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October 8, 2020

Department of the Interior **Fish and Wildlife Service** (FWS) Proposed Rule:
Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Designating Critical Habitat
Document Citation: 85 FR 55398, pages 55398-55407
50 CFR 17
Docket Number: FWS-HQ-ES-2019-0115
RIN: 1018-BD84

Submitted Electronically via eRulemaking Portal:
https://www.federalregister.gov/documents/2020/09/08/2020-19577/endangered-and-threatened-wildlife-and-plants-regulations-for-designating-critical-habitat#open-comment

Attorneys for Animals Comment on Proposed Rule Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Designating Critical Habitat

Attorneys for Animals, Inc. (AFA) is a Michigan non-profit and 501(c)(3) organization of legal professionals and animal advocates. Founded in the 1990s, we actively follow legislative, administrative, and policy actions related to the welfare of animals, both in Michigan and nationwide. We oppose the proposed rule.

The purpose of the Endangered Species Act of 1973, 16 USC 1531 *et seq*. ("the Endangered Species Act") is to "protect and recover imperiled species and the ecosystems upon which they depend." It is meant to create federal standards and to emphasize the importance of the species under consideration. The policy statement behind the Endangered Species Act is that "*all* Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." 16 U.S.C. § 1531(c) (emphasis added).

The United States Fish and Wildlife Service (FWS) proposed rule seeks to expand the ability to exclude critical habitats for threatened and endangered species in order to favor economic interests. The rule is framed in a seemingly positive light and interprets a U.S. Supreme Court case, *Weyerhaeuser Co v US Fish & Wildlife Serv*, 139 S Ct 361, 368 (2018) holding that a FWS decision to exclude a critical habitat from such designation is judicially reviewable. The decision allows the Secretary discretion to decide whether to consider the economic and other impacts before making the decision not to exclude a habitat from the critical habitat designation. FWS takes the court's holding a step too far, by allowing those that have an interest in excluding the critical habitat to demand review of the agency's decision to designate

the area as a critical habitat and require an exclusion of the designation if the economic benefits outweigh the harm to the species.

The proposed rule goes well beyond giving the Secretary discretion to exclude an area from a critical habitat designation. The language in *Weyerhaeuser* explains: "Section 4(b)(2), which states that the Secretary "*may* [emphasis added] exclude [an] area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of [designation]." The FWS proposed rule states "(e) If the Secretary conducts an exclusion analysis under paragraph (c) of this section, and if the Secretary determines that the benefits of excluding a particular area from critical habitat outweigh the benefits of specifying that area as part of the critical habitat, then the Secretary *shall* [emphasis added] exclude that area, unless the Secretary determines, based on the best scientific and commercial data available, that the failure to designate that area as critical habitat will result in the extinction of the species concerned."

In addition, the proposed rule allows FWS to designate the weight that each interest will have in evaluating the cost benefit analysis of excluding a specific habitat from the critical habitat designation. This has the potential to give undue control to local business interests, and precludes a robust, scientific review as the Act requires. This proposed rule will undermine the purpose of the Endangered Species Act and will negatively affect the ability of FWS to protected the endangered species and their habitat.

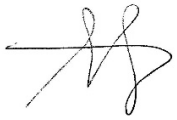
The proposed rule goes well beyond statutory or case law requirements and will weaken the protection of endangered species and therefore must be rejected.

Very truly yours,

Attorneys for Animals, Inc.

By:

Beatrice M. Friedlander, JD
Its President, Board of Directors



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