

September 21, 2018

Public Comments Processing
Attention: FWS-HQ-ES-2018-0007
U. S. Fish and Wildlife Service, MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

RE: Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants (Docket No. FWS-HQ-ES-2018-0007; 4500030113)

Dear Secretary Zinke,

The Animal Legal Defense Fund (ALDF) and the Animal Welfare Institute (AWI) submit the following comments regarding the U.S. Fish and Wildlife Service (the Service)'s proposal to rescind blanket protections for threatened species under the Endangered Species Act (ESA), 16 U.S.C. § 1533(d). ALDF is a national nonprofit organization that represents over 250,000 members nationwide, whose mission is to protect the lives and advance the interests of animals through the legal system. AWI is a nonprofit charitable organization founded in 1951 and dedicated to reducing animal suffering caused by people. AWI engages policymakers, scientists, industry, and the public to achieve better treatment of animals everywhere—in the laboratory, on the farm, in commerce, at home, and in the wild. ALDF and AWI urge the Service to withdraw this proposal and continue protecting threatened species as the ESA requires.

The ESA is clear that the Service must act to protect threatened species. If the Service lists a species as threatened, by definition, it has concluded that special protections are necessary to halt that species' decline toward endangerment, and therefore extinction, "within the foreseeable future." *See id.* § 1532(20). Section 4(d) of the ESA requires the Service to issue regulations to provide for the conservation of species listed as threatened. *Id.* § 1533(d). While the Service has discretion in determining exactly *what* protections are necessary for a specific species, it does not have the discretion to determine *whether* protections are necessary for a species, once listed. *Id.* § 1533(d) ("Whenever any species is listed as a threatened . . . the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species.") In keeping with the statute's policy and purpose of conserving threatened species, *id.* § 1531, the ESA expressly allows the Service to extend the same protections to threatened species as to endangered species, *id.* § 1533(d), as a means of carrying out that directive.

Contrary to this clear statutory mandate, the Service now proposes to leave listed species without the legal protections required by the ESA unless or until the Service issues species-specific regulations. This shifts the baseline for threatened species from protected to unprotected, which directly contravenes and is contrary to the ESA. The proposed rule increases the risk that threatened species will be deprived of protection due to a lack of Service resources necessary to write such special rules. Given the Service's pattern and practice of failing to issue species-specific rules, continuing to extend blanket, baseline protections to threatened species is necessary to effectuate the ESA's mandate.

The Service's proposal and consistent failure to promulgate species-specific regulations is especially problematic for captive animals. The ESA's section 9 anti-take provision protects captive wildlife. *See, e.g.*, 80 Fed. Reg. 7380, 7385 (Feb. 10, 2015) (“[T]he ESA does not allow for captive held animals to be assigned separate legal status from their wild counterparts on the basis of their captive status.”); *id.* at 7399 (“On its face the ESA does not treat captives differently. . . . Section 9[] of the ESA [prohibiting take] applies to endangered species regardless of their captive status.”); 79 Fed. Reg. 37578, 37597 (July 1, 2014) (“Captive members have the same legal status as the species as a whole.”); *accord* Order, *Graham v. San Antonio Zoological Society*, No. 5:15-cv-01054-XR, DE 16 (W.D. Tex. Jan. 27, 2016). However, as the Service's current regulations recognize, captive animals require different considerations than their counterparts in the wild. *See* 50 C.F.R. § 17.3 (distinguishing captive from wild animals in the context of “harass”); 63 Fed. Reg. 48634, 48636 (Sept. 11, 1998) (“[T]he captive or non-captive status of a particular specimen is a significant factor in determining whether particular actions would ‘harass’ that specimen or whether such actions would ‘enhance the propagation or survival’ of the species.”).

Specifically, the Service's proposal has the potential to fundamentally alter how captive animals are treated in the context of exhibition, experimentation, and canned hunts. Regarding exhibited animals, the Eighth Circuit recognized in *Kuehl v. Sellner* that ESA protections extend to the living conditions of animals in captivity and that treatment of captive endangered or threatened animals can violate the ESA's prohibition on the “taking” of these species by “harming” and “harassing” them. 887 F.3d 845, 852-54 (8th Cir. 2018); *see also Kuehl v. Sellner*, 161 F.Supp.3d 678, 711-13, 717-18 (N.D. Iowa 2016). The proposed rule would provide no ESA protections to animals listed as threatened in the future until a special rule is issued, which could be years after listing, or never, which leaves these animals vulnerable to take. ESA protections for exhibited animals covered by the ESA are necessary to ensure that mistreatment can be addressed. Regarding experimentation, the proposed rule would allow for species listed as threatened in the future to be subjected to harm, harassment, and death with no obligation for the researcher to obtain a take permit. This could open the door to painful and lethal experimentation and unsuitable housing, handling and care with no Service oversight. Similarly, regarding canned hunts, the proposed rule would allow for species listed as threatened in the future to be bred and killed on canned hunting ranches without a permit, which would allow ranchers to circumvent any oversight under the ESA, unless a special rule provided otherwise. This proposed rule would therefore eliminate vital safeguards for the treatment of certain imperiled species.

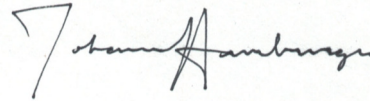
Extending blanket protections for threatened species or providing interim measures in the absence of species-specific regulations is the only means of ensuring that captive members of threatened species will be free from the types of activities that threaten and ultimately endanger their survival, as the ESA requires. Failing to extend the protections offered to endangered species or provide interim measures while the Service delays or simply never promulgates species-specific regulations deprives captive animals of legal protection to which they are entitled, in violation of the ESA

ALDF and AWI urge the Service to act in accordance with the ESA by withdrawing this proposal and continuing its practice of extending blanket protections to threatened species in the absence of species-specific regulation.

Sincerely,

Cristina Stella

Cristina Stella
Staff Attorney
Animal Legal Defense Fund
525 E. Cotati Ave.
Cotati, CA 94931
Phone: 707-795-2533 ext. 1055
Email: cstella@aldf.org

A handwritten signature in black ink, reading "Johanna Hamburger". The signature is written in a cursive style with a large, stylized initial "J".

Johanna Hamburger
Wildlife Attorney
Animal Welfare Institute
900 Pennsylvania Avenue, SE
Washington, DC 20003
Phone: 202-446-2136
Email: johanna@awionline.org