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Public Comments Processing

Attn: FWS–HQ–ES–2020–0047; FWS–HQ–ES–2019–0115

U.S. Fish & Wildlife Service, MS: PRB(3W)

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Falls Church, VA 22041–3803

Re: Comments on Notices of Proposed Rulemaking, “Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat,” Docket No. FWS–HQ–ES–2020–0047, and “Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat,” Docket No. FWS–HQ–ES–2019–0115.

On October 27, 2021, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, the Services) jointly proposed to rescind the recently finalized definition of “habitat” under the Endangered Species Act (ESA). 86 Fed. Reg. 59353. The same day, FWS separately published a proposal to rescind the similarly recent changes it made to the process and criteria for excluding areas from critical habitat designations. 86 Fed. Reg. 59346. The Western Urban Water Coalition (WUWC or Coalition)¹ appreciates this opportunity to comment on the Services’ proposed rescissions.

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.

¹ WUWC consists of the following members: **Arizona** (Central Arizona Project, City of Phoenix, and Salt River Project); **California** (Eastern Municipal Water District, City of Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District (Valley Water), 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 the submission of these comments.

WUWC members are 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 sources are being diminished by climate change and other factors and the development of sustainable supplies is vital. Their mission has proven more critical now than ever considering the essential role of clean water in combatting the spread of disease and maintaining public health, livelihoods, and sustenance during times of crisis, including the COVID-19 pandemic. In serving to meet this mission, WUWC members are involved in federal and nonfederal activities that are subject to the ESA.

Throughout its 29-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 FWS's proposed rescission of its revisions to the regulations that implement section 4(b)(2) of the ESA, which set forth a process for excluding areas from designation as critical habitat of listed species. 85 Fed. Reg. 82376 (Dec. 18, 2020) ("Critical Habitat Exclusion Rule"). One of the most significant ESA issues that WUWC has evaluated and acted on 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 Association v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001), 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.² WUWC also has submitted numerous comments on rulemakings

² See "Administrative Reform of Endangered Species Act—A Recommended Method for Economic Analysis for Critical Habitat Designation Under the Endangered Species Act," Attachment A to WUWC Comment Letter, Oct. 8, 2020 (Docket No. FWS-HQ-ES-2019-0115).

related to the Services' critical habitat designations.³ Specifically, WUWC submitted comments on FWS's proposed version of the Critical Habitat Exclusion Rule that it now proposes to rescind.⁴

WUWC similarly supports the Services' joint proposal to rescind the 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. 85 Fed. Reg. 81411 (Dec. 16, 2020) ("Habitat Definition"). WUWC submitted comments on the Service's proposed version of the Habitat Definition that they now propose to rescind.⁵

Over the years, some of WUWC's comments and recommendations have been adopted, but others have not. As a result, WUWC believes that additional action is needed to reform the critical habitat designation and exclusion process. Based on this extensive background and our members' experience being on-the-ground partners with the Services and having land and water that has been subject to critical habitat designations and exclusions, 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. The comments set forth in this letter are in furtherance of these general goals.

II. Comments on the Proposed Rules

a. FWS's Proposal to Rescind the Critical Habitat Exclusion Rule

The implementing regulations for the designation of critical habitat for listed species are located in 50 C.F.R. part 424. Relevant definitions are at 50 C.F.R. § 424.02, and the standards and procedures for identifying critical habitat are at 50 C.F.R. § 424.12. These regulations are jointly administered by the Services. On February 11, 2016, the Services issued a joint policy describing how they implement the authority to exclude areas from critical habitat designations.⁶ On December 18, 2020, FWS amended portions of its regulations that implement section 4(b)(2) of the ESA and incorporated the final revisions into 50 C.F.R. part 17 (at § 17.90), because the

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, Oct. 9, 2014 (Docket Nos. FWS-R9-ES-2011-0072, FWS-HQ-ES-2012-0096, and FWS-R9-ES-2011-0104) (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)); 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).

⁴ WUWC Comment Letter, Oct. 8, 2020 (Docket No. FWS-HQ-ES-2019-0115).

⁵ WUWC Comment Letter, Sept. 4, 2020 (Docket No. FWS-HQ-ES-2020-0047).

⁶ Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 Fed. Reg. 7226 (Feb. 11, 2016) (hereinafter "2016 Policy").

Critical Habitat Exclusion Rule applied solely to critical habitat designated by FWS. The new regulations at 50 C.F.R. § 17.90 superseded FWS's implementation of the joint 2016 Policy.

FWS now proposes to rescind the Critical Habitat Exclusion Rule, which set out the process and criteria for excluding areas from critical habitat designations, and resume its previous approach, which would be consistent with the approach NMFS continues to implement. FWS provides three overarching reasons it proposes to rescind the Critical Habitat Exclusion Rule. First, the Rule "potentially limits or undermines" FWS's role as the expert agency responsible for administering the ESA by giving "undue weight" to outside parties in the process of determining whether to exclude areas from critical habitat designations. 86 Fed. Reg. at 59347. Second, the Rule inappropriately employs a "rigid ruleset" in all situations, regardless of the specific facts, as to when and how FWS must exercise discretion to exclude areas from critical habitat designations. *Id.* Finally, for purposes of clarity and transparency, FWS finds that it is preferable for its section 4(b)(2) processes and standards to once again be consistent with those employed by NMFS. *Id.* at 59347–48.

Section 4(b)(2) processes and standards should be consistent across both FWS and NMFS.

WUWC agrees with FWS that the section 4(b)(2) processes and standards should be consistent across FWS and NMFS. WUWC made this very comment in response to the proposed rules under the last Administration. Both agencies administer the ESA and, therefore, different standards for the designation of critical habitat by the Services would inevitably result in confusion and inconsistency. We recommend that any future revisions to the critical habitat exclusion regulations be issued jointly by FWS and NMFS.

The Services should retain the discretion to include an area in a critical habitat designation even if the benefits of exclusion outweigh the benefits of inclusion.

WUWC agrees with FWS's assertion that while an area generally should be excluded from critical habitat designation if FWS determines that the benefits of exclusion outweigh the benefits of inclusion, this determination should not be absolute. Thus, WUWC supports FWS's conclusion in the proposed rule that the rigid "shall exclude" language in the Critical Habitat Exclusion Rule "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 in all situations, regardless of the case-specific facts or the conservation outcomes." *Id.* at 59350.

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 habitat 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, WUWC supports FWS’s proposal to “resume the implementation of the provisions of the Policy, under which the Secretary would retain discretion not to exclude an area when the benefits of exclusion outweigh those of inclusion.” *Id.*

The Services should document the basis for any determination not to undertake an exclusion analysis in both the draft and final critical habitat decision.

In its proposed rule, FWS concludes that the Supreme Court decision in *Weyerhaeuser Co. v U.S. Fish and Wildlife Service* does not conflict with the proposed rescission. 139 S. Ct. 361 (2018). In that case, the Court ruled that a decision not to grant an exclusion—like a decision to grant an exclusion—is subject to judicial review. The case explained that FWS must explain decisions not to exclude areas from critical habitat, but the case did not require promulgation of a new set of standards and processes under section 4(b)(2). FWS states that “[t]he *Weyerhaeuser* decision made clear that we now need to explain decisions not to exclude areas from critical habitat. Therefore, we will always explain our decisions not to exclude,” even if the rescission of the Critical Habitat Exclusion Rule is finalized. 86 Fed. Reg. at 59347. This is not only consistent with *Weyerhaeuser*, but also critical to FWS’s goal of increasing “transparency and predictability.” *Id.*

In addition to documenting decisions whether to exclude areas from critical habitat designations, WUWC urges both FWS and NMFS to document the basis for any determination not to undertake an exclusion analysis in the first place. In the preamble to the proposed version of the Critical Habitat Rule, FWS stated that it “intends” to document in the final determination regarding critical habitat its decision not to undertake an exclusion analysis. 85 Fed. Reg. 55398, 55401 (Sept. 8, 2020). To allow stakeholders an opportunity to comment on a determination not to undertake an exclusion analysis, the Services should document any determination in the draft *and* final critical habitat determinations.

Federal lands should not be barred from exclusion but a higher standard for exclusion should be applied.

We support FWS’s statement that, if the Critical Habitat Exclusion Rule was rescinded and the 2016 Policy was reinstated, the agency still “would retain the discretion to exclude Federal lands when the factual circumstances merit it.” 86 Fed. Reg. at 59350.

The Critical Habitat Exclusion Rule applies the same standards to exclusions of Federal and non-Federal Lands. In contrast, the 2016 Policy generally did *not* exclude federal lands from designations of critical habitat. While federal lands should 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 generally should be excluded from critical habitat designation where the benefits of exclusion outweigh the benefits of inclusion.

It is unclear 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.

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

Like the Critical Habitat Exclusion Rule, the 2016 Policy requires consideration for exclusion of “areas for which [the Department of Defense (DoD)], Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns.” 81 Fed. Reg. at 7231. Thus, regardless of whether FWS rescinds the Critical Habitat Exclusion Rule, both FWS and NMFS must consider national-security or homeland-security impacts. We simply point out that homeland-security impacts include impacts to water services and infrastructure projects. The White House and DHS 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.⁷ 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.⁸ 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, both FWS and NMFS 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 undertaken.

⁷ Presidential Policy Directive: *Critical Infrastructure Security and Resilience* (Feb. 12, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil>.

⁸ National Infrastructure Protection Plan: Water Sector, U.S. DEP’T OF HOMELAND SECURITY, https://www.dhs.gov/xlibrary/assets/nipp_snapshot_water.pdf.

When considering nonbiological impacts identified by water utilities.

WUWC does not object to FWS's proposed rescission of the obligation to 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. 50 C.F.R. § 17.90(d)(1)(iii). 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 the Services 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 Services should consider information provided by water utilities regarding impacts to these projects or plans when determining whether to designate or exclude specific areas.

Lands subject to non-ESA conservation plans 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 the Services or in partnership with the Services—and implemented for listed species are excluded from critical habitat. In past years, for example, 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. Thus, WUWC supports reverting to the 2016 Policy, in which the Services asserted a presumption in favor of exclusion for such plans when certain conditions are met. *See* 81 Fed. Reg. at 7230.

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.

Under both the Critical Habitat Exclusion Rule and the 2016 Policy, the Services generally will not exclude from a designation of critical habitat any areas likely to be covered by CCAAs, SHAs, and HCPs that are still under development during the exclusion analysis. However, there are certain circumstances under which the Services should consider a draft plan. For example, if a plan is in near-final form with few, if any, anticipated revisions, the Services should consider the benefits that the draft plan, if realized, would have for the species for which a critical habitat designation is proposed.

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.

The Services should consider information provided by qualified outside parties in their critical habitat designation process.

WUWC does not take a position on whether the Critical Habitat Exclusion Rule invited excessive participation from outside parties, or whether the role of outside parties would impede the Services in doing their jobs, as FWS asserted in the proposed rescission. However, WUWC believes that third parties with relevant expertise can play an important and helpful role in critical habitat designations and exclusions. We, therefore, strongly recommend that, in their next rulemaking related to critical habitat designations and exclusions, the Services incorporate an active role in the process for project applicants and qualified experts.

The Services should revise how they conduct their critical habitat economic impacts analysis.

Regardless of whether the Critical Habitat Exclusion Rule is rescinded, the method for calculating the economic consequences of critical habitat designation remains opaque. This evaluation is an integral part of designating critical habitat and it cannot be ignored. Section 4(b)(2) of the ESA 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, they have yet to issue long overdue guidance on how economic impacts will be evaluated. Recognizing the importance of this issue, WUWC participated with other parties in developing an approach and submitting it to the Services.⁹ The Services, however, did not follow up regarding the recommended approach. WUWC encourages the Services to initiate a stakeholder outreach process to gather input that will aid the Services in creating economic impacts guidance necessary to the clarity of the critical habitat designation process.

⁹ See Administrative Reform of Endangered Species Act, *supra* note 2.

b. Joint Proposal to Rescind the Definition of “Habitat”

Prior to the Services’ joint Habitat Definition, neither the ESA nor the implementing regulations included a specific definition of the word “habitat.” The Habitat Definition was added at 50 C.F.R. § 424.02, specifically for use in the context of critical habitat designations. 85 Fed. Reg. 81411. The Definition reads as follows:

For the purposes of designating critical habitat only, habitat is 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.

In their proposed rescission of the Habitat Definition, the Services conclude that the definition should be rescinded, and the Services should revert to their previous practice: determining whether areas constitute habitat on a case-by-case basis and on the basis of the best scientific data available.

WUWC believes that defining “habitat” could have significant benefits. By defining the term, the Services will greatly assist other parties in understanding what areas qualify as “habitat” and therefore should be considered during the process of designating critical habitat. A definition also would provide guidance and limitations that will assist in the critical habitat designation process. The term is far too important within the ESA and its various implementing programs, including habitat programs not related to critical habitat, to leave interpretation and application to a case-by-case approach. We are aware that developing such a definition is complex and challenging, and that there will be a wide range of views. For that purpose, we provide some initial recommendations below.

WUWC agrees with the Service that the ESA’s goal of conservation should be the starting point for any interpretation of the term “habitat” as it applies to designations of critical habitat. 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 ESA is applied to the land, 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. The conservation purpose of the ESA is also apparent in the definition of “critical habitat” in section 3(5):

- (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

- (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).¹⁰ Ultimately, limiting and narrowing critical habitat designations is not WUWC's goal, nor should it be the objective of the Services in their implementation of the regulations. 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: species conservation.

We recommend that the Services incorporate language into the definition that would include as "habitat" areas that do not currently possess the necessary attributes to support the listed species but, in the foreseeable future, would have those attributes due to natural processes or proactive conservation and recovery measures undertaken for purposes of the ESA. We made this recommendation in our comments on the proposed Habitat Definition, but the recommendation was not incorporated into the final rule. Instead, the Services explained at that time that areas that do not already include the requisite attributes do not qualify as "habitat." WUWC is pleased to see that the Services have reassessed their prior determination and now assert that "an area should not be precluded from qualifying as habitat because some management or restoration is necessary for it to provide for a species' recovery." 86 Fed. Reg. at 59354.

It is reasonable to expect that there will be circumstances where an area under review is the subject of ongoing conservation measures and activities pursuant to the ESA that will result in establishing those attributes with a high degree of certainty and within a foreseeable time frame. For example, an HCP or 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 attain the regulatory benefits of achieving such a high level of protection). Such a result should not be precluded 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 possible inclusion of such a habitat area should not be precluded from the species' "habitat."

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

¹⁰ 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).

“habitat” and did not limit the possibility that some areas not currently occupied by a listed species can qualify as “habitat.” 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.¹¹

As a result of these considerations, WUWC recommends the following definition of “habitat”¹²:

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.

For purposes of transparency and regulatory certainty, the Services should establish a stakeholder outreach process to continue to gather input regarding the parameters of “habitat,” with the ultimate goal of promulgating a definition. Indeed, many stakeholders have extensive experience with the ESA and we believe that the Services would greatly benefit from an ongoing dialogue with those stakeholders.

III. Conclusion

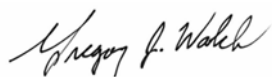
Based on this extensive background and our members’ experience being on-the-ground partners with the Services, WUWC is prepared to assist the Services in their efforts to both improve and encourage the goals of the ESA. Further, WUWC looks forward to continued dialogue and collaboration on how the ESA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

¹¹ 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.

¹² Agencies have broad discretion to promulgate rules and, here, the Services are well within their authority to adopt WUWC’s proposed 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”).

Sincerely,

A handwritten signature in cursive script, reading "Gregory J. Walch".

Gregory J. Walch
Chairman

cc: Donald C. Baur
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