



**DESERT TORTOISE COUNCIL**

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Submitted via <https://www.regulations.gov>

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Martha Williams, Director  
Carey Galst, Branch of Listing Policy & Support  
U.S. Fish and Wildlife Service  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

Angela Somma, Endangered Species Division Chief  
Office of Protected Resources  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910

RE: Proposed Rule – Listing Endangered and Threatened Species and Designating Critical Habitat  
(Docket Number FWS-HQ-ES-2021-0107)

Dear Director Williams, Mr. Galst, and Ms. Somma,

The Desert Tortoise Council (Council) is a non-profit organization comprised of hundreds of professionals and laypersons who share a common concern for wild desert tortoises and a commitment to advancing the public's understanding of desert tortoise species. Established in 1975 to promote conservation of tortoises in the deserts of the southwestern United States and Mexico, the Council routinely provides information and other forms of assistance to individuals, organizations, and regulatory agencies on matters potentially affecting desert tortoises within their geographic ranges.

As of June 2022, our mailing address has changed to:

Desert Tortoise Council  
3807 Sierra Highway #6-4514  
Acton, CA 93510.

Our email address has not changed. Both addresses are provided above in our letterhead for your use when providing future correspondence to us.

We appreciate this opportunity to provide comments on the proposed changes to regulations on threatened and endangered species. Because the proposed changes in the regulations may affect the listing and designation of critical habitat for the Sonoran desert tortoise (*Gopherus morafkai*) (synonymous with Morafka's desert tortoise), our comments are based on our commitment to enhance protection of this species and provide for its conservation. Please accept, carefully review, and include in the administrative record, the following comments by the Council.

## **Comments on Regulations for Listing Species and Designating Critical Habitat**

### **Background**

On Thursday, June 22, 2023, the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) (collectively Services) published in the *Federal Register* a proposed rule to revise some of the regulations concerning listing endangered and threatened species and designating critical habitat. The proposed changes were the result of two directives – Executive Order 13990 and a Federal court decision. The former document directed Federal agencies to immediately review agency actions taken between January 20, 2017, and January 20, 2021, and, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding agency actions that conflict with important national objectives, including promoting and protecting public health and the environment, and to immediately commence work to confront the climate crisis. The Federal District Court decision, first vacated the Services' 2019 recent revisions (referred to as the 2019 rule) to the regulations on the Federal Endangered Species Act (FESA or Act), and later remanded the 2019 rule to the Services without vacating it, as the Services agreed they would implement a rulemaking process to revise the 2019 rule.

### **Proposed Changes to Part 424—Listing Endangered and Threatened Species and Designating Critical Habitat**

The Services are proposing “to revise *several of those same regulatory provisions*” and earlier in the “Background” section “to amend *some aspects* of the 2019 rule” (emphasis added). The Council questions the Services' decision to amend part of the 2019 rule without explaining those parts of the 2019 rule that would not be changed. To be transparent in the processes directed by the Executive Order and the Federal courts (especially because the 2019 rule was vacated originally before agreeing to revise the 2019 rule) and to demonstrate compliance, we request that the Services show the public the written analyses they conducted of the 2019 rule that supports the decisions not to amend the remaining sections of that rule.

In the proposed rule, the Services state that “[i]f finalized, these regulations would apply to [endangered and threatened] classification and critical habitat rules finalized after the effective date of this rule and would not apply retroactively to classification and critical habitat rules finalized prior to the effective date of this rule.” Any prior final listing, delisting, or reclassification determinations or previously completed critical habitat designations made under the 2019 rule would not be reevaluated on the basis of any changes made to the 2019 rule.

The original Federal court decision vacated the entire rule. This action indicates there were substantial issues with the rule. Consequently, some or all of the species affected by the 2019 rule may have been “shortchanged” in implementing the conservation purposes of the Act when listing determinations and critical habitat designations were finalized. The Services support many of their proposed changes to the 2019 rule explaining that the proposed changes would ensure that the regulations are to implement the conservation purposes of the Act. The Council requests that the Services review all their listing decisions and critical habitat determinations made under the 2019 rule to determine their compliance with the proposed amendments/revisions to the 2019 rule, when they are finalized to have the full benefit of the conservation purposes of the Act. This would ensure that the purpose of the Act, “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species” is being implemented correctly and effectively by all Federal departments and agencies to “seek to conserve endangered species and threatened species” and to “utilize their authorities in furtherance of the purposes of this Act.”

## **Section 424.11—Factors for Listing, Delisting, or Reclassifying Species**

### *Economic Impacts*

The Council supports restoring the phrase “without reference to possible economic or other impacts of such determination” to the end of 50 CFR 424.11(b) for the reasons given by the Services in the *Federal Register* document. According to wording in the FESA, listing determinations “are to be made solely on the basis of the best scientific and commercial data available.” This focus is further supported with wording from congressional reports including that listing decisions are based solely upon biological criteria, and economic considerations have no relevance to these determinations.

By restoring these words, the regulations explain what information is used and what is not used in the listing process. Providing these boundaries for this or any process is fundamental to ensuring clear communication to the public about the process as well as the agency implementing it.

In this section of the *Federal Register* document, the Services say “[t]he removal of this phrase from the regulations, as well as certain statements made by the Services in the preamble accompanying its removal caused confusion...” We inquire whether the Service also will be removing the certain statements made by the Services in the preamble that caused/contributed to the confusion. Given the information provided by the Services in this *Federal Register* document, removal of these certain statements would seem appropriate along with the wording the Services are proposing to restore to fully eliminate confusion.

### *Foreseeable Future*

In this section of the *Federal Register* document, the Services offer two options to more clearly define the framework for applying the term “foreseeable future” as it is used in the Act’s definition of a “threatened species.” The first is to align the regulatory language more closely to that of the “M-Opinion,” a 2009 opinion from the Department of the Interior, Office of the Solicitor, M-37021 (<https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37021.pdf>).

Current wording from section 424.11(d) on the 2019 rule that defines “foreseeable future” is that “In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time.”

The Services are proposing to delete the second sentence and replace it with “The term foreseeable future extends as far into the future as the Services can reasonably rely on information about the threats to the species and the species' responses to those threats.” They claim this amended language is consistent with the M-Opinion that has guided the Services since 2009 in interpreting this term in the FESA.

The second option suggested is removing section 424.11(d) of the regulations rather than revising the regulatory framework and relying on the M-Opinion for implementation of foreseeable future.

We find the arguments presented by the Services for the first option to be weak. For the first option, the proposed second sentence does little to clarify the change in meaning from the existing wording. When comparing the existing wording —

“can reasonably determine that both the future threats and the species' responses to those threats are likely”

with the proposed wording —

“can reasonably rely on information about the threats to the species and the species' responses to those threats”

we find little difference between their meanings. In addition, if the Services must use paragraphs to explain the intent/meaning of the replacement sentence as they do in the *Federal Register* document, our conclusion is that changing the existing sentence is inadequate, replacing it with the proposed new sentence continues to be unclear in its meaning, and removing unclear and inadequate wording (i.e., the proposed second sentence) should be implemented. Rather, we support the Services' option to remove section 424.11(d).

The second option, use of the M-Opinion, provides an extensive evaluation of the legislative and judicial history of the use of this term, a description of the complex framework or process that the Services had and would now continue to implement, and examples of how it may be applied. The Council supports implementation of this option as the M-Opinion carefully and logically presents the numerous requirements that need to be addressed during a listing determination. However, we were unable to find in the *Federal Register* document a description of information contained in the M-Opinion other than it “provides a more thorough and detailed examination and explanation of how this statutory phrase is interpreted.” We suggest that the Services should have either presented information on the complex process of determining the meaning of the phrase and the framework to apply it, or provided a link to the M-Opinion so the public could read it.

### *Factors Considered in Delisting a Species*

In this section of the *Federal Register* document, the Services are proposing to make two changes:

(1) to insert the phrase “the species is recovered” at the beginning of 50 CFR 424.11(e)(2) so it will read as follows: The species is recovered or otherwise does not meet the definition of a threatened or endangered species; and

(2) to remove the word “same” from both instances where it occurs in the sentence stating that the Services must “consider the same factors and apply the same standards” when determining whether a species is recovered or no longer warrants listing as when listing or reclassifying a species.

The inclusion of the word “recovered,” and thus the concept of recovery, in the delisting regulations acknowledges one of the principal goals of the Act and of the Services. The removal of “same” eliminates any possible confusion that the analysis is limited to those same, specific factors or threats that initially led the Services to list that particular species.

The Council supports the removal of the words “same” as we are unfortunately familiar with an increase in the types of threats (as well as the magnitude) that have occurred since the listing of the Mojave desert tortoise in 1989 and other desert species such as the endangered Lane Mountain milk-vetch (*Astragalus jaegerianus*). For this listed plant, energy development, anthropogenic dust, development on private land, predation, infrequent recruitment, increase and spread of nonnative plants and resulting competition, precipitation patterns, drought, climate change, and reduced gene exchange or genetic isolation are threats that were identified in the 2014 species report but not identified in final listing rule of 1998. Thus, if the six threats that were identified in the listing rule (i.e., military training and operations activities; mining activities; off-highway vehicle activities; increase in fire frequency, size, and intensity; reduced population persistence/vulnerability from natural random events; and regulatory mechanisms) were substantially reduced or eliminated, the other 10 threats identified in the 2014 species report would not be considered under the 2019 rule, but may be equivalent to or greater in their impact to the survival and conservation/recovery of the species. Consequently, the Council supports these proposed changes.

### **Section 424.12—Criteria for Designating Critical Habitat**

#### *Not-Prudent Determinations*

The Services propose to make two changes in this section of the regulations that were adopted under the 2019 rule:

(1) to remove the second half of § 424.12(a)(ii), which states that designation of critical habitat would not be prudent if threats to the species’ habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act; and

(2) to clarify § 424.12(a)(1)(v), which is the last circumstance set forth in § 424.12(a)(1), and states that the Secretary otherwise determines critical habitat would not be prudent based on the best scientific data available.

The removal of the wording for threats to species' habitats that cannot be addressed through management actions resulting from section 7 consultations is proposed because its inclusion suggests that the only conservation benefits of a critical habitat designation are through the section 7 process. The wording in the Act and court decisions do not support this. Congress did not exclude private lands from the designation of critical habitats and the courts have concluded that "the designation of the critical habitat provides information to the public and state and local governments that the species is endangered or threatened and the area is essential to the conservation of the species. In addition, this wording in the 2019 rule implies that the Services should decline to designate critical habitat for species threatened by climate change.

To clarify the meaning of § 424.12(a)(1), the Services would remove § 424.12(a)(1)(v) because it gives the appearance that the Services might overstep their authority under the Act by issuing "not prudent" determinations for any number of unspecified reasons that may be inconsistent with the purposes of the Act. The Services would insert a clause in the opening sentence of this section to indicate that the list of identified circumstances for determining that designating critical habitat is not prudent is not intended to be exhaustive.

In addition, the Council would argue that that Services should word the regulations to explain the wording in the Act, the intention of Congress as described in committee reports and other congressional documents, and relevant court decisions. The Services should not create wording in the regulations that they "presume" is appropriate without conducting this thorough analysis of the meaning and intent of the statute. Nor should the Services develop/modify regulations that limit their applicability when the wording of the statute, the intention of Congress, and/or court decisions do not indicate this. Therefore, the Council supports these changes.

### *Designating Unoccupied Areas*

The Services propose to make several revisions to § 424.12(b)(2) to address the designation of specific areas as unoccupied critical habitat. The Services provide several pages that explain the history of past changes to this section, what the proposed changes are, and the supporting information for making this change. These pages of information appear to be similar in structure to the M-Opinion the Services use for implementing the "foreseeable future" requirement of the FESA.

The Council request the Services implement the following suggestions. Because of the District Court's initial decision to vacate the 2019 rule, which suggests there are several issues with the 2019 rule, and the Services' past practice of using Solicitor opinions to describe the framework for complying with certain terms in the listing determination process (e.g., foreseeable future), we suggest that the Services use a Solicitor opinion for determining and describing the framework for designating unoccupied critical habitat. A solicitor's opinion would provide an extensive evaluation of the legislative and judicial history of the use of this term, a description of the complex framework or process that the Services had and would now continue to implement, and examples

of how it may be applied. This opinion would become a standard reference document that the Services would use to implement designation of unoccupied critical habitat, and the public would have easy access to and use to determine whether the Services followed it in their critical habitat designation process. Ultimately, because this opinion would be written and reviewed by several solicitors with the assistance of biologists, it would likely be broad in its framework to apply to unknown circumstances in the future and thorough in its research and consideration of the statute, congressional intent, and application of relevant court decisions. This approach would diminish the likelihood of its framework being challenged successfully in court. While the Council supports the proposed changes to the wording on unoccupied critical habitat in the *Federal Register* document, we strongly recommend the Services request a Solicitor's opinion on the framework for designating unoccupied critical habitat.

### **National Environmental Policy Act**

In this section of the proposed rule, the Services say they will complete their analysis of the proposed rule in compliance with NEPA, before finalizing the proposed regulations.

If the Services determine that to implement the proposed regulations an environmental assessment is needed to comply with NEPA, we request that this document be available for public review and comment. If the Services determine that issuance of a categorical exclusion is the appropriate NEPA compliance document for the proposed changes, we request that the Services make this NEPA document available for public inspection prior to issuing the final regulations.

### **Clarity of the Rule**

The USFWS requested feedback on whether certain requirements for writing and explaining the proposed changes to the regulations have been met. We offer the following suggestions for the requirement to use lists and tables wherever possible.

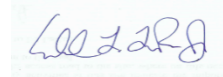
Because of this complicated history of the pre-2019 rule, the 2019 rule, and the proposed rule, we believe that providing the public with a table with the wording of these rules would have been helpful. This table would allow the public to conduct a side-by-side comparison of the prior, current, and proposed wording and determine the extent of the changes the USFWS is proposing to the 2019 rule.

Similarly, when the USFWS is proposing to make any change to the wording of a regulation, a table that compares the current wording next to the proposed wording would be helpful and assist the public in comparing and better understanding the extent of the proposed changes.

We appreciate this opportunity to provide comments on this proposed rule and trust they will help protect desert tortoises and other species during their implementation. Herein, we reiterate that the Desert Tortoise Council wants to be identified as an Affected Interest for this and all other proposed actions funded, authorized, or carried out by the USFWS that may affect species of desert tortoises directly or indirectly. As an Affected Interest, the Council requests that any subsequent environmental documentation for this proposed action (e.g., NEPA compliance, etc.) is provided

to us at the contact information listed above. In addition, we ask that you respond in an email that you have received this comment letter so we can be sure our concerns have been registered with the appropriate personnel and office for this project.

Respectfully,



Edward L. LaRue, Jr., M.S.  
Desert Tortoise Council, Ecosystems Advisory Committee, Chairperson

### **Literature Cited**

[USFWS] U.S. Fish and Wildlife Service, 2014. 12-Month Finding on a Petition To Reclassify *Astragalus Jaegerianus* as a Threatened Species. <https://www.govinfo.gov/content/pkg/FR-2014-05-02/pdf/2014-10052.pdf#page=1>

[USFWS] U.S. Fish and Wildlife Service. 2014. Species report for Lane Mountain milk-vetch, *Astragalus Jaegerianus*. <https://www.regulations.gov/document/FWS-R8-ES-2014-0011-0003>