WESTERN URBAN WATER COALITION

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U.S. Fish & Wildlife Service
MS: PRB(3W), 5275
Leesburg Pike, Falls Church, VA 22041–3803
Public Comments Processing, Attn: FWS–HQ–ES–2020–0047

RE: Comments on the "Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat," 85 Fed. Reg. 47333 (Aug. 5, 2020), Docket No. FWS–HQ–ES–2020–0047

The Western Urban Water Coalition (WUWC or Coalition) [1] appreciates this opportunity to comment on the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, "Services") Proposed Rule on "Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat," 85 Fed. Reg. 47333 (Aug. 5, 2020).

WUWC was established in 1992 to address the West's unique water supply and water quality challenges that threaten the economic sustainability and growth of the large western population centers. WUWC consists of the largest urban water utilities in the West, who together serve more than 40 million urban water consumers in 18 major metropolitan areas across seven states. Some of these utilities also operate wastewater, natural gas and electric, including hydroelectric, facilities for their customers.

WUWC members are nonprofit public utilities dedicated to providing a reliable, high-quality urban water supply for present and future generations. As operators of urban water supply systems, WUWC members serve the health, environmental, and economic needs of their communities around the clock, every day of the year. WUWC advocates for effective and practicable approaches to the implementation of environmental protection programs in a time when water is becoming increasingly scarce and vital to the West's sustainability. Their mission is more critical now than ever considering the essential role of clean water in combatting the

[1] WUWC consists of the following members: **Arizona** (Central Arizona Project, City of Phoenix and Salt River Project); **California** (Eastern Municipal Water District, Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District, and City and County of San Francisco Public Utilities Commission); **Colorado** (Aurora Water, Colorado Springs Utilities, and Denver Water); **Nevada** (Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority); **New Mexico** (Albuquerque Bernalillo County Water Utility Authority); **Utah** (Salt Lake City Public Utilities); and **Washington** (Seattle Public Utilities). Seattle Public Utilities does not participate in this comment letter.

spread of COVID-19 and maintaining public health, livelihoods, and sustenance during this time of crisis. In serving to meet this mission, WUWC members are involved in a number of federal and nonfederal activities that are subject to the Endangered Species Act (ESA).

Throughout its 28-year history, WUWC has been and will continue to be both a supporter of the goals of the ESA and an active participant in ESA administrative and regulatory improvement measures. WUWC does not believe sweeping legislative reform is needed, but instead supports a continuation of the actions taken by all Departments of the Interior and Commerce Secretaries since the mid-1990s to achieve meaningful regulatory and administrative policy reform. This includes improvements in the efficiency of the decision-making process and ESA review procedures, and the encouragement of greater participation by nonfederal entities in species conservation.

WUWC generally supports the proposed definition of "habitat" as that term is used in the context of critical habitat designations under the regulations that implement section 4 of the ESA. In 2019, the Services finalized a set of rules under the ESA, including revisions to the implementing regulations governing designation of critical habitat. 50 C.F.R. § 424.12. WUWC submitted comments on the proposed rule published by the Services in 2018. *See* WUWC Comment Letter, Sept. 24, 2018 (Docket No. FWS-HQ-ES-2018-0006-55737). In these comments, WUWC expressed its support for the proposal to prioritize designation of occupied habitat over unoccupied habitat and emphasized that a key part of the proposal was the exception that the Services would consider designating unoccupied areas as critical when a designation limited to occupied areas would "result in less efficient conservation for the species." WUWC Comment Letter, Sept. 24, 2018, at 8-9. WUWC noted that this exception is important because, in some situations, unoccupied habitat may be less costly and controversial to protect than occupied habitat and may be important as rising sea levels or other factors affect currently occupied habitat. *Id*. at 9. While the 2019 revisions made some modifications to the regulatory requirements that must be met for areas outside the geographical area occupied at the time of listing to be considered "essential for the conservation of the species," they did not address the broader habitat issue presented by the Supreme Court's decision in *Weyerhaeuser Co. v U.S. Fish and Wildlife Service*, 139 S. Ct. 361 (2018), in which the Court held that an area must logically be "habitat" in order for that area to meet the narrower category of "critical habitat."

In response to *Weyerhaeuser*, the Services now propose the following definition of the term "habitat":

> The physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas with existing attributes that have the capacity to support individuals of the species.

The Services are also requesting comment on the following alternative definition:

> The physical places that individuals of a species use to carry out one or more life processes. Habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where the necessary attributes to support the species presently exist.

As an initial matter, we request that the final rule make it clear that the definition of the term "habitat" in this regulation is limited to use in the context of "critical habitat." The term "habitat" is used 38 times in the ESA, and at least five of these are not related to the requirements of section 4 and 7 that concern "critical habitat."[2] This rulemaking is being driven by the Supreme Court decision in *Weyerhaeuser*, but the Court's discussion of "habitat" related only to the term "critical habitat," not all uses of "habitat" in the ESA. Also, the Service's proposed rule is subject to an unusually short comment period of only 30 days, which is too brief for an issue as important as critical habitat, not to mention broader uses of "habitat" in the ESA. In all likelihood, the short comment period is the result of this Administration's desire to ensure that it has sufficient time to publish a final rule and for the rule to come into effect before a possible transition. Taken together, these factors argue in favor of limiting the scope of this rule, so it does not have unintended or insufficiently analyzed consequences for other aspects of the ESA that are distinct from the critical habitat context defined by the *Weyerhaeuser* decision.

The Services should establish a stakeholder outreach process to continue to gather input on the proposed rule before it is finalized. As noted above, this proposed addition of a regulatory definition of "habitat" is significant and would change some fundamental principles of ESA implementation. It is very challenging for stakeholders, many of whom have extensive experience with the ESA, to understand fully and respond to the proposed rule within a 30-day comment period. Finalizing the proposal without adequate input is likely to be counterproductive to the goal of ensuring that the proposal is thoughtfully crafted and legally defensible. Indeed, we believe that the Services would greatly benefit from an ongoing dialogue on the proposed rule, after the comment period closes and key issues are identified.

WUWC believes that the definition adopted in the final rule should combine elements of both the proposed and alternative definitions, with important modifications.

First, we accept the first sentence of the Services' favored proposed definition – "The physical places that individuals of a species depend upon to carry out one or more life processes." The key difference between the principal definition and the alternative definition is the use of "depend upon"[3] in the former and "use" in the latter.

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[2] *See, e.g.*, other places in the ESA where the term "habitat" is used other than in the context of "critical habitat": (1) section 3(3) definition of the terms "conserve," "conserving," and "conservation," 16 U.S.C. § 1532(3); (2) section 4(1) list of factors determining whether any species is an endangered species or a threatened species, *id*. § 1533(a)(1)(A); (3) section 6(c)(1) list of State program requirements for cooperative agreements, *id*. § 1535(c)(1)(D); (4) section 8 list for demonstration of encouragement of foreign programs, *id*. § 1537(b)(3); and (5) section 8A(e)(2) list of steps required under the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, *id*. § 1537a(e)(2)(B).

[3] The term 'depends upon' could give rise to questions and competing interpretations. WUWC requests that the Services establish a process for developing guidance on the meaning of "depends upon" based on stakeholder input and consultation. We note that guidance on the meaning of "depends upon" should generally include those places inhabited by individuals of a species, but should exclude areas that only contribute to the features of the areas that the individuals actually depend upon. For example, upstream areas where individuals of the species are not present that may contribute to downstream areas where they are present, such as by providing food supply, should not be considered to meet the "depends upon" criterion of the first sentence of the proposed definition. To the extent "depends upon" is subject to interpretation, WUWC requests that the public be provided the opportunity to comment on any agency guidance interpreting this term.

The limitation of "depend upon" is narrower than "use" and is likely to lead to smaller critical habitat designations. Achieving more limited and narrow designations is not WUWC's goal, nor should it be the objective of the rulemaking. The controlling consideration should be which characterization of the species' reliance on the habitat area best fulfills the intent of Congress and the objectives of the ESA.

The ESA itself does not provide a clear answer, and there is no legislative history that is directly on point. Nonetheless, an important signal as to the intent of Congress is found in section 2(b) "Purposes" of the ESA, which declares that the "purposes of this Act are to provide a means whereby the *ecosystems upon which* endangered and threatened species *depend* may be *conserved*." 16 U.S.C. § 1531(b) (emphasis added). In this provision, Congress made it clear that the conservation mandate of the Act is applied to the land and water and air—the "ecosystems"—upon which listed species "depend." The "habitat" of listed species is, of course, within these ecosystems. In fact, the ecosystem that a species depends upon can in some cases be more expansive than the habitat of the species. But if Congress intended there to be a dependency relationship between the ecosystems and the species, it must also have intended that the same relationship exist between a species and its habitat. Congress could have tied the Act's purposes to the ecosystems "used by" or "related to" or "important for" listed species; but it instead clearly tied the Act's purposes to the ecosystems (and necessarily the habitats within the ecosystems) that species depend upon.

Additional support for this conclusion is found in the parallel language used in section 2(b) "Purposes" and the definition of "critical habitat" in section 3(5). 16 U.S.C. §§ 1531(b), 1532(5). Under section 2(b), the ESA provides the "means" to "conserve" the ecosystems upon the species "depend." *Id*. § 1531(b). Under section 3(5), critical habitat is defined to mean:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the *conservation* of the species and (II) which may require special management considerations or protection; and
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> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the *conservation* of the species.

Id. § 1532(5) (emphasis added).[4] The parallel usage of the terms "conserve" and "conservation" in both the purposes section as tied to ecosystems and in the definition section for critical habitat bolsters the connection between the two and supports applying the "depend upon" qualification

[4] The ESA defines the terms "conserve" and "conservation" to mean "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking." 16 U.S.C. § 1532(3).

used in the former to evince the Congressional intent in determining the geographic scope of the latter. In other words, Congress wanted the tools of the Act to conserve species to be applied to two types of areas—the ecosystems upon which they depend and critical habitat. Habitat for species cannot, by definition, lie outside of the ecosystem for that species; hence the "depend upon" qualification must apply to both types of areas.[5]

While we accept the first sentence of the proposed definition, we believe that the second sentence of the alternative definition, subject to certain revisions, is better suited for the final rule.

WUWC recommends that the second sentence of the definition be revised for two purposes. First, it should make clear that the definition addresses the unoccupied habitat question recognized by the Supreme Court. The definition includes circumstances where habitat is not occupied but is nonetheless subject to inclusion in critical habitat.[6] After the *Weyerhaeuser* decision, there are much narrower circumstances than previously has been the norm for the designation of unoccupied habitat, but it is nonetheless still within the scope of the ESA to do so. The first definition in the Services' proposal does not make this clear. Indeed, it speaks only in the present tense by including the "depend upon" test. Taken literally, unoccupied habitat would never meet this test because no individuals of the species are there to depend upon it. For this reason, WUWC recommends that the first phrase of the second sentence of the second definition be used—"Habitat includes areas where individuals of the species do not presently, …."

The second issue arises from requirement that the necessary habitat "attributes" presently exist. For sure, after the *Weyerhaeuser* decision, in most instances it will be the case that such habitat characteristics will need to exist at the time of designation. However, it is reasonable to expect that there will be circumstances where an area under review is the subject of ongoing conservation measures and activities that will result in establishing those attributes with a high degree of certainty and within a foreseeable time frame. For example, a Habitat Conservation Plan (HCP) or Candidate Conservation Agreement with Assurances (CCAA) sponsor or incidental take permit holder or applicant may seek to restore habitat within its lands and waters to a level that would qualify for critical habitat designation (and to achieve the regulatory benefits of achieving such a high level of protection). Such a result should not be precluded by the definition of habitat merely because the necessary attributes have not been established at the time of designation. It can also be expected that there will be situations where natural processes are underway that will reclaim the attributes of an area such that they will become available to the species with a high degree of certainty and within the foreseeable future. When such a natural process can be confirmed, the definition should not legally preclude the possible inclusion of

[5] Congress also indicated its intention to connect habitats to species based upon dependency in its directive on implementation of the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, where it required the identification of birds that migrate between the United States and other parties to the Convention and the "habitat upon which they depend." 16 U.S.C. § 1537a(e)(2)(B).

[6] The definition of habitat does not answer the question of whether the covered area is critical habitat. The definition is simply the first test for determining what is the habitat area of the species for possible designation. The second test is to apply the definition of critical habitat as set forth in section 3(5), 16 U.S.C. § 1532(5), and the designation criteria under section 4(b)(2), *id*. § 1533(b)(2), and then apply the test for exclusion to determine when the benefits of not designating a particular area outweigh the benefits of designation.

such a habitat area under the definition of "habitat." To address this issue, WUWC recommends that the second part of the second sentence in the alternative definition be revised to state: "only if such areas presently possess the necessary attributes to support the species within the area itself, or would possess the necessary attributes within the foreseeable future as a result of current or planned conservation measures or ongoing natural processes, the necessary attributes to support the species."[7]

We believe the *Weyerhaeuser* decision leaves room for the Services to apply their expertise and discretion to define "habitat" to include those areas that, due to future developments, will have the attributes necessary for designation, even if those attributes do not exist at the exact point in time of the designation. The Supreme Court observed that critical habitat is a "subset" of "habitat." *Weyerhaeuser*, 139 S. Ct. at 363. In other words, "habitat" is inherently a broader term than "critical habitat" for purposes of critical habitat designation. The Court expressly acknowledged the breadth of the term "habitat" and did not limit the possibility that some areas not currently occupied by a listed species can qualify as "habitat."[8] Especially with regard to future restoration activities of landowners, this concept is very important to WUWC because its members are often involved in proactive conservation and recovery actions for the benefit of listed species where raising the value of the land and water areas involved to the level of critical habitat is a desired outcome.[9]

As a result of these considerations, WUWC recommends the following definition of "habitat":

> The physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas where individuals of the species do not presently exist, only if such areas presently possess the necessary attributes to support the species within the area itself, or would possess the necessary attributes within the foreseeable future as a result of current or planned conservation measures or ongoing natural processes.

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[7] The proposed definition relies to an important degree on the term "attributes." This important term needs to be subject to a definition or clear guidance. It is beyond the scope of the current rulemaking to define that term, because public comment and consultation with stakeholders is important to establish its correct meaning. WUWC recommends that such a procedure be undertaken as soon as possible. In addition, clarification should be provided as to how many attributes need to be present. It seems to WUWC that a single attribute should be sufficient, but we welcome the opportunity for additional stakeholders involvement in answering this question.

[8] Agencies have broad discretion to promulgate rules and, here, the Services are well within their authority to adopt WUWC's proposed revisions to the definition of "habitat." *See Prof'l Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1221 (D.C. Cir. 1983) (noting that "rulemaking is an inherently policy-oriented process and the agency must be accorded considerable deference in evaluating information presented and reaching decisions based upon its expertise"); *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 818 (D.C. Cir. 1981) (discussing "the broad discretionary powers possessed by administrative agencies to promulgate (or not promulgate) rules"); *Am. Radio Relay League, Inc. v. F.C.C.*, 617 F.2d 875, 879 (D.C. Cir. 1980) (acknowledging that the courts "must defer to the agency rulemakers unless the challenger shows that the agency has abused the broad policymaking discretion granted it by Congress and thereby acted beyond the scope of its rulemaking authority").

[9] WUWC understands that critical habitat can always be changed as a result of the petition process set forth in section 4 if attributes become present, or if they become clearly lost. The regulations should discuss this process, and the subject of changing designations should be included in the stakeholder process we recommend.

WUWC supports the Services' application of this proposed definition prospectively, so that it would not affect any critical habitat designations made final on or before the date on which the new definition of "habitat" would become effective.

Based on this extensive background and our members' experience being on-the-ground partners with the Services, WUWC is prepared to assist the Services in their efforts to both improve and encourage the goals of the ESA. Further, WUWC looks forward to continued dialogue and collaboration on how the ESA can benefit water providers in the West and across the country.

Thank you for the opportunity to provide these comments. If you have any questions regarding these comments, please contact me at 702-258-7166 or greg.walch@lvvwd.com, or the WUWC national counsel, Don Baur at 202-654-6234 or dbaur@perkinscoie.com.

Very truly yours,

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