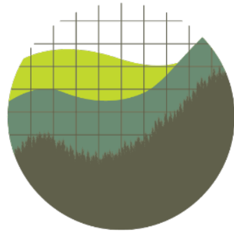

October 8, 2020

George Wallace, Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior

Subject: Comments on Proposed Regulations for Designating Critical Habitat

The Institute for Policy Integrity at New York University School of Law[1] submits these comments on the Fish and Wildlife Service's (FWS's) proposed amendments to its regulations for designating critical habitat.[2] Policy Integrity is a non-partisan think tank dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity's amicus brief in *Weyerhaeuser Co. v. U.S. FWS*, 139 S. Ct. 361 (2018)—which we attach and hereby incorporate into these comments—focused on the reasonableness and necessity of considering indirect benefits and unquantified benefits in weighing the costs and benefits of including or excluding areas as critical habitat.

The proposed rule makes several changes that are inconsistent with the best practices for weighing the costs and benefits of agency action. Consequently, the proposed rule is unreasonable and arbitrary as drafted and, therefore, should not be finalized. In particular, these comments focus on the following proposed changes:

- The proposed rule wrongly casts doubt on the consideration of indirect benefits, and more generally focuses disproportionately on economic costs while paying relatively little attention to, and offering little advice on, the possible benefits of designating critical habitat.
- The proposed rule wrongly defers to regulated entities, lessees, and private landowners on the weighing of costs, ceding FWS's discretion in ways inconsistent with the best practices for vetting economic information. The proposed rule also wrongly constrains FWS's discretion on the ultimate decision whether to exclude areas from designation.
- The proposed rule arbitrarily reverses the agency's prior position on the treatment of federal lands, and in particular highlights potential costs relating to federal leases and permits but fails to consider how substitution may offset such costs.
- The proposed rule makes unreasonable changes with respect to public notice of excluded areas.

I. The Endangered Species Act Requires Full Consideration of Direct and Indirect Benefits

A. The Proposed Rule Wrongly Casts Doubt on Indirect Benefits and Minimizes the Possibility of Economic Benefits

There are several ways in which the proposed rule wrongly casts doubt on indirect benefits or minimizes the potential for a critical habitat designation to result in economic benefits at all.

[1] This document does not purport to present New York University School of Law's views, if any.

[2] 85 Fed. Reg. 55,398 (proposed Sept. 8, 2020).

The proposed regulatory text says that, in weighing the costs and benefits of including or excluding particular areas of critical habitat, FWS will weigh all "economic impacts" and "other relevant impacts" against "the conservation value of that particular area."[3] Similarly, the proposed rule's preamble states that "[w]hen analyzing whether to exclude such an area, the Secretary will weigh such [economic and other relevant] impacts relative to the conservation value of the area."[4] This statement comes in a paragraph discussing potentially negative community impacts of a habitat designation, such as delaying the completion of a school or hospital. This formulation therefore reveals a biased assumption in the proposed rule: namely, that the only benefits of inclusion are the "conservation value of the area," while economic impacts and other relevant impacts, like community impacts, are always counted as the costs of inclusion. This assumption is false: including an area as critical habitat can also carry economic benefits and community benefits distinct from what may typically be classified as the "conservation value of the area." As explained more below in the next subsection, historically FWS has considered a broad array of direct and indirect economic benefits from critical habitat designations.

The proposed regulatory text is even more limiting in delineating the factors that FWS will consider in reviewing areas covered by conservation plans, agreements, or partnerships. Here, seemingly the conservation needs only "of the species" are counted.[5] Again, as explained more below in the next subsection, indirect benefits to non-target species and to the environmental, public health, economic, and community welfare generally should all be counted under the Endangered Species Act.

The proposed rule's preamble states that FWS has "include[d] a non-exhaustive list of categories of potential impacts" in order to "provide greater transparency and clarity to the public and stakeholders."[6] Yet the list in the regulatory text focuses largely on costs and fails to provide the public with transparency and clarity about the benefits that FWS should consider. Indeed, the proposed rule text diminishes the likelihood of economic benefits compared to economic costs, referring to "possible" benefits.[7] The word "possible" wrongly suggests that perhaps economic benefits are less likely to occur than economic costs, or are less certain in a way that makes them less important to consider. The only specific benefits that the proposed rule mentions are "outdoor recreation and ecosystem services."[8]

In fact, FWS has historically considered a much broader array of benefits: not just direct benefits like the use, non-use, bequest, and existence values relating to the target species, but various benefits relating to the habitat designation or the general conservation efforts in the designated areas, including property value benefits for nearby landowners from increased open space or decreased density of development; benefits to co-existing species (including use and non-use values for those species); improvements to ecosystem health, biodiversity gains, and ecosystem service benefits; aesthetic benefits and public willingness to pay to preserve habitats or open spaces; increased recreational opportunities; possible gains to regional employment, output, or income stemming from the above benefits; and informational gains from the designation, including benefits to assist local governments in

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[3] *Id.* at 55,407.

[4] *Id.* at 55,403.

[5] *Id.* at 55,407 ("(3) . . . (iii) Whether the conservation plan . . . meets the conservation needs of the species. . . . (4) . . . (vi) The degree to which the plan or agreement provides for the conservation of the physical or biological features that are essential to the conservation of the species.").

[6] *Id.* at 55,400.

[7] *Id.* at 55,406.

[8] *Id.*

long-range planning. FWS should continue to consider all these direct and indirect benefits, consistent with the requirements of the Endangered Species Act.

B. FWS Has Historically Considered a Broad Array of Direct and Indirect Benefits in Making Critical Habitat Determinations

Section 4(b)(2)'s open-ended use of the word "benefits" indicates that all benefits count, whether direct benefits to a particular endangered species or ancillary benefits to other species, habitats, and interests. The language for Section 4(b)(2) originated in a bill drafted by the House Subcommittee on Fisheries and Wildlife Conservation and the Environment, chaired by Rep. Leggett. During the House's consideration and passage of the legislation, in the middle of discussing the "discretion" now given to the Secretary in weighing the costs and benefits of critical habitat designation, Rep. Leggett recalled that: "The ultimate goal of the Endangered Species Act is the conservation of the ecosystem on which all species, whether endangered or not, depend for survival."[9] In other words, the chair of the drafting committee believed that ancillary benefits to non-endangered species, and to the ecosystems they share with endangered species, were relevant to critical habitat designations.

A related provision introduced in the 1978 amendments required an interagency Endangered Species Committee to exempt certain federal actions from consultations and restrictions if "the benefits of such action clearly outweigh the benefits of alternative courses of action."[10] A Joint Explanatory Statement of the House-Senate Conference Committee on the 1978 amendments explained that the word "benefits" in that related provision "shall include, but not be limited to, ecological and economic considerations," and that the interagency committee "should also consider the national interest . . . the esthetic, ecological, educational, historical, recreational and scientific value of any endangered or threatened species; and any other factors deemed relevant."[11]

In addition to that expansive and open-ended list, the Joint Explanatory Statement of the House-Senate Conference Committee also recommended that the interagency Endangered Species Committee should consult the criteria "in OMB Circular A-107 and in Executive Order 11,949" on the scope of costs and benefits to consider.[12] President Ford issued Executive Order 11,949 to broaden the title and scope of his prior Executive Order 11,821, from "inflation impact statements" to the broader "economic impact statements."[13] OMB's *Circular A-107*, issued in 1975 under Executive Order 11,821, guided agencies on their evaluation of regulatory impacts, and notably it both encouraged agencies to consider "secondary cost and price effects" and also recognized that not all important benefits could be quantified.[14] It is notable that, from the time of the 1978 amendments, Congress intended that the term "benefits" be understood by reference to the federal government's guiding documents on regulatory cost-benefit analysis, which advised agencies to consider indirect effects and unquantified benefits. Of course, those original documents referenced by Congress—*Circular A-107* and Executive Order 11,949—were the

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[9] 124 Cong. Rec. 38,134 (Oct. 14, 1978) (statement of Rep. Leggett), *reprinted in* S. Comm. on Env't & Pub. Works, 97th Cong., *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979 and 1980*, at 825 (1982) [hereinafter "Leg. Hist."].

[10] 16 U.S.C. § 1536(h)(1)(A)(ii).

[11] H.R. Rep. No. 95-1804 (1978), *reprinted in* Leg. Hist., *supra* note 9, at 1211.

[12] *Id.*

[13] 42 Fed. Reg. 1017 (Jan. 5, 1977).

[14] Office of Mgmt. & Budget, Exec. Office of the President, *Circular A-107* § 4(b)(1)–(2) (1975) (advising that "benefits should be quantified to the extent practical" and so implicitly including unquantifiable effects in the "comparison of the benefits"), a*vailable at* https://www.fordlibrarymuseum.gov/library/document/0039/18514794.pdf (see page 34 of the pdf).

precursors to the federal government's current guiding documents on cost-benefit analysis: *Circular A-4* and Executive Orders 12,866 and 13,563.[15]

Given this legislative history, it is not surprising that FWS has a long history, under administrations of both political parties, of assessing ancillary benefits in its critical habitat designations. For example, in 1992 during the George H.W. Bush administration, FWS issued its Determination of Critical Habitat for the Northern Spotted Owl. In that designation, FWS wrote:

> Designation of critical habitat for the spotted owl is expected to provide a wide range of economic benefits to society. These economic benefits are whenever possible defined in monetary terms. They include use values as well as intrinsic or preservation values. Benefits provided by preservation of the owl's habitat include the same types of direct *and indirect use values* of old growth forest ecosystems. Habitat preservation also provides *water quality protection, scenic and air quality, biological diversity, and other environmental services*.[16]

Policy Integrity's attached amicus brief details more such examples through FWS's history. But of particular relevance, in the 2016 joint policy regarding implementation of Section 4(b)(2), FWS, together with NMFS, clearly indicated that "the Services should consider the indirect effects resulting from a designation of critical habitat. In fact, the Services are required to evaluate the direct and indirect costs of the designation of critical habitat under the provisions of Executive Order 12866, and we do so through the economic analyses of the designation of critical habitat."[17] Furthermore, FWS interpreted the statutory reference to "economic impact" as "inclusive of benefits and costs . . . . This interpretation is further supported by Executive Order 12866 as clarified in OMB Circular A-4."[18]

The proposed rule now suddenly, and without adequate explanation, breaks from this long history of considering indirect benefits generally, and economic benefits in particular, in making critical habitat determinations. Because it casts doubt on the consideration of indirect benefits and wrongly minimizes the possibility of economic benefits, the proposed rule is arbitrary and should not be finalized.

II. FWS, Not Third Parties, Should Exercise Its Discretion on Weighing Costs and Benefits

The proposed rule unreasonably constrains FWS's discretion in at least three ways. First, on the FWS's discretion whether to engage in an exclusion analysis, the proposed rule commits FWS to conduct exclusion analyses whenever a proponent of exclusion presents any "factual" information about almost any potential impact at all.[19] Second, when weighing the costs and benefits of exclusion, the proposed rule would require FWS to, by default, defer to any "firsthand" information presented on economic costs by the proponents of exclusion themselves, unless such information can be affirmatively rebutted.[20] And third, when determining whether to exclude areas from designation, the proposed rule

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[15] Executive Order 12,866 remains the guiding order on regulatory cost-benefit analysis under the Trump administration, and recent executive orders have continued to cite elements of Executive Order 13,563 as well. *See* Exec. Order No. 13,777 § 2(a)(ii)-(iii), 82 Fed. Reg. 12,285, 12,285 (Mar. 1, 2017).

[16] 57 Fed. Reg. 1796, 1819 (Jan. 15, 1992) (emphases added).

[17] 81 Fed. Reg. 7226, 7239 (Feb. 11, 2016).

[18] *Id.* at 7240.

[19] *Compare* 85 Fed. Reg. at 55,406 ("The Secretary will conduct an exclusion analysis when . . . .") *with* Endangered Species Act § 4(b)(2) ("The Secretary may exclude . . .").

[20] *Compare* 85 Fed. Reg. at 55,407 ("the Secretary will assign weight to those benefits consistent with the expert of firsthand information, unless the Secretary has knowledge of material evidence that rebuts that information") *with* ESA § 4(b)(2) ("if [*the Secretary] determines* that the benefits . . .") (emphasis added).

commits FWS to make its decision on the basis of the cost-benefit analysis alone,[21] without considering other important factors like distributional effects and option value. In these ways, the proposed rule is inconsistent with the statutory language and arbitrarily breaks from best practices on using cost-benefit analysis to inform agency decisions.

A. Ceding Its Discretion on Initiating an Exclusion Analysis

The proposed rule states that FWS "will conduct an exclusion analysis" whenever a proponent of exclusion has presented "credible information."[22] Though the preamble at first indicates that the "credible information" must be "reasonably reliable" and concern a "meaningful economic or other relevant impact," the subsequent sentence immediately undermines that description of "credible." Instead, the preamble explains that FWS will consider just "two factors" in evaluating such information: (1) whether the information is "factual," and (2) whether the impacts "may be meaningful for purposes of an exclusion analysis."[23] This sets an unreasonably low bar and so effectively cedes to self-interested parties FWS's own statutory discretion on whether to undertake an exclusion analysis. The proposed rule sets no standards for how such information will be vetted for quality, sets no standards for how trivial or significant the claimed impacts may be,[24] and provides no examples of what kinds of information would or would not pass muster.

The Department of the Interior's guidelines on information quality explain that when the agency "relies upon technical, scientific, or economic information submitted or developed by a third party, that information is subject to the appropriate standards of objectivity and utility,"[25] where "objectivity" includes, among other things, standards for lack of bias, completeness, transparency, and sound methodology.[26] It is impossible to square the proposed rule's low bar for merely "factual" information with best practices for requiring objective data that is complete, transparent, sound, and free of bias.

B. Ceding Its Discretion on Weighing Costs and Benefits

The proposed rule divides costs and benefits into two categories: those that are allegedly "outside the scope of the Service's expertise"—specifically "nonbiological impacts," such as any economic impacts "identified by a permittee, lessee, or contractor applicant for a permit, lease, or contract on Federal lands"—versus those impacts within FWS's expertise, such as biological impacts.[27]

For impacts allegedly outside FWS's expertise, the proposed rule "would assign weights to benefits consistent with expert or firsthand information, unless the Secretary has knowledge or material evidence that rebuts that information . . . such as the information in the economic analysis, as informed by public input."[28] This framing gives self-interested parties, such as regulated entities, lessees, and

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[21] *Compare* 85 Fed. Reg. at 55,407 ("then the Secretary shall exclude that area") *with* ESA § 4(b)(2) ("The Secretary may exclude").

[22] 85 Fed. Reg. at 55,400.

[23] *Id.* at 55,401.

[24] Indeed, the proposed rule says that only the "nature of the probable incremental economic impacts, and not necessarily a particular threshold level, should trigger considerations of exclusions." *Id.* at 55,403. This suggests that there is not even a *de minimis* threshold for meaningfulness or significance, and that any claimed economic injury by a proponent of exclusion, no matter how small, will obligate FWS to engage in a full analysis.

[25] Dept. of the Interior, *Information Quality Guidelines Pursuant to Section 515* at 7, *available at* https://www.doi.gov/sites/doi.gov/files/uploads/doi_information_quality_guidelines.pdf.

[26] *Id.* at 8-9.

[27] 85 Fed. Reg. at 55,407.

[28] *Id.* at 55,401.

private landowners, primacy in determining the weight of their own claims about economic costs. FWS's own economic analysis, as well as other input from the public, is relegated to a secondary status and subject to a high bar: it must fully "rebut" the regulated entities' information; otherwise, the regulated entities' information is seemingly presumed to be correct, simply because it is "firsthand."[29]

As described above, it is hard to square this near-absolute deference to information supplied by self-interested parties with the agency's own guidelines on information quality. FWS never explains why information deserves such deference simply because it is deemed "firsthand" or "expert," without any other concern for the objectivity and quality of that information. Moreover, ceding its discretion on the weighing of costs and benefits in this fashion is inconsistent with legislative intent and regulatory precedent. In 2013, FWS concluded that "There is no single approach for evaluating and weighing incremental impacts resulting from a designation of critical habitat against the conservation needs of a species. Thus, the Secretaries must retain discretion in choosing the methods of evaluating these issues in the context of a particular designation."[30] And according to the House Committee Report on the 1978 amendments to the Endangered Species Act that added section 4(b)(2), "[t]he consideration and weight given to any particular impact is completely within the Secretary's discretion."[31] Congress clearly intended for the agency to exercise its own reasonable judgment in weighing costs and benefits, not to cede its judgment to self-interested parties.

The proposed rule would also defer to state and local governments on the weight assigned to certain negative impacts, such as delays to public-works projects or employment losses following a critical habitat designation.[32] However, the proposed rule does not suggest deferring to state and local governments on potential benefits of critical habitat designation, such as local economic benefits relating to recreational opportunities, local property value benefits from the preservation of open spaces, or even local ecosystem service benefits based on local knowledge. The fact that the proposed rule cedes FWS's discretion on claims about economic costs but not on claims about benefits reveals the proposed rule's biases.

A similar inconsistency appears when the proposed rule identifies the Departments of Defense and Homeland Security as the likely experts for national security impacts. No other federal agencies that might have expertise on other costs or benefits are mentioned. In particular, for economic impacts related to permits, leases, or contracts on Federal lands, the proposed rule seems inclined to turn exclusively to the permittees, lessees, and contractors themselves,[33] with no mention of the expertise even of the federal agencies that approved those permits, leases, or contracts. In this way, the proposed rule once again shows an unreasonable amount of deference to information provided by the affected parties themselves simply because it is "firsthand," with no consideration for whether the information supplied is objective, accurate, or transparent, with no explanation of why "firsthand" information deserves particular deference, and with no consideration for any alternative approaches to the weighing of costs and benefits. The proposed rule is therefore arbitrary.

C. Ceding Its Discretion on the Ultimate Decision about Exclusion

Finally, the proposed rule would flip the statutory language on its head when it comes to making the final decision about whether to exclude an area from designation. The statute provides that FWS "may

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[29] *Id.*

[30] 78 Fed. Reg. 53,058, 53,072 (Aug. 28, 2013).

[31] H.R. Rep. No. 95-1625, at 17, *cited by* 78 Fed. Reg. at 53,063.

[32] 85 Fed. Reg. at 55,402.

[33] *Id.* at 55,407.

exclude any area" from designation "*if* . . . the benefits of such exclusion outweigh the benefits of specifying such area."[34] In other words, the cost-benefit comparison is simply the prerequisite that gives FWS the authority to exclude an area from designation, at which point FWS must still decide whether to exercise its discretion. As the existing joint regulations state: "The Secretary has discretion to exclude any particular area from the critical habitat upon a determination that the benefits of such exclusion outweigh the benefits of specifying the particular area as part of the critical habitat."[35] The proposed regulatory text would instead flip the script and require that as soon as FWS finds the benefits of exclusion to outweigh the costs, "then the Secretary *shall* exclude that area, unless . . . [doing so] will result in the extinction of the species."[36]

Dictating a policy choice based solely on benefits outweighing costs, with no further exercise of FWS's discretion, is not only inconsistent with the statute,[37] but is also inconsistent with best practices for agency cost-benefit analysis and decisionmaking. To begin, it is not clear to what extent unquantified effects will factor into this weighing. While the proposed rule does say that "impacts may be qualitatively or quantitatively described,"[38] there is an unfortunate tendency for decisionmakers to give less weight to unquantified effects as compared to quantified effects.[39] Because economic impacts are more likely than environmental impacts to be quantified, the risk here of unquantified effects being given less weight is compounded by the proposal's choice to cede discretion on weighing economic costs to the affected parties themselves. Indeed, one reason why Executive Order 12,866 calls for benefits to "justify" the costs[40]—rather than, as Executive Order 12,291 had, for benefits to "outweigh" costs[41]—is to allow a fuller consideration of unquantified effects.[42] Because the proposed rule does not specify that unquantified effects will be given due consideration, the "outweigh" formulation is unreasonable. While the statute does use the term "outweigh" as well, the statute leaves FWS discretion to consider other factors in deciding whether or not to exclude an area after determining that benefits outweigh costs.[43] Thus, even if the benefits of exclusion seem to justify the costs, before making an exclusion decision, FWS should carefully consider whether different assumptions about unquantified effects would change the calculus.

Furthermore, there are other factors beyond the cost-benefit analysis that, under the statute, FWS should consider before exercising its discretion about excluding areas from critical habitat. In particular, cost-benefit analysis does not traditionally account for the distribution of impacts.[44] Even if the benefits of exclusion were to justify the costs, before making an exclusion decision, FWS should consider the distributional effects and environmental justice implications of its actions.[45]

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[34] ESA § 4(b)(2) (emphasis added).

[35] 50 C.F.R. § 424.19(c).

[36] 85 Fed. Reg. at 55,407 (emphasis added).

[37] ESA § 4(b)(2) ("may").

[38] 85 Fed. Reg. at 55,406.

[39] *See* Richard L. Revesz, *Quantifying Regulatory Benefits*, 102 Cal. L. Rev. 1423, 1434-35, 1442 (2014).

[40] Exec. Order 12,866 § 1(b)(6) (Oct. 4, 1993).

[41] Exec. Order 12,291 § 2(b), 46 Fed. Reg. 13,193 (Feb. 17, 1981).

[42] *See* Caroline Cecot et al., *A Statistical Analysis of the Quality of Impact Assessment in the European Union* at 3-4 n.6 (AEI-Brookings Working Paper 07-09, 2007) (comparing the two Executive Orders).

[43] ESA § 4(b)(2) ("may exclude").

[44] *See* OMB, *Circular A-4* at 2 (2003).

[45] *See, e.g.*, Exec. Order 12,898.

Cost-benefit analysis also necessarily entails a degree of uncertainty, and whether or not the benefits of exclusion justify the costs may depend on various assumptions and choices.[46] FWS should consider uncertainty through various lenses before making an exclusion decision. For example, when uncertainty is due to lack of data, delaying a decision can be beneficial. Indeed, there is "option value" in waiting for more information before making a decision. As OMB's Circular A-4 explains, "as long as taking time will lower uncertainty . . . and some costs are irreversible . . . a benefit can be assigned to the option to delay a decision. That benefit should be considered a cost of taking immediate action versus the alternative of delaying that action pending more information."[47] Because once an area is excluded from designation, any actions taken on that critical habitat may impose irreversible costs on the threatened species, there may be value in waiting to make a decision about whether to exclude areas at a later date. Even if the benefits of exclusion seem to justify he costs, before making an exclusion decision, FWS should consider the option value of waiting to make a decision.

These are just some of the factors that FWS should consider in conjunction with cost-benefit analysis before making a decision on excluding an area from consideration. Because the proposed rule would mandate a decision based purely on whether the benefits "outweigh" the costs, the proposed rule is both arbitrary and inconsistent with the statute.

III. The Benefits and Substitution Effects of Designating Federal Lands

The proposed rule claims it is "reversing the 2016 Policy's prior position that we generally do not exclude Federal land."[48] In fact, the 2016 policy was not to preclude any exclusions of Federal land per se, but rather to recognize that "Federal lands will typically have greater benefits of inclusion compared to the benefits of exclusion."[49] This is because of the typical characteristics of Federal lands, as well as because of the declared congressional policy for federal agencies to promote the conservation of threatened species. In other words, one benefit of designating federal lands is that it allows federal agencies to advance the congressional policy of using their authorities to promote conservation. The new proposed rule fails to rationally address the agency's prior finding from 2016 that the benefits of including Federal lands typically exceed the benefits of exclusion. The proposed rule also fails to rationally explain its change in position, and it fails to address the forgone benefit of complying with the statutory intent that all federal agencies should use their authorities to further the purposes of the Endangered Species Act.

The proposed rule's failure to address the benefits of advancing statutory policy is particularly problematic in light of the proposed rule's decision to count as an economic cost the "administrative or transactional costs associated with the consultation process."[50] In the 2016 policy, FWS explained that it did "not consider avoidance of transaction costs associated with section 7 consultation to be a benefit of exclusion," because "those costs represent the inherent consequence of Congress' decision to require Federal agencies to avoid destruction or adverse modification."[51] In other words, in 2016, FWS thought that the benefits of complying with statutory intent, for all federal agencies to participate in the protection of threatened species, were great enough to offset the administrative costs of consultation.

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[46] *See* OMB, *Circular A-4* at 38-39.

[47] *See id.* at 39.

[48] 85 Fed. Reg. at 55,402.

[49] 81 Fed. Reg. at 7238 ("This policy does not preclude exclusions of Federal lands. . . . However, the Services maintain their policy position that Federal lands will typically have greater benefits of inclusion compared to the benefits of exclusion.").

[50] 85 Fed. Reg. at 55,402.

[51] 81 Fed. Reg. at 7239-40.

The proposed rule fails to explain its change in position, or why it would be rational to count the costs of the consultation process without counting all the benefits of the consultation process.

Similarly, the proposed rule considers only part of the equation when focusing on the "costs to Federal agencies and other affected parties, including applicants for Federal authorizations (e.g., permits, licenses, leases, contracts)."[52] Presumably, the proposed rule intends for this to include, for example, economic losses if lessees on federal lands cannot complete projects as planned, and perhaps any associated losses in federal royalties or taxes. But as the Department of the Interior has frequently argued in recent years in an attempt to claim that federal leasing decisions have no greenhouse gas impacts, interrupting the operation of one project associated with one federal lease may cause a substitute increase in activity in other similar projects.[53] For example, if designation of critical habitat raised the costs of a natural gas drilling project on one federal lease, it is possible that at least some portion of the planned drilling activity—as well as the associated economic, employment, royalty, and tax effects—would move to a substitute site on a different federal lease, or onto state or private lands. Yet the proposed rule does not indicate whether or how it will account for such substitution effects that may at least partly offset any costs to federal agencies, lessees, or other entities.

By failing to look at both sides of the equation—benefits as well as costs; indirect substitute effects as well as direct effects—the proposed rule arbitrarily ignores important aspects of the problem.

IV. Insufficient Public Notice

The proposed rule seeks to "make clear that, at any time during the process of designating critical habitat, the Secretary may still consider additional exclusions, including areas that were not identified in the proposed rule."[54] The proposed rule text says that the areas identified for possible exclusion in a notice of proposed designation of critical habitat is "neither binding nor exhaustive."[55] In other words, FWS claims the authority to announce an excluded area as a *fait accompli*, with no specific public notice or opportunity for the public to comment on the costs and benefits of excluding a specific area. This is plainly inconsistent with required practices for agency decision and rulemakings.

The proposed rule is arbitrary and inconsistent in multiple ways with both statutory requirements and best practices for cost-benefit analysis, and should not be finalized as proposed.

Sincerely,

Jason A. Schwartz, Legal Director
Institute for Policy Integrity

Attached: Policy Integrity's Amicus Brief in *Weyerhaeuser v. FWS*

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[52] 85 Fed. Reg. at 55,402.

[53] *See, e.g.*, Bureau of Land Mgmt., Dept. of Interior, *Buffalo Field Office Final Supplemental EIS and RMPA* at B-6 (2019) ("If mines in the northern or central part of the southern PRB were to close, unused capacity across the three southern mines would be sufficient to absorb the closing mines' market share by increasing production. In this manner, overall production of low-sulfur sub-bituminous coal from the PRB would be unlikely to be affected by future mine closures, although the distribution of production across operating minds could change.").

[54] 85 Fed. Reg. at 55,400.

[55] *Id.* at 55,406.