



August 5, 2022

VIA Electronic Submission ([regulations.gov](https://www.regulations.gov))

Public Comments Processing
Attn: FWS-HQ-ES-2021-0033
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 20041

Re: Proposed Amendments to Regulations Section 10(j) of the Endangered Species Act, FWS-HQ-ES-2021-0033

To Whom It May Concern:

The National Hydropower Association (“NHA”) and the Northwest Hydropower Association (“NWA”) (together, the “Associations”) appreciate the opportunity to provide written comments in response to the U.S. Fish and Wildlife Service’s (the “Service”) proposed rule to amend the regulations implementing Section 10(j) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1539(j). 87 Fed. Reg. 34,625 (2022) (“Proposed Rule”). The Associations appreciate the Service’s consideration of these comments. The hydropower industry understands the importance of protecting threatened and endangered species and their habitats and commits tremendous resources to those goals each year through enhancement, restoration, and fish passage measures, among other measures. In fact, hydropower operations often involve strategic water releases in order to maintain instream flow and temperatures in an effort to restore habitat and address impacts from climate change.

Hydropower projects also involve the management of large areas of property and aquatic resources for the protection of species, recreational and project purposes and the Associations

anticipate this Proposed Rule could have significant implications for the management of those resources. For these reasons, the Associations believe that a NEPA analysis is necessary to give the Service and potentially affected stakeholders a baseline understanding of the potential effects of the Proposed Rule.

I. Background.

NHA is a national non-profit association dedicated to advancing the interests of the U.S. hydropower industry, including conventional, pumped storage and new marine and hydrokinetic technologies. NHA's membership consists of over 300 organizations, including consumer-owned utilities, investor-owned utilities, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys.

NWHA is dedicated to the promotion of the Northwest region's waterpower as a clean, efficient energy while protecting the fisheries and environmental quality that characterize the Northwest region. NWHA's 125 members represent all segments of the hydropower industry: public and private utilities; independent developers and energy producers; manufacturers and distributors; local, state, and regional governments including water and irrigation districts; consultants; and contractors.

Many of the Associations' members hold licenses issued by the Federal Energy Regulatory Commission ("FERC"). Under the Federal Power Act ("FPA"), FERC has exclusive authority to license nonfederal hydropower projects.¹ FERC licenses include measures to protect, mitigate, and enhance ("PM&E measures") resources affected by a hydropower project, including threatened and endangered species and their habitats. FERC licensees have a significant interest in the Service's Proposed Rule.

The Associations offer the following concerns and comments below.

II. The Service's Existing Regulations Provide Appropriate Discretion to Establish Experimental Populations Outside the Species Historic Range.

In the Proposed Rule, the Service indicates that it requires additional regulatory discretion to establish experimental populations of ESA-listed species outside of the species' probable historical ranges due to climate change and threats from invasive species. However, the Service's existing regulations already provides that the Service may do so "in the extreme case that the primary habitat of the species has been unsuitably and irreversibly altered or destroyed."² The Service in adopting its current regulations recognized the inherent risks in introducing experimental populations outside the species range and the possible unintended consequences. The Service explained:

¹ 16 U.S.C. § 817(1).

² 50 C.F.R. § 17.81(a)

For conservation measures involving the transplantation of listed species, it is Service policy to restrict introductions of listed species to historic range, absent a finding by the Director in the extreme case that the primary habitat of the species has been unsuitable and irreversibly altered or destroyed. The Service believes this is the most biologically acceptable approach to utilize in species introductions. Further, the purposes and policies of the Act would be violated if the Service were to regularly permit the introduction of listed species into new habitat areas as exotic species. Under sections 2(b) and 2(c)(1) of the Act, the Service must commit itself to ecosystem protection and to programs for the conservation of listed species in their natural habitats. Generally, the transplantation of listed species to non-native habitat abandons the statutory directive to conserve species in native ecosystems. Transplantation of listed species beyond historic range would subject the population to doubtful survival chances and might result in the alteration of the species' gene pool—results that are clearly contrary to the goals of the Act. Additionally, the concept of releasing any species into non-native habitat runs afoul of the spirit of Executive Order 11987, which prohibits the introduction of exotic, foreign species into the natural ecosystems of the United States. The final rule reflects the above considerations.

49 Fed. Reg. 33,885, 33,890 (1984).

The Service's existing regulations reflect a deliberate, well-considered, and well-explained policy decision. The Proposed Rule, in contrast, does not explain why it is reversing its policy decision made in 1984. Given the Service already has adequate discretion to determine that climate change effects can have unsuitably or irreversibly altered or destroyed a species' primary habitat, then it appears that the Service's Proposed Rule is intending to further relax the standards the apply to the exercise of that discretion and, in effect, create a presumption in favor of introducing experimental populations outside their probable historic range. The Associations are concerned that such an approach could create the unintended consequences that the Service warned about when it adopted the regulations in 1984. Additionally, this lack of explanation violates the Administrative Procedures Act ("APA").³ Accordingly, the Associations respectfully request that the Service provide its reasoning and rationale for its change in policy position.

³ See *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009) (court held that a policy change complies with the APA if the agency (1) displays "awareness that it is changing position," (2) shows that "the new policy is permissible under the statute," (3) "believes" the new policy is better, and (4) provides "good reasons" for the new policy, which, if the "new policy rests upon factual findings that contradict those which underlay its prior policy," must include "a reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy."

III. NEPA.

The proposed rule requires assessment in accordance with the National Environmental Policy Act (“NEPA”). A categorical exclusion from this process is not appropriate. The Service states that a categorical exclusion is appropriate because it is too speculative to assess the environmental impacts now, and a decision by the Service to establish an experimental population will be subject to NEPA analysis at that time. While the designation of an experimental population may be subject to NEPA analysis, it is unclear whether the decision to introduce that species into an area outside its historic range will be assessed. That decision could be made at a later time from the experimental population designation. The rule should confirm that a NEPA analysis will take place as part of the determination of where to introduce the experimental population.

The implementation of this proposed rule will have significant implications not only for the species that is being introduced, but also on the ecosystem into which it is introduced. The Service has tools to evaluate these impacts, and should do so as part of a NEPA analysis. Moreover, public input into the proposed introduction of an experimental population outside of its historic range is important, and can provide the Service with better insight, information and understanding of the local habitat and ecosystem, and potential effects of the introduction.

Moreover, the Service’s argument applies to the decision to introduce experimental populations into areas outside their range. It does not apply to the action at issue here – which is changing the Service’s regulations to ease the ability to make such introductions. The Service suggests that this is an administrative change, and that the Service is the only entity affected by the proposed rule. But this is not correct. Experimental populations are subject to certain protections under the Endangered Species Act. They are considered threatened species, both for purposes of the take prohibition and Section 7 consultation. Thus, the impact of introducing these species beyond their historic range has the potential to significantly increase the regulatory burden on licensees. It also has the potential to affect native listed species, by disrupting the existing ecosystem and creating a competition for habitats that have become more scarce due to climate changes. These are the types of potential impacts from this proposed rule that should be assessed through a NEPA analysis.

For the same reason, this Proposed Rule should be subject to review by the Office of Information and Regulatory Affairs (“OIRA”) in the Office of Management and Budget.

IV. Conclusion.

The hydropower industry recognizes the critical importance of protecting threatened and endangered species and their habitats and takes its stewardship responsibilities seriously. Association members commit significant resources towards the protection of listed species. Their projects provide benefits to other resources and are managed to achieve a balance of multiple public and environmental benefits, such as flood control, water supply and recreation.

However, the Associations have significant concerns about the potential impacts of this proposed change to the Service's well-reasoned existing regulation. The Associations ask that the Service provide explanation for why its existing regulations are not sufficient.

Additionally, the Associations request that the Service provide meaningful review in accordance with NEPA and the OIRA regulatory review process.

Thank you for your consideration of these comments.

Sincerely,

/s/ Michael Purdie

Michael Purdie
Director of Regulatory Affairs and Markets
National Hydropower Association

/s/ Brenna Vaughn

Brenna Vaughn
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