Docket Number FWS-HQ-ES-2018-007

Memorandum Presenting Comments On Proposed Rule Changes

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

From: Eric Biber, Professor of Law, University of California, Berkeley
436 North Addition, Berkeley CA 94720 (510) 643-5647
ebiber@law.berkeley.edu

Alejandro E. Camacho, Professor of Law and Director, Center for Land, Environment, and Natural Resources, University of California, Irvine
401 E. Peltason Dr., 4500-A, Irvine, CA 92697 (949) 824-4160
acamacho@law.uci.edu

Robin Craig, James I. Farr Presidential Chair in Law, University of Utah, S.J. Quinney College of Law, 383 South University St.,
Salt Lake City, UT 84112 (801) 581-6897
robin.craig@law.utah.edu

Robert Fischman, George C. Smith, II Distinguished Professor of Law, Indiana University Maurer School of Law, 211 S. Indiana Ave.,
Bloomington, IN 47505 (812) 855-4565
rfischma@indiana.edu

Dave Owen, Professor of Law, University of California, Hastings College of the Law, 200,McAllister Street, San Francisco, CA 94102 (415) 703-8285
ownedave@uchastings.edu

W. William Weeks, Clinical Professor of Law, Scolnik Chair of Conservation Law, and Director Conservation Law Center, Indiana University Maurer School of Law, 211 S. Indiana Ave, Bloomington, IN 47405 (812) 855-0615
wwweeks@indiana.edu

Date: September 24, 2018

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"). They have provided public notice of certain of those changes in an announcement styled "Docket No. FWS-HQ-ES-2018-0007, and these comments address those changes.

Comment 1: The proposed revision, if promulgated, is likely to poorly serve the purposes of the Act because it will likely result in fewer species being listed as threatened in a timely manner, and/or result in a significant decline in the protection and survival of species that are listed as threatened. The budget FWS has proposed for FY 2019 will exacerbate the problems with the proposed revision.

The Services propose to offer a newly listed threatened species no Section 9 protection unless protections are included in a rule developed and custom-tailored for that species as part of the listing process. This proposal would replace the current approach under which threatened species qualify for the same protections as endangered species under the Endangered Species Act (the "Act") unless or until the FWS prepares a special rule narrowing the statutory prohibitions. The Act expressly limits the FWS discretion by allowing only special rules that are "necessary and advisable to provide for the conservation" of listed species. 16 U.S.C. 1533(d). The proposed rule fails to adequately explain how a new default of "no Section 9 protection" rather than "full protection" meets the statutory conservation standard under section 4(d). In particular, the proposed revisions clearly would require meaningful increases in the FWS listing budget. FWS, however, has

proposed a substantially decreased listing budget. This strongly suggests that the FWS will be unable to promulgate timely customized protective prohibitions to prevent threatened species from slipping closer to extinction.

In support of the proposed rule, the Services suggest that the Department of Commerce has routinely promulgated customized protections for threatened species. However, the Act-related programs of NOAA are of significantly smaller than those of FWS. For example, the FWS deals with about 1600 listed species while NOAA deals with fewer than 100. Further, the NOAA species may be subject to a narrower range of threats than the FWS species. We think NOAA's experience is not a persuasive argument for changing the current rule, particularly as it applies to FWS.

At best, FWS funding is barely sufficient for meeting its current responsibilities under the Act. For confirmation, one need only look at the list of species for which listing decisions await, or for which listing is warranted but precluded because of funding. In 2016 there were nearly 50 such species. 81 Fed. Reg. 232 (Dec. 2, 2016.) We look forward to the day full funding is available. Until that time, the FWS is not prepared to thoroughly consider, propose, and promulgate custom rules for each threatened species that it should and must list.

The Administration, however, has not even planned to maintain current funding levels. It proposed a FY 2019 FWS budget that cuts planned listing expenditures by about 50% and reflects fewer FTE's dedicated to listing. Adoption of the proposed change in the regulations in conjunction with much reduced listing resources is nearly certain to result in fewer deserving species being listed as threatened. And it will be similarly harder to muster the resources for well-developed analyses that identify what is necessary and advisable to provide for conservation under 16 U.S.C. 1533(d). Moreover, the FWS even at current funding levels, is behind on preparing recovery plans, which are the best tool for determining what prohibitions are "necessary and advisable to provide for the conservation" of listed species under 16 U.S.C. 1533(d). The last posted FWS report on recovery stated that 330 listed species lacked recovery plans. (Report to Congress on the Recovery of Threatened and Endangered Species, Fiscal Year 2013-2014.) Thus the vision of implementing a threatened species listing process like that used by NOAA seems unlikely to be realized.

Threatened plant species are even more likely than other threatened species to be harmed under the proposed regulatory revision. The FWS, as far as we can determine, has never issued a special 4(d) rule for any plant species. Rather, it has relied upon general 4(d) rule for plants to protect all plant species listed as threatened.

The adoption of the proposed revision would undermine the rationale for creating the category of threatened species. Among the goals was to provide advance warning of species imperilment: "We are convinced that it is far sounder to take the steps necessary to keep a species…from becoming endangered than to attempt to save it after it has reached that critical point." Rogers Morton, Secretary of the Interior to Rep, Carl Albert, Speaker of the House, Feb. 16, 1973. Implementing that "far sounder" approach is not possible without an effective listing program. Moreover a listing program that anticipates, as the Services appear to, the development of specific rules that include customized conservation programs for threatened species would surely require a greater, rather than a significantly smaller budget. 4(d) rules have to be "necessary and advisable to provide for the conservation" of listed species. That necessarily requires taking into account the on-the-ground implications of those rules for the conservation of listed species. And that necessarily requires taking into account the reality of FWS' ability to do case-by-case protection rules, rather than a default rule.

The current default of extending the full protections of Section 9 of the Act to threatened species promotes efficiency in the listing process. The Service has always been able to promulgate a tailored Section 4(d) rule when appropriate, and it has done so on many occasions. Nonetheless, in about half of threatened listings, according to a 2017 report by Defenders of Wildlife, the Service has opted for the standard protections of the Act. That has been a reasonably efficient way to promulgate the necessary listing rules. Under either the current or the proposed regulation, beneficial tailoring only occurs if a special 4(d) rule is promulgated. With either default, an agency would need to promulgate a special rule in order to take advantage of the tailoring.

The implication, however, of the current default rule is that the Service has believed that absent an affirmative decision otherwise, all of the protections of the Act are appropriate for threatened species. In our view, the implication of the proposed rule is that the Service believes that absent an affirmative action otherwise, none of the Act's Section 9 protection are necessary. Such a turnabout is indefensible.

The proposed switch to the "no prohibitions" default would also undermine the effectiveness of tailored rules because it would reward delay by stakeholders that may suffer economic losses associated with the restrictions being considered in a species-specific rule. Currently, stakeholders who attempt to stave off listing by agreeing to habitat plans, best practices, etc. have an incentive to lobby the agency to list with a special, tailored rule if the attempt to avoid listing appears to be failing. That is one reason that the tailored rules have grown in detail and number in recent years. Changing the default from full protection to no protection eliminates that incentive to cooperate on a tailored rule. That will make tailored rules harder to promulgate.

The special rule promulgated in 1993 for the coastal California gnatcatcher is cited in the proposal for a change in the regulations. That rule exempted activities covered by a state National Communities Conservation Plan from ESA liability. Under the existing, full-protection default, powerful real-estate developers had a strong incentive to push for a tailored rule so that the plans they had negotiated with San Diego and the state would not be upset by federal prohibitions. In essence, real-estate developers agreed to some restrictions under the NCCP in order to avoid greater restrictions under a FWS listing. The proposed change to the no-prohibition default would provide weaker incentives to agree to a special protection regime because, without a specially tailored rule, there would be no restrictions rather than the full protection. Even worse, the original San Diego NCCP may never have gotten off the ground if real-estate developers sensed that they had little to gain from agreeing to even some restrictions. The best way for FWS to reward effective area-wide conservation planning is to maintain the current all-prohibition default and work with willing plan participants as appropriate to carve out an exception to the Section 9 incidental take prohibitions.

As Yaffee and others have pointed out "the specter of enforcement, though unlikely, does motivate collaborative conservation by landowners, their lenders, and others whose businesses create habitat degradation or otherwise impede recovery…The ESA, in particular, served as the "regulatory driver" of stakeholder cooperation in about half of the hundreds of conservation collaborations…studied." STEVEN L. YAFFEE ET AL., ECOSYSTEM MANAGEMENT IN THE UNITED STATES: AN ASSESSMENT OF CURRENT EXPERIENCE 21, 27 (1996); *see also* JULIA M. WONDOLLECK & STEVEN L. YAFFEE, MAKING COLLABORATION WORK: LESSONS FROM INNOVATION IN NATURAL RESOURCE MANAGEMENT 102, 240 (2000) (describing more case studies).

Comment 2. We believe the proposed revision will have a significant effect on the human environment and therefore does not qualify for a categorical exception from NEPA environmental analysis.

The proposed rule states that the Interior Department's NEPA counterpart regulation's categorical exclusion for NEPA environmental analysis "likely applies" to this rulemaking. The categorical exception cited is for rules that "are of an administrative, financial, legal, technical, or procedural nature." While aspects of this proposal are administrative and procedural, the exclusion does not apply in the "extraordinary circumstances" outlined in 43 CFR 46.215. One of the listed "extraordinary circumstances" is for actions that have "significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species". 43 CFR 46.215(h). We believe that in these comments we have explained how implementation of the proposed regulations would have just such significant impacts

on newly listed threatened species. 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) 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

---

[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).

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 threatened species. Accordingly, the proposed regulations may have a direct effect on "public health and safety" by reducing protections for threatened species.

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

The proposed regulations establish a substantive framework for the development of rules protecting threatened species from take 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, 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 Section 9 protections for threatened species, this factor strongly suggests preparation of at least an EA may be necessary.

---

[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)).

The proposed regulatory changes may be programmatic in nature, rather than authorizing specific projects. 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 consultation process. *See, e.g.*,) *California ex rel. Lockyer v. U.S. Dep't of Agriculture*, 459 F. Supp. 2d 874 (N.D. Cal. 2006) (striking down national Forest Service rules regarding roadless area management 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 national 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 that 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 CE 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 and private parties conduct their activities and on the level of protection for threatened 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): the feasibility of preparing species-specific 4(d) rules for all of the threatened species to be listed by FWS in the future; the impacts of changes to the 4(d) rules on the willingness of private parties to proactively advance species conservation; the impacts of proposed future budget cuts on FWS's ability to conduct species-specific 4(d) rules; etc.

We conclude by noting that, if the Services opts for preparing an EA rather than an EIS they should also provide an opportunity for public comment in that process (unless they subsequently proceed to prepare a full EIS). *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).