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October 8, 2020

George Wallace
U.S. Fish and Wildlife Service
Department of Interior
Washington, DC 20240

RE: Docket No. FWS-HQ-ES-2019-0115

Dear Mr. Wallace,

The National Cotton Council (NCC) appreciates this opportunity to provide comments on the proposed rule of the U.S. Fish and Wildlife Service (FWS) entitled “Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat.” The NCC recognizes the significance of defining critical habitat as it applies to statutory language of the Endangered Species Act (ESA). A regulation that attempts to define the scope of regulatory authority in the definition of critical habitat under ESA must be crafted very carefully in order to remain faithful to legislative intent. It is imperative that the definition conveys succinct meaning in order to avoid legal challenges of interpretation.

The NCC is the central organization of the United States cotton industry. Its members include producers, ginners, cottonseed processors and merchandizers, merchants, cooperatives, warehousemen and textile manufacturers. A majority of the industry is concentrated in 17 cotton-producing states stretching from California to Virginia. U.S. cotton producers cultivate between 10 and 14 million acres of cotton with production averaging 12 to 20 million 480-lb bales annually. The downstream manufacturers of cotton apparel and home furnishings are located in virtually every state. Farms and businesses directly involved in the production, distribution and processing of cotton employ more than 125,000 workers and produce direct business revenue of more than \$21 billion. Annual cotton production is valued at more than \$5.5 billion at the farm gate, the point at which the producer markets the crop. Accounting for the ripple effect of cotton through the broader economy, direct and indirect employment surpasses 280,000 workers with economic activity of almost \$75 billion. In addition to the cotton fiber, cottonseed products are used for livestock feed and cottonseed oil is used as an ingredient in food products as well as being a premium cooking oil.

The NCC notes the opinion of the Supreme Court in (*Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 139 S. Ct. 361, 2018), in particular acknowledging that an area must first actually be “habitat” for a species before it may be eligible to be designated “critical habitat” for that species. The Court notes that ESA defines “critical habitat” to include “specific areas” that are “(I) essential to the conservation of the species and (II) which may require special management considerations or protection” for conservation of threatened or endangered species (586 U.S. ___, at 3)(quoting 16 U.S.C. §1532(5)(A)). An agency must first determine whether a specific area is a part of the “habitat” of the species before it can then consider whether that specific area is also properly considered “critical habitat.” This necessarily means that “critical habitat” is “essential” for

preservation and recovery of the species and is a subset of and certainly no broader than the “habitat” of the species.

The NCC further notes the definition of “habitat” for purposes of ESA rulemaking has not yet been established by FWS. Understanding the definition of “habitat” first is key to understanding the subset of area that could properly be eligible for a designation of “critical habitat.” The NCC encourages FWS to ensure the definition aligns with biological and ecological definitions presently established.

The NCC encourages FWS to engage the affected State(s) to identify areas likely to meet exclusion criteria and enhance identification of “other impacts” during the first stages of identifying critical habitat. In doing so, FWS and the affected State(s) can discuss any actions or partnerships for conservation of the species and identify partnership opportunities to offset or minimize the impact for excluding areas. Additionally, the NCC believes the State(s) would enhance the FWS’s draft designation and minimize additional proponents seeking exclusion analyses.

The NCC supports the FWS’s proposed rule establishing Section 17.90 and expanding the transparency of the critical habitat designation and use of discretionary authority to exclude areas from critical habitat. The proposed rule enhances the understanding of scientific processes related to designation of Critical Habitat, discloses potential economic and other impacts associated with the Critical Habitat designation, and articulates processes and credible information that may assist the Secretary of Interior’s consideration to exercise exclusion analysis. The improvements of the language will enhance public understanding that may enhance conservation partnerships and practices.

Credible Information

The FWS has asked for stakeholder input regarding what constitutes “Credible Information” that will trigger exclusion analysis. The NCC believes Credible Information implies information (e.g. data, studies, formed concepts) that is formed and presented with supporting evidence to establish the basis for a credible or convincing conclusion. While the language does not imply “proof” or scientific merit, it does imply trustworthiness and reliability. The NCC notes Congress included the words “other impacts” in the statute, which indicates that Congress understood an agency may need to account for additional considerations that were not yet known or understood at the time of ESA’s enactment. Those could include social impacts that are seldom captured by science, particularly at local levels. Credible Information should require a level of trust and reliability but should not be limited by data that may not capture relevant “other impacts,” whether social, economic, or ecological, if the information contains supporting evidence of trustworthy. For example, Credible Information concerning the impact of a designation on a community could include community survey submissions that support the reliability of the information. The FWS should consider types of supporting evidence necessary to achieve Credible or Reliable criteria. However, the FWS should include such impacts and build partnerships that minimize excluded area impacts.

Proposed 17.90

The NCC appreciates the expansion of paragraph (a) and believes the transparency will enhance public trust, understanding, and consideration of opportunities for other species’ conservation practices through consideration of the reasons the Secretary outlines for exclusion. This action will provide educational information and an understanding of the species habitat need in a section that

will likely receive the most focused attention. Additionally, the information will assist commenters in development of Credible Information for feedback.

The NCC supports modifying the language of paragraph (c) but urges FWS to give additional consideration to (c)(1) and (c)(2). We recognize the Secretary retains discretion to exercise exclusion analysis and urge consideration of merging (c)(1) and (c)(2) in a manner that stipulates the Secretary's discretion. The NCC believes the proposed (c)(1) and (c)(2) could create confusion how the two paragraphs interact. The NCC believes the Secretary's decision not to exercise exclusion consideration still results in a decision not to exclude.

The NCC supports paragraph (d) and appreciates that the FWS provide a framework to weigh the benefits of exclusion as comparison to the benefits of inclusion. The NCC appreciates FWS attention to conservation plans and believes (d)(3) and (d)(4) will enhance knowledge and participation in conservation efforts.

The NCC supports paragraph (e) and believes final determinations showing the process of exclusion, when exercised, will build public trust and support for the transparent process.

Summary

The NCC supports the FWS proposed 17.90 and urges the FWS to consider early engagement with state authorities prior to a draft critical habitat designation. The NCC believes improved communication with affected State(s) prior to publishing a draft will enable identification of most areas suitable for exclusion consideration. The cooperation with the affected State(s) and resulting exclusion areas, if any, will ensure greater public confidence in the agency's determination. Publishing the analyses described above will demonstrate the determination process and credible information used, aiding the public to consider the credibility of alternative information prior to a comment or exclusion request. The NCC believes this process would conform to the legislative intent of the ESA, increase cooperative State(s) engagement to refine a draft determination, and minimize additional refinements for a final Critical Habitat designation.

Still, the effectiveness of the proposal depends on a reliable definition of "habitat" that is supported by appropriate ecological and biological factors.

The NCC appreciates the opportunity to provide these comments and appreciates their consideration by the Fish and Wildlife Service.

Sincerely,



Gary M. Adams
President & CEO
National Cotton Council