



**ASSOCIATION OF
METROPOLITAN
WATER AGENCIES**

LEADERS IN WATER

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September 21, 2018

Mr. Jim Kurth
Acting Director
U.S. Fish and Wildlife Service
1849 C St NW
Washington, DC 20240

Re: Docket No. FWS–HQ–ES–2018–0006, Endangered and Threatened Species: Listing Species and Designating Critical Habitat

Dear Acting Director Kurth,

The Association of Metropolitan Water Agencies (AMWA) welcomes the opportunity to comment on the Fish and Wildlife Service’s (FWS) proposed rule to update the procedures for designating critical habitat under the Endangered Species Act (ESA). AMWA represents the largest metropolitan, publicly owned drinking water systems in the nation and collectively our members serve more than 130 million people.

The proposed revisions to FWS’s processes for designating critical habitat under the ESA are of interest to AMWA because such designations can affect our members’ watershed protection strategies and plans. AMWA supports the ESA as a cornerstone of our country’s environmental protection laws and also supports efforts to introduce clarity and regulatory certainty. The current proposal, while seeking to provide efficiency under the ESA, introduces new terms, processes and ideas that are not fully defined or rationalized. Therefore, in order to meet the proposal’s goal of promoting transparency and certainty, the nature of the proposed revisions must be unambiguous and presented in such a way that avoids introducing more confusion into the critical habitat designation process.

Specifically, three recurring terms identified in §4211(d) that require clear, explicit definitions are “foreseeable future,” “reliable,” and “reasonable.” Given that these terms appear frequently throughout the proposal, and often in relation to each other, they must be given precise definitions when first presented and accordingly must be applied consistently throughout the proposal. AMWA further anticipates that defining these three terms will make it easier to subsequently define other related concepts that appear throughout the proposed rule.

The need for such clarity is demonstrated in the proposed definition of “foreseeable future (83 FR 35195)”: a span of time, which “extends only so far as predictions about the future are reliable.” While this seems reasonable, as AMWA supports the use of the best available data, the

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proposal then goes on to say that “[r]eliable’ does not mean ‘certain’; it means sufficient to provide a reasonable degree of confidence in the prediction. ‘Reliable predictions’ is also used here in a non-technical, ordinary sense and not necessarily in a statistical sense.” This means that, under the proposal, “reliable” has two definitions: “sufficient to provide a reasonable degree of confidence” and also “non-technical, ordinary sense,” i.e. not related to statistics.

To ensure consistency and to avoid confusion, “reliable” must have a single, predictable definition. “Reasonable” (as used to define a “degree of confidence) must be similarly defined due to its use, in turn, in determining whether standards are “reliable.” Given that the proposal frequently references the need for actions and data to be reasonable and consistent, it is imperative that FWS gives clear, unambiguous definitions for these terms.

These definitions are particularly important since the proposal states, “[i]n some circumstances, [population projections] may include reliance on the exercise of professional judgment by experts where appropriate (83 FR 35195).” The nature of the professional judgment described above, as well as the process for when to apply it, must be clear and well-defined.

The proposal further states, “the foreseeable future can extend only as far as the Services can reasonably depend on the available data to formulate a reliable prediction and avoid speculation and preconception.” Again, to ensure consistent application of these terms under the ESA, it is essential to define the criteria used to distinguish between “reliable prediction” and “speculation and preconception.” FWS should also describe the process for determining the circumstances that would require expert judgment in order to ensure consistent application of the ESA.

AMWA believes the ESA should promote an ecosystem-wide approach to conservation in order to better manage watersheds. Such ecosystems can be regional or sub-regional ecosystems to which subject species belong. Furthermore, input from the general scientific community should be solicited and prioritized in order to give ESA decisions the broadest possible acceptance and credibility. However, while FWS states it “will continue to make determinations based solely on biological considerations (83 FR 35194)” it also acknowledges “there may be circumstances where referencing economic, or other impacts may be informative to the public.” Given the importance of basing ESA decisions on scientific evidence, FWS must clarify how economic impacts will be “referenced” but not “considered” in the listing process. This is particularly important given that the notice also references the Act’s requirement that determinations be based “solely” on “biological considerations.”

Clearly identifying which data inform assessments is a recurring obligation, as the proposal later states, “[in some] situations, a designation could create a regulatory burden without providing any conservation value to the species concerned (83 FR 35197).” The processes for both identifying a “regulatory burden” and for evaluating “conservation value” should be further discussed in the rule. The idea of assessing the efficacy of such plans is revisited again, as the proposal later refers to the potential for plans that limit critical habitats to currently occupied areas to “(1) be inadequate to ensure the conservation of the species, or (2) result in less-efficient

conservation for the species.” Just as FWS should outline the process for evaluating and comparing “regulatory burden” and “conservation value,” it should also describe the process for determining how a conservation plan could be found to be “inadequate” or “less-efficient.” Explaining the steps in these processes is important in order to avoid having to revise a critical habitat designation due to potentially flawed processes, which could force utilities to abruptly change watershed protection strategies and plans. Such sudden changes could be both labor-intensive and expensive to utilities and, by extension, their ratepayers.

In summary, FWS should clearly define processes that include a definable degree of rigor and reproducibility, using the best available peer reviewed science, while recognizing that our understanding of what is the best available data will change as more data is collected and analyzed. In addition, the process for using appropriate data to designate critical habitat must be consistently applied.

AMWA thanks FWS for the opportunity to comment and looks forward to working with the service to protect drinking water sources in the future. We believe it is important to continually evaluate current policies in order to increase efficiency, but encourages the FWS to carefully define its criteria, strategies and processes to ensure that any revisions bring the desired regulatory certainty and consistency without confusing or obfuscating the process. If you have any questions about our comments, please contact Erica Brown (brown@amwa.net), AMWA’s Chief Strategy and Sustainability Officer.

Sincerely,



Diane VanDe Hei
Chief Executive Officer