EWAC®
Energy and Wildlife Action Coalition

December 13, 2021

Comments Regarding the Advance Notice of Proposed Rulemaking Regarding the Proposed Rescission of Endangered Species Act Section 4(b)(2) Regulations

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:
Public Comments Processing
Attn: FWS–HQ–ES–2019–0115
U.S. Fish and Wildlife Service
MS: JAO (PRB/3W)
5275 Leesburg Pike
Falls Church, VA 22041-3803

Docket No. FWS–HQ–ES–2019–0115

The Energy and Wildlife Action Coalition ("EWAC")[1] submits these comments in response to the United States Fish and Wildlife Service's ("Service") October 27, 2021 proposed rule ("Proposed Rule")[2] to rescind the Service's 2020 regulations setting forth the process for implementing section 4(b)(2) of the Endangered Species Act ("ESA") ("2020 Regulations").[3] As is described in greater detail in this comment letter, EWAC encourages the Service to reconsider its proposal to rescind the 2020 Regulations and to take a measured approach to any future contemplated rescissions or revisions to ESA implementing regulations.[4]

I. The Service and the regulated community benefitted from the 2020 Regulations.

Section 4(b)(2) of the ESA requires the Service "tak[e] into consideration the economic impact . . . and any other relevant impact, of specifying any particular area as critical habitat"[5] and provides the Service with the discretion to "exclude any area from critical habitat if [the Secretary] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat."[6] The Secretary retains this discretion "unless [she] 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."[7]

Prior to the Service's adoption of the 2020 Regulations, the Service and the National Marine Fisheries Service ("NMFS") conducted ESA section 4(b)(2) exclusion analyses by following guidance established by the agencies' joint Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act ("2016 Policy").[8] Adoption of the 2020 Regulations was, in part, due to the United States Supreme Court decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*,[9] in which the Court held that the Service's decision to exclude (or not) a particular area from critical habitat is subject to judicial review.

EWAC continues to believe the 2020 Regulations are reasonable, helpful, and should be maintained for at least the following reasons.

---

[1] EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, 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] 86 Fed. Reg. 59,353 (Oct. 27, 2021). The Service subsequently extended the comment period associated with the Proposed Rule. 86 Fed. Reg. 67,012 (Nov. 24, 2021).

[3] 85 Fed. Reg. 82,376 (Dec. 18, 2020); *see also* 50 C.F.R. 17.90.

[4] For additional explanation as to why EWAC supports the 2020 Regulations, please see the attached comment letter ("Appendix A") submitted by EWAC on October 8, 2020 during the regulatory notice and comment period associated with the then-proposed 2020 Regulations.

[5] 16 U.S.C. § 1533(b)(2).

[6] *Id.*

[7] *Id.*

[8] 81 Fed. Reg. 7226 (Feb. 11, 2016).

[9] 139 S. Ct. 316 (2018).

- **Predictability and Certainty.** The 2020 Regulations make explicit when and how the Service will conduct its analysis to determine whether an area should be excluded from the critical habitat designation. This adds valuable clarity to Service staff tasked with conducting exclusion analyses and adds predictability to the regulated community faced with the potential for critical habitat designations to impact projects. Predictability and certainty are always valuable to the regulated community, but it is particularly necessary now, given that this Administration is committed to meeting ambitious climate goals that will require the widespread construction and installation of renewable energy infrastructure, and transmission and distribution of the same. Non-federal actors, including EWAC members, rely on federal agencies like the Service to remain consistent so that these vital projects are not delayed or otherwise derailed.

- **Recognition of Community Impacts and Expertise.** The 2020 Regulations improve the Service's ability to conduct a robust exclusion analysis by providing instruction to integrate state and local expertise.[10] Often, state and local agencies will be more in tune with the needs of their communities and the degree to which a given proposal may give rise to environmental justice concerns—which is a focus of this Administration.[11]

- **Recognition of Impacts Associated with Non-Federal Projects on Federal Lands.** EWAC continues to support the Service's position in the 2020 Regulations that federal lands are eligible for exclusion from critical habitat and that designation of critical habitat over federal lands can have significant impacts to non-federal entities who have a permit, lease, contract, or other authorization for use.[12] It is similarly appropriate that the 2020 Regulations give weight to non-biological impacts associated with non-federal projects occurring on federal lands.[13]

- **Recognition of Conservation Under Existing ESA Section 10 Permits**. Lands that are already the subject of existing ESA section 10 Permits should be excluded from critical habitat. Habitat conservation plans, safe harbor agreements, and candidate conservation agreements with assurances developed pursuant to ESA section 10 are carefully coordinated with the Service and contribute significantly to listed and candidate species conservation.[14] The 2020 Regulations codified certain factors set forth in the 2016 Policy that the Service should use to evaluate any potential ESA section 10 lands for exclusion.[15] By doing so, the 2020 Regulations advance the overarching policy goal of incentivizing voluntary conservation tools

[10] 50 C.F.R. 17.90(d)(1)(ii).
[11] *See* Executive Order 13990, 86 Fed. Reg. 7037 (Jan. 25, 2021); Executive Order 14008, 86 Fed. Reg. 48,745 (Aug. 31, 2021).
[12] *See* 85 Fed. Reg. at 82,382.
[13] *Id.* at (d)(1)(iv).
[14] For a more detailed explanation of how codifying the factors that go into section 10 evaluations promotes voluntary conservation plans (such as Habitat Conservation Plans, Candidate Conservation Agreements with Assurances, and Safe Harbor Agreements), *see* Appendix A at 2.
[15] 85 Fed. Reg. at 82,382 at (d)(3).

that allow non-federal entities to protect listed and non-listed species.[16] For these reasons, EWAC supports keeping the 2020 Regulations in place; however, ideally, EWAC recommends further incentivizing voluntary conservation by returning to Service practice as it existed prior to the agency's adoption of the 2016 Policy.[17] Areas already covered as part of approved ESA section 10 plans that are in good standing should be presumed to be excluded. Further, allowing the Service to presume exclusion for areas covered by ESA section 10 plans will not reduce conservation for listed species covered by an ESA section plan. For example, pursuant to a habitat conservation plan ("HCP"), the Service has authorized "take" of ESA-listed species, often through habitat modification. Thus, some lands included in the HCP plan area likely will be permanently or periodically impacted by human activity. Nevertheless, pursuant to ESA section 10, these impacts have or will be minimized and significantly mitigated and the Service has determined that the impacts will not jeopardize the continued existence of those species or result in the destruction or adverse modification of designated critical habitat. Should the Service propose to designate critical habitat on HCP-covered lands, the permittee likely will expend valuable time and resources seeking to prevent a designation on areas on which the Service has already permitted impacts and found such impacts will not thwart the species' survival and recovery. EWAC is concerned that through the Proposed Rule, which is designed to rescind the 2020 Rule, there would be a return to the policy whereby section 10 plans are not presumed as excluded, as the removal of the presumed exclusion of section 10 plans from the regulatory framework 1) erodes regulatory assurances for non-federal actors; and 2) undermines the significant efforts undertaken by the permittees and Service personnel. These unfortunate effects are disincentives to the regulated community from creating and implementing section 10 plans, which are critical to the ultimate success of the ESA.[18]

II. EWAC recommends the Service reconsider some of the rationale set forth in the Proposed Rule.

The overarching basis for the Proposed Rule appears to be the Service's concern that the 2020 Regulations somehow limit the agency's discretion in designating (or not) an area as critical habitat. As set forth below, EWAC believes this is not the case as the Service retains ultimate discretion over whether an area will be excluded from critical habitat.

a. Non-Service experts will not have "outsized" role.

The first stated basis for the Proposed Rule is the "outsized" role of non-Service stakeholders in the critical habitat determination process.[19] However, the 2020 Regulations

[16] *See* Appendix A at 2, 5-6.
[17] 81 Fed. Reg. 7,226 (Feb. 11, 2016).
[18] *See* Appendix A at 5.
[19] 86 Fed. Reg. at 59,348.

continue to place the authority over exclusion decisions with the Service.[20] While the 2020 Regulations require the Service to give weight to the opinion of experts on "non-biological" matters, ultimately the Service retains the discretion to reject those opinions where the best available information rebuts the information provided by the non-biological expert.[21]

It is both reasonable and appropriate that the Service consider and give due weight to the opinions of experts in areas beyond its own expertise. On a matter as important as designating critical habitat, the Service should recognize where its knowledge may be lacking and should supplement that knowledge with outside information when possible. This is especially true with respect to non-biological impacts, but sometimes even in the biological realm, where an analysis would benefit from more complete or better information. For example, many private companies and consultants collect troves of data on natural resources related to the development and operation of their assets that can be shared with the Service. Additional data helps the Service to make a more informed decision and therefore is in the best interest of the environment and the public.

b. The Service must still determine whether information is, in fact, credible to require an exclusion analysis.

The 2020 Regulations are explicit that the Service retains discretion on when to perform exclusion analyses, what information to consider, and whether the benefits of exclusion outweigh the benefits of inclusion.[22] In doing so, the 2020 Regulations protect the Service's discretion both as to when an exclusion analysis should be considered and what information should be considered as part of that analysis. The Service will conduct an exclusion analysis when the agency "otherwise decides to exercise [its] discretion" to do so.[23] In other words, with respect to what constitutes "credible information," the Service is in no way obligated to give credence to blatantly biased information or flawed research or field studies. Although the 2020 Regulations require an exclusion analysis when a proponent of the exclusion presents "credible" evidence, determining what constitutes "credible" is ultimately up to the Service.[24] Moreover, the preamble to the 2020 Regulations instructs that the Service should not give weight to purported expert opinions if the Service has knowledge or material evidence rebutting such information.[25]

c. The Service is the ultimate arbiter of whether to exclude an area from critical habitat.

The 2020 Regulations explicitly state that when the Service does consider outside expert opinions, those opinions must be "weigh[ed] relative to the conservation value of that particular

[20] 85 Fed. Reg. at 82,377 ("…once the Secretary has identified and considered economic and other relevant impacts, he has discretion in how to determine whether the benefits of excluding a particular area from the designation outweigh the benefits of including that area in the designation.").
[21] *Id.* at 82,380.
[22] *Id.* ("…we will give weight to benefits of inclusion or exclusion based on who has the relevant expertise. We will base critical habitat designations based on the best available information… We do not consider speculative or unsupported information to be the best available information and will use our best professional judgment to evaluate all information critically before incorporating it into any exclusion analysis.").
[23] *Id.* at 82,388.
[24] *Id.* at 82,380.
[25] *Id.*

area."[26] Thus, the Service retains full discretion in balancing and weighing the conservation value of a particular area against the costs of including the same area in a critical habitat designation.

Taken together, these provisions of the 2020 Regulations make it clear that the Service is the ultimate arbiter of whether a portion of land should be excluded from critical habitat designation; it merely requires that the Service consider all *relevant*, *credible* information before issuing its decision.

d. The Service has historically administered the ESA differently than NMFS.

The Service lists as another reason for rescinding the 2020 Regulations the fact that they are inconsistent with NMFS regulations, and therefore a new rule is necessary to bring the agencies' practices into alignment.[27] However, the Service's ESA regulations have long been inconsistent with NMFS in certain respects, and this inconsistency does not seem to have bothered the agency previously. For example, until September 26, 2019, the Service's rule regarding implementation of ESA section 4(d) did not align with NMFS' section 4(d) rule.[28] Specifically, when the Service listed a species as threatened under the ESA, the prohibitions of ESA section 9 relating to "take" automatically applied unless the Service issued a species-specific section 4(d) rule. NMFS, by contrast, does not apply the ESA section 9 prohibition on "take" *unless* a species-specific rule is issued by that agency. Upon finalization of the Service's current section 4(d) rule, the Service's practices with respect to threatened species were brought into alignment with NMFS' practices. However, the Service recently announced its intention to return to an earlier version of the 4(d) rule—which would once again cause Service regulations to be inconsistent with NMFS regulations.[29] In short, there is no precedent requiring Service regulations to mirror NMFS regulations, the Service has announced its intention to make its ESA implementation regulations inconsistent with NMFS regulations in the context of ESA section 4(d), and, thus, consistency with NMFS regulations should not be a primary driver of rescinding the 2020 Regulations.

e. The "shall exclude" language is appropriate.

Finally, the preamble to the 2021 Proposed Rule changes the "shall exclude" language of the 2020 Regulations, however, such language actually is appropriate and is the rational result of an exclusion analysis. If the Service, after conducting a rigorous, thorough analysis, concludes that the benefits of excluding an area from critical habitat designation outweigh the benefits of inclusion, then the reasonable conclusion is that the Service should exclude that portion of the land. In the preamble to the Proposed Rule, the Service indicates that the shall exclude language "ties the hands of current and future Secretaries in a particular way in all situations";[30] however, this overlooks the fact that the purpose of the ESA section 4(b)(2) analysis is to determine whether

---

[26] *Id.* at 82,389.
[27] 86 Fed. Reg. at 59,349 ("This significant difference in implementation [between NMFS and the Service] of the Act is likely to be confusing to other Federal agencies, Tribes, States, and other potentially affected stakeholders and members of the public…").
[28] Final Rule: Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44,753 (Aug. 26, 2019) ("2019 4(d) Rule").
[29] U.S. Fish and Wildlife Service and NOAA Fisheries to Propose Regulatory Revisions to Endangered Species Act, https://www.fws.gov/news/ShowNews.cfm?ref=u.s.-fish-and-wildlife-service-and-noaa-fisheries-to-propose-regulatory-&_ID=36925.
[30] 86 Fed. Reg. at 59,350.

the conservation value of including an area is indeed outweighed by various benefits of exclusion—including lessening the economic burden on affected landowners and project proponents. Put simply, the conservation goals associated with designating critical habitat are part of the 4(b)(2) analysis and are given due weight through that process.

In sum, it is EWAC's contention that language requiring the Services to exclude areas from critical habitat when the benefit of inclusion is outweighed by the benefit of exclusion should be preserved.

III. The Service should take a measured approach to reviewing and revising ESA implementing regulations put into place under the previous Administration.

While EWAC appreciates the Administration's commitment to rigorous environmental review, including the use of best available scientific information, EWAC is concerned that a wholesale rescission of the 2020 Regulations will not further the purposes of the ESA, and of section 4(b)(2) in particular. Clear and consistent regulatory frameworks help both agencies and those they regulate to anticipate and steer clear of potential project hurdles. A straightforward set of rules helps ensure that all stakeholders are on the same page, which fosters collaboration essential to confronting some of our nation's greatest environmental and infrastructural challenges, such as buildout of renewable energy generation, and modernizing and expanding our electricity grid to reduce carbon emissions. By contrast, constantly shifting goal posts makes it harder for the regulated community to invest time and capital in energy projects that are necessary to further the clean energy goals of this Administration. Under that framework, businesses, the public, and the environment all lose.

IV. Conclusion

EWAC supports the 2020 Regulations and the clarity they provide the regulated community, the broader public sector, and the Service in connection with the agency's implementation of ESA section 4(b)(2). EWAC encourages the Service to withdraw its proposed rescission of those rules and, instead, consider whether a narrower set of changes to the 2020 Regulations may be more appropriate. EWAC shares the Service's goal of protecting endangered species and believes it is possible, and, in fact, necessary, to do this work while also prioritizing this Administration's transition to renewable energy and its related transmission and distribution infrastructure.

***

Please feel free to contact the following EWAC representatives:

Tim Rogers, EWAC Policy Chair, timothy.g.rogers@xcelenergy.com, 612-330-1955

John M. Anderson, EWAC Executive Director, janderson@energyandwildlife.org, 202-508-5093

Brooke Marcus, Nossaman LLP, bmarcus@nossaman.com, 512-813-7941