



August 21, 2023

Submitted via: <http://www.regulations.gov>

Shannon A. Estenoz
Assistant Secretary, Fish and Wildlife and Parks
Department of Interior
Department of the Interior
1849 C Street, N.W.
Washington DC 20240

Public Comments Processing
Attention: FWS-HQ-ES-2021-0107
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Comments on the following U.S. Fish and Wildlife Service's Proposed Rules

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

Dear Ms. Estenoz:

The Petroleum Alliance of Oklahoma (The Alliance) is submitting the following comments on the U.S. Fish and Wildlife Service's (FWS) proposed rules identified above (hereinafter referred to as the Proposed Rules). The Alliance appreciates the opportunity to provide these comments.

The Alliance represents more than 1,400 individuals and member companies and their tens of thousands of employees in the upstream, midstream, and downstream sectors and ventures ranging from small, family-owned businesses to large, publicly traded corporations. Our members produce, transport, process and refine the bulk of Oklahoma's crude oil and natural gas.

Our members work hard to ensure that their activities avoid and minimize impacts to species and their habitat. Our members participate in habitat conservation plans, candidate conservation agreements, candidate conservation agreements with assurances, and many other programs to benefit species and their habitat. Our members have a history of coordinating with federal regulatory agencies including the FWS on candidate and listed species and conservation as well as working with various state agencies to ensure that oil and gas development is accomplished in a manner that protects species and their habitat.

In general, we find that the proposed rulemaking is unnecessary and attempts to undo any clarity or regulatory certainty that the 2019 rules provided, and in some instances, the revisions are contrary to the Endangered Species Act (ESA). We provide the following comments on the Proposed Rules and request the FWS address the issues discussed below.



I. Docket No. FWS-HQ-ES-2021-0107 – Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat

- A. The FWS requests “comments on all aspects of the 2019 rule, including whether any of those provisions should be rescinded in their entirety (restoring the prior regulatory provision) or revised in a different way. All relevant information will be considered prior to making a final determination regarding the regulations for listing endangered and threatened species and designating critical habitat. Depending on the comments received, we may change the proposed regulations based upon those comments.”¹ The FWS cannot merely finalize a rule based on comments received without first clearly defining those revisions in a Proposed Rule and allowing the opportunity to review and provide comments.
- We request the FWS provide a supplemental proposed rule on any changes not clearly defined in this Proposed Rule.
- B. The FWS proposes to revise Section 424.11(b) as follows:

“The Secretary shall make any determination required by paragraphs (c), (d), and (e) of this section solely on the basis of the best available scientific and commercial information regarding a species' status: ~~without reference to possible economic or other impacts of such determination.~~”

Comment:

The Act states that determinations under section 4(a)(1) are to be made solely on the basis of the best scientific and commercial data available. However, the FWS states in the preamble that “...the Services cannot take into account potential economic impacts *stemming from* classification when making such determinations **does not preclude the Services from evaluating economic data and information relevant to understanding the threats to the species that must be assessed under the statutory factors.**”² (emphasis added). As such, it is unclear if the proposed revisions are attempting to remove the FWS’s ability to evaluate any economic data and information as described/emphasized in the preamble. The addition of the proposed text provides confusion and regulatory uncertainty.

- We request the FWS maintain the 2019 language.
- C. The FWS proposes to revise Section 424.11(d) as follows:
- “In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The term foreseeable future extends ~~as far only so far~~ into the future as the Services can reasonably ~~rely on information about the determine that both the future~~ threats ~~to and~~ the species' ~~and the species'~~ responses to those threats ~~are likely~~. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into

¹ 88 Fed. Reg., 40771, June 22, 2023.

² Id., 40766.



account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time.”

Comment:

The existing text was meant to provide some reasonable context as to what is considered “foreseeable future”. Conversely, the proposed changes provide the FWS significant flexibility and subjectivity as to how far it can extend “foreseeable future” in its analysis. It fails to provide the public with any regulatory certainty as to what is reasonably the “foreseeable future” in such analysis, and it leads to inconsistent application.

- We request the FWS maintain the existing 2019 language.

D. The FWS proposes to revise Section 424.22(e) as follows:

“~~It is appropriate to delist a species if the~~ ~~The~~ Secretary finds, ~~shall delist a species if the Secretary finds that,~~ after conducting a status review based on the best scientific and commercial data available:

- (1) The species is extinct;
- (2) The species ~~is recovered or otherwise~~ does not meet the definition of ~~a threatened or an~~ endangered species. ~~or a threatened species.~~ In making such a determination, the Secretary shall consider the ~~same~~ factors and apply the ~~same~~ standards set forth in [paragraph \(c\)](#) of this section regarding listing and reclassification; or
- (3) The listed entity does not meet the statutory definition of a species.

Comment:

In 424.22(e), the FWS proposes to revise the opening sentence of this section by replacing the phrase “shall delist a species if” with “it is appropriate to delist a species if.” This revision is unnecessary and removes the directive for the FWS to delist a species as outlined in 424.22(e)(1)-(3) following appropriate rulemaking procedures. As long as a species is classified as threatened and/or endangered, the regulated community is required by the ESA and the FWS to avoid take of the species. Continued efforts by the regulated community to avoid take of listed species that should be delisted can be costly and burdensome. As such, the FWS should be diligent, follow appropriate rulemaking procedures, and delist such species.

In 424.22(e)(2), we support the proposed revision that adds “~~is recovered or otherwise~~ does not meet the definition of ~~a threatened or an~~ endangered species.” However, we do not support the removal of “same” that follows in that provision. If a species no longer meets the threshold requirements to be listed, then it should be delisted. For many species, the regulated community is frustrated that the delisting “goal line” is everchanging and never allows a species to be delisted. Maintaining the term “same” provides clarity and regulatory certainty.



- We request the FWS maintain the word “same” in this provision.

E. The FWS proposes to revise Section 424.12(a)(1) as follows:

~~Designation of critical habitat may~~~~The Secretary may, but is not required to, determine that a designation would~~ not be prudent in circumstances such as, but not limited to, the following ~~circumstances~~:

- (i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;
- (ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, ~~or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;~~
- (iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States; ~~or~~
- (iv) No areas meet the definition of critical habitat.; ~~or~~
- ~~(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.~~

Comment:

We do not support the revisions provided in Section 424.12(a)(1)(ii) or (v). The ESA allows the FWS to determine where the designation of critical habitat is not prudent, and the text being removed provides additional clarity on this issue. The opening sentence of this provision uses the term “may”, meaning it might happen and follows with the examples provided. The FWS acknowledges in the preamble that such situations (outlined in the stricken text) are rare but do occur. These types of situations should be clearly articulated in the rule. In addition, the existing text being removed provides implementation consistency and regulatory certainty for stakeholders.

- We request the FWS maintain the 2019 rule text identified in (ii) and (v).

F. The FWS proposes to revise Section 424.12(b)(2) as follows:

~~“After identifying areas occupied by the species at the time of listing, the The Secretary will identify designate as critical habitat, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species at the time of listing that the Secretary determines are essential only upon a determination that such areas are essential for the conservation of the species. Such a determination must be based on the best scientific data available. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to~~



~~geographical areas occupied would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.”~~

Comment:

We do not support the proposed revision to Section 424.12(b)(2). This text provides a process the FWS will follow and provides reasonable criteria the FWS will consider in the process of designating critical habitat in unoccupied areas. The proposed deleted text provides regulatory certainty for stakeholders that the FWS provide a critical analysis of the process. The designation of critical habitat in unoccupied areas where the species has not been found, there is no reasonable certainty the area will contribute to the conservation of the species, or the area contains no physical or biological features essential to the conservation of the species is unreasonable. To do so places unnecessary and unreasonable burdens and costs on local development and economic activities.

- We request the FWS maintain Section 402.12(b)(2) as currently written.

II. Docket No. FWS-HQ-ES-2023-0018 – Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants

- A.** The FWS proposes to reinstate the general application of the “blanket rule” to protect newly listed threatened species with the same prohibitions as for endangered species. We do not support this revision. The FWS proposal does not conform to Congress’ plain intent. By differentiating between “endangered” species and “threatened” species, Congress intended to create “two levels of protection” under the ESA so that conservation efforts can be readily adapted to every species’ needs. See S. Rep. 93-307 (July 1, 1973) (explaining the legislative rationale for covering threatened species under the ESA).³ Instead, it authorized the Services to issue regulations “[w]henver any species is listed as a threatened species” that they consider “necessary and advisable to provide for the conservation of such species,” up to and including extending the take prohibition to any threatened species if warranted. 16 U.S.C. § 1533(d).⁴ Additionally, the FWS specifically states in the preamble that, “The Act provides a specific list of prohibitions for endangered species under section 9, but the Act does not provide these same prohibitions to threatened species.”⁵ The FWS cannot interpret Congress’ silence on the prohibitions for threatened species to mean that it can “automatically” apply endangered species prohibitions to threatened species. Additionally, as noted in the preamble, the National Marine Fisheries Service (NMFS) is following species-specific rules for threatened species, and not automatically

³ IPAA and Petroleum Association of Wyoming comments submitted on Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 83 Fed. Reg. 35174 (July 25, 2018), September 24, 2018.

⁴ Id.

⁵ 88 Fed. Reg., 40747, June 22, 2023.



applying the blanket rule to threatened species. To reapply the blanket rule to threatened species would create inconsistent application among the agencies.

The FWS's proposed revisions to apply the blanket rule to threatened species without fully analyzing species-specific needs creates unnecessary regulatory restrictions on development and economic activities that may not impact those species.

- We request the FWS not reinstate the general application of the “blanket rule” to protect newly listed threatened species with the same prohibitions as for endangered species.

III. Docket No. FWS-HQ-ES-2021-0104 – Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation

- A.** The FWS requests comments on “revisions to the regulations in 50 CFR 402.02 and 402.14 regarding the scope of RPMs in incidental take statements, given that this was a topic not raised in the 2019 rule revisions” and “comments on all aspects of the 2019 rule, including whether any of those provisions should be rescinded in their entirety (restoring the prior regulatory provision) or revised in a different way. All relevant information will be considered prior to making a final determination regarding the regulations for interagency cooperation. Depending on the comments received, we may change the proposed regulations based upon those comments.”⁶ The FWS cannot merely finalize a rule based on comments where revisions to the rule were not clearly defined in a Proposed Rule and where the public has not had the opportunity to review and provide comments.
- We request the FWS provide a supplemental proposed rule on any changes not clearly defined in this Proposed Rule.
- B.** The FWS proposes to remove Section 402.17 in its entirety. We do not support this removal. The text in this provision clarifies aspects of the process of determining whether an activity or consequence is reasonably certain to occur, and identified a list of factors that could be relevant (but not all inclusive) to this inquiry. The FWS now states that this provision has provided confusion and inconsistent application. However, the FWS provides no real-world examples of where this has occurred or how often. Instead, the FWS proposes to remove this provision and possibly clarify this issue in future guidance. Regulatory certainty and consistent implementation should be provided in the rule, not a guidance document that is non-binding.
- We request the FWS maintain Section 402.17 as currently written in the 2019 rule.
- C.** The FWS proposes to revise the definition of “Reasonable and prudent alternatives” by removing the text “impacts, i.e., amount or extent, of incidental take.” Even though 50 CFR 402.14 provides regulatory text on this issue, we think this text in the definition reinforces and provides additional clarity, and it is also used in other parts of Section 402.

⁶ 88 Fed. Reg., 40760, June 22, 2023.



THE PETROLEUM ALLIANCE
OF OKLAHOMA

- We request the FWS maintain the current definition of “Reasonable and prudent alternatives”.

IV. Conclusion

The Alliance appreciates your consideration of these comments. If you have any questions, please do not hesitate to contact me at 405-601-2124.

Sincerely,

Angie Burckhalter
Sr. V.P. of Regulatory and Environmental Affairs
The Petroleum Alliance of Oklahoma