November 29, 2021

Public Comment Processing
Attn: FWS-HQ-ES-2019-0115
United States Fish and Wildlife Service
MS: JAO (PRB/3W)
5275 Leesburg Pike
Falls Church, VA 22041-3803

RE: Docket No. FWS-HQ-ES-2019-0115 – Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat
Submitted via Federal eRulemaking Portal *https://www.regulations.gov/*

Dear Ms. Fahey:

The California Farm Bureau appreciates the opportunity to provide comments on the United States Fish and Wildlife Service's (Service) proposed rule which seeks to rescind the final rule titled "Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat" (Final Rule) that was published on December 18, 2020 and became effective on January 19, 2021. The proposed recission, if finalized, would remove the regulations established by the Final Rule and resume implementation of the 2016 Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (Policy) and the regulations at Title 50 of the Code of Federal Regulations (CFR) Chapter 1, Part 424.19. We understand that any previously finalized critical habitat designation would not be reevaluated should this proposed recission become final.

I. About California Farm Bureau

California Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing approximately 32,000 agricultural, associate, and collegiate members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers, ranchers, and foresters engaged in production agriculture to provide a reliable, safe, and affordable supply of food and fiber through responsible stewardship of our natural resources.

II. Background

On December 18, 2020, the Final Rule issued by the Service amended portions of regulation that implement Section 4 of the Endangered Species Act of 1973 ("ESA" or "Act"), as amended. These amendments were incorporated into 50 CFR part 17 (at §17.90). The Final Rule applied solely to critical habitat designated by the Service and set forth a process for implementing section 4(b)(2) of the Act, which requires the Service to consider the impacts

of designating critical habitat and allows the Service to exclude particular areas following a discretionary exclusion analysis subject to certain limitations.

Section 4(b)(2) of the Act requires that the Service consider the economic impact, the impact on national security, and any other relevant impact of designating any particular areas as critical habitat. It provides that the Service may also engage in a further discretionary consideration, including exclusion of particular areas from the designation, if the benefits of exclusion outweigh the benefits of inclusion and exclusion would not result in extinction of the species.

The overarching intent of the Final Rule was to clarify how the Service considers impacts caused by critical habitat designations and conducts its discretionary exclusion analysis, especially given the recent U.S. Supreme Court decision in *Weyerhaeuser Co. vs. U.S. FWS*, 139 S. Ct. 361 (2018) (*Weyerhaeuser*). The Final Rule discussed the Service's intent to articulate clearly when and how exclusion analysis will be undertaken under Section 4(b)(2). A non-exhaustive list of categories of potential impacts that the Service could consider was also included.

At this juncture, the Service is now changing its view of the best way to balance transparency and predictability with flexibility and discretion stating that the prior Final Rule is problematic because it constrains the Service's discretion in administering the Act, potentially limiting or undermining, the Service's role as the expert agency and its ability to further the conservation of endangered and threatened species through designation of their critical habitats.

California Farm Bureau opposes the proposed recission of the regulations that established a framework for how the Service conducts its impact analysis and evaluation of exclusion from critical habitat. Recently finalized by the Service, the regulations were promulgated to provide the regulated community with greater transparency and certainty as it relates to the critical habitat exclusion process. We do not believe these values are promoted by the current proposal that would return to a much narrower policy.

III. General Comments

Private landowners, federal permittees, and contactors, including farmers, ranchers, and water users in California and beyond, have an important stake in the Service's administration and application of the Act's critical habitat provisions. For this reason, California Farm Bureau offers the following comments on the proposed recission:

Transparency and Certainty are Essential

When a species is listed as threatened or endangered, the Service is also required to designate any habitat of such species which is then considered to be critical habitat. Recognizing the impacts that critical habitat designation can have on an area, the Act also authorizes the Service to exclude areas from critical habitat. Factors considered include economic impacts, the impact on national security and other relevant impacts the Secretary may factor if determined that the benefits of such exclusion outweigh the benefits of specifying an area as critical habitat unless the Secretary determines, based on the best scientific and commercial data available, that the failure to designate the area will result in the extinction of the species. This process allows for consideration and balance of all impacts and benefits of including a particular area within critical habitat which is especially important for those affected by designation.

There are great economic, regulatory, and other implications associated with critical habitat. It is essential that farmers, ranchers, and all stakeholders have a clear regulatory basis by which to evaluate the Service's critical habitat decisions. Yet, until recently, the Service has not provided substantial regulatory criteria establishing how they conduct their critical exclusion analysis, essentially relying upon a history of case law instead of clear regulation.

The proposed recission states that the Final Rule employs a rigid ruleset in all situations regardless of facts as to when and how the Secretary may utilize their discretion to exclude areas from critical habitat designation. Additionally, the proposed recission also states that the Final Rule undermines the Service's ability to further conservation of a species because the rule set applies to all situations regardless of facts or the conservation outcomes. Contrary to these characterizations included in the proposed rule, the Final Rule provided the establishment of regulatory procedure that simultaneously informs the Service and provides clarity for the regulated community. We cannot over emphasize the importance of transparency and consistency as it relates to how the Service determines inclusion versus exclusion and ultimately exercises their discretion regarding the exclusion of an area.

Additionally, reverting to the Policy will not provide better clarity and transparency even though it identifies specific factors to consider if a discretionary exclusion analysis is conducted. The Policy stops short of articulating more generally how the Service should approach the determination to undertake an analysis. Adding elements of the Policy to the implementing regulations would greatly assist with guiding agency activity and provide greater transparency and certainty to the regulated community.

Primary Substantive Provisions

The proposed rule would rescind each of the primary substantive provisions included in the 2020 Final Rule. We offer the following comments on each of those provisions:

A. "Credible Information" Standard

The Service is proposing to rescind the mandate that the Service undertake a discretionary exclusion analysis whenever a proponent of an exclusion provides credible information supporting the exclusion. The Service states that the credible information standard is vague, does not accomplish the stated goal of improving transparency about what information will or will not trigger an exclusion analysis, and will lead to potential inefficiencies and waste the Service's limited resources. The Service also states that the Final Rule fails to define "meaningful" impact, therefore providing lack of clarity as to when it would be applied when assessing whether credible information had been provided.

The Final Rule explained 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. In evaluating whether a proponent has provided credible information in support of a claim that an area should be excluded, the Service looks at two factors- whether the proponent has provided factual information and support of the claimed impacts and whether the claimed impacts may be meaningful for purposes of an exclusion analysis.

As previously articulated by the Service, the term "meaningful" was not regulatorily defined because the Service's intent was for the word's meaning to retain its plain language interpretation. For example, if evidence suggests that there is a trivial economic impact associated with a proposed designation, then an exclusion analysis would not be triggered. The Service has stated that the "credible information" standard will not always require an exclusion analysis, nor does it waive the Secretary's discretion. Instead, it provides guidance to the Secretary as to how to exercise Secretarial discretion under the statute on a consistent, comprehensive basis rather than a case-by-case basis. The addition of a "credible information" standard adds clarity and transparency to what had otherwise been an uncertain, and at times opaque, decision point for stakeholders.

B. Assigning Weights According to Who Has the Expertise

The Service is proposing to rescind the provision to automatically assign weights based on the nonbiological impacts identified by entities outside the agency due to the belief that it does not advance the conservation goals of the Act. The Service states that this provision included in the Final Rule constrains their authority and responsibility as the agency with the expert judgment in the implementation of the

ESA and that it could also be at odds with the ESA's mandate to base designations on the best scientific data available.

This proposal disregards the Service's own prior explanation in the Final Rule. The information submitted by outside parties is thoroughly evaluated by the Service and there are safeguards in place regarding the assignment of weights. Per the Final Rule, the Service's authority or legal responsibilities under the ESA are not constrained or in conflict as the regulations are not rigid. They do not require that weight is given to information submitted by outside parties.

The proposed recission also misrepresents the scope of the Service's statutory obligations it must follow when determining whether to exclude an area from critical habitat. ESA Section 4(b)(2) requires that the Secretary, when designating critical habitat, shall designate on the basis of the best scientific data available *and* after taking into consideration the economic impact, the impact on national security, and other relevant impact. Because critical habitat designations are based on more than just the best scientific data available, information on non-biological impacts, and the assignment of weight to those impacts for determining exclusion, are both statutorily required. This required process is not in conflict with the Secretary's mandate to base designation on the best scientific data available as stated in the proposed recission.

Finally, after the Supreme Court issued its *Weyerhaeuser* decision in 2018, the Service promulgated the Final Rule and evaluated the process and procedures described in the Policy. The Service concluded that it should be deliberate and transparent about how it makes critical habitat exclusion determinations. Should the Service rescind the Final Rule and revert to the Policy, it is not clear how the Service intends to address the concern about the need for the Service to be more deliberate and transparent in its decision-making as it related to critical habitat exclusion.

C. "Shall Exclude"

The Service is proposing to rescind the requirement in the 2020 Final Rule that the Secretary shall exclude an area where the benefits of exclusion outweigh the benefits of inclusion as long as exclusion will not result in the extinction of the species. The Service states that retaining the provision "interferes with the statute's conservation goals by making a binding rule that ties the hands of current and future Secretaries in a particular way and in all situations" and is an "unnecessarily broad constraint on the Secretary's discretion." Acknowledging that the Secretary balances multiple factors and criteria in a determination process, the Final Rule created a standard of how the Secretary would proceed when the benefits of exclusion outweigh the benefits of inclusion. This recission and reversion to the 2016 Policy would favor Secretarial

discretion over providing transparency and certainty to stakeholders and the regulated community.

D. Other Regulatory Provisions of the Final Regulations

The Service is proposing to rescind other provisions added in the 2020 Final Rule that identify factors for the Secretary to consider when conducting exclusion analyses that involve particular categories of impacts. The Service's prior intention of promulgating the Final Rule was to provide greater transparency and certainty for the public and stakeholders. While the Service believes the factors in the Final Rule to be similar to those factors included in the 2016 Policy, there are some components explained in the Final Rule for the first time especially as it relates to both economic impacts and other relevant impacts. California Farm Bureau supports retaining these additional provisions as their retention promotes greater transparency and certainty.

IV. Conclusion

California Farm Bureau appreciates the opportunity to provide comments in response to the Services' proposed recission. Critical habitat designations can have great impact on California's valuable and productive agricultural lands. By better spelling out the Service's general approach, steps, triggers, and specific considerations to be consistently applied to critical habitat exclusion analyses, a better balance is achieved between regulatory protections, voluntary action, and necessary flexibility to enable improved management and greater resilience. For these reasons, we request that you take our comments and analysis into full consideration. Should the Service reconsider the recission or pursue refinements, we stand ready to offer constructive insights and perspectives. Please contact Erin Huston at ehuston@cfbf.com (916-849-3746) with additional questions.

Sincerely,

JAMIE JOHANSSON
President