

United States Senate

WASHINGTON, DC 20510

September 12, 2018

The Honorable Ryan Zinke
Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

The Honorable Wilbur Ross
Secretary
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Dear Secretary Zinke and Secretary Ross:

We are writing to express our strong concerns regarding the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) proposed rules to amend the existing regulations for implementing sections 4 and 7 of the Endangered Species Act (ESA). The ESA is a highly successful¹, very popular² statute and has recovered iconic species such as the bald eagle and the humpback whale. We do not believe the proposed rules are consistent with the letter or the spirit of the law as Congress directed, and some of the included proposals could impair species conservation outcomes. Rather than expending limited agency resources on a regulatory overhaul of the ESA, we urge you to instead work with us to ensure adequate funding for the Services to better implement the ESA.

Section 4(b)(1)(A) of the ESA requires that species listing decisions be based solely on the best available science. After providing greater flexibility for economic considerations for critical habitat in the updates to the ESA in 1978, Congress was explicit in the 1982 amendments that listing decisions must be based solely on science. The FWS and NMFS rule to amend 50 CFR 424 proposes to remove the phrase “without reference to possible economic or other impacts of such determination” for species listing decisions. The proposed rule states that this change is only for the purpose of allowing economic impacts data to inform the public. However, conducting an economic impacts assessment, even for informational purposes, could improperly influence the listing process to the detriment of species and create pressure for the Services to minimize protections that science indicates are necessary to recover species.

The FWS and NMFS rule to amend 50 CFR 424 may also limit the ability of the Services to consider the impacts of climate change when deciding whether or not to list an imperiled species as threatened, as the FWS did when listing the polar bear³. The rule proposes that the term “foreseeable future” in the ESA “extends only so far into the future as the Services can reasonably

¹ Charise Johnson, [“The newly endangered species of the Trump era is the Endangered Species Act.”](#) NBC News, July 23, 2018.

² Jeremy Bruskotter, John Vucetich, Ramiro Berardo, [“Support for the Endangered Species Act remains high as Trump administration and Congress try to gut it.”](#) The Conversation, July 20, 2016.

³ U.S. Fish and Wildlife Service. 2016. [Polar Bear \(*Ursus maritimus*\) Conservation Management Plan, Final](#). U.S. Fish and Wildlife, Region 7, Anchorage, Alaska. 104 pp.

determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable.” Given this Administration’s track record of climate denial and inaction⁴, memorializing this approach in regulation would almost certainly result in fewer protections for imperiled species most impacted by climate change. This change is especially troubling as climate change is causing increasing “widespread and consequential” harm to species⁵, including to commercially significant fish.⁶

The FWS rule to amend 50 CFR 17 to rescind existing “blanket 4(d)” protections for threatened species causes us additional concern. Currently, when FWS lists species as threatened, the blanket rule provides those species with protections under section 9 of the ESA unless the FWS finalizes a species-specific special rule. Section 9 of the ESA prohibits any activity that would harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect any endangered species. Under existing regulation, the FWS can and still does issue a special rule regarding the application of section 9 for threatened species, and with the blanket rule in place, there is no lapse in protection from the time a species is listed to the time a special rule is finalized. This is an important safeguard, and we believe it should remain in place. If the Administration seeks alignment between the Services, we encourage NMFS to adopt the blanket 4(d) rule.

Additionally, the FWS and NMFS proposal to amend 50 CFR 402 seeks public input on adding deadlines for the NMFS and FWS to consult informally with other agencies, in hopes of improving interagency cooperation. While we appreciate the need for substantive yet efficient review during consultation, this solicitation seems to be a solution in search of a problem. In a review of nearly 110,000 requests for consultation with federal wildlife agencies—including informal consultation—the median time was 14 days. Of approximately 10% of requests which required formal consultation, the average was 61 days.⁷ By these metrics, the current system is working on a reasonable timeframe, and we urge the Administration to leave the creation of any arbitrary deadlines out of this rule.

Two redefinitions in the proposal to amend 50 CFR 402 invite clear steps backwards for conserving listed species and their habitats. First, the proposed redefinition of “destruction or adverse modification” of critical habitat will make it easier for species’ critical habitat to be lost through death by a thousand cuts, even if no single action affects “the critical habitat as a whole.” Second, the notion of redefining “environmental baseline” raises concerns. Undermining the integrity of the baseline could make it easier to bury the harm of actions by making tiny improvements appear much more beneficial than they are in reality. At a time when more

⁴ Harvard Environmental Law Program, [Regulatory Rollback Tracker](#). Harvard Law School. Last updated: August 10, 2018.

⁵ Christine Dell’Amore, “[7 Species Hit Hard by Climate Change – Including One that’s Already Extinct](#).” *National Geographic*, April 2nd, 2014.

⁶ Marlene Cmons, “[Warming seas are robbing some fish of their vital sense of smell](#).” *Popular Science*, August 3, 2018.

⁷ Ryan Richards and Kyle Cornish, “[The Endangered Species Act: Protecting America’s Natural Heritage](#).” *Center for American Progress*, January 9, 2018.

protective, not less protective, measures are warranted, these redefinitions would move us in exactly the wrong direction.

In March 2018, Congress passed and the President signed into law the Consolidated Appropriations Act of 2018. This statute set clear parameters regarding reinitiation of consultation under the ESA for U.S. Forest Service and Bureau of Land Management forest plans. These parameters were carefully negotiated and thus included in the Consolidated Appropriations Act of 2018 with bipartisan support. We are alarmed that the FWS and NMFS proposal to amend 50 CFR 402 also attempts to broaden the statutory parameters in direct contradiction with this recent law.

We urge you to reconsider and rework or rescind all of these short-sighted, unfounded proposals that will not improve the conservation of threatened and endangered species. Instead, because ESA recovery funding is less than 25% of what scientists say is necessary to protect species⁸, we stand prepared to work with you to provide adequate funding for the Services to implement the ESA and improve species conservation outcomes.

In closing, scientists estimate that we could lose 75 percent of all species in the coming centuries⁹, with potential for half of all species to be facing extinction in the next century¹⁰. Species' extinction is happening at a rate at least 100 times greater than what would be considered normal. In just the last 40 years, we have also lost half of all wild animals on our planet¹¹. At this moment in history, we should be working to uphold and strengthen the ESA, not undercut it. Thank you for your consideration.

Sincerely,



Thomas R. Carper
U.S. Senator



Tom Udall
U.S. Senator



Chris Van Hollen
U.S. Senator



Christopher A. Coons
U.S. Senator

⁸ Leah Gerber, [Proceedings of the National Academy of Sciences](#), 2015.

⁹ Richard Monastersky, "[Life – a status report.](#)" *Nature*, December 11th 2014.

¹⁰ Robin McKie, "[Biologists think 50% of species will be facing extinction by the end of the century.](#)" *The Guardian*, March 9th, 2017.

¹¹ John D. Sutter, "[Sixth mass extinction: The era of 'biological annihilation'.](#)" *CNN*, July 11th, 2017



Richard Blumenthal
U.S. Senator



Jeanne Shaheen
U.S. Senator



Kamala D. Harris
U.S. Senator



Tammy Duckworth
U.S. Senator



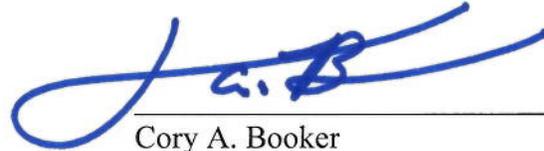
Richard J. Durbin
U.S. Senator



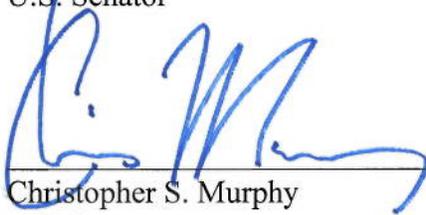
Jeffrey A. Merkley
U.S. Senator



Margaret Wood Hassan
U.S. Senator



Cory A. Booker
U.S. Senator



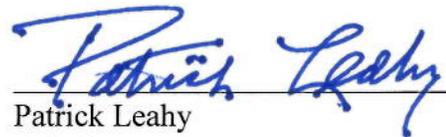
Christopher S. Murphy
U.S. Senator



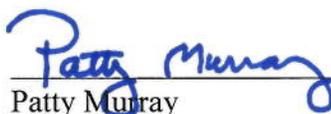
Ron Wyden
U.S. Senator



Gary C. Peters
U.S. Senator



Patrick Leahy
U.S. Senator



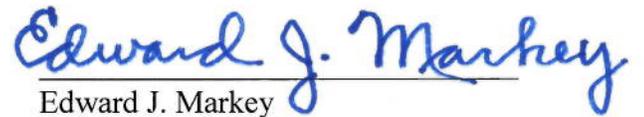
Patty Murray
U.S. Senator



Kirsten Gillibrand
U.S. Senator



Maria Cantwell
U.S. Senator



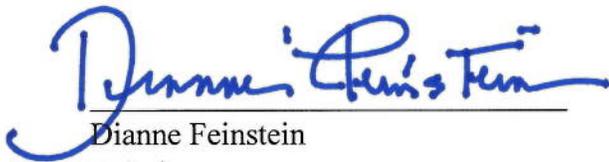
Edward J. Markey
U.S. Senator



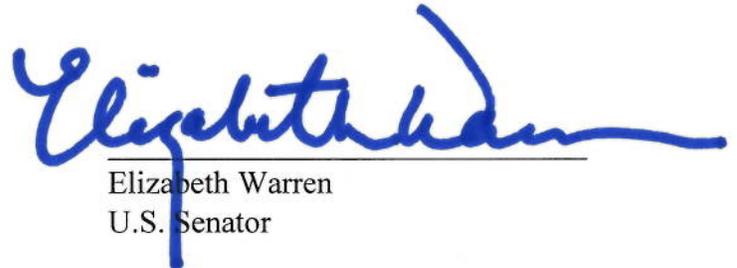
Sheldon Whitehouse
U.S. Senator



Martin Heinrich
U.S. Senator



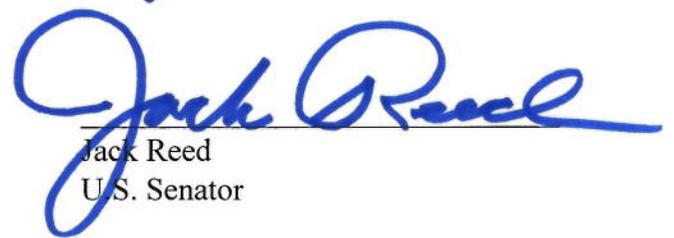
Dianne Feinstein
U.S. Senator



Elizabeth Warren
U.S. Senator



Bill Nelson
U.S. Senator



Jack Reed
U.S. Senator



Brian Schatz
U.S. Senator



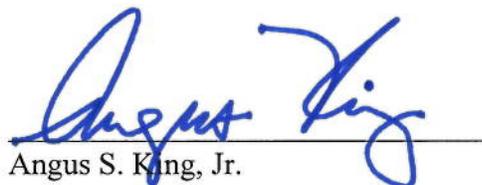
Benjamin L. Cardin
U.S. Senator



Mazie K. Hirono
U.S. Senator



Bernard Sanders
U.S. Senator



Angus S. King, Jr.
U.S. Senator



Charles E. Schumer
U.S. Senator

Handwritten signature of Catherine Cortez Masto in blue ink.

Catherine Cortez Masto
U.S. Senator

Handwritten signature of Robert Menendez in blue ink.

Robert Menendez
U.S. Senator