



July 18, 2023

VIA ELECTRONIC SUBMISSION

The Honorable Gina Raimondo  
Secretary  
U.S. Department of Commerce  
National Marine Fisheries Service  
1401 Constitution Ave., NW  
Washington, D.C. 20230

**Re: Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation (Docket No. FWS-HQ-ES-2021-0104), Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat (Docket No. FWS-HQ-ES-2021-0107), Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants (Docket No. FWS-HQ-ES-2023-0018)**

Dear Secretary Raimondo:

On June 23, 2023, the Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) published three proposed rules titled “Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation,”<sup>1</sup> “Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat,”<sup>2</sup> and “Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants.”<sup>3</sup> Each of the proposed rules would make multiple changes to Endangered Species Act (ESA) regulations. The Office of Advocacy (Advocacy) is concerned that, given the breadth of issues covered by these proposed rules, the current comment period will not be sufficient to allow small entity stakeholders to provide meaningful feedback in what amounts to a single comment period for three separate, but closely related, proposed rules.

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<sup>1</sup> 88 Fed. Reg. 40753 (June 22, 2023).

<sup>2</sup> 88 Fed. Reg. 40764 (June 22, 2023).

<sup>3</sup> 88 Fed. Reg. 40742 (June 22, 2023).

Therefore, Advocacy recommends the agencies extend the comment periods for each of the proposed rules by at least 60 days.

## **I. Background**

### **A. The Office of Advocacy**

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),<sup>4</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>5</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>6</sup> The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.<sup>7</sup>

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."<sup>8</sup>

### **B. The Proposed Rules**

On June 22, 2023, FWS and NMFS published three proposed rules revising multiple aspects of the ESA. Specifically, the proposals would:

- Reinstatement of the "blanket 4(d) rule" applying ESA Section 9 protections to newly listed threatened species of wildlife and plants.
- Extension of exemptions to the ESA's take prohibitions, which are currently available to federal and state agencies, to federally recognized tribes.
- Requirement that species listing determinations be made "without reference to possible economic or other impacts of such determination."<sup>9</sup>

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<sup>4</sup> 5 U.S.C. §601 et seq.

<sup>5</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

<sup>6</sup> Small Business Jobs Act of 2010 (PL. 111-240) §1601.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat, 88 Fed. Reg. 40764, 40765 (June 22, 2023).

- Revise the framework for interpreting the term “foreseeable future” in the ESA’s definition of threatened species.
- Revise the procedures and standards applied when making delisting decisions.
- Remove the justification for a “not prudent” critical habitat determination when threats to habitat stem solely from causes which cannot be addressed through management actions in a Section 7 consultation.
- Remove the justification for a “not prudent” critical habitat determination when “the Secretary otherwise determines critical habitat would not be prudent based on the best scientific data available.”<sup>10</sup>
- Remove the requirement that unoccupied areas will only be considered for critical habitat when occupied critical habitat would be inadequate for conservation of the species.
- Remove requirements for there to be a reasonable certainty that unoccupied areas will contribute to the conservation of the species and contain one or more physical or biological features that are essential for the conservation of the species.
- Revise the terms “Effects of the Action” and “Environmental Baseline” in regulations governing ESA Section 7 consultations.
- Remove regulatory language determining whether an activity or consequence is “reasonably certain to occur.”
- Expand the scope of reasonable and prudent measures to include measures outside of the action area that avoid, reduce, or offset the impact of an incidental take.

Small businesses are directly impacted by ESA regulations. If enacted, these proposals will modify existing permitting requirements for the ESA, potentially resulting in increased compliance costs and delays for projects involving small businesses. Multiple industry sectors, specifically those in construction, will have an interest in all three of these proposals.

## **II. Recommendation for an Extension of the Public Comment Period**

The agencies’ current deadline for August 21, 2023, gives small businesses 60 days to comment on three different proposed rules covering multiple areas of the ESA. It is not often that an agency releases three proposals altering a single statute on the same day with the same comment period. Small entities and their representatives have expressed their concerns about being able to address all the proposed changes to ESA regulations which directly impact their operations within this timeframe.<sup>11</sup>

A 60-day extension of the comment period will allow small businesses more adequate time to thoroughly review each of the proposals and provide meaningful feedback during the comment period.

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<sup>10</sup> *Id.* at 40,768.

<sup>11</sup> A request to extend the comment period for all three proposals has already been submitted by the National Association of Home Builders. *See* Nat’l Ass’n of Home Builders, Comment Letter on Proposed Rule Listing Endangered and Threatened Species and Designating Critical Habitat (June 30, 2023), <https://www.regulations.gov/comment/FWS-HQ-ES-2021-0107-0003>.

### **III. Conclusion**

Advocacy urges the agencies to extend the public comment period for each of the proposed rules by at least 60 days to allow for small entities to participate more meaningfully in these rulemaking processes. Doing so will allow each of the proposals to receive the attention it deserves from the regulated community.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Nick Goldstein at (202) 772-6948 or by email at [nick.goldstein@sba.gov](mailto:nick.goldstein@sba.gov).

Sincerely,

/s/

Major L. Clark, III  
Deputy Chief Counsel  
Office of Advocacy  
U.S. Small Business Administration

/s/

Nick Goldstein  
Assistant Chief Counsel  
Office of Advocacy  
U.S. Small Business Administration

Copy to: Richard L. Revesz, Administrator  
Office of Information and Regulatory Affairs  
Office of Management and Budget