Docket Number FWS-HQ-ES-2018-009

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 related to 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-0009.

Comment 1. The Services propose to revise the definition of adverse modification of critical habitat in 50 C.F.R. §402.02 by adding the words "as a whole." Because the standard for designating habitat as critical is that it must be "essential" to the conservation of a listed species, the proposal to permit chipping away at habitat designated critical is inconsistent with the language and purposes of the Act.

The Services propose to revise the definition in 50 C.F.R. §402.02 of "adverse modification" of critical habitat. The heart of the statutory definition of critical habitat is habitat that is "essential to the conservation of the listed species." The definition leads to the conclusion that the loss of any such essential habitat is adverse modification requiring consultation. If the habitat is essential, as the definition specifies, loss of it would reduce, lessen, or weaken the value the habitat has for the species.

The proposed addition of the words "as a whole" to the regulatory definition of destruction or adverse modification of critical habitat frames the issue differently. It tacitly asks how much of the habitat that has been defined as critical, that is, essential, may be compromised without reducing the value of the habitat as a whole

for the species. Because that framing is inconsistent with the definition of critical habitat, adding "as a whole" to the regulatory definition of adverse modification would be unlawful.

The proposed change is also inconsistent with the plain meaning of "adverse modification." The ESA prohibits the destruction or adverse modification of critical habitat. It does not accompany that prohibition with any exemption for modest habitat degradation; it does not carve out an exception for "minor" or "insubstantial" adverse habitat modification, or say that an adverse change to habitat only counts as "adverse modification" if it is noticeable when viewed at landscape scale. Notably, when Congress intended to include such size modifiers in the requirements of environmental law, it explicitly included them. See, e.g., 43 U.S.C. § 4332(C) (requiring environmental impact statements for "major federal actions significantly affecting" the environment). The statute prohibits habitat destruction and adverse modification regardless of scale. The proposed regulations' attempt to create such an exemption therefore would effectively amend the statutory text.

The statute's literal meaning is consistent with the ESA's goals, and the proposed change is not. The statute is designed to reverse species' trends toward extinction, and achieving that goal is often incompatible with allowing continued whittling away of protected species' habitats. The inconsistency is particularly stark for the many species that are threatened primarily by incremental habitat loss. Consequently, the addition of the "as a whole" language would undermine the statute's core purposes as well as its literal meaning.

Instead of adding "on the whole" to the regulatory definition for critical habitat consultation purposes the Services should strike language stating that adverse modification only occurs if the change "considerably reduces" the value of critical habitat for survival or recovery.

We understand that the services may want to focus their regulatory efforts on larger harms, and that they do not want to impose procedural and substantive burdens on relatively small impacts. However, there are three problems with those rationales (which we are just inferring; the proposal does not make them explicit). One is that, as the United States Court of Appeals for the D.C. Circuit has warned, "all the policy goals in the world cannot justify reading a substantive provision out of a statute." North Carolina v. EPA, 531 F.3d 896 (D.C. Cir. 2008). Second, the proposed language is vague and overly broad. It could be applied—and, in fact, similar language has been applied—to exempt harms that rise above any reasonable de minimis threshold. Dave Owen, Critical Habitat and the Challenge of Regulating Small Harms, 64 Florida L. Rev. 141, 168-69 (2012). Third, the proposal overlooks multiple ways in which the Services could efficiently address

small instances of habitat degradation. In other contexts, agencies have used measures like general permits and compensatory mitigation to address small increments of harm, often in ways that create relatively small administrative burdens. Eric Biber & J.B. Ruhl, The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State, 64 Duke L.J. 133 (2014). The same should be done here.

Comment 2. The Services, in their explanation of the proposal to amend the regulatory definition in 50 C.F.R. §402.02, argue that in deciding whether an action "appreciably diminishes" the value of critical habitat, they need not take into account the particularly dire status of a species that is perilously rare. This position is inconsistent with the language and purposes of the Act.

The Services argue that for purposes of determining the effects of an agency's action, they should not consider whether a species is already in jeopardy in determining whether a proposed agency action itself would cause or contribute to jeopardy. This position is inconsistent with the statute and the regulations (even as revised). The action agency and the Services are obliged to take into account the environmental baseline in the consultation process. National Wildlife Federation v. National Marine Fisheries Serv., 524 F.3d 917 (9th Cir. 2008). If a species is already on the edge of extinction, then harms that would be trivial if the population were more numerous (for example) are much more serious. Further jeopardizing the prospect of a rare species, it must be made clear, is, for Section 7 purposes, jeopardizing its prospects for continued existence just as clearly as the first action that had that effect.

Comment 3. The Services assert that they need not consider identifying a "tipping point" for a listed species. We believe that considering whether there is an identifiable tipping point would improve the process of designating critical habitat and consulting with action agencies.

The claim that the action agency and the Services do not need to consider tipping points for jeopardy is inconsistent with the law and basic ecology/biology. While the Services point to "success in the recovery of several listed species" that had low numbers, that claim does not prove that the recovery of many other species may not be possible when their numbers reach a critical breaking point. Sometimes the goal of efficient and effective conservation can best be reached through available analyses (including modeling) that would identify population tipping points for listed species.

Comment 4. We oppose the proposal to amend the 50 C.F. R. §402.02 definition of environmental baseline and the proposed criteria for

deciding whether certain federal actions should be considered part of the baseline or evaluated in the Section 7 consultation. Consultation should be re-initiated when there is a significant change in management or operation plans or environmental context.

In conjunction with its proposed revisions regarding the environmental baseline, the Services have requested comment on how "on-going activities" should be defined. In our view, ongoing actions come in two basic flavors. One is really a single action that just takes a while to implement (e.g., dam building and dam removal). For these types of actions, the existing case law for both the ESA and NEPA have got it basically right: the initial consultation should evaluate impacts over the realistically expected duration of the action, taking account of other expected changes (human, climate change, etc.) that are likely to be occurring over that same time. At that point, consultation is finished unless there is a significant change either in the plan for the project or in the environmental context. Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989).

The other type of ongoing action is basically ongoing federal management--operating one or a series of dams, managing a forest, etc. Section 7 consultation for these types of ongoing actions should occur initially and take account of the action's long-term nature. However, re-consultation should be required every time there is a change in management or operation plans and whenever the environmental context has significantly changed--listing of a new species, drought, flood, the ecosystem(s) involved cross a threshold, etc. We understand the frustrations of all parties with drawn-out consultations over such federal actions as operation of the Columbia River dams. But the Services would improve and quicken the process if they were somewhat less determined that consultations should result in "no jeopardy" decisions. Better and faster consultation is possible under the existing rule, but only with more candor about the difficult trade-offs among objectives.

Comment 5. The Services propose to revise 50 C.F.R. 402.03 to preclude the need to consult when the action at issue would "have effects that are manifested through global processes and (i) cannot be measured at the scale of a listed species' current range." We think that the Act's mandate to agencies that they use their authorities to conserve listed species and other Act provisions requires consultation regarding the consequences of a federal action for global processes known to have effects on listed species.

The Services have requested comment on whether 50 C.F.R. §402.03 ought to be revised to relieve an action agency of the requirement to consult when the action would "have effects that are manifested through global processes and (i) cannot be measured at the scale of a listed species' current range." In our view, this

proposed revision would be unwise. A wiser course would be to propose revisions that acknowledge, include, and reflect the best available scientific efforts to account for the effects of such global processes as climate change and ocean acidification. The courts have made it clear that climate change and ocean acidification data ought not to be excluded when the Services are implementing the Act. In determining whether a proposed activity is likely to jeopardize the species or damage or destroy critical habitat for Section 7 consultation purposes, for example, the activity must be evaluated in the context of what climate change (and for marine species, ocean acidification) is doing to that species in that location. An agency proposal to bring machinery that runs hot or might spark a blaze into endangered species habitat might need to be evaluated in light of the increased likelihood of fire in an area that has become increasingly dry because local summers have become warmer and drier.

In addition, the failure to consider climate change and ocean acidification complicates the whole effort of determining an environmental baseline against which to measure a project's effects. For example, if a proposed federal action would reduce the likelihood that a species can survive by adapting to climate change, the consultation analysis should incorporate reasonably prudent measures to ameliorate its effects on the listed species. Impairing a species' adaptation potential may well have the same consequences for recovery as conventional, local causes of jeopardy.

In our view, the Act obliges the Services to consider, as part of the consultation process, the best available science and include a determination, even if doing so is difficult, of the effects in light of global processes of a proposed agency action on a listed species in its current range. At the least, the broader expected effects of global processes such as climate change represent necessary context in which to consider the effects of a proposed action. The science of down-scaling global climate change to local impacts is progressing rapidly. See, IPCC, 2014: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Barros, V.R., C.B. Field, D.J. Dokken, M.D. Mastrandrea, K.J. Mach, T.E. Bilir, M. Chatterjee, K.L. Ebi, Y.O. Estrada, R.C. Genova, B. Girma, E.S. Kissel, A.N. Levy, S. MacCracken, P.R. Mastrandrea, and L.L.White (eds.)], Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 1137-38. The Services should avoid regulatory changes that will isolate their analyses from the best science in this emerging area.

Comment 6. The Services have requested comment on whether consultation should be restricted to matters within the action agency's jurisdiction or control. Placing such boundaries on consultation would not serve the purposes of the Act, because an agency may be in a position to

counteract forces beyond its immediate jurisdiction and control with prudent measures it may be tasked with carrying out as a result of the consultation.

In response to the Services' request for comments on whether consultation should be restricted to matters within the jurisdiction and control of the consulting agency, we advise that doing so would be a mistake. For examples of instances of limited agency jurisdiction and control, we need look no further than climate change and other global processes. Limiting consultation to matters within the authority of the particular action agency exacerbates agencies' inclination to act as if they are not all part of one government enterprise, an enterprise mandated in all of its divisions to use its authorities to conserve species. Further, to paraphrase our comment number 5 above, an action that would be benign except for the effect of global processes might well contribute additional stresses. Additional conservation measures conducted at the federal agency action level might provide the margin that a species needs to survive in the face of the effects of global processes or other factors not closely within the control of the consulting agency.

The material prepared for the consultation will be incomplete if it does not include consideration of matters that represent threats to the species that cannot be resolved by the immediately consulting agencies alone. Inclusion of an analysis of such threats, along with estimates of what they may mean for mortality of the species at the center of the consultation is necessary for evaluating cumulative impacts. Only such an encompassing analysis can properly guide the process of establishing reasonable and prudent measures for the consulting agency to take in order to fulfill the statutory mandate to use its authorities to conserve listed species. More extensive or effective actions to reduce listed species mortality may be required precisely because of the existence of threats that the agency participating in the consulting process is not in a position to resolve.

Comment 7. The Services seek advice on setting deadlines for responses in informal consultation. In this and other aspects of the docket posting, the Agency has not provided enough information to permit useful public comment. Similarly, the Services have claimed that because they have announced proposed changes in this posting and others posted the same day, they have met the requirement of providing adequate public notice and opportunity for comment to make changes in the regulations not announced here. We disagree.

The agency asks for advice on deadlines for informal consultation. It is hard to know what to make of this without knowing what the consequences for missing the deadline would be. With respect to any proposed revision arising out of this request, or arising out of any other matter not detailed in the official notice of proposed revisions, we assert that no final rule may be promulgated because there

has not yet been sufficient notice and opportunity to comment. Any proposed new rule emerging generally from an open ended request for advice, or a broad notice that some sort of change to the regulations under the Act are being considered must be published in a new notice in order to provide statutorily sufficient opportunity to comment under the Administrative Procedure Act.

Comment 8. The "optional collaborative consultation process," as described, is too ambiguous to provide sufficient assurance that the proposal will be effective. As presented, the proposal would likely allow other federal agencies without expertise in species conservation to play the lead role in analysis. Without more resources to ensure analyses adequately consider the best available science, streamlining only raises the risk of pro forma consultation.

While we are interested in any proposal to increase the efficiency of decision-making under the Act without compromising conservation goals, this particular proposal is so vague that we do not know how to meaningfully comment upon it. We also recommend that the Services discuss ways in which their field staff are already working to expedite consultations, particularly when working with repeat-player agencies like the Army Corps of Engineers. Discussion of those efforts might reveal that a new expedited consultation process is unnecessary, or, alternatively, it might provide valuable information for the development of an expedited consultation process—as well as facilitating more meaningful comments than we can presently provide.

Comment 9. The Services propose to add a new provision to 50 C.F.R. §402.14 that would allow action agencies to use material prepared for other purposes in consultation submissions. We think the idea needs refinement in order to avoid an unacceptable lowering of standards for the information available to the Services in consultation.

The Services describe a qualified willingness to allow action agencies to use material prepared for other purposes as a substitute for material otherwise required to be prepared for the Section 7 consultation process. With due regard for the important goal of reducing inefficiency and redundancy, action agencies and the Services must do more than blindly copy and paste material prepared for purposes other than the one currently at hand. Such a practice appears to have contributed to the inadequate analysis of the risks to the Gulf of Mexico in the NEPA compliance in developing the Macondo well, which led to the 2010 Deepwater Horizon blowout. National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, Final Report (2011). To avoid arbitrary and capricious decision-making, action agencies and the Services must: (1) identify exactly what material from different government processes they have adopted; (2) independently evaluate the value of

the adopted analyses; and (3) explain in detail why adopting that analysis is warranted and appropriate. Moreover, exceptionally careful analysis is warranted when the materials were prepared long ago or far away from the proposed action. The Services and action agencies have a continuing duty to update older analyses with the best available science.

Comment 10. The Services propose that 50 C.F.R. 404.14 should be "clarified" to relieve the Services of any duty to verify or evaluate the credibility of measures an agency proposes to take to avoid, minimize or mitigate the effects of its action. The immunity the Services propose to grant themselves on this question is too broad.

The proposed revisions in the regulations assert that the Services may rely on action agencies' statements that avoidance or mitigation measures will be faithfully executed. In our view, the Services must adhere to a more demanding mandate than that. As the Services have indicated, more attentive review appears to be required by law in the Ninth Circuit (National Wildlife Federation v. National Marine Fisheries Service, 524 F. 3d 917 (9th Cir. 2008)). The Services have cited no Circuit Court cases that have ruled otherwise, and we are aware of none. The Services must at least determine that the plan to avoid, minimize or mitigate the effects of a proposed action is credible, that the plan for funding such measures is reasonable, and that are no known obstacles that may keep the measures from being carried out. The consultation is a two party process. The Services cannot serve their statutory role unless they do more than merely to assume that the proposed plan is adequate with regard to mitigation commitments, any more than they can take the documentation on faith with respect to other elements of the consultation. Moreover, the Services should identify measurable standards for the action agency to monitor the effectiveness of mitigation. The Services should require re-initiation of consultation if the monitoring of the standards indicates that the mitigation is not performing as expected.

Comment 11. The Services propose to amend 50 C.F. R. § 402.16 to make it unnecessary for BLM and the Forest Service to re-initiate consultation on a management plan when a species that exists in the area subject to the plan is listed. The asserted justification for the change—that plans will come up for review within five to fifteen years--is unpersuasive. A listed species is likely to require action in much shorter periods, and may require a re-ordering of priorities established in management plans.

Agency actions associated with management plans are among those consultations the Services propose to exempt from re-initiation upon the occurrence of some events that had previously been thought to require it. The Services have not provided persuasive justification for this proposed revision. As the Services have stated, the range of times for agency review of plans ranges from 5-15 years; those

periods may be essential for survival of an endangered species. In addition, BLM and the Forest Service have regularly missed the statutory deadlines for revising their plans, meaning that plans may be in place for far more than 5-15 years without any updating. The periodic planning processes that many action agencies use establish frameworks that incorporate activity and resource priorities for agency action. The listing of an endangered species changes the conditions in which such policy priorities were determined. Such a change requires a review of the soundness of the framework, and a re-initiation of consultation is the vehicle by which that review can best be done: consultation is the process by which the Services can help other federal agencies meet the mandate to use their authorities to conserve endangered species. The Services have the information needed to facilitate that process, and both their own mandates and the general mandate of the Act as it applies to other agencies require that the Services make that information available to other federal agencies in a timely way.

We also note that this proposal is at odds with the services' suggestion, elsewhere in the proposal, that programmatic consultations should be used more often.

Comment 12. Finally, the proposed regulations require the preparation of an environmental impact statement. They are not fundamentally administrative. Implementation of the regulations will have an immediate and significant effect on the human environment. For example, the failure to consider effects of global processes as part of the consultation will result in substantively different consultation agendas and results and the failure to re-initiate consultation on management plans when an affected species is listed is likely to result in fewer opportunities to do advance planning to conserve listed species, lower numbers of recovered species, and more costly emergency efforts to make up for putting blinders on the planning processes.

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]

[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).

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 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. For example, 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 or eliminating consideration of climate change in the consultation process, 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 consultation process would decrease the role that uncertain harms play in the listing of species – for instance, by eliminating protection for some losses of critical habitat, and by eliminating consideration of tipping points in the consultation process. 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 show that there is a serious amount of 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 consultation process 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 consultation process for all listed species, this factor strongly suggests preparation of at least an EA may be necessary.

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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)).

The proposed regulatory changes might be programmatic in nature, rather than authorizing specific projects. That would 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 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 proposed changes to planning regulations for the National Forests might be characterized as procedural, but that 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 performance 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): the importance of the loss of small segments of critical habitat for listed species; the existence and prevalence of tipping points in the conservation of listed species; the importance of critical habitat for species already in a state of jeopardy; the importance of climate change for species conservation and the practicability of undertaking analyses at the level of the range

of individual species; the impact on species conservation of limiting consultation to matters within the action agency's jurisdiction or control; the feasibility and impact of setting deadlines for informal consultation; the extent to which action agency proposals to avoid, minimize, or mitigate the impacts of actions on endangered species are actually implemented; etc.

We conclude by noting that if the Services decide to prepare 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 arguably "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).