PROTECTING WATER FOR WESTERN IRRIGATED AGRICULTURE

Testimony of Dan Keppen, P.E.
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Before the
Committee on Natural Resources
Subcommittee on Water, Wildlife
and Fisheries
U.S. House of Representatives
Washington, D.C.

Legislative Hearing on H.R. 276, H.R. 845, H.R. 1897 & H.R. 1917

March 25, 2025

Dear Chair Hageman, Ranking Member Hoyle, and Members of the Subcommittee:

On behalf of the Family Farm Alliance (Alliance), thank you for the opportunity to present this testimony today on *The Endangered Species Act Amendments Act of 2025* (H.R. 1897), a bill aimed at improving the Endangered Species Act (ESA) by clarifying provisions that have created significant challenges for farmers, ranchers and water managers across the West without corresponding outcomes for species. This bill, introduced by Rep. Bruce Westerman (R-AR), modernizes the ESA and its implementing regulations to provide clearer direction to the federal agencies in applying and enforcing the law. The Alliance strongly supports H.R. 1897, and we thank Chairman Westerman for his leadership on this important bill.

About the Family Farm Alliance

The Alliance is a grassroots organization of family farmers, ranchers, irrigation districts, and allied industries in 16 Western states. We are committed to the fundamental proposition that Western irrigated agriculture must be preserved and protected for a host of economic, sociological, environmental and national security reasons – many of which are often overlooked in the context of other national policy decisions. The American food consumer nationwide has access to fruits, vegetables, nuts, grains and beef throughout the year largely because of Western irrigated agriculture and the projects that provide water to these farmers and ranchers. The Alliance is a key

player in the context of Western water resource management and how this important function is impacted by implementation of federal laws and regulations.

Agency Implementation of the ESA

A prime factor concerning Western irrigators is the employment of the ESA by federal agencies as a means of protecting endangered or threatened aquatic species under the law by focusing on one narrow stressor to fish: water diversions. In recent decades, increasing numbers of Western irrigators in places like California's Central Valley and the Klamath River Basin have seen such listings lead to federal fishery agencies focusing on one narrow stressor to fish: the diversion of water to irrigated farms and ranches in the West. In Central Oregon, the listing of the spotted frog has also resulted in disproportionate attention paid to irrigation. In the Pacific Northwest, thirteen species of ESA-listed salmon and species in the Columbia and Snake River basins affect all water-related activities in a watershed area roughly the size of France.

The Western producers we represent have seen firsthand the economic impacts that can accompany ESA single species management. ESA consultations and biological opinions often add prohibitively costly mandates to any action that could remotely be determined by federal agencies as impacting or harming species or habitat, whether the species exists in the areas designated or not. Litigation that often surrounds ESA listings and federal agency management decisions dramatically drives up costs and increases uncertainty for farmers and ranchers who rely on federal water projects located in areas where ESA-protected fish and wildlife live.

The Alliance has consistently and strongly supported efforts to reform the ESA and its implementing regulations –that would provide clearer direction to the agencies in applying and enforcing the law. Key issues include more transparency on how critical habitat designations are determined and administered, factoring the economic impacts of ESA listings and critical habitat designations, making clear what is needed to de-list the species, giving deference to state and local efforts to recover species, ensuring proper involvement of water users and other stakeholders, and respecting state water laws. For decades, the Alliance has advocated that collaboration, coordination and cooperation – as opposed to conflict and litigation – are keys to successful implementation of the ESA in a way that actually leads to recovery of the species. The Alliance in November 2021 developed a detailed comment letter (attached to this testimony) to federal fisheries agencies that reaffirmed the support the organization placed behind the substance and process used to finalize the 2019 Trump Administration's ESA rules that were rescinded in 2021 by the Biden Administration.

"Boots-on-the-ground" efforts and actual recovery of species should define success under the ESA, not endless litigation and what appears to be the opportunistic pursuit of taxpayer-funded attorney's fees by certain environmental groups. These environmental lawsuits are the poster child for what has become an environmental litigation industry. While others are busy fixing the problems outside the courtroom– such as collaborative efforts by ranchers to prevent listing of the

Western sage grouse - litigious groups continue to drain resources and time, slowing or hindering projects, and distracting everyone from achieving the real goals of the ESA.

Our members are often directly impacted by implementation of federal laws, including the ESA, due to the potential for their Western irrigation projects to impact listed species or their critical habitat. A constant frustration our members have experienced with the implementation of the ESA and analogous processes is the lack of accountability for success or failure. There is a demonstrated lack of empirical measure of the success or failure of mitigation measures (or the Reasonable and Prudent Alternatives), and most important, adjustment of those measures, as a result. Right now, the law does not specifically hold federal implementing agencies accountable for failures or for the wasteful use of resources, including water at the expense of state water law and water users. It only provides for the protection of the species, at all costs, but only within their agency's authority.

The Destructive Tactics of the Environmental Litigation Industry

A 2024 *Capital Press* review of Internal Revenue Service filings by 20 nonprofit environmental organizations active in the West found they have total net assets of nearly $2 billion. The net assets listed in the most recent tax filings available range as high as $462 million for the Natural Resources Defense Council and $487 million for American Society for the Prevention of Cruelty to Animals. Past research into litigation associated with federal environmental laws has uncovered some unsettling facts: the implementation of the ESA appears to have produced more paper than realization of actual on-the-ground species and habitat improvement[1]. Regrettably, millions of taxpayer dollars have been spent by federal agency attorneys either defending litigation over the ESA or on actions to avoid anticipated litigation. This is precious money that could be used to recover species or to ensure policies that will balance species with economic activity and jobs[2].

Tax exempt, non-profit organizations are essentially receiving attorney fees from the federal government…. for suing the federal government. Funds awarded to the "prevailing" litigants are taken from the "losing" federal agencies' budget. There is no oversight in spending this money, which could otherwise be funding on- the-ground programs to protect public lands, national forests, ranchers, fish and wildlife and other land uses.

Western producers who have seen firsthand the economic impacts that can accompany ESA single species management are wary and concerned. Decades of closed-door, "sue and settle" litigation practices create justifiable concerns about the data and science behind ESA listings and federal

[1] U.S. House of Representatives Committee on Oversight and Government Reform, Subcommittee on the Interior "Barriers to Endangered Species Act Delisting Part 1", April 20, 2016

[2] U.S. House of Representatives Committee on Natural Resources Oversight Hearing on "Taxpayer-Funded Litigation: Benefitting Lawyers and Harming Species, Jobs and Schools", June 19, 2012.

agency management decisions and adds a whole new level of costs and uncertainty for farmers and ranchers who rely on federal water projects, mostly in the West. With the possible addition of several hundred new species to the ESA list, there are also concerns that other agencies – including the Environmental Protection Agency over Clean Water Act permit decisions and the Federal Emergency Management Agency's floodplain guidelines – will be forced to consult with federal wildlife officials over the impacts of its decisions to the hundreds of newly protected species. Finally, given the size of the U.S. Fish and Wildlife Service (FWS) budget for these consultations, and the aggressive timelines set by the court as part of settlements, there is certain to be a great deal of incomplete, outdated, and otherwise inadequate science and a lack of current data going into these listing decisions.

Biden-Harris Administration ESA Rulemaking

The Biden White House approved changes to the ESA regulations, reversing most of the Trump-era ESA improvements from 2019. These changes, promulgated by the FWS and National Marine Fisheries Service (NMFS), have sparked renewed debate and are likely to face further litigation. The revisions address critical elements of the ESA, such as the designation of critical habitat and defining terms like "foreseeable future" for assessing species status. The Biden rules reinstate a default policy for threatened species to receive strict protections unless a special rule is created. Additionally, federal agencies must consult with FWS and/or NMFS before authorizing actions on designated critical habitat.

While the Biden-era ESA regulation changes have drawn varied reactions, including criticism from environmentalists who feel more aggressive action is needed, they mark a significant negative shift in ESA implementation towards stricter protections for endangered and threatened species. Notably, the Biden ESA regulations took out the previous Trump Administration's important reform that listing decisions should consider economic impacts. Moreover, they reversed some of the first Trump Administration's 2019 amendments related to Section 7 consultation, which had clarified correctly what is and is not part of the environmental baseline of federal-related projects.

The Endangered Species Act Amendments Act of 2025

Enacted more than fifty years ago, the ESA was an important and historic piece of legislation intended to preserve and recover species, and though we are disappointed in the relatively low level of success over five decades, there are instances where we have seen successes that should be encouraged . For example, successful programs, such as the Colorado River Basin Recovery Programs and the Little Snake River Watershed initiatives, demonstrate how collaborative efforts between federal agencies, states, landowners, and local stakeholders can lead to effective species conservation while balancing human needs like water use and agriculture.

Unfortunately, since ESA's enactment the norm is not these success stories but instead, increasing and more frequent overreaching by federal agencies and abuse by serial litigators that severely hampers communities with little or sometimes actually negative progress toward recovering

species. It is clear that meaningful changes are necessary, and this legislation is a major step in the right direction.

H.R. 1897, House Natural Resources Chairman Bruce Westerman's legislation to reform the ESA, includes many of the previous provisions of H.R. 9533 - the bill he introduced in the 118th Congress that was approved by the Committee in September 2024 - including prioritization of ESA listing determinations, incentivizing state, local, tribal and private conservation agreements and permits, disclosure and capping payment of ESA-related attorneys' fees. However, the new bill includes some important additions and edits from the previous bill, including:

- **Transparency of Federal ESA Decisions -** The new bill requires not only that the data used by FWS and NMFS in listings decisions be published on the internet, but also stipulates that data used to determine critical habitat for ESA species also be published on the internet.

- **Clarifies Criteria for Critical Habitat Determinations -** The new bill clarifies that "habitat" is defined more precisely for settings where processes include resources necessary to support one or more life processes of the species, does not include areas visited by vagrant individual members of the species, and if life processes are not supported in a setting, a threatened or endangered species must be able to access other areas necessary to support it remaining life processes.

- **Clarifies the Definition of Conservation of Species to Encourage Transplantation -** The new bill would remove restrictive language from ESA's definition of "conserve; conserving; and conservation" such that the Secretary has greater discretion to utilize transplantation to conserve species not just in "extraordinary cases."

- **Defines Existing Structures to be in "Environmental Baseline" under Section 7 -** The bill would state that existing structures and facilities, such as irrigation diversion dams, canals and water storage dams, are considered to be in the "environmental baseline" for section 7 consultations rather than requiring "ongoing impacts to listed species or designated critical habitat from existing facilities or activities not caused by a proposed action."

- **Adds New Section Encouraging Section 10 Conservation Plans**, including exempting them from Section 7 consultation and NEPA incidental take permits.

- **Requires Agencies to Make Delisting Determinations -** Upon a Secretarial determination that recovery goals have been met, the Secretary would be required to review and determine whether a species should be removed from the ESA list—something not part of the law.

- **Requires Review of Effectiveness of 'Reasonable & Prudent Alternatives/Measures**—To streamline the permitting process, the bill includes a provision requiring the federal

agencies review the effectiveness of RPAs/RPMs to determine whether such RPAs/RPMs are likely to help species recovery in subsequent ESA consultations and requires them to discontinue them if the Secretary determines that the RPAs/RPMs won't materially improve species or timeline of recovery.

- **Clarifies that "Commercial Data" Should be Factored as to Action's Effects -** Current law presumes "in favor of the species" on the determination of whether an action is reasonably certain to affect a species. The new provision requires consideration of the *actual data*.

- **Clarifies "Jeopardy" Under Section 7 -** Requires the Secretary to first consult with affected states prior to a jeopardy determination, and more accurately clarifies that jeopardy determinations are only critical if the Secretary determines, based on best scientific and commercial data available, that the effects are reasonably certain to be caused by the action proposed.

- **Includes Provision to Restore Congressional Intent to Limit Federal ESA Regulations -** H.R. 1897 requires the Services to disclose to Congress all costs associated with ESA-related lawsuits. It further places a cap on the award of attorney's fees to successful litigants in line with the Equal Access to Justice Act, rather than allow litigious groups to be paid hundreds of dollars an hour in taxpayer-funded attorneys' fees.

- **Adds Required Consideration of ESA Listing effects on Human Health and Safety -** Importantly, the legislation requires an analysis of the economic impacts and national security impacts of each listing and critical habitat determination. It further clarifies that these analyses do not change the listing criteria set out by the ESA.

We are also supportive of the bill's provisions to define "Best Scientific and Commercial Data" to include data submitted by States, Tribes and local governments—those closest to the ground and with the best track record of helping actually get species off the list or protect them from being listed in the first place . We reaffirm our belief that relatively greater weight should be given to actual data that has been field-tested or peer-reviewed, rather than static studies performed decades ago with no peer review. The former requirement would help clarify when such things as "personal observations" or mere folklore are considered by the agencies to be reliable enough to make decisions with potentially profound effects.

Even though Congress itself passed the ESA, we all know how difficult it is for Congress to now amend the ESA, even with the intention to improve it. However, there is considerable discretion in *how* the ESA is implemented. Given the significant scientific uncertainty with many listed species and the ecosystems in which they reside and the failure of the ESA regulators to look more holistically at the many varied stressors affecting them, the agencies need to step back and rethink the consequences of their actions. Even though the ESA does not require the human consequences of their decisions to be considered, it does not prohibit such consideration. Understanding the

impacts on people that come with ESA decisions is simply good public policy. To ignore how people are affected is simply bad public policy. This concern and others deserve further consideration from Congress.

Conclusion

The Family Farm Alliance believes the Subcommittee's efforts to consider legislation that would modernize the ESA and make it a more effective tool for conservation are greatly appreciated and commendable. We strongly support H.R. 1879--the *ESA Amendments Act of 2025* and encourage its swift passage to improve the balance between species protection and economic and resource-use considerations.

Farmers, ranchers, and some conservation groups know that the best water solutions are unique and come from the local, watershed, and state levels. They know we need policies that encourage agricultural producers, NGOs, and state and federal agencies to work together in a strategic, coordinated fashion. They understand that species recovery and economic prosperity do not have to be mutually exclusive.

We believe the enactment of H.R. 1897 will help meet the challenges our farmers and ranchers face with the current implementation of the ESA. It is our hope that Congress will embrace the core philosophy previously stated: the best solutions are driven locally by real people with a grasp of "on-the-ground" reality and who are heavily invested in the success of such solutions.

Western irrigated agriculture is a strategic and irreplaceable national resource important to both our food security and our economy. It must be appreciated, valued, and protected by the federal government in the 21st Century.

Thank you for this opportunity to submit this testimony and we would be happy to answer any questions the Subcommittee may have.

Attachment A: Family Farm Alliance letter to Ms. Bridget Fahey, USFWS Division of Conservation and Classification Re: Public Comments Processing - FWS–HQ–ES–2019–0115, FWS–HQ–ES–2020–0047. November 23, 2021.

Attachment A

November 23, 2021

Ms. Bridget Fahey
U.S. Fish and Wildlife Service
Division of Conservation and Classification,
5275 Leesburg Pike, Falls
Church, VA 22041–3803

Transmitted via Federal eRulemaking Portal

Re: Public Comments Processing - FWS–HQ–ES–2019–0115, FWS–HQ–ES–2020–0047

Dear Ms. Fahey:

On behalf of the Family Farm Alliance (Alliance), thank you for this opportunity to comment on revisions to regulations that implement portions of the Endangered Species Act (ESA), proposed by the U.S. Fish and Wildlife Service (USFWS). Specifically, this letter has been prepared to respond to USFWS's proposed two new rules to roll back the Trump Administration's regulatory clarifications involving critical habitat under the ESA.

The Alliance is a grassroots organization of family farmers, ranchers, irrigation districts, and allied industries in 16 Western states. The Alliance is focused on one mission: to ensure the availability of reliable, affordable irrigation water supplies to Western farmers and ranchers. We are also committed to the fundamental proposition that Western irrigated agriculture must be preserved and protected for a host of economic, sociological, environmental, and national security reasons – many of which are often overlooked in the context of other national policy decisions

The federal government's significant presence in the West presents unique challenges for Alliance members. This is particularly true with respect to the reach of the ESA. Implementation of the ESA impacts the management of land and water throughout the West. For example, federal water supplies that were originally developed by the Bureau of Reclamation (Reclamation) primarily to support new irrigation projects have, in recent years, been targeted and redirected to other uses. The result is that these once-certain water supplies – one of the few certainties in Western irrigated agriculture – have now been added to the long list of existing "uncertainties."

Given the nature of water storage and delivery, Alliance members are often directly impacted by the implementation of the ESA and other federal laws. A constant frustration our members experience is the lack of accountability for success or failure for the implementation of these federal laws. There is no empirical measure of the success or failure of mitigation measures (including reasonable and prudent alternatives) or the adjustment of those measures as a result. The ESA has at times been interpreted to empower federal agencies to take action intended to protect listed species without consideration of the societal costs of such action, even when it is not clear that the action taken will actually yield conservation benefits for the particular species. Thus, the Alliance strongly supports efforts to reform the ESA and its implementing regulations to provide clearer direction to the agencies in applying and enforcing the law.

The purpose of this letter is to reaffirm the support we placed behind the substance and process used to finalize the 2020 ESA rules that are now being rescinded. We have combined our responses to the two dockets into this one document, which will be submitted to each of the two dockets.

Proposal to Rescind ‘‘Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat” and remove regulations established by that rule. [Docket No. FWS-HQ-ES-2019-0115]

The USFWS plans to rescind the Trump Administration’s 2020 rule that clarified the process for designating critical habitat for threatened and endangered species under Section 4 of the ESA. As further explained below, the Alliance opposes the Proposed Recission. Less than a year ago, FWS promulgated the 2020 regulations in order to provide “greater transparency and certainty for the public and stakeholders” regarding its critical habitat exclusion process, given the preceding Supreme Court holding in *Weyerhaeuser* that decisions not to exclude an area from critical habitat are judicially reviewable. Now, FWS finds that its 2020 Final Rule is “problematic because it unduly constrained the Service’s discretion in administering the [ESA].”

Background

On February 11, 2016, NMFS and USFWS (collectively, the “Services”) issued a joint policy describing how they implement the authority to exclude areas from critical habitat designations. On December 18, 2020, USFWS amended its portions of their regulations that implement section 4 of the ESA. The final regulation applied solely to critical habitat designated by USFWS. The Final Rule set forth a process for implementing section 4(b)(2) of the ESA, which requires USFWS to consider the impacts of designating critical habitat and allows the agency to exclude particular areas following a discretionary exclusion analysis subject to certain limitations. That proposed rule provided the background for proposed revisions in terms of the statute, legislative history, and case law.

Section 4(b)(2) of the Act requires that the Service consider the economic impact, the impact on national security, and any other relevant impact of designating any particular areas as critical habitat. It provides that USFWS then may engage in a further discretionary consideration and

exclude particular areas from the designation if the benefits of exclusion outweigh the benefits of inclusion and exclusion would not result in extinction of the species. In the Final Rule, USFWS discussed its desire to articulate clearly when and how it will undertake such an exclusion analysis under section 4(b)(2), including identifying a non-exhaustive list of categories of potential impacts for the Service to consider. The goal for the Final Rule was to clarify, based on agency experience, how USFWS considers impacts caused by critical habitat designations and conducts its discretionary exclusion analyses, partially in light of the Supreme Court's recent decision in *Weyerhaeuser Co.* v. *U.S. FWS,* 139 S. Ct. 361 (2018) (*Weyerhaeuser).*

On January 20, 2021, President Biden issued Executive Order 13990, which, among other things, required all agencies to review agency actions issued between January 20, 2017 and January 20, 2021 to determine consistency with the purposes articulated in section 1 of the E.O. A ''Fact Sheet'' supporting the E.O. set forth a non-exhaustive list of specific agency actions that agencies were required to review. One of the agency actions included on the Fact Sheet was the December 18, 2020 Final Rule. Pursuant to the direction in EO 13990, USFWS has reviewed the Final Rule to assess whether to keep the rule in place or to revise any aspects of it.

The agency's review included evaluating the benefits or drawbacks of the rule, the necessity of the rule, its consistency with applicable case law, its inconsistency with NMFS's process for applying section 4(b)(2) of the Act, and other factors. Based on its evaluation, USFWS is now proposing to rescind the Final Rule.

Alliance Response and Recommendations

Congress included ESA Section 4(b)(2) to provide a mechanism to exclude particular areas from critical habitat, after consideration of the economic and other impacts of the designation, when the benefits of exclusion outweigh the benefits of inclusion, and exclusion of that area would not result in extinction of the species. In practice, the evaluation of critical habitat exclusions has been complicated due to a lack of transparency and consistent standards describing how USFWS and NMFS (collectively, the "Services") would assign weight to particular impacts, weigh the respective benefits of inclusion versus exclusion, and ultimately exercise their discretion regarding the exclusion of a particular area.

The Family Farm Alliance in October 2020 formally responded to the revisions proposed by USFWS relative to regulations for designating critical habitat, under section 4(b)(2) of the ESA. We generally supported USFWS's revisions to clarify the scope of economic and other impacts that would be considered; to assign weight to impacts and benefits based on the expertise of the exclusion proponent and the recognition that nonbiological impacts are outside of USFWS's expertise; and to always exclude an area when the benefits of exclusion outweigh the benefits of inclusion, unless extinction of the species would result.

The Alliance has long supported efforts to balance effective, science-based conservation with common-sense policy designed to bring the ESA into the 21st century. We felt the 2020 Final Rule was a strong step in this direction.

We do not believe that transparency and regulatory certainty are promoted by USFWS's proposal to rescind the regulations in order to return to a narrower, "non-binding policy" that provides the Services' position on certain components of the critical habitat exclusion process. Our belief is built upon the following observation and recommendations, which are more fully detailed in the November 2021 letter submitted to you by the National Endangered Species Act Reform Coalition (NESARC) on this matter[3]:

1. **The Critical Habitat Exclusion Procedures in the 2020 Final Rule Are Necessary to Provide Greater Transparency and Certainty for the Public and Stakeholders.**

2. **FWS Failed to Provide the Requisite Reasoned Explanation for Rescinding the 2020 Final Rule.** While USFWS has purported to explain the bases for its change in position, the provided explanations are neither reasoned nor meaningfully address the facts and circumstances supporting the recent promulgation of the procedures implanting the Section 4(b)(2) critical habitat exclusion process. The 2002 Final Rule does not undermine USFWS's role in ESA implementation nor give undue weight to outside parties. That Rule is not overly rigid, but instead, provides the necessary regulatory framework to guide the consideration of exclusions from critical habitat. Reverting to the 2016 policy does not provide clarity or transparency to the critical habitat exclusion process. It defies logic for USFWS to now assert that clarity and transparency would be improved by reverting back to a policy that has already been found not to achieve those objectives because it does not contain the requisite regulatory framework.

3. **USFWS Failed to Provide a Reasoned Explanation for Rescinding Each of the Primary Substantive Provisions of the 2020 Final Rule.**

    a. USFWS now states that the "credible information" standard is vague and does not accomplish the stated goal of improving transparency about what information will or will not trigger an exclusion analysis. In fact, <u>the explanations provided during the promulgation of the 2020 Final Rule informs what must be provided by proponents of a critical habitat exclusion</u>.

    b. In the Proposed Recission, USFWS states that it now finds that "the provision to automatically assign weights based on the nonbiological impacts identified by entities outside the agency does not advance the conservation goals of the Act." In this instance, USFWS disregards its explanation in the 2020 Final Rule and

[3] We support that letter and incorporate it by reference herein.

misstates the scope of its statutory obligations pursuant to ESA Section 4(b)(2). The criteria for assigning weights to impacts do not constrain USFWS's authority or responsibility under the ESA.

c. USFWS points to the change in treatment of Federal lands as justification for proposing to rescind the 2020 Final Rule. USFWS notes that, under the 2016 Policy, the Services would generally not exclude Federal lands from a designation of critical habitat and, instead, the 2020 Final Rule applies the same standards for evaluating Federal and non-Federal lands. USFWS states that all Federal agencies have responsibilities under ESA section 7 to carry out programs for the conservation of listed species and to ensure that their actions are not likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitat. Finally, USFWS asserts that the 2020 Final Rule "fails to recognize that the Policy does not prohibit exclusions of Federal lands." Unfortunately, USFWS fails to appreciate that these issues and concerns were already raised and addressed during the promulgation of the 2020 Final Rule. We believe the critical habitat exclusion process applies equally to federal and non-federal lands.

d. USFWS now finds that the requirement in the 2020 Final Rule that the Secretary "shall" exclude an area where the benefits of exclusion outweigh the benefits of inclusion is an "unnecessarily broad constraint on the Secretary's discretion," and one that "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." Instead of providing transparency and certainty to the regulated community, USFWS now indicates that it is preferable to "preserve the Secretary's discretion on exclusions regardless of the outcome of the balancing." We believe clarifying when USFWS will exclude areas from critical habitat is an appropriate exercise of discretion.

e. Since promulgation of the 2020 Final Rule, USFWS has determined that the inclusion of certain "other provisions identifying factors for the Secretary to consider when conducting exclusion analyses that involve particular categories of impacts" was unnecessary, and that their removal would not affect USFWS's implementation of the ESA. USFWS's explanation is contrary to the purpose of the 2020 Final Rule, which was to "provide greater transparency and certainty for the public and stakeholders." We believe the "other" regulatory provisions of the 2020 Final Rule should be retained.

In summary, we believe the rationale for this proposed regulatory action is unsupported and contrary to legal precedent. Should USFWS reconsider this proposal and, instead, pursue

subsequent refinements to the relevant regulations, the Alliance and its members look forward to providing constructive insights and perspectives to these efforts.

Proposal to Rescind "Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat" and remove the regulatory definition of "habitat" [Docket No. FWS–HQ–ES–2020–0047]

Under the second proposal, USFWS and NMFS – collectively, the "Services" - plan to rescind the Trump administration's 2020 regulatory definition of "habitat," which the Services promulgated to increase consistency in their critical habitat designations. On December 16, 2020, the Services published a final rule adding a definition of the term ''habitat'' to its regulations. As noted above, on January 20, 2021, President Biden's EO 13990 identified agency actions for the agencies to review. One of those actions was the December 16, 2020, final rule promulgating a regulatory definition for ''habitat'' under the ESA. USFWS has reevaluated that final and are now proposing to rescind it.

Alliance Response and Recommendations

The final definition of habitat adopted in the December 16, 2020 final rule was, "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." This definition explicitly limited the term habitat to apply only to critical habitat designations under the ESA, and no previously finalized critical habitat designations were to be reevaluated as a result of its establishment. At the time, the Alliance believed the final definition of habitat would continue to improve implementation of the ESA, which defines critical habitat and establishes separate criteria depending on whether the area is within or outside the geographical area occupied by the species at the time of listing.

The Alliance opposes the Proposed Recission of the definition of "habitat." The Services recently promulgated this definition to provide "transparency, clarity, and consistency" by defining a term that the Supreme Court explicitly stated was a necessary component of critical habitat designations. The 2020 final rule marked the first instance that "habitat" was defined and interpreted for purposes of application to ESA critical habitat designations. The Services now propose to rescind—but not revise or provide further guidance—the definition because it is unclear, confusing, and inconsistent with other ESA definitions. Instead of retaining a regulatorily defined term, the Services propose to revert back to their prior practice of assessing habitat on a "case-by-case basis," only if needed in an agency-determined context, and with no established guidance for landowners, project proponents, state and local governments, and other stakeholders. The Proposed Recission is the antithesis of promoting "transparency, clarity, and consistency." Further, the Services' stated rationale conflicts with the Supreme Court's mandate that ESA Section

4 "does not authorize the Secretary to designate the area as critical habitat unless it is also habitat for the species."[4]

A definition of "habitat" is necessary to inform the designation of "critical habitat". The Services have failed to provide the requisite reasoned explanation for their change in position. The definition of habitat does not constrain the ability to designate areas that meet the ESA's definition of "critical habitat". The definition's terminology is further explained and clarified in the 2020 final rule. Application of that definition is explicitly limited to "critical habitat" and does not create confusion or inconsistency. The definition of habitat applies to more than unoccupied areas and should not be limited to a case-by-case determination. These concerns are further detailed in the November 2021 letter submitted to you by NESARC on this matter. We support that letter and incorporate it by reference herein.

The Services should reconsider this proposed action and, instead, pursue efforts to further refine or interpret the definition of "habitat" as may be necessary to effectuate the requirements of the ESA.

Conclusion

We all know of the difficulty for Congress to amend the ESA. However, there is considerable discretion in *how* the ESA is implemented. Given the significant scientific uncertainty with many listed species and the ecosystems in which they reside and the failure of the ESA regulators to look at the many varied stressors affecting them, the agencies need to step back and rethink the consequences of their actions. Even though the ESA does not require the human consequences of their decisions to be considered, it does not prohibit such consideration. Understanding the impacts on people that come with ESA decisions is simply good public policy. To ignore how people are affected is simply bad public policy. This concern and others deserve further consideration from the highest policy officials.

Thank you for this opportunity to comment. Farmers, ranchers, and some conservation groups know that the best water solutions are unique and come from the local, watershed, and state levels. They know we need policies that encourage agricultural producers, NGOs, and state and federal agencies to work together in a strategic, coordinated fashion. They understand that species recovery and economic growth and activity do not have to be mutually exclusive.

The Family Farm Alliance has developed these recommendations for the Services to help form the basis for solutions to help meet the challenges our farmers and ranchers face. It is our hope that you and your agencies will embrace the core philosophy previously stated: the best solutions are

[4] *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2018) (emphasis in original).

driven locally by real people with a grasp of "on-the-ground" reality and who are heavily invested in the success of such solutions.

Western irrigated agriculture is a strategic and irreplaceable national resource important to both our food security and our economy. It must be appreciated, valued, and protected by the federal government in the 21st Century.

If you have any questions about this letter, please do not hesitate to contact me at 541-892-6244.

Sincerely,

Dan Keppen
Executive Director