WESTERN URBAN WATER COALITION

October 8, 2020

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U.S. Fish & Wildlife Service
MS: JAO/1N, 5275
Leesburg Pike, Falls Church, VA 22041–3803
Public Comments Processing
Attn: FWS–HQ–ES–2019-0115

**RE: Comments on the "Regulations for Designating Critical Habitat," 85 Fed. Reg. 55398 (Sept. 8, 2020), Docket No. FWS–HQ–ES–2019-0115**

The Western Urban Water Coalition (WUWC or Coalition) [1] appreciates this opportunity to comment on the U.S. Fish and Wildlife Service's (FWS) proposed "Regulations for Designating Critical Habitat." 85 Fed. Reg. 55398 (Sept. 8, 2020) (Proposed Rule).

## I. Western Urban Water Coalition

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 western population centers. WUWC consists of the largest urban water utilities in the West, which 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 Department of the Interior and Commerce Secretaries since the 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 amendments to the regulations that implement section 4 of the ESA, which would set forth a process for excluding areas from designation as critical habitat of listed species. One of the most significant ESA issues that has been evaluated and acted on by WUWC is the manner in which areas are excluded from proposed critical habitat designations on the basis of economic considerations. Following the 2001 Tenth Circuit decision in *New Mexico Cattle Growers Ass'n v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001), FWS and the National Marine Fisheries Service (NMFS) (collectively "the Services") determined that it would be necessary to establish a meaningful and consistent approach for determining the economic impacts caused by critical habitat designation. Recognizing the importance of this issue, WUWC participated with other parties in developing such an approach and submitting it to the Services. *See* Attachment A.[2] WUWC also has submitted numerous comments on rulemakings related to the Services' critical habitat designations.[3] Specifically, WUWC submitted extensive comments on the Services' proposed "Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act," 81 Fed. Reg. 7226 (Feb. 11, 2016) (2016 Policy), which FWS addresses in this Proposed Rule.[4]

More recently, in 2019, the Services finalized a set of rules under the ESA, including revisions to the implementing regulations governing critical habitat exclusions. 50 C.F.R. § 424.12. WUWC commented 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 its

[2] The Position Paper at Attachment A "Administrative Reform of Endangered Species Act—A Recommended Method for Economic Analysis for Critical Habitat Designation Under the Endangered Species Act," was developed in 2010, has been submitted on numerous occasions by WUWC to the Services, including as Attachment 2 to a WUWC letter to FWS and NMFS dated Oct. 23, 2012 and Exhibit 3 to a WUWC Comment Letter dated Oct. 9, 2014 (Docket Nos. FWS-R9-ES-2011-0072, FWS-HQ-ES-2012-0096 and FWS-R9-ES-2011-0104).

[3] WUWC Comment Letter, Oct. 23, 2012 (Docket No. FWS-R9-ES-2011-0073) (comments on the Services' proposed revisions to the regulations for impact analyses of critical habitat); WUWC Comment Letter, Sept. 17, 2015 (Docket No. FWS–HQ–ES–2015–0016) (comments on the Services' proposal to improve the content and specificity of petitions and to enhance the efficiency and effectiveness of the petition process under section 4(b)(3) of the ESA); WUWC Comment Letter, Sept. 24, 2018 (Docket No. FWS-HQ-ES-2018-0006-55737) at Attachment 1 (comments on the Services' proposed revision of the regulations for listing species and designating critical habitat); WUWC Comment Letter, Sept. 4, 2020 (Docket No. FWS–HQ–ES–2020–0047) (comments on the Services' proposed definition of "habitat" as it is used in the context of "critical habitat").

[4] WUWC Comment Letter, Oct. 9, 2014 (Docket Nos. FWS-R9-ES-2011-0072, FWS-HQ-ES-2012-0096 and FWS-R9-ES-2011-0104).

comments, WUWC expressed its support for the development of standardized guidance for determining and evaluating economic impacts associated with critical habitat exclusions. WUWC Comment Letter, Sept. 24, 2018, at 9. While the 2019 ESA revisions did not address the issue, FWS is now proposing to revise the regulations governing critical habitat exclusions in part due to the Supreme Court's decision in *Weyerhaeuser Co. v U.S. Fish and Wildlife Service*, 139 S. Ct. 361 (2018), in which the Supreme Court agreed that a decision not to exclude an area is discretionary but also found that such a decision may still be reviewed by courts for abuse of agency discretion. 139 S. Ct. at 371. In response to *Weyerhaeuser*, FWS now proposes to make its exclusion analysis process more transparent and predictable for the public and stakeholders.

Based on this extensive background and our members' experience being on-the-ground partners with FWS and having land and water that has been subject to critical habitat designations and exclusions, WUWC is prepared to assist FWS in its 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. The comments set forth in this letter are in furtherance of these general goals.

## II. Comments on the Proposed Rule

### *a. The Proposed Rule should be issued jointly with the National Marine Fisheries Service.*

We commend FWS's stated intent to provide greater transparency and certainty for the public and stakeholders, as well as to reflect recent Supreme Court precedent, incorporate agency expertise, and modify current practices. These considerations apply just as forcefully to the NMFS, which administers the ESA together with FWS. The Proposed Rule would add a new regulation, 50 C.F.R. § 17.90, under which some existing provisions would be revised and others would be newly promulgated to incorporate the 2016 Policy. The 2016 Policy was published jointly by the Services and provided direction regarding how both FWS and NMFS would exercise their discretion to exclude areas from critical habitat designations. Different standards for the designation of critical habitat by the Services will inevitably result in confusion and inconsistency. We therefore recommend that the proposed rule be issued jointly with NMFS. We are aware of no reason why NMFS should not participate in this rulemaking, and there is no explanation for the failure to do so set forth in the Proposed Rule.

### *b. FWS should retain discretion to designate an area as critical habitat even if the benefits of excluding the area outweigh the benefits of including the area.*

WUWC agrees that an area generally should be excluded from critical habitat designation if FWS determines that the benefits of excluding the area from critical habitat outweigh the benefits of specifying that area as part of the critical habitat. However, this determination should not be absolute. It would be a mistake to abandon all discretion and the ability to include an area in a critical habitat designation even if economic or other impacts exceed benefits to the species of designation. First, there may be cases in which the benefits of exclusion are equal to or very near the benefits of inclusion. In those cases, the margin for error in the exclusion analysis may very well account for the difference between the benefits favoring exclusion and those favoring inclusion. Also, for some areas covered by conservation plans, agreements, or partnerships, the

permittee may wish to have the area included in the critical habitat designation even if the economic and other benefits of exclusion exceed the benefits of inclusion to the species.

For these reasons, while WUWC generally favors a strict application of the test, we believe FWS needs to retain some discretion. We recommend removing "shall" in the proposed 50 C.F.R. § 17.90(e) and revising the provision to account for that discretion.

*c. FWS should document any determination not to undertake an exclusion analysis in both the draft and final critical habitat decision.*

WUWC urges FWS to expressly state in the proposed regulations that if FWS determines not to undertake an exclusion analysis, the agency will document the basis for that determination in its draft *and* final decision regarding critical habitat for the species. In the proposed rule, FWS states that it "intends" to document its decision not to undertake an exclusion analysis, but only in the final determination regarding critical habitat for the species. To allow stakeholders an opportunity to comment on that determination, FWS also should document its determination in the draft decision. Further, the agency should show its commitment to this practice by incorporating the requirement into its proposed regulations, rather than simply stating its intent to document its determination in the preamble to the Proposed Rule.

*d. FWS should consider water impacts based on national security and homeland security implications.*

WUWC supports FWS's proposal to consider in the exclusion analysis "impacts based on national-security or homeland-security implications identified by the Department of Defense, Department of Homeland Security, or any other Federal agency responsible for national security or homeland security." We point out that "homeland-security impacts" include impacts to water services and infrastructure projects. The White House and the Department of Homeland Security (Homeland Security) have recognized that water systems are one of the nation's critical infrastructure systems. In Presidential Policy Directive 21 (PPD-21), the water and wastewater infrastructure sector was recognized as one of 16 critical infrastructure sectors.[5] PPD-21 also designated the Environmental Protection Agency (EPA) as the Federal lead for the protection of the security and resilience of drinking water and wastewater infrastructures across the country. The water sector is critical to the functioning of other sectors and disruptions to water infrastructure could negatively impact public health and economic vitality.[6] Thus, when a critical habitat designation could negatively affect the continuous, efficient, and effective operation of water services and infrastructure projects in a particular area to a degree that creates security issues, FWS should defer to the expert judgment of the federal agency and other parties responsible for the security of water services and infrastructure for that area in deciding whether an exclusion analysis should be applied.

[5] Presidential Policy Directive: Critical Infrastructure Security and Resilience (Feb. 12, 2013), available at https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil.

[6] National Infrastructure Protection Plan: Water Sector, U.S. DEP'T OF HOMELAND SECURITY, available at https://www.dhs.gov/xlibrary/assets/nipp_snapshot_water.pdf.

*e. When considering the nonbiological impacts identified by State or local governments, FWS must take into account the impacts identified by water utilities.*

WUWC agrees with FWS that the agency should consider nonbiological impacts identified by State or local governments in those cases where a designation of critical habitat affects State or local government operations in a material way. However, WUWC seeks recognition that municipal water utilities such as the WUWC members are key components of their local governments with a specific expertise that should be considered by FWS when a critical habitat designation stands to affect their services or projects. Water utilities play a critical role in their communities and are uniquely positioned to assess impacts to water distribution, water treatment, and related services. Whether a critical habitat designation will affect the proper functioning of those services—or lead to the delay or preclusion of a water project—falls within the expertise of water utilities. As a result, the weight that FWS assigns to the benefits of designating or excluding specific areas based on impacts to these projects or plans should be consistent with the information provided by water utilities.

*f. Federal lands, including federal waters, should be excluded from critical habitat designation where the benefits of exclusion outweigh the benefits of inclusion.*

We support the Proposed Rule's reversal of the 2016 Policy's position that FWS generally does not exclude federal lands from designations of critical habitat. Although we agree that federal lands should be available to be considered for exclusion, we would support a higher standard for such exclusion due to the affirmative duties of federal agencies to conserve ESA-listed species in section 7(a)(1) of the Act. We also emphasize that "Federal lands" include waters on those lands. FWS has authority to designate both lands and waters as critical habitat. Like federal lands, waters allocated through federal reserved water rights, federal water contracts, and other authorizations for use should be excluded from critical habitat designation where the benefits of exclusion outweigh the benefits of inclusion.

It is unclear in the Proposed Rule whether FWS's consideration of federal lands for exclusion from critical habitat would only include lands within a project's footprint or would include lands that may be impacted by a project but are not part of the project footprint (e.g., a water development project that could impact a nearby wildlife refuge). WUWC supports the broader interpretation. We also believe that FWS's consideration should not be limited to federal lands; State lands should be available to be considered for exclusion as well.

*g. Lands that are subject to non-ESA conservation plans also should be considered for exclusion.*

Critical habitat generally should exclude areas where special management tools are provided that eliminate the need for designation. This principle has been applied to exclude areas covered by conservation management instruments such as habitat conservation plans (HCPs), safe harbor agreements (SHAs), candidate conservation agreements with assurances (CCAAs), and federal land management plans that include species conservation components (e.g., federal land use management plans).

It has long been the presumption that areas subject to HCPs and similar programs that are formally established − either with no involvement of FWS or in partnership with FWS—and implemented for listed species serve as the grounds for exclusion from critical habitat. In past years, FWS has applied a nearly uniform practice of excluding areas subject to species conservation plans because the benefits of doing so (e.g., by enlisting private sector support for species conservation and implementing measures that otherwise would not be possible because of the lack of federal control or funding) outweigh the benefits of including those lands and waters. FWS precedent provides that areas can be excluded from critical habitat when landowner plans exist which provide for conservation of the species.

To avoid discouraging the use of affirmative species conservation measures, the new rule should send a strong signal that FWS will continue to rely on a presumption in favor of exclusion for such plans when certain conditions are met. One of those conditions is that the species for which critical habitat is being designated is either a covered species in the conservation plan or is "very similar in its habitat requirements to a covered species." The quoted language only exists in the preamble to the Propose Rule but should also be expressly included in the proposed regulation. Future listings can be forestalled or avoided based on proactive measures by non-federal landowners to protect species and their habitat and establish protective legal mechanisms that satisfy ESA listing criteria. Conservation actions also could bolster the grounds for future delisting petitions. The array of options for pro-active measures to alter the scope and effect of the ESA on non-federal lands will depend on the nature of the restrictions that currently apply to activities occurring on those lands, and the level of commitment that landowners are prepared to make to invoke the available regulatory incentives extended to private and non-federal governmental landowners.

WUWC urges that the presumption in favor of excluding areas covered by a permitted CCAA/SHA/HCP should also be extended to conservation plans, agreements, or partnerships that have not been authorized by a permit under section 10 of the ESA. Many of these plans have undergone extensive critical analysis and public review, agency review, NEPA review or similar review processes. Thus, the particular areas covered by these plans deserve the presumption in favor of exclusion from critical habitat designation that already is afforded to conservation plans related to a permit under section 10 of the ESA.

In the Proposed Rule, FWS notes that if a CCAA, SHA, or HCP is still under development when the agency undertakes an exclusion analysis, FWS will evaluate the draft plans under the framework of general plans and partnerships, and will give little weight to unrealized future conservation actions in draft CCAAs, SHAs, and HCPs that have not been permitted. However, there are certain circumstances under which FWS should consider a draft plan. For example, if a plan is in near-final form with few, if any, anticipated revisions, FWS should consider the benefits that the draft plan, if realized, would have for the species for which a critical habitat designation is proposed. FWS recognizes that "HCP permittees commit to do more for the conservation of the species and their habitats on their non-Federal lands than designation of critical habitat would provide alone." That still would be the case for a near-final HCP.

In certain situations, however, areas included in HCPs as mitigation lands or other components are appropriate to include in critical habitat because of the management goals of all

the applicants/permit holders. HCPs are voluntary agreements, and accordingly their proponents should be allowed to opt for inclusion of such areas in critical habitat when there is unanimous agreement among them to do so.

*h. FWS should revise how it conducts the critical habitat economic impacts analysis.*

WUWC commends the FWS for increasing the clarity and transparency of the exclusion framework with respect to economic impacts. Remaining opaque, however, is a uniform method for calculating the economic consequences of critical habitat designation. This evaluation is an integral part of designating critical habitat and it cannot be ignored. Section 4(b)(2) of the Act requires evaluation of economic impacts, and exclusion of those areas where the costs outweigh the benefits. While the Services have recognized that economic impacts must be taken into account, there is a need for guidance on how economic impacts will be evaluated. This should be done through a cost-effectiveness framework designed to find the least-cost means of achieving the ESA objectives of designating and conserving habitat that is essential for species conservation. Under such an approach, the economic costs for each habitat area should be evaluated by addressing direct and indirect costs, and then comparing such costs with the biological value of the same area. Recognizing the importance of this issue, WUWC participated with other parties in developing an approach and submitting it to the Services. *See* Attachment A. While many elements of WUWC's recommended approach were adopted by the Services for some past designations, the methodology used to calculate economic impacts has become confused, with a wide variation in standards and inconsistent results.

The attachment to this comment letter describes and recommends a method for weighing the economic costs of critical habitat designation against the benefits of habitat protection for species conservation. It is grounded in a belief that economists should focus their analysis on giving policymakers the input they need to make sound decisions in accordance with the law.

There are five key principles in WUWC's recommended cost-effectiveness methodology, which are summarized below:

**Principle 1 − *A cost-effectiveness approach is the appropriate framework of economic science for weighing the economic costs and benefits of critical habitat designation.***

The Services should employ a cost-effectiveness framework that is designed to find the least-cost means to achieving the ESA-mandated objective of designating and protecting habitat that is essential for species conservation. This simplified form of benefit/cost analysis is appropriate for two reasons. First, the numerator in the benefit/cost equation has been fixed at the ESA-policy objective of preserving habitat essential for species conservation, and second, the economic benefits of species preservation have already been captured during the earlier and separate decision to list the species.

**Principle 2 − *Agency biologists should determine the biological value of specific habitat areas for the conservation of the species.***

The critical habitat benefits should be specified in terms of the contribution of specific areas to species conservation. Biologists—not economists—should decide which habitat and

physical/biological elements of that habitat have the most biological value for species conservation and what special management measures are needed to conserve species beyond those measures necessary to prevent jeopardy to, and likely extinction of, a species. It is not necessary to specify the exact amount of biological value for each habitat area. Instead, the Services need to use their professional judgment to delineate and prioritize specific geographic areas based on the quality of habitat attributes present at that location and the degree to which the area is essential to the conservation of a species. Ranking the qualitative benefits of various habitat segments is highly appropriate.

**Principle 3 − *Economists can estimate the direct and indirect economic costs of critical habitat designation for specific geographic areas and standards for habitat protection.***

The Services should be afforded some flexibility in choosing the economic tool that is most appropriate for each designation. The more complicated economic models should be used to analyze designations of large geographic areas and areas where economic activity is concentrated. The simple, direct-cost method should be used where designations are small in area, or where there is little variation in the type of land/water use and economic activity throughout the proposed designation.

**Principle 4 − *Use a practical approach for weighing the costs of critical habitat designation against the benefits of critical habitat protection.***

Under the recommended cost-effectiveness framework, the Services are provided with information on the relative costs and benefits for designating or excluding specific geographic areas from habitat designation. Areas that have high habitat value and low economic cost will usually be included. Areas that are low in habitat value, but high in economic cost should be excluded. And, if high habitat value-low cost areas do not provide enough habitat for the conservation of the species, then the Services can consider including high value-high cost areas, or low value-low cost areas to achieve species conservation objectives.

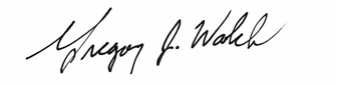
**Principle 5 − *Avoid efforts to monetize biological benefits—Attempting to monetize the biological benefits of designation and species recovery adds little value to policymaking.***

There is little value gained in attempting to monetize the biological value of habitat areas. Such efforts must rely on expensive and sometimes controversial non-market valuation studies. Prioritizing habitat segments mirrors the information that might be gained through a monetized approach, but does so in a way consistent with the relatively crude levels of available biological data. Cost-effectiveness analysis proceeds from an assumption that the conservation of listed species will generate a similar set of biological and net social welfare benefits, no matter which set of habitat areas is least cost. The differences in benefits between various sets of habitat areas that conserve species are so small that they do not justify the expense of attempting to measure them.

## III. Conclusion

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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