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

Memorandum Presenting Comments On Proposed Rule Changes

To: United States Fish and Wildlife Service
National Oceanic and Atmospheric Administration

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Introduction

In response to the notice posted in the Federal Register July 25, 2018 seeking comments on specific proposed changes and certain other matters associated with regulations promulgated under the Endangered Species Act, the above listed law

professors offer the following comments in light of our respective scholarly and practical expertise with the Endangered Species Act.

We wish to begin by acknowledging many conservation successes of the Fish and Wildlife Service and the National Marine Fisheries Service, and the commendable efforts of many employees of both Services. We call for increased funding so that the Services can fully address the many critical responsibilities of administering the Endangered Species Act.

That said, as our comments below explain, we think many of the revisions that have been proposed will result in less effective, rather than more effective, administration of the Endangered Species Act.

Comments

The Fish and Wildlife Service and the National Oceanic and Atmospheric Administration (together, the "Services") are proposing changes in the regulations promulgated under the Endangered Species Act (the "Act"). We have presented our comments on certain of these changes in the order in which those changes are discussed in the Services' official notice of them: Docket No. FWS-HQ-ES-0006.

Comment 1. Economic considerations have no place in the listing process, and the proposal to revise 50 C.F.R. §424.11 to include economic analysis at the Service's discretion would unwisely waste limited agency resources, divert the Services from the legal obligation of listing species, and confuse the public.

The Services, explaining that discussing the economic implications of listing may be useful to the public, propose to eliminate from §424.11 the language that paraphrases the statutory requirement that economic issues may not be considered in the listing process. It is simply incorrect to state that eliminating the prohibition on economic impact evaluation "more closely align[s] with the statutory language," which baldly prohibits consideration of cost in listing decisions.

There are two reasons that the proposed modification of the regulation is problematic. First, the statutorily relevant issues associated with determining the status of a species proposed for listing present adequate evaluation challenges. Given scarce resources, there is no good reason for adding the consideration of economic factors to the process. Second, with respect to the asserted justification that including economic factors may be useful to the public, the precise opposite is

true: adding economic factors may confuse the public, leading people to believe that the biological science-driven listing process is also supposed to make a judgment about the cost of conserving a listed species. By contrast, Congress required listing to be based solely on an honest scientific assessment of the imperiled status of a species. Designation of critical habitat and other elements of the response our nation makes to species imperilment is a more complex problem for which Congress requires consideration of economics.

Providing economic analyses for listing species is not analogous to the EPA providing economic analyses under the Clean Air Act. First, in the Clean Air Act, Congress *ordered* the EPA to produce such an analysis. 42 U.S.C. §7612(a). As a result, Congress directly supported the EPA's expenditure of the funds necessary to complete such an analysis. The FWS and NMFS enjoy no similar congressional support for engaging in economic analyses for species listings under the Endangered Species Act. Expending money to perform an economic impact analysis for any species being considered for listing would be an unsupportable usurpation of funds meant to be devoted to the biological questions properly associated with the listing analysis.

Second, under the Clean Air Act, both benefits and costs are relatively easy to monetize. The primary goal of National Ambient Air Quality Standards and emissions limitations under the Clean Air Act is to protect public health, and—as the EPA has demonstrated repeatedly—public health benefits are often possible to monetize, making for a fairly straightforward comparison between those benefits and the costs of industry compliance. In contrast, as has also been demonstrated repeatedly, the economic benefits of protecting species and ecosystems, while real, are much more difficult to monetize than public health benefits. Experience under CERCLA and the Oil Pollution Act with natural resource damages shows how difficult it can be to put a dollar figure on the value of species and ecosystems, even when the goal is restoration. See, Ohio v. Dep't of Interior, 880 F.2d 432 (D.C. Cir. 1989). In the context of the Endangered Species Act, time and budget constraints would be likely to dictate a truncated effort to determine the full economic value of the benefits of species conservation, thus distorting the public perception of the benefits of listing species and of protecting ecosystem functions and services. The cost of conservation, in contrast, will be forcefully quantified in hard dollars by industry, development interests, and property owners.

Finally, if the Services analyze the economic dimension of species listings on a species-by-species basis, they are likely to ignore or undervalue the cumulative benefits of multiple species listings that lead to programs for recovering functions and services throughout a larger ecological system, such as the Snake River in Washington and Idaho. See, e.g., https://www.rco.wa.gov/documents/salmon/Regional_Summary_Snake%20River.pdf;

https://www.deq.idaho.gov/media/60176959/snake-river-restoration-restoring-processes-native-habitats-presentation-071515.pdf. Especially in aquatic systems, early listings serve as harbingers of broader risks to ecosystems. People and their communities stand to lose many beneficial ecosystem services that may not be evident in a single listing decision. In such situations any economic analysis, to be truly useful, must occur at the ecosystem or social-ecological system scale. Species-specific economic analyses will either undervalue the benefits of a listing or overtax the already limited capacity of the Services to engage in economic valuations.

Comment 2. The Services' proposal to add language to 50 C.F.R. §424.11 that expands upon the meaning of the term "foreseeable future" does not usefully clarify the term and is likely to discourage the Services from appropriately considering threats that are important but difficult to quantify.

The Services attempt to define a "probable" standard as the proper touchstone for determining that a species should be listed threatened because it is likely to become endangered in the foreseeable future. The proposal seems to ultimately require the determination that "predictions about the future are reliable." There are two problems with the proposed change: first, the proposal doesn't take into account the seriousness of a future threat in determining how reliable or probable a prediction should be to be considered; however, that is a fairly basic risk assessment concept (and a common theme in environmental law—see, e.g., Reserve Mining Co. v. Environmental Protection Agency, 514 F. 2d 492 (8th Cir. 1975; Ethyl Corp. v. Environmental Protection Agency, 541 F. 2d 1 (D,C. Cir. 1976)). If the magnitude of a possible harm is more serious, we should act even if there is a lower probability the risk might occur. Indeed, the Services apply this risk assessment concept in the discussion of designating unoccupied habitat as critical: "where the potential contribution of the unoccupied area to the conservation of the listed species is extremely valuable, a lower threshold than "likely' [to become usable habitat] may be appropriate."

Second, a basic purpose of the Act is to be precautionary in protecting species. Tennessee Valley Authority v. Hill, 437 U.S. 153, 194 (1978). A "probable" standard sets too high a bar on the likelihood of endangerment in this circumstance where Congress sought to avoid all extinctions. *Tennessee Valley Authority* at 177-78. The proposed probable standard also undermines the effectiveness of recovery measures because earlier intervention is almost always cheaper and easier than later intervention.

In justifying the proposed interpretation of "foreseeable future" the Services properly discuss both biological considerations and the known external conservation

threats. The Services propose to consider both, but suggest that listing depends upon a finding that both biological threats and external threats are "probable" over a relevant time period. This standard does not provide enough guidance. In keeping with the conservation purposes of the Act, we suggest a more specific standard. We propose that the Service evaluate currently known threats to a species under consideration for listing in light of the biology of the species. Thus a species with a lifespan that indicates five generations in ten years merits a foreseeable future defined to be a shorter period of time, while a long-lived, slow-reproducing species requires an extended number of years over which foreseeable future must be adjudged. Once the biological factors are evaluated, the Services should turn to external threats. *Any currently known threat should be considered a threat in the foreseeable future unless* the weight of credible evidence shows that it is not likely to remain a threat in the foreseeable future. If there are potential future threats that are not current threats, the Services must determine, in more or less the manner it now proposes, whether such threats are probably going to be important during a time period that is relevant to the species, applying in addition the probability standards we have discussed above (i.e., that more serious harms should be considered even when it may not be possible to predict that they are likely to occur.).

The change the Services have proposed would also discourage consideration of climate change effects in listing decisions for threatened species. In our view, the regulations should be explicit that the best available science regarding the "foreseeable future" must include climate change and ocean acidification projections as well as any studies regarding what those projections will mean for both specific species and larger ecosystems. Such projections generally present a range of probabilities based on different assumptions about uncertainty. The Services must consider those ranges as best science even though they do not present a single likelihood of any particular impact.

Comment 3. The Services propose to emphasize that when considering, under 50 C.F.R. §424.11, de-listing or down-listing a listed species, the proper approach is to simply review a species status as if it were unlisted. A better approach, more in keeping with the goals and language of the Act, would be to shift the burden. The burden at the time of listing is to show that a species is in danger of extinction. Down-listing ought to require a showing that the species is *not* any longer endangered and will remain non-endangered without the Act's protections for endangered species. De-listing a threatened species ought to require a showing that the species is *no* longer likely to become endangered in the foreseeable future, even without the Act's protections.

A precautionary standard is advisable when the Services consider down-listing or de-listing a species. Among the principal purposes of the Act is "to provide a program for the conservation of such endangered and threatened species." Similarly, Section 4(d) of the Act requires that the Secretary issue the regulations necessary to conserve threatened species. "Conservation" is defined as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." When conservation efforts have succeeded in resolving only immediate threats (which would result in a possibly short-term population increase) halting them as a consequence of down-listing or de-listing would be premature. Medium-term threats, left unattended after delisting, could quickly make the danger of extinction imminent again. Down-listing an endangered species while extinction is still an active and present threat is not only inconsistent with the conservation purposes of the Act but might well cause the ultimate conservation of the species to be inefficient and costly.

Under the proposed regulation, a threatened species could be de-listed at the moment conservation efforts on behalf of a threatened species have resulted in a movement of its status from "likely" to become extinct in the foreseeable future to "as likely as not" to become extinct in the foreseeable future. Few, however, would say that the protective measures of the Act are no longer required for the species at that point.

An endangered species, because of the purposes of the Act, should not be down-listed at the moment it would not, at that point, qualify for listing, but rather only upon a showing that it is *not* in danger of extinction and will continue to not be in danger even without the Act's protections for endangered species. Further, a species-specific plan for its conservation should have been prepared in advance that can accompany its down-listing to threatened. A threatened species, because of the purposes of the Act, should not be de-listed until a showing can be made that it is *not* likely to become endangered in the foreseeable future even without the Act's protections. This formulation is consistent with the Act's definition of recovery. And it is entirely consistent with Blackwater v Salazar, 691 F.3d 428 (D.C. Cir. 2012), which is both less definitive than the Services' citation of it suggests and focused on a different question. *Blackwater* simply sets forth the statutory requirement that de-listing decisions be made in accordance with the factors set forth for listing. Our comment calls for the most natural way to apply the factors for de-listing: the law requires that we list a species when we can show that it is endangered or likely to become endangered in the foreseeable future. We down-list when we are able to show that the species is not endangered or likely to become endangered. Our position is also consistent with basic principles of administrative law, which require rulemakings that undo previous rules to specifically show why the rationales for the

previous rule are no long rational. Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, 453 U.S. 29 (1983).

Likewise, the Services should be clear that, under 16 U.S.C. §1533(a)(1)(D) ("the inadequacy of existing regulatory mechanisms"), a species should *not* be delisted if the only or main factor keeping the species in a stable or even recovered state is the ESA itself and its protections.

Comment 4. The Services propose to revise 50 C.F.R. §424.12 to expand the circumstances in which they may decline to designate critical habitat because doing so would not be prudent. The proposal strays too far from the requirements of the Act.

The Services provide an extended discussion of the question of when designating critical habitat may not be required because doing so would not be prudent. The issue receives undue emphasis; it appears to be an attempt to armor an inclination to stray from the statutory language—a point made in several of the cases cited in the discussion.

Under 16 U.S.C. §1533(b)(2), in deciding what to designate as critical habitat, the Services can consider the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. However, the Services can actually exclude any area from the critical habitat designation ***only*** if they determine "that the benefits of such exclusion outweigh the benefits of specifying such area are part of the critical habitat" and even then ***only*** if the failure to designate will not result in the extinction of the species. Congress has created a fairly clear presumption that all habitat that qualifies as critical habitat should be designated. The presumption can be overcome only if the Services complete the rigorous cost-benefit analysis required in this section and even then only if they can prove that extinction will not occur if the habitat at issue is excluded. The Services' proposed revisions are also contrary to the relevant legislative history and case law, which state that critical habitat should be designated for all listed species except "in rare circumstances." Conservation Council for Hawaii v. Babbitt, 2 F. Supp. 2d 1280, 1284 (D. Hawaii 1998) (quoting H.R. Rep. No. 95-1625 at 17 (1978)).

Comment 5. Further revisions of the "not prudent" rules would link critical habitat designation to the likely outcome of consultation. The Service has no authority under the Act to promulgate the proposed revision of the regulation.

The Services propose to revise the critical habitat designation standards by revising the standards for deciding that designation would not be beneficial to the listed species. The proposal would allow the agency to avoid designating critical habitat where the Service predicts that consultation would not address the threats to the habitat. Circumstances in which the Services know that Section 7 consultation would not protect a species will be exceedingly rare. When the Services designate critical habitat, they will rarely be certain about all the future threats to a species, and they therefore will not know whether future federal actions affecting the species are possible. If any such uncertainty exists, critical habitat still must be designated. Moreover, Congress may create new programs that generate new kinds of federal actions that might trigger consultation even if they do not exist at the time of listing/determinations.

In addition, the Services use examples of climate change to illustrate the proposed revision. We believe this proposed revision suffers from the same problems that plague the companion proposed revision to the scope of consultation. First, an agency action that significantly contributes to climate change can jeopardize listed species and can adversely modify their critical habitat, and consultation can help reduce those threats. Climate change is an important driver of species stress, and ignoring it because it is difficult to resolve is a disservice to the purposes of the Act.

Comment 6. The Services propose to revise 50 C.F.R. §424.12 to preclude designation of habitat in the United States when habitat in the United States would provide "negligible conservation value" for a species that occurs primarily outside of the United States. This proposed revision fails to account for the Act's stated acknowledgment of the "esthetic, ecological, educational historical, recreational, and scientific value to the Nation" of its fish, wildlife and plants, and it dismisses too easily the importance of this nation's resources and commitment to avoiding extinction.

When a species occurs primarily in other countries, the Services propose, under 50 C.F.R. §424.12(a)(1)(iii), that they may decline to designate critical habitat in the United States because, it is asserted, doing so would not contribute in an important way to the conservation of the species. It takes no more than a quick reading of the Section 2(a) of the Act to conclude that the proposal is contrary to the purposes of the Act. Section 2(a)(5) of the Act summarizes references made in sub-sections one and three: the Act is "key to …better safeguarding the *Nation's* heritage in fish, wildlife and plants." See, e.g. Center for Biological Diversity v. Kempthorne, 607 F. Supp.2d 1078 (D. Arizona 2009). The Act is concerned, in significant part, with conserving the biological heritage of this country. Thus, it is of vital concern, under the Act, when a species that is part of this nation's biota is lost from this country, even when that species is still found, rarely or commonly, in other countries. The United States' population of an endangered species—that is,

the exemplars of the species that are part of this nation's biological heritage—ought to be conserved as a priority for this nation's conservation efforts. Habitat in the United States for listed species is the habitat over which we have the most control and the best knowledge. Such United States habitat ought to be a priority for listing as critical whatever the status of the habitat for the species in other countries. Charismatic species that are emblematic of our efforts under the Act, expensive though their conservation has been, make the point; bald eagles, grey wolves, and grizzly bears are all species that might not even have been listed had we not been committed to retaining their populations in the lower 48 states. Had those species been rare throughout their range but most economically protected in Canada or Russia, it would still have been important to consider designating critical habitat for them in this country, rather than to categorically decline to do so because the bulk of their population or their best habitat was beyond the boundaries of the United States.

Further, in practice, if a species is in such dire condition that it is threatened or endangered, yet it is still present in the United States, it is highly unlikely that its United States habitat will be of negligible importance to the species' conservation.

Comment 7. The Services, in an extended discussion, propose to revise 50 C.F.R. §424.12 by changing the standard for designating habitat currently unoccupied by the listed species. The artful definition of "essential" that is proposed unduly complicates the plain meaning of "essential" as used in the Act.

The proposed restoration of the "rigid step-wise approach" to designation of unoccupied critical habitat basically depends on the Services' assertion that there have been "continued perceptions" that the Services intend to designate "expansive areas of unoccupied habitat." However, there is no support for this assertion in the proposal, and the Services never rebut the reasoning that they put forward to justify the 2016 change: that the step-wise approach was inefficient.

The Act evidences congressional recognition that resolving a species' endangerment may well require listing critical habitat that is "outside of the geographical area the area occupied by the species at the time it is listed." Congress included this provision because species are not in danger of extinction until their populations, and usually the habitat those populations occupy, is seriously compromised. The Services should designate whatever critical habitat is "essential for the conservation"—that is, survival and recovery—"of the species," just as Congress has authorized them to do. Consideration of efficiency and effectiveness, however defined, are important but not primary. The primary consideration is what

is required for the conservation of the species, and it would not be surprising at all if a species that merited listing had—by the time it was listed—already receded from habitat that is essential to its recovery.

The proposed regulation, by contrast, most strongly reflects a consideration that is not present in the Act. Its eccentric definition of what is "essential" with regard what constitutes habitat essential to the conservation of the species is dominated by its concern for "efficiency," by which it means, in part, avoiding trouble with private landowners. The statutory concern, however, is effectiveness. Only Congress can relieve the Services of the duty to administer the law, even when there is local, and—experience shows—often transitory resistance to a critical habitat designation.

Finally, the new rules should explicitly recognize that unoccupied areas can constitute critical habitat if the species is likely to need to move into them in order to adapt to climate change impacts on its current habitat

Comment 8. The proposed revisions are not categorically exempt from the requirement that the Services prepare an environmental analysis under NEPA.

Finally, the proposed regulations are not, in our view, fundamentally administrative or otherwise categorically exempt from the NEPA requirement that an environmental impact statement or and environmental assessment be prepared.

The National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 et seq., imposes procedural requirements on all federal agencies to consider the impacts of their actions on the environment. In particular, NEPA requires federal agencies to prepare a detailed environmental impact statement (EIS) for "all major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). The issuance, repeal, or revision of agency rules and regulations falls within the scope of "Federal actions" pursuant to NEPA. 40 C.F.R. § 1508.18(a).[1] The Council of Environmental Quality (CEQ) has issued a series of regulations implementing the procedural requirements of NEPA. Two of those regulations are particularly relevant here. One, CEQ has listed a series of factors that an agency should consider in determining whether there will be a significant impact on the environment from an agency action. Included in those factors are:

> (1) the degree to which the proposed action affects public health or safety; (2) the degree to which the effects will be highly controversial; (3)

[1] *See* Daniel R. Mandelker, *NEPA Law and Litigation* § 8:27 (2005 Suppl.) ("Federal agency rules and regulations are federal actions that may require the preparation of an impact statement."); *see also Citizens* for Better Forestry v. U.S. Dep't of Agriculture, 481 F. Supp.2d 1059, 1080 (N.D. Cal. 2007).

> whether the action establishes a precedent for further action with significant effects; and (4) whether the action is related to other action which has individually insignificant, but cumulatively significant impacts. *Citizens for Better Forestry*, 481 F. Supp. 2d at 1080 (citing 40 C.F.R. § 1508.27(b)).

Two, CEQ has established a procedure by which federal agencies must decide whether an agency action will have "significant" impacts such that an EIS must be prepared. In general, a federal agency that has not decided to prepare a full EIS must prepare an Environmental Assessment (EA) to determine whether the environmental impact of the proposed action is significant. 40 C.F.R. § 1508.9. An agency may avoid conducting an EA, but only if it determines that a categorical exclusion (CE) identified in prior agency rulemaking appropriately applies to the proposed federal action. *See* 40 C.F.R. §§ 1508.4 and 1507.3(b)(2)(ii). In making that determination, an agency must use a "scoping process" to "determine the scope of the issues to be addressed and for identifying the significant issues related to a proposed action." *See Citizens for Better Forestry*, 481 F. Supp. 2d at 1081 (citing *Alaska Ctr. for the Env't v. United States*, 189 F.3d 851, 859 (9th Cir. 1999)).

In determining whether or not a CE should apply to a proposed federal action, the courts have held that the agency must specifically cite to the specific categorical exclusion that the agency is relying upon. *Citizens for Better Forestry*, 481 F. Supp. 2d at 1082. Moreover, courts have held that "[a]pplication of a CE is inappropriate if there is the possibility that an action *may have* a significant environmental effect." *Id.* at 1087.

Given the discussion earlier in these comments, there is no question that the Services should at the very least conduct an EA to determine whether an EIS might be appropriate for these changes to the ESA regulations. The regulations – by the Services' own admission – are intended to affect the applicability of the ESA to the impacts of climate change on threatened and endangered species. By reducing consideration of climate change for listing and critical habitat designation decisions, the proposed regulations may have a direct effect on "public health and safety" by reducing protections for threatened and endangered species. Moreover, by reducing the scope of the applicability of the ESA in the federal government's response to climate change, the proposed regulations will reduce the government's overall ability to respond to climate change, with potential impacts on public health and safety broader than just the impacts on threatened and endangered species.

The proposed revisions to the critical habitat provisions would decrease the role that uncertain harms play in the listing of species. Thus, species faced with uncertain threats will receive less protection, which in turn may result in more actions that will have a harmful impact on threatened or endangered species.

The detailed comments provided above illustrate that there is significant controversy over the potential effects of the proposed regulatory changes on the environment.[2]

The proposed regulations establish a procedural and substantive framework for the listing of species and designation of critical habitat in the future. Accordingly, the regulations set a "precedent for further action with significant effects." *Citizens for Better Forestry*, 481 F. Supp. 2d at 1089 (concluding that proposed changes to Forest Service planning regulations warranted at least review pursuant to EA).

Even if the Services believe that the proposed regulations may be beneficial for listed species as a whole – perhaps by allowing more actions that will be beneficial to listed species to occur without the paperwork burden of consultation – it must nonetheless conduct environmental review. The CEQ regulations make clear that a "significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial." 40 C.F.R. § 1508.27(b)(1).

Likewise, even if the Services believe that the future impact of the proposed regulations on the protection of listed species is highly uncertain, that would also cut in favor of preparing at least an EA. *See* 40 C.F.R. § 1508.27(b)(5) (one factor determining whether a proposed action might be significant is the "degree to which the possible effects on the human environment are highly uncertain").

Finally, the CEQ regulations make clear that if the proposed federal action "may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the" ESA, it is more likely that the action will be considered significant such that full environmental review should take place. 40 C.F.R. § 1508.27(b)(9). Given that the proposed regulations could fundamentally change the listing, delisting, and critical habitat designation process for a range of listed species, this factor strongly suggests preparation of at least an EA may be necessary.

The proposed regulatory changes may be programmatic in nature, rather than authorizing specific projects, but that does not change the applicability of NEPA. The CEQ regulations implementing NEPA state that "[e]nvironmental impacts statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations." 40 C.F.R § 1502.4(b). The courts have consistently required federal agencies to conduct NEPA analysis, including EAs and EISs, for a wide range of programmatic and regulatory changes similar to the proposed revisions to the ESA listing process. *See, e.g.*, *California ex*

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[2] *See* National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722 (9th Cir. 2001) (holding EA for agency management plan was inadequate because, in part, controversy over potential impacts from the plan indicated significance of environmental impacts); *see also Citizens for Better Forestry,* 481 F. Supp. 2d at 1089 (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)).

rel. Lockyer v. U.S. Dep't of Agriculture, 459 F. Supp. 2d 874 (N.D. Cal. 2006) ((striking down Forest Service planning rules for failure to comply with NEPA)); *Wyoming v. U.S. Dep't of Agriculture*, 277 F. Supp. 2d 1197 (D. Wyo. 2003) (same); *Citizens for Better Forestry*, 481 F. Supp. 2d 1059 (striking down Forest Service planning regulations for failure to comply with NEPA). Moreover, the fact that numerous agencies have been able to conduct environmental review for programmatic regulatory changes shows that such review is feasible. *See, e.g.*, 73 Fed. Reg. 21468 (April 21, 2008) (finalizing regulatory changes to Forest Service planning regulations after preparation of EIS); *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (agency prepared EIS for national coal leasing program).

Nor does the fact that elements of the proposed regulatory changes might be characterized as "procedural" mean that NEPA review is not required. For instance, the fact that the proposed changes to planning regulations for the National Forests might be characterized as procedural did not prevent the courts from concluding that, at the very least, an EA must be prepared for review. *See Citizens for Better Forestry,* 481 F. Supp. 2d 1059.

It would also be inappropriate for the Services to rely on a claim of categorical exemption to avoid NEPA review where, as here, there is "the possibility that an action *may have* a significant environmental effect." *See Citizens for Better Forestry*, 481 F. Supp. 2d at 1087.

We would add that, in this context, the preparation of at least an EA, if not a full EIS, will not be a fruitless and meaningless exercise in paperwork. The changes that the agency has proposed to the ESA regulations are significant, and they will likely have significant impacts on how federal agencies conduct their activities and on the level of protection for endangered species.

As the comments above make clear, there are serious questions about the agencies' analyses. Additional data about a range of factors would help narrow the uncertainty about the possible impacts of the proposed changes. Those factors include (but are not limited to): public perceptions of the critical habitat designation process; the ability of the Services to quantify the benefits of protecting endangered species; the role that cost-benefit analysis for listing might play in informing or confusing the public; the ability of the Services to determine which risks to species are quantifiable or probable; how likely it is that designated critical habitat will not produce consultation that might benefit a species; how many species would not have critical habitat designated because better habitat is located outside the United States; etc.

We conclude by noting that, if the Services should decide to prepare an EA, rather than an EIS, they should nonetheless provide an opportunity for public comment in that process. *See Citizens for Better Forestry v. U.S. Dep't of Agriculture*,

341 F.3d 961, 970-71 (9th Cir. 2003) (noting importance of public participation in the entire NEPA process, including preparation of EAs). The CEQ regulations specify that federal agencies preparing EAs "shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments." 40 C.F.R. § 1501.4(b). The regulations add that a 30-day comment period should be provided by agencies after a decision not to prepare an EIS where the proposed action is one in which an EIS would normally be prepared or is "without precedent." 40 C.F.R. § 1501.4(e)(2). Given the substantial revisions proposed by the Services to the regulations – the first comprehensive revisions in over 20 years – and the analysis above, the proposed revisions would normally warrant preparation of an EIS and are "without precedent." Even if the specific provisions in §§ 1501.4(e)(2) do not apply, given the primary importance of public participation in the NEPA process and the significance of the proposed regulatory changes, public participation in the EA process is appropriate and necessary. *See Citizens for Better Forestry*, 341 F.3d at 970-71 (agency failure to allow public comments on EA for revisions to National Forest planning regulations violated NEPA regulations).