



September 4, 2020

Mr. George Wallace
Assistant Secretary for Fish and Wildlife and Parks
Department of Interior

Mr. Chris Oliver
Assistant Administrator,
National Marine Fisheries Service
National Oceanic and Atmospheric Administration

Via Regulations.gov

Re: Docket No. FWS–HQ–ES–2020–0047, Endangered and Threatened Species: Listing Species and Designating Critical Habitat

Dear Assistant Secretary Wallace and Assistant Administrator Oliver,

The Association of Metropolitan Water Agencies (AMWA) welcomes the opportunity to comment on the Fish and Wildlife Service’s (FWS) and National Oceanic and Atmospheric Administration’s (NOAA) proposed definition of “habitat” under the Endangered Species Act (ESA). AMWA represents the largest metropolitan, publicly-owned drinking water systems in the nation. The definition of “habitat” is of interest to AMWA because it is tied directly to the definition of “critical habitat,” and critical habitat designations can affect our members’ watershed protection strategies and plans, capital projects and other activities that are subject to the ESA. In order to ensure the greatest regulatory certainty for utilities, we seek for the Endangered Species Act to be administered under clear parameters that account for the dynamic and wide-ranging nature of species’ interactions within ecosystems and create consistent, predictable standards for compliance. As stewards of public funds, it is imperative that utilities be able to anticipate how the ESA will be applied in order to minimize financial risks to their plans and projects. Such risks can come in many forms but the cost associated with unexpected plan revisions and delays is certainly among them. Neither of the proposed definitions as written offers sufficient regulatory clarity to allow water utilities to confidently develop plans in areas where they may encounter threatened or endangered species.

In the case of the proposed definitions, interpretations of “depend upon” and “use” could take several forms. Even among drinking water utilities developing comments on this proposal, there

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Mr. George Wallace
Mr. Chris Oliver

Page 2

have been dramatically different interpretations of these terms' definitions. Such ambiguity creates the risk that utilities, after developing project plans or strategies, may be forced to revise their plans based on a different interpretation and application of the existing standard. The use of either definition also leaves the possibility that utilities will have to revise plans if an endangered species establishes itself in a viable but previously uninhabited area it was not deemed to "depend upon" or "use" under one of the proposed definitions.

Project revisions may also be necessary if, following the beginning of a project, "depend upon" or "use" is redefined by statute, in a court ruling, or through regulatory action. As AMWA stated in its 2018 comments (FWS-HQ-ES-2018-0006-41613) on the service's proposed definition of "critical habitat," revisions to the critical habitat designation process must be unambiguous and presented in a way that avoids introducing additional uncertainty into the process. To limit opportunities for conflicting interpretations, AMWA urges the services to explicitly define "depend upon" and "use" from their proposed definitions, as these phrases are open to interpretation and, thus, introduce uncertainty into utilities' risk calculations. An expansive definition of habitat that reflects the complicated nature of ecosystem dynamics may create more restrictions on how utilities can operate within the range of a species but it also provides regulatory certainty by increasing the likelihood of developing a legally and scientifically defensible plan successfully on the first attempt.

While both proposed definitions oversimplify species' dynamic relationships with their environments, the term "depend upon" could be seen as more closely tied to Congress' intent, as section 2(b) "Purposes" of the ESA states, the "purposes of this Act are to provide a means whereby the ecosystems upon which endangered and threatened species *depend* may be conserved." (emphasis added). Our interpretation is that the alternative definition's broader "use" more accurately illustrates the relationship between species and their environments than "depend upon." However, in order to better reflect how species may move through their ranges, the services would need to revise the second sentence in the alternative definition, which currently reads "Habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where the necessary attributes to support the species presently exist." We encourage the services to expand the alternative definition to include areas where species may reside in the future based on recently or currently observed trends, including those resulting from current conservation measures. Such language would also capture temporary changes to ecosystems from disturbances or seasonal phenomena. This revision would better illustrate the relationship between species and their environments and account for areas where species may establish themselves during the life of a long-term plan or project. Adopting a definition that accounts for such changes in an ecosystem would allow utilities to more accurately evaluate the potential implications of the ESA for their plans and initiatives.

AMWA thanks FWS and NOAA for the opportunity to comment and looks forward to working with the services to protect drinking water sources in the future. We continue to urge the services to carefully define its criteria and processes to ensure that any revisions bring regulatory

Mr. George Wallace
Mr. Chris Oliver

Page 3

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

Cc: Gary Frazer, U.S. Fish and Wildlife Service
Samuel D. Rauch, III, National Marine Fisheries Service