



North Carolina and Virginia Joint Public Comments to Fish & Wildlife Service & National Oceanic and Atmospheric Administration

Joint Comments Submitted by North Carolina and the Commonwealth of Virginia re: Rulemakings related to the Endangered Species Act

On behalf of the State of North Carolina and the Commonwealth of Virginia, please accept these comments in response to your request for comments regarding the following rulemakings related to the Endangered Species Act (ESA) announced in the Federal Register on July 25, 2018:

- Revision of the Regulations for Prohibition to Threatened Wildlife and Plants. 83 Fed. Reg. 35174 (July 25, 2018) (Department of the Interior only);
- Revision of Regulations for Interagency Cooperation 83 Fed. Reg. 35178 (July 25, 2018) (Department of the Interior and Department of Commerce); and
- Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35193 (July 25, 2018) (Department of the Interior and Department of Commerce).

Virginia and North Carolina are home to more than 75 federally-listed fish and wildlife species and more than 20 federally-listed plants. This biodiversity contributes to our shared tourism and recreation economies¹, which generated \$887 billion in annual consumer spending, \$65.3 billion in federal tax revenue, \$59.2 billion in state and local tax revenue, and supported 7.6 million jobs across the United States in 2017. We are concerned that altering the existing and successful state and federal partnership dedicated to recovering species, or weakening the ESA as these rulemakings propose, would make endangered species protection and restoration efforts in the southeast less effective and would harm our state and local economies.

Our states believe that the ESA as currently written and implemented has done a remarkable job of protecting endangered species and their habitats. Iconic species such as the bald eagle, Florida manatee, and humpback whale would likely be extinct today if not for the ESA. While most programs can be improved, we are concerned that the proposed ESA rules changes would do more to hinder than support future endangered species protection and the collaborative work between states and the federal government.

¹ The Outdoor Recreation Economy State report by the Outdoor Industry Association

In particular, we raise the following concerns:

1) The agencies have proposed to revise the procedures for designating critical habitat, establishing policy that they will first evaluate areas currently occupied by the species before considering unoccupied areas. On its face, this sounds almost innocuous, but for some species (and especially those affected by changing climate) currently unoccupied habitats may be their last best chance. We recommend the existing model, which identifies the habitat that is critical to the species' survival and recovery, whether currently occupied or not. Examples in North Carolina and Virginia include the red-cockaded woodpecker, Carolina northern flying squirrel, Virginia big-eared bat, Saint Francis' satyr butterfly, and red wolf, which all currently have small or fragmented ranges, but that we hope to see recovered across our region. This goal can only be met if habitat is protected in advance of a full recovery and expansion of the existing range.

2) The ESA defines a threatened species as one that is likely to become in danger of extinction within the "foreseeable future." For the first time, the agencies are proposing a restrictive interpretation of "foreseeable future" based on a limited understanding of future threats and species' responses to those threats. This will make it more difficult for the agencies to consider the effects of complex forces like climate change. We believe that a more precautionary interpretation that considers the possible range of threats and responses – not just the most probable – is more appropriate.

3) The U.S. Fish and Wildlife Service (USFWS) is separately proposing to rescind its precautionary rule under section 4(d) of the ESA, which automatically conveys the same protections for threatened species as for endangered species unless and until a species-specific rule is developed. Under longstanding practice, USFWS policy has been to afford the law's full protections to both endangered and threatened species, to help prevent threatened species from becoming endangered. However, for threatened species, the agency can, and frequently has put in place a special, species-specific rule under section 4(d) of the ESA - often called a "4(d) rule". These rules tailor the protections for threatened species, relaxing some safeguards if the best available science shows that doing so will not hinder recovery of the species. Under the current proposal, no protections would apply, unless the agency fashions a specific rule enacting them. The ESA is designed to protect and conserve species. Our default switch should be set to "protect" versus what is now proposed - "not protect."

4) Science has always been imperative throughout the ESA listing process. In fact, the law requires that the agency shall consider only the "best available" science in making listing decisions. The proposed regulatory changes would allow the agency to analyze the economic impacts of listing a species, even though the law prohibits the consideration of those effects. Listing a species has always, and appropriately, been treated as a factual diagnosis. The species is endangered or threatened, or it is not. Applying economic analysis during the listing decision runs counter to both the letter and the spirit of the ESA: extinction should be avoided no matter the cost.

5) The USFWS is proposing to preclude the need for Federal agencies to consult with the USFWS under certain circumstances outlined in the revisions to section 402.03. The USFWS is uniquely qualified to determine whether a proposed project is likely to affect listed species or critical habitat, and whether the impacts would be considered small or insignificant or would result in "take." Delegating these determinations to other federal agencies that may not have staff

qualified to make these determinations, or that may be predisposed to find “no significant impacts” in order to achieve their proposed projects, will weaken the protections provided by the ESA. USFWS recovery biologists have the most relevant experience reviewing projects and their impacts, and recognizing what projects are likely to affect listed species. Precluding consultation will bypass their valuable contributions to identifying potential impacts and reducing harm to protected species.

Since its passage in 1973, the Endangered Species Act has had a remarkable success rate, with 99 percent of listed species avoiding extinction and 90 percent on track to meet their recovery goals². The act also has broad, long-term and consistent support among the general public, with an average of 83 percent of Americans expressing support for the ESA over the past 20 years³. This approval transcends political ideology, with a majority of conservatives, liberals and moderates all expressing similar levels of support.

The Endangered Species Act’s federal-state partnership has protected biodiversity and helped maintain our region’s natural and outdoor heritage by protecting the unique species and ecosystems that draw people to Virginia and North Carolina. We respectfully request that these proposed rules be set aside and the ESA program continue as it has in recent years. We also request that any additional modifications the Services might propose as an outgrowth of the current proposed rulemaking process be made subject to public review and comment. Should the administration desire to increase the effectiveness of the ESA, we recommend full funding for ESA section 6 grants, recovery planning, habitat protection, and the listing program, as well as adequately-staffed agencies to best work with our respective states.



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² [A Wild Success: American Voices on the Endangered Species Act at 40](#). Center for Biological Diversity. 2014

³ [Bruskotter JT, Vucetich JA, Slagle KM, Berardo R, Singh AS, Wilson RS. Support for the U.S. Endangered Species Act over Time and Space: Controversial Species do not Weaken Public Support for Protective Legislation. *Conservation letters*. 2018:e12595.](#)