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Public Comments Processing
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Re: Proposed amendment of 50 CFR Part 17 (Docket No. FWS-HQ-ES-2021-0033)

To whom it may concern:

Thank you for the opportunity to offer comment on the U.S. Fish and Wildlife Service's ("Service") proposed rule revisions to 50 CFR Part 17. After reviewing these proposed revisions, the State of Montana concludes that the proposed amendments are not supported by law and constitute significant federal overreach. Montana encourages the Service to withdraw its proposed amendments.

1. **The rule revisions proposed by the Service exceed the scope of the Endangered Species Act (ESA).**

The purpose of the ESA is

> to provide a means whereby the ***ecosystems upon which endangered species and threatened species depend*** may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

16 U.S.C. § 1531(b) (emphasis added). Service rules, promulgated pursuant to the ESA, presently allow the Secretary of the Interior to bestow an "experimental population" designation

upon a population of endangered or threatened species that has been, or will be, released into suitable natural habitat. While the population may be released outside current natural range, it must be within the species' probable historic range, absent a finding by the Director that the primary habitat has been unsuitably and irreversibly altered or destroyed. 50 C.F.R. § 17.81(a). Specifically, the rule reads:

> The Secretary may designate as an experimental population a population of endangered or threatened species that has been or will be released into ***suitable natural habitat outside the species' current natural range (but within its probable historic range, absent a finding by the Director in the extreme case that the primary habitat of the species has been unsuitably and irreversibly altered or destroyed)***, subject to the further conditions specified in this section, provided that all designations of experimental populations must proceed by regulation adopted in accordance with 5 U.S.C. 553 and the requirements of this subpart.

Id. (emphasis added). The Service's proposed revision, as stated below, would remove the requirement that releases occur in "probable historic range," as well as any duty borne by the Director in departing from that requirement.

> The Secretary may designate as an experimental population a population of endangered or threatened species that has been or will be released into ***habitat that is necessary to support one or more life history stages outside the species' current range***, subject to the further conditions specified in this section, provided that all designations of experimental populations must proceed by regulation adopted in accordance with 5 U.S.C. 553 and the requirements of this subpart.

87 Fed. Reg. 34625, 34628 (June 7, 2022) (emphasis added).

The proposed revision, removing the limitation on where experimental populations can be relocated, is an egregious move beyond the authority bestowed upon the Service. 16 U.S.C. § 1531(b) clearly contemplates the conservation of ecosystems upon which endangered and threaten species depend. The statute does not contemplate conservation of new ecosystems never occupied by the species. Indeed, how can a species depend on an ecosystem it has never used before?

The proposed revision is an unprecedented deviation from the Service's long-standing interpretation of its own authority. When the present rule was adopted in 1984, the Service faced criticism from those who questioned limiting introduction sites to the species' probable historic range. 49 Fed. Reg. 33885, 33890 (Aug. 27, 1984). The Service responded by stating

> ***Long-standing Service policy provides that the relocation or transplantation of native listed species outside their historic range will not be authorized as a conservation measure***. For conservation measures involving the transplantation of listed species, it is Service policy to restrict introductions of listed species to historic range, absent a finding by the Director in the extreme case that the primary habitat of the species has been unsuitable [sic] and irreversible [sic] altered or destroyed. ***The Service believes this is***

> ***the most biologically acceptable approach to utilize in species introductions. Further, the purposes and policies of the Act would be violated if the Service were to regularly permit the introduction of listed species into new habitat areas as exotic species. Under sections 2(b) and 2(c)(1) of the Act, the Service must commit itself to ecosystem protection and to programs for the conservation of listed species in their natural habitats. Generally, the transplantation of listed species to non-native habitat abandons the statutory directive to conserve species in native ecosystems.*** Transplantation of listed species beyond historic range would subject the population to doubtful survival chances and might result in the alteration of the species' gene pool—results that are clearly contrary to the goals of the Act. Additionally, the concept of releasing any species into non-native habitat runs afoul of the spirit of Executive Order 11987, which prohibits the introduction of exotic, foreign species into the natural ecosystems of the United States. The final rule reflects the above considerations.

Id. (emphasis added).

There is no basis upon which the Service can or should so significantly alter its interpretation of the ESA, which it has held for at least 38 years. Montana urges the Service to withdraw its proposal.

2. **The Service's rationale for seeking the proposed amendments underscores its lack of authority to pursue the same.**

The Service's rationale for the proposed amendments proves as concerning as the amendments themselves. The Service states that at the time of rule adoption in 1984, the agency "did not anticipate the impact of climate change on species and their habitats." 87 Fed. Reg. at 34625.

> Therefore, it may be necessary and appropriate to establish experimental populations outside of the species' historical range to provide for their conservation and adapt to the habitat-related impacts of climate change and other threats. ***These proposed regulatory changes will more clearly establish the authority of the Service*** to introduce experimental populations into areas of habitat outside of the historical range of the affected listed species.

Id. (emphasis added).

First, regulations do not "establish" agency authority. "Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'" *W. Va., et al. v. Envtl. Prot. Agency, et al.*, 142 S. Ct. 2587, 2609 (2022) (citations omitted). The Service's desire to "establish" its authority in this rule amendment is itself a Freudian admission of what the Service truly seeks …more power.

Second, it borders on ridiculous for the Service to admit that a 1984 rule failed to anticipate climate change, but argue that the 1973 ESA allows the proposed expansion of authority to accommodate climate change. While the Service was undoubtedly ignorant of climate change considerations in 1984, so also was Congress similarly ignorant in 1973. It is highly unlikely

that Congress delegated such power to the Service in 1973, particularly as climate change has only become a subject of intense political debate relatively recently. *Id.* at 2608-2609. Because climate change was not an issue driving the ESA or its passage, it seems doubtful, at best, that Congress meant to confer the power that the Service now asserts in the name of climate change. *Id.* at 2607-2609. Indeed, "when an agency claims the power to resolve a matter of great 'political significance,' or end an 'earnest and profound debate across the country,'" the Major Questions Doctrine may be called into question. *Id.* at 2620 (Gorsuch concurrence).

3. <u>The proposed rule invades State sovereignty and evades democratic principles.</u>

The Service's attempt to expand its authority beyond the purview of the ESA comes at the expense of State sovereignty and democracy. Introducing experimental populations of protected species outside their historic ranges, and into areas never before occupied, forces new and unwanted regulatory paradigms onto States in ways never contemplated by Congress. "[C]ourts have consistently held that 'nothing but express words, or an insurmountable implication' would justify the conclusion that lawmakers intended to abrogate the States' sovereign immunity." *Id.* at 2616-2617 (Gorsuch concurrence) (citation omitted). There is no express language in the ESA that supports the Service's proposed amendment. 16 U.S.C. § 1531(b).

In reaching beyond its delegated authority, the Service's proposed amendments circumvent the legislative process and the benefits associated therewith.

> By effectively requiring a broad consensus to pass legislation, the Constitution sought to ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives during their consideration, and thanks to all this prove stable over time. …

W. Va., 2618 (Gorsuch concurrence). Allowing rules, like those proposed by the Service, to stand outside the purview of Congress would upend the legislative scheme, reducing legislation to the will of the current administration and those unelected officials acting therein. *Id.* Under such interpretation, "little would remain to stop agencies from moving into areas where state authority has traditionally predominated." *Id.* (internal citations omitted).

> 'That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood, and have been frequently used, and if Congress had intended to grant such a power to the [agency], it cannot be doubted that it would have used language *open to no misconstruction,* but *clear and direct.*'

Id. at 2619 (quoting *Interstate Commerce Comm'n v. Cincinnati, New Orleans & Tex. Pac. Ry. Co.*, 167 U.S. 479, 505 (1897)).

If Congress had intended to permit the action the Service now seeks to facilitate, it would have expressly given that authority in the ESA. It did not. The proposed expansion of the Service's authority evades democracy by impermissibly expanding the administrative state, to the detriment of state sovereignty.

4. **The proposed rule contradicts common sense, an affront exacerbated by the Service's elimination of its own accountability.**

It is the height of hubris for the Service to presume that it can successfully introduce experimental populations to new ecosystems, outside their historic ranges, where there is no historic evidence supporting survival. The relationships that evolve between a species and its ecosystem over generations of occupancy are complex, to the say the least. Entire careers are spent researching individual species and their ecosystems, only to find more questions that have yet to be answered. To introduce experimental populations to new ecosystems renders the experimental population nothing more than an invasive species, threatening the natural balance within the ecosystem unaccustomed to its presence.

Equally concerning is the Service's proposed elimination of accountability. As the rule presently reads, introduction must be within the probable historic area "absent a finding by the Director in the ***extreme case*** that the primary habitat of the species has been unsuitably and irreversibly altered or destroyed." 50 C.F.R. § 17.81(a) (emphasis added). Setting aside, momentarily, that this portion of the existing rule 1) exceeds the Service's statutory authority, and 2) runs afoul of the Service's own long-standing policy and interpretation, it at least required the Service to provide a scientific determination as to the primary habitat. By eliminating this requirement, the Service would give itself free-reign to avoid assessment, let alone determination, of the species' existing ecosystem. Removing this high bar from the current rule could lead the Service, regardless of exigency, to protect ecosystems upon which the species does not actually "depend." Such is a departure from the Service's longstanding policy and constitutes an impermissible expansion beyond the express language of the ESA (*i.e.* 16 U.S.C. § 1531(b)).

5. **The proposed rule revision has the potential to generate significant economic burden on unsuspecting communities and economies.**

Just as species and ecosystems evolve to symbiosis, so also do ecosystem economies. The designation of a species as being "threatened" or "endangered" generally acts as a limitation on economic vitality. However, where an economy has historically recognized the species and its relationship to the ecosystem, that economy is better able to capitalize on, or mitigate against, the listing of the species. Grizzly bears, for example, have long been integral to Montana's natural ecosystem. Whether livestock predator or tourist attraction, grizzly bears have always impacted Montanan's economy and Montanans have developed mechanisms to account for that impact. While listing the grizzly bear as "threatened" has exacerbated that economic impact, Montanans had tools ready to partially mitigate the burden.

The same will not hold true for communities outside historic ranges, should the Service decide to introduce an experimental population. Nebraska and Ohio will not be prepared to absorb the economic harm caused by an experimental population of grizzly bears. As such, the economic harm will be significantly harsher for those economies to address.

6. **The proposed rule is subject to full analysis under the National Environmental Policy Act (NEPA).**

The Service anticipates that "the categorical exclusion found at 43 CFR § 46.210(i) likely applies to the proposed regulation changes." 87 Fed. Reg. at 34627. 43 C.F.R. § 46.210(i) lists categorical exclusions to NEPA analysis, including:

> Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case.

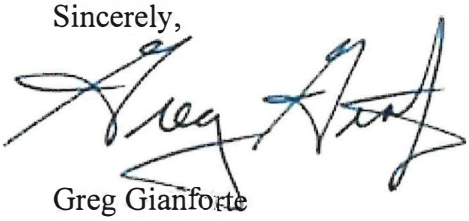
43 C.F.R. § 46.210(i). However, 43 C.F.R. § 46.215 lists "extraordinary circumstances" in which categorically excluded actions may require NEPA analysis. Extraordinary circumstances occur when an action may…

> (c) Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources [NEPA section 102(2)(E)].
>
> (d) Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks.
>
> (e) Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.
>
> (f) Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects.
>
> …
>
> (h) Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species.

43 C.F.R. § 46.215. The proposed rule revision triggers the "extraordinary circumstances" identified above. However, the notice fails to acknowledge, let alone evaluate, these extraordinary circumstances as required by 43 C.F.R. § 46.205(c)(1).

Furthermore, this is the third significant rulemaking effort associated with the ESA to occur within the last year. Each of those regulatory revisions, the most recent culminating July 21, 2022, affects habitat and critical habitat associated with endangered and threatened species. *See,* 87 Fed. Reg. 43433 (July 21, 2022); 87 Fed. Reg. 37757 (June 24, 2022). Not only is analysis appropriate for the proposed rule at issue here, but the Service should also conduct a cumulative impacts analysis of each of these regulatory efforts. Failure to conduct these analyses, shelving these efforts as a "categorical exclusion," is in violation of NEPA.

Sincerely,



Greg Gianforte
Governor
State of Montana