U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

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Bridget Fahey
U.S. Fish & Wildlife Service
Division of Conservation & Classification
5275 Leesburg Pike
Falls Church, VA 22041

Re: Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 86 Fed. Reg. 59,347 (Oct. 27, 2021); Docket No. FWS-HQ-ES-2019-0115.

Dear Ms. Fahey:

The U.S. Chamber of Commerce, American Gas Association, American Road & Transportation Builders Association, Associated General Contractors of America, Interstate Natural Gas Association of America, National Association of Manufacturers, National Cattlemen's Beef Association, National Rural Electric Cooperative Association, and the Public Lands Council ("the Associations") appreciate the opportunity to comment on the U.S. Fish and Wildlife Service's (the "Service") proposed rule, "Endangered and Threatened Wildlife and Plants: Regulations for Designating Critical Habitat."[1] The proposed rule would rescind the currently effective rule by the same name, which amended the Service's regulations to better implement section 4(b)(2) of the Endangered Species Act. More specifically, the rule that the Service now proposes to rescind clarified, "based on agency experience, how the Service considers impacts caused by critical habitat designations and conducts [its] discretionary exclusion analysis."[2]

The Associations support the Endangered Species Act's ("Act") goal of protecting species threatened with extinction and the habitat those species depend on. Evaluating which areas should be excluded from critical habitat designations because the harms of designation outweigh the benefits plays an important role in ensuring the Act's goals are met without unduly burdening the economy and other important government objectives. The current rule provides regulatory certainty and presents clear, enforceable guideposts for agency staff performing these evaluations. The United States is embarking on a much-lauded bipartisan effort to repair, rebuild, and improve our infrastructure. The resources of the Service and the whole of the Federal government will be called upon to efficiently carry out their obligations with regard to project approval and permitting. It is therefore unwise to revoke this definition. For the reasons described in more detail below, the Associations urge the Services to withdraw the proposal.

[1] 86 Fed. Reg. 59346 (Oct. 27, 2021).
[2] *Id.*

1. The Associations Support Wildlife Conservation Efforts and the Endangered Species Act's objectives.

The Endangered Species Act seeks to protect and recover imperiled species and the ecosystems they depend on. The Associations support these objectives and several organizations may have supported initiatives to help improve wildlife conservation. For example, several have supported:

- America's Conservation Enhancement Act of 2020, which reauthorized the North American Wetlands Conservation Act and the associated grant program to conserve wetlands for waterfowl and other birds. Over the last two decades, the program has funded over 3,000 projects totaling $1.83 billion in grants. More than 6,350 private and business partners have contributed another $3.75 billion in matching funds.[3] Almost 30 million acres of bird habitat have been acquired, restored, or enhanced under the program.

- Neotropical Migratory Bird Conservation Act, which provided over $75 million grants to support 628 projects in 36 countries, including Canada and Mexico. These projects have positively affected approximately five million acres of bird habitat and spurred partnerships of an additional $286 million.[4]

- Great American Outdoors Act, which not only improves our national parks system, but helps protect migratory birds and other wildlife. Almost $800 million in annual royalties from oil and gas revenues from production in the Gulf of Mexico could be directed to this conservation effort each year.

- Farm Bills that provide incentives to private landowners to create conservation easements and partnership programs to improve millions of acres of wildlife habitat, including that of migratory birds.

The funding and other incentives in these federal programs will help support migratory birds and other wildlife, including threatened and endangered species, through the development and protection of their habitat. These programs demonstrate the United States' strong commitment to our neighbors concerning wildlife protection. Coupling the funding provided through these conservation programs with the voluntary industry efforts will help minimize and often times avoid impacts to listed species.

The Associations firmly believe that conservation efforts and the business community can thrive at the same through disciplined application of the Act. However, as noted below, balancing, and achieving these objectives requires certainty, adherence to the law, and focused and efficient analyses.

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3 North American Wetlands Conservation Act, Protecting, Restoring, and Enhancing Wetland Habitats for Birds, U.S. Fish and Wildlife Service, https://www.fws.gov/birds/grants/north-american-wetland-conservation-act.php.
4 Neotropical Migratory Bird Conservation Act, Conserving Birds Across the Americas, https://www.fws.gov/birds/grants/neotropical-migratory-bird-conservation-act.php.

2. Rebuilding our infrastructure requires, among other things, focused ESA analyses.

Thanks to the bipartisan Infrastructure Investment and Jobs Act, the United States will be undertaking a much-needed effort to, among other things, improve access to broadband, provide clean drinking water to millions of families, upgrade our energy grid, and grow our economy. This includes the single largest investment in bridges since construction of the Interstate Highway System and the largest-*ever* investment in innovation, efficiency, and resiliency. It will require "all hands-on deck" across the federal agencies, as many of these projects will require federal approvals and evaluations or touch federal lands.

Implementing these efforts requires efficient federal reviews focused on compliance with our environmental statutes and goals, while furthering this great effort to improve the economy and the well-being of millions of Americans. Stable and efficient environmental evaluations, including Endangered Species Act consultations performed by the Services and critical habitat designations that may have implications for various projects, are essential for major projects enabled by both the government and private sector. The clear and efficient fulfilment of the Services' duties is needed now more than ever.

Too often, however, delays and associated costs from overly expansive environmental reviews that fail to focus on their statutorily defined objectives result in the cancellation of projects or long delay in their implementation. The United States cannot realize the Infrastructure Investment and Jobs Act's promises if it cannot efficiently complete its various environmental reviews in reasonable time frames, including habitat and critical habitat evaluations under the Act.

The Associations are concerned that the proposal, which would revoke the current regulations governing critical habitat exclusions, will complicate these efforts. It will decrease uniform application of the Act's requirements, which will lengthen review times and waste resources. Importantly, and as noted further below, it is legally flawed because it is arbitrary and capricious. This will jeopardize both this rule and the certainty of any later analyses performed under it.

3. The current rule is consistent with the Act's requirement that the Service balance the benefits of conservation efforts against potential negative consequences and with principles of good government.

The Service is charged with making "critical habitat" designations under the ESA. This is an important responsibility that requires evaluation of the best science and information on species conservation. It also requires the Service to balance conservation goals against the economic impacts of critical habitat designation and the negative consequences those designations can have. Specifically, when determining whether to designate "critical habitat," section 4(b) requires the Service to "take[] into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat."[5] The Service may exclude *any* area from critical habitat if "the benefits of such exclusion outweigh

[5] 29 U.S.C. § 1533(b)(2).

the benefits of specifying such areas as part of the critical habitat" unless failure to designate will result in extinction. *Id.*

The rule that the Service now proposes to rescind clarified how the Service considers the impacts of designation and evaluates the negative consequences that may justify excluding an area from critical habitat designation. For example, the current rule clarifies when the Service will conduct an exclusion analysis, the type of information it will evaluate, and the weight the Service will give to information on relevant factors like economics, for which the Service's biologists may have less expertise.[6] Providing regulatory guideposts like these ensures disciplined application of the agency's authority, prevents conflict between agencies, gives certainty to stakeholders, improves efficiency, and reduces litigation risk. It's good government.

The overarching rationale for rescission is that the current rule "unduly constrained" the agency's discretion. The agency may now view these guideposts as inconvenient, but it has failed to provide a reasoned basis for rescinding them. Finalizing the proposal would be arbitrary and capricious. Indeed, when an agency reverses itself, it "must show that there are good reasons for the new policy." *FCC v. Fox Television Stations, Inc.*, 566 U.S. 502, 515 (2009). It must provide "a reasoned explanation . . . for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 515-16. As discussed in more detail below, the Service's rational is conclusory and fails to provide a meaningful rationale for rescission. We therefore urge the agency to withdraw the rescission.

4. The specific rationale described in the proposal is insufficient to justify rescission and fails to afford stakeholders a meaningful opportunity to comment.

The proposal raises a series of concerns about specific aspects of the current rule. We address each in turn.

A. Credible information. The current rule commits the Service to *consider* excluding an area from critical habitat designation when a proponent presents "credible information" regarding the existence of "meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area."[7] In the proposed rule, the Service argues that this provision is vague and fails to improve transparency, but its bases for rescinding this provision are thin and do not improve transparency.

First, the language in the current rule is not vague. To guide whether the Service must consider exclusion, the current rule uses common phrasing that has guided legal and regulatory decisions for ages. It says that "credible information" is information that presents a "reasonably reliable indication" of the impacts and looks to whether the proponent presents factual support for its assertions. Determining credibility and relying on evidence that is reasonably reliable are bedrock principles within our legal system. For example, Congress has used the term "credible evidence" to describe the evidence necessary to trigger further action at least twenty times in the United States Code.[8] It is even more common for Congress to require decisionmakers to use

[6] 50 C.F.R. § 17.90.
[7] *Id.* § 17.90(c)(2).
[8] *See, e.g.*, 26 U.S.C. § 7491; 10 U.S.C. § 1507; 19 U.S.C § 4646.

"reasonably reliable" information.[9] There is simply nothing vague about such commonly understood terms.

Second, the Service claims that the language causes confusion. However, the proposal fails to present any specific example of confusion, including who was confused, how that confusion was resolved, and whether it was well founded. This type of conclusory rationale is inadequate to provide stakeholders a meaningful opportunity to comment on the best way to improve the situation. It cannot alone form the basis for revoking a regulation.

Third, the Service wrongly suggests that the language is not needed because the Service must consider the best information available when making critical habitat designations anyway, and asserts that it always considered requests for exclusion before it had the current regulation. The credible information requirement does provide an important degree of certainty to stakeholders. It assures that stakeholders can hold the agency to its promise to consider exclusion when credible information supports consideration. It also sets a standard that stakeholders must meet if they wish the agency to consider exclusion. Without such standards, the agency will face requests based on far less reliable information (which will waste resources) and stakeholders will have less certainty regarding the information they must present to the agency, all of which potentially leads to lengthier reviews and delayed approvals.

B. Expertise. For non-biological factors relevant to excluding areas from designation, such as economic impacts, the current rule favors information from experts in those areas and others with first-hand knowledge of the facts on the ground (such as local regulators). "When analyzing the benefits of including or excluding any particular area based on impacts identified by experts in, or by sources with firsthand knowledge of, areas that are outside the scope of the Service's expertise, the Secretary will give weight to those benefits consistent with the expert or firsthand information . . ."[10] Examples of the type of non-biological information for which the rule favors others' expertise include: non-biological impacts to Tribal resources; nonbiological impacts identified by state or local governments, national security concerns, impacts to permittees, and economic impacts. This makes sense because the Service has no particular expertise in assessing these non-biological factors.

The Service complains that this weighting eliminates its discretion to evaluate the factors itself and use its "expert judgement and mandate to base designations on the best scientific data available." It does nothing of the sort. Applying proper weight to economic and other non-scientific analyses from those with more expertise than the Service has no impact on the Service's evaluation of the biological/scientific data. The rule retains the Service's ability to rely on the best science available and even its ability to rebut non-biological data obtained from others.

The Service incorrectly asserts that the rule undermines its role in undertaking an impartial evaluation of the relevant data, including information that proponents of exclusions provide, and hinders its ability to designate habitat based on scientific data. The rule, however, specifies that the Service does not have to give weight to the information from experts in non-

[9] *See, e.g.*, 15 U.S.C. § 1639c; 42 U.S.C. § 7411.
[10] 50 C.F.R. § 17.90(d)(1).

biological factors if it "has knowledge or material evidence that rebuts that information." As stated above, it has no impact on the Service's discretion to weigh the best available scientific data.

Finally, the Service has provided no example of how the current rule's provisions have negatively impacted its discretion or led to decisions that are contrary to the Act or federal policy. Absent such examples, the Service is merely speculating about negative impacts. It therefore deprives stakeholders a meaningful opportunity to comment on the bases for changing the rule.

C. Federal Lands. The Service's basis for rescinding the rule's clarification that federal lands are equally eligible for exclusion as private lands is similarly misplaced. Contrary to the proposal's suggestion, the Act's purpose is not inconsistent with treating federal lands equal to private and state lands when evaluating exclusion. Indeed, Section 4(b)(2) requires the Secretary to consider economic impact and relative benefits before deciding to exclude an area from critical habitat or proceed with designation, without regard to whether the land in question is federal or not. On the contrary, Congress must have intended the Service to take its obligation to weigh these factors on federal land that might be critical habitat, because the critical habitat designation have their highest degree of impact on federal, not private land. As the Service has put it, "[c]ritical habitat designations affect only Federal agency actions or federally funded or permitted activities. Critical habitat designations do not affect activities by private landowners if there is no Federal "nexus"—that is, no Federal funding or authorization."[11]

To put it another way, nothing in the statute distinguishes federal from state lands for the purposes of evaluating exclusions from critical habitat. The statute provides clear factors for considering exclusions and those factors can be applied anywhere. Where an exclusion is appropriate, that is necessarily consistent with the Act's purpose because that is how Congress designed the program.

D. Shall Exclude. The proposal wrongly contends that the rule's "shall exclude" language "interferes with the statute's conservation goals."[12] The rule states that the Secretary "shall" exclude an area where the benefits of exclusion outweigh those of inclusion, so long as the exclusion will not result in the extinction of the species concerned.[13]

This does not interfere with the statutory goals. The Act clearly gives the Service discretion to exclude an area when the benefits of exclusion outweigh those of inclusion.[14] Narrowly tailoring critical habitat designations to balance benefits and harms is embedded in the statute.

The sole provision of the Act addressing the Secretary's authority to designate "critical habitat" directs the Secretary to "designate any habitat of [a listed] species which is then considered to be critical habitat" concurrently with listing the species (reserving the ability to revisit later). The Secretary must do this with a narrow focus. For example, the Secretary must

[11] U.S. Fish & Wildlife Service, Critical Habitat: What is it? (March 2017) *available at* https://www.fws.gov/endangered/esa-library/pdf/critical_habitat.pdf.
[12] 86 Fed. Reg. at 59,350.
[13] 50 C.F.R. § 17.90(d).
[14] 16 U.S.C. § 1533(b)(1)(B)(2).

focus on only those areas within a habitat that are "essential to the conservation of a species." It must consider only "the best scientific and commercial data" available. It must take into account efforts by others (i.e., state and foreign governments) to protect the species and the habitat within their jurisdictions. It must consider "the economic impact, the impact on national security, and any other relevant impact, of specifying any particular areas as critical habitat." It may also exclude any area that might constitute critical habitat from a designation if the benefits of exclusion outweigh inclusion (and so long as exclusion will not cause extinction).

In short, the statutory context shows that the Services must take great care to narrowly focus on the habitat and critical habitat within it to make only those designations necessary to conserve the species while minimizing the negative consequences of designation. Clarifying that the Service will make the appropriate exclusions when the facts and evidence support doing so is perfectly consistent with the statute.

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For the above given reasons, the Associations respectfully urge the Services to withdraw the proposal.

Sincerely,

American Gas Association
American Road & Transportation Builders Association
Associated General Contractors of America
Interstate Natural Gas Association of America
National Association of Manufacturers
National Cattlemen's Beef Association
National Rural Electric Cooperative Association
Public Lands Council
US Chamber of Commerce