Commonwealth of Pennsylvania

DEPARTMENT OF
CONSERVATION AND NATURAL RESOURCES

DEPARTMENT OF
ENVIRONMENTAL PROTECTION

September 24, 2018

Bridget Fahey
U.S. Fish and Wildlife Service
Division of Conservation and Classification
5275 Leesburg Pike
Falls Church, VA 22041-3803

Attn: Docket No. FWS-HQ-ES-2018-0006; FWS-HQ-ES-2018-0007

Re: Revision of the Regulations for Listing Species and Designating Critical Habitat and Prohibitions to Threatened Wildlife and Plants

Ms. Fahey:

The Pennsylvania Departments of Conservation and Natural Resources (PADCNR) and Environmental Protection (PADEP) appreciate the opportunity to comment on the U.S. Fish and Wildlife Service (FWS) proposed rules for Endangered and Threatened Species on Listing Species and Designating Critical Habitat and Prohibitions to Threatened Wildlife and Plants published on July 25, 2018 (83 FR 35193; 83 FR 35174).

The Commonwealth of Pennsylvania believes that the current Endangered Species Act (ESA or the Act) is a powerful and successful tool for protecting endangered and threatened species from extinction and for aiding in their recovery. The proposed changes to the Act would weaken its provisions, under the guise of greater efficiency, and cripple its ability to bring species back from the brink and to sustain the complex web of species interactions and ecosystem dependencies that could have far-reaching consequences for the environment.

In Pennsylvania, not only are wildlife resources held in trust for the benefit of the people, but pursuant to the Environmental Rights Amendment to the Pennsylvania Constitution, all public natural resources are held in trust for the benefit of all the people. Pa. Const. art. I, § 27 (The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.) In *Pennsylvania Environmental Defense Foundation v. Commonwealth*, 161 A.3d 911 (Pa. 2017), the Pennsylvania Supreme court reaffirmed that Article I, Section 27 creates fundamental individual rights to ensure that neither private nor public actions are contrary to the public trust.

The success of the current Act is evident from the number of success stories it has produced. For instance, Osprey were once common in Pennsylvania along lakes and rivers. By 1982, biologists noticed a complete absence of breeding pairs in the state, and the raptor was listed as a state threatened species. Through active reintroduction efforts and habitat protections, the osprey has recovered and was delisted as a state threatened species in 2017, precisely the way the Act was intended to work.

PADCNR updated its lists of rare, threatened and endangered plants this year, with more plants being delisted than elevated for protections, reflecting the dynamic habitat conditions, protection efforts, and new survey data showing gains and losses for individual plant communities and species. Silverweed, a low-growing member of the rose family with yellow flowers, was listed as state endangered along the shores of Lake Erie, and has now recovered and been downgraded to rare as habitat protection efforts have proven successful.

In the comments below, we address individual sections of the proposed rule.

**Section 424.11—Factors for Listing, Delisting, or Reclassifying Species**

***Economic Impacts***

The Federal Register proposes to strike the phrase "without reference to possible economic or other impacts of such determination." This change would result in paragraph (b) reading "The Secretary shall make any determination required by paragraphs (c) and (d) of this section solely on the basis of the best available scientific and commercial information regarding a species' status."

This would cause more paperwork and a slower, less streamlined process of determining species' status. The proposed rule explains the word "solely" was added to the ESA in 1982 to clarify that the status determination was to be made based on biological criteria and to prevent non-biological considerations from affecting the determination. It goes on to explain how Congress expressed concerns with requirements of other acts, implying that adding "solely" was a way to reduce the burden of paperwork on the agency and public. Similarly, removing this phrase would imply that economic impact must be reviewed and analyzed. This would cause a requirement of lengthy and costly economic impact analyses, which would make the process less streamlined and increase paperwork. It may not be possible to meaningfully consider the economic impact for each species to be listed or delisted. The example given in the proposed rule was the National Ambient Air Quality Standards' cost-benefit analysis. The U.S. Environmental Protection Agency (EPA) provides estimates for local, state and municipal agencies on cost to reduce pollutants and control efficiency. Since the majority of wildlife and plant species do not have an economic value, assessing their "worth" or "cost" would be difficult.

In addition, it would also be difficult to determine a "cost" for complying with the listing. Most federally-listed species are not found uniformly throughout the United States, so only a small percentage of the population may encounter the species and be subjected to the "cost." Since the situation, location, project, duration and species would vary with each person, company, municipality, state or local government, the "cost" of compliance would change. The proposed rule states that this ruling would not significantly affect small governments or small businesses. It is possible that removing the phrase "without reference to possible economic or other impacts of such determination" from 50 CFR 424.11 (b) could lead to additional paperwork and a less streamlined process.

***Foreseeable Future***

The proposed wording is unlikely to clarify the current language regarding foreseeable future. There are many caveats included in the proposed 424.11(d) that may still be difficult to interpret.

The proposed rule indicates that the Services "propose to add to section 424.11 a new paragraph (d) that sets out a framework for how the Services will consider the foreseeable future." This would follow a 2009 opinion from the Department of the Interior (M-37021) for interpretation of "foreseeable future," widely accepted, according to the proposed rule. In general, Pennsylvania is in agreement that the proposed framework for foreseeable future should only extend as far as the Service can reasonably determine the conditions posing a danger of extinction are probable. Also, Pennsylvania shares the view that no specific time period should be set, that it should be described on a case-by-case basis as conditions and threats will vary for each species, and that the best available data should be used.

The discussion included in the proposed rule on data and use of models is unclear. The Register states that the foreseeable future can extend only as far as the Services can reasonably depend on the available data to formulate a reliable prediction and avoid speculation and preconception; it says that "in cases where the available data allow for quantitative modeling or projection, the time horizon presented in these analyses does not necessarily dictate what constitutes the 'foreseeable future' or set the specific threshold for determining when a species may be in danger of extinction." This seems to be contradictory. If there is enough information to provide a reliable prediction that avoids speculation, based on quantitative modeling or projection, it seems that the Services should consider that as a "foreseeable future." This phrasing seems to indicate that models may show specific time periods, but that it can still be ignored. All data and information should be reviewed and interpreted, including modeling. If mounting evidence points to a threshold where a species is in danger of being extirpated, it should be considered as a possible foreseeable future. It is agreed that one model should not dictate a foreseeable future; however, if a body of evidence including empirical data exists and is supported, it should be included in the determination.

Finally, if the guidance provided in the 2009 opinion is already being implemented by the Services, there is no need to make this revision. This process may just create more paperwork and a less-streamlined process.

***Factors Considered in Delisting Species***

The proposed rule suggests several changes to streamline this section. It is proposed to replace the current 424.11 (d) with a new paragraph (e) that will better explain when a species can be removed from the list. As with the previous section, these changes are unlikely to streamline the process.

In general, the Services should use the same standards in determining a species' status, regardless of whether a species is listed at that time or not; that if a species does not meet the definition of "species," "endangered," or "threatened," that species should not be listed. Also, if a species recovers (according to best available scientific and all data), it should be delisted.

The proposed change added in new section (e) is similar to wording in current section (c). A possible suggestion to simplify the changes regarding delisting, is to add language in existing section (c) "A species shall be listed, *delisted* or reclassified if the Secretary determines…" The

Register mentions many times how the same criteria would be used to list and delist. Therefore, combining those two sections into one would streamline the document.

The second change proposes changing existing 424.11 (d)(1) to new section (e)(1) that states "the species is extinct," as a reason for delisting. This makes sense if, as the proposal states, the Services will be using the best available information to make that determination and the situations indicated in existing (d)(1) are satisfied. If the Services consider combining sections, they could add "(c)(6) The species is extinct."

The third change is unclear. The Register states it will replace the current (d)(2), referring to recovery, with language in new section (e)(2) that "aligns with the statutory definitions" of endangered or threatened species. The proposal states it will remove the word "recovery" but continue to refer to species that have been recovered because they no longer fit the definitions of a threatened or endangered species. While, it can be agreed that a species that has recovered does not fit the definitions and should be delisted, it is unclear why this change is being proposed. It seems unclear.

In the introductory material provided by the Register regarding considerations in delisting species, some discussion was devoted to describing alleged confusion over recovery plans. *Friends of Blackwater v. Salazar*, 691 F.3d 428 (D.C. Cir. 2012) illustrated how the language in the ESA surrounding the implementation of the recovery plans can cause confusion as to whether the conditions in the recovery plan should be met before delisting. However, in that example, sufficient data supported the delisting of the West Virginia flying squirrel. It is unclear how the proposed edits to 424.11 will improve the current Act. Recovery plans are not mentioned in current (d)(2)- only that the species may be delisted on the basis of recovery only if the best scientific and commercial data available indicates it is no longer endangered or threatened. The issue with the recovery plans appearing to "direct" the Secretary's ability to delist a species is not addressed in this change. This would not change with the removal of "recovery" from the regulation. It should be clarified that the species is recovered and no longer fits the definition of endangered or threatened.

Fourth, the Services propose to add a provision (e)(3) that clarifies that species may be delisted if they do not meet the criteria of a species as set forth in the act. PADCNR also uses the most up-to-date taxonomy to determine if a taxon is considered a valid species; however, PADCNR must follow a taxonomic authority which guides what is the accepted nomenclature. This information the Services follow is not included. Taxonomists frequently disagree and lump or split taxa into different species, subspecies, or varieties that differ from region to region. There should be some information as to what the guiding authority or reference is, which may vary from species to species.

Fifth, the current section (d)(3), which states any species listed in error will be delisted, will be removed. The assumption here seems to be that if the Services follow the 5-step process and use the best available data, there will not be errors in listing. A useful exercise would be to go back and see if any species have been listed in error in the past. If species have been added in error, it would behoove the Services to determine what those errors were and address them more fully.

**Section 424.12—Criteria for Designating Critical Habitat**

***Not Prudent Determinations***

The proposed rule states that to clarify section 424.12, the Services propose to add a non-exhaustive list of circumstances in which they may find it not prudent to designate habitat. This approach raises the question: why, when a list of examples provided in 424.11 were confusing with respect to criteria for delisting, would a list of examples be helpful in clarifying 424.12? The Departments also support retaining language stating that if the species is threatened by taking or other human activity and identification of critical habitat will further endanger the species, then it is not considered prudent to designate that habitat.

In determining when it would not benefit a species by designating critical habitat, the proposed rule seeks to retain the circumstance where "the present or threatened destruction, modification or curtailment of a species habitat or range is not a threat to the species" (424.12)(a)(1)(ii). The example given is when the species is threatened primarily due to a disease or other factor, not necessarily loss of habitat, such as the melting of glaciers. However, if a species is suffering due to a disease or other factor, habitat availability does not become less important. In Pennsylvania, many bat species, including Indiana bats, are afflicted by white-nosed syndrome, and PADCNR is engaged in writing a bat habitat conservation plan in concert with the PA Game Commission and the USFWS. Even though bats are primarily under threat due to the disease, PA Game Commission and PADCNR are required to protect the caves and other habitat that the bats use. Their precarious situation due to the disease makes having available critical habitat that much more important. It is unclear why, if a species is threatened by other means, critical habitat would "not be beneficial" to the species.

Also, the Act states that the Secretary can exclude any area from critical habitat if he determines that the benefits of exclusion outweigh the benefits of designating the area. This seems to satisfy any situation mentioned when designation would not be prudent. If designating melting glaciers is not prudent or beneficial to the species, it can be excluded at the Secretary's discretion, based on Section 4(b)(2).

***Designating Unoccupied Areas***

The Services should continue to designate unoccupied areas. It is not beneficial to a species to be held to an arbitrary period of time, where the species was only found in a tiny portion of its habitat. It also seems beneficial to be able to reconsider occupied habitat, based on additional information gained after the time of listing.

It is also true that the Services must distinguish between actual changes and changes in information available to them at the time of listing. However, the proposed solution may not cover all potential situations. Section 424.12(b)(2) states when the Services would determine whether unoccupied areas are essential, giving several potential situations. The proposed language will only consider unoccupied areas under two situations, when critical habitat is inadequate to conserve the species or when it would be less efficient in conservation. While those two criteria are obviously potential situations that might be encountered, there may be other situations when designating unoccupied critical habitat may be necessary. By limiting it to only two situations, this limits the effectiveness and interpretation of the regulation. There may be other situations that would also necessitate the designation of unoccupied habitat.

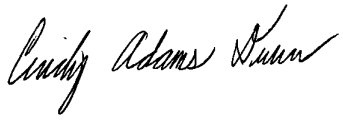
In addition, the term "less efficient" conservation may be problematic in the future. The proposed rule states that conservation is considered efficient when it is "effective, societal conflicts are minimized, and resources expended are commensurate with the benefit to the species." There are many caveats implied in this definition and it opens up many questions. How is effective conservation measured? How much societal conflict is considered enough to deter designation? Will societal conflict in favor of designation hold the same weight as conflict in opposition? The rule goes on to state that the Secretary must determine there is a "reasonable likelihood" that an unoccupied area would contribute to the conservation of the species. This would include using the best available data such as whether an area is likely to become useable habitat, the likelihood of Section 7 consultation, and how much the area contributes to the biological needs of the species. These caveats sound like they would create similar situations as the "foreseeable future" conundrum.

The proposed rule discussion implies that federal lands would be more likely to be protected. The assumption that non-federal landowners will be unwilling to participate in restoration should not be a reason to fail to designate unoccupied areas as critical habitat. Landowners change over time, and their desires for their lands may change. Therefore, assuming privately owned land is less likely to be conserved for a species is not necessarily true.

Another suggestion is to add an explanation of "unoccupied critical habitat" as a definition in 50 CFR 424.02, Definitions.

It is essential to consider connectivity between known occupied habitat when determining the unoccupied critical habitat. Protecting isolated populations is not adequate. The rule needs to allow for dispersal by protecting connectivity.

Sincerely,



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