TRANSPORTATION AND NATURAL RESOURCES
CYNTHIA C. MCDONALD, COUNTY EXECUTIVE

Travis County Administration Building
700 Lavaca Street-5th Floor
P.O. Box 1748
Austin, Texas 78767
Phone: (512) 854-9383

24 September 2018

U.S. Fish and Wildlife Service
MS: BPHC, 5275 Leesburg Pike
Falls Church, VA 22041-3803

RE: Public Comments Processing
Attn: FWS-HQ-ES-2018-0006
FWS-HQ-ES-2018-0007
FWS-HQ-ES-2018-0009
Proposed Rules: Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation; Revision of the Regulations for Listing Species and Designating Critical Habitat; Revision of the Regulations for Prohibitions to Threatened and Wildlife and Plants

Dear Sir or Madam:

The Travis County Natural Resources and Environmental Quality Division (NREQ) appreciates the opportunity to comment on the U.S. Fish and Wildlife Service's (USFWS) proposed rule changes to 50 CFR Parts 17, 402, and 424 of the Endangered Species Act (ESA). NREQ has more than 20 years of experience conserving endangered species while facilitating development in one of the fastest growing regions of the country. As an agency dedicated to the conservation of endangered species that has spent millions of dollars on land acquisition and management for this purpose, NREQ is opposed to these proposed ESA rule changes.

Travis County and the City of Austin, Texas obtained a 10(A)(1)(b) incidental take permit by the USFWS in 1996 for the Balcones Canyonlands Conservation Plan. This permit allows the loss of some endangered species or their habitats in the course of otherwise legal actions, such as development, as long as mitigation land is protected and carefully managed for those endangered species. This successful permit has allowed development and economic growth to occur in a rapidly urbanizing area while protecting more than 30,000 acres of habitat. The Balcones Canyonlands Preserve benefits numerous endangered species, including the golden-cheeked warbler (*Setophaga chrysoparia*) and the recently delisted black-capped vireo (*Vireo atricapilla*). It is an example of the ESA properly functioning to protect, and ultimately recover, endangered species.

The purpose of the ESA is to prevent species extinctions and to help species recover so they are no longer at risk of extinction. Many of the proposed changes would weaken the ESA's ability to protect and recover. Therefore, these changes undermine the intent of the law. The proposed changes would likely reduce protections to the species Travis County is tasked with protecting. These species need to be strongly protected throughout their range or our efforts in Travis County may be in vain.

Travis County's Natural Resources Program staff offer the following comments on proposed changes to 50 CFR Parts 17, 402, and 424 of the ESA. The comments for all parts have been combined because the

impacts of the rule changes are interconnected. We categorized the type of impacts these proposed rule changes will cause and highlighted them with a few examples.

Changes that would reduce recovery efforts and/or increase cumulative effects

The proposed rule Part 402.02 to alter the definition of "destruction or adverse modification" raises the bar for which Federal actions might trigger such a determination. Currently, destruction or adverse modification is defined as:

> "a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of the species or that preclude or significantly delay development of such features."

With the focus on critical habitat, it should be noted that Section 3(5)(A) of the ESA defines critical habitat as areas "essential" to the conservation of the species. The proposed rule defines destruction or adverse modification as:

> "a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species."

This change alters the intent of the ESA by diminishing the importance of the areas that have been designated as critical habitat as less than "essential". This change signals to Federal agencies that unless an action will impact the entire critical habitat, no destruction or adverse modification will occur. This higher threshold for determination of destruction or adverse modification has the potential to erode the integrity of critical habitat and lead to a 'death by a thousand cuts'. The alteration to the definition would allow for the proliferation of multiple adverse impacts, which would not meet the threshold for the determination individually. Those cumulative effects would amount to destruction or adverse modification.

The proposal removes the second sentence of the definition:

> "Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of the species or that preclude or significantly delay development of such features."

This further weakens the ESA by minimizing the importance of unoccupied critical habitat to the recovery of the species. This very issue was raised in Sierra Club vs USFWS, 245, F.3d 434 (5th Cir. 2001) with the court ruling that the USFWS must consider not only survival of a species, but recovery in order to comply with the spirit of the ESA. Removing the language to highlight these areas essential to recovery, coupled with the proposed rule Part 424.12 to restrict the ability of the USFWS and the National Marine Fisheries Service (NMFS) [collectively referred as the "Services] to designate unoccupied habitat as critical habitat, culminate in a weakening of the ESA that is contrary to the goal of species recovery. Many endangered species exist only in small portions of their historic range. If unoccupied habitat can reasonably provide an opportunity to help species recover, it should be included as critical habitat.

Another proposed change is adding this sentence to 402.14(g)(8):

> "Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action and do not require any additional demonstration of specific binding plans or a clear, definite commitment of resources."

This change would mean that the USFWS does not need to consider whether a Federal agency has specific binding plans or the committed financial resources available to carry out actions that would mitigate for the impacts being proposed in the formal consultation. In other words, an agency could impact a species, claim that they are going to mitigate, but then fail to carry out the mitigation measures. Having assurances that the mitigation efforts will be carried out is important to protecting endangered species. Without it, uncompensated losses will inevitably occur. Courts have supported this idea and the USFWS is dismissing this important protective measure by adding this sentence.

The wording change proposed in 424.11 states "the Secretary shall consider the same factors and apply the same standards" when considering delisting of a species. The wording is ambiguous and could be interpreted to mean that only factors that were originally considered in each species listing would be considered in delisting determinations. It is not clear if threats that emerge after listing will also be considered in the delisting. For example, a species originally listed due to habitat loss subsequently becomes threatened by a new disease which further inhibits species recovery. Even if sufficient habitat becomes available, the species should remain listed until the population has fully recovered from the threat of the disease. Delisting should be contingent on the success of meeting criteria established in species recovery plans. Recovery plans should be updated periodically to address current conditions and new threats.

Changes that allow more discretionary authority rather than using best available science

The proposed changes to these rules also weaken the ESA by creating opportunities for the Services to utilize discretionary authority, rather than making data-driven decisions. There are multiple examples within these three proposed rule changes, but here we highlight changes to the definition of "foreseeable future" and to section 7 allowances for interagency cooperation.

The proposed addition to section 424.11 is presented as adding guidelines and clarification to the term "foreseeable future," however this addition increases the vagueness of the term. The proposed change would allow the USFWS to determine the foreseeable future on a "case-by-case basis" and require the Services to determine that future threats to a species are "probable." By expanding on the qualitative statement "foreseeable future," the Services open the determination of threat and the species' responses to judgement calls on what is "probable" within this undefined time period. This weakens the Services' relationship with science and data-driven decision making by allowing the Services to dismiss and or bypass threats reported by published, reputable scientific analyses at the discretion of the Services on the grounds of what is "probable." This change does not clarify the time period of "foreseeable future," but rather allows that time period to be altered to adjust to the whims of the Services.

Another example of the weakening of the ESA and the increased allowance of discretionary authority within these changes is within 402.03 - allowing Federal agencies the ability to preclude consultation when an agency does not "anticipate take." This leaves the determination of "take" to non-experts, and agencies without the capacity, experience, or resources to determine whether their actions will have impacts on a given species. This will undoubtedly result in the unknowing and/or unacknowledged take of listed species, which will inhibit the prevention, mitigation, and restoration of take to occur. This change would negatively impact both the recovery and the survival of listed species.

Changes that increase rather than decrease bureaucracy

This phrase in Section 424.11(b) is proposed for deletion:

> ". . .without reference to possible economic or other impacts of such determination."

Removing this phrase and allowing the mention of economic impacts for listing decisions would be detrimental to the Services and would not benefit the species the ESA was designed to protect. This change directly contradicts Executive Order 13777 ("Streamlining Regulatory Processes and Reducing

Regulatory Burden"), and Executive Order 13771 ("Reducing Regulation and Controlling Regulatory Costs"). Removing this phrase will not streamline regulatory processes or control regulatory costs. Allowing economic impact consideration would generate substantial increases to the workload and shift staff use of time and expertise from actual conservation. Creating the need for additional economic impact studies would increase, rather than streamline, regulatory costs. It could also erode public support, by making it hard for people to see anything but a price tag for conservation. The ESA is expected to make determinations, "solely on the basis of the best scientific and commercial data available," and allowing economic impacts to be considered would only complicate and confuse the process. The proposed rule mentions that "solely" was added to this phrase in 1982 to avoid anything but, "the best scientific and commercial data available" to hold merit in making determinations. The language of using "the best scientific and commercial data available" without regards to economic impact ensures that the species get the protection necessary to ensure their recovery.

In the 50 CFR Part 17 proposed rule change, adding the need for a species-specific rule in order to promulgate protections for threatened species would significantly increase regulatory burden and costs, contradicting the mandates of Executive Orders 13777 and Executive Order 13771. Requiring species-specific plans will increase the amount of effort and time it will take to get a species under protection once it is listed. With the current 4(d) rule, threatened species automatically share the same protections as endangered species without need for any lag time. If this proposed rule were to be accepted, threatened species would linger unprotected for an unknown amount of time while potentially declining in numbers and remaining subject to threats. If this rule is passed and threatened species are allowed to remain in limbo, it will be more difficult and costly to reverse population declines that will likely ensue. Additionally, it is not reasonable to assume the USFWS would have the same capability as NMFS to enact these species-specific rules in a reasonable amount of time, since the USFWS manages some 401 threatened species (https://ecos.fws.gov/ecp0/reports/ad-hoc-species-report) and NMFS is accountable for only 48 threatened species (https://ecos.fws.gov/ecp0/reports/ad-hoc-species-report). Species-specific conservation rules could be beneficial if they do not delay the listing process and subsequent protections.

Concerns about clarity of rule

Many of the proposed changes appear unnecessary and do not clearly demonstrate the need for modification. The seemingly subtle semantics changes lead to difficulty in deciphering the intent and ramifications of the proposed rules. In addition, the proposed changes are not consistent with Executive Orders 12866 and 12988 and the June 1, 1998 Presidential Memorandum, specifying that the rules be written in plain language and that it is logically organized and clearly written. Tables and lists should be used wherever possible. We recommend the USFWS provide a Table that displays the original text of the rule, the proposed change, and the intent and necessity of each change. The following changes highlight examples of particularly abstruse language:

- 402.02 (d) Definition of "Effects of the action" is not written clearly
- 402.02 (g) Service responsibilities (4) on usage of agency effects and the environmental baseline is not written clearly
- 402.02 Definition of programmatic consultation, the intent of this addition is unclear
- 402.14 (h) Biological Opinions (4) verbose, and the intent of this change is unclear
- 424.11 (d) Definition of "foreseeable future" is too long and not written clearly
- 424.11 (e)(2) Sentence is not clearly written and meaning is ambiguous
- 424.12 Paragraph 2, discussing designation of critical habitat in unoccupied areas is too long, and discusses steps for designation out of logical order

Summary

NREQ has firsthand experience of how the ESA can be successful in protecting listed species. Studies have found that the ESA has wide public support and people are generally concerned with species

survival. Changes to the ESA should strengthen its ability to protect species from extinction and to recover species at risk of extinction. The proposed regulation changes shall weaken the ESA and its purpose of protecting and recovering species. In fact, in most cases, the changes put species at added and unnecessary increased risk by delaying protections, and it is likely to increase costs and agency staff burdens. NREQ does not support the proposed revisions to 50 CFR Parts 17, 402, or 424 of the ESA. We would welcome the chance to work with the USFWS to propose meaningful measures to improve species conservation. Thank you for the opportunity to comment on the proposed changes.

Respectfully,

Jon A. White
NREQ Division Director
Travis County Transportation and
Natural Resources Department

Melinda Mallia
Natural Resources Program Manager
Travis County Transportation and
Natural Resources Department

cc: C. McDonald, TNR, County Executive
K. Harvey, BCCP Secretary
S. Kuhl, City of Austin