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September 24, 2018

Public Comments Processing
Attn: FWS-HQ-ES-2018-0006
U.S. Fish and Wildlife Service
MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

RE: Docket No: FWS-HQ-ES-2018-0006. *Endangered and Threatened Species: Listing Species and Designating Critical Habitat*

The National Cotton Council (NCC) appreciates the opportunity to provide comments on this issue. The NCC is the central organization of the United States cotton industry. Its members include producers, ginner, cottonseed processors and merchandizers, merchants, cooperatives, warehousemen and textile manufacturers. A majority of the industry is concentrated in 17 cotton-producing states stretching from California to Virginia. U.S. cotton producers cultivate between 9 and 12 million acres of cotton with production averaging 12 to 18 million 480-lb bales annually. The downstream manufacturers of cotton apparel and home furnishings are located in virtually every state. Farms and businesses directly involved in the production, distribution and processing of cotton employ more than 125,000 workers and produce direct business revenue of more than \$21 billion. Annual cotton production is valued at more than \$5.5 billion at the farm gate, the point at which the producer markets the crop. Accounting for the ripple effect of cotton through the broader economy, direct and indirect employment surpasses 280,000 workers with economic activity of almost \$100 billion. In addition to the cotton fiber, cottonseed products are used for livestock feed and cottonseed oil is used as an ingredient in food products as well as being a premium cooking oil.

The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the “Services”), propose to amend portions of their regulations that implement section 4 of the Endangered Species Act of 1973 (ESA), as amended. The proposed revisions to the regulations clarify, interpret, and implement portions of the Act concerning the procedures and criteria used for listing or removing species from the Lists of Endangered and Threatened Wildlife and Plants and designating critical habitat.

The Services propose to remove the phrase, “without reference to possible economic or other impacts of such determination,” from paragraph (b) to more closely align with the statutory language. Section 4(b)(1)(A) of the Act requires the Secretary of Commerce to make determinations based “solely on the basis of the best scientific and commercial data available after conducting a review of the status of the species.” The word “solely” was added in the 1982 amendments to the Act (Pub. L. 97-304, 96 Stat. 1411) to clarify that the determination of

endangered or threatened status was intended to be made “solely upon biological criteria and to prevent non-biological considerations from affecting such decisions.” In making the clarification, Congress expressed concerns with the requirements of the Regulatory Flexibility Act, Paperwork Reduction Act, and E.O. 12291 potentially introducing economic and other factors into the basis for determinations under the Act (H.R. Rep. No. 97-567 at 19-20, May 17, 1982).

However, Congress did not take into consideration how the ESA, based "solely" on biological (non-economic) data, would interact with other Federal regulations that, by statute, take economics and other considerations into account. The implications of this may be most apparent in the ESA's interactions with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Under these two Acts, the Services must interact with the Environmental Protection Agency (EPA) under a consultation process for the registration of pesticides. The fact that the consultation process has been a clear failure lies in part with the incompatibility of the two laws, both of which, in the end, are designed to protect some part of our environment. While the NCC agrees that removing a reference to economics should be done to align with the statutory language, we believe that it is in the best interest of the public and for transparency purposes that cost-benefit analyses be conducted and published whenever possible. Congress did not prohibit informing the public of economic consequences and there has been support in Congress and the Administration for transparency on regulatory costs and benefits.

The NCC agrees with the proposal to replace the current section 424.11(d)(1) with a new section 424.11(e)(1) that simply states the first reason for delisting a species as, “The species is extinct.” The NCC also agrees with the proposal in the current section 424.11(d)(2), where the Services intend for the proposed language to continue to refer to species that have been "recovered," because species that have been recovered no longer meet the definition of either an endangered species or a threatened species.

The Services are proposing to add a new provision, section 424.11(e)(3), clarifying that listed entities will be delisted if they do not meet the definition of “species” as set forth in the Act. This could occur if new information, or new analysis of existing information, leads the Secretary to determine that a currently listed entity is neither a taxonomic species or subspecies, nor a “distinct population segment.” The NCC agrees with this proposed change.

The Services propose to revise section 424.12(b)(2) by restoring the requirement that the Secretary will first evaluate areas occupied by the species before designating Unoccupied Areas as critical habitat. The Services also propose to clarify when the Secretary may determine unoccupied areas are essential for the conservation of the species. The Act defines unoccupied critical habitat in terms of a determination that such areas are essential for the conservation of the species. The proposed section 424.12(b)(2) specifies how the Services would determine whether unoccupied areas are essential. The proposed language states that the Services would only consider unoccupied areas to be essential in two situations: When a critical habitat designation limited to geographical areas occupied would (1) be inadequate to ensure the conservation of the species, or (2) result in less-efficient conservation for the species. The proposed changes will provide additional predictability to the process of determining when designating unoccupied habitat may be appropriate. The NCC supports this proposal.

In addition, the Services propose to further clarify when the Secretary may determine that an unoccupied area may be essential for the conservation of the species. Under this proposal, for an unoccupied area to be considered essential, the Secretary must determine there is a reasonable likelihood that the area will contribute to the conservation of the species. The NCC supports this proposal.

The NCC urges the Services to recognize the critical need for streamlining and reducing regulatory overreach while still protecting critical species and habitats.

Thank you for your consideration.

Respectfully,

A handwritten signature in black ink that reads "Steve Hensley". The signature is written in a cursive, flowing style with a large initial "S" and "H".

Steve Hensley
National Cotton Council