KATE BROWN
GOVERNOR

September 24, 2018

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

Samuel D. Rauch III
National Marine Fisheries Service
Office of Protected Resources
1315 East-West Highway
Silver Spring, MD 20910

RE: Revision of the Regulations for Listing Species and Designating Critical Habitat – Docket Number: FWS-HQ-ES-2018-0006
Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants – Docket Number: FWS-HQ-ES-2018-0007
Revision of Regulations for Interagency Cooperation – Docket Number: FWS-HQ-ES-2018-0009

Dear Ms. Fahey and Mr. Rauch:

I appreciate the opportunity to provide comments to the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively referred to as "the Services") regarding the proposed changes to the Endangered Species Act (ESA or ACT).

The Governor is charged with leading the Oregon way—"She flies with her own wings"—and believes in collaboration across the aisle and between government agencies. For many years, states and the federal government have worked collaboratively and with success to implement the ESA and protect at-risk species, including the bald eagle, gray wolf and many other animals. But there is much more work to be done. We are very concerned that the changes proposed are out of line with the spirit and intent of the law, would undermine necessary ongoing efforts, and move our State's work with your offices on species conservation backward.

The Beaver State's rich and varied landscape supports an incredible array of plants and wildlife, and as Oregonians, we are dedicated to being good stewards of our lands by conserving and protecting the diverse species and their habitats for these and future generations.

The purpose of the ESA is to recover species that have been harmed or diminished by human activity or other threats. The foundation of the Endangered Species Act, the precautionary principle, defines actions on issues considered to be uncertain and mitigates risk. The very

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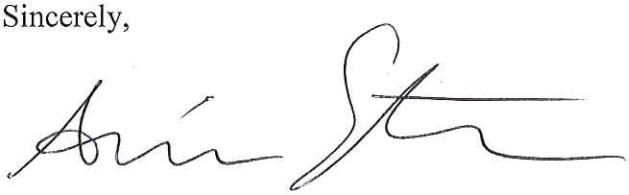
policy speaks to the possibility of harm of making a decision that would ultimately be detrimental to a species. In many ways, the proposed changes do not enhance species recovery, and in fact, do the opposite of creating certainty in an uncertain future. Climate change, industry pressures, and a changing landscape impact species across the nation and in Oregon. It is our duty as stewards of the Earth to alleviate actions that have harmful impacts on native species. The proposed changes would undermine existing protections and diminish important considerations to native Oregon species, and if implemented, would significantly impact state agencies by incurring additional time and cost.

Since the Services proposed regulatory and administrative changes to the Act in late August, the Governor's office has met with various state agencies, including the Oregon Department of Forestry, the Oregon Department of Fish and Wildlife, Oregon Department of Parks and Recreation, the Department of Land Conservation and Development, the Oregon Watershed Enhancement Board and the Oregon Department of Agriculture, along with many stakeholders from the environmental conservation community and natural resources industries, to gather input on how the proposed changes would impact the State of Oregon. The input received throughout this process informed the comments attached.

I urge you to review these comments and reconsider these proposals that will harm, and not improve, efforts to protect at-risk and endangered species. Thank you for your consideration of this request.

Sincerely,



Amira Streeter
Natural Resources Policy Advisor
Office of Governor Kate Brown

AS:kl

The ESA in Oregon

The regulations for implementation of the ESA provides guidance to vital programs on listing, critical habitat designation, prohibitions and limitations, and interagency consultation. Oregon prides itself on being collaborative and coordinated among state agencies and respects the established partnerships with federal agencies. It is unfair to assume that certain groups are unwilling to engage in conversations about conservation. If there are no protection provisions from federal agencies, then there would be less incentive to create collaborative partnerships for conservation management. In Oregon, agencies are uniquely positioned to conserve its natural heritage.

Many Oregon state agencies have been working with adjacent landowners to partner on conservation projects. For example, Oregon State Parks works extensively with landowners on a number of restoration projects. Also, the Sage Grouse Conservation Partnership was formed in 2010 to provide a forum where federal, state, local, non-profit, and private interests gather and take action to implement, coordinate, and monitor conservation strategies across public private lands. This Partnership has been instrumental in avoiding the need to add Greater Sage Grouse to the list of threatened and endangered species.

Other examples can be found in Tualatin, Oregon, where government agencies work to create options for landowners to create riparian areas with an income alternative for conservation spaces. Also, ranchers in Coquille, Oregon work with the Oregon Watershed Enhancement Board to create pools for fish in the winter months. The partnership allows ranchers to "grow cows" in the summer and fish in the winter. The Greenbelt land trust is another example where conservation easement projects allow for the conservation of salmonids with working farms.

These are just a few examples of the collaborative partnerships that are occurring across the state with a variety of different interests and stakeholders because of the current structure of the ESA. Making these proposed changes will impact the state agencies' ability to effectively administer the ESA.

Inclusion of Economic Impacts

The determination of economic impacts of listing a species is inconsistent with the statute. Developing economic impact analysis in conjunction with biological assessment could be harmful in that more deference could be given to decisions based on the economic impacts of listing a species. Listing decisions should be made solely on the best scientific and factual information available. Decisions need to remain objective. There would also be a significant burden on agencies to undergo an economic analysis, especially if it is not the driving decision-maker.

Foreseeable Future Standard

The Services attempt to clarify the definition of "foreseeable future" but the proposed definition could create a loophole that would allow the Services to exclude consideration for climate change. Without including climate change, this definition will not be very useful. The major concern is that the proposed definition of "foreseeable future" discounts the impacts of climate change. Including the Services' definition of this provision would prevent the Services from considering longer terms threats, predicted from modeling and forecasting.

The Services need to allow for the consideration of climate change when defining foreseeable future. Climate change is a major driver of habitat alteration, but not fully considering climate change-related threats has resulted in the denial of recent species listings. For example, reduced snowpack is a critical issue to Oregonians in every way – agriculture, recreation, forest management, and wildlife and fish protections. Reduced snowpack is a direct result of climate change. Chinook salmon and steelhead are just some of the unique species impacted by this phenomenon. The Wolverine, which has a listing decision to come out this year, is another species that will be impacted. Without the consideration for climate change impacts, listing determinations would be incomplete.

Critical Habitat Designation

The Services revision for Criteria for Designating Critical Habitat, Section 424.12(4)(ii), says "Add that critical habitat may not be prudent when threats to habitat cannot be solved (melting glaciers, sea level rise)", which runs counter to the need for agencies to consider climate change impacts to species and their habitats. To find these circumstances as not prudent, sends the wrong message when it comes to combatting climate change. There needs to be the ability to inform what habitat areas needs to be protected for future recovery, which may include currently unoccupied habitat. Due to climate change, wildlife may need to migrate to higher elevations to follow suitable habitat. The Services should not exclude consideration of these areas for potential habitat, particularly where climate change or other factors could threaten currently occupied habitat. The entire possible habitat for a species needs to be able to be considered "critical habitat".

Unoccupied habitat must be included when determining critical habitat. Not only is the language to exclude unoccupied habitat too vague, but it ignores the many successful efforts that have occurred when landowners voluntarily join programs for conservation benefits. There is a desire to be proactive. Instead of removing the potential for unoccupied habitat to be included for determination of species recovery, agreements with assurances should be used as an effective tool. For example, in Lane County, Oregon there is a 10-year safe harbor agreement underway where government has worked directly with landowners to diminish the incidental take of spotted owl. Mutual collaboration works well instead of making changes that could create patchwork state regulation.

The focus of the ESA should be on recovery. Recovering a range of unoccupied habitat could be the key to having a future home for a species and greater range for that species to survive. Additionally, if unoccupied public land can no longer be considered for recovery that might put undue pressure on private land where space is limited on occupied areas. There cannot be a haphazard depletion of habitat for a species because that will impact recovery efforts.

Adverse Modification

The inclusion of "as a whole" into the definition of adverse modification would be detrimental to the interagency consultation process by creating a piecemeal form of management. It would not make sense biologically to only measure the local impact of a take on a species' critical habitat. To disregard the cumulative effect of impacts from distinct areas of different populations of a threatened or endangered species would be death by a thousand cuts. The proposed language does not clarify for how cumulative impacts will be accounted under this proposed rule.

The Blanket Rule

The proposed changes to Section 7 of the ESA would run counter to the purpose of the ESA and the precautionary approach. If regulations are not adopted at the time of listing, newly threatened species would receive no additional protection than before listing and could not have adequate protection.

Eliminating the blanket take prohibition for threatened animal and plants species would leave those species unprotected while the Services forms details of species-specific rules, especially for distinct populations. A case-by-case consideration of species-specific rules could be useful for active management. The Streaked Horned Lark is a species that currently benefits from a species-specific rule that allows for agricultural practices to not be precluded, because the species needs disturbed areas for habitat.

However, to have a species-specific process for every newly listed species would add a considerably burden to listing and could result in additional delay and cost. There are resource constraints on agencies to do this type of work.

Oregon
Kate Brown, Governor

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September 21, 2018

Governor Kate Brown
900 Court Street NE, Suite 254
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Dear Governor Brown:

Thank you for the opportunity to include comments from the Oregon Department of Fish and Wildlife in your response to the proposed changes to the regulations implementing the federal Endangered Species Act (ESA). As the agency that protects and enhances Oregon's fish and wildlife and their habitats for use and enjoyment by present and future generations, ODFW was pleased to evaluate how the proposed changes would affect implementation of the federal ESA and our ability to recover species in Oregon.

The Department supports implementing regulations that make the ESA more effective while being sensitive to the needs of private landowners and listed species in the state. However, multiple new provisions in the revised regulations would compromise our collective ability to recover listed species. We have highlighted our concerns in the attached analyses.

Many of the proposals involve clarifications; codifying existing practice; and defining terms not previously defined in regulation. The changes are geared to reducing time and costs involved, but don't offer significant improvements that enhance the purpose of the ESA: to recover species. In many ways, the proposals do not enhance the urgent need to actually recover species and protect the ecosystems we all depend upon. For example, one of the biggest challenges faced by the global conservation community is the predicted and observed responses to climate change. None of the proposed modifications addresses this fact.

The Services also asked for comment beyond the proposed rule changes. To that, we feel that there is a missed opportunity to revisit the lessons learned in implementing recovery over the last 20+ years. There are no proposals or provisions included in these regulations that provide additional incentives to help recover species. Likewise, an opportunity has been missed to expedite recovery planning through critical habitat designations, consultations, and incidental permitting and incentives to private landowners under the Act to genuinely encourage recovery of species.

Attached to this letter you will find detailed comments on each of the three Federal Register Notices related to revising 50 CFR Part 17, 50 CFR Part 424, and 50 CFR Part 402 of the ESA regulations. We respectfully submit these comments for your inclusion in your letter. You may direct questions about these comments to Davia Palmeri, 503-947-6077 or Davia.M.Palmeri@state.or.us.

Sincerely,

Curtis E. Melcher
Director

Attachments: ODFW Comments on 50 CFR Part 17, ODFW Comments on 50 CFR Part 424, ODFW Comments on 50 CFR Part 402

ODFW Comments on 50 CFR Part 17; Docket No. FWS-HQ-ES-2018-0007; 4500030113 - Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants

The Department cannot support the proposed withdrawal of the general section 4(d) rule for threatened species unless the FWS adds accompanying language clarifying that species-specific rules must be assessed and developed at the time of listing or within a legally binding amount of time thereafter. Our principal concern is that delays or failures in crafting 4(d) rules and implementing those rules at the time of listing could have serious consequences for the recovery of threatened species. The proposed changes to ESA would run counter to the purpose of the ESA and the precautionary approach if they leave threatened species with no protection at all.

ODFW recognizes and supports the intent of the U.S. Fish and Wildlife Service to create a more clear distinction between protections afforded to threatened and endangered species. Oregonians have seen the benefits of specific 4 (d) rules, including focusing prohibitions on the key, specific stressors impacting the threatened status of the species – as long as they can be identified – and avoiding unnecessary impacts to business and private citizens regarding activities that are not currently threatening a species. For example, under the species-specific rules for threatened bulltrout, harvest of individuals is allowed in the two healthy populations in Oregon. This protects the species where they need protection, but does not burden Oregon's anglers where it is not necessary. Species-specific rules also provide certainty about what constitutes take in ways that are helpful for state fish and wildlife agencies in implementing ESA protections at the state level.

However, we are concerned that protections for threatened species could be far weaker under this proposal, largely because of the additional administrative workload this will require and because socio-political pressures on the FWS could result in the Service backing away from adopting some necessary rules. If regulations are not adopted at the time of listing, newly threatened species will receive no additional protection than before listing. For example, very few threatened plants currently have species-specific rules in place. Additionally, if no 4(d) rule is in place, the development of Habitat Conservation Plans and issuance of incidental take permits could be delayed, thereby hindering recovery.

The proposed regulations require the Service, under section 4(d) of the ESA, to determine what protective regulations are appropriate for threatened species. The FWS asked specifically for comments on the feasibility of developing species-specific rules at the time of threatened listings as well as any binding requirements, such as timelines for setting those rules. ODFW believes that FWS should be required to publish species-specific rules at the time of listing or within a legally binding amount of time thereafter. If the Services fail to publish species-specific rules, they must publish a written justification for why a species-specific rule was not deemed to be necessary to protect the threatened species. We are concerned that any initial lack of protection created by the proposed regulation would create situations where threatened species go without specific protections or where third-party suits or other third party influences may result in delays in protections. The FWS should also develop criteria to specify how species-specific rules should be developed and what criteria would allow for an exemption from the creation of these rules.

ODFW Comments on 50 CFR Part 424; Docket No. FWS–HQ–ES–2018–0006; Docket No. 180202112–8112–01; 4500030113 - Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat

Listing and De-listing Species

ODFW appreciates the clarification that the criteria for listing species and removing species from the list should be the same. Working with our state and federal partners, Oregon has achieved great success with delisting Oregon Chub--the first ever delisting of a freshwater fish as a result of recovery. State and federal partners achieved this milestone because the delisting criteria were clear and there was a shared path to reaching those goals.

In the proposed section 424.11(e)(3), the Services propose to delist species that "no longer meet the statutory definition of a species." Considering the emphasis in this section, we recommend that the services revisit their ESU Policy (56 FR 58612) to clarify the definition of an ESU in light of recent advances in genetic methods. Modern genomics research is able to determine levels of genetic separation between individuals at a very fine scale. It is important for the Services to be clear about interpretation of the statutory definition of species for listing and delisting decisions regarding these genetic methods to avoid confusion.

Economic Impacts

ODFW recommends that the Services withdraw the proposal to remove the phrase, "without reference to possible economic or other impacts of such determination" from paragraph (b) of section 424.11. We understand the stated intent to increase transparency to the public about potential economic impacts of a listing decision, but this proposed change will likely lead to confusion about how economic analysis did or did not affect a listing decision. Additionally, economic information may be biased by contributions from affected parties and may unintentionally bias decision makers who are directed by statute to make decisions "based solely on the basis of the best available scientific and commercial information regarding a species' status". Finally, the Services are currently failing to meet scheduled deadlines to produce assessments that must be completed to make listing decisions. Adding economic analyses to staff workloads will increase the burden without a corresponding increase in successful implementation of the ESA.

Foreseeable Future

ODFW appreciates the framework to describe how the Services will consider foreseeable future. The definition mirrors the definition that has been used by the Services for the last 10 years and has the potential to bring clarity that can aid in setting timelines for recovery planning and future status reviews. We do however have some concern with the inclusion of the word "probable" in this definition. Model projections are used across the biological sciences and all come with inherent levels of uncertainty, which is not the same as probability. If the proposed framework will be useful, it must rely on the exercise of expert professional judgement where appropriate to determine how probable a model outcome may be. Most importantly, we encourage the Services to ensure that this framework allows for the reasonable inclusion of global climate change projections in determining the likelihood of future endangerment of species.

Criteria for Designating Critical Habitat

ODFW is generally comfortable with the revised list of circumstances in which the Services may find it is not prudent to designate critical habitat. Although, for species under which critical habitat is deemed not prudent under proposed section 424.12(a)(1)(ii), we would encourage the Services to work with the state and local jurisdiction to consider creating a new, non-regulatory, voluntary designation of vital habitat for

the recovery of listed species.[1] The intent of such a designation would be to avoid current incentives to destroy habitat that could be associated with critical habitat designations on private lands, but still motivate landowners to feel that they have a role in recovering a species.

Section 424.12(a)(1)(ii) is concerning to the Department considering the likely outcome of not designating critical habitat for species that are listed based on the threat of climate change and other global processes. To find these circumstances as not prudent, sends the wrong message when it comes to combatting climate change and will be counter to recovery goals for species threatened by climate change.

We also recommend removing the proposed 424.12(a)(1)(iii) relating to areas within the jurisdiction of the US for a species occurring primarily outside the jurisdiction of the US. The following sections (iv and v) should cover situations such as (iii) without unnecessarily ruling out U.S. critical habitat for species that cross a shared international border. The U.S. has made strong international commitments to species conservation that should not be undermined by these ESA regulations.

Designating Unoccupied Areas

ODFW recommends that the Services fully reconsider the proposal to amend section 424.12(b)(2). The rationale behind this change reflects that the designation of some unoccupied areas is unlikely to affect actual recovery, particularly on private lands. However, implementation of the proposal would weaken protections for species for which we have limited data regarding the geographic area currently occupied by the species and for species who have declined rapidly so that they only occupy a small portion of their former ranges. For these data-limited and rare species, there is a high likelihood that our understanding of currently occupied habitat is incomplete. The step-wise approach created be these regulations will unnecessarily exclude currently occupied (but unknown) habitat from critical habitat designations.

Additionally, it is unclear how the Services would assess willingness of private landowners to engage in voluntary conservation actions (i.e., not required under section 7) and the "efficient conservation" approach seems to ignore the many successful efforts to enroll landowners in voluntary programs for conservation benefits that have occurred post-listing.

Other definitions

The Services requested comment on potential modifications to the definitions of "geographical area occupied by the species or "physical or biological features". The Department does not recommend modifying those definitions. If the Services do decide to modify these definitions, we urge the Services to consider the effects of climate change in potentially expanding species ranges to the north and upslope when defining "physical or biological features".

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[1] See Hensen, P., White, R., and Thompson, S.P. 2018. Improving implementation of the endangered species act: finding common ground through common sense. *Bioscience*, biy093, https://doi.org/10/1093/biosci/biy093. for a longer description of this idea.

ODFW Comments on 50 CFR Part 402; Docket No. FWS-HW-ES-2018-0009; FXES11140900000-189-FF09E300000; Docket No. 180207140-8140-01; 4500090023 - Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation

ODFW supports ways in which the consultation process between the Services and federal land-managing agencies can be more efficient and effective without compromising recovery of listed species. Some of the proposals have the ability to offer greater efficiency, reduce frustration for land managers and owners, increase time spent on action, and improve informal consultation through deadlines. We support the development of a process for programmatic consultation, expedited consultation, the ability to submit existing documents to initiate formal consultation, timelines for informal consultation and clarifications regarding reinitiation of consultation. We also urge the Services to include more details in the final rules that clarify how the Services will be able ensure that these streamlined processes actually continue to meet the intent of Section 7 of the ESA.

Despite the good intentions of some of these proposals, ODFW has identified a few that would adversely affect recovery of listed species in Oregon. Our recommendations are described below.

Definitions of Adverse Modification and Environmental Baseline – Application of Revised Definition
The Services seek to clarify that there is no baseline jeopardy when evaluating the potential for destruction or adverse modification of critical habitat. As such, the Services will consider that even the most imperiled species cannot already be "in jeopardy" solely because of baseline conditions for the species. Therefore, any additional impact as a result of the action will not automatically trigger a jeopardy or adverse modification finding. ODFW opposes this change in interpretation as it creates uncertainty about when a species can and cannot sustain additional harm without significantly affecting its survival or recovery prospects.

If the Services do proceed with this change, we recommend the Services identify how the likelihood of jeopardy could change depending on a species' degree of imperilment. Providing this clarity would benefit stakeholders by providing greater certainty about the types of effects to certain species or habitat they would need to avoid.

Commitment to Reasonable and Prudent Alternatives - 402.14(g)(e)
ODFW opposes the proposed revision of section 4012.14(g)(e). The Services intend to clarify that proposed actions, including reasonable and prudent alternatives, "do not require any additional demonstration of specific binding plans or a clear, definite commitment of resources." The Services have not presented a logical justification for this change and the proposal would undermine the entire formal consultation process. If there is no need for a commitment to specific binding plans for implementation of RPA actions, the Federal agency or applicant is unlikely to complete those actions, thus take of Endangered Species will not be avoided and the process becomes null.

Definition of Effects of the Action
ODFW does not support the proposed edits to this definition. The Services intend to 'refocus' interpretation of the 'effects of the action' by removing references to indirect effects of their actions. We believe that considering indirect effects of their actions is a vital part of the Section 7 consultation process.

The regulation also implements the "reasonably certain to occur" standard for consultation for analyzing impacts of proposed actions and to "avoid inclusion of activities whose occurrences would be considered speculative." While it is sensible to avoid speculation, so much of recovery planning is informed opinion or built on risk assessment. Nothing in the natural world is 'for certain' but levels of probability, which might need some speculation. We urge the Services to remove the "reasonably certain to occur" standard.

Programmatic Consultation

ODFW supports the creation of a formal definition of Programmatic Consultation. This process opens up the potential for the Department to work with our federal partners to implement important programs for habitat restoration without having to engage in individual consultation for each step. This will speed the application of conservation actions on the ground with cascading benefits to threatened and endangered species in the state.

We encourage the Services to incorporate more details about how agreed upon "offsets" will ensure "no net loss" of suitable critical habitat and how those details will be documented in action. We also recommend that the Services include some additional criteria to allow the programmatic consultations to be updated periodically to remain sensitive to change (i.e. climate change, species' status changes, changes to risk factors, new information) and to account for cumulative take over time.

Single Biological Opinion for Actions Affecting Species under Joint Jurisdiction

The Services requested comment on the merit, authority, and means for the Services to conduct a single consultation, resulting in a single biological opinion for Federal agency actions affecting species that are under the jurisdiction of both FWS and NMFS. ODFW supports the concept of a single biological opinion, but would appreciate the opportunity to provide input on a draft regulatory framework to oversee such a process.

Limiting the Scope of Consultation

The Services requested comment on limiting the scope of consultation only to activities, areas, and effects within jurisdictional control and responsibility of the consulting agency. ODFW does not recommend that the Services take up regulations that limit the scope of consultation. The broad nature of the current process is helpful in providing the big picture context in which the jurisdictional control and responsibility of the consulting agency fits. Limiting the scope of the consultation would adversely affect the collective efforts required by all parties to recover threatened and endangered species.