



July 13, 2020

Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5655
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Re: Financial Factors in Selecting Plan Investments (RIN 1210-AB95)

Please accept the following comments on behalf of the Center for Biological Diversity in response to the Department of Labor’s (DOL) proposed rule amending the “Investment Duties” regulation under Title I of the Employee Retirement Income Security Act of 1974 (hereafter, the “proposed rule”).

The Center for Biological Diversity (“Center”) is a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has more than 1.7 million members and online activists dedicated to the protection and restoration of endangered species and wild places. The Center has worked for many years to protect imperiled plants and wildlife, open space, air and water quality, and overall quality of life. We appreciate the opportunity to provide comment.

We are concerned with the DOL’s proposed rule that would effectively prohibit plan fiduciaries from considering Environmental, Social, and Governance (“ESG”) factors in investing because of the proposed rule’s potential impacts upon endangered species and the environment more generally. If finalized, this proposed rule limiting ESG investing will increase investments in funds that invest in the production of fossil fuels and other environmentally destructive activities. This collective disinvestment in ESG funds will further entrench the United States’ economy in activities that harm the climate, increase pollution, and endanger species.

Specifically, the DOL’s failure to consult with the Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the “Services”) regarding the proposed rule’s impacts upon endangered species violates the Endangered Species Act (ESA), and the DOL’s failure to assess the proposed rule’s environmental impacts violates the National Environmental Policy Act (NEPA).

1. Failure to consult the Services on the proposed rule’s impacts on endangered species violates the Endangered Species Act.

The DOL has an obligation to protect all endangered species that may be affected by its actions under Section 7(a)(1) of the ESA, which states that all Federal agencies shall “utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species.”¹ Further, the DOL is statutorily required take proactive action to protect endangered species and consult with the Services under Section 7(a)(2) of the ESA.²

Section 7(a)(2) of the ESA requires that “each federal agency *shall*, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical.”³ Agency “action” is broadly defined in the ESA’s implementing regulations to include “the promulgation of regulations.”⁴ Under Section 7(a)(2), DOL must consult with the Services to determine whether its actions will jeopardize listed species’ survival or adversely modify designated critical habitat, and if so, to identify ways to modify the action to avoid that result.⁵ Under the Services’ joint regulations implementing the ESA, an action agency, such as the DOL, must initiate consultation under Section 7 whenever its action “may affect” a listed species or critical habitat.⁶ Only where the action agency determines that its action will have “no effect” upon any listed species or designated critical habitat is the consultation obligation lifted.⁷ The consultation requirement applies to any discretionary agency action that may affect listed species.⁸

The issuance of the proposed rule is clearly a discretionary action that falls within the consultation requirement of the ESA. First, the proposed rule meets the “may affect” threshold because the DOL failed to prepare a biological assessment, initiate informal consultation with the Services, or secure a biological opinion evaluating the impact on listed species or designated critical habitat.⁹ Second, the Employee Retirement Income Security Act of 1974 does not mandate that the DOL address the permissibility of consideration of ESG factors by fiduciaries when investing, rendering the issuance of the proposed rule a discretionary act. Nor is their lack of compliance obviated by DOL’s statement that the proposed rule is intended to codify the DOL’s “position” on ESG investing that had previously been stated in sub-regulatory guidance.¹⁰ Finally, the programmatic nature of the proposed rule does not create an exemption to the consultation requirement. The Services’ regulations clearly articulate the possibility of programmatic consultations on federal, nationwide rulemakings that impact listed species.¹¹

¹ 16 U.S.C. § 1536(a)(1).

² See 16 U.S.C. § 1536(a)(2).

³ 16 U.S.C. § 1536(a)(2) (emphasis added).

⁴ 50 C.F.R. § 402.02.

⁵ 50 C.F.R. § 402.14.

⁶ 50 C.F.R. § 402.14(a).

⁷ See U.S. FISH & WILDLIFE SERV. & NAT’L MARINE FISHERIES SERV., ENDANGERED SPECIES CONSULTATION HANDBOOK (1998). See also *Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 597 (D.C. Cir. 2019).

⁸ *Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007).

⁹ 50 C.F.R. 402.14(b).

¹⁰ 85 Fed. Reg. 39114 (June 30, 2020).

¹¹ See 50 C.F.R. § 402.12 (defining agency “action” as including the promulgation of regulations).

2. Failure to perform an assessment of the proposed rule’s environmental impacts violates the National Environmental Policy Act.

This proposed rule must be rescinded due to the DOL’s failure to make any attempt to comply with the procedural requirements of NEPA. The DOL has a statutory obligation to produce a “detailed statement” assessing the environmental impacts of the proposed rule under Section 102(2)(C) of NEPA, which states that all agencies of the Federal Government are required to assess the environmental impacts of the proposed action, as well as alternatives to the proposed action, for every “major” Federal action “significantly affecting the quality of the human environment.”¹²

The proposed rule is clearly a major Federal action. A major Federal action includes actions with “effects that may be major and which are potentially subject to Federal control and responsibility.”¹³ The adoption of official policy adopted pursuant to the Administrative Procedure Act, such as the proposed rule, is a federal action.¹⁴ Further, the DOL itself acknowledges that the proposed rule is a “major” or “significant” rule because of its likely effects.¹⁵

Finally, the proposed rule would significantly affect the quality of the human environment, and thus requires assessment of the proposed rule’s impacts under NEPA. A proposed rule may be deemed “significant” when its possible effects on the human environment are “highly uncertain or involve unique or unknown risks.”¹⁶ As it appears that DOL made no attempt to study the environmental effects of near prohibition of ESG investing, the proposed rule’s direct and indirect effects¹⁷ upon the human environment are “highly uncertain.” Finally, the proposed rule would clearly affect the quality of the human environment, defined as “the natural and physical environment and the relationship of people with that environment,”¹⁸ because the proposed rule would require nearly all current ESG investments that benefit the quality of the environment to be re-invested in non-ESG investments.

The proposed rule must be rescinded, as it fails to comply with the clear directives of two major environmental statutes. The DOL must consult with the Services regarding the proposed rule’s impact upon endangered species and must assess the environmental impact of the proposed rule. The Supreme Court has made clear that endangered species must be given priority and that compliance with Section 7 of the ESA is required “whatever the cost”¹⁹ and that NEPA prohibits agencies from taking “uninformed”²⁰ action.

¹² 42 U.S.C. § 4332(2)(C).

¹³ 40 C.F.R. § 1508.18.

¹⁴ 40 C.F.R. § 1507.18(b)(2).

¹⁵ See 85 Fed. Reg. 39120 (June 30, 2020).

¹⁶ 40 C.F.R. § 1508.27(b)(5).

¹⁷ “Effects” include both direct effects caused by the action and indirect effects caused by the action which are later in time or farther removed in distance, but still reasonably foreseeable. See 40 C.F.R. § 1508.8(a)-(b).

¹⁸ 40 C.F.R. § 1508.14.

¹⁹ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184-185 (1978).

²⁰ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351 (1989).

Sincerely,

A handwritten signature in black ink, appearing to read 'Caitlyn Cook'. The signature is fluid and cursive, with the first name 'Caitlyn' and last name 'Cook' clearly distinguishable.

Caitlyn Cook
Center for Biological Diversity