

United States Senate
WASHINGTON, DC 20510

October 8, 2014

Honorable Sally Jewell
Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, DC 20240

Honorable Penny Pritzker
Secretary
U.S. Department of Commerce
1401 Constitution Ave, NW
Washington, DC 20230

Dear Secretary Jewell and Secretary Pritzker,

We write to request that you withdraw two proposed rulemakings and a draft policy issued by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) on May 12, 2014 that relate to critical habitat designations under the Endangered Species Act (ESA). As Ranking Members of the Senate Committees and Subcommittees with jurisdiction over the ESA, we are concerned that the proposals provide the FWS and the NMFS with an unprecedented ability to designate vast swaths of land and bodies of water as critical habitat with limited justification and without stakeholder input.

These latest proposals follow a troubling trend, at both Services, of expanding the ESA beyond its lawful scope. In 2011, the FWS reached a secret sue-and-settle agreement with two radical environmental groups to require listing determinations on more than 250 species across the entire United States. In August 2013, the Services moved forward with a rule to severely limit economic analyses required under the ESA. These alarming actions are transforming the Act into less of a statute designed to protect species, and more of a statute that controls and encroaches upon land and private property and limits the productive use of that land.

Furthermore, the proposals function in tandem to fundamentally expand the Services' abilities to designate areas as critical habitat. In turn, this limits appropriate development or other economically beneficial uses on those lands.

Under the proposed rule, the Services assert authority under the ESA that they never claimed existed in the nearly forty years they have enforced the Act. First, they claim, in direct conflict with their current regulations, the authority to designate unoccupied areas as critical habitat, even if the occupied areas already designated as critical habitat are sufficient to provide for the conservation of the species. Second, they claim the authority to designate unoccupied areas as critical habitat even if they do not presently - and may never - "have the [physical and biological] features essential to the conservation of the species." These assertions are an overreach not supported by the plain text of the ESA. If the Services believe the ESA needs to be amended to address what they believe may be the future effects of climate change, their only avenue for that authority is through Congress and not around it.

In addition, the proposal's revised definition of "destruction or adverse modification" is an inappropriate transformation of the ESA. Under the proposed definition, the Services will seek to

protect, from “destruction or adverse modification,” not only the habitat features that are currently present and that are essential to the conservation of the species, as generally understood to be provided by the ESA, but also the features that might someday develop and become essential to the conservation of the species. The ESA does not provide such authority. Congress defined “critical habitat” in areas occupied by the species as the areas “on which are found those physical and biological features ... essential to the conservation of the species and ... which may require special management considerations or protection.” Thus, what defines habitat as critical and in need of protection against “destruction or adverse modification” are the essential “physical and biological features” presently found in the habitat, and not the features that could potentially be found in a geographic area.

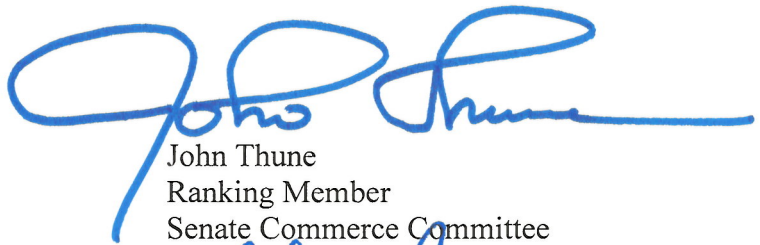
Finally, the Services’ draft policy on exclusions should serve as a warning to states with significant federal lands. By issuing a policy that focuses on the “benefits” of including federal lands as critical habitat, the Services virtually guarantee that more federal lands will be included in critical habitat designations. This could severely impact both renewable and traditional energy production on federal lands, at a time when our country needs to enhance its energy resources and the opportunities that these resources provide.

The Services claim that these two rulemakings and draft policy are simply efforts to “increase the predictability and transparency” of critical habitat designations. To the contrary, we strongly assert that they fundamentally alter how critical habitat will be designated in the future. As a result, the Services improperly assume authority from Congress. These proposed rulemakings and the draft policy were released without any significant Congressional consultation. Moreover, if the FWS and the NMFS proceed, these changes will be used to ultimately lock up more federal and private lands from any productive and beneficial use. As such, we request you withdraw these proposals immediately.

Sincerely,



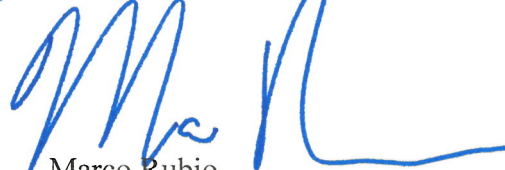
David Vitter
Ranking Member
Senate EPW Committee



John Thune
Ranking Member
Senate Commerce Committee



John Boozman
Ranking Member
Subcommittee on Water and Wildlife



Marco Rubio
Ranking Member
Subcommittee on Oceans, Atmosphere
Fisheries and Coast Guard

Cc: Dan Ashe, Director, USFWS
Dr. Kathryn Sullivan, Under Secretary of Commerce and NOAA Administrator