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Comments regarding:

November 21, 2025 Endangered and Threatened Wildlife and Plants: Listing Endangered and Threatened Species and Designating Critical Habitat

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Public Comments Processing
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Docket No. FWS-HQ-ES-2025-0039

The Energy and Wildlife Action Coalition (“EWAC”)¹ submits these comments in connection with the U.S. Fish and Wildlife Service’s (“USFWS”) and National Marine Fisheries Service’s (“NMFS”) (collectively, “Services”) November 21, 2025 proposal regarding Listing Endangered and Threatened Species and Designating Critical Habitat (“Proposed Rule”).²

I. General Comments of Support

EWAC appreciates the time and effort the Services have expended to review existing regulations governing listing and critical habitat designations under Endangered Species Act (“ESA”) section 4 (“Section 4”) (“Section 4 Regulations”), and generally agrees that returning the Section 4 Regulations to the version promulgated in 2019 (“2019 Regulations”)³ will benefit the Services, the regulated community and ultimately, species conservation efforts. The Proposed Rule would result in clearer and more efficient administration of Section 4, as well as decision-making processes that may be better able to withstand challenge by third parties.

For example, EWAC supports the Services’ proposal to re-incorporate language explaining that designating critical habitat may not be prudent where threats to a species’ habitat stem solely from causes that cannot be addressed through management actions resulting from ESA section 7 consultations.⁴ EWAC agrees that where a species is threatened or endangered due to factors that are unrelated to habitat or cannot be addressed by management actions developed through consultation, the Services’ resources are better expended pursuing research and other opportunities to improve the species’ status. This is a better solution than processing consultations to assess and address potential impacts to “critical” habitat that, in fact, neither is “essential to the conservation of the species” nor can be managed through the consultation process.⁵

EWAC also supports the Services’ proposal to reinstate the two-part process that would govern when the agencies may designate as critical habitat areas that are unoccupied by the species, which prioritizes designating occupied areas. EWAC believes that this prioritization aligns more closely with statutory intent,⁶ legislative history,⁷ and caselaw.⁸

¹ EWAC is a national 501(c)(6) trade association formed in 2014 whose members consist of electric utilities, electric transmission providers, and independent power producers, 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 90 Fed. Reg. 52,607 (November 21, 2025) (“Proposed Rule”).

³ 84 Fed. Reg. 45,020 (August 17, 2019).

⁴ Proposed Rule at 52,611.

⁵ 16 U.S.C. § 1532.

⁶ 16 U.S.C. § 1532(5)(A)(ii); *see also Loper Bright Enterprises v. Raimondo*, 603 U.S. 639 (2024) (holding that even where a statute is ambiguous, “there is a best reading all the same”).

⁷ H.R. Rep. No. 96-1625, at 25 (1978).

⁸ *See, e.g., Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) (stating that “if certain habitat is essential, it stands to reason that if the Service did not designate this habitat, whatever the Service otherwise designated would be inadequate The regulation provides only elaboration and not an additional requirement or restriction”).

The comments below provide the Services with some additional suggested modifications to the Proposed Regulations to further the Services' efforts to better align its ESA implementation regulations with the best meaning of the ESA.⁹

II. The Services' Listing Regulations Should Provide Additional Clarification on the Meaning of "Foreseeable Future"

Section 3 of the ESA defines "threatened species" as a species "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."¹⁰ EWAC continues to support the Services' promulgation of a regulation that establishes the basic framework to be used by the agencies in connection with determining whether a species should be listed as threatened. However, EWAC disagrees with continuing to include language in the regulation that agencies "need not identify the foreseeable future in terms of a specific period of time."¹¹ While EWAC understands the Services may not want to constrain their listing analyses to a particular timeframe, we also are keenly aware that there are a significant number of species awaiting listing, downlisting, and delisting. Narrowing the scope of the Services' listing determination with respect to what constitutes the "foreseeable future" would assist the Services in focusing the agencies' efforts on those species with more urgent needs, would allow agency staff to concentrate on higher priority issues, and would provide the regulatory community with much-needed predictability concerning species listings.

III. Additional Suggestions Concerning Designating Unoccupied Critical Habitat

EWAC appreciates that in the Services' discussion of the required two-step process for designating unoccupied areas as critical habitat, the agencies acknowledge the U.S. Supreme Court's ("SCOTUS") decision in *Weyerhaeuser Company v. U.S. Fish and Wildlife Service* ("*Weyerhaeuser*"),¹² in which SCOTUS held that in order to be eligible to be designated as critical habitat, that area must constitute habitat in the first place. The Services also recognize that "[t]o say that an area that is currently uninhabitable for a species at the time of listing is 'essential' for the conservation of such species defies logic."¹³ However, the Proposed Rule does not include an explicit requirement that an area contain "habitat" for a species in order to be eligible for designation as critical habitat. While, taken together, the *Weyerhaeuser* decision and the Services' discussion in the preamble to the Proposed Rule should clearly prohibit the Services from designating as critical habitat areas that do not contain habitat for the species, EWAC recommends making this prohibition explicit in the regulatory text of any final rule for the avoidance of doubt.

IV. Conclusion

EWAC appreciates the opportunity to comment on the Services' Proposed Regulations and looks forward to continuing to work with the Services in their efforts to improve the processes

⁹ Proposed Rule at 52,609.

¹⁰ 16 U.S.C. 1532(20).

¹¹ Proposed Rule at 52,609.

¹² 586 U.S. 9, 19-20 (2018).

¹³ Proposed Rule at 52,612.

associated with listing and delisting endangered and threatened species, and designating critical habitat.

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