Id.* at 1284. Rather, the FWS must conduct a “full analysis of all of the economic impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes, such as the initial species listing. *Id.* at 1285.

The analysis required by *New Mexico Cattle Growers* can be facilitated by allowing the Services to reference economic impacts when listing a species and provide that information to the public. Clearly the FWS in *New Mexico Cattle Growers* considered economic impacts because it acknowledged that there may have been economic impacts due to listing. Because Section 424.11(b) required it to make listing determinations without even referencing the economic impacts, however, the FWS inappropriately refused to consider those impacts in connection with its critical habitat designation. It found the critical habitat designation itself would result in no further economic impact, despite the district court acknowledging that local cattle growers had been adversely impacted by the designation. *Id.* at 1284.

Allowing, and even requiring, the Services to provide economic impact assessments to the public when making a listing decision will help ensure that such cases do not arise in the future. While the ESA requires the Services to decide whether to list a species as endangered based solely on scientific and commercial data, critical habitat designations must account for all possible economic impacts, including those due to the listing determination.

Consideration of economic impacts will not prevent the Services from carrying out its statutory obligations to designate crucial habitat. Courts have held that critical habitat designations are not arbitrary or capricious as long as the Services follow § 1533(b)(2) by considering the economic impact in addition to scientific data or any other relevant impacts of the designation. *Building Indus. Ass'n of the Bay Area*, 792 F.3d at 1035. In *Building Industry*, the court acknowledged that judicial review of designation decisions is appropriate, and upheld a critical habitat designation because NMFS “performed an economic and biological analysis of every area under consideration of critical habitat designation” and did not “act in an arbitrary or capricious manner or otherwise abuse its discretion.” *Id.* Likewise, the United States Supreme Court agrees that these agency decisions are subject to arbitrary and capricious review. *Bennett v. Spear*, 520 U.S. 154, 174 (1997).

Having access to economic impacts of listing decisions will ensure the Services can successfully make critical habitat designations that adequately protect endangered species while remaining fiscally responsible.

#### **IV. Efforts to Define the Range of “Foreseeable Future” When Listing Threatened Species Will Provide Consistency in the Conservation Process**

WLF applauds the Services’ proposed approach to making determinations on threatened species through the addition of proposed section 424.11(d). Any predictions about whether a species will become threatened in the “foreseeable future” logically should be based on “reliable” information. WLF is aware that such predictions may extend to global warming issues. To the extent that the Services consider the potential that global warming may threaten thriving species in the “foreseeable future,” WLF agrees with the Services that they must be sure to limit their consideration to “reliable,” scientifically verifiable evidence. Predictions about future climate conditions become significantly less reliable the further into the future that one’s predictions extend.

**V. The Services Should First Evaluate Areas Occupied by a Listed Species before Determining Unoccupied Areas are Essential for Conservation**

WLF also supports the proposal to re-adopt the language of former Section 424.12(e) (deleted in 2016), by adding it to Section 424.12(b)(2). While there may be instances where it is necessary to designate as critical habitat an unoccupied area that is essential for the conservation of a listed species, the Services must first evaluate those areas already occupied by a species. In the event the Services wishes to utilize unoccupied area, it must demonstrate that “a critical habitat designation limited to geographic areas occupied [by the species] would be inadequate to ensure the conservation of the species.”

**VI. Conclusion**

It is possible to protect threatened and endangered species while also ensuring costs do not outweigh the benefits of regulations. Environmental activist groups too often operate under the assumption that environmental policies should receive a blank check. Yet that is not how the ESA does, or should, operate. The Services must analyze the economic impacts of listing decisions and provide that information to the public. They still should designate critical habitats by focusing solely on scientific and biological information, but economic impact must be fully acknowledged. Otherwise the government will fail to stem overregulation, harming countless landowners in the process.

Sincerely,

/s/ Marc B. Robertson  
Marc B. Robertson  
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/s/ Richard A. Samp  
Richard A. Samp  
Chief Counsel