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Comments regarding:

November 21, 2025 Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat

Submitted by:

Energy and Wildlife Action Coalition

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Docket No. FWS-HQ-ES-2025-0048

The Energy and Wildlife Action Coalition (“EWAC”)¹ submits these comments in connection with the U.S. Fish and Wildlife Service’s (“Service”) November 21, 2025 proposal regarding Regulations for Designating Critical Habitat (“Proposed Rule”).² The Proposed Rule would revise regulations implementing Endangered Species Act (“ESA”) section 4(b)(2) (“Section 4(b)(2)”). Section 4(b)(2) of the ESA requires the Service 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) provides the Service 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 excluding the area will not result in the extinction of the species at issue (“Exclusion Analysis”).⁴ The Proposed Rule revises and clarifies procedures for designating critical habitat, and codifies aspects of the Service’s 2016 *Policy Regarding Implementation of Section 4(b)(2) of the ESA* that was issued jointly with the National Marine Fisheries Service (“NMFS”), which provided direction on how the agencies should conduct analyses under Section 4(b)(2) (“Section 4(b)(2) Policy”).⁵

As is described in greater detail below, EWAC generally supports the Proposed Rule and, in particular, its underlying purpose of providing increased transparency and certainty for the public and stakeholders.⁶ Comments provided herein are intended to assist the Service in achieving the goals of transparency and certainty.

I. Comments in Support of the Proposed Rule

EWAC believes the Proposed Rule establishes clear parameters on when and how the Service will apply Section 4(b)(2) and how the agency will conduct an Exclusion Analysis. This assures that Service personnel will adopt a consistent approach 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 (“Preamble”) states that the term “credible information” means “information that constitutes a reasonably reliable indication regarding the existence of a

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. 52,592 (Nov. 21, 2025) (“Proposed Rule”).

³ 16 U.S.C. § 1533(b)(2).

⁴ *Id.*

⁵ 81 Fed. Reg. 7,226 (Feb. 11, 2016).

⁶ *Id.*

meaningful economic or other relevant impact supporting a benefit of exclusion for a particular area.”⁷ The Preamble goes on 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 in the Preamble on what the agency views as “credible information.” However, given the term is integral to prompting an Exclusion Analysis, EWAC recommends the Service include the definition in the text of any final rule—rather than providing the definition in the Preamble.

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 that provision of “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 regulation.

b. Non-federal activities on federal lands

EWAC again commends the Service for proposing to change the agency’s treatment of federal lands in an Exclusion Analysis. The Proposed Rule’s treatment of federal lands appropriately recognizes that impacts to non-federal entities can result from critical habitat designation on those lands.⁹ Many energy generation, transmission, and distribution facilities currently operate or will be constructed on federal lands. Having critical habitat designated over a proposed project footprint can have significant implications for project timelines and costs and can also complicate the ongoing operation of existing facilities. The Preamble correctly notes that critical habitat designation on federal lands can result in significant increased costs to non-federal project proponents where the proponents redesign the project to avoid impacts to critical habitat (either on their own initiative or through outside pressure). EWAC strongly agrees 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.

⁷ Proposed Rule. at 52,595.

⁸ *Id.*

⁹ *Id.* at 52,596.

c. Community interests

EWAC supports the Proposed Rule's express recognition of the importance of impacts to community interests as being relevant to an Exclusion Analysis.¹⁰ Local communities frequently have unique considerations and, in many cases local governments and private landowners have extensive and unparalleled knowledge of not only the use and value of the areas under consideration, but also how those areas are used by listed species. Therefore, it is imperative that impacts to community interests 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.¹¹ 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.¹² 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.

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 within their jurisdictions. Because of their focus on specific areas within their jurisdiction, these governmental entities may offer expertise that also should be considered by the Service in an Exclusion Analysis. Likewise, private companies regularly collect data on the natural resources where they develop and operate infrastructure, which can result in years and even decades of data that may not be readily available to the Service.

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 the Service clarify in any final rule that non-Service biological expertise should be given fair consideration in an Exclusion Analysis.

II. Exclusion Analysis Should Not Discourage Voluntary Conservation

EWAC previously commented on the Service's Section 4(b)(2) Policy when it was first proposed in 2014.¹³ Prior to Service adoption of the Section 4(b)(2) Policy, it was common practice for the agency to exclude areas already covered as part of approved ESA section 10 ("Section 10") plans that were in good standing, so long as exclusion would not result in extinction. The Policy

¹⁰ *Id.* at 52,594, 52,599.

¹¹ *Id.* at 52,595, 52,599.

¹² *Id.*

¹³ *Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act*, 79 Fed. Reg. 27,052 (May 12, 2014) (Proposed).

introduced the Service’s current position that areas covered by Section 10 plans are not presumed excluded and instead will be evaluated under factors prescribed in the Section 4(b)(2) Policy, which have, in turn, 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 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. Failing to include a presumed exclusion of areas already covered as part of an approved Section 10 plan¹⁴ erodes the regulatory assurances afforded by those plans and 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 Section 10 plans. Such plans are critical to the ultimate success of the ESA 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 Service’s recognition in the Preamble that the agency values partnerships that are developed during the preparation and implementation of Section 10 plans.¹⁵ EWAC strongly believes that critical habitat designations should not interfere with these partnerships and the conservation efforts that result. Consider the example of lands covered by a Service-approved habitat conservation plan (“HCP”). Practically-speaking, HCP lands fall into two categories: (1) Covered Lands—those areas included for take coverage due to the potential take of ESA-listed species; and (2) Conservation Lands—those areas on which specific measures are being taken to conserve the covered species, including those that provide the compensatory mitigation to offset the authorized impacts of the take. 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 protected and managed in accordance with the terms of the HCP, for the benefit of the covered species and, therefore, are unlikely to experience a significant additional benefit by a critical habitat designation.

Designating critical habitat over lands included in Section 10 plans (and lands covered by other voluntary conservation programs) removes a crucial incentive for participation in these plans. 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 Section 10 processes, such that it is the expectation that 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 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.

¹⁴ E.g., habitat conservation plans, candidate conservation agreements with assurances, safe harbor agreements, conservation benefit agreements.

¹⁵ Proposed Rule at 52,596.

III. An Area Should be Excluded Where 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.

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 Section 4(b)(2), and specifically on the agency's authority to exclude 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. EWAC welcomes the opportunity to discuss its comments in greater detail with the Service or others within the Administration.

Please feel free to contact the following EWAC representatives:

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