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October 8, 2020

Public Comments Processing
Attn: Docket No.
FWS–HQ–ES–2019–0115
U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Comments on the proposal to alter the existing process for deciding when to exclude a particular area from a critical habitat designation under the Endangered Species Act of 1973

Defenders of Wildlife ("Defenders") is a 501(c)(3) non-profit organization dedicated to the protection of all native animals and plants in their natural communities. With more than 1.6 million members and activists, Defenders is a leading advocate for innovative solutions to safeguard our wildlife heritage for generations to come. Defenders appreciates the opportunity to offer comments on the proposal by the U.S. Fish and Wildlife Service ("FWS") to modify the process by which areas are excluded from a critical habitat designation under the Endangered Species Act ("ESA" or "the Act").

Defenders strongly opposes the proposed rule. Designation of critical habitat is an important protection that should be afforded, when practicable, to all threatened and endangered species. The ESA already grants the FWS wide discretion to exclude areas that from designation when the costs of doing so greatly outweigh the benefits or when designation would otherwise be harmful to the species. The proposed regulation would simply put a heavy thumb on the scale in favor of excluding even more areas that species need in order to survive and recovery. Indeed, the proposed regulation is more prescriptive than the ESA itself. It states that FWS "shall" exclude areas when the costs of designating them outweigh the benefits (except when it can be shown that extinction would otherwise result). The ESA uses the word "may" and does not require FWS to exclude any area on the basis of economic impacts.

Of particular concern, the proposed rule would reverse the FWS's 2016 policy position that FWS will generally not exclude Federal lands from critical habitat designations. 81 Fed. Reg. 7,226, 7,231-32 (Feb. 11, 2016). Federal agencies and federal lands have a special responsibility to provide for species conservation, but under the proposal, permittees and licensees on federal land could demand FWS review proposed critical habitat designations for potential economic impacts and give weight to those concerns.

The proposed regulation would also require FWS to weigh heavily the evidence offered by state and local governments and private interests when determining whether to exclude an area from

designation, unless the agency has information specifically rebutting that evidence. Specifically, the proposal would require FWS to defer to expert or "firsthand" information on impacts "outside FWS' expertise" when deciding on critical habitat exclusions, unless FWS has information rebutting that outside information. Not only does this inappropriately presume the validity of such information, which could include speculative economic analyses by self-interested parties, but it appears to preclude FWS from investigating the evidence and collecting further data regarding such claims. As a consequence, non-FWS entities will have the ability to drive critical habitat designations.

For these reasons, and as detailed further below, Defenders urges FWS to reject the proposed rule. At a time when scientists are repeatedly warning that species in the United States and across the globe are disappearing at an alarming rate, FWS should not be reducing protections for listed species. FWS is already fully capable of making necessary exclusions with its current authority under the Act and the implementing regulations already in existence. FWS does not need any additional authority to do so, and the authority proposed would violate both the letter and spirit of the ESA.

I. The Proposed Rule Is Inconsistent With the Language and Purpose of the ESA

Any critical habitat designation process must be consistent with the purpose of the ESA, which is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). "Conservation," in turn, is statutorily defined as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." *Id.* § 1532(3). As the Supreme Court has held, an "examination of the language, history, and structure [of the ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978).

As soon as a species is listed as either threatened or endangered, FWS must consider the designation of a critical habitat. 16 U.S.C. § 1533(b)(6)(2). Critical habitat is defined as "the specific areas within the geographical area occupied by the species … on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." *Id.* § 1532(5)(A)(i); *Building Industry Ass'n of the Bay Area v. U.S. Dept. of Commerce*, 792 F.3d 1027, 1033 (9th Cir. 2015). An agency must take into consideration the economic impact, the impact on national security, and any other relevant impact of the critical habitat designation. 16 U.S.C § 1533(b)(2).

Under the ESA, the agency *may* exclude any area from critical habitat if it determines that the benefits of an exclusion outweigh the benefits of designating the area as critical habitat. *Id.* The first sentence of 4(b)(2) imposes a "categorical requirement" that the Secretary consider economic and other impacts while the second sentence authorizes the Secretary to act on his consideration by providing that he *may* exclude an area if he determines the benefits of exclusion outweigh the benefits of designation. *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 139 U.S. 361, 363 (2018). As FWS previously recognized in its 2016 policy, "the decision to exclude is always discretionary," and, "[u]nder no circumstances is exclusion required under the second sentence of section 4(b)(2)." 81 Fed. Reg. at 7,229. Nonetheless, the proposed rule states that FWS *shall* exclude areas when the

costs of designating them outweighs the benefits, which directly contradicts the Act's discretionary language.

The proposed rule also does not align with the Act's conservation principles. Protection of habitat is central to the conservation of imperiled species. The ESA's purpose is to conserve "the ecosystems upon which endangered species and threatened species depend" by protecting and recovering endangered species and threatened species. Designation of critical habitat is a key tool authorized by the ESA to ensure habitat, including unoccupied habitat needed for recovery, is conserved. The new rule will likely increase exclusions because impacted parties will have a greater say in the balancing test and, as explained below, FWS will have less ability to rebut that information.

II. The Proposed Rule Is an Unjustified Departure from Past Practice

One of the "basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016). The agency "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). That requirement is satisfied when the agency's explanation is clear enough that its "path may reasonably be discerned." *Encino*, 136 S. Ct. at 2125 (citing *Bowman Transp., Inc. v. Arkansas–Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)).

Requiring FWS to follow a specific balancing procedure not only is contrary to the ESA but departs from longstanding practice. In *Building Industry Ass'n of the Bay Area v. U.S. Dept. of Commerce*, the Court of Appeals for the Ninth Circuit held that the entire exclusionary process is discretionary and there is "no particular methodology that the agency must follow." 792 F.3d at 1033. The Ninth Circuit cited a House Report in support of this conclusion, which states that the agency is "not required to give economics or any other 'relevant impact predominant consideration … in specification of critical habitat." *Id.* (citing H.R. Rep. No. 95–1625 at 17 (1978)). The court further explained that an agency's "obligation" to consider the economic impact of a critical habitat designation derives from the first sentence of 4(b)(2), which only requires that an agency take economic impact into consideration. *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 172 (1997)). Both the courts and legislative history thus support the contention that the ESA intends agency discretion in balancing the benefits of exclusion against the benefits of designation as a critical habitat.

FWS already possesses the power to decide when and how to exclude areas as critical habitat, and that power is committed to agency discretion. For FWS to follow a specific balancing procedure that departs from clear past practices without specifying the reasons and justifications for the change would be arbitrary and capricious. Agencies "are free to change their existing policies as long as they provide a reasoned explanation for the change. *See, e.g., National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 U.S. 967, 981–982 (2005). But to now depart from their longstanding approach to critical habitat designations, FWS must at least "display awareness that it is changing position" and "show that there are good reasons for the new policy." *Encino*, 136 S. Ct. at 2125 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)). It follows that an "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice." *Brand X*, 545 U.S. at

981. In this particular case, the imposition of a specific balancing test is not only a change from past practice without adequate justification, but it runs afoul of the plain language of the ESA itself.

III. Federal Lands Should Not Be Excluded from Critical Habitat

Similarly, the proposal does not adequately explain why the FWS should jettison its current policy, which generally does not support excluding areas on federal lands from designation as critical habitat. FWS's 2016 Policy Regarding Implementation of Section 4(b)(2) states that "Federal lands should be prioritized as sources of support in the recovery of listed species" and that "designation of critical habitat [should focus] on Federal lands." 81 Fed. Reg. 7,226, 7,231-32 (Feb. 11, 2016). That presumption actually predates the 2016 policy, as evidenced by, for example, the critical habitat designation for the Gunnison sage grouse, which notes: "On Federal lands where agencies are required to conserve endangered species (section 7(a)(1) of the Act) and consult on projects that may adversely affect species (section 7(a)(2) of the Act), it is difficult to show how an exclusion outweighs inclusion." 79 Fed. Reg. 69,312, 69,321 (Nov. 20, 2014).

Contrary to the proposed rule's emphasis on *excluding* federal lands from critical habitat, the presumption in favor of *designating* federal lands is inherent in the ESA itself. Section 7 of the ESA imposes a substantive obligation on federal agencies to "utilize their authorities in furtherance of … the conservation of endangered species and threatened species." 16 U.S.C. § 1536(a)(1). Federal agencies must also "in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat" 16 U.S.C. § 1536(a)(2). This consultation process is specifically designed to lessen the impact of federal or federally-permitted activities on species and their critical habitats. As the 2016 regulations on designating critical habitat stated:

> The Federal Government, through its role in water management, flood control, regulation of resources extraction and other industries, Federal land management, and the funding, authorization, and implementation of myriad other activities, may propose actions that are likely to affect critical habitat. The designation of critical habitat ensures that the Federal Government considers the effects of its actions on habitat important to species' conservation and avoids or modifies those actions that are likely to destroy or adversely modify critical habitat.
>
> This benefit is especially valuable when, for example, species presence or habitats are ephemeral in nature, species presence is difficult to establish through surveys (*e.g.,* when a plant's "presence" is sometimes limited to a seed bank), or protection of unoccupied habitat is essential for the conservation of the species.

81 Fed. Reg. 7,414, 7,415 (Feb. 11, 2016).

The proposed regulation flies in the face of Congress's express intention in Section 7 of the ESA that federal agencies hold a special responsibility to protect species and their critical habitats from the impacts of their permitted activities. It would instead elevate the interests of extractive industries, such as grazing and mining, that are already allowed to use federal lands at well below

market rates, over species protection. In fact, the proposal specifically highlights the possibility that a lessee or permittee might have to modify their operations in response to a critical habitat designation as the kind of cost that FWS would now have to take into account and give weight to in deciding whether to exclude the area from designation.

Federal lands play a vital role in species conservation. It makes no sense to minimize or undermine that rule, but that is precisely what the proposal would do. Accordingly, Defenders strongly believes that FWS should retain the current presumption against excluding habitat on federal lands.

IV. Areas Under Conservation Plans Should Be Reviewed on a Case-By-Case Basis

Under current practice, FWS already routinely considers excluding areas from critical habitat when conservation plans, agreements, or partnerships authorized under section 10 are in place. 16 U.S.C. § 1539. The proposal, however, creates a presumption that such areas will not be included in future critical habitat designations. We oppose that presumption.

The current practice of considering such areas on a case-by-case basis is the better approach. Although areas that are subject to conservation plans or agreements may provide sufficient protection to the species and its habitat, these plans and agreements are not always closely monitored. Under the proposal, FWS will only consider whether the permittee is properly implementing the conservation plan or agreement but will not evaluate whether the plan or agreement is actually effective in conserving the species. It is essential that FWS fully consider both the benefits of any applicable conservation agreement as well as any gaps in protection that may result either from its design or from a lack of adequate implementation.

FWS should never exclude an area because of the mere existence of a plan, regardless of the plan's effectiveness. Where critical habitat would provide additional conservation value the land should be designated—and that is particularly true, as discussed above, on federal lands.

V. The Proposed Rule Requires FWS to Weigh Economic Considerations Over Species Conservation and Would Allow Non-FWS Entities to Drive the Exclusion Process

Under the new rule, FWS proposes to weigh heavily the evidence offered by state and local governments, and private interests, when determining whether to exclude an area from designation, unless the agency has information specifically rebutting that evidence. The validity of economic analyses by impacted parties is assumed, allowing non-FWS entities undue control over the designation and exclusion process. Although the ESA requires that FWS take economic considerations into account, it does not countenance weighing these interests over species conservation. To the contrary, it would contravene Congress's intent that the Act "give the benefit of the doubt to the species" (H.R. Rep. No. 96-697, at 12 (1979)).

Of particular concern, the proposal creates new presumptions that any information submitted by state and local governments, as well as private interests, is valid unless the agency has specific information in its possession to rebut that information. The ESA requires that critical habitat designation decisions be made on the basis of the best scientific and commercial data available. 16 U.S.C. § 1533(b)(2). That necessarily requires FWS to assess any information provided

to ensure that it is accurate and reliable. The proposal would require FWS to accept as valid speculative economic analyses (including land development proposals and valuations), and it appears the agency would not be permitted to investigate the evidence and collect further data regarding such claims. If FWS cannot fully evaluate information presented, exclusions could become the rule rather than the exception. Indeed, this would encourage state and local agencies, and private landowners, to refuse to collaborate with FWS on conservation initiatives and research in order to ensure the former's information is the only data available.

Additionally, in emphasizing economic costs, the proposed rule nowhere mentions the possible benefits of critical habitat designation. In considering whether to exclude an area because of potential economic impacts, FWS must also evaluate the potential benefits. Species and habitat protection can have enormous economic benefits as well as costs, but the proposed rule offers no guidance on how—or even whether—such benefits will be assessed.

Such a blatant weighting of evidence against critical habitat designation is simply not necessary to accommodate reasonable economic concerns. Research shows that critical habitat designations do not, in theory or practice, hamstring all private development. In fact, the ESA only restricts federal actions destroying or adversely modifying critical habitat; private activities that do not require federal permits are unaffected. Properly implemented, critical habitat designations advance the ESA's recovery goals by striking a science-driven balance between conservation and economic activity. In fact, FWS has generally been cautious in its designation of critical habitat in part because of political and economically-driven concerns. Jacob W. Malcom and Ya-Wei Li, *Data contradict common perceptions about a controversial provision of the US Endangered Species Act*, PNAS (December 29, 2015), https://www.pnas.org/content/112/52/15844.

As Defenders' own research demonstrates, FWS does not need any additional authority to determine whether to exclude areas from critical habitat. In June of 2020, Defenders produced a report with the results of a study of 4(b)(2) exclusions. Seventy-six critical habitat designations were examined, thirty-one of which had exclusions. Andrew Carter, et. al., *Limited Patterns Among ESA 4(b)(2) Critical Habitat Exclusions* (2020). HTTPS://DEFENDERS-CCI.ORG/PUBLICATION/ESA-4B2-CRITICAL-HABITAT-EXCLUSIONS/. In sixteen out of seventy-six instances, an exclusion was included in the final rule that was not included in the proposed rule. *Id.* The report concludes that critical habitat exclusions increased dramatically in the 2000s suggesting that FWS already has the necessary discretion to exclude areas from critical habitat designations when warranted.

VI. FWS Must Conduct a NEPA Review of the Proposed Rule

Defenders believes that review of the proposed rule pursuant to NEPA is required. NEPA requires all agencies of the federal government to prepare a "detailed statement" of the environmental effects of all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). As part of that statement, FWS must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 40 U.S.C. § 4332(E). Under the NEPA rules currently in effect, a "major federal action" for which an environmental impact statement ("EIS") may be required includes "new or revised agency rules [and] regulations." 40 C.F.R. § 1508.18(a).

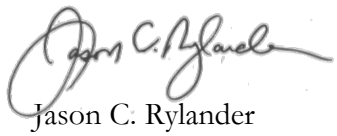
FWS's proposed rule for determining whether an area should be excluded from critical habitat designation is a major federal action that will significantly impact the scope of future designations of unoccupied critical habitat. This could adversely impact many species and their habitats and undermine the effectiveness of the ESA. Thus, FWS must prepare an EIS.

Conclusion

Although the ESA is rightly credited with helping to recover or stabilize many species on the brink, biodiversity remains in crisis. Now, climate change threatens to undermine much of the progress we have made in protecting species and habitats in the United States and around the world. Successful conservation in this challenging era requires expanding, not contracting, the tools we have to conserve wildlife and the habitats on which they depend.

Critical habitat is a historically underutilized conservation tool that, properly implemented, could yield significant benefits for species. Unfortunately, the proposed rule puts a heavy thumb on the scale in favor of development interests over species conservation. And it does so in a way that violates the plain language and intent of the ESA. FWS already possesses all the discretion it needs to balance economic interests and determine whether or not an area should be excluded. Accordingly, we urge FWS to reject the proposed rule.

Sincerely,



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