November 23, 2021

Public Comments Processing
Attn: FWS-HQ-ES-2019-0115
US Fish and Wildlife Service
MS: JAO (PRB/3W)
5275 Leesburg Pike
Falls Church, VA 22041-3803

Submitted via Federal eRulemaking Portal: Docket No. FWS-HQ-ES-2019-0115

Re: Illinois Farm Bureau Comments on Proposed Recission of 2020 ESA Section 4(b)(2) Regulations

Dear Ms. Fahey:

On behalf of Illinois Farm Bureau® (IFB), please find for your consideration the comments below regarding the proposed rule that would, if finalized, remove the regulations that the agency promulgated on December 18, 2020, to implement Section 4(b)(2) of the Endangered Species Act ("ESA"). Founded in 1916, IFB is a non-profit, membership organization directed by farmers who join through their County Farm Bureau. IFB has a voting membership of approximately 74,000. IFB represents three out of four Illinois farmers. IFB appreciates the opportunity to provide comments on the proposed recission of the 2020 ESA Section 4(b)(2) regulations.

IFB opposes the Proposed Recission of FWS's regulations that establish the framework for how it conducts its impact analysis and evaluation of exclusions from critical habitat. FWS recently promulgated these 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, ten months later, FWS finds that its 2020 Final Rule is "problematic because it unduly constrained the Service's discretion in administering the [ESA]." Accordingly, FWS proposes to revert back to its pre-existing 2016 policy regarding implementation of ESA Section 4(b)(2), but fails to explain how that would address the issues and concerns that caused FWS to promulgate regulations superseding the 2016 Policy. Notably, FWS previously found it necessary to "provide transparency about how the Secretary intends to exercise his discretion regarding exclusions under section 4(b)(2)." Transparency and regulatory certainty are not promoted by FWS's proposal to rescind the regulations in order to return to a more narrow, "non-binding policy" that provides the Services' position on certain components of the critical habitat exclusion process.

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

Pursuant to the ESA, when listing a species as threatened or endangered, and to the extent prudent and determinable, FWS is required to "designate any habitat of such species which is then considered to be critical habitat." Recognizing the economic and other impacts that derive from the designation of any particular area as critical habitat, the ESA also authorizes FWS to exclude areas from critical habitat. Section 4(b)(2) states that:

> "The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned."

The purpose of this provision is to ensure that critical habitat designations are not based solely on the best scientific data available but, instead, require the consideration and balancing of the impacts (economic, national security, and other relevant impacts) versus the benefits of including a particular area within critical habitat.

Congress amended the ESA in 1978 to include the definition of critical habitat and to authorize the FWS and the National Marine Fisheries Service ("NMFS") (collectively the "Services") to exclude areas from a designation based on economic and other impacts. One of the primary purposes of the amendment was to ensure the consideration of economic impacts in the designation of critical habitat. Congress explained that "[e]conomics and any other relevant impact shall be considered by the Secretary in setting the limits of critical habitat for such a species." Accordingly, Congress authorized the Services to modify a proposed critical habitat designation when the economic benefits of excluding a portion of the critical habitat outweigh the benefits of designating the area as part of the critical habitat. As Congress explained:

> "Factors of recognized or potential importance to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat of [a species]. The committee expects that in some situations, the resultant critical habitat will be different from that which would have been established using solely biological criteria. In some situations, no critical habitat would be specified."

Congress intended to "cause the Secretary to be more judicious in specifying such a critical habitat," and to avoid conflicts between listed species and Federal activities at an early stage.

For those affected by critical habitat designations, there are elevated interests and repercussions associated with the Services' processes and procedures for evaluating and determining whether to exclude a particular area from critical habitat. Until recently, the Services have not provided substantial regulatory criteria establishing how they conduct most

components of the critical habitat exclusion analysis. Notably, the applicable, pre-2020 regulations consist of three short subsections codified at 50 CFR § 424.19(a)-(c). The Services sought to complement these regulations through the issuance of a "non-binding policy" in 2016 that explained the Services' position regarding certain, discrete components of the critical habitat exclusion process. However, the Services have avoided providing significant or sufficient insight into how they exercise their discretion regarding critical habitat exclusions. As FWS acknowledged, up until recently, "the Services were guided by a line of cases in which courts had held that a decision by the Services not to exclude a particular area under section 4(b)(2) of the Act was committed to agency discretion by law and therefore not subject to judicial review."

In 2018, overturning these lower court opinions, the Supreme Court held that decisions not to exclude a particular area are judicially reviewable. While recognizing that the word "may" confers discretion on the Secretary (and Services), the Court stated "[t]hat does not, however, segregate his discretionary decision not to exclude from the procedure mandated by Section 4(b)(2), which directs the Secretary to consider the economic and other impacts of designation when making his exclusion decisions." Furthermore, regarding the weighing of the benefits of exclusion versus inclusion, the Court stated that "Section 4(b)(2) requires the Secretary to consider economic impact and relative benefits before deciding whether to exclude an area from critical habitat or to proceed with designation." Accordingly, the Services are required to weigh and balance the potential impacts and benefits of designating a particular area as critical habitat before they exercise their discretion to determine whether to include or exclude that area.

In response to the Supreme Court's Weyerhaeuser decision, and recognizing the "abuse of discretion" standard of review that now applies to decisions not to exclude an area from critical habitat, FWS promulgated regulations further elaborating on its critical habitat exclusion process. As FWS explained, "[t]o provide transparency about how the Secretary intends to exercise his discretion regarding exclusions under section 4(b)(2), we are proposing this regulation…." Subsequently, in response to comments questioning the impetus of FWS's proposed regulations, FWS responded that, "[t]o provide transparency, clarity, and certainty to the public and other stakeholders about how the Secretary intends to exercise his discretion regarding exclusions under section 4(b)(2), we are finalizing this regulation…." Furthermore, FWS stated that "the Service is of the view that the Court's decision underscores the importance of being deliberate and transparent about how the Service goes about making decisions about whether to exclude areas from designations of critical habitat."

II. FWS Failed to Provide the Requisite Reasoned Explanation for Rescinding the 2020 Final Rule

Should FWS proceed with this proposal and rescind the recently promulgated Section 4(b)(2) procedures, FWS must comply with the requirements of the Administrative Procedure Act ("APA"). Under the APA, an agency action is arbitrary and capricious if the agency fails to adequately explain or make statutorily-required findings. When an agency changes its position, it must (1) "display[ ] awareness that it is changing position," (2) show "the new policy is permissible under the statute," (3) "believe[ ]" the new policy is better, and (4) provide "good reasons" for the new policy. Moreover, if a "new policy rests upon factual findings that contradict those which underlay its prior policy," the agency must provide "a reasoned explanation ... for disregarding facts and circumstances that underlay or were engendered by the prior policy." While FWS 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.

A. The 2020 Final Rule Does Not Undermine FWS's Role in ESA Implementation nor Give Undue Weight to Outside Parties

As its first reason for proposing to rescind the 2020 Final Rule, FWS states that "the Final Rule potentially limits or undermines the Service's role as the expert agency responsible for administering the Act because it potentially gives undue weight to outside parties in guiding the Secretary's statutory authority to exclude areas from critical habitat designations." FWS further elaborated that:

> "The Final Rule potentially limits the Service from fulfilling aspects of this role by giving parties other than the Service, including proponents of particular exclusions, an outsized role in determining whether and how the Secretary will conduct exclusion analyses. This undue reliance on outside, directly affected parties in certain aspects of the process interferes with the Secretary's authority to evaluate and weigh the information provided by those parties, when determining what specific areas to designate as critical habitat for a species."

FWS's concerns are unfounded, and are contrary to the explanations and safeguards provided in the 2020 Final Rule.

First, the APA does not prohibit Federal agencies from soliciting information from experts or from those with first-hand knowledge. FWS routinely conducts this practice, and relies on submitted information, when implementing other components of the ESA. The fact that outside, directly affected parties are submitting information to FWS is not a legitimate basis for recission.

Furthermore, FWS neglects to address the explanation provided in the 2020 Final Rule that specifies how FWS will review information provided by outside parties to ensure that they do not have an "outsized role" or receive "undue weight" in the critical habitat exclusion process. As FWS stated:

> "As some of the commenters pointed out, it is reasonable for the Secretary to seek input from experts regarding those other relevant impacts that are outside the scope of the Service's expertise. The proposed rule strikes that balance by providing for the Service to seek that input from experts and give weights to particular impacts in accordance with that input, while also making clear that the Service ultimately retains the discretion to reject or adjust that input to the extent it is rebutted by the best information available to the Service. By retaining that discretion for the Service, the rule avoids putting disproportionate weight on the expertise of entities whose ultimate goal may not be conservation."

These safeguards—critically reviewing all submitted and retained information for consistency with the best available information standard—anticipated and preemptively resolved the concern now raised by FWS about the role of outside parties in the critical habitat exclusion process.

Finally, FWS's concern about giving outside parties an "outsized role" or "undue weight" in the critical habitat exclusion process is belied by FWS's Proposed Recission. FWS suggests that reverting back to the 2016 Policy will address and resolve this concern. In the 2016 Policy, the Services recognized that they have the discretion to determine "what weight" to assign the benefits of inclusion and benefits of exclusion from critical habitat. Notwithstanding, and similar to (albeit, more narrow than) the 2020 Final Rule, the Services decided to ascribe greater weight to concerns raised by certain outside parties, including proponents of particular exclusions, than those raised by other parties. The Services stated that: (1) "[we] will give great weight to Tribal concerns in analyzing the benefits of exclusion"; (2) "we will give great weight to national-security and homeland-security concerns in analyzing the benefits of exclusion"; and (3) "we give great weight and consideration to conservation partnerships, including those partnerships with States and Tribes." FWS has not explained this general inconsistency about the merits of assigning weight to concerns raised by outside parties nor has FWS addressed the disparate treatment that would result by assigning weight to concerns raised by a subset of affected parties.

B. The 2020 Final Rule Is Not Overly Rigid, but Provides the Necessary Regulatory Framework to Guide the Consideration of Exclusions from Critical Habitat

FWS asserts that the 2020 Final Rule "employs a rigid ruleset in all situations regardless of the specific facts as to when and how the Secretary will exercise the discretion to exclude areas from critical habitat designations." In particular, FWS states that "the regulatory text mandates a rigid process for when the Secretary will enter into an exclusion analysis, how weights are assigned to impacts, and when an area is excluded." FWS is concerned that "the Final Rule undermines the Service's ability to further the conservation of the species because the ruleset applies in all situations regardless of the specific facts at issue or the conservation outcomes." Contrary to FWS's characterizations, the 2020 Final Rule is not overly "rigid" but, instead, provides clarity and transparency to the critical habitat exclusion process through the establishment of regulatory procedures that inform and guide the FWS's exercise of discretion.

As FWS recognized, "[a]lthough the [2016] Policy identified specific factors to consider if a discretionary exclusion analysis is conducted, it stopped short of articulating more generally how we approach the determination to undertake that analysis." FWS sought to address this deficiency by promulgating the additional procedures that are now proposed for recission. Rather than a rigid application, FWS explained that "[p]roposed paragraph (c)(2) describes the two circumstances in which FWS will conduct an exclusion analysis for a particular area: Either (1) when a proponent of excluding the area has presented credible information in support of the request; or (2) where such information has not been presented, when the Secretary exercises his or her discretion to evaluate any particular area for potential exclusion. " In turn, "[p]roposed paragraph (d) describes how FWS would undertake an exclusion analysis once the Secretary exercises the discretion to enter into one. ... Proposed paragraphs (d)(1) through (d)(4) describe factors that FWS considers with respect to conservation plans or agreements, tribal implications, national-security implications, and Federal lands, in parallel to paragraphs 2 through 6 of the Policy." Contrary to FWS's stated concerns, the 2020 Final Rule merely provides a more robust regulatory framework to guide FWS's consideration of exclusions from critical habitat, and FWS still retains the flexibility to consider the specific facts at issue or the conservation outcomes on a species-by-species or area-specific basis.

C. Reverting to the 2016 Policy Does Not Provide Clarity or Transparency to the Critical Habitat Exclusion Process

In reversing its impetus for promulgating the 2020 Final Rule, FWS has now determined that "the Final Rule does not accomplish the goal of providing clarity and transparency." Regarding the need for clarity and transparency, FWS states that "it [is] particularly important that potentially affected entities and other relevant stakeholders have a clear understanding of what information is relevant to the Secretary's evaluation of impacts of critical habitat designations and of how that information fits into the exclusion process." In this reconsidered effort to achieve these objectives, FWS finds that "the previous approach—in which both agencies follow the joint implementing regulations at 50 CFR 424.19 and the [2016] Policy—provides greater clarity for the public and Service staff."

FWS fails to recognize that it already determined that the 2016 Policy failed to provide the necessary clarity and transparency to the regulated community and other stakeholders. As FWS stated in 2020, "[a]lthough the [2016] Policy identified specific factors to consider if a discretionary exclusion analysis is conducted, it stopped short of articulating more generally how we approach the determination to undertake that analysis." Accordingly, following the issuance of the 2016 Policy, and irrespective of the approach that NMFS would adopt, FWS concluded that "adding some elements of the policy to the implementing regulations would be more effective in guiding agency activities and would provide greater transparency and certainty to the public and stakeholders." Given these findings, it is disingenuous for FWS 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.

III. FWS Failed to Provide a Reasoned Explanation for Rescinding Each of the Primary Substantive Provisions of the 2020 Final Rule

In addition to the "overarching rationale" discussed above, FWS also provided its basis for rescinding each of the primary substantive provisions contained in the 2020 Final Rule. These additional bases are addressed below.

A. The "Credible Information" Standard Informs What Must Be Provided by Proponents of a Critical Habitat Exclusion

FWS 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, potentially resulting in inefficiencies and wasting the Service's limited resources." As an example of a lack of clarity, FWS notes that it did not define "meaningful impact" as it would be applied when assessing whether credible information had been provided. Finally, FWS objects that the inclusion of the "credible information" standard creates a commitment to conduct an exclusion analysis even in those circumstances where "it is clear to the Service, in its expert judgment and experience, that the benefits of exclusions are not going to outweigh the benefits of inclusion" thereby causing unnecessary and time-consuming analyses. FWS's concerns are belied by the explanations provided during the promulgation of the 2020 Final Rule.

FWS provided an explanation for how "credible information" would be implemented as part of the procedures informing the critical habitat exclusion process. Notably, in 2020, FWS explained that:

> "The term '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. In evaluating whether a proponent has provided 'credible information' in support of a claim that an area should be excluded, we look at two factors— whether the proponent has provided factual information in support of the claimed impacts and whether the claimed impacts may be meaningful for purposes of an exclusion analysis."

Regarding what constitutes a "meaningful" impact, FWS further explained that "[w]e do not define 'meaningful,' as we intend it to have its plain-language meaning. We included the word to indicate that evidence of de minimis economic impacts of a proposed designation will not trigger an exclusion analysis." Given that FWS had not previously articulated when it would conduct an exclusion analysis, the inclusion of the "credible information" standard adds clarity and transparency to what had been an uncertain and unknown decision point for those in the regulated community.

Furthermore, for purposes of this rulemaking, FWS has already explained that the "credible information" standard will not always require an exclusion analysis. As FWS stated, "with the application of the credible-information threshold, we anticipate that we will not be in a position where every submission by a proponent of an exclusion would meet the standard of having a meaningful impact and thereby trigger an exclusion analysis." Instead, FWS articulated a process by which it would evaluate whether an exclusion proponent has provided the "credible information" necessary to trigger the exclusion analysis. Thus, in response to a public comment raising a similar concern as FWS has stated here, FWS found that "[t]he rule does not waive the Secretary's discretion; instead, the regulation constitutes the Secretary's decision on how to exercise his discretion under the statute on a consistent comprehensive basis instead of a case-by-case basis."

Finally, FWS's concern that the "credible information" standard will lead to unnecessary and time-consuming analyses is unfounded. FWS points to an example where it is already clear to the Service that "the benefits of exclusions are not going to outweigh the benefits of inclusion," and asserts that it should have discretion not to conduct an exclusion analysis in these individual circumstances. In raising this hypothetical, FWS overlooks the fact that, even in these "clear" or obvious scenarios, it is still conducting a perfunctory balancing of the benefits of exclusion versus inclusion for purposes of its critical habitat exclusion analysis.

B. The Criteria for Assigning Weights to Impacts Do Not Constrain FWS's Authority or Responsibility under the ESA

In the Proposed Recission, FWS states that it now finds that "the provision to automatically assign weights based on the non-biological impacts identified by entities outside the agency does not advance the conservation goals of the Act." Specifically, FWS notes that this provision in the 2020 Final Rule "unduly constrain[s] our authority and responsibility as the agency with the expert judgment in implementation of the [ESA]" and that "it could also be at odds with the [ESA's] mandate to base designations on the best scientific data available."

FWS disregards its explanation in the 2020 Final Rule and misstates the scope of its statutory obligations pursuant to ESA Section 4(b)(2).

When promulgating the 2020 Final Rule, FWS thoroughly described the process by which it evaluates information submitted by outside parties and the safeguards that are in place regarding the assignment of weights to that information. As explained in our comments above, contrary to FWS's characterizations in the Proposed Recission, the assignment of weights is not "automatic" or "rigid" nor does it "unduly constrain" or "conflict" with FWS's authority or legal responsibilities under the ESA.

In addition, FWS misstates the legal obligations that apply when it considers whether to exclude an area from critical habitat. FWS asserts that the assignment of weight to non-biological impacts conflicts with the Secretary's "mandate to base designations on the best scientific data available." FWS fails to recognize that ESA Section 4(b)(2) requires that "[t]he Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact." Accordingly, the ESA unequivocally requires that critical habitat designations are based on more than just the best scientific data available. The solicitation of information on non-biological impacts, and the assignment of weight to those impacts for purposes of the exclusion balancing test, are both statutorily contemplated and required.

Finally, FWS states that "[w]ithout the Final Rule, our consideration of impacts, including the weights we assigned to the impacts and identification of the best available data, would still be subject to judicial review under the APA's 'abuse of discretion' standard," which would apply to implementation should FWS revert to the 2016 Policy. This purported justification ignores the impetus for promulgating the 2020 Final Rule. After the Supreme Court issued its Weyerhaeuser decision in 2018, FWS evaluated the process and procedures described in the 2016 Policy. As a result, and in light of the Court's holding that decisions not to exclude are subject to an abuse of discretion standard of review, FWS concluded that "[it] is of the view that the Court's decision underscores the importance of being deliberate and transparent about how the Service goes about making decisions about whether to exclude areas from designations of critical habitat." Given that FWS already determined that promulgation of the 2020 Final Rule was a necessary response to the holding in Weyerhaeuser, FWS has not explained how returning to the 2016 Policy would address its concerns about needing to be more "deliberate and transparent" in its decision-making regarding exclusions from critical habitat.

C. The Critical Habitat Exclusion Process Applies Equally to Federal and Non-Federal Lands

FWS points to the change in treatment of Federal lands as justification for proposing to rescind the 2020 Final Rule. FWS 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. FWS 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, FWS asserts that the 2020 Final Rule "fails to recognize that the Policy does not prohibit exclusions of Federal lands."

FWS fails to appreciate that these issues and concerns were already raised and addressed during the promulgation of the 2020 Final Rule. In the 2016 Policy, the Services state that "Federal lands should be prioritized as sources of support in the recovery of listed species. To the extent possible, we will focus designation of critical habitat on Federal lands in an effort to avoid the real or perceived regulatory burdens on non-Federal lands." While IFB supports the desire to reduce regulatory burdens for proponents of projects on non-Federal lands, as FWS correctly identified in 2020, "there is nothing in the Act that states that Federal lands shall be exempted from the consideration of a discretionary 4(b)(2) analysis simply because land is managed by the Federal government" and that "section 4(b)(2) of the Act does not provide for a different standard for exclusions on Federal lands relative to other lands." FWS's proposed recission does not address or explain these prior findings.

In addition, FWS misstates the 2016 Policy's treatment of Federal lands and when the Services would entertain requests for exclusions of Federal lands from a critical habitat designation. Specifically, in the 2016 Policy, the Services state that they "will focus our exclusions on non-Federal lands." In addition, the Services provided a single, narrow exception whereby they "are most likely to determine that the benefits of excluding Federal lands outweigh the benefits of including those lands when national-security or homeland-security concerns are present." Contrary to FWS's statements in the Proposed Recission, the 2016 Policy does not provide "sufficient discretion" for the Secretary to consider the exclusion of Federal lands because it largely forecloses the ability to consider exclusions of these areas based on economic impacts. Recognizing that non-Federal entities make use of Federal lands, the 2020 Final Rule addressed the disparate treatment of these areas in the 2016 Policy by stating that "[i]n any exclusion analysis for Federal lands, [FWS] will consider not only the transactional costs associated with consultation with a Federal agency, but also any potential costs to affected parties, including applicants for Federal authorizations (e.g., permits, licenses, leases, contracts), that would stem from any project modifications that may be required to avoid destruction or adverse modification of critical habitat."

D. Clarifying When FWS Will Exclude Areas from Critical Habitat is an Appropriate Exercise of Discretion

FWS 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, FWS now indicates that it is preferable to "preserve[] the Secretary's discretion on exclusions regardless of the outcome of the balancing."

In promulgating the 2020 Final Rule, FWS already recognized and addressed these issues and concerns. Notably, in proposing the "shall exclude" provision, FWS stated that "the Secretary would exercise the broad discretion given under section 4(b)(2) by establishing as a principle that FWS will exclude areas whenever it determines that the benefits of exclusion outweigh the benefits of inclusion, as long as exclusion will not result in the extinction of the species." In the 2020 Final Rule, responding to public comments, FWS further explained that:

> "the Secretary is choosing to exercise his discretion in this way to provide for transparency and certainty. Under the statute, the Secretary could have elected to undertake exclusion analyses on a case-by-case basis and exclude areas every time the

> benefits of exclusion outweigh the benefits of inclusion. However, the approach finalized here would provide greater transparency and certainty because it creates an advance understanding of how the Secretary will proceed when the benefits of exclusion outweigh the benefits of inclusion."

Here, FWS has not explained how the stated interests of promoting "greater transparency and certainty" would be addressed by reverting to the 2016 Policy and providing a case-by-case explanation of the basis for any exclusion decision.

Finally, FWS suggests that the "shall exclude" provision "interferes with the statute's conservation goals." This explanation is without merit. As FWS explained in the 2020 Final Rule:

> "Even with the words 'shall exclude' in the regulation, under the statute the Secretary could exclude areas only if the Secretary determines that the benefits of exclusion outweigh the benefits of inclusion after considering the conservation value or benefit of inclusion of the area weighed against the impacts of the designation or benefits of exclusion, and the Secretary determines that exclusion will not lead to extinction of the species."

Thus, the retention of this provision does not conflict with the ESA's conservation goals, but clearly accommodates them in accordance with the requirements of ESA Section 4(b)(2).

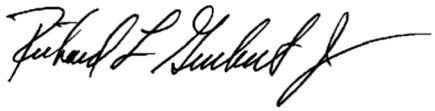
E. The Other Regulatory Provisions of the 2020 Final Rule Should be Retained

Since promulgation of the 2020 Final Rule, FWS 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 FWS's implementation of the ESA. FWS's purported explanation is contrary to the purpose of the 2020 Final Rule, which was to "provide greater transparency and certainty for the public and stakeholders."

While the 2020 Final Rule includes several factors that "are mostly the same" as factors in the 2016 Policy (see portions of 50 CFR § 17.90(d)), FWS included other components that were explained for the first time in the 2020 Final Rule. Notably, FWS identified factors that it will consider when evaluating the statutorily specified "economic impacts" and "other relevant impacts." FWS asserts that they can be removed because they are "neither mandatory nor exhaustive" so will not affect FWS's implementation of the ESA. Given that these terms are not defined in the 2016 Policy or the pre-existing critical habitat exclusion regulations, FWS has not explained how recission of these provisions promotes "greater transparency and certainty."

IFB appreciates the opportunity to provide these comments on FWS's Proposed Recission, and we respectfully request that you take these comments into full consideration when determining whether to rescind the procedures for the critical habitat exclusion process under ESA section 4(b)(2). We reiterate that the rationale for this proposed regulatory action is unsupported and contrary to legal precedent.

Sincerely,



Richard L. Guebert, Jr.
President