



September 24, 2018

VIA ELECTRONIC SUBMISSION

The Honorable Wilbur Ross  
Secretary  
U.S. Department of Commerce  
National Marine Fisheries Services  
1401 Constitution Ave NW  
Washington, D.C. 20230

The Honorable Ryan Zinke  
Secretary  
U.S. Department of the Interior  
Fish and Wildlife Service  
1849 C St. NW  
Washington, D.C. 20240

**Re: Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat; Revision of the Regulations for Interagency Cooperation; and Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants (83 Fed. Reg. 35, 193; 35, 178; 35, 174 (July 25, 2018.))**

Dear Secretaries Ross and Zinke:

On July 25, 2018 the U.S. Department of the Interior's Fish and Wildlife Service (FWS) along with the U.S. Department of Commerce's National Marine Fisheries Service (NMFS), (hereinafter "Services" or "the Services") published two proposed rules on revisions to



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regulations for endangered and threatened wildlife and plants;<sup>1</sup> the Fish and Wildlife Service concurrently published a third rule.<sup>2</sup> The first joint rule revises portions of the regulations implementing section 4 of the Endangered Species Act (ESA), (hereinafter “the Act” or “Act”) designating critical habitat. The second joint rule clarifies the interagency consultation process under section 7 of the ESA, and the third rule revises Fish and Wildlife Service regulations concerning section 4 (d) prohibitions to threatened species. The U.S. Small Business Administration’s Office of Advocacy (Advocacy) applauds the Services’ efforts to update and revise these specific provisions of the Act to make them clearer and more consistent with the intentions of the Act. Advocacy recommends that the Services pay special consideration to the public comments and recommendations of small business, some of which are highlighted below, though this list is not exhaustive. Where applicable, the Services should consider the impacts to small business in determining the appropriate definition or standard to use.

### **The Office of Advocacy**

Congress established 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>3</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>4</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, federal agencies are required by the RFA 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>5</sup> The agency must include, in any explanation or discussion accompanying the final rule’s publication in the Federal Register, the agency’s response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.<sup>6</sup>

### **Background**

Congress enacted the ESA in 1973 to conserve species likely to become endangered.<sup>7</sup> The Act has not been amended since 1988, and the implementing regulations enacted by the Services

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<sup>1</sup> Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35, 193 (Proposed July 25, 2018).  
Endangered and Threatened Wildlife and Plants: Revision of Regulations for Interagency Cooperation, 83 Fed. Reg. 35, 178 (Proposed July 25, 2018).

<sup>2</sup> Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 83 Fed. Reg. 35, 174 (Proposed July 25, 2018).

<sup>3</sup> 5 U.S.C. §601 *et seq.*

<sup>4</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 *et seq.*).

<sup>5</sup> Small Business Jobs Act of 2010 (PL. 111-240) §1601.

<sup>6</sup> *Id.*

<sup>7</sup> 16 U.S.C. § 1531 *et seq.*

have not been revised since 1986.<sup>8</sup> The Services since that time have adopted various policies, procedures, guidances, and handbooks for carrying out the functions of the Act; however, some of these current practices do not align with the original intent of the Act, and create uncertainty and ambiguity.

The Act defines endangered species as any species that is “in danger of extinction throughout all or a significant portion of its range.”<sup>9</sup> Section 4 of the Act requires the Services to designate critical habitat when a determination is made that a species is endangered or threatened.<sup>10</sup> Section 9 of the Act allows for specific prohibitions on activities and takings pertaining to species listed as endangered under the Act.<sup>11</sup> Section 4 (d) of the Act allows for extensions of Section 9 prohibitions to species listed as threatened.<sup>12</sup> Finally, Section 7 requires that Agencies ensure that their actions do not imperil the continued existence of endangered or threatened species.<sup>13</sup> It is these various provisions that are the subjects of the three proposed rules, each of which will be discussed in further detail below.

### **Small Businesses are in Favor of these Rules**

On March 1, 2017, President Trump issued Executive Order 13777<sup>14</sup> directing the agencies to make long term regulatory reform plans. In response to that Order both Services requested public comment on regulatory reform efforts. Also in response to the Order, Advocacy has been engaged in a comprehensive outreach effort on regulatory reform issues. Advocacy has heard from numerous small businesses and trade associations in almost every state that ESA reform is necessary. The Services state that these three proposed rules are the result of comments received on suggestions for regulatory reform to the ESA. Advocacy is pleased that the Services are considering its recommendations and those of small business stakeholders to revise the ESA to alleviate burdensome and confusing practices and definitions.

Advocacy spoke with various stakeholders, and coalitions that represent small business regarding these specific proposed rules. Across the industries small entities are supportive of these efforts by the Services to clarify and harmonize the proposed sections of the Act.<sup>15</sup> Existing regulations and practice cause uncertainty for small business resulting in excessive costs, lengthy litigation, and continued confusion.

Small entities have said the proposed rules will give them greater clarity and will ultimately be less burdensome both for the Agencies themselves and for small business stakeholders.

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<sup>8</sup> See Endangered and Threatened Wildlife and Plants: Revisions of Regulations for Interagency Cooperation. 83 Fed Reg. 35, 178 (Proposed July 25, 2018).

<sup>9</sup> 16 U.S.C. § 1533 (a) (3) (A).

<sup>10</sup> 16 U.S.C. § 1532 (6).

<sup>11</sup> *Id.* §1538 (a).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* § 1536 (a).

<sup>14</sup> Exec. Order No. 13777, 82 Fed. Reg. 12285 (March 1, 2017).

<sup>15</sup> See Comments of the ESA Cross-Industry Coalition, (83 Fed. Reg. 35,193, 35,178, 35,174) ( filed on September 24, 2018).

Small entities also contend, however, that these rules do not address all of the problematic parts of the Act and its implementation. Stakeholders are hopeful that following these rules, the Services will also revise appropriate guidances and handbooks, and review and reassess mitigation policies, candidate conservation agreements, and other related practices that stem from the Act and the outcome of these rules.

Stakeholders are also concerned that despite better definitions for the applications of the rules, the Services also need to diversify how, where, and what types of information they use in their determinations. In all cases the Services must rely on the best available science in making determinations for listing, designating critical habitat and interagency consultations. Small businesses have suggested that the Services consider using peer-reviewed data that is reviewed by an impartial body, that the Services work in closer consultation with state and local municipal agencies who may already have such information available, and that they consult with industry and allow for more public review of the available data before final determinations are made, or at the very least publish the appropriate data concurrent with the rulemaking so that agency determinations have more transparency.

Furthermore, stakeholders have requested, and Advocacy strongly recommends that the Services, in the final rules, indicate that they will publish subsequent guidance for implementation of the new policies and procedures, and set a firm deadline for publication of guidance documents. Advocacy is available to assist the Services in the development of these guidance documents. This will give industry clarity and certainty that the rules will be implemented consistently throughout each region, and that there will not be further questions regarding implementation.

Advocacy notes the proposed rule for revisions to critical habitat designations may be affected by the outcome of current Supreme Court litigation directly concerning unoccupied critical habitat.<sup>16</sup> Advocacy strongly encourages the Services to move forward with the finalization of at least the two rules that do not concern critical habitat; and to hold in abeyance the portions of the rule concerning unoccupied habitat, until the Court has issued an opinion on the subject, at which time agency action will be more appropriate.

## **I. Comments in Response to Proposed Rule on Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat<sup>17</sup>**

### **Rules Concerning the Designation of Critical Habitat Should be Revised, Redefined, and Reinterpreted to Better Match Statutory Language.**

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<sup>16</sup> *Weyerhaeuser Company v. United States Fish and Wildlife Service et. al.*, 848 F. 3d 635 (5<sup>th</sup> Cir. 2017), *petition for cert. granted*, (No. 17-71) (January 22, 2018). At issue is whether the ESA prohibits designation of private land as unoccupied critical habitat when that land is neither habitat nor essential to species conservation, and whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review. The Court is set to hear arguments on Oct. 1, 2018, and the outcome of this litigation could affect the Services' proposals in this rulemaking regarding unoccupied land being considered for designation.

<sup>17</sup> Endangered and Threatened Wildlife and Plants; Revisions of the Regulations for Listing Species and Designating Critical Habitat. 83 Fed. Reg. at 35,196 (Proposed July 25, 2018).

### *Definition of Foreseeable Future*

The proposed rule states that the Services will rely on available data to “formulate a reliable prediction and avoid speculation and preconception.”<sup>18</sup> The rule further states that the term “foreseeable future” will be determined on a case-by-case basis, and based on “reasonable confidences.”<sup>19</sup> The determination will be made based on “whether the species is likely to become an endangered species within the foreseeable future.”<sup>20</sup> The term would only extend so far as the Services can determine that the conditions posing danger are probable.<sup>21</sup>

Several stakeholders stressed the need to further clarify this definition, as it still leaves room for timeframes that overextend the intention of the Act. Specifically stakeholders stated that the language should be amended to ensure that listing decisions not rely on speculative data of future conditions that are unreliable, broad in geographical scale, or so far in the future that a prediction simply cannot be made.

Advocacy agrees that the Services should further define “foreseeable future.” The Services should also consider further defining “likely to occur” in terms of the probability of a species to become endangered. Advocacy spoke with stakeholders who suggested that the term “probable” be explained in the final rule, and eliminating the term “potential” from this rulemaking.<sup>22</sup> Potential is a lower standard than “likely” to occur, and causes the Services to speculate about future circumstances rather than rely on the present conditions.

Further, while the Services have stated that they do not need to provide specific numerical timeframes, and that this would deter from the case-by-case analysis that is necessary, having at least a definitive point at which data is so speculative that it is automatically unreliable, specifically mentioned in the rule, will provide interested parties with the clarity and finality they are seeking.

### *Consideration of Economic Impacts*

Advocacy is pleased with the Services’ proposal to remove the phrase, “without reference to possible economic or other impacts of such.”<sup>23</sup> The Services acknowledge that while listings should be made based on biological considerations, there may be instances in which referencing economic or other impacts may be useful.

Advocacy believes that the Services should provide a regulatory impact analysis (RIA) to better inform the public of the impacts of any listing as critical habitat designation. While the Services state that they will not be providing an RIA in every instance, Advocacy would argue that this type of analysis is required by statute and would provide the public with a level of transparency in the rulemaking process that currently does not exist. The Services’ duty to inform the public

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<sup>18</sup> *Supra* note 15 at 196.

<sup>19</sup> *Id.* at 195.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *See id.* at 196.

<sup>23</sup> *See* 50 C.F.R. § 424.11 (b).

in many cases falls short because no such analysis is currently provided. Advocacy is pleased that the Services are taking this important step to remove the language, and encourages the Services to go even further and provide for this analysis to be included with each rulemaking.

On numerous occasions Advocacy has respectfully disagreed with the Services' assertion that the RFA does not apply to critical habitat designations and the Services certifications that the rule will not have an impact on small business.<sup>24</sup> Advocacy has urged the Services to conduct thorough initial RFA analyses to consider the impacts of critical habitat designations on small business. Many if not all critical habitat designations have a direct and in most cases significant effect on small business. In some instances small businesses have had to completely abandon potential projects due to a critical habitat designation because the permitting process was so costly and arduous, and the delay in time so lengthy that they would not have been able to recover these lost costs if and when the project did move forward.<sup>25</sup>

Advocacy urges the Services in making the proposed modifications, to make it clear that the Services will conduct an RFA analyses for every rulemaking so as to comply with its obligations under the RFA to specifically analyze the impacts to small business.

#### *Delisting Factors*

Advocacy supports the Services' attempt to revise portions of the regulations relating to delisting species to ensure that the standards for delisting are equivalent to those of listing the species in the first instance.<sup>26</sup>

Stakeholders stated that current language, as well as agency practice, establishes a heightened standard for delisting, with the result that delisting actions take much longer despite the five factor parameters being identical in either determination. The proposed rule would help to ensure that the two actions are equivalent. Delisting species once they are no longer threatened or endangered lifts the cumbersome permitting requirements that many small businesses face in conducting various activities within the designated habitat. There is no reason that the Services should be delaying these rulemakings in favor of listing rulemakings.

Advocacy suggests that in addition to the changes in the proposed rule, the Services further clarify that equal weight will be given to delisting species as it is to listing, and that both will be considered and acted upon within the same timeframe.

#### *Not Prudent Determination*

Advocacy appreciates the Services' efforts to clarify the circumstances under which the agencies are authorized to find that it is "not prudent" to designate critical habitat.<sup>27</sup> In situations where

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<sup>24</sup> See Comments of SBA Office of Advocacy, Designation of Critical Habitat for Gunnison Sage-Grouse (78 Fed. Reg. 57604) (filed December 2, 2013). See also several Comments from the SBA Office of Advocacy regarding no RFA analyses in the rulemaking, and/or incorrect certifications of rules by the Services. Available at: <https://www.sba.gov/category/advocacy-navigation-structure/legislative-actions/regulatory-comment-letters>

<sup>25</sup> See *id.*

<sup>26</sup> *Supra* note 16 at 196.

<sup>27</sup> See *Id.* at 197, 201.

conservation management actions cannot address the harm to the species, such as disease, it is not appropriate for the Services to designate critical habitat as this would not provide any further benefit to the species.

Advocacy is pleased that the Services have identified situations that would be considered “not prudent” and we encourage the agencies to consider additional bases under which critical habitat would not be appropriate, such as situations under which the economic and societal impacts outweigh the benefits to the species, and situations in which the areas to be designated are already under federal management for other purposes. Stakeholders have said that designating prior managed lands would ultimately be duplicative, and create unnecessary burdens while not providing any new or further protections for listed species.

This is also in line with the Services’ proposal to consider potential economic impacts and conduct regulatory impact analyses within rulemakings. Conducting such analyses will allow the Services to best determine those situations in which it is “not prudent” to designate due to marginal incremental benefits to the species relative to the economic impacts.

#### *Designating Unoccupied Areas*

The proposed rule states that the Services would only consider unoccupied areas as part of a designation where occupied areas alone would be inadequate to ensure conservation.<sup>28</sup> The Services then propose a second condition for considering unoccupied area, stating that they would consider the unoccupied portions when occupied areas alone would “result in less-efficient conservation for the species.”<sup>29</sup>

Advocacy has heard from stakeholders that the second condition that mentions “less-efficient” is problematic because it grants the agencies over-reaching discretion to designate unoccupied areas that are not based on what is actually essential for conservation. Advocacy urges the Services to consider the comments of the specific coalitions on this issue.<sup>30</sup>

The proposed rule also states that if the potential contribution of an occupied area is extremely valuable to the conservation of the species, then the Services may use a lower threshold than “likely” to contribute to conservation.<sup>31</sup> This too is problematic; it allows the Services to designate unoccupied areas of land as critical habitat when there is not a likelihood that doing so would contribute to species conservation. Stakeholders have stated that this type of designation is contrary to the intended purpose of the Act, which includes designating only those areas that are “essential” to the conservation of the species.<sup>32</sup> Advocacy would suggest the Services revisit this proposal, and consider eliminating the language allowing for a lower threshold, as this is contrary to the Act’s intentions.

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<sup>28</sup> *Id.* at 198.

<sup>29</sup> *Id.*

<sup>30</sup> See Comments of the ESA Cross-Industry Coalition, (83 Fed. Reg. 35,193, 35,178, 35,174) ( filed on September 24, 2018).

<sup>31</sup> *Id.* at 199.

<sup>32</sup> 16 U.S.C. § 1532 (5).

The Services are also seeking comment on whether to consider modifying the definition of “geographical area occupied by the species” and “physical or biological features.”<sup>33</sup> Advocacy has heard from stakeholders that they do wish to see these definitions modified in the final rule. Stakeholders are suggesting that the Services modify the definition of “geographical area occupied by the species” so as to avoid inclusion of areas that are only used temporarily or periodically by the species. Such areas are outside the scope, and thus should be designated under a separate determination and only when it is determined that designation is essential to the conservation of the species.

With respect to the definition of “physical or biological features” stakeholders have suggested that the 2016 final rule on critical habitat allows for the consideration of temporary or dynamic habitat features that may be based solely on potential future occurrences.<sup>34</sup> This allows for designations of areas based on features that may not have been in existence, are not currently in existence, and are unlikely to be in existence for several years if ever. The consideration of “potential” future occurrences does not rely on best available science, and is speculative. Advocacy recommends the Services revise the definition and consider clarifying that critical habitat can only be designated when the feature is actually present at the time of designation. Given that the Services can modify their designation at a future date, there should be no inclusion of areas that only have the “potential” for the feature to occur.

## **II. Comments in Response to Proposed Rule on Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Interagency Cooperation<sup>35</sup>**

### Small Businesses Are In Support of the Services’ Proposed Rule with Specific Suggestions.

Section 7 of the ESA requires Federal agencies to consult with the Services to ensure that any activities they intend to carry out do not jeopardize the existence of endangered or threatened species or result in the adverse modification of critical habitat.<sup>36</sup> The interagency consultation process results in delays to projects and high costs for small entities. The time and expenses associated with conducting these consultations that often result in additional requirements, in some cases make certain projects untenable for small businesses. Advocacy supports the Services’ efforts to streamline the consultation process, thereby reducing the burden to small business, and notes additional specific comments on the proposal below.

#### *Definition of Adverse Modification*

The proposed rule revises the definition of “adverse modification” by adding the phrase “as a whole” to the first sentence of the definition, and eliminating the second sentence.<sup>37</sup> Thus the definition would read, “Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat *as a whole* for the conservation of the

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<sup>33</sup> *Supra* note 16 at 194.

<sup>34</sup> *See* 81 Fed. Reg. at 7439 (codified at 50 C.F.R. §§ 424.02, 424.12 (b) (1) (ii)), 7422.

<sup>35</sup> Endangered and Threatened Wildlife and Plants; Revisions of the Regulations For Interagency Cooperation. 83 Fed. Reg. at 35, 178 (Proposed July 25, 2018).

<sup>36</sup> *See* 50 C.F.R. 402.02

<sup>37</sup> *Supra* note 32 at 179.

listed species” (emphasis added.)<sup>38</sup> Stakeholders have stated that they are in support of these changes. The addition of the “as a whole” language clarifies that the Services must determine if the overall value of the critical habitat is likely to be reduced. This ensures that not all actions that result in adverse effects be classified as destruction or adverse modification if they do not reduce the overall value.

The second sentence of the definition states that alterations may include physical or biological features, or those alterations that preclude or delay development of such features.<sup>39</sup> As currently written, the standard allows for the Services to make a finding of adverse modification for virtually any area with broad discretion. The Services could even make findings in those areas where a physical feature does not currently exist, but may have the potential to exist at some time in the future.<sup>40</sup>

Advocacy supports the Services’ proposal to strike this sentence from the definition. This standard creates ambiguity and uncertainty resulting in costly litigation both for businesses and the Agencies. Advocacy has heard from stakeholders that in some instances they have had to modify their project, find a new location, or pay high mitigation costs simply because there is the possibility that a biological feature may at some point in time be present on the land where one does not already exist.

Stakeholders also mentioned that they are concerned that the manner in which the proposed rule is written would allow for this practice to continue, as language in the preamble leaves room for the Services to continue this practice. Advocacy contends that findings of adverse modification should not be based on unoccupied areas that have no biological features to support the needs of the species, as this was not the Act’s intent.<sup>41</sup> The Services should take caution to properly clarify that these findings will be made only on what is available at the time of the determination.

#### *Definition of Appreciably Diminish*

The Services have stated that they do not intend to alter the definition and interpretation of the term “appreciably diminish” in this rulemaking.<sup>42</sup> Advocacy would encourage the Services to revisit this definition, noting that stakeholders have raised it as problematic stating that the standard is overly broad, and that as currently written adverse modification can be found based on any measurable effect rather than those that are actually harmful and adverse to the conservation of the critical habitat as a whole. Advocacy recommends that the Services work with stakeholders to develop a more workable definition that meets the agencies objectives and the intent of the Act while not being overly broad and burdensome.

#### *Definition of Environmental Baseline*

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<sup>38</sup> *Id.* at 180-181.

<sup>39</sup> *See* 81 Fed. Reg. at 7226 (Codified at 50 C.F.R. § 402.02).

<sup>40</sup> *See Id.* at 216-217.

<sup>41</sup> *See* 16 U.S.C. § 1532 (5).

<sup>42</sup> *Supra* note 32 at 182.

In the proposed rule the Services state that they are modifying the environmental baseline definition to be a stand-alone definition. The definition would be clarified to include “past, present and ongoing impacts of all past and ongoing Federal, State or private actions.”

<sup>43</sup> Advocacy has heard that stakeholders are strongly in support of this change and thus would encourage the Services to proceed with the modification.

Stakeholders have indicated that under the current definition, the Services have in the past converted beneficial rulemakings into harmful ones by creating artificial baselines that consider ongoing actions that would continue absent the action in question, instead of counting those as part of the environmental baseline. Actions that would continue after the consulting Agencies action, but which are not caused by it, should not be counted as such. Some stakeholders also indicated that if the action has already been considered under another environmental analysis framework, it should not be considered once again, for example if the action has been considered for its impacts under NEPA or another statute by which the designation would be covered.

### *Streamlining Consultation*

The proposed rule makes several references to streamlining the consultation process in the context of Section 10 permits, and programmatic consultations.<sup>44</sup> Small businesses have stated they are generally in favor of these proposed changes, with a few minor modifications to the overall proposals. Advocacy supports efforts to reduce the burden of the consultation process and encourages the Services to carefully review the public comments of the coalitions, and consider the changes being sought in the final rulemaking.<sup>45</sup>

## **III. Comments in Response to Proposed Rule on Endangered and Threatened Wildlife Species and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants<sup>46</sup>**

### Small Businesses are Strongly in Favor of the Proposed Rule

As stated above, Section 9 of the ESA provides prohibitions on activities that would harm species listed as endangered.<sup>47</sup> Section 4 (d) allows the Services to extend prohibitions to threatened species at the Services’ discretion.<sup>48</sup> This rule proposed solely by FWS would modify FWS policies to align with those of NMFS. That is, the Service is proposing to eliminate a “blanket § 4 (d) rule” and instead develop species-specific rules for each species that is listed as threatened.<sup>49</sup> Developing species-specific rules would streamline the protections needed for each individual species. Currently, FWS treats endangered and threatened species as needing the same protections, which is neither realistic nor accurate.

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<sup>43</sup> *Id.* at 184.

<sup>44</sup> *Id.* at 19

<sup>45</sup> See Comments of the ESA Cross-Industry Coalition, (83 Fed. Reg. 35,193, 35,178, 35,174) (filed on September 24, 2018).

<sup>46</sup> Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 83 Fed. Reg. 35, 174 (Proposed July 25, 2018).

<sup>47</sup> 16 U.S.C. §1538 (a).

<sup>48</sup> *Id.*

<sup>49</sup> *Supra* note 45 at 175.

Advocacy supports these changes. Small business stakeholders need rules that are well-defined and as narrow in scope as possible. The “blanket rule” has meant that small businesses have to apply for additional permits to be able to conduct activities that have minimal or beneficial effects on species recovery. With this proposal, the rules will automatically be tailored to the specific species and will eliminate the need for additional permit applications and reviews.

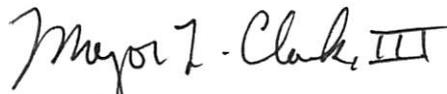
Advocacy also supports the proposal to finalize species-specific rules concurrent with final listings. Advocacy understands that in some cases it may not be feasible to finalize both rules concurrently. In those instances Advocacy would encourage the Service to issue a section 4 (d) proposal at the time of final listing so that the industries affected by the proposal have an opportunity to review and be alerted as soon as possible whether their activities will be prohibited or require further permitting.

### **Conclusions and Recommendations**

Advocacy applauds the Service’s efforts to respond to regulatory reform concerns from the public by proposing three rules to revise definitions and procedures under the ESA. Advocacy encourages the Services to consider the impacts to small business in these three and conduct regulatory impact analyses on the proposals before they are finalized. Furthermore, Advocacy requests that the Services not finalize the critical habitat unoccupied lands section of the rule prior to the outcome of the current litigation on the subject.

Advocacy urges FWS and NMFS to give full consideration to the above issues and recommendations. If you have any questions or require additional information please contact me or Assistant Chief Counsel Prianka Sharma at (202) 205-6938 or by email at prianka.sharma@sba.gov.

Sincerely,



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



Prianka P. Sharma  
Assistant Chief Counsel

Office of Advocacy  
U.S. Small Business Administration

Copy to: Neomi Rao, Administrator  
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Office of Management and Budget