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December 13, 2021

Public Comments Processing
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U.S. Fish and Wildlife Service
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Falls Church, VA 22041-3803

Public Comments Processing
ATTN: FWS-HQ-ES-2019-0115
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Submitted via https://www.regulations.gov

Re: Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat (FWS-HQ-ES-2020-0047) and Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat (FWS-HQ-ES-2019-0115)

Dear Sir/Madam:

On behalf of the States of Alabama, Alaska, Arizona, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wyoming, we respectfully submit the following comments in response to two related Proposed Rules. The first, published by the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS"), proposes rescinding the Services' final rule defining the term "habitat" for purposes of designating "critical habitat" under Section 4(a)(3) of the Endangered Species Act ("ESA"). *See* Notice of Proposed Rulemaking, 86 Fed. Reg. 59,5346 (Oct. 27, 2021) ("Proposed Habitat Rule"); 86 Fed. Reg. 67,013 (Nov. 24, 2021) (extending comment period); Final Rule, 85 Fed. Reg. 81,411(Dec. 16, 2020) ("Habitat Rule"). The second, published only by the FWS, proposes rescinding the FWS's implementing regulation detailing how and when the Service will undertake an analysis to exclude areas from critical habitat designation under Section 4(b)(2) of the ESA. *See* Notice of Proposed

Rulemaking, 86 Fed. Reg. 59,346 (Oct. 27, 2021) ("Proposed Exclusion Analysis Rule"); 86 Fed. Reg. 67,012 (Nov. 24, 2021) (extending comment period); Final Rule, 85 Fed. Reg. 82,376 (Dec. 18, 2020) ("Exclusion Analysis Rule").

Listing of species and establishment of critical habitat remove state oversight for the management of the listed species as well as the habitats they occupy that are designated as critical habitat and places the oversight authority for these species and their designated critical habitats with federal agencies. We are concerned that federal agencies are listing species and designating critical habitats as a means to control species use and the landscapes they occupy. Federal usurpation of state management should only be done when absolutely necessary and only to the extent required.

By their nature, critical habitat designations limit human activity, which in turn almost always results in a loss of economic opportunity. And designations significantly impact States, which are expressly covered by the ESA—along with individuals, corporations, municipalities, and political subdivisions within each State. 16 U.S.C. § 1532(13). These costs can be necessary to comply with the statute. But States have lost a significant amount of taxpayer funds in their efforts to comply with critical habitat designations that go well beyond what the ESA allows or which should have been excluded from designation for other reasons.

We thus have significant concerns about the Proposed Rules, which seek to increase agency discretion by limiting transparency and predictability. Not only that, but the Proposed Habitat Rule will make it difficult for the Services to comply with the ESA's requirement that "critical habitat" be "habitat," while the Proposed Exclusion Analysis Rule will hinder the FWS's ability to make a reasoned decision concerning habitat exclusion. And both Proposed Rules promote uncertainty, which will impose significant costs on stakeholders, States, and, ultimately, the intended beneficiaries—threatened and endangered species.

BACKGROUND

A. Proposed Habitat Rule

The ESA recognizes that geographic areas unoccupied by a species when a listing decision is made may nevertheless be designated as "critical habitat" if the Secretary determines "that such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). But as the Supreme Court held in 2018, "[e]ven if an area otherwise meets the statutory definition of unoccupied critical habitat because the Secretary finds the area essential for the conservation of the species, Section 4(a)(3)(i) [of the ESA] does not authorize the Secretary to designate the area as *critical* habitat unless it is also *habitat* for the species." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2018).

Following *Weyerhaeuser*, the Services proposed a definition of "habitat" to "serve as a regulatory standard to ensure that unoccupied areas that [the Services] designate as critical habitat are 'habitat' for the species and are defensible as such." 85 Fed. Reg. 47,335. In response to comments to the proposed rule, the

Services settled on the following definition: "For the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species." 85 Fed. Reg. 81,412. It is this definition the Services propose to rescind.

B. Proposed Exclusion Analysis Rule

Under Section 4(b)(2) of the ESA, "[t]he Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." 16 U.S.C. § 1533(b)(2). In *Weyerhaeuser*, the Court held that, although a decision not to exclude a particular area is discretionary, that decision can be reviewed by courts for abuse of discretion under Section 706(2) of the Administrative Procedure Act. *See* 139 S. Ct. at 371.

That holding was at odds with the Services' 2016 Policy, which emphasized "the discretionary nature of the Secretaries' consideration of whether to exclude areas from critical habitat" and indicated the Services' position that such decisions are not subject to judicial review. 81 Fed. Reg. 7233 The FWS thus revisited its application of the 2016 Policy after *Weyerhaeuser* to help it better comply with the reasoned decisionmaking requirements of the APA and "to provide greater transparency and certainty for the public and stakeholders." 85 Fed. Reg. 82,376.

Among other changes, the Exclusion Analysis Rule the FWS settled on committed the Secretary to "make available for public comment the draft economic analysis" of any critical habitat designation and to conduct an exclusion analysis whenever a "proponent of excluding a particular area … has presented credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion." 85 Fed. Reg. 82,388.

The Rule also created a process by which the Secretary would "weigh the benefits of including or excluding particular areas," and ensured that the Secretary would consider and "give weight to" impacts "identified by experts in, or by sources with firsthand knowledge of, areas that are outside the scope of the Service's expertise." 85 Fed. Reg. 82,388. In particular, the Rule identified "[n]onbiological impacts identified by State or local governments" as impacts tending to be outside the Service's expertise that the Secretary must consider. 85 Fed. Reg. 82,389. The Rule also provided that, "[w]hen analyzing the benefit of including or excluding any particular area based on economic impacts or other relevant impacts … the Secretary will weigh such impacts relative to the conservation value of that particular area." 85 Fed. Reg. 82,389.

The Proposed Exclusion Analysis Rule seeks to rescind these regulations and return the FWS to the 2016 Policy. 86 Fed. Reg. 59,346. Under that Policy, the Secretary was under no obligation "to undertake a discretionary 4(b)(2)

exclusion analysis," nor to consider specific impacts outside the Service's expertise. 81 Fed. Reg. 7248.

DISCUSSION

We are concerned that both Proposed Rules increase agency discretion by needlessly decreasing transparency, accountability, and predictability. We address each Proposed Rule in turn.

I. Proposed Habitat Rule

We offer three primary concerns with the Proposed Habitat Rule.

First, to the extent the Services seek to rescind the definition of "habitat" in order to designate as "critical habitat" geographic areas in which a species could not live, that is an improper reason for the rulemaking. The ESA prohibits such designations. *See* 16 U.S.C. § 1532(5)(A)(i), (ii). "Critical habitat" must first be "habitat," *Weyerhaeuser,* 139 S. Ct. at 368, which at the least means that a species could survive in the area if put there. It does not mean that the species could live there if conditions were as they existed fifty years ago or fifty years hence with enough modifications.

The Services disagree, reasoning that the ESA's broad definition of the term "conservation" means they can designate presently uninhabitable areas as "critical habitat" *now* rather than "delaying until an arbitrary point in time" when, following modification, the species could actually live there. 86 Fed. Reg. 59,354. But what the Services call an "arbitrary point in time" is the very thing that makes "habitat" habitat: the ability of the species to survive in the area. A rocky field is not "habitat" for an alligator simply because it could be made into a swamp with enough bulldozering.

The Services offered a similar argument in *Weyerhaeuser,* there emphasizing the broad definition of "essential" in the ESA. The argument wasn't any more persuasive then. *See* 139 S. Ct. at 368. Either way, the Services' interpretation means "that virtually any part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." *Markle Ints., LLC v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 483 (5th Cir. 2016) (Owen, J., dissenting), *vacated and remanded sub nom. Weyerhaeuser,* 139 S. Ct. 361. Because the ESA does not grant the Services that power, the Services' proposal to rid itself of the definition of "habitat" so they can exercise that power is not a lawful reason to rescind the Habitat Rule.

Accordingly, we call on the Services either to abandon their rescission efforts or clarify that they are not seeking to exercise the non-existent authority described above.

Second, the Proposed Rule will increase uncertainty for stakeholders. The Services worry that having a definition of "habitat" may "limit[] how the Services can consider what areas meet the definition of 'critical habitat,'" and thus opt for a less limiting approach. 86 Fed. Reg. 59354. And they assure that they "can adequately address, on a case-by-case basis … any concerns that may arise in future designations as to whether unoccupied areas are habitat for a particular species." 86 Fed. Reg. 59355.

This reasoning wholly ignores the flip side of the coin: Greater discretion for the Services necessarily means less predictability and more uncertainty for stakeholders. Sometimes that is the cost of enforcing the ESA. But the Services have not explained why it's a necessary cost here. A "case-by-case" determination, without a working definition of what "habitat" means, may be great for the Services, but it does other stakeholders little good.

And the costs to other stakeholders are real. An unbounded, completely arbitrary definition of "habitat"—which is what a "case-by-case" determination is—means that the Services could designate as "critical habitat" geographic areas in which the species could not survive. Indeed, that seems to be the point of the rescission. When that happens, the economic impact can be immense. In *Weyerhaeuser*, for instance, the landowners faced a cost of $34 million as a result of the Services' "critical habitat" designation. 139 S. Ct. at 367. And because the dusky gopher frog could not survive in its new "critical habitat," there was no benefit on the other side of the ledger.

To the extent the Services do not intend such a broad application, the Services have not explained how they plan to limit things—what internal definition of "habitat" they plan to apply instead. That lack of direction itself harms stakeholders because they will be unable to predict how they will be regulated. Such uncertainty, in turn, could harm species, as landowners become less likely to engage in proactive conservation efforts and may even engage in preemptive habitat destruction. It also harms States, which have the primary role and authority to manage and conserve wildlife in accordance with local needs. Regulatory uncertainty hurts those efforts, just as surely as unbounded "critical habitat" designations themselves do.

We thus believe the Services should retain the current definition of "habitat." Absent that, it should revise the definition in ways that serves both the Services' need for flexibility and stakeholders' desire for certainty and predictability.

Third, rescinding the Habitat Rule will cause confusion. This is important because one of the primary reasons the Services offer for rescinding the Rule is that the definition they chose less than a year ago turned out to be "confusing." 86 Fed. Reg. 59,354-55. This was so, they said, because the definition (1) used phrases like "biotic and abiotic setting" and "resources and conditions" that were not in the ESA, and (2) was limited for use in the "designation of critical habitat" only. *Id.*

The Services do not share who is confused by the definition or what regulatory problems it has caused in the short time it has been on the books. Nor do they explain how having no definition at all would help matters. What constitutes "habitat" in the wake of *Weyerhaeuser* is of great concern to all stakeholders, and having an imperfect definition is likely to be better than no definition at all because it provides greater certainty and predictability. Indeed, stakeholders are already confused—that's why the Services added the definition in the first place. The Services do not now contend that the impetus for promulgating the definition has gone away, only that the definition it chose is somehow confusing. If that's the case, the answer is to amend the definition, not get rid of it entirely.

We therefore request that the Services stay the Proposed Rule to allow time for the existing definition to be used for a longer time period. Doing so will provide the Services the evidence it needs to see if stakeholders are actually confused by the existing definition. We also ask that the Services invite and consider comments on how to improve the existing definition before deciding to rescind the definition in its entirety.

II. Proposed Exclusion Analysis Rule

Our concerns with the Proposed Exclusion Analysis Rule are similar. The Court in *Weyerhaeuser* made clear that decisions not to exclude areas from critical habitat designations are judicially reviewable and must comply with the reasoned decisionmaking requirements of the APA. *See* 139 S. Ct. at 371; 85 Fed. Reg. 55,399. Yet the FWS now seeks to return to the 2016 Policy, which took as its starting point that the Service's discretion in this area is unbounded and not subject to review. The Proposed Exclusion Analysis Rule does not explain how returning to the 2016 Policy will ensure that the FWS considers the relevant information it needs to reach a reasoned, well-informed decision.

Indeed, reneging on its commitment to conduct an exclusion analysis when presented with "credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion," 85 Fed. Reg. 82,388, would seem to hinder, not help, the Service's decisionmaking abilities. And while the Service emphasizes that it retains its discretion to conduct an exclusion analysis when confronted with such information, that is cold comfort. Such an insistence does nothing for stakeholders who offer "credible information" concerning exclusion only to have the Service decide, without even conducting an analysis, that exclusion is unnecessary. The more freewheeling discretion the Service clings to, the more arbitrary the process will feel to stakeholders, making them less willing to engage. That, in turn, will harm the Service's decisionmaking because it will be without information it otherwise would have had.

To that end, we are particularly troubled that the Secretary will no longer commit to even considering the "[n]onbiological impacts identified by State or local governments." 85 Fed. Reg. 82,389. The ESA specifically requires the

Secretary to "cooperate to the maximum extent practicable with the States," 16 U.S.C. § 1535(a)—a recognition by Congress that States are the primary protectors of their wildlife and that state agencies are likely to have knowledge and expertise useful to the implementation of the ESA. Yet the Proposed Exclusion Analysis Rule jettisons the promise of such cooperation in favor of discretionary hearing on the Service's part.

Moreover, as the Service recognized when it proposed the rule, the impacts of critical habitat designations often fall outside the Service's expertise or knowledge, but need to be considered if its habitat exclusion analysis is to be well-informed:

> It has been the experience of FWS that in some cases a designation of critical habitat may affect State or local government operations in a material way. For example, a State or local government may be in the planning stages of a public-works project such as a hospital or school and may have concerns that a designation of critical habitat would delay or preclude their project. This proposed regulatory provision specifically recognizes that, because these projects and the importance they may have to the community are not within FWS's expertise, the weight that the Secretary assigns to the benefits of designating or excluding specific areas based on impacts to these projects or plans should be consistent with the information provided by the State or local government, unless we have rebutting knowledge or material information. Additionally, State and local governments may have credible information regarding potential economic or employment losses from a proposed critical habitat designation. The FWS will consider such information as part of any proposed critical habitat exclusion.

Proposed Exclusion Analysis Rule, 85 Fed. Reg. 55,402 (Sep. 8, 2020).

The Service has not explained what has changed in the last year to alleviate these concerns. Is it no longer the Service's experience that a critical habitat designation "may affect State or local government operations in a material way"? Or has the Service developed some other way to weigh interests outside its expertise? The Proposed Rule is silent on these matters. Instead, it justifies diminishing the role of the States by simply asserting that having a different standard than NMFS in this area has resulted in "increased confusion and decreased clarity," 86 Fed. Reg. 59,348—though once again the Service does not explain who has been confused, or why the answer is to decrease transparency.

To be sure, the ESA grants the Secretary discretion to exclude, or not exclude, area from critical habitat designation. But the Secretary must exercise that discretion in a reasonable, non-arbitrary manner. The Proposed Exclusion Analysis Rule is at cross-purposes with that requirement, hindering the Service's decisionmaking abilities while making the process feel opaque and arbitrary to

stakeholders. We therefore request that the FWS scrap its Proposed Rule and retain the Exclusion Analysis Rule it finalized earlier this year.

CONCLUSION

We urge the Services to reject or seriously revise the Proposed Rules. Thank you for the opportunity to provide comments. If you have any questions, please contact the Office of the Alabama Attorney General.

Respectfully submitted,

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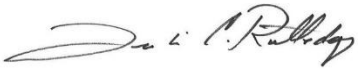

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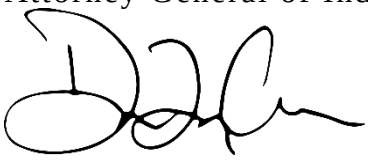

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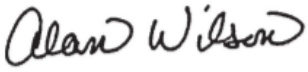

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