



# THE WILDLIFE SOCIETY

*Leaders in Wildlife Science, Management and Conservation*

08 October 2020

Public Comments Processing  
Attention: FWS-HQ-ES-2019-0115  
U.S. Fish and Wildlife Service  
5275 Leesburg Pike  
Falls Church, VA 22041– 3803

RE: Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat [Docket No. FWS-HQ-ES-2019-0115]

Dear U.S. Fish and Wildlife Service,

The Wildlife Society appreciates the opportunity to comment on the newly proposed modifications to the implementation of the critical habitat exclusion analysis process under the Endangered Species Act (ESA).

Founded in 1937, The Wildlife Society (TWS; [wildlife.org](http://wildlife.org)) and our network of affiliated chapters and sections represents over 15,000 wildlife biologists and managers, dedicated to excellence in wildlife stewardship through science and education. Our mission is to inspire, empower, and enable wildlife professionals to sustain wildlife populations and their habitat through science-based management and conservation.

One of the Endangered Species Act's stated purposes is to provide a means "whereby the ecosystems upon which [listed species] depend may be conserved" (16 U.S.C. 1531(b)). Critical habitat designations for listed species are a key part of the ESA's ability to conserve the ecosystem.

The Secretary has the ability to exclude areas from critical habitat designation when the benefits of exclusion (economic, national security, or other impacts) outweigh the benefits of inclusion (conservation of the species), unless excluding the area will result in the extinction of the species.

We appreciate the Service's desire to "improve transparency, consistency, and defensibility" of their actions related to critical habitat designations and build from their 2016 policy on Section 4(b)(2) exclusions. Indeed, we believe that detailed policy and guidance on how to assess the economic and other impacts of habitat designation and balance the benefits of designating an area with the benefits of excluding an area would be beneficial to implementing the ESA ([TWS Technical Review 05-1](#)).

However, we have several concerns with the proposal and its potential negative impact on wildlife professionals' ability to advance the conservation of species listed under the ESA through science-based management and conservation. Our primary concerns and suggestions are provided below. **Underlying all of these concerns is the Administration's lack of provided rationale for this proposal and any reasoning for exemption of the National Marine Fisheries Service in its implementation.**

Many of our affiliated chapters and sections whose members work towards the on-the-ground conservation of at-risk species have also expressed concern. However, due to the limited window to provide public comment, many natural resource professionals and organizations were unable to engage in this rulemaking. As such, **we request an extension of the comment period to ensure the Service has an adequate understanding of the impacts this rule will have on science-based decision making.**

### **Power of third-party stakeholders**

The Wildlife Society appreciates the intent of the proposal to ensure clarity for non-federal stakeholders in implementation of Section 4(b)(2) of the Endangered Species Act. However, by attempting to bring certainty to stakeholders through further codification of the exclusion analysis process, the Service has provided potentially unlimited reasoning for areas to be excluded from designation as critical habitat. As a result, we are concerned that application of this rule will have the opposite of the intended effect, increasing opaqueness for the majority of stakeholders, and the process will be highly subjective in its implementation.

There is a need to continue a degree of flexibility in the exclusion analysis process. Each critical habitat designation is unique and has its own set of impacts to consider. We recommend that **additional definitions and regulatory structures be adopted** to ensure third parties do not hold an outsized level of power in this process. As currently proposed, third parties with varying degrees of financial or other interest in an area, including an area of federally-managed land, can use this amended language to slow down the designation process.

This is particularly the case when considering implementation of paragraph c(2)(i) of the proposal, which allows third parties to provide "credible information" as to the impacts of a proposed critical habitat designation in order to prompt an exclusion analysis. If the Administration feels compelled to codify this provision, providing for additional clarity as to what is considered "credible information" is necessary. In addition, the Service should provide clarity as to how that information will be assigned weight against biological information used to justify critical habitat designation.

### **Inadequate public and stakeholder input in exclusion determination**

This proposal would allow the Service to consider new critical habitat exclusion proposals following the public comment period on a proposed designation of critical habitat. According to the proposal, as long as credible, non-biological information is determined to warrant exclusion of an area from a critical habitat designation, it will be included in the final rule on designation of critical habitat.

As such, the public would have no recourse to provide comment on any information that is brought forward by a third party and accepted by the Service for exclusion from critical habitat designation. **Removing the ability of stakeholders and the public to comment on this third-party information does not improve the transparency, consistency, or defensibility of the process - and does not ensure that the process uses the best available information.**

The Service should republish third-party information it is considering as part of an exclusion analysis for public review. **We recommend the Service provide an amended critical habitat**

**designation proposal if it is determined that new areas should be excluded based on input received from the initial proposal.**

### **Inadequate resources to implement rule**

The Administration is proposing to place a significant burden on the already resource-limited USFWS Ecological Services program with the mandated engagement on third party information received. This burden would be exacerbated by the mandate that the Service continue to provide all relevant economic impacts to the public in their critical habitat designation proposal, along with any other impacts deemed relevant to the designation.

The Wildlife Society **urges the Service to request additional resources from Congress to sufficiently address critical habitat designations as required by law. The system is already backlogged, and additional resources will be necessary to implement this rule.** Without additional resources to analyze and publish for review all known impacts of the designation, as well as the resources needed to respond to additional information submitted by stakeholders, the Service will further exacerbate the backlog of ESA-related work and delay urgently needed conservation of threatened and endangered species.

Thank you for the opportunity to submit comment. Please contact Caroline Murphy, AWB®, government relations manager at The Wildlife Society (cmurphy@wildlife.org; 301-897-9770 x 308), with any questions regarding the recommendations outlined above.

Sincerely,



Carol L. Chambers, PhD  
President, The Wildlife Society