



November 23, 2021

VIA ELECTRONIC SUBMISSION

The Honorable Gina Raimondo  
Secretary  
U.S. Department of Commerce  
National Marine Fisheries Service  
1401 Constitution Ave NW  
Washington, D.C. 20230

The Honorable Deb Haaland  
Secretary  
U.S. Department of the Interior  
Fish and Wildlife Service  
1849 C St. NW  
Washington, D.C. 20240

**Re: Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat (86 Fed. Reg. 59346; October 27, 2021) and Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat (86 Fed. Reg. 59353; October 27, 2021).**

Dear Secretaries Haaland and Raimondo:

On October 27, 2021 the U.S. Department of the Interior’s Fish and Wildlife Service (FWS) along with the U.S. Department of Commerce’s National Marine Fisheries Service (jointly “Services”), published a proposed rule rescinding the 2020 final rule that added a definition of “habitat” to regulations implementing Section 4 of the Endangered Species Act.<sup>1</sup> On the same date, FWS published a proposed rule rescinding its 2020 final rule that revised policies and

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<sup>1</sup> 16 U.S.C. § 1533 (a)(3)(A)(i).



procedures for implementing exclusionary analysis when designating critical habitat. The Office of Advocacy of the U.S. Small Business Administration (Advocacy) respectfully submits the following comments. Rather than completely rescinding both 2020 rules, the Services should instead revise the rules to address agency concerns but retain provisions for regulatory transparency and certainty.

### **The Office of Advocacy**

Advocacy was established pursuant to Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. The Regulatory Flexibility Act (RFA),<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA),<sup>3</sup> gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, federal agencies are required by the RFA to assess the impact of the proposed rule on small business and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.<sup>4</sup> The agency must include, in any explanation or discussion accompanying the final rule's publication in the Federal Register, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.<sup>5</sup>

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."<sup>6</sup>

### **Background**

Congress enacted the Endangered Species Act (ESA) in 1973 to conserve species likely to become endangered. The Act defines endangered species as any species that is "in danger of extinction throughout all or a significant portion of its range."<sup>7</sup> Section 4 of the Act requires the Services to designate critical habitat when a determination is made that a species is endangered or threatened.<sup>8</sup> A critical habitat designation is to be made based on the best available scientific data, and also take into consideration the economic impacts of the proposal, and any other relevant impact of designating a specific area as critical habitat.<sup>9</sup> Critical habitat is further defined as the specific areas within a geographic area occupied by the species at the time it is

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<sup>2</sup> 5 U.S.C. § 601 et seq.

<sup>3</sup> Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. § 601 et seq.).

<sup>4</sup> Small Business Jobs Act of 2010 (PL 111-240) § 1601.

<sup>5</sup> *Id.*

<sup>6</sup> 5 U.S.C. Sec. 601 note

<sup>7</sup> 16 U.S.C. § 1532(6).

<sup>8</sup> *Id.*

<sup>9</sup> 16 U.S.C. § 1533 (b) (2).

listed.<sup>10</sup> Critical habitat may include areas not currently occupied by the species when those areas are determined to be essential to the conservation of the species.<sup>11</sup> In determining geographic areas occupied by the species, the statute looks to physical and biological features essential to the conservation of the species that may require special management considerations.<sup>12</sup>

On November 27, 2018 the U.S. Supreme Court in *Weyerhaeuser v. U.S. Fish & Wildlife Serv.* ruled that to be eligible for critical habitat designation, an area must be “habitat” for the listed species.<sup>13</sup> In this case, the Court also ruled that a decision of whether to exclude areas from critical habitat is subject to judicial review.<sup>14</sup>

On December 16, 2020, in response to the Court’s decision, the Services finalized a rule to add a definition of “habitat” to regulations implementing Section 4 of the ESA.<sup>15</sup> This final action followed a public comment period in which Advocacy and various small entity stakeholders commented that the rule was necessary to provide regulatory certainty to critical habitat designations.<sup>16</sup> The 2020 final rule codified the definition of habitat for purposes of designating critical habitat as “the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species.”<sup>17</sup>

On October 27, 2021 the Services issued a proposed rule to rescind the 2020 final rule, thereby removing the regulatory definition of habitat. The Services’ justification for rescinding the rule is that it is too prohibitive and does not allow the agencies to properly consider unoccupied habitat that may require restoration as part of the designation.<sup>18</sup> The Services further state that having a one-size fits all definition of habitat is confusing, and that the agencies can adequately

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<sup>10</sup> 16 U.S.C. § 1532 (5).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> See *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018). At issue was whether the ESA prohibited designation of private land as unoccupied critical habitat when that land was neither habitat nor essential to species conservation and whether FWS’ decision not to exclude areas from the critical habitat designation were judicially reviewable. Petitioner stated that FWS erred in its determination that a site in St. Tammany Parish, LA “Unit 1” be designated as unoccupied critical habitat for the dusky gopher frog. The frog had not been spotted in Unit 1 for decades and the land was now being used as a commercial timber plantation. Petitioner also stated that the Secretary abused his discretion in not excluding Unit 1 from designation given that the benefits of exclusion outweighed the benefits of inclusion. FWS countered that exclusionary analysis is not judicially reviewable. The Supreme Court unanimously ruled in favor of the Petitioner stating that an area is eligible for designation of critical habitat only if it is habitat for the species, and that exclusionary analyses are judicially reviewable.

<sup>14</sup> *Id.* at 370-372.

<sup>15</sup> Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 81411 (December 16, 2020).

<sup>16</sup> See Comments from Office of Advocacy on Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 47333, (September 4, 2020), <https://advocacy.sba.gov/2020/09/09/advocacy-comments-on-fws-and-nmfs-proposed-rule-to-define-habitat-in-critical-habitat-designations/>.

<sup>17</sup> *Id.* at 81412.

<sup>18</sup> Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 86 Fed. Reg. 59346, (October 27, 2021) at 59354.

address the issue of whether unoccupied areas are habitat of the species on a case-by-case basis.<sup>19</sup>

On October 27, 2021, FWS also published a proposed rule rescinding a 2020 final rule that revised procedures for designating critical habitat.<sup>20</sup> The 2020 final rule published on December 18, 2020 provided for additional transparency regarding FWS' implementation of Section 4 (b) (2) of the Endangered Species Act.<sup>21</sup> The final rule clarified how FWS considers the impacts of designations and how FWS implements exclusionary analysis when the benefits of exclusion outweigh the benefits of inclusion.<sup>22</sup> The rule also corrected statements from a 2013 joint policy that stated that decisions not to exclude certain areas were not judicially reviewable, which in light of the *Weyerhaeuser* decision were no longer accurate.<sup>23</sup> This proposed rule removes the provisions of the 2020 final rule stating that those provisions constrain FWS' discretion.<sup>24</sup>

### **Comments from Advocacy**

#### **The comment period should be extended to allow small businesses to meaningfully participate.**

As a general matter, 30 days for written comments is not enough time for small businesses to familiarize themselves with a rulemaking and then provide meaningful written comment. Such short comment periods create a disadvantage for those entities that do not have the financial means to employ sophisticated regulatory and policy representation. They create equity issues in rulemakings pursuant to EO 13985.<sup>25</sup> Advocacy therefore requests that the Services consider extending the public comment periods to allow small businesses time to develop substantive comments on both rules.

In consideration of these two proposed rules Advocacy conducted outreach to small businesses. These small businesses were not in favor of total rescissions of the 2020 final rules, and instead encourage the Services to issue revised rules that address the agencies' concerns while still taking into consideration the need for regulatory certainty on these issues. Some small entities indicated that to provide meaningful comments and suggestions they required additional time beyond the 30-day comment period offered by the Services.

#### **Critical habitat designations directly affect small entities.**

Critical habitat designations can impose a significant burden on small entities, especially in instances where the Services improperly designate an area. Critical habitat designations delay infrastructure and development projects and necessary repairs to existing infrastructure. Once

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<sup>19</sup> *Id.* at 59355.

<sup>20</sup> Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 86 Fed. Reg. 59353, (October 27, 2021).

<sup>21</sup> Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 85 Fed. Reg. 82376, (December 18, 2020).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Supra* note 20 at 59347.

<sup>25</sup> Exec. Order No. 13985, 86 Fed Reg. 7009 (January 25, 2021).

critical habitat has been designated, often small entities must wait for more than a year for a consultation and biological assessment finding of “not likely to adversely affect” the species.<sup>26</sup>

One stakeholder from the National Rural Electric Cooperative (NRECA) noted that a critical electrical transmission line project was delayed for two years and resulted in over \$270,000 in added costs despite multiple biological surveys indicating that the species was not present, and that the area was uninhabitable by the species.

The issue of critical habitat designations is also itself a matter of equity and should be subject to the requirements of EO 13985. Rural electric cooperatives are often in low-income areas;<sup>27</sup> a recent comment from NRECA on the FWS’ lesser prairie-chicken endangered species listing stated that 85 percent of the counties in the lesser prairie-chicken’s range had a higher percentage of low-income residents than the general US population. NRECA also noted that mitigation costs resulting from the listing could potentially double or triple the cost of constructing transmission lines to provide people with power. In this example, NRECA estimated approximately 8 million dollars in mitigation costs for a 15-mile transmission line.<sup>28</sup> These designations also create significant economic concerns for the consumers who live in low-income areas and who bear the costs of these regulations directly. Critical habitat designations have direct and burdensome effects on small entities.<sup>29</sup> It is therefore prudent that the Services adopt clear and transparent regulatory policies concerning such designations so that small businesses are not unduly burdened by them.

It should also be noted that in both instances justification for full rescission of the 2020 final rules is merely speculative given that not enough time has passed for either rule to have been implemented in a final critical habitat designation.

**The Services should not resort to a case-by-case basis for implementing the *Weyerhaeuser* decision and should instead propose a modified definition of habitat for public comment.**

The Services state that one of the reasons for rescinding the 2020 final rule that established a definition for “habitat” is that the rule created confusion. The Services are instead proposing to address whether an unoccupied area is habitat of the species on a case-by-case basis.<sup>30</sup> Not

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<sup>26</sup> 16 U.S.C. § 1536 describes the process for consulting with the Services when an action is to occur in an area where a species is present, or where critical habitat has been designated. The Services then issue biological assessments to identify species or habitat that may be affected, and whether the action is likely to result in destruction or adverse modification of habitat. It is this process that results in delays to small businesses.

<sup>27</sup> *Supra* note 25.

<sup>28</sup> Nat’l Rural Electric Coop. Assoc., *Comment on Endangered and Threatened Wildlife and Plants; Lesser Prairie-Chicken; Threatened Status with Section 4(d) Rule for the Northern Distinct Population Segment and Endangered Status for the Southern Distinct Population Segment* (September 1, 2021), <https://www.regulations.gov/comment/FWS-R2-ES-2021-0015-0230>.

<sup>29</sup> *See, for example*, Comments of SBA Office of Advocacy, Designation of Critical Habitat for Gunnison Sage-Grouse (78 Fed. Reg. 57604) (filed December 2, 2013). *See also*, Comments of SBA Office of Advocacy, Proposed Designation of Critical Habitat for the New Mexico Jumping Mouse (78 Fed. Reg. 37328) (filed July 15, 2013), Comments from SBA Office of Advocacy, Revisions to the Regulations for Impact Analysis for Critical Habitat (77 Fed. Reg. 51503) (filed January 31, 2013), Comments of SBA Office of Advocacy, Designation of Revised Critical Habitat for Southwestern Willow Flycatcher (76 Fed. Reg. 50542) (filed October 11, 2011).

<sup>30</sup> *Supra* note 18.

having a codified definition of habitat that will guide the Services' application of the Supreme Court decision breeds regulatory uncertainty. Advocacy is concerned that this will lead to more unoccupied areas being designated despite those areas not being actual habitat of the species and despite the Court's decision. As was the case in *Weyerhaeuser*, the Services' critical habitat designations have costly impacts on private business owners.

While the main purpose in establishing a definition for habitat was to incorporate the Court's findings in *Weyerhaeuser*, the Services also indicated that the rulemaking was an attempt to provide consistency and clarity in the designation process so that both the Services and the regulated community alike would have a standard by which the agencies would make such determinations.<sup>31</sup> Advocacy is confused as to how the Services can now assert that the 2020 final rule, and this proposed rule to rescind it both create greater regulatory certainty. This does not seem to be sound justification for rescinding the final rule. Rather than rescind the definition of habitat all together, the Services should instead issue a proposal for a modified definition that is more workable and address some of the agencies' concerns. Having a clear definition of habitat is necessary. The Services should work to establish a definition that is supported by regulated entities. In its definition the Services should consider language that would make clear that the agencies will exclude those areas that are clearly unsuitable for species conservation and that are clearly not habitat of the species. Codifying the term habitat ensures that the agencies will apply this standard consistently and offers greater transparency to regulated entities.

**FWS should not remove provisions of its 2020 final rule pertaining to exclusionary analyses, as they provide necessary transparency that did not exist prior.**

The *Weyerhaeuser* decision makes clear that FWS' exclusionary analysis is subject to judicial review.<sup>32</sup> Therefore it follows that the agency must provide a proper and thorough discussion of both the scientific evidence, and the economic analysis used to determine whether to designate or exclude areas from critical habitat. Furthermore, given that the designations are judicially reviewable, it would be to FWS' benefit to establish a standard for demonstrating the weight given to each factor in the statute including the economic impact.<sup>33</sup> FWS provides little explanation as to the benefits and impacts of designation decisions, and no discussion as to the weight that each factor is given. Historically it has been a challenge to understand FWS' rationale for making exclusionary determinations. Advocacy has in the past commented to FWS on the lack of a proper and thorough RFA analysis and factual bases for certification pursuant to statute.<sup>34</sup>

In this proposed rule FWS states that it is rescinding the 2020 final rule because it is too rigid and undermines the agency's role in the decision-making process. The 2020 rule set out a process for when the Secretary would enter an exclusion analysis, how weight is assigned to various factors, and when an area should be excluded.<sup>35</sup> This proposal states that the final rule

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<sup>31</sup> Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat, 85 Fed. Reg. 81411, (December 16, 2020).

<sup>32</sup> *Supra* note 13.

<sup>33</sup> 16 U.S.C. § 1533.

<sup>34</sup> *Supra* note 29.

<sup>35</sup> Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 85 Fed. Reg. 82376, (December 18, 2020).

employed a rigid ruleset in all situations regardless of the facts and that it should be rescinded entirely.<sup>36</sup> From Advocacy's point of view and that of small entities a better option would be, rather than rescinding the entire rule set, FWS simply add clarifying language that would specify when such a process is not necessary based on the best available information.

The proposed rule further states that the 2020 final rule undermines the agency as the expert responsible for administering the ESA.<sup>37</sup> The proposal states that the final rule gives undue weight to outside parties; however, it fails to offer specific examples to support this assertion. FWS has often ignored information concerning the economic impacts of a particular designation on small entities and omitted such discussions from its rulemakings despite being required to consider these impacts by statute. For example, on many occasions FWS has in its RFA analyses certified rulemakings without providing a factual basis that identifies the small entities impacted and discusses the economic impacts on those entities. The 2020 final rule provided greater agency transparency on this issue. When designating critical habitat, FWS must provide a regulatory impact analysis (RIA) and a proper RFA analysis as required by statute, and to inform the public of the impacts of the designation. This type of analysis does not give undue weight to outside parties; rather, it ensures that FWS is meeting its statutory obligations for rulemakings.

Advocacy notes that stakeholders have continually commented on issues with FWS' assertions that its designations do not have a significant economic impact on a substantial number of small entities and that FWS continually fails to provide a factual basis for these assertions, merely stating that the designation does not directly impact small entities.<sup>38</sup> FWS states in this proposed rule, "we will always explain our decisions not to exclude"<sup>39</sup> and yet FWS has consistently failed to provide data on small entity impacts in its critical habitat rulemakings.

Rather than rescinding the requirements of the 2020 rule in favor of allowing itself permission to omit such discussions from habitat designations, FWS should consider ways in which the agency can modify the rule to address its concerns while still fostering regulatory certainty and transparency to the public.

## **Conclusions and Recommendations**

Advocacy urges the Services to reconsider total rescission of the two 2020 final rules. Critical habitat designations are economically burdensome to small businesses and it is therefore prudent that the Services promulgate regulations that provide transparency, clarity, and certainty to regulated entities about the economic impacts of designation, and how and why the Services chose a particular area to be designated. The Services should consider extending the comment period and respond to all comments from small entities on both rules.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Prianka Sharma at (202) 205-6938 or prianka.sharma@sba.gov.

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<sup>36</sup> *Supra* note 21.

<sup>37</sup> *Supra* note 20.

<sup>38</sup> *Supra* note 29.

<sup>39</sup> *Supra* note 20 at 59348.

Sincerely,

/s/

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Office of Advocacy  
U.S. Small Business Administration

/s/

Prianka P. Sharma  
Assistant Chief Counsel  
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Copy to: Sharon Block, Acting Administrator  
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