



October 8, 2020

**Submitted via online portal**

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

**Re: Comments on Proposed Rule; Regulations for Designation Critical Habitat,  
85 Fed. Reg. 55,398 – Docket No.: FWS-HQ-ES-2019-0115**

The Alaska Oil and Gas Association, American Exploration & Mining Association, American Forest Resource Council, American Sheep Industry Association, Arizona Farm and Ranch Group, California Cattlemen’s Association, International Association of Geophysical Contractors, National Cattlemen’s Beef Association, Offshore Operators Committee, Oregon Cattlemen’s Association, Oregon Concrete & Aggregate Producers Association, Oregon Farm Bureau, Oregon Forest & Industries Council, Public Lands Council, Washington Cattlemen’s Association, and Washington Farm Bureau (collectively, the “Coalition”) appreciate the efforts of the U.S. Fish and Wildlife Service (“FWS”) to clarify one of the Nation’s most important environmental laws—the Endangered Species Act (“ESA”). The Coalition offers the following comments regarding the proposed rule amending the process for excluding areas of critical habitat pursuant to Section 4(b)(2) of the ESA.

**The Associations**

Descriptions of the associations are contained in the attached Appendix A.<sup>1</sup> Our organizations represent a diverse array of natural resource industries in agriculture, forestry, energy, exploration and energy development, and related sectors that form the backbone of America’s economy. We fully support FWS’s efforts to improve the ESA and its implementation. The Proposed Rule is a step in the right direction toward clarifying when areas should be excluded from critical habitat designations for the purposes of the ESA. Indeed, Section 4(b)(2) *requires* consideration of the economic, national security, and other impacts of critical habitat designations prior to confirmation of such designations.

Because information regarding economic and other impacts of such a designation must come directly from private entities and landowners, FWS should consider providing additional clarification or guidance on the process for submitting information and on what constitutes “credible information” for a Section 4(b)(2) analysis. FWS must also explain how it will weigh

---

<sup>1</sup> Appendix A.

generalized impacts versus specific economic and other impacts anticipated by those project proponents and landowners with firsthand knowledge. Careful consideration of the true economic, national security, and other impacts of critical habitat designations is essential to ensuring that the ESA achieves protection of fish, wildlife, and plant populations without unduly burdening economic growth, job creation, and private property rights. To bolster regulatory certainty, FWS should also work with the National Marine Fisheries Service (NOAA Fisheries) to ensure that the changes recommended in the Proposed Rule are considered and adopted, as appropriate, with regard to marine species.

### **Overview of Concerns**

The Coalition emphasizes the following as key areas for FWS to clarify or revise in the Proposed Rule:

- FWS must clarify what qualifies as “credible information,” including the level of specificity required of project proponents, private landowners, and other entities regarding the economic impacts of critical habitat designations;
- FWS should adopt a straightforward process for regulated entities to request exclusion or withdrawal of areas from critical habitat;
- Counterpart regulations for the NMFS (NOAA Fisheries) should be developed with regard to marine species to ensure regulatory consistency and consistency in critical habitat determinations pursuant to Section 4(b)(2).

### **Comments**

Congress specifically revised the ESA in 1978 and again in 1984 to provide additional sideboards on the use of critical habitat designations.<sup>2</sup> These important changes resulted in the addition of language requiring consideration of “the economic impact, the impact on national security, and any other relevant impact” of designating an area as critical habitat.<sup>3</sup> This impact analysis is then used by the Secretary, in conjunction with the best scientific information available, to determine whether “the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat.” 16 U.S.C. § 1533(b)(2). While the revised Section

---

<sup>2</sup> In addition to requiring an economic impact analysis, the 1978 amendments narrowed the statutory definition of critical habitat and provided the current mechanism for exclusion of areas of critical habitat where “the benefits of exclusion outweigh the benefits of specifying such areas as part of the critical habitat.” Pub. L. 95-632, § 11(7), 92 Stat. 3766 (amending 16 U.S.C. § 1533(b)(2)); H.R. Rep. No. 95-1625, at 17 (1978). *See also* National Defense Authorization Act, Pub. L. 108-136 (2003) (adding national security language).

<sup>3</sup> The Proposed Rule inaccurately states that “the Secretary has discretion whether to enter into an exclusion analysis under section 4(b)(2).” *See* 85 Fed. Reg. at 55,400. While the Secretary clearly has discretion in the ultimate weighing decision, the clear language of Section 4(b)(2) provides that critical habitat designations shall be made only “after taking into consideration” the economic, national security, and other relevant impacts of the designation.

4(b)(2) provides the Secretary with discretion in making the ultimate balancing determination, Section 4(b)(2) is clear that economic and other impacts must be considered prior to the designation decision. *See also Weyerhaeuser v. U.S. Fish and Wildlife Service*, 139 S. Ct. 361 (2018) (definitively holding that exclusion decisions are subject to judicial review pursuant to the Administrative Procedure Act). This distinction is meaningful and indicates Congress’s clear intention to provide a balancing analysis that both takes into account the economic and other burdens of critical habitat designations and weighs those impacts against the benefits of designation.

Until now, the ESA implementing regulations have not provided for sufficient consideration of economic and other impacts by the Secretary in this balancing analysis. For example, the joint regulations applicable to FWS and NOAA Fisheries largely reiterated the language of Section 4(b)(2). *See* 50 C.F.R. § 424.19(c). Further, the regulations did not clearly identify the type and scope of economic impacts that the Secretary should consider or outline the process for doing so. *See id.* § 424.19(b) (indicating that the Secretary should consider the “probable” economic and other impacts of designation “upon proposed or ongoing activities”). In focusing on proposed or ongoing “activities,” this provision failed to ensure consideration of numerous aspects of the economic and other impacts of a critical habitat designation—including on future economic activity, land devaluation, perverse consequences of designation, and many more. Other than through public comment on a proposed initial habitat designation, *see id.* § 424.19(a), the regulations also did not provide a clear mechanism for affected parties to provide economic or other impact information to FWS after designation or to seek withdrawals.

As such, the Coalition supports FWS’s much-needed efforts to clarify when areas should be excluded from critical habitat designations based on economic and other considerations. These determinations have significant consequences for the Coalition’s members both in the form of public lands management and for industry actions on private lands and waters throughout the United States. An ESA critical habitat determination has significant implications for private landowners, federal permitting decisions, public land management decisions, federal loans, and enforcement of the ESA’s Section 9 “take” prohibition. While these determinations may positively impact species if made appropriately, they also can carry unnecessary restrictions and costs for industry and private landowners and may lead to perverse incentives contrary to the purposes of the ESA if they are not approached thoughtfully, while ultimately providing no benefit to the species of concern. As such, FWS’s regulations must provide clear direction for regulated entities, landowners, and other actors who ultimately bear the burdens of these restrictions.

In order to simplify our industries’ input on a complex subject, the Coalition offers additional comments on only the following issues to assist FWS in refining the Proposed Rule.

#### **1. Exclusionary Analysis Procedure and “Credible Information” Standard**

The Coalition generally supports the dual exclusion processes outlined in the proposed rule whereby the Secretary may exercise his or her discretion to exclude a particular area for exclusion or, alternatively, a private party may submit credible information in support of a request for exclusion. 85 Fed. Reg. at 55,400-02. As discussed above, the plain language of

Section 4(b)(2) requires the Secretary to, at a minimum, *consider* the economic, national security, and other impacts of critical habitat designations. Proposed paragraph (c)(2) appropriately acknowledges this duty by requiring the Secretary to always enter into an exclusion analysis where credible information supporting exclusion has been presented. *Id.* at 55,401. However, FWS must further explain the process and standard for submission of information by private parties to provide clarity for regulated entities and landowners who may be impacted by critical habitat designations.

In particular, the proposed rule indicates that credible information “refers to information that constitutes a reasonably reliable indication regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for a particular area.” 85 Fed. Reg. at 55,401. The FWS has proposed two factors to assess whether information is credible: (1) “whether the proponent has provided factual information in support of the claimed impacts” and (2) “whether the claimed impacts may be meaningful for purposes of an exclusion analysis.” 85 Fed. Reg. 55,401. FWS must take further steps, either by clarifying the proposed rule or through further rulemaking, to outline the process and level of specificity or evidentiary support required for fulfilling this credible information standard. Whether information is “factual” and “meaningful” may be highly subjective. To fully comply with Section 4(b)(2), additional revisions to this rule or subsequent rules must make clear that economic and other relevant information provided by landowners and project proponents must be considered and should be considered credible unless it appears unreasonable or wrong on its face. A common definition of the word credible is “offering reasonable grounds for being believed.” *Credible*, Merriam-Webster Dictionary (Sept. 25, 2020). Given the often confidential nature of the economic, national security, and other information that private parties may be submitting through this process, it may be unduly invasive to require too high an evidentiary standard. Thus, FWS should consider information provided by regulated entities to be credible unless it appears unreasonable or wrong on its face.

The Coalition also requests clarification regarding the appropriate weighing of impacts. In particular, how does FWS plan to weigh the tangible and direct economic impacts for private landowners, project proponents, and other regulated entities against the broader “conservation value” of inclusion of an area as critical habitat? 85 Fed. Reg. 55,407. The proposed rule appropriately acknowledges that assigning weights to different impacts requires expertise and that the benefits of inclusion and exclusion will be considered based on “who has the relevant expertise.” 85 Fed. Reg. at 55,400. FWS should plainly acknowledge that regulated entities and landowners that will be affected by a critical habitat designation have expertise in the economic and other impacts of a designation. As owners of private lands, users of public lands and waters, and regulated entities, the Coalition’s members have long experience with regard to the likely impacts of critical habitat on their lands and businesses. FWS must give appropriate weight to this expertise. Further, FWS must clarify how it will engage in the weighing analysis between economic, conservation, and other concerns.

To ensure that economic and other impacts of critical habitat designations are appropriately considered, the Coalition proposes including language in a preamble to 50 C.F.R. § 17.90 substantially similar to the following—

It is the Service's intent that the revised regulations recognize and codify the Secretary's obligation to give a meaningful and substantive "hard look" at the economic, national security, and other impacts of critical habitat designations prior to making a critical habitat decision, and to substantively explain, with supporting rationale, its conclusion in response to any exclusion request under Section 4(b)(2).

This proposed language would further clarify the Service's obligations and intentions with regard to how it will apply the new proposed rules.

**2. FWS Must Implement an Exclusion/Withdrawal Application Process to Comply with the Ongoing Duty to Consider Economic and Other Impacts of Critical Habitat Designations.**

As discussed above, FWS should adopt a clear and straight-forward process for private parties and regulated entities to request an exclusion (or, if already designated, a withdrawal) from critical habitat. Section 4(b)(2) specifically requires the Secretary to designate critical habitat "and make revisions thereto" based on the best scientific data and economic and other impacts. 16 U.S.C. § 1533(b)(2). In other words, the Secretary has an ongoing duty under Section 4(b)(2) to continue to look at emerging science as well as the economic and other relevant impacts to private landowners and regulated entities. In order to fully comply with this duty, FWS must ultimately adopt a streamlined process that: (1) allows affected parties to continue to advise the agency of economic and other impacts of the critical habitat designation both prior to and after a designation decision is made; (2) allows affected parties to request exclusion and/or withdrawal of areas from critical habitat; and (3) makes clear that the Secretary will continue to weigh on an ongoing basis whether exclusion of areas from critical habitat is appropriate. The effectiveness of this process will be critical to meeting the Secretary's duty under Section 4(b)(2) and reducing the administrative and economic burdens to regulated entities.

**3. The Services Should Work Together to Develop Counterpart Regulations for NMFS to Ensure Section 4(b)(2) is Applied Analogously to Critical Habitat Determinations for Marine Species.**

Regulatory certainty is of the utmost importance to regulated entities. The Coalition believes it would be beneficial for FWS to work with NOAA Fisheries to develop corresponding changes to the ESA regulations for marine species that mirror the exclusion analysis process in the proposed rule. Providing one unified process, or similar processes, for considering exclusions from critical habitat would provide consistency and reduce administrative and legal burdens considerably for regulated entities and landowners. Changes to NOAA Fisheries' regulations are also necessary, as discussed above, in order to fully comply with Congress's intent in revising Section 4(b)(2) to require the consideration of economic and other impacts of critical habitat designations.

## **Conclusion**

The Coalition appreciates the opportunity to provide comments on behalf of our industries and members. We look forward to continuing this discussion and please do not hesitate to reach out to us if you have any additional questions or concerns.

Sincerely,

/s/ Caroline Lobdell

Caroline Lobdell, Executive Director  
Western Resources Legal Center  
9220 SW Barbur Blvd., Suite 119 #327  
Portland, Oregon 97237  
[clobdell@wrlegal.org](mailto:clobdell@wrlegal.org)  
503-768-8500

On behalf of the following:

Alaska Oil and Gas Association  
American Exploration & Mining Association  
American Forest Resource Council  
American Sheep Industry Association  
Arizona Farm and Ranch Group  
California Cattlemen's Association  
International Association of Geophysical Contractors  
National Cattlemen's Beef Association  
Offshore Operators Committee  
Oregon Cattlemen's Association  
Oregon Concrete & Aggregate Producers Association  
Oregon Farm Bureau  
Oregon Forest & Industries Council  
Public Lands Council  
Washington Cattlemen's Association  
Washington Farm Bureau

## **Appendix A: The Coalition Associations**

**Alaska Oil and Gas Association.** AOGA is a professional trade association whose mission is to foster the long-term viability of the oil and gas industry for the benefits of all Alaskans. We represent the majority of companies that are exploring, developing, producing, refining, or marketing oil and gas on the North Slope, in the Cook Inlet, and in the offshore areas of Alaska. In addition to providing a forum for communication and cooperation with members and the public AOGA also regularly provides input on local, state and national legislative and administrative actions that affect the petroleum industry in Alaska.

**American Exploration & Mining Association.** AEMA is a 125-year-old, 1,700-member national trade association representing the minerals industry with members residing in 44 U.S. states, 7 Canadian provinces or territories and ten other countries. AEMA is the recognized national voice for exploration the junior mining sector, and maintaining access to public lands, and represents the entire mining life cycle, from exploration to reclamation and closure. More than 80% of our members are small businesses or work for small businesses.

**American Forest Resource Council.** AFRC is a regional trade association whose purpose is to advocate for sustained yield timber harvests on public timberlands throughout the West to enhance forest health and resistance to fire, insects, and disease. We do this by promoting active management to attain productive public forests, protect adjoining private forests, and assure community stability. We work to improve federal and state laws, regulations, policies and decisions regarding access to and management of public forest lands and protection of all forest lands. AFRC represents over 50 forest product businesses and forest landowners throughout Washington, Oregon, California, Idaho, and Montana.

**American Sheep Industry Association.** With roots dating back to 1865, ASI is a federation of 46 state associations representing sheep producers nationwide with a common goal to promote the well-being and profitability of the U.S. sheep industry. From the East to the West, pasture flocks to range operations, ASI works to represent the interests of more than 79,500 American sheep producers.

**Arizona Farm and Ranch Group.** AFRG is a non-profit corporation formed to unite farmers and ranchers throughout Arizona and address the challenges faced by the agricultural industry at large. AFRG members include farmers, ranchers, and irrigation districts, as well as the many thousands of individuals and businesses involved in agriculture. AFRG provides a forum to remain informed and advocate for Arizona agriculture at the local, state, and federal levels. Among other things, AFRG meets with legislators and agencies, comments on legislation and agency rules, and, when necessary, participates in litigation in federal and state courts, including matters involving the Endangered Species Act.

**California Cattlemen's Association.** CCA is a mutual benefit corporation organized under California law in 1917 as an "agricultural and horticultural, nonprofit, cooperative association" to promote the interests of the industry. Membership in the CCA is open to any person or entity engaged in breeding, producing, maturing, or feeding cattle, or who leases land for cattle production. The CCA is the predominate organization of cattle grazers in California and, acting

in conjunction with its affiliated local organizations, it endeavors to promote and defend the interests of the livestock industry.

**International Association of Geophysical Contractors.** Founded in 1971, IAGC is the global trade association for the geophysical and exploration industry, the cornerstone of the energy industry. With more than 80 member companies in 50 countries, our membership includes onshore and offshore survey operators and acquisition companies, data and processing providers, exploration and production companies, equipment and software manufacturers, industry suppliers and service providers.

The IAGC focuses on advancing the geophysical and exploration industry's freedom to operate. The IAGC engages governments and stakeholders worldwide on issues central to geophysical operations and exploration access, including prioritizing timely, accessible data acquisition throughout the life of the asset; providing predictability & competition; promoting regulatory & fiscal certainty and promulgating risk- & science-based regulations.

**National Cattlemen's Beef Association.** NCBA is the national trade association representing U.S. cattle producers, with more than 25,000 individual members and several industry organization members. Together NCBA represents more than 175,000 cattle producers and feeders. NCBA works to advance the economic, political and social interests of the U.S. cattle business and to be an advocate for the cattle industry's policy positions and economic interests. Many of NCBA's members hold grazing permits and leases authorizing livestock grazing on federal lands.

**Offshore Operators Committee.** OOC is a non-profit trade association focused on safety and technology formed in 1948. It represents offshore energy companies that operate on the United States Outer Continental Shelf (OCS), as well as the service and supply industries that support their efforts. The OOC's mission includes all forms of offshore energy development in all Federal OCS regions including renewables. For the last several decades, the OOC's membership has represented more than 90% of the offshore energy production in the United States.

**Oregon Cattlemen's Association.** OCA is a nonprofit organization that seeks to advance the economic, political and social interests of the cattle industry in Oregon and to represent the over 1,800 cattle producers and members throughout the state. OCA's mission is to promote environmentally and socially sound cattle industry practices alongside a positive image of the industry; assure a strong political presence in related areas; and protect industry communities and private property rights.

**Oregon Concrete & Aggregate Producers Association.** Formed in 1967, OCAPA is an industry trade association that seeks to advance the construction and the construction materials industries in the state of Oregon. OCAPA represents businesses who produce concrete and mine aggregate, as well as industry suppliers and associate members. Among other things, OCAPA provides a forum for the interchange of ideas relative to concrete and aggregate production in all its phases; seeks to enhance the public's understanding and recognition of the merits of concrete and concrete products; and advocates for the industry at the local, state, and federal levels in legislative and administrative affairs.



**Oregon Farm Bureau.** OFB is a voluntary, grassroots, nonprofit organization representing Oregon's farmers and ranchers in the public and policymaking arenas. As Oregon's largest general farm organization, its primary goal is to promote educational improvement, economic opportunity, and social advancement for its members and the farming, ranching, and natural resources industry. Today, OFB represents nearly 7,000-member families professionally engaged in the industry.

**Oregon Forest & Industries Council.** OFIC is a trade association representing more than 50 of Oregon's forestland owners and forest products manufacturers. Our members combine sustainable forest management practices with the latest science and technology to continuously improve the environmental, social, and economic value of healthy working forests. In total, our members manage more than 5 million acres of Oregon forestlands. OFIC promotes the industry's leading role in delivering environmental and economic benefits while balancing the sustainable use of forest resources. We seek to ensure the multi-generational survival of healthy forests and successful communities through collaborative partnerships with policymakers, community leaders, and advocacy organizations.

**Public Lands Council.** PLC represents ranchers who use public lands and preserve the natural resources and unique heritage of the West. PLC is a Colorado nonprofit corporation, whose membership comprises state and national cattle, sheep, and grasslands associations, as well as individual ranchers. These ranchers own nearly 120 million acres of the most productive private land in the West. PLC members also manage vast areas of public land and national forests in grazing allotments under permits and leases from the Bureau of Land Management and the Forest Service.

**Washington Cattlemen's Association.** WCA formed in 1925 as a grassroots organization devoted to promotion of agriculture and the cattle industry. WCA actively participates in promoting and preserving the beef industry through producer and consumer education, legislative participation, regulatory review, and litigation.

**Washington Farm Bureau.** WFB is an independent membership federation representing more than 46,000 farm and ranch families across the state, serving as the voice of the agriculture industry at all levels of government. WFB is a voluntary, grassroots advocacy organization whose mission is to provide leadership and organization skills, while educating the public and our members on the issues affecting farm and ranch families.