United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

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The Honorable Cliff Bentz
Chairman
Subcommittee on Water, Wildlife, and Fisheries
Committee on Natural Resources
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Bentz:

Enclosed are responses to questions for the record submitted to U.S. Fish and Wildlife Service Assistant Director for Ecological Services Gary Frazer following his appearance before your Subcommittee at the October 25, 2023, legislative hearing. These responses were prepared by the U.S. Fish and Wildlife Service.

Thank you for the opportunity to respond to you on this matter.

Sincerely,

Pamela L. Barkin
Acting Legislative Counsel
Office of Congressional and
Legislative Affairs

Enclosure

cc: The Honorable Jared Huffman
Ranking Member
Subcommittee on Water, Wildlife, and Fisheries

Questions for the Record
House Natural Resources
Water, Wildlife, and Fisheries Subcommittee
Legislative Hearing
October 25, 2023

Questions from Subcommittee Chairman Bentz

Question 1: What percentage of species listed under the ESA are improving?

Response: The approximately 1,600 Endangered Species Act-listed species under the U.S. Fish and Wildlife Service's jurisdiction face a wide variety of threats and have varying life histories, which makes it very difficult to say at a particular point in time whether a species is "improving" in a biologically significant way. For example, a species may have more individuals than it did several years ago while also suffering significant habitat decline or may be experiencing one or more poor reproduction cycles. For listed species, the margin of error is so thin that it would be unwise and misleading to declare overall improvement until the best available science supports a change in species status from endangered to threatened (downlisting) or from endangered or threatened to recovered (delisting).

The Service works with states, Tribes, other federal agencies, landowners, the private sector, and other conservation partners to develop and execute species recovery plans: our roadmaps to improvement, recovery, and, ultimately, delisting. Currently, 84 percent of listed species have final recovery plans that are designed based on the best available science to improve species status. Ensuring that the Service has sufficient resources to develop, maintain, revise, and execute recovery plans is critical.

Further, through the biennial Recovery Report to Congress, the Service details the progress toward recovery of all domestic threatened and endangered species protected under the ESA for which the Service has lead responsibility. The report provides the outcomes of comprehensive status reviews that evaluate a species' status in relationship to the ESA's five factors and definitions of threatened and endangered species. The 2020 Recovery Report to Congress conveyed that as of September 30, 2020, status reviews had been completed for 93% (1,388) of the U.S. species listed for 5 or more years under the jurisdiction of the Service. Of the 1,388 status reviews completed, 93 percent (1,294) recommend no change in status for the species, 3 percent (40) recommend reclassifying from endangered to threatened, 3 percent (38) recommend delisting (22 due to extinction, 13 due to recovery, and 3 due to error), 1 percent (13) recommend reclassifying from threatened to endangered, and less than 0.01 percent (2) recommend a revision to the listed entity. For individual species, five-year status reviews provide information on the condition of the species at the time of review, including by documenting changes to factors like species habitat, populations, threat reduction, and genetics. We are happy to discuss any individual species with you at your convenience.

Question 2: The Service has indicated plans to restore the "blanket 4(d) rule," that automatically regulates endangered species as if they were threatened. During this administration, the Service has so far listed 11 animal species as threatened. It could have extended endangered-level regulations to any of them. Instead, in every case, it has rejected that approach because a tailored rule would be better for species conservation. Given this

administration's consistent rejection of the blanket rule's approach, why is it moving forward with plans to restore the blanket rule?

Response: Reinstating the "blanket rule" will provide a base level of protection for all species listed as threatened while retaining the option for the Service to adopt a species-specific 4(d) rule. Absent the blanket rule, we must promulgate a species-specific rule to extend any protections for threatened species. Blanket rule protections include the section 9 prohibitions afforded to endangered species, but the rule also includes multiple exceptions to those prohibitions that allow additional activities than those allowed for endangered species. The Service's ability to tailor protections to what is necessary and advisable for a given species is an important tool to further the conservation of threatened species and will not be affected by reinstating the blanket rule. For every newly listed threatened species, we will determine what section 4(d) protections are appropriate. For threatened species of wildlife, we anticipate that we will continue to routinely use species-specific 4(d) rules to incentivize known beneficial actions for the species by removing or reducing regulatory requirements associated with those actions and remove or reduce regulatory requirements associated with permitting of otherwise prohibited actions or forms or amounts of "take" considered inconsequential to the conservation of the species. However, for plants, we expect to use blanket rules frequently because the prohibitions for plants under the Act are narrower than those for wildlife. The final regulation will allow us the flexibility to apply the appropriate protective regulations in the most efficient manner based on the best available scientific and commercial information.

Question 3: In the 2019 final rule to revise the regulations for Section 4 of the Endangered Species Act relating to listing of endangered and threatened species and designating critical habitat, the Fish and Wildlife Service and the National Marine Fisheries Service added more robust and detailed procedures for the designation of unoccupied areas as critical habitat. The 2023 proposed rule would largely remove those regulatory provisions. Along with the 2022 rescission of the definition of "habitat" that was finalized in 2020, with this proposed rule, it appears that the Services are opting for regulatory ambiguity and unconstrained discretion in deciding what areas qualify as critical habitat. Can you explain why the Services are proposing removal of these provisions?

Response: The 2024 final rule revises the implementing regulations for the designation of unoccupied critical habitat by removing requirements that are not mandated by the language or structure of the Act and better fulfills the authority of the Secretaries of the Interior and Commerce to further the conservation purposes of the Act. The final rule removes certain criteria for designating unoccupied areas as critical habitat, but does not expand the Services' authority under the ESA to designate unoccupied habitat. The final rule removes the requirement that unoccupied areas must have a "reasonable certainty" to both contribute to the species' conservation and contain one or more features essential to the species' conservation. The final rule also removes the requirement that the Services must designate all possible occupied areas as critical habitat before designating any unoccupied areas. These criteria, most of which were newly added to the regulations in 2019, imposed requirements beyond the statutorily required

science-based finding that an unoccupied area is "essential for the conservation" of the listed species. In doing so, these criteria created the perception that critical habitat designations would need to be based on an ambiguously high level of certainty with respect to those data rather than on the best scientific data available. Moreover, imposing a "reasonable certainty" standard is unnecessary because the best-available-data standard of the Act already prohibits the Services from basing their decisions on speculation. Under the final rule, we must apply the best scientific data available, and in the record for any rulemaking that includes a designation of unoccupied areas, we must provide an explanation and support for why we have concluded that the unoccupied areas being designated as critical habitat are "essential" for that species' conservation. We must also designate critical habitat in a manner consistent with the Supreme Court decision in *Weyerhaeuser Co. v. U.S.F.W.S*, 139 S. Ct. 361 (2018).

Question 4: The courts have said that species are to be delisted when they no longer meet the definition of a threatened species or endangered species. The existing regulations use the word "shall" to reinforce this mandatory obligation. The 2023 proposed rule to revise the regulations implementing Section 4 of the Endangered Species Act relating to listing of endangered and threatened species and designating critical habitat would revise this to say that the regulatory criteria demonstrate when "it is appropriate to delist a species." Can you explain this change in position, which appears to diverge from what is required by statute?

Response: The language referred to in this question was revised in the final rule that the Services published on April 5, 2024, which states, "Species will be delisted" if any of the reasons for delisting is present. These revisions to the delisting criteria do not change the meaning, standards, procedures, or requirements for delisting under the Act. The fundamental question under the Act for listing, delisting, or reclassification (i.e., classification) is whether the species meets the definition of an "endangered species" or "threatened species" because of any of the factors in section 4(a)(1) of the Act, which is the standard we have retained in our regulations. Under the final rule, the Services have made clear that they will delist any species if they determine that it does not meet either definition, after conducting a status review based on the best available scientific and commercial data available.

Question 5: In the proposed rule to revise regulations for interagency cooperation under Section 7 of the Endangered Species Act published earlier this year, the Fish and Wildlife Service and the National Marine Fisheries Service are considering revisions to their long-standing interpretation of the scope of "reasonable and prudent measures." If this proposed language is finalized, instead of minimizing the impacts of incidental take, the Services could require that these impacts be fully offset. This change could impose significant additional costs on project proponents. Can you explain the legal basis/authority for this change since it appears contrary to the plain language of ESA Section 7(b)(4)(C)(ii)?

Response: Under the proposed regulatory revisions, which the Service has since finalized and which took effect on May 6, 2024, the Services clarified that, after considering measures that avoid or reduce incidental take within the action area, the Services may consider reasonable and prudent measures (RPMs) inside or outside the action area that offset any remaining impacts of incidental take that cannot be avoided.

As mentioned in the preamble of our final rule, the legal authority that authorizes the use of offsets as RPMs is found in the statutory language contained in ESA Section 7(b)(4). That section provides the requirements for issuance of an incidental take statement (ITS), which includes RPMs and the terms and conditions to carry out the RPMs specified in the statement. If, after consultation, the Secretary concludes that the agency action will not violate section 7(a)(2) of the ESA (i.e., will not jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat), but incidental take of the listed species is anticipated, the Secretary must provide the agency with a written statement that includes certain components. The written statement must specify the impact of such incidental taking on the species and specify those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact (16 U.S.C. 1536(b)(4)). ESA Section 7(o) further provides that taking in compliance with the terms and conditions of the ITS is then exempt from the taking prohibitions of ESA Section 9 (16 U.S.C. 1536(o)).

None of these provisions indicates the specific types of RPMs that may be used to minimize impacts of incidental take, nor the extent to which impacts may be minimized. By referring to measures the Services deem "necessary or appropriate," the Act provides the Services with substantial discretion to identify RPMs.

And as the Services discussed in the final section 7 revision preamble, the relevant language at ESA section 7(b)(4)(C)(ii) states that RPMs are to include measures that minimize the "impacts" of incidental take, not just incidental take itself. Like measures that avoid or reduce incidental take, the Services' understanding is that offsetting measures will also "minimize" the impacts of incidental take on the species.

As explained in the final rule, we anticipate measures that avoid or reduce incidental take will, in most cases, be all that is "necessary or appropriate" to minimize the impacts of incidental take caused by the Federal proposed action subject to consultation. Further, any offsetting measures specified by the Services must be proportional to the impact from incidental take, and the scale of the take caused by the action would provide an upper limit on the scale of any offsetting measures. Any RPM, including offsetting measures, must also comply with the minor change rule such that RPMs, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may only involve minor changes.

Question 6: The rulemaking making revisions related Section 7 of the ESA was issued days after a significant ruling from the U.S. Court of Appeals from the D.C. Circuit, *Maine*

***Lobstermen's Association v. National Marine Fisheries Service*, No. 22-5238 (D.C. Cir. June 16, 2023). Could you please clarify how this ruling may affect section 7 consultation, as well as other areas of ESA implementation, including in the development and issuance of a final rule?**

Response: The Service expects application of the *Maine Lobstermen's Association v. National Marine Fisheries Service* decision to be limited to its facts without broader implications for the Service in our implementation of section 7(a)(2). The Service views the opinion's holding as being confined to the specific facts in the National Marine Fisheries Service's administrative record before the Court.

For further context, please see the recent Endangered Species Act joint rule with the National Marine Fisheries Service, in which the Services explained the limited implications of the *Maine Lobstermen's Association* decision. *Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation*, 89 Fed. Reg. 24,268, 24,269-24,270 (Apr. 5, 2024).