



NATIONAL ENDANGERED SPECIES ACT  
REFORM COALITION

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Public Comments Processing  
Attn: FWS-HQ-ES-2021-0033  
U.S. Fish and Wildlife Service  
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5275 Leesburg Pike  
Falls Church, VA 22041-3803

Submitted via Federal eRulemaking Portal: Docket No. FWS-HQ-ES-2021-0033

**Re: NESARC Comments on Proposed Rule on Designation of Experimental Populations**

Dear Ms. Ellis:

On June 7, 2022, the U.S. Fish and Wildlife Service (“FWS”) issued a Proposed Rule to revise its regulations concerning experimental populations of endangered species and threatened species under the Endangered Species Act (“ESA”).<sup>1</sup> Pursuant to the Federal Register notice, the National Endangered Species Act Reform Coalition (“NESARC”) respectfully provides its comments and recommendations on the Proposed Rule.

NESARC is the country’s oldest broad-based, national coalition dedicated solely to achieving improvements to the ESA and its implementation. As detailed in the membership list attached to these comments, NESARC includes agricultural interests, cities and counties, conservationists, electric utilities, energy producers, farmers, forest product companies, home builders, oil and gas companies, ranchers, realtors, water and irrigation districts, and other businesses and individuals throughout the United States. NESARC and its members are committed to promoting effective and balanced legislative and administrative improvements to the ESA that support the protection of fish, wildlife, and plant populations as well as responsible land, water, and resource management.

NESARC is concerned that the Proposed Rule, if finalized in its current form, could cause a number of unintended and harmful consequences. As stated, FWS seeks to increasingly “allow for the introduction of species populations into habitat outside of their historical range for

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<sup>1</sup> 87 Fed. Reg. 34,625 (June 7, 2022) (“Proposed Rule”).

conservation purposes.”<sup>2</sup> In doing so, FWS is proposing to remove regulatory restrictions on when these introductions could occur and is proposing to revise descriptions of what habitat areas may be appropriate for such introductions. Given the dearth of explanation in the Proposed Rule, and the removal of appropriate and necessary regulatory restrictions on this contemplated practice, it appears that FWS is granting itself unfettered discretion to introduce potentially invasive species into areas outside of native habitat. As explained below, NESARC believes that the revisions contemplated in the Proposed Rule are unnecessary and ill-advised given that FWS already has the ability to introduce species outside their historical range in appropriately limited circumstances. Further, absent additional regulatory safeguards, FWS’s proposal, if implemented, could have negative ecological, economic, or human health impacts that undermine the objective of establishing experimental populations under ESA section 10(j).

## **I. Comments on the Proposed Rule**

### **A. FWS Already Has the Ability to Introduce Experimental Populations Outside a Species’ Historical Range.**

In the Proposed Rule, FWS states that “[t]he primary proposed revision is to delete the reference to a species’ ‘historical range.’ We intend for this change to allow for experimental populations to be introduced into habitat outside of the historical range of the species under appropriate circumstances.”<sup>3</sup> FWS explains that “[s]uch circumstances could include instances where little to no habitat remains within the historical range of a species or where formerly suitable habitat within the historical range has undergone, or is undergoing, irreversible decline or change, rendering it unable to support one or more life history stages for the species, thereby leading to the need to establish the species in habitat in areas outside the historical range.”<sup>4</sup> Based on the provisions of the existing regulation, this proposed revision is unnecessary and lacks the necessary explanation.

Under its current regulations, FWS has the ability to introduce a species into areas outside its historical range in appropriate circumstances. In relevant part, the existing regulatory provision states that:

The Secretary may designate as an experimental population a population of endangered or threatened species that has been or will be released into suitable natural habitat outside the species’ current natural range (but within its probable historic range, absent a finding by the Director in the extreme case that the primary habitat of the species has been unsuitably and irreversibly altered or destroyed), subject to the further conditions specified in this section....<sup>5</sup>

The plain language in the parenthetical cited above clearly gives FWS the ability to authorize the introduction of an experimental population outside a species’ historical range in those cases where “the primary habitat of the species has been unsuitably and irreversibly altered or

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> 50 C.F.R. § 17.81(a) (emphasis added).

destroyed.” The scope of these regulatory preconditions encompasses the “appropriate circumstances” that FWS now identifies as justification for its proposed revision.<sup>6</sup> Absent additional explanation, there appears to be no legal, policy, or scientific justification for revising the relevant existing regulations to provide authority that FWS already possesses.

While NESARC notes FWS’s concerns regarding the impacts of climate change and invasive species, these reasons do not support or justify providing expanded discretion to introduce species into areas they have not historically occupied. As FWS should already be aware, there are significant risks and dangers associated with disrupting existing ecosystems and habitats through the introduction of species into areas they have not previously existed. These include, for example, the introduction of diseases or pathogens, disruption of established predator-prey relationships, resource competition issues, impacts to habitats, reduction of a species’ population size through unsuccessful introduction, and broad economic impacts. Furthermore, in proposing this approach, FWS is paradoxically promoting the establishment of invasive species, which is one of the threats it now seeks to ameliorate.<sup>7</sup> Instead of embracing anthropogenic ecosystem engineering, FWS should retain its policy of limiting the introduction of experimental populations to within the species’ historical range unless there are extreme or emergency circumstances that warrant a deviation.

#### **B. FWS Fails Acknowledge Its Prior Interpretation that Transplantation of Species Outside Their Historical Range Is Generally Prohibited by the ESA.**

In support of the Proposed Rule, FWS states that it has “concluded that it may be increasingly necessary and appropriate to establish experimental populations outside of their historical range if the ability of the habitat to support one or more life history stages has been reduced due to threats, such as climate change or invasive species.”<sup>8</sup> This reflects a significant change in long-standing FWS policy that is neither acknowledged nor adequately explained.

When promulgating its experimental population regulations in 1984, FWS stated that “[l]ong-standing Service policy provides that the relocation or transplantation of native listed species outside their historic range will not be authorized as a conservation measure.”<sup>9</sup> FWS provided for exceptions in “extreme case[s]” and explained that “this is the most biologically acceptable approach to utilize in species introductions.”<sup>10</sup> Furthermore, FWS explained that regularly authorizing the introduction of species outside their historical range would violate the purposes and policies of the ESA.

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<sup>6</sup> Habitat that has been “unsuitably and irreversibly altered or destroyed” appears to include those circumstances where “little to no habitat remains within the historical range of a species or where formerly suitable habitat within the historical range has undergone, or is undergoing, irreversible decline or change, rendering it unable to support one or more life history stages for the species.” *Compare* 50 C.F.R § 17.81(a) *with* Proposed Rule at 34,625.

<sup>7</sup> “Invasive species are non-native plants, animals and other living organisms that thrive in areas where they don’t naturally live and cause (or are likely to cause) economic or environmental harm, or harm to human, animal or plant health.” FWS, Invasive Species Program, at <https://www.fws.gov/program/invasive-species> (emphasis added).

<sup>8</sup> Proposed Rule at 34,625.

<sup>9</sup> 49 Fed. Reg. 33,885, 33,890 (Aug. 27, 1984).

<sup>10</sup> *Id.*

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.<sup>11</sup>

Accordingly, FWS declined to authorize the introduction of species outside their historical range except in extreme circumstances.

In the Proposed Rule, while acknowledging the content of its existing regulation, FWS does not address the long-standing policy considerations and interpretations of the ESA statutory provisions that underpinned the 1984 rulemaking. As its primary justification, FWS asserts that “[a]t the time the Service adopted these regulations, it did not anticipate the impact of climate change on species and their habitats.”<sup>12</sup> Contrary to FWS’s assertion, projections of global warming and climate change-related impacts have been made for over four decades,<sup>13</sup> and predate the enactment of ESA section 10(j) and the promulgation of the 1984 regulations. In addition, FWS fails to acknowledge its prior determination that the purposes and policies of the ESA prohibit the transplantation of listed species beyond their historical ranges and fails to reconcile this interpretation with the revisions it proposes in this Proposed Rule. Given this prior interpretation of its statutory authority, FWS lacks the ability to broadly pursue the introduction of experimental populations into areas that have not been historically occupied by the species.

**C. If FWS Proceeds with this Proposed Rule, It Must Include Regulatory Provisions Specifying the Appropriate Circumstances for Introducing a Species Outside Its Historical Range.**

While the existing regulations include preconditions limiting FWS’s discretion to introduce a species outside its historical range, the Proposed Rule would remove these limitations. FWS proposes the following revisions:

(a) The Secretary may designate as an experimental population a population of endangered or threatened species that has been or will be released into ~~suitable natural~~ habitat that is necessary to support one or more life history stages outside the species’ current natural-range ~~(but within its probable historic range, absent a finding by the Director in the extreme case that the primary habitat of the species has been unsuitably and irreversibly altered or destroyed)~~, subject to the further conditions specified in this section, ~~;~~ *provided*, that all designations of experimental

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<sup>11</sup> *Id.*; see also *id.* (“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.”).

<sup>12</sup> Proposed Rule at 34,625. FWS also notes the potential impacts of invasive species, but these threats have always existed. *Id.*

<sup>13</sup> *E.g.*, Charney et al, *Carbon Dioxide and Climate: A Scientific Assessment*, National Academy of Sciences (1979).

populations must proceed by regulation adopted in accordance with 5 U.S.C. 553 and the requirements of this subpart.

While FWS discusses certain “appropriate circumstances” for these types of introductions in the preamble, the identified circumstances must be included in the regulations in order to promote transparency and regulatory certainty for potentially affected landowners and other stakeholders.

FWS must recognize that one of Congress’s purposes in enacting ESA section 10(j) was to reduce local opposition to reintroduction efforts perceived to conflict with human activity. This purpose is significantly undermined by providing FWS with unfettered discretion to introduce species into areas where they have never existed, which will undoubtedly create additional conflicts with both human activity and natural ecosystem processes. In the preamble of the Proposed Rule, FWS states that the circumstances for such an introduction “could include instances where little to no habitat remains within the historical range of a species or where formerly suitable habitat within the historical range has undergone, or is undergoing, irreversible decline or change, rendering it unable to support one or more life history stages for the species.”<sup>14</sup> To provide transparency and regulatory certainty for potentially affected landowners, FWS must include all of the specific circumstances when it may be appropriate to consider the introduction of a species outside its historical range as part of the experimental population regulations. Given that FWS seeks to “more clearly establish the authority of the Service” to pursue these actions,<sup>15</sup> it is essential to include regulatory provisions unambiguously establishing when and in what circumstances FWS may exercise this authority.

**D. If FWS Proceeds with this Proposed Rule, It Must Include Additional Revisions Specifying the Habitat Conditions Outside a Species’ Current Range for the Introduction of an Experimental Population.**

FWS proposes to replace the phrase “suitable natural habitat” with the phrase “habitat that is necessary to support one or more life history stages.”<sup>16</sup> As its only justification, FWS states that the terms “natural” and “suitable” are not defined. FWS should address and explain the implications of this proposed revision, and make additional revisions to clearly establish what areas may constitute habitat for purposes of introducing an experimental population.

While the terms “natural” and “suitable” are not defined in the ESA or implementing regulations, that alone does not support their deletion. On the contrary, there are numerous terms in FWS’s regulations—such as “habitat”—that are undefined but still utilized when taking action under the ESA.<sup>17</sup> In such cases, the typical approach is to utilize the commonly understood definition of that term. For example, “suitable” is defined as “adapted to a use or purpose; satisfying propriety; able, qualified.”<sup>18</sup> “Natural” is defined, in part, as “being in accordance with or determined by nature; occurring in conformity with the ordinary course of nature;

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<sup>14</sup> Proposed Rule at 34,625.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 34,626.

<sup>17</sup> While FWS had defined “habitat” for purposes of designating critical habitat, the final rule promulgating that definition was recently rescinded. 87 Fed. Reg. 37,757 (June 24, 2022).

<sup>18</sup> Merriam Webster Dictionary (definition of “suitable”), available at <https://www.merriam-webster.com/dictionary/suitable>.

existing in or produced by nature, not artificial.”<sup>19</sup> Taken together, these terms provide important descriptions of the type and status of areas of habitat that may support the introduction of an experimental population. Furthermore, the phrase “suitable natural habitat” was included as part of the regulations promulgated in 1984, and the Proposed Rule does not identify any issues regarding its application or interpretation in the approximately 64 experimental populations that have been established to date.

FWS’s proposed revision—“habitat that is necessary to support one or more life history stages”—is vague from both an ecological and regulatory perspective and requires further explanation and modification. First, the phrase “life history stages” is not defined in the applicable regulations. Given FWS’s expressed concerns about the application of undefined terms, it should provide a regulatory definition of this phrase. Second, FWS should clarify that, to constitute an appropriate area for an introduction, the necessary attributes comprising habitat must exist in sufficient quality to support the species at the time of introduction. It is not appropriate to introduce a species outside its current range based on the possibility that the area may become habitat sometime in the future, either through natural progression or human intervention. Third, FWS should recognize that the identification of an area of habitat requires a more holistic examination that considers the attributes that are present in a particular area, the ability to support one or more of the species’ relevant life history stages, and the contribution of that area to the persistence of the species in the broader ecological context. Because species may depend on different areas at different times for certain life history stages, a determination of habitat should not focus on an area supporting one stage in isolation. Instead, FWS must take into account broader considerations and the relationship of an identified area to a species’ other life history stages. For a species that does not depend on an area for its entire life cycle, it must be able to access other areas providing habitat for its remaining life history stages. Fourth, prior to any introduction, FWS should conduct an overall biological and ecological assessment of the area proposed to receive an experimental population. This should ensure that the introduction of an experimental population does not have harmful effects on the area’s native species and their habitats.<sup>20</sup> Fifth, FWS should state that it will use the best scientific and commercial data available when determining whether an area constitutes habitat for purposes of introducing an experimental population.<sup>21</sup> Finally, FWS must explain these determinations and provide the supporting data during the rulemaking process to promote transparency, to allow for proper public notice and comment, and to inform the consultation with, and agreement of, affected stakeholders.<sup>22</sup>

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<sup>19</sup> *Id.* (definition of “natural”), available at <https://www.merriam-webster.com/dictionary/natural>.

<sup>20</sup> For example, if ESA-listed species are already present in the area where an introduction is proposed, FWS should conduct a section 7 consultation on the establishment of the experimental population. FWS should also ensure that any regulations establishing an experimental population include provisions to address, mitigate, or remediate any unanticipated consequences of the introduction (e.g., if the species migrates outside the area of its introduction).

<sup>21</sup> See 50 C.F.R. § 17.81(b)(1)-(4).

<sup>22</sup> See 50 C.F.R. § 17.81(d) (FWS proposes to redesignate 50 C.F.R. § 17.81(d) as § 17.81(e)).

**E. FWS Should Retain the Limitation on the Designation of Critical Habitat in Areas Where an Essential Experimental Population Overlaps with a Natural Population.**

FWS proposes to delete the sentence in its regulations stating that “[i]n those situations where a portion or all of an essential experimental population overlaps with a natural population of the species during certain periods of the year, no critical habitat shall be designated for the area of overlap unless implemented as a revision to critical habitat of the natural population for reasons unrelated to the overlap itself.”<sup>23</sup> As justification, FWS states that “this language is not included in the ESA and it is not necessary to implement the statutory provisions related to critical habitat designations.”<sup>24</sup> On the contrary, this sentence contains an important clarification and should be retained.

ESA section 10(j) states, in relevant part, that “the term ‘experimental population’ means any population (including any offspring arising solely therefrom) authorized by the Secretary for release under paragraph (2), but only when, and at such times as, the population is wholly separate geographically from nonexperimental populations of the same species.”<sup>25</sup> FWS includes this statutory provision in its definition of the term “experimental population,” and further explains that:

[w]here part of an experimental population overlaps with natural populations of the same species on a particular occasion, but is wholly separate at other times, specimens of the experimental population will not be recognized as such while in the area of overlap. That is, experimental status will only be recognized outside the areas of overlap.<sup>26</sup>

This regulatory language establishes the classification and regulatory requirements that apply in areas of overlap between experimental and nonexperimental populations.

Contrary to FWS’s explanation in the Proposed Rule, the provision that is proposed for deletion arises from the same statutory requirement that experimental populations are only classified as such when geographically separate from nonexperimental populations. Accordingly, the regulatory provision is necessary to clarify the process and procedures that apply when designating critical habitat for essential experimental populations in areas with overlap with natural populations—i.e., because experimental populations do not retain that classification in areas of overlap, critical habitat can only be designated in areas of overlap based on the location of the nonexperimental population. Previously, in response to comments questioning this regulatory provision, FWS stated that “[it] believes that this is a valid restriction and should not be modified.”<sup>27</sup> NESARC believes that it remains a valid and clarifying restriction and that it should be retained in any final rule.

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<sup>23</sup> 50 C.F.R. § 17.81(f) (FWS proposes to redesignate 50 C.F.R. § 17.81(f) as § 17.81(g)).

<sup>24</sup> Proposed Rule at 34,626.

<sup>25</sup> 16 U.S.C. § 1539(j)(1) (emphasis added).

<sup>26</sup> 50 C.F.R. § 17.80(a).

<sup>27</sup> 49 Fed. Reg. at 33,892.

**F. FWS Should Conduct an Appropriate Review under the Regulatory Flexibility Act.**

FWS asserts that a regulatory flexibility analysis under the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act, is not required because the Proposed Rule “would not have a significant economic effect on a substantial number of small entities.”<sup>28</sup> FWS explains that the Proposed Rule: (1) does not expand the reach of species protections; (2) only directly affects FWS as the entity that would apply these regulations; and (3) does not cause any external entities (including small businesses, small organizations, or small governments) to experience any economic impacts.<sup>29</sup> FWS’s conclusion is overly narrow and inaccurate. The Proposed Rule would provide FWS with additional flexibility to introduce experimental populations into areas in which the ESA-listed species have never previously existed. This will expand the application of the ESA, along with its procedural and substantive requirements, to additional geographic areas with corresponding adverse effects to any “small entities” in or adjacent to those locations. Accordingly, these entities have substantial economic interests that will be directly affected by the rulemaking. FWS must fully assess such potential impacts on small entities in compliance with the Regulatory Flexibility Act.

**II. Conclusion**

NESARC appreciates the opportunity to provide these comments on FWS’s Proposed Rule, and we respectfully request that you take these comments into full consideration when determining whether to proceed with promulgating a final rule to revise the experimental population regulations.

Sincerely,



Tyson Kade  
NESARC Counsel

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<sup>28</sup> Proposed Rule at 34,627.

<sup>29</sup> *Id.*



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**American Farm Bureau Federation**  
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**American Forest and Paper Association**  
*Washington, DC*

**American Fuel and Petrochemical  
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