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Comments regarding:

September 8, 2020 Proposed Regulations for Designating Critical Habitat

Submitted by:

Energy and Wildlife Action Coalition

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The Energy and Wildlife Action Coalition (EWAC)¹ submits these comments in response to the U.S. Fish and Wildlife Service (Service) Proposed Rule to partially amend regulations that provide a process for excluding areas from critical habitat under section 4(b)(2) of the Endangered Species Act (ESA) (Proposed Rule).² Section 4(b)(2) of the ESA requires the Secretary of the Interior (Secretary) to “tak[e] into consideration the economic impact . . . and any other relevant impact, of specifying any particular area as critical habitat.”³ In addition, section 4(b)(2) of the ESA provides the Secretary with the discretion to exclude any particular area from a critical habitat designation if the benefits of exclusion outweigh the benefits of inclusion for that area, so long as exclusion will not result in the extinction of the species.⁴ This Proposed Rule revises and clarifies procedures for designating critical habitat, and responds to the United States Supreme Court decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018).⁵

EWAC generally supports the Proposed Rule, and appreciates, in particular, that it provides the Service and the regulated community with clear guidance on when and how the exclusion analysis should be conducted. EWAC also appreciates the clarification that information provided to the Service during its analysis that covers subject matter outside of the Service’s expertise should be given due consideration. EWAC further commends the Service’s proposed treatment of federal lands and acknowledgment that non-federal entities with projects and existing infrastructure located on federal lands are impacted by critical habitat designations that include their project and infrastructure footprints. In a few instances, however, EWAC has some suggestions for improvement in any final rule to promote voluntary conservation and avoid unintended consequences.

The Proposed Rule provides an opportunity for the Service to promote and incentivize greater use of existing ESA section 10 plans (Habitat Conservation Plans, Candidate Conservation Agreements with Assurances, and Safe Harbor Agreements).⁶ Excluding areas already covered by these plans and other private non-federal conservation programs is an opportunity to promote, support, and reward voluntary pre- and post-listing conservation and is reasonable given the Service has already authorized certain activities on those lands while weighing impacts to the species. The Service should ensure that any final rule advances the overarching policy goal of incentivizing use of these tools given the essential role of non-federal

¹ EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

² Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 85 Fed. Reg. 55,398 (proposed Sept. 8, 2020) (Proposed Rule), available at: <https://www.govinfo.gov/content/pkg/FR-2020-09-08/pdf/2020-19577.pdf>.

³ 16 U.S.C. § 1533(b)(2).

⁴ *Id.*

⁵ Proposed Rule at 55,399.

⁶ *Id.* at 55,403.

entities in conservation efforts for listed and non-listed species. In particular, EWAC recommends the Service clarify in any final rule that lands included in ESA section 10 plans that are in good standing should be excluded from critical habitat designations.

I. EWAC Generally Supports the Proposed Rule.

The Proposed Rule clarifies when and how ESA section 4(b)(2) is to be implemented. This assures that Service personnel will adopt a consistent approach to undertaking exclusion analyses when designating critical habitat. It also provides all interested parties with a clear explanation of the Service's approach, thereby contributing to open and transparent government. This is particularly important to parties that may be impacted by a proposed critical habitat designation.

A. Credible information

The preamble to the Proposed Rule states that the term “‘credible information’ refers to information that constitutes a reasonably reliable indication regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for a particular area.”⁷ The preamble to the Proposed Rule continues to explain:

In evaluating whether a proponent has provided “credible information” in support of a claim that an area should be excluded, we look at two factors— whether the proponent has provided factual information in support of the claimed impacts and whether the claimed impacts may be meaningful for purposes of an exclusion analysis.⁸

EWAC agrees that the receipt of “credible information” should prompt the Service to conduct an exclusion analysis, and appreciates the Service's clarification of what constitutes “credible information.”⁹ However, the term “credible information” is not defined in the Proposed Rule itself. EWAC recommends the Service incorporate the term “credible information” in the rule text of any final rule. Given this definition is integral to prompting an exclusion analysis, the term warrants codification within the rule text.

Also, the Proposed Rule implies that someone who submits “credible information” will not know whether the Service concludes their submittal constitutes “credible information” until the final designation is published. Given “credible information” is the threshold required for a member of the regulated community to prompt an exclusion analysis, it would be helpful for the submitter to know whether their information qualifies as credible information before the Service takes final action. Otherwise, the only recourse is litigation. EWAC recommends the Service consider incorporation of an advanced notice of proposed rulemaking or some other interim step to improve transparency before making and publishing notice of a final designation.

⁷ Proposed Rule at 55,401.

⁸ *Id.*

⁹ *Id.*

B. Non-federal activities on federal lands

EWAC again commends the Service for its proposed change to its treatment of federal lands in an exclusion analysis. The Service's change in position on federal lands appropriately recognizes the impacts to non-federal entities that can result from critical habitat designations on federal lands.¹⁰ Many EWAC members have facilities that are operating or will be constructed on federal lands. Having critical habitat designated over a proposed project footprint can have significant implications for project timeline and cost and also can complicate the ongoing operation of existing facilities. The Proposed Rule correctly notes that a critical habitat designation on federal lands can result in significant increased costs to a non-federal project proponent if the proponent re-designs the project to avoid impacts to critical habitat (either on their own initiative or through outside pressure). EWAC members strongly agree that the impacts of a critical habitat designation on project proponents using federal lands is a factor that should be given careful consideration in an exclusion analysis.¹¹

C. Community impacts

EWAC supports the Proposed Rule's express recognition of the importance of community impacts.¹² EWAC member projects generate and deliver electric power to communities, and EWAC's members see firsthand the positive impacts that renewable energy and electric infrastructure can bring to a community. Local communities frequently have unique considerations and, in many cases local governments and private landowners have extensive and unparalleled knowledge to not only of the use and value of the areas under consideration, but also how those areas are used by listed species. Therefore, it is critical that community impacts be taken into account when designating critical habitat.

D. Due consideration of expertise

The Proposed Rule appropriately recognizes the importance of stakeholder expertise when assessing economic and other impacts.¹³ In general, EWAC appreciates the Service's recognition of the limitations of its expertise and the express direction in the Proposed Rule that the Service will give appropriate weight to others' expertise on nonbiological impacts.¹⁴ While the Service generally has the knowledge and expertise to assess the impact of a designation on listed species, the Service does not have that same specialized knowledge and expertise when assessing the impact of a designation on a project's financing, cost, engineering feasibility, or timeline. EWAC agrees that outside expertise on impacts should be given appropriate deference and consideration when provided to the Service for consideration in an exclusion analysis.

¹⁰ *Id.* at 55,402.

¹¹ *See id.*

¹² *Id.* at 55,403.

¹³ *See id.* at 55,401-55,402.

¹⁴ *Id.* at 55,401.

In addition, while the Service does have significant biological expertise on listed species, in many instances, significant analyses may have also been conducted by non-Service biologists and ecologists, which should be given due consideration. For example, federal, state, and local governments may have commissioned studies and analyses of how species use certain areas of its jurisdiction. Because of their focus on areas within their jurisdiction, they may offer expertise that also should be considered by the Service in an exclusion analysis. Companies regularly collect data on the natural resources where they develop and operate infrastructure, which can result in years and even decades of data. As written, the Proposed Rule's silence on biological (as opposed to nonbiological) expertise could suggest that non-Service biological expertise may not be appropriately considered in an exclusion analysis. EWAC recommends that any final rule clarify that non-Service biological expertise should be given fair consideration.

II. Exclusion Analysis Should Not Discourage Voluntary Conservation.

EWAC previously commented on the 2016 "Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act," (Policy)¹⁵ when it was proposed in 2014.¹⁶ Prior to publication of the Policy, it was common practice for the Service to exclude areas already covered as part of approved ESA section 10 plans that were in good standing, so long as exclusion would not result in extinction. The Policy introduced the Service's current position that areas covered by ESA section 10 plans are not presumed excluded and instead will be evaluated under factors prescribed in the Policy, which have been included in the Proposed Rule. In its 2014 comments, EWAC recommended the Service return to its previous position: that areas already covered as part of approved ESA section 10 plans that are in good standing should be presumed to be excluded. EWAC repeats this recommendation under the same reasoning as it did in 2014. That is, the Policy and Proposed Rule's removal of the presumed exclusion (1) erodes the regulatory assurances afforded by those plans; and (2) undermines the significant efforts undertaken by the permittees and Service personnel. This in turn creates a disincentive to the private sector/regulated community to create and implement ESA section 10 plans. Such plans are critical to the ultimate success of the Act given the extent to which listed species occupy non-Federal lands and are dependent on such lands for their long-term survival and recovery.

EWAC believes the return to a presumption of exclusion is logical and appreciates the preamble language of the Proposed Rule indicating the Service anticipates excluding lands covered under ESA section 10 plans. EWAC members participate in the various conservation plans authorized under ESA section 10 and strongly believe that critical habitat designations should not interfere with these conservation efforts. Consider the example of lands covered by an ESA section 10(a)(1)(B) Habitat Conservation Plan (HCP).¹⁷ Practically-speaking, HCP lands fall into two categories: (1) Covered Lands – those areas included for take coverage due to the

¹⁵ 81 Fed. Reg. 7,226 (Feb. 11, 2016).

¹⁶ Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 79 Fed. Reg. 27,052 (May 12, 2014).

¹⁷ See 16 U.S.C. § 1539(a)(1)(B).

potential take covered species; and (2) Conservation Lands – those areas that provide the compensatory mitigation to offset the authorized impacts of the take of covered species. In the case of Covered Lands, areas already authorized for take of covered species should not then be designated as “essential to the conservation of a species.” In the case of Conservation Lands, the areas are typically managed under plans approved by the Service and, therefore, may or may not require the added protection of a critical habitat designation.

Designating critical habitat over ESA section 10 lands and lands covered by other voluntary conservation programs removes a critically important incentive for participation. EWAC encourages the Service to reiterate in any final rule that the Service should give appropriate weight to the conservation and special management already afforded by the rigorous ESA section 10 processes, such that it is the expectation that ESA section 10 conservation plan lands are typically excluded from designations, unless otherwise requested by the permit holder. Given the importance of this issue, this language should be included in the rule text rather than the preamble of any final rule. Inclusion of such language in a final rule will help reduce the instances when case-by-case exclusion analyses will be conducted on lands already covered under ESA section 10 plans. This in turn will reduce the unnecessary burden on Service staff, prevent unilaterally reopening carefully negotiated, voluntary plans and protect the regulatory assurances provided by these plans.

We also caution the Service against its blanket statement that draft ESA section 10 plans will be treated as “Conservation Plans Not Related to Permits Under Section 10 of the Act.”¹⁸ Draft ESA section 10 plans come in various forms and should be weighed accordingly. For example, the Service should give due consideration to a draft amendment to an existing, long-standing HCP where mitigation and financial commitments have already been established. EWAC recommends that any final rule clarify this point.

Finally, we caution the Service to avoid a final rule that disincentivizes landowner participation in voluntary conservation agreements that are not related to ESA section 10 plans. Many EWAC members work with landowners to implement voluntary conservation plans to ensure member projects and facilities are consistent with the member’s overall environmental stewardship standards and to demonstrate consideration of or compliance with other federal, state, and local policies and statutes. As mentioned above, such voluntary efforts on non-federal lands are critical to the ultimate success of the ESA because they are necessary to secure the conservation of myriad listed species.

III. An Area Should Be Excluded If the Benefits of Exclusion Outweigh the Benefits of Inclusion.

EWAC agrees with the Proposed Rule’s clarification that where an exclusion analysis concludes that the benefits of exclusion outweigh the benefits of inclusion, an area should then be excluded. This is the rational result of the exclusion analysis, and EWAC appreciates the Service making this point clear.

¹⁸ Proposed Rule at 55,404.

IV. Conclusion

EWAC supports the Proposed Rule and the clarity it provides to the regulated community, broader public sector, and Service staff alike on the Service's authority under ESA section 4(b)(2), and specifically to exclusion of certain lands from critical habitat designations. EWAC applauds the Proposed Rule's position with respect to the treatment of federal lands and consideration for non-federal entities that operate existing infrastructure and plan new projects on federal lands. EWAC believes the suggestions provided above will further clarify the exclusion process and help retain incentives for voluntary conservation efforts. Thank you for consideration of these comments.

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