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U.S. Fish and Wildlife Service
Public Comments Processing
Attn: FWS-R9-ES-2011-0072
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Submitted via Federal eRulemaking Portal: http://www.regulations.gov

Re: NESARC Comments on the FWS/NMFS Proposed Rule on Definition of Destruction or Adverse Modification of Critical Habitat

Dear Sir/Madam,

On May 12, 2014, the U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively, "Services") issued a proposed rule to amend the existing regulations governing section 7 consultation under the Endangered Species Act ("ESA") to revise the definition of "destruction or adverse modification" of critical habitat.[1] Pursuant to the Federal Register notice and subsequent notice of extension of the comment period, the National Endangered Species Act Reform Coalition ("NESARC") respectfully provides its comments and recommendations on the Services' proposed definition of "destruction or adverse modification" of critical habitat.

NESARC is the country's oldest broad-based, national coalition dedicated solely to achieving improvements to the ESA and its implementation. As detailed in the membership list attached to these comments,[2] NESARC includes farmers, cities and counties, rural irrigators, electric utilities, forest product companies, homebuilders, agricultural interests, mining companies, and other businesses and individuals throughout the United States. NESARC and its members are committed to promoting effective and balanced legislative and administrative improvements to the ESA that support the protection of fish, wildlife, and plant populations as well as responsible land, water, and resource management.

[1] 79 Fed. Reg. 27,060 (May 12, 2014).

[2] *See* Appendix A.

I. Overview of Concerns

NESARC has long sought action by the Services to remove the uncertainty regarding the definition of "adverse modification" resulting from court decisions invalidating the existing regulatory definition. In requesting such action, NESARC has stressed that any clarification of the "adverse modification" definition must comport with the statutory directives of the ESA, be capable of effective and efficient administration, and maintain the appropriate role intended for the section 7 consultation process.[3] To that end, NESARC has encouraged the Services to retain the current regulatory definition of "adverse modification" with only those minor modifications and additional justification necessary to address the courts' concerns. Unfortunately, in this proposed rule, the Services fail to meet these basic principles.

II. The Services Should Adopt a More Focused Revision to the Definition of "Adverse Modification" and Forego Broad Changes to the Section 7 Consultation Process

In response to decisions of the Fifth and Ninth Circuits, the Services have proposed to significantly revise the definition and application of the phrase "destruction or adverse modification" in the section 7 consultation process. Instead of adopting the minor revisions suggested by the courts,[4] the Services have opted for more expansive proposed revisions than warranted. If adopted, this approach would add unnecessary complexity to the adverse modification inquiry and diverge from the many decades of practical experience and case law that serve to guide the federal agencies and regulated community in its application.

The Services propose to revise the definition of "adverse modification" as follows:

> *Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the* <u>*conservation*</u> *value of critical habitat for* ~~*both the survival and recovery of a*~~ *listed species. Such alterations* <u>*may*</u> *include, but are not limited to,* <u>*effects that preclude or significantly delay the development of physical or biological features that support the life-history needs of the species for recovery*</u> ~~alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical~~.

[3] It is our understanding that the proposed rule is limited to providing a revised definition of "destruction or adverse modification" and explaining its implementation, and that the Services are not proposing to revise other components of the section 7 analysis, such as when a formal consultation is triggered. Any final rule on this matter should clarify and affirm that the Services' revised definition does not change the procedures and findings necessary to trigger a formal consultation under section 7.

[4] *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) ("Where Congress in its statutory language required 'or,' the agency in its regulatory definition substituted 'and.'").

The Services also have incorporated into the preamble of the proposed rule a series of interpretations and definitions of key terms such as "conservation value" and "appreciably diminish." If adopted, these interpretations and definitions also would significantly change the scope and nature of the adverse modification inquiry in subsequent section 7 consultations.

The extent of changes to the definition of "adverse modification" proposed by the Services is unwarranted. In fact, a much simpler and less expansive change can and should be adopted. NESARC urges the Services to limit the revisions to the definition of "adverse modification" to those necessary to address the concerns raised by the Fifth and Ninth Circuits. Specifically, the Services should replace "both" with "either" and replace "and" with "or." Thus, an appropriate definition would be:

> "*Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the value of critical habitat for either the survival or recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical."

These modest changes would continue to recognize that critical habitat may support both the survival and recovery of a species. Further, this formulation is consistent with the practical approach that the Services have taken in implementing the "adverse modification" standard following the *Gifford Pinchot* decision. Specifically, the Services issued guidance directing agency personnel to rely upon the language of the ESA itself, which requires critical habitat to be designated to achieve the twin goals of survival and conservation of listed species.[5] This approach has been effectively implemented and should be retained through the proposed edits set forth above.

III. Comments on the Services' Proposed Definition

As noted in Section II of these comments, NESARC believes that the Services' proposed rule steps far beyond what is necessary. Instead, NESARC has proposed limited changes to the regulatory definition of "adverse modification" that would maintain the practical approach that has largely been followed by the Services since invalidation of the existing regulatory definition. However, should the Services insist upon adopting a more sweeping set of changes, NESARC provides the following comments and respectfully requests that the Services revisit and reconsider their proposed definition of "adverse modification," along with the incorporated definitions and interpretative guidance, and make the changes and clarifications set forth below.

[5] Memorandum of Acting Director, Marshall Jones to U.S. Fish and Wildlife Service Regional Directors, Regions 1, 2, 3, 4, 5, 6, and 7 "Application of the 'Destruction or Adverse Modification' Standard under Section 7(a)(2) of the Endangered Species Act" (Dec. 9, 2004).

A. Any Interpretation of "Conservation Value" and "Appreciably Diminish" Must be Adopted as a Regulatory Definition

In the definition of "adverse modification," the Services include the phrases "appreciably diminish" and "conservation value" and define their meaning in the preamble text. As explained below, the incorporation of "conservation value" and the revised interpretation of "appreciably diminish" are contrary to Congressional intent and the relevant case law, and *should not be adopted by the Services*. If the Services continue to adhere to the use of these phrases, the Services must re-propose the rule with clearer definitions that are incorporated into the relevant regulations (rather than relying upon interpretations embedded within a regulatory preamble).

It is generally recognized that, while informative, an agency's preamble guidance does not have the binding force of the agency's regulations.[6] The definitions of "appreciably diminish" and "conservation value" should not be treated as mere guidance that can be revised, ignored, or discarded at any time without warning. As proposed by the Services, these definitions would be used to inform and shape the "adverse modification" inquiry and, thus, would effect changes in existing law and policy, as well as impose rights, obligations, and other significant effects on private interests. Accordingly, if retained, they should be treated as legislative or substantive rules under the Administrative Procedures Act and re-proposed subject to full notice and comment procedures. In order to ensure consistent interpretation and application and to provide the requisite procedural protections regarding any future revisions, the Services must clearly and precisely define these phrases in 50 C.F.R. Part 402. Further, any such definition of either phrase must be consistent with the ESA and the animating purpose of the section 7 consultation process as envisioned by Congress in its enactment.[7]

B. The Introduction of "Conservation" as a Modifying Term to the Value of Habitat is Inconsistent with the Purposes of Section 7(a)(2) and Would Improperly Impose a Recovery Burden Under the Guise of a Section 7 Consultation

The Services explain that the intent of introducing the phrase "conservation value" is to ensure that the consultation inquiry considers the "contribution the critical habitat provides, or has the ability to provide, to the recovery of the species."[8] Further, the Services explain that determining "conservation value" will be based not only on the current status of the critical habitat but also, when degraded or subject to ongoing ecological processes, on the "potential" for the habitat to provide further recovery support for conserving the species.[9] The introduction of such a broadly defined term is inconsistent with the ESA, would radically repurpose the adverse

[6] *Howmet Corp. v. E.P.A.*, 614 F.3d 544, 552 (D.C. Cir. 2010).

[7] As described further in these comments, the Services' formulations of "conservation value" and "appreciable diminishment" are not consistent with the ESA and are not appropriately defined for application in the section 7 consultation process.

[8] 79 Fed. Reg. at 27,062.

[9] *Id*.

modification inquiry, and should be removed. Further, a determination that an activity will result in the destruction or adverse modification of critical habitat cannot be made based on the speculative "potential" for particular areas to provide recovery support.[10] For the reasons described in this section, NESARC recommends that the present focus of the adverse modification inquiry be retained—by focusing on impacts to the quality or quantity of critical habitat.

The Services' incorporation of "conservation value" into the adverse modification definition, and particularly their emphasis on potential habitat values, is inconsistent with the purposes of the ESA. In section 7(a)(2), the consultation process focuses on preventing the effects of a federal action from resulting in the destruction or adverse modification of critical habitat.[11] In contrast, section 4(f) focuses on the recovery of species by requiring the development and implementation of recovery plans.[12] Further, section 7(a)(1) imposes an obligation that federal agencies utilize their authorities to implement programs for the conservation of listed species.[13] Given the different scope and purposes of these statutory provisions, the Services cannot conflate section 7(a)(2) with sections 4(f) and 7(a)(1) by infusing the adverse modification inquiry with a recovery obligation.

The Services' incorporation of "conservation value" into the adverse modification definition would impermissibly convert the consultation analysis into the imposition of a recovery standard. Based upon the Services' interpretation of the relevant regulatory terms, it appears that adverse modification could be found if there is any recognizable diminishment in the contribution that critical habitat provides, or could provide, to the recovery of the species. If adopted, this approach would establish such a low threshold that conceivably any alteration of critical habitat would constitute adverse modification to the extent it even remotely affected the recovery of the species. In turn, a finding of "adverse modification" would then result in the imposition of a reasonable and prudent alternative, or require adoption of avoidance and minimization measures that would ensure that the federal agency action would not violate the conservation value/recovery standard embedded within this new definition. Such an outcome would represent a drastic expansion of the section 7 consultation process beyond what was intended by Congress.

In contrast to the Services' expansive interpretation, the courts have taken a functional approach when evaluating the value of critical habitat within the adverse modification inquiry.[14] For example, in explaining the appreciable diminishment of habitat value, the Ninth Circuit stated that:

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[10] *See*, below Section II.C.3.

[11] 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(h).

[12] 16 U.S.C. § 1533(f)(1).

[13] 16 U.S.C. § 1536(a)(1).

[14] *Rock Creek Alliance v. U.S. Fish & Wildlife Serv.*, 663 F.3d 439, 442-43 (9th Cir. 2011) (upholding no adverse modification determination when all critical habitat elements would remain functional, although at a lower functional level, and the most significant impacts would only last five to seven years).

> Adverse effects on individuals of a species or constituent elements or segments of critical habitat generally do not result in jeopardy or adverse modification determinations unless that loss, when added to the environmental baseline, is likely to result in significant adverse effects throughout the species' range, or appreciably diminish the capability of the critical habitat to satisfy essential requirements of the species.[15]

Thus, it is not adverse modification if portions of a species' critical habitat would be degraded. Rather, the measure of adverse modification is whether the action would significantly reduce the functionality of such critical habitat, or render it non-functional, in the context of the species overall range.[16] Likewise, the courts have held that a portion of critical habitat can be destroyed without appreciably diminishing the value of critical habitat for the species' survival or recovery.[17] The Services' new regulatory definition, however, would undermine these well-established precedents.

For the reasons discussed in these comments, NESARC requests that the Services remove the concept of "conservation value" and retain the present focus of the adverse modification inquiry on whether the direct or indirect alteration appreciably diminishes the quality or quantity of the critical habitat in the context of overall (critical) habitat for the listed species. This would ensure that adverse modification continues to involve the actual, present and identifiable impacts to critical habitat that are attributable to the federal action subject to consultation.

C. Any Retained Use of Conservation Value Must Be Accompanied by Clarifications to its Scope and Use in the Adverse Modification Inquiry

If the concept of "conservation value" is not removed from the revised definition of adverse modification, the Services must provide further clarification of the scope of this phrase. In their preamble, the Services explain that the phrase "conservation value" is intended to "capture the role that critical habitat should play for the recovery of listed species."[18] Further, the Services explain that the conservation value "will be based on [the] current understanding of the life-history needs of that particular species, and how the features of the critical habitat provide or have the ability to provide for those life-history needs to continue the survival and promote the recovery of that species."[19]

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[15] *Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 948 (9th Cir. 2010) (citing Consultation Handbook at 4-34).

[16] *Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1057 (9th Cir. 2013) (upholding no adverse modification determination when portion of critical habitat would be degraded but no reduction in functionality); *Rock Creek Alliance*, 663 F.3d at 442-43.

[17] *Butte Envtl. Council*, 620 F.3d at 947-48 (noting that the project would destroy only a very small percentage of each affected species' critical habitat, whether viewed on a unit or nationwide basis).

[18] 79 Fed. Reg. at 27,061.

[19] *Id*. at 27,062.

1. *Use of "Conservation Value" Must Reflect that "Conservation" Refers to Methods and Procedures Promoting Species Recovery, Not an End State of Recovery Itself*

The ESA defines "conservation" to mean "to *use and the use of all methods and procedures* which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."[20] This emphasis on conservation activities (*i.e.*, methods and procedures), and not on the end goal of an action, is not clearly articulated within the Services' present concept of conservation value. Rather, the Services improperly extend the concept of conservation beyond its proper *functional* role into a measure of "meeting recovery." Instead, any continued use of "conservation value" within the adverse modification definition must be consistent with the statutory definition of conservation as a set of methods and procedures that work towards recovery of a species.

The Services should conform the term "conservation value" in the adverse modification definition to the ESA's statutory focus on the "*use of methods and procedures*" which are necessary for species recovery. For example, areas designated as critical habitat will often have specific federal, state, county or local programs in place to protect and enhance specific habitat functions such as improving the quality of foraging habitat. Thus, if retained, an appropriate application of the "conservation value" concept would be to consider and identify those conservation activities (*i.e.*, methods and procedures) that are in place within designated critical habitat, and consider whether the proposed federal agency action appreciably diminishes the implementation or effect of those proactive measures.

2. *The Services Should Not Include a "Foreseeable Future" Component in the Adverse Modification Context, or If They Do, They Must Further Clarify its Use and Scope*

In discussing the concept of "conservation value," the Services state that "conservation value of critical habitat also includes consideration of the likely capability, in the foreseeable future, of the critical habitat to support the species' recovery given the backdrop of past and present actions that may impede formation of the optimal successional stage or otherwise degrade the critical habitat."[21] The integration of a "foreseeable future" component into identifying the relevant conservation value for an adverse modification inquiry is unworkable as presently formulated.

In the ESA, the term "foreseeable future" only appears in the statutory definition of "threatened species," is not defined in the relevant statutory or regulatory provisions, and has been found by courts to be ambiguous.[22] While NMFS has not developed guidance on what

[20] 16 U.S.C. § 1532(3).

[21] 79 Fed. Reg. at 27,062.

[22] *W. Watersheds Project v. Ashe*, 948 F. Supp. 2d 1166, 1177 (D. Idaho 2013).

constitutes the foreseeable future in listing decisions, the Solicitor of the Department of the Interior has issued an M-Opinion which emphasizes that "the foreseeable future extends only so far as the Secretary can explain reliance on data to formulate a reliable prediction."[23] In the consultation regulations, the Services must act based on the best scientific and commercial data available and have adopted a more rigorous approach to the section 7 consultation inquiries beyond mere "predictions," such as requiring that indirect effects be "reasonably certain to occur."[24]

As the Supreme Court has noted, the "ESA [is] not [to] be implemented haphazardly, on the basis of speculation or surmise."[25] This is particularly relevant to the extent the Services introduce the concept of "foreseeable future" into the adverse modification inquiry. Here, the Services offer no explanation for how the concept of foreseeable future will be applied in the adverse modification inquiry or how they will achieve a level of reasonable certainty regarding predictions of the foreseeable future.

Given the inherently speculative nature of the inquiry, and its potential for misapplication, the Services should not incorporate the phrase "foreseeable future" into the adverse modification inquiry. If the concept is retained, any assessment of impacts or support functions of critical habitat within the foreseeable future must be bounded by additional procedures and safeguards to avoid the use of improper assumptions or speculation. In the listing context, the Services have interpreted "foreseeable future" on a case-by-case basis, and the courts have acknowledged that the temporal extent may vary depending upon life history, generation time, and modeling projections of future conditions.[26] There are undoubtedly many factors to consider in determining the appropriate temporal scope of an adverse modification inquiry. Merely defining such temporality as the "foreseeable future" is inadequate, particularly with respect to implementing such inquiry within the context of the requirement for the use of the best available scientific and commercial data[27] and determining effects of the action with

[23] DOI Office of the Solicitor, M-37021, The Meaning of "Foreseeable Future" in Section 3(20) of the Endangered Species Act at 8 (Jan. 16, 2009).

[24] 50 C.F.R. § 402.02 (definitions of indirect effects).

[25] *Bennett v. Spear*, 520 U.S. 154, 176 (1997).

[26] *E.g.*, *In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litig.*, 794 F. Supp. 2d 65, 95 (D.D.C. 2011) ("agency sufficiently explained that its decision was based on "IUCN criteria,[36] the life-history and population dynamics of polar bears, documented changes to date in both multi-year and annual sea ice, and the direction of projected rates of change of sea ice in future decades," which all supported a 45–year or three-generation timeframe for the foreseeable future") *aff'd sub nom. In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.--MDL No. 1993*, 709 F.3d 1 (D.C. Cir. 2013); *Ctr. for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 965 (N.D. Cal. 2010) ("since there was little reliability, NMFS did not err in determining that models after 2050 were too variable to be part of the foreseeable future"); *W. Watersheds Project v. Foss*, CV 04-168-MHW, 2005 WL 2002473 (D. Idaho Aug. 19, 2005) (recognizing that the definition of "foreseeable future" may vary depending on the particular species-for example, "foreseeable future" may be defined differently for a sequoia tree (the National Park Service indicates an age of 3,200 years for a mature tree) than for the slickspot peppergrass, which is an annual or biennial plant).

[27] 50 C.F.R. § 402.02. Several recent court decisions have emphasized the difficulty in developing the requisite scientific data to support impacts to the species purported to occur within the foreseeable future. *E.g.*, *W.*

reasonable certainty. Rather, the Services must ensure that: (i) the temporal scope of the adverse modification inquiry is well defined and supported by the best available scientific and commercial data; and (ii) that assessment of the effects of the action upon designated critical habitat can be identified and assessed with reasonable certainty. In addition, if the Services retain the "foreseeable future" concept, the Services should clarify that, in projecting the capability of critical habitat into the "foreseeable future," such inquiry is identifying those conditions that, based on sound science and data, are "reasonably certain to occur."

3. *The Services Cannot Make Speculative Determinations as to Adverse Modification of a Potential Habitat Characteristic or Value that is Not Yet Present*

The Services suggest that critical habitat may be designated based on the "potential for some of the features not already present or not yet fully functional to be developed, restored, or improved and contribute to the species' recovery."[28] In turn, the adverse modification inquiry would then consider these potential, but not yet present, factors when assessing the effects of the action. However, the Supreme Court has cautioned against the haphazard implementation of the ESA, noting that the Services cannot rely upon "speculation or surmise."[29] Notwithstanding that any physical or biological features "must be found" on occupied land before it is eligible for critical habitat designation,[30] the Services fail to explain how they will determine that a currently non-existent feature could be subsequently present in the action area within the timeframe relevant to the analysis of effects of the action. Further, the Services also fail to explain how any such analysis would differentiate between effects caused by other intervening factors or conditions as compared to effects on such "potential" habitat from the project. On its face, this approach is so dependent upon uncertain conditions and hypothetical assumptions that it fails as impermissible speculation. Accordingly, NESARC requests that the Services remove any references to adverse modification being evaluated based upon features that are not already present or fully established.

Watersheds Project v. Ashe, 948 F. Supp. 2d at 1180-81 (upholding decision not to list pygmy rabbit when FWS could not define the foreseeable future due to a lack of sufficient population data or data linking population trends and potential threats); *Alaska Oil and Gas Ass'n v. Pritzker*, No. 13-cv-00018-RRB, at *30-31 (D. Ak. July 25, 2014) (scientific data regarding forecasting more than 50 years into the future is too speculative and remote to support listing the Beringia DPS of bearded seal).

[28] 79 Fed. Reg. at 27,062.

[29] *Bennett*, 520 U.S. at 176.

[30] *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of the Interior*, 344 F.Supp.2d 108, 122 (D.D.C. 2004) (emphasis added).

D. "Appreciably Diminishes" Requires a Quantifiable Diminishment of Habitat Value

In the preamble to the proposed rule, the Services provide a revised interpretation of how to determine whether the effects of an action "appreciably diminish" the value of critical habitat.[31] The Services explain that "diminish" means to "reduce, lessen, or weaken."[32] The Services then conclude that "appreciably" should mean to "recognize the quality, significance, or magnitude" or "grasp the nature, worth, quality or significance."[33] However, this interpretation of "appreciably" is essentially analogous to the terms "noticeable" or "measureable" which the Services rejected as too simplistic.[34] Moreover, the Services' interpretation would essentially read the word "appreciably" out of the regulatory provision. Obviously, to constitute adverse modification, the word "diminish" taken by itself already requires that the effect be "recognize[able] or grasp[ed]."

The definition of "appreciably" must incorporate a threshold of quantitative significance in order to have independent meaning. Presently, the Consultation Handbook definition states that "appreciably diminish" means "to considerably reduce the capability of designated or proposed critical habitat to satisfy the requirements essential to both the survival and recovery of a listed species."[35] Notwithstanding that courts have invalidated the phrase "survival and recovery," the remaining definition demonstrates that "appreciably" is a quantitative measure of significance, not one of mere recognition. While the Services now assert that "considerable" is ambiguous (noting that it could be interpreted to mean large in amount or extent, worthy of consideration, or measureable),[36] the context in which the term is used clearly requires that the determination of "appreciably diminish" analyze the effect of an action upon critical habitat with respect to its quantitative significance and magnitude.

Notably, the courts have already addressed this issue, and rejected attempts to conflate the term "appreciably" with being perceived or recognized. For example, courts have stated that "[p]laintiffs' interpretation of 'appreciably' to mean any 'perceptible' effect would lead to irrational results, making <u>any</u> agency action that had <u>any</u> effects on a listed species a 'jeopardizing' action."[37] Instead, the courts have upheld the Consultation Handbook's

[31] 79 Fed. Reg. at 27,063.

[32] *Id*.

[33] *Id*.

[34] *Id*.

[35] Consultation Handbook at 4-36.

[36] 79 Fed. Reg. at 27,063.

[37] *Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 606 F. Supp. 2d 1195, 1208 (E.D. Cal. 2008) (emphasis in original); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 875 (E.D. Cal. 2010) (same), *aff'd in part, rev'd in part sub nom. San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014).

interpretation that "appreciably" means significant or considerable biological effects.[38] Consequently, the term "appreciably" must be interpreted to mean more than capable of being merely recognized or grasped. Rather, the Services must continue to interpret and implement the "appreciably diminish" inquiry as requiring an assessment as to both the magnitude and significance of the effect upon designated critical habitat.[39] NESARC requests that the phrase "appreciably diminish" continue to be interpreted and applied as a measure of quantitative significance consistent with the concept of "to considerably reduce" in the Consultation Handbook.

E. Adverse Modification Inquiry Must Remain Consistent with the ESA's Focus on the Protection of Habitat That is "*Essential* to the Conservation of the Species"

As the Services recognize in the proposed rule, in 2001 and 2004, separate federal circuit court decisions held that the "adverse modification" regulation was facially inconsistent with the plain text of section 7 of the ESA.[40] These decisions took issue with the Services' regulatory standard for "adverse modification" which had determined that adverse modification of designated critical habitat occurred when the action affected both the survival and recovery of a listed species. In the courts' view, this regulation "set[] the bar too high" and "read[] the 'recovery' goal . . . out of the inquiry."[41] Moreover, the courts opined that "Congress intended that conservation and survival be two different (though complementary) goals of the ESA."[42]

In crafting a definition of "destruction or adverse modification," the Services cannot disregard how Congress characterized the role of critical habitat under the ESA. For example, in 1978, Congress enacted a definition of critical habitat in the ESA that narrowed the scope of the term from what was defined in existing regulations.[43] In discussing the House's initial iteration of the definition, Rep. Bowen stated:

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[38] *E.g.*, *Forest Guardians v. Veneman*, 392 F.Supp.2d 1082, 1092 (D. Az. 2005) (refusing to apply dictionary definitions of appreciably and instead deferring to the Consultation Handbook's interpretation of appreciably to mean significant or considerable biological effects).

[39] The adverse modification determination looks to the effects upon critical habitat as a whole. While a section 7 consultation is limited to review of the effects of a federal agency action within the action area, the effects of the action still must be placed in the context of the overall status of the species (in the context of a jeopardy determination) and the overall status of critical habitat (for the adverse modification inquiry). This contextual analysis is part and parcel of assessing the magnitude and significance of the effects of the action upon designated critical habitat.

[40] *Sierra Club v. U.S. Fish and Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001); *Gifford Pinchot*, 378 F.3d 1059.

[41] *Gifford Pinchot*, 378 F.3d at 1069.

[42] *Id*. at 1070.

[43] The 1978 amendments were characterized as narrowing the scope of critical habitat as defined in the regulations. H. Rep. 95-1625 at 25 (Sept. 25, 1978) (stating that the phrase "significantly decrease the likelihood of conserving such species" in H.R. 14104 "narrows the scope of the term as it is defined in the existing regulations") (emphasis added); House Agreement to Conf. Rep., Cong. Rec. Oct.14, 1978 (stating that the subsequently enacted definition was "[a]n extremely narrow definition of critical habitat") (emphasis added).

> The present law provides no definition of what critical habitat is, and this law makes some steps in that direction. It points out that the critical habitat for endangered species must include the range the loss of which would significantly decrease the likelihood of preserving such species. So we have given some fairly rigid guidelines. … [T]he Office of Endangered Species has gone too far in just designating territory as far as the eyes can see and the mind can conceive. What we want that office to do is make a very careful analysis of what is actually needed for survival of this species.[44]

Further, in introducing an amended definition of critical habitat, Rep. Duncan explained that the definition "maintains intact the purpose of this bill, which is to prevent the extinction of species who require this critical habitat."[45] Thus, in defining critical habitat, the role of "conservation" was placed in the narrower concept of what is "essential to the conservation" of the species for purposes of designating critical habitat.[46] The legislative history is clear that the primary concern was protecting specific core areas that held critical characteristics (physical or biological features) or otherwise were determined essential or indispensable to the conservation of the species. The Services were not being empowered to undertake broad designations "as far as the eyes can see and the mind can conceive." To the contrary, Congressional intent is clear that critical habitat served a specific purpose and was not to be a catch-all for a broad reservation of habitat from other uses.

Likewise, the Senate also recognized the distinction between what contributes to recovery versus habitat that may be truly essential to a species. In response to a FWS proposal to designate broad areas of currently-unoccupied areas as critical habitat for grizzly bears, the Senate Committee on Environment and Public Works stated:

> [U]nder present regulations the Fish and Wildlife Service is now using the same criteria for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species. The committee feels that the rationale for this policy ought to be reexamined by the Fish and Wildlife Service. There seems to be little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are critical to a species continued survival.[47]

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[44] House Consideration and Passage of H.R. 14104, Cong. Rec. (Oct. 14, 1978), reprinted in "A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979 and 1980," Prepared by the Congressional Research Service for the Committee on Environment and Public Works, U.S. Senate, Committee Print. No. 97-6, p. 817 (February 1982) hereinafter "ESA Leg. Hist."

[45] *Id*. at ESA Leg. Hist. at 880; *see also id*. at ESA Leg. Hist. at 818 ("I think that if we are concerned with critical habitat, that word 'critical' implies essential to its survival.") (statement of Rep. Duncan).

[46] *Id*. at ESA Leg. Hist. at 880 ("I think that in order to be consistent with the purposes of this bill to preserve critical habitat that there ought to be a showing that it is essential to the conservation of the species and not simply one that would appreciably or significantly decrease the likelihood of conserving it.").

[47] S. Rep. No. 95-874, at 9-10 (1978) (emphasis added).

This concern underlies the narrowing purpose of the phrase "*essential* to the conservation of the species." Thus, Congress recognized a distinction between lands that may contribute to population expansion versus lands that are truly critical, *i.e.*, essential, to the methods and procedures in place to achieve recovery.

The Services' revised interpretation of adverse modification eschews a consideration of what is "essential" to the conservation of a species and instead lowers the bar to merely "support" for life history needs of a species. Such an approach ignores the clear statutory purpose and scope of a critical habitat designation. Many habitat features within a specific area may "support" a species' needs, yet those resources may exist in other areas with an equal or higher quantity or value. In those instances, such habitat or features are not essential to the conservation of the species, and an impact upon such features or habitat should not be considered to be an appreciable diminishment of critical habitat within the context of an adverse modification inquiry. Accordingly, the Services must delete references to adverse modification of resources that "support the life-history needs of the species for recovery" and re-focus this inquiry on effects to habitat that has been determined to be essential (*i.e.*, necessary or indispensable) to the conservation efforts for such species.

F. The Potential for Preclusion or Delay of Physical or Biological Features Does Not Constitute Adverse Modification

The Services propose to expand the definition of destruction or adverse modification to include activities that would preclude or significantly delay the development or restoration of the physical or biological features needed to achieve the recovery of the species. However, the Services' proposal is inconsistent with Congressional intent, overbroad, and capable of so many interpretations that it is unduly vague and unenforceable.

1. Inconsistent with Congressional Intent

The Services' proposal to expand the definition of adverse modification to include preclusion or delay of physical or biological features steps beyond the statute and Congressional intent. Particularly, in the 1973 enactment of the ESA, the initial formulation of section 7(a) provided that federal agencies take measures necessary that their actions do not "result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical."[48] In explaining the purpose of this formulation, both the House and Senate Reports state that the focus of this provision was to prevent physical acts of "destruction of critical habitat of [listed] species."[49] In no case, is there any support for a finding that Congressional intent went beyond such direct, physical actions and into the realm of actions that preclude or delay physical or biological features of habitat.

[48] 87 Stat 892 (Dec. 28, 1973).

[49] H. Rep. No. 93-412 at 14 (July 27, 1973); S. Rep. No. 93-307 at 9 (July 1, 1973) (actions "do not . . . result in the destruction of its habitat.").

The adoption of the modern formulation of "destruction or adverse modification" in 1978 likewise provides no support for the Services' attempt to shoehorn preclusion or delay into the the adverse modification inquiry. While, early in legislative consideration, the term "destruction or adverse modification of critical habitat" was proposed within a definition for habitat degradation,[50] that habitat degradation language was later deemed counter-productive.[51] Instead, Congress adopted a more discrete change to the existing language in section 7(a), namely, to insert "adverse" within the concept of destruction or modification of critical habitat.[52] Significantly, there is no indication that Congress intended that the phrase "destruction or adverse modification" be so expansive as to encompass the Services' now-proposed concept of preclusion or delay in the development or restoration of habitat. On the contrary, the plain meaning of the terms "destroy" and "modify" describe an actual change in condition to the habitat features under protection.[53]

Merely precluding or delaying the restoration of degraded habitat does not constitute the change in condition that the plain language of the statute requires and is not consistent with the section 7 consultation framework. For example, the environmental baseline serves as a "snapshot in time" and includes the past and present impacts of all actions and human activities in the action area, along with the impacts of federal projects that have completed consultation and contemporaneous state or private actions.[54] Thus, the baseline would include the status of the critical habitat and account for any ongoing degraded condition. The consultation would then examine whether the incremental effects of the proposed action, when added to the environmental baseline, would result in the destruction or adverse modification of critical habitat.[55] To be consistent with Congressional intent, this examination must focus on the extent to which the direct and indirect effects of the federal action would result in an adverse change in the condition of the critical habitat when compared to its baseline condition. Any attempt to expand such inquiry into an analysis of effects on the timing or nature of potential, future habitat conditions is beyond the Congressional purpose of enacting the adverse modification inquiry.

[50] H. Rep. 95-1625 at 19, 25 (Sept. 25, 1978) (emphasis added).

[51] H.Rep. 95-1804 at 18 (1978).

[52] *Id*. at 3.

[53] "Destroy" is generally defined as "to cause (something) to end or no longer exist : to cause the destruction of (something) : to damage (something) so badly that it cannot be repaired." Modify is generally defined as "to change some parts of (something) while not changing other parts." *See also*, *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247, 1278 (E.D. Cal. 2010) ("'Destroy' and 'modify,' like 'jeopardize,' are verbs describing a change in condition.").

[54] 50 C.F.R. § 402.02.

[55] 50 C.F.R. § 402.14(g).

2. No Reasoned Explanation of Departure from Precedent

It is well established that an agency must provide a reasoned explanation for its departure from prior standards.[56] In the proposed rule, the Services fail to provide the requisite explanation for their change from long-standing practices to now include preclusion or delay in the development of physical or biological features as part of the definition of destruction or adverse modification of critical habitat. Previously, the Services focused on alterations that "adversely modif[ied] any of those physical or biological features that were the basis for determining the habitat to be critical."[57] Namely, the alteration must effect a change in condition to the physical or biological features being protected through the critical habitat designation.

Here, the Services state that "an action that would preclude or significantly delay habitat regeneration or natural successional processes, to an extent that it appreciably diminishes the conservation value of critical habitat, would result in destruction or adverse modification."[58] While the Services attempt to explain how the concept of preclusion or delay would operate within their proposed definition of adverse modification, the explanation and example provided do not address the underlying reasons or justifications supporting this new, revised approach. Furthermore, the reasonableness of any relevant analysis is undermined because the Services fail to provide a consistent explanation of what actions would constitute destruction or adverse modification. For example, the Services state that "in order for an action to be found to adversely modify critical habitat, it must in some way cause the deterioration of the critical habitat's pre-action condition, which includes its ability to provide recovery support to the species based on ongoing ecological processes."[59] The Services are correct that "deterioration" of the pre-action condition of critical habitat may be determined to be adverse modification—because deterioration of a pre-action condition connotes an adverse change in condition of the habitat features under protection. However, this example does not support the idea that preclusion or delay constitute a change in condition, since neither preclusion nor delay would be a change in the pre-action conditions within the critical habitat. In fact, what the Services appear to be attempting to claim as adverse modification is essentially the continuation of a static environment as represented by the baseline conditions.

[56] *See, e.g., Sec'y of Agric. v. United States*, 347 U.S. 645, 653 (1954) (holding that an agency's reasons for its decision are inadequate when it "has not adequately explained its departure from prior norms"); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("an agency changing its course . . . is obligated to supply a reasoned analysis for the change . . . .").

[57] 50 C.F.R. § 402.02; Consultation Handbook at xiii.

[58] 79 Fed. Reg. at 27,061.

[59] 79 Fed. Reg. at 27,063 (emphasis added).

3. *Preclusion or Delay Is Not Capable of Being Established as a Causal Connection*

The section 7 consultation process focuses on the effects of a proposed federal action. Thus, to constitute destruction or adverse modification, there must be a causal relationship between the action and the effects to habitat.[60] In the take liability context, it is well accepted that proximate cause is an element of ESA section 9 claims.[61] As the Supreme Court has explained, "[a] requirement of proximate cause thus serves, *inter alia*, to preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity."[62] Given the nature of the preclusion or delay of physical or biological features, and the multitude of intervening factors that could intercede, the Services have failed to establish how these impacts can be attributed to the effects of proposed federal actions in the section 7 consultation.

A recent Fifth Circuit decision affirms that delays or impacts to potential habitat growth are not proper considerations in the adverse modification inquiry. In *Aransas Project v. Shaw*, the court found that there was no causal connection between the issuance of water withdrawal permits by a Texas state agency and whooping crane deaths due to emaciation.[63] For example, the court noted the numerous contingencies affecting the chain of causation from licensing to crane deaths.[64] Notably, the court recognized the potential effects due to the "unpredictable and uncontrollable" forces of nature (*e.g.*, weather, tides, and temperature conditions). These same causal issues will be inherent in any attempt to link a proposed federal action to any purported delay or preclusion in the development of physical or biological features for purposes of an adverse modification inquiry. For example, in the willow tree hypothetical provided in the proposed rule, the Services fail to elucidate how the action itself will be determined to cause the preclusion or significant delay of appropriate willow age-class development—since there are numerous intervening natural factors (climate change, invasive species, other physical conditions) that would affect and break any chain of causality between a federal agency action and the identified potential for preclusion or delay in habitat growth or establishment.[65] Without the ability to establish a causal link, and support it scientifically, the Services cannot establish that potential delays or preclusion in the development of critical habitat constitute an appreciable diminishment of critical habitat warranting an adverse modification determination.

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[60] *See, e.g., Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008) ("To 'jeopardize'—the action ESA prohibits—means to 'expose to loss or injury' or to 'imperil.' Either of these implies causation, and thus some new risk of harm. . . . Agency action can only "jeopardize" a species' existence if that agency action causes some deterioration in the species' pre-action condition."). This same analytical framework would also apply to adverse modification.

[61] *Babbitt v. Sweet Home Chapter of Comtys*, 515 U.S. 687, 696 n.9 & 700 n.13 (1995).

[62] *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014).

[63] *Aransas Project v. Shaw*, 2014 WL 2932514 at *17 (5th Cir. June 30, 2014)

[64] *Id*. at *16.

[65] 79 Fed. Reg. at 27,063.

4. Otherwise Vague and Unenforceable

By defining adverse modification to include the delay or preclusion of physical or biological features, the Services also are proposing a process that is vague and unenforceable. Recent court decisions and agency actions clearly demonstrate that there are significant uncertainties and speculation associated with attempts to project future changes to habitat, particularly in the context of climate change, and the resulting impacts on species. For example, NMFS listed the Beringia DPS of bearded seal as a threatened species based on projected losses of sea ice through the end of the 21st century.[66] However, in vacating this listing, the court recognized that NMFS "lack[ed] any reliable data as to the actual impact on the bearded seal population as a result of the loss of sea-ice."[67] In addition, FWS recently withdrew a proposed rule to list the wolverine as a threatened species, stating:

> .. . due to the uncertainty of climate models, and the fact that we do not have the fine-scale modeling available to make accurate predictions about the continued availability of den sites, in our best professional judgment, we no longer agree with the conclusion about wolverine habitat loss that formed the basis of the proposed rule. Although climate change effects are expected to result in the loss of some wolverine habitat, we have no data to inform us as to whether or how these projected effects may affect the viability of wolverine populations.[68]

Notably, these decisions occurred in the ESA listing context, which typically involves a more robust and detailed examination of the relevant scientific information regarding the relationship between habitat and species status than what may occur in an individual section 7 consultation. Given the difficulties associated with making reliable predictions about future habitat conditions on a broad scale (*e.g.*, modeling that only projects general sea ice conditions off Alaska), the Services fail to demonstrate how they will be able to do so on a site-specific basis, especially when there are many more discrete factors and influences affecting habitat development or restoration. As a result, the proposal to incorporate the delay or preclusion of physical or biological features as part of adverse modification inquiry results in a vague and unenforceable process that lacks scientific reliability and predictability for those parties participating in the section 7 consultation process.

5. "Preclusion or Delay" Considerations May Not Be the Basis for Bootstrapping Aspirational Recovery Goals into an Adverse Modification Inquiry

Finally, the Services cannot use aspirational goals and targets stated in a recovery plan to assert that preclusion or delay of physical or biological features has occurred. As one court stated, a recovery plan "presents a guideline for future goals, but does not mandate any

[66] 77 Fed. Reg. 76,740, 76,748 (Dec. 28, 2012).

[67] *Alaska Oil and Gas Ass'n*, No. 13-cv-00018-RRB, at *31 (emphasis added).

[68] 79 Fed. Reg. 47,522, 47,544 (Aug. 13, 2014) (emphasis added).

actions."[69] Further, it is well settled that recovery plans do not carry the "force of law."[70] Given that recovery plans are not enforceable, the Services cannot expand their application by infusing recovery criteria, goals or other planning elements into the section 7 consultation process as mandatory targets that then become the basis of an adverse modification determination.

In summary, for all of the reasons noted in this Section III.F., NESARC requests that the Services remove any reference to the "preclusion" or "delay" of habitat growth as a basis for an adverse modification determination.

G. The Services Must Provide Additional Information on What Constitutes "Life-History Needs" and How They Are Determined

As discussed in Section III.E., the Services should not incorporate the vague and generic phrase "supporting life-history needs" as a component of the adverse modification inquiry. Instead, the Services should maintain their focus on those features that are essential to the conservation of the species. However, if the Services continue the use of "life-history needs" as an element of the adverse modification inquiry, the Services must re-propose the rule with a clearer definition that is incorporated into the Code of Federal Regulations. Further, the process for identification of such life-history needs must be clarified as discussed below.

1. Failure to Provide an Adequate Explanation as to the Scope and Context of Life History Needs Evaluations as part of an Adverse Modification Inquiry

The Services propose to define "destruction or adverse modification" in a manner that would include alterations that affect the development of the physical or biological features that support the "life-history needs" of the species. As part of their introduction of the concept of "life history" as an evaluative factor in the adverse modification inquiry, however, the Services only explain that a species' life-history needs "may include, but are not limited to, food, water, light, shelter from predators, competitors, weather and physical space to carry out normal behaviors or provide dispersal or migratory corridors."[71] This general recitation of generic physical or biological components does not provide the requisite clarity regarding the "life-history needs" that will be considered by the Services in subsequent adverse modification inquiries.[72] Given the role proposed for these life-history needs in determining conservation

[69] *Or. Nat. Res. Council v. Turner*, 863 F. Supp. 1277, 1284 (D. Or. 1994).

[70] *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 548 (11th Cir. 1996).

[71] 79 Fed. Reg. at 27,061.

[72] Under the existing regulatory framework, the Services are required to identify the primary constituent elements with specificity. The level of specificity must be capable of providing "(1) a standard for distinguishing those geographic segments of the [species'] historic habitat truly critical to its survival, and (2) a cornerstone for informing federal agencies and others of those attributes of habitat considered immutable." *Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F.Supp.2d 1156, 1185 (D. N.M. 2000). *See also Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F.Supp.2d 1013, 1022 (D. Az. 2008) (the Service may not write an absurdly brief set of PCEs for a species and then rely on an argument that the PCEs are supported by the best available science."), *aff'd* 606 F.3d 1160 (9th Cir. 2010).

value, the Services must provide a specific definition of this term.[73] Generic descriptions of geographic features or environmental conditions, for example, are not sufficient.

2. Recommendations as to Process for Identification of Life History Needs

If a species' "life-history needs" remains an evaluative factor in the adverse modification inquiry, the Services must identify and allow for public comment on any life-history needs of the species that may later inform an adverse modification inquiry. Further, where the Services propose the designation of critical habitat, such identification and examination of such life-history needs must be further incorporated into, and fully explained, in the proposed critical habitat designation. Importantly, the level of detail provided by the Services must be sufficient to demonstrate and explain the relationship between the life-history needs and any adverse modification inquiry.[74] This would provide the public with the requisite information necessary to provide informed comments and additional scientific information for consideration.

Finally, if the Services retain the "life-history needs" concept, the Services should include, as a separate element of any final rule listing a species and any concurrent or later designation of critical habitat, a clear statement as to: (1) those life-history needs that may be incorporated into an adverse modification inquiry; and (2) specific procedures and standards by which such life-history needs may be evaluated in the adverse modification inquiry. Such a step would provide further transparency and consistency in the integration of this element. Moreover, this would help provide the requisite information to assist proponents of federal actions assess the effects that their actions may have on critical habitat and provide increased capability to assess what avoidance, minimization or mitigation measures may be necessary or advisable.

H. Recovery Plans Are Not Enforceable and Recovery Criteria, Goals and Other Elements of Such Plans Should Not be Incorporated into the Adverse Modification Inquiry

In any final rule on the adverse modification definition, the Services must clarify that, as elements of unenforceable planning documents, recovery criteria, goals or programs established in a recovery plan may not be used as a basis for an adverse modification determination. Moreover, the Services must not bootstrap recovery plans, goals or criteria into constituent elements of the adverse modification inquiry (such as any retained application of the term "conservation value" within the adverse modification definition).

[73] For additional comments on the proposed use of "life-history needs," please refer to the comments that NESARC submitted on the Services' proposed modification to the procedures for the designation of critical habitat. These comments are attached as Appendix B.

[74] The need for an adequate explanation as to the basis of the critical habitat designation and identification of specific features to be protected extends also to the need for a detailed explanation as to the purpose and relationship of any concept of "conservation value" that may be retained in the definition of adverse modification. Specifically, the relationship between a species' life-history needs and the conservation value of areas designated as critical habitat must be demonstrated and fully explained in the proposed designation, including the identification and explanation of any conservation or mitigation efforts being conducted that effect critical habitat areas.

The consultation process under section 7 of the ESA was never intended to be the mechanism by which the Services initiate and manage the process of recovery for a species.[75] Rather, the ESA addresses the means for recovery efforts under sections 4(f), 5, 6 and 7(a)(1) of the Act. In contrast, the regulatory provisions of section 7(a)(2) (consultation process), section 9 (take prohibitions), and section 10 (incidental take permits) have separate and more specific purposes. This distinction—between consultations intended to protect against jeopardy to a listed species or destruction/adverse modification of its critical habitat and the separately authorized and directed ESA actions focused on the recovery of listed species—must be retained in any continued implementation of all elements of the adverse modification inquiry.

The courts have recognized that, if Congress intended that recovery plans, or the criteria contained therein, apply to critical habitat designations and consultations, it would have included such requirements in the statute.[76] Further, it is well established that recovery plans only provide guidance for future goals, and do not impose enforceable obligations.[77] Notably, section 4(f) creates no duty even on federal agencies to implement a recovery plan.[78] Given the aspirational nature of recovery plans, the Services cannot use the adverse modification inquiry to convert unenforceable goals into mandatory recovery targets or obligations.

I. NESARC Agrees with the Services that Alteration to Critical Habitat Is Not Per Se Adverse Modification and that the Adverse Modification Inquiry Must Consider the Value of Critical Habitat as a Whole

Any alteration of critical habitat is not *per se* adverse modification. The Services appear to recognize this distinction by noting that adverse modification involves an "alteration" that "appreciably diminishes the conservation value of critical habitat."[79] While NESARC has identified concerns with the Services' characterization and use of "appreciably diminish" and "conservation value," NESARC generally supports the Services' recognition that the focus of the adverse modification is an "alteration" of critical habitat in the first instance and, that such alteration must have an appreciable diminishment on the value of critical habitat. This comports with the Services' early recognition that there are many types of activities or programs that may not constitute an alteration of critical habitat in the first instance.[80] Moreover, not every alteration of habitat necessarily results in a diminution of measured habitat values that rise to the level of an adverse modification.

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[75] As the courts have recognized, recovery planning is a different process and has different requirements than consultation. *E.g.*, *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 998 (D. Ariz. 2011).

[76] *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 990 (9th Cir. 2010).

[77] *Fund for Animals*, 85 F.3d at 547; *Biodiversity Legal Found. v. Norton*, 285 F. Supp. 2d 1, 13-14 (D.D.C. 2004); *Or. Nat. Res. Council*, 863 F. Supp. at 1284.

[78] *Friends of Blackwater v. Salazar*, 691 F.3d 428, 433-34 (D.C. Cir. 2012) ("It does not follow, however, that with each criterion he includes in a recovery plan the Secretary places a further obligation upon the Service.").

[79] 79 Fed. Reg. at 27,062.

[80] 43 Fed. Reg. 870, 875 (Jan. 4, 1978) (stating that "[t]here may be many types of activities or programs which could be carried out in critical habitat without causing such diminution").

In addition, the Services recognize that the proper scope of the adverse modification inquiry considers the entirety of the designated critical habitat. Specifically, the Services state that the focus of the adverse modification is on the "critical habitat as a whole, not just in the area where the action takes place."[81] NESARC agrees. Further, the courts have upheld the use of large-scale analyses that relied upon the relative size of critical habitat when considering the impact of an action on a species.[82]

J. The Services Must Take Additional Steps Prior to Finalizing Any Rule Redefining Adverse Modification

The proposed definition of "destruction or adverse modification" of critical habitat, and the process by which it is assessed, represents a significant revision to the section 7 consultation process. Given its scope and significance, NESARC respectfully requests that, prior to the issuance of any final rule, the Services take the following steps:

1. Undertake an Appropriate Review under the Regulatory Flexibility Act

In the proposed rule, the Services assert that a regulatory flexibility analysis under the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act, is not required because the proposed rule "would not have a significant economic effect on a substantial number of small entities."[83] The Services explain that the proposed rule only directly affects federal agencies, and they are not considered to be small entities. The Services' conclusion is overly narrow and inaccurate. The proposed rule broadly changes the definition of adverse modification of critical habitat which is applied in section 7 consultation on federal actions. In many instances, "small entities" (*i.e.*, small businesses, small organizations, and small county or local governments) are the parties triggering the federal action that necessitates the consultation (*e.g.*, permit requests, federal funding, etc.). Because it is the actions of these small entities that will be potentially subject to costly modification or mitigation measures due to any destruction or adverse modification of critical habitat, these entities have substantial economic interests that will be directly affected by the rulemaking. Accordingly, the Services must fully assess such potential impacts on small entities in compliance with the Regulatory Flexibility Act.

[81] 79 Fed. Reg. at 27,063.

[82] *E.g.*, *Rock Creek Alliance*, 663 F.3d at 442 (FWS "did not err by conducting a large-scale analysis and by relying on the relative size of Rock Creek critical habitat to evaluate the mine's impact on the bull trout"); *Butte Envtl. Council*, 620 F.3d at 948 (recognizing that "project would destroy only a very small percentage of each affected species' critical habitat, whether viewed on a unit or nationwide basis"); *Gifford Pinchot*, 378 F.3d at 1075 (upholding use of "landscape scale" analysis in biological opinion when localized risk was not improperly hidden by use of large scale analysis).

[83] 79 Fed. Reg. at 27,065.

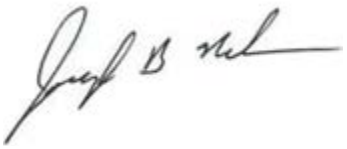
2. Conduct Further Coordination with State, County, and Local Governments

As the Services consider revisions to the proposed rule, they should seek further coordination with state, county, and local governments (including political subdivisions and special districts). Notably, areas designated as critical habitat will often have specific state, county, or local programs in place to protect and enhance specific habitat functions. In addition, because state, county, and local governments are often better situated to develop and maintain measures that will protect and manage the listed species and their habitat, they have unique perspectives that could further inform the Services' efforts to craft a workable definition of adverse modification. We request that the Services better utilize these experiences and perspectives by increasing the amount of coordination with state, county, and local governments.

IV. Conclusion

NESARC greatly appreciates the opportunity to provide these comments to the Services and to initiate a further discussion on ways to improve the definition of "destruction or adverse modification" of critical habitat. We respectfully request that you take these comments into full consideration and adopt the proposed revisions when finalizing the applicable regulatory language.

Sincerely,



Joseph B. Nelson
NESARC Counsel

APPENDIX A

NATIONAL ENDANGERED SPECIES ACT
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National Endangered Species Act Reform Coalition
Membership Roster

American Agri-Women
Washington, D.C.

American Farm Bureau Federation
Washington, D.C.

American Forest and Paper Association
Washington, D.C.

American Petroleum Institute
Washington, D.C.

American Public Power Association
Washington, D.C.

Association of California Water Agencies
Sacramento, California

Basin Electric Power Cooperative
Bismark, North Dakota

Central Electric Cooperative
Mitchell, South Dakota

Central Platte Natural Resources District
Grand Island, Nebraska

Charles Mix Electric Association
Lake Andes, South Dakota

Coalition of Counties for Stable Economic Growth
Glenwood, New Mexico

Codington-Clark Electric Cooperative, Inc.
Watertown, South Dakota

Colorado River Energy Distributors Association
Phoenix, Arizona

Colorado River Water Conservation District
Glenwood Springs, Colorado

Colorado Rural Electric Association
Denver, Colorado

County of Eddy
Carlsbad, New Mexico

County of Sierra
Truth or Consequences, New Mexico

CropLife America
Washington, D.C.

Dixie Escalante Rural Electric Association
Beryl, Utah

Dugan Production Corporation
Farmington, New Mexico

Eastern Municipal Water District
Perris, California

Edison Electric Institute
Washington, D.C.

Frank Raspo & Sons
Vernalis, California.

Empire Electric Association, Inc.
Cortez, Colorado

Garrison Diversion Conservancy District
Carrington, North Dakota

Guadalupe Blanco River Authority
Seguin, Texas

High Plains Power, Inc.
Riverton, Wyoming

Idaho Mining Association
Boise, Idaho

Independent Petroleum Association of America
Washington, D.C.

National Alliance of Forest Owners
Washington, D.C.

National Association of Counties
Washington, D.C.

National Association of Conservation Districts
Washington, D.C.

National Association of Home Builders
Washington, D.C.

National Mining Association
Washington, D.C.

National Rural Electric Cooperative Association
Washington, D.C.

National Water Resources Association
Arlington, Virginia

Nebraska Farm Bureau Federation
Lincoln, Nebraska

Northern Electric Cooperative, Inc.
Bath, South Dakota

Northwest Horticultural Council
Yakima, Washington

Northwest Public Power Association
Vancouver, Washington

Public Lands Council
Washington, D.C.

Renville-Sibley Cooperative Power Association
Danube, Minnesota

San Luis Water District
Los Banos, California

Southwestern Power Resources Association
Tulsa, Oklahoma

Sulphur Springs Valley Electric Cooperative
Willcox, Arizona

Teel Irrigation District
Echo, Oregon

Tri-State Generation & Transmission Association, Inc.
Denver, Colorado

Washington State Potato Commission
Moses Lake, Washington

Washington State Water Resources Association
Yakima, Washington

Wells Rural Electric Company
Wells, Nevada

West Side Irrigation District
Tracy, California

Western Energy Alliance
Denver, Colorado

Wheat Belt Public Power District
Sidney, Nebraska

Whetstone Valley Electric Cooperative, Inc.
Milbank, South Dakota

Wilder Irrigation District
Caldwell, Idaho

Wyrulec Company
Lingle, Wyoming

Y-W Electric Association, Inc.
Akron, Colorado

APPENDIX B

NATIONAL ENDANGERED SPECIES ACT
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October 9, 2014

U.S. Fish and Wildlife Service
Public Comments Processing
Attn: FWS–HQ–ES–2012–0096
Division of Policy and Directives Management
4401 N. Fairfax Drive, Suite 222
Arlington, VA 22203

Submitted via Federal eRulemaking Portal: http://www.regulations.gov

RE: NESARC Comments on the FWS/NMFS Proposed Rule Implementing Changes to the Regulations for Designating Critical Habitat

Dear Sir/Madam,

On May 12, 2014, the U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively, "Services") issued a proposed rule to implement changes to the regulations for designating critical habitat under the Endangered Species Act ("ESA").[1] Pursuant to the Federal Register notice and subsequent notice of extension of the comment period, the National Endangered Species Act Reform Coalition ("NESARC") respectfully provides its comments and recommendations on the Services' proposed rule.

NESARC is the country's oldest broad-based, national coalition dedicated solely to achieving improvements to the ESA and its implementation. As detailed in the membership list[2] attached to these comments, NESARC includes farmers, cities and counties, rural irrigators, electric utilities, forest product companies, homebuilders, agricultural interests, mining companies, and other businesses and individuals throughout the United States. NESARC and its members are committed to promoting effective and balanced legislative and administrative improvements to the ESA that support the protection of fish, wildlife, and plant populations as well as responsible land, water, and resource management.

[1] 79 Fed. Reg. 27,066 (May 12, 2014) ("Proposed Rule").

[2] See Appendix A.

I. Overview of Concerns

In describing the purpose of the Proposed Rule, the Services state that the amendments "…are intended to add clarity for the public, clarify expectations regarding critical habitat and provide for a credible, predictable, and simplified critical habitat designation process."[3] However, these proposed amendments step beyond mere clarifications and simplification of the process. Instead, these amendments attempt a broad re-orientation of the scope and purpose of a critical habitat designation.

NESARC opposes the Proposed Rule, as drafted, and urges the Services to reconsider and revise the critical habitat procedures. Fundamental changes to the Proposed Rule are required to ensure that the Services remain consistent with the critical habitat process envisioned and enacted by Congress. NESARC's comments address a number of key issues and concerns:

- In enacting the statutory definition and process for designation of critical habitat, Congress did not grant the Services unfettered discretion. To the contrary, Congress envisioned a critical habitat program that had a specific purpose and scope—one that did not entail broadly designating critical habitat based on the "potential" for physical and biological features to emerge at some future point in time. The Proposed Rule must be re-shaped, particularly with respect to giving proper meaning to all elements of the critical habitat definition. Notably, to be consistent with the ESA, conservation of the species is a process, not an "end state." Thus, the Services may only designate those specific areas that are essential (i.e., absolutely necessary or indispensable) to the conservation (i.e., use of methods and procedures) being undertaken to achieve recovery of the species.

- Implementing regulations should provide clear procedures and guidelines for the day-to-day administration of the ESA. The Services propose a series of definitions, some within the preamble and others in regulatory text, that not only step outside of the bounds of the statute, but also are so vague as to be ineffective in implementation. NESARC provides specific comments and proposed changes to these proposed regulatory definitions in order to ensure that the definitions are consistent with the ESA and can be practically implemented.

- Regulatory certainty must be maintained—especially in this case where the Services *are not* acting as a result of any amendment to the ESA. The Services undermine this regulatory certainty by proposing to eliminate the use of primary constituent elements or

[3] Proposed Rule at 27,066-67.

> "PCEs" in the designation of critical habitat and removing core requirements such as the limitation on designation of unoccupied areas as critical habitat unless occupied areas have been determined to be inadequate. Moreover, while asserting that the proposed regulatory changes are prospective in nature, the Services have included regulatory text explicitly allowing the re-opening of the 703+ existing critical habitat designations. NESARC urges the Services to retain the core elements of the existing critical habitat program, particularly the use of PCEs and ensuring that unoccupied habitat is only designated as critical habitat when existing occupied habitat is inadequate.

These core concerns are further described in the NESARC comments as set forth below. NESARC respectfully requests the Services full consideration and action upon these comments.

II. Comments

A. Critical Habitat Designations Must Continue to Reflect the Specific Role Envisioned by Congress in its Enactment

As the Services have noted, "an interpretation of a statute should give meaning to each word Congress chose to use."[4] While acknowledging this principle of statutory construction, the Services fail to adhere to this directive in the Proposed Rule. Under Section 3(5) of the ESA, critical habitat is defined to mean:

> (A)…(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.[5]

Through a series of clarifications and re-interpretations, the Services now propose to: (i) eliminate any pretense that the Services must define a "specific area" for designation of critical habitat; (ii) allow habitat that is outside the geographic area occupied by the species to be designated as critical habitat based on the "potential" to support physical and biological features,

[4] *Id.* at 27,070.

[5] 16 U.S.C. § 1532(5) (emphasis added).

even though the statute explicitly holds that such same area would not be eligible to be designated as critical habitat within the geographic area occupied by the species; and (iii) treat "conservation" as the achievement of recovery rather than its actual statutory definition of being "to use or the use of all methods and procedures" in furtherance of recovery. Each of these steps, as well as other changes embedded in the Proposed Rule, expand the scope of critical habitat designations beyond what was authorized and intended by Congress.

Congress neither envisioned nor authorized the type of broad scale designation of critical habitat that the Services now attempt to allow. In fact, the legislative history reflects that the ESA amendments defining the scope of critical habitat were driven by Congressional concerns that the Services were attempting overly broad designation of species habitat. In 1978, the Services adopted a broad definition of critical habitat covering:

> … any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) or any constituent thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion.[6]

Congress disagreed with such a broad definition. For example, in the 1978 House floor debate on ESA amendments, the floor sponsor of the legislation, Representative David R. Bowen (D-Mississippi), answered a question as to whether there is a limitation on the size of an area that can be designated as critical habitat, stating that:

> . . . The present law provides no definition of what critical habitat is, and this law makes some steps in that direction. It points out that the critical habitat for endangered species must include the range the loss of which would significantly decrease the likelihood of preserving such species. So we have given some fairly rigid guidelines.
>
> I am in complete agreement with the gentleman, and I believe the majority of the House is in agreement on that, that the Office of Endangered Species has gone too far in just designating territory as far as the eyes can see and the mind can

[6] 43 Fed. Reg. 870, 874-75 (Jan. 4, 1978).

> conceive. What we want that office to do is make a very careful analysis of what is actually needed for survival of this species."[7]

Further, the Senate committee report on legislation that contained the present definition of "critical habitat" noted that:

> It has come to the committee's attention that under present regulations the Fish and Wildlife Service is now using the same criteria for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species. This committee feels that the rational for this policy ought to be reexamined by the Fish and Wildlife Service. There seems to be little or no reason to give exactly the same status to lands need for population expansion as is given to those lands which are critical to a species continued survival.[8]

Thus, the legislative history is clear that the Services were not being empowered to undertake broad designations so far "as the eyes can see and the mind can conceive." To the contrary, Congress intended the designation of critical habitat to serve a limited and specific purpose and not to be a mechanism for broad reservations or withdrawal of habitat from other uses.

B. The Statutory Mandate to Designate Specific Areas Cannot be Usurped Through a Claim to Complete Discretion to Define the Scale of an Area to be Designated

As part of the Proposed Rule, the Services propose to insert language reserving to the Secretary's sole discretion, the determination of an appropriate scale of a critical habitat designation. Specifically, the Services propose to condition the requirement to identify a "specific area" by stating that the Secretary will determine such area "at a scale determined by the Secretary to be appropriate."[9] In explaining this change, the Services declare that:

> …the Secretary need not determine that each square inch, yard, acre, or even mile independently meets the definition of ''critical habitat.'' Nor would the Secretary necessarily consider legal property lines in making a scientific judgment about

[7] House Consideration and Passage of H.R. 14104, Cong. Rec. (Oct. 14, 1978), reprinted in "A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979 and 1980," Prepared by the Congressional Research Service for the Committee on Environment and Public Works, U.S. Senate, Committee Print. No. 97-6, p. 817 (February 1982) hereinafter "ESA Leg. Hist."

[8] ESA Leg. Hist., pp. 947-48 (S. Rep. 95-874, Endangered Species Act Amendments of 1978, May 15, 1978).

[9] Proposed Rule at 27, 078.

> what areas meet the definition of ''critical habitat.'' Instead, the Secretary has discretion to determine at what scale to do the analysis.[10]

The Services explanation disregards the plain meaning of the statute. The ESA requires the Secretary to designate the "specific area" that meets the definition of critical habitat. In fact, the Services' own regulations recognize that critical habitat is not determinable where "the biological needs of the species are not sufficiently well known to identify any area that meets the definition of critical habitat."[11] For geographic areas occupied by the species, critical habitat may only be designated where the specific area is determined to have physical or biological features essential to the conservation of the species.[12] Likewise, for unoccupied areas, the Secretary must make a specific determination that the specific area is essential to the conservation of the species.[13] Neither formulation allows the Secretary the complete discretion to pick and choose the scale of the designation; rather, the scale still must be at a level of granularity that is sufficient to determine that the specific area possesses the physical or biological features that are essential to the conservation species (or other applicable criteria). For example, it would be improper for the Secretary to designate all waterways within a watershed to be critical habitat when the actual physical and biological features necessary for the species only occur in streams or water bodies with certain stream flow characteristics.

The Service's attempt to claim broad discretion to set the scale of a critical habitat designation also conflicts with the Services' obligation to use the best available scientific information in designating critical habitat. When such information is available at a scale of individual parcel ownership, due process requires that the Services determine critical habitat at that level. The irony of the Services usurpation of the statutory mandate is that, today, through GIS databases and other computing and analytical tools, the Services are better equipped and able to identify specific areas actually meeting the criteria for designation of critical habitat than ever before. Given these tools, it would be wholly contradictory and arbitrary for the Services now to be unwilling to use satellite data, GIS information and other resources at their disposal to differentiate between areas in which the necessary features are and are not present.

In addition, the exclusion process under section 4(b)(2) requires that the Services review habitat designation at a scale of detail that would allow individual parcels to be excluded. This is a particular concern where there are towns, residences, farms and other parcels that support key economic activities as well as specific areas that do not possess the physical and biological

[10] *Id.* at 27,071.

[11] 50 C.F.R. § 424.12(a)(2)(ii).

[12] 16 U.S.C. § 1532(5)(A)(i).

[13] 16 U.S.C. § 1532(5)(A)(ii).

features intended to be protected under a critical habitat designation. A broad scale approach would preclude this exclusionary process from functioning. The Services are required to use the best available scientific and commercial data in determining exclusions from a critical habitat designation. The Services do not have the discretion to fail to use this information when it is available at the scale of individual parcels.[14] Further, the use of individual parcel information, when available, promotes transparency in the actual application of the critical habitat designation since landowners or operators would have certainty as to whether their lands are within a particular critical habitat designation.

Proposed Action: The Services must remain fully compliant with the statutory requirement for the identification of specific areas within any designation of critical habitat. Therefore, the proposed insertion to 50 C.F.R. 424.12(b)(1) and (2) should be removed:

> (b**)** Where designation of critical habitat is prudent and determinable, the Secretary will identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat.
>
> > (1) The Secretary will identify~~, at a scale determined by the Secretary to be appropriate,~~ specific areas within the geographical area occupied by the species for consideration as critical habitat. …
> >
> > AND
> >
> > (2) The Secretary will identify, ~~at a scale determined by the Secretary to be appropriate,~~ specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species.

C. Emphasis Must Remain on Designating Only Habitat That is "Essential" to the Use of Methods and Procedures for Furthering Recovery of the Species

The Services cannot disregard how Congress characterized the role of critical habitat under the ESA and its adoption of the defining phrase "essential to the conservation" of the species. As discussed in Section I.A., the impetus for Congressional action on a definition of

[14] *See, e.g., Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1149-50 (N.D. Cal. 2006) ("in relying on an unsubstantiated assumption that was critical to its exclusion decision, the Service did not rely on the 'best available scientific and commercial data available' as required by the ESA"); C*ity of Las Vegas v. Lujan*, 891 F.2d 927, 933 (D.C. Cir. 1989) (requirement to use best available scientific and commercial data "prohibits the Secretary from disregarding available scientific evidence that is in some way better than the evidence he relies on. Even if the available scientific and commercial data were quite inconclusive, he may-indeed must-still rely on it at that stage.").

"critical habitat" was a concern that the "the Office of Endangered Species has gone too far in just designating territory as far as the eyes can see and the mind can conceive." [15] Acting on this concern, Congress sought to require that the Services undertake "a very careful analysis of what is actually needed for survival of this species" and that the designation of critical habitat occur within the context of "fairly rigid guidelines."[16] Thus, the legislative history is clear that the primary concern was ensuring that protecting specific core or critical areas that held critical characteristics (physical or biological features) or otherwise were determined essential.

A key element used by Congress to limit the Services' authority to designate critical habitat was ensuring that the role of "conservation" was placed in the narrower concept of what is "essential to the conservation" of the species for purposes of designating critical habitat. Specifically, the Senate addressed the distinction between what habitat may considered needed for expansion of a species' population as opposed to habitat that is truly essential to conservation of a species. In response to a USFWS proposal to designate broad areas of currently-unoccupied areas as critical habitat for grizzly bears, the Senate Committee on Environment and Public Works stated:

> "[U]nder present regulations the Fish and Wildlife Service is now using the same criteria for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species. The committee feels that the rationale for this policy ought to be reexamined by the Fish and Wildlife Service. There seems to be little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are critical to a species continued survival."[17]

Congress' concern with the broad designation of "critical habitat" informs the purpose ***and limiting nature of*** the use of "*essential* to the conservation of the species" within the statute.

The ESA defines "conservation" to mean "to *use and the use of all methods and procedures* which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."[18] In adopting this definition, Congress explicitly treated conservation as a function, namely, "to use and the use of" methods and procedures, and not an end state. Thus, while the methods and procedures have a goal of achieving recovery, the use of "conservation" within the statute—including within

[15] ESA Leg. Hist. at 817, House Consideration and Passage of H.R. 14104, Cong. Rec. (Oct. 14, 1978).

[16] *See id.*

[17] S. Rep. No. 95-874, at 9-10 (1978) (emphasis added).

[18] 16 U.S.C. § 1532(3).

the definition of critical habitat—is still referring to the functional efforts to conserve a species. Moreover, meaning must be given to the use of the modifying adjective, "essential" to the conservation of the species. The common definition of "essential" refers to a state of being absolutely necessary or indispensable. Placing both the term "essential" and the statutory definition of "conservation" together, the focus of the complete phrase "essential to the conservation of the species" is upon the identification of those areas which are absolutely necessary or indispensable (i.e., essential) to the use of methods and procedures for the purpose of recovering the species (i.e., "conservation" as defined within the ESA).

The Services proposed definitions and clarifications to their procedural rules fail to properly interpret and comply with the limited focus of the critical habitat, as defined by Congress. Importantly, it is not merely enough to determine that an area is occupied and contains physical and biological features that reflect the species habitat needs or that an unoccupied area has the potential to support such physical and biological features. Rather, such areas still must pass the further screen as to whether they are *essential*, (i.e., absolutely necessary or indispensable) to the conservation of a species.

Proposed Action: The purpose of critical habitat, as defined by Congress, had a narrow and specific purpose protection of areas *essential* to the conservation of the species, not necessarily any area that may contribute to a species' recovery. Accordingly, the Services must adopt further clarifications to its procedures for designation of critical habitat by including, after the general standard for designation of occupied and unoccupied habitat in 50 C.F.R. § 424.12(b) a new subparagraph (3) providing that:

(b) ….

> (3) The Secretary shall designate as critical habitat only those specific areas which have been determined, using the best available scientific and commercial data, to meet all criteria set forth in (b)(1) or (2), as applicable, and also determined to be absolutely necessary or indispensable to the use of methods and procedures being undertaken for the survival and recovery of the species.

D. The Services' Definition of "Geographical Area Occupied By the Species" Must Be Clarified

The Proposed Rule defines the previously undefined term "geographical area occupied by the species" as "the geographical area which may be delineated around the species' occurrences, as determined by the Secretary (i.e., range)."[19] Under the Proposed Rule, "[s]uch areas may

[19] Proposed Rule at 27,068-69.

include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals)."[20] Further, the Services explain that a "species occurrence" is a "particular location in which members of the species are found throughout all or part of their life cycle."[21] The Services conclude by stating that the geographical area occupied by the species is a broader, coarser-scale that encompasses the occurrence of the species and can be considered the "range" of the species. Several clarifications are warranted for the Services' definition and application of the "occupied" area term.

1. The Concept of a Species' Range is Irrelevant to the Critical Habitat Inquiry and Should be Removed

In the recent issuance of a final policy interpreting the phrase "significant portion of its range," the Services explicitly discussed and confirmed that use of "range" within the ESA only occurs within the context of a listing determination.[22] In fact, the Services go so far as to state that "[t]hus, the term "range" is relevant to whether the Act protects a species, but not how that species is protected."[23]

By introducing considerations as to a species "range" into the critical habitat determination process, the Services unnecessarily confuse the listing inquiry (which uses the term "range") and the critical habitat determination (which does not). Rather, the *sole* focus of a critical habitat determination should be the identification of occupied and unoccupied habitat meeting the definition of critical habitat under the ESA.

Proposed Action: In addition to the other changes we recommend below, the Services should clarify its procedural rules and focus all critical habitat determinations solely on the identification of occupied and unoccupied habitat meeting the definition of critical habitat under the ESA. Specifically, the following references to "range" proposed in 50 C.F.R. §§ 424.02 and 424.12(a)(1) should be removed, including at:

> *Geographical area occupied by the species.* An area which may generally be delineated around species' occurrences, as determined by the Secretary ~~(i.e., range)~~. Such areas may include those areas used throughout all or part of the species' life cycle, even if not used

[20] *Id.*

[21] *Id.* at 27,069.

[22] 79 Fed. Reg. 37578, 37583 (Jul. 1, 2014).

[23] *Id*.

> on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically,
>
> …
>
> AND
>
> (ii) Such designation of critical habitat would not be beneficial to the species. In determining whether a designation would be beneficial, the factors the Services may consider include, but are not limited to: The present or threatened destruction, modification or curtailment of a species habitat ~~or range~~ is not a threat to the species, or no areas meet the definition of critical habitat.

2. The Services Must Clarify the Meaning of "Occupied" to Require Sustained or Regular Use of an Area

In their preamble to the Proposed Rule, the Services explain that the term "occupied" includes areas used periodically or temporarily and is not limited to areas where the species may be found continuously.[24] This formulation is capable of misinterpretation and should be further clarified.

The determination that an area is "occupied" should require documentation that there is sustained or regular occupancy of a specific area by the species. This clarification is consistent with the Services' explanation that "[o]ccupancy by the listed species must be based on evidence of regular periodic use by the listed species during some portion of the listed species' life history."[25] Further, a requirement for persistent and regular use of an area is supported by recent decisions such as *Arizona Cattle Growers' Ass'n v. Salazar*.[26] In this decision, the Ninth Circuit held that "[t]he FWS has authority to designate as 'occupied' areas that the owl uses with *sufficient regularity* that it is likely to be present during any reasonable span of time. This interpretation is sensible when considered in light of the many factors that may be relevant to the factual determination of occupancy."[27]

The Services cite *Arizona Cattle Growers' Ass'n* to support their proposal that a species is "temporarily present" on critical habitat is a sufficient basis for deeming the area occupied, even if the species is not continuously present.[28] It states that the term occupied "includes areas

[24] Proposed Rule at 27,069.

[25] *Id.*

[26] 606 F.3d 1160 (9th Cir. 2010).

[27] 606 F.3d at 1165-66 (emphasis added).

[28] Proposed Rule at 27,069.

that are used only periodically or temporarily by a listed species during some portion of its life history, and is not limited to those areas where the listed species may be found more or less continuously." However, by including the word "temporary" and asserting a broad concept of temporary use, the Services have selectively interpreted the case law without regard to context. In fact, there is not a single instance of the use of the word "temporary" in the *Arizona Cattle Growers* decision.

The Services should not conflate temporary use with occupancy. In fact, they are different terms. Occupation of an area requires a level of residency or control over an area, not mere transient or temporary presence. For example, eagle nest counts often use the standard that a "breeding territory is considered to be 'occupied' if a pair of birds is observed in association with the nest and there is evidence of recent nest maintenance (e.g. well-formed cup, fresh lining, structural maintenance)." This approach is consistent with the common usage of the term "occupied." Namely, for an area to be occupied by a species, the Services must look at the extent and nature of the residency or control, rather than mere presence within an area. Further, the Service must focus its designation of critical habitat on those physical locations, within the occupied area, that are regularly used (even if not continuously used) and which possess the habitat features that have been identified as essential to the conservation of the species. This will ensure that critical habitat designations are effectively focused and have a direct relationship to existing species needs.

3. Use of Indirect or Circumstantial Evidence to Support a Determination that an Area is Occupied is Inappropriate

The Services claim that making a determination of occupancy can be done on the basis of indirect or circumstantial evidence.[29] This is inconsistent with the requirement that the determination make use of the best scientific data available. The basis of a determination that a habitat is "occupied" should not be casual observances or isolated incidents. Instead, there must be a sustained or regular use of an area that is documented through physical evidence. Speculation about the species' presence is an insufficient basis on which to find that habitat is occupied.[30]

[29] *Id.*

[30] *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife,* 273 F.3d 1229, 1244 (9th Cir.2001).

4. The Services Should Clarify Use of "Life Cycle" in the Identification of Occupied Areas

The Services' proposed definition of a "geographic area occupied by the species" encompasses those areas used throughout all or a part of a species "life cycle."[31] Further, the Services then use a parenthetical to relate a species life cycle to migratory corridors and seasonal habitats that may be "used by" the species. The Service's use of "life cycle" in this context is confusing and requires further clarification. In biological terms, the term "life cycle" is typically used to describe a series of developmental stages, such as progression from a zygote to final maturity.[32] In other words, a butterfly has life cycles in its development, namely as an egg, larva, chrysalis and adult.

A species' occupancy of an area and its habitat needs from such area may fundamentally change depending upon the species' life cycle stage. Further, an area and its supporting habitat features may be "essential" to conservation of the species in certain life stages, but not others. The Services must acknowledge and address these complexities by further detailing, in regulatory text, how they will identify the species life cycle stages, and habitat features for such life cycle stages, requiring designation of critical habitat.

5. Any Continued Consideration of "Temporary" Presence Should be Limited to Consistently Repeating or Reoccurring Use of a Specific Area

NESARC opposes the designation of critical habitat on the basis that a species is "temporarily present" in an area. However, should the Services continue to employ such an approach, the Service must establish that such temporary presence rises to the level of occupancy. A species' periodic or temporary use of an area must be documented as a reoccurring or repeating use that reflects a level of sustained or regular residence or use of the specific habitat. Further, such reoccurring or repeating periodic use must be documented to occur over multiple generations of the species. This further documentation will allow for the necessary differentiation between temporary presence in an area as opposed to a periodic use that maintains the attributes of sustained or regular use.

Proposed Action: NESARC recommends the following edits to the term "geographical area occupied by the species" at 50 C.F.R. § 424.02 to address these issues:

[31] Proposed Rule at 27,077.

[32] *See, e.g., Consol. Salmonid Cases*, 713 F. Supp. 2d 1116, 1132 (E.D. Cal. 2010) (describing salmonid life stages as "adults spawning in fresh water, to fry emergence from gravel, to downstream migration as smolts rear, and then to the species' salt-water life history"); *United States v. Lykes Bros. S. S. Co., Inc.*, 511 F.2d 218, 220 n. 2 (5th Cir. 1975) (testimony regarding life cycle discussing stages from birth through death).

> "the geographical area which may be delineated around the species' occurrences, as determined by the Secretary, when the best available scientific information includes documentation in support of such occurrences ~~(i.e., range).~~ Such areas ~~may include~~ are those areas ~~used~~ that support a species' biological needs ~~throughout all or part of the species' life cycle, even if not used on a~~ on a sustained or regular basis for a reasonable period of time (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals or on a temporary basis). A specific area may be considered occupied where the species is documented to have periodic use or presence in the area that is of a repeating or reoccurring nature over multiple generations of such species."

E. Further Transparency in the Identification of Physical or Biological Features is Required

The Services propose a definition of "physical or biological features" that encompasses:

> …the features that support the life-history needs of the species, including but not limited to water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.[33]

This new definition establishes a menu of characteristics from which the Services apparently may pick and choose at their discretion. Specifically, the Services posit at least four (if not more) formulations of what may be considered a physical or biological feature—generally, (1) features supporting an undefined concept of "life history needs"; (2) single or complex "habitat characteristics"; (3) features supporting "ephemeral or dynamic habitat conditions" and (4) features expressed in terms of principles of conservation biology." Understandably, defining "physical and biological features" in a manner that can be generally applied to each species is difficult. Further, physical and biological features are likely to be dependent upon the species' specific habitat needs as well as the threats to the species that have resulted in the species being designated as threatened or endangered. However, the term "physical and biological features" has a purposeful use within the Act and cannot be delineated by a broad "menu" of options that can be arbitrarily chosen to fit a particular desired outcome. Rather, there must be a **c**onsistent

[33] Proposed Rule at 27,069.

and transparent process for identifying physical and biological features that ensures the use of the best available scientific information and allows for a sufficient level certainty in the application of the criteria found within the Service's proposed definition.

Proposed Action: NESARC proposes that the Services adopt the following procedures for identifying physical and biological features:

1. In the *Federal Register* notice for a proposed rule for designation of critical habitat [or five year status review, or petition to reopen an existing critical habitat designation], the Service must specifically notify the public that they are planning to identify physical and biological features essential to the conservation of the species within the context of the proposed rule [or status review or petition]. This notice shall include:

    a. A request for information from the public (including state, county and local governmental entities) that might inform the Services' consideration of those physical and biological features that may be the basis of a critical habitat designation; and

    b. A website address and location of a physical document room, through which the public may obtain, review and comment on any and all information that the Service has in its possession regarding the species and its habitat needs that may be used in the identification of potential areas for designation of critical habitat.

2. Before a final determination regarding designation of critical habitat is made, the Service must publish a determination regarding the physical and biological features identified for the species. This determination shall:

    a. Delineate which physical and biological features the Service proposes to base the critical habitat designation upon;

    b. Identify all studies and information considered in critical habitat designation or review;

    c. Explain how the proposed physical and biological features are essential to the conservation of the species; and

    d. Request public comment on the initial determination of physical and biological features.

F. The Services' Definition of "Physical and Biological Features" Lacks Certainty in Definition and Must Remain Consistent With the Statute

In addition to the adoption of transparency measures discussed in Section I.E., further refinement of the overall definition of "physical and biological features" is warranted.

1. The Services' Have Not Defined or Explained What May Constitute a Habitat Characteristic Supporting an Ephemeral and Dynamic Habitat Condition

The Services' definition of physical or biological features states that such "[f]eatures may include habitat characteristics that support ephemeral or dynamic habitat conditions."[34] However, the Services fail to provide further clarity as to how habitat characteristics may "support" ephemeral or dynamic habitat conditions. Further, the scope of what might be considered an ephemeral or dynamic habitat condition also is unbounded. Including such an undefined feature renders the regulatory definition void for vagueness.[35]

The full extent of the Services' discussion on the ephemeral or dynamic habitat condition factor is a single example of riparian vegetation that occurs within limited years after flooding events, i.e., successional stage vegetation.[36] Further, the Services state that "[t]he necessary features, then, may include not only the suitable vegetation itself, but also the flooding events, topography, soil type, and flow regime, or a combination of these characteristics and the necessary amount of the characteristics that can result in the periodic occurrence of the suitable vegetation."[37] However, under the Services' logic, the regular occurrence of tornadoes and hurricanes, like a flooding event, could most certainly affect habitat characteristics—which in turn might create ephemeral or dynamic habitat conditions. In fact, under the logic of the Service's example, rainfall, itself is a "physical or biological feature" since its periodic occurrence will result in the growth of vegetation. NESARC, reasonably, assumes that the Services do not intend to make such a broad leap of logic to the point of designating critical habitat based on the occurrence of meteorological conditions. However, without a more precise definition of what is covered by its "ephemeral or dynamic habitat conditions" factor, that uncertainty of application exists.

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[34] *Id.* at 27,077.

[35] *See, e.g.*, *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); *see also* Brennan v. Occupational Safety & Health Review Comm'n, 505 F.2d 869, 872 (10th Cir. 1974) (formulation of rule).

[36] Proposed Rule at 27,069-70.

[37] *Id*.

NESARC recommends deleting reference to ephemeral and dynamic habitat conditions in the critical habitat designation context. If the ephemeral or dynamic habitat conditions concept is retained, the Services must define the scope of both "ephemeral" and "dynamic" as used in this feature. Both terms are often loosely defined and, without clear parameters for their use in this context, could be susceptible to conflicting application that do not allow for a consistent application of the dynamic/ephemeral condition factor for purposes of critical habitat designations.[38]

2. The Services Must Focus on Specific Habitat Conditions Serving an Essential Biological Need for the Species Rather Than an Overbroad Characterization of Life History Needs

Under the Services' definition of "physical and biological features" a key inquiry will be whether the feature supports "the life-history needs of the species."[39] However, the Services provide no further definition or explanation of what the term "life history needs" entails. In fact, there is no discussion within the Proposed Rule regarding whether there is a scientific consensus on how to define and identify life history needs, or whether and how life history needs for a species can be confirmed.

Rather than integrating this undefined term into the definition of physical and biological features, the Services' identification of physical and biological features should build from the administrative record developed in the status review of the species in the listing process and focus on: (i) identifying those habitat conditions that serve a species' essential biological needs; (ii) assessing the quantity or quality of such habitat conditions; and (iii) determining the relevance of such habitat conditions to ongoing or planned efforts to conserve the species. From that collective data point, the Service can then consider those factors (i.e., essential biological needs, quantity and quality of habitat and relevance to conservation efforts for the species) in the identification of specific areas that possess the necessary physical and biological features essential to the conservation of the species that warrant designation as critical habitat within the meaning and purpose of the ESA.

[38] While the Services have not directly suggested any linkage, their reference to ephemeral and dynamic conditions raises a concern that the Services could later assert that the treatment of ephemeral or dynamic hydrologic features in the controversial "waters of the United States" rulemaking (or any final rule on such definition) can become the basis of a critical habitat designation. NESARC would oppose any such assertion. Not only is the treatment of ephemeral and dynamic hydrologic conditions in that rulemaking in legal and scientific dispute, but also the inquiry and purpose of the use of such factors are specific to the Clean Water Act and are not directly translatable to the ESA critical habitat designation process.

[39] *Id.* at 27,077.

3. The Unilateral Adoption of the "Principles of Conservation Biology" Violates the Mandate for the Use of the Best Scientific Data Available

As part of the Proposed Rule, the Services announce that they "will expressly translate the application of the relevant principles of conservation biology into the articulation of the features" for the determination of areas occupied by a listed species and warranting designation as critical habitat.[40] The Services' unilateral adoption of the principles of conservation biology violates the ESA requirement for use of the best scientific data available. There is no basis or rationale provided by the Services to justify placing the principles of conservation biology on a higher plane than other schools of scientific theory. Moreover, these principles are neither conducive to, nor appropriate for "endorsement" for, use in the determination of what constitutes physical or biological features for designation of critical habitat.

The Services must use the best scientific data available in the designation of critical habitat. ***Any and all*** principles applied to the determination of a species' critical habitat must meet that standard, as applied in the context of the species under consideration—including any use of conservation biology principles within a specific critical habitat designation. Accordingly, the Services should strike any unilateral adoption of conservation biology principles from the critical habitat determination process.

Proposed Action: Consistent with the comments in this Section I.F., the Services should modify the definition of "physical and biological features" as follows:

> *Physical or biological features*. The features that support the ~~life-history~~ <u>essential biological</u> needs of the species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. ~~Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity~~.

G. The Services Should Retain the Use of "Primary and Constituent Elements" in the Designation of Critical Habitat

The Proposed Rule would remove "primary and constituent element" or "PCEs" from the process for determining critical habitat and replace it with reference to "physical and biological

[40] *Id.* at 27,072.

features." In general, the concept of physical and biological features is used within the ESA and therefore is appropriate for use, if properly defined. NESARC has already noted its concerns and the required clarifications to the definition of physical and biological features proposed by the Services. In addition, however, NESARC urges the Services to retain the use of PCEs in the designation of critical habitat. A critical reason for doing so is that, with the retention of the PCE factors, the Services would avoid potentially undermining most of the 703+ critical habitat designations that already have been established—and certainly all critical habitat designations that used PCEs to define the applicable boundaries and protected features for a specific critical habitat designation.

Prospectively, elimination of PCE identification could frustrate the effective implementation of an adverse modification inquiry under section 7. Whether an action is likely to result in adverse modification of designated critical habitat necessarily depends on whether specific habitat conditions, i.e., PCEs, are adversely affected as well as the extent and nature of such adverse effects. Under the Services' definition, physical and biological features can encompass a broad scope of habitat characteristics and features that support a species' life history needs. As such, the identification of physical and biological features serve a higher level role in expressing the habitat needs of a species. However, such general "habitat characteristics" may actually be served or met by a number of different habitat types or elements—and this is where PCEs must remain as a key role in the critical habitat designation and implementation process. Application of the physical and biological features necessary for the species to the adverse modification inquiry is likely be too general in scope and not always specific to the action area under review. Continuing the identification of PCEs will provide that additional layer of granularity that is needed within an adverse modification analysis.

Retaining PCE considerations also will assist the Services in documenting the need for habitat protections and ensuring that the critical habitat designation actually serves its intended purpose of addressing areas essential to the species and upon which conservations can or will take place to assist the species in recovery. In developing the PCE approach, the Services were implementing the statutory definition of critical habitat, including the consideration of physical and biological features. Thus, identification and consideration of PCEs in the designation of critical habitat can take the broader prism of physical and biological features and apply that requirement to the more granular question of how such physical and biological features relate to specific habitat conditions that are essential to the species needs and to efforts to recover such species.

For all of these reasons, NESARC urges the Services to retain the identification and consideration of PCEs in the designation of critical habitat.

H. The Requirement to Find That a Specific Area Requires Special Management Must be Retained and Given its Original Meaning Under the Statute

In the preamble to the Proposed Rule, the Services assert that:

> We expect that, *in most circumstances,* the physical or biological features essential to the conservation of endangered species may require special management in all areas in which they occur, particularly for species that have significant habitat based threats. However, if in some areas the essential features do not require special management or protections because there are no applicable threats to the features that have to be managed or protected for the conservation of the species, then that area does not meet this part (section 3(5)(A)(i)) of the definition of ''critical habitat.'' *Nevertheless, we expect such circumstances to be rare.*

The determination that a specific area may require special management is a statutory determination that must be made on a species-specific basis. The Services' pronouncement within this preamble amounts to pre-determinational bias and should be explicitly retracted. The determination that special management considerations or protections may be required for an area must be a factual determination supported by an administrative record and must take into consideration the existence of state, county, local and voluntary management and protection measures. Any assumption that special management considerations are necessary in "most circumstances" would send an inappropriate signal that would bias what must be an independent and species-specific determination.

I. The Proposed Rule Improperly Expands the Basis for Designating Occupied and Unoccupied Areas as Critical Habitat

In the Proposed Rule, the Services propose several changes that would improperly expand the basis for designation of critical habitat. First, the Services remove from their regulations a requirement that the designation of unoccupied habitat only occur where the Service determines that "a designation limited to its present range would be inadequate to ensure the conservation of the species."[41] The Services remove this limitation entirely from the critical habitat determination process and claim the ability to designate unoccupied habitat without respect to the adequacy of presently occupied areas. Second, within the preamble to the

[41] 50 CFR § 424.12(e).

Proposed Rule, the Services assert that they may designate unoccupied areas, regardless of the present quality or habitat characteristics within the specific area, such that:

> … the Services may identify areas that do not yet have the features, or degraded or successional areas that once had the features, or areas that contain sources of or provide the processes that maintain the features as areas essential to the conservation of the species. Areas may develop features over time, or, with special management, features may be restored to an area. Under proposed section 424.12(b)(2), the Services would identify unoccupied areas, either with the features or not, that are essential for the conservation of a species. [42]

In other words, as long as the Services can conceive the potential of an area to develop features essential to the conservation of the species, the Services may designate the area as critical habitat. Such a broad declaration of authority to designate areas as critical habitat harkens back to the unequivocal criticism made in the House debate on legislation ultimately resulting in enactment of a *limiting* definition of critical habitat, namely: "*I am in complete agreement with the gentleman, and I believe the majority of the House is in agreement on that, that that the Office of Endangered Species has gone too far in just designating territory as far as the eyes can see and the mind can conceive*."[43] Yet the Service's claim of authority for designating unoccupied habitat on the basis of the potential to develop of habitat features is essentially a return to such criticized practices.

1. The Regulatory Requirement that Occupied Areas First be Determined to be Inadequate Prior to Designation of Unoccupied Areas Must be Retained

Under present regulations, the Services designate unoccupied habitat only where there has been a determination that a designation limited to its present range would be inadequate to ensure the conservation of the species."[44] The Services now propose to eliminate this precondition entirely. It is well established that an agency's decision to depart from prior policy requires a reasoned explanation and analysis of the change.[45] The Services fail to provide an adequate explanation as to why they have chosen to change the scope of a regulation that has been in place for 30 years as consistent with the statute.

[42] Proposed Rule at 27,073.

[43] ESA Leg. Hist. at p. 817, House Consideration and Passage of H.R. 14104, Cong. Rec. (Oct. 14, 1978).

[44] 50 CFR § 424.12(e).

[45] *See, e.g., Sec'y of Agric. v. United States*, 347 U.S. 645, 653 (1954) (holding that an agency's reasons for its decision are inadequate when it "has not adequately explained its departure from prior norms"); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("an agency changing its course . . . is obligated to supply a reasoned analysis for the Change . . . .").

The "explanation" provided by the Service is that the precondition is "unnecessary and unintentionally limiting." Yet, no example or explanation is provided as to how this precondition limits the Services in making an appropriate designation of critical habitat or how it is otherwise "unnecessary" to the process for determining critical habitat. Moreover, the Services further claim of support is merely that they have found nothing in the legislative history to show that Congress intended the Services to exhaust occupied habitat before considering whether any unoccupied area may be essential. What the Services have proffered are excuses, not an explanation.

The designation of critical habitat on unoccupied areas is widely recognized as an intrusive act that warrants a high threshold for determination prior to such action. This was re-emphasized most recently by a federal district judge in ruling on a challenge to a critical habitat designation for the dusky gopher frog.[46] Specifically, the court upheld a critical habitat designation for privately-owned, unoccupied habitat, finding that, consistent with the current regulations, FWS had determined that (1) existing occupied habitat was inadequate; and (2) specific unoccupied habitat was essential to the conservation of the species. While ruling in favor of the FWS, the court noted its concern that it had "little doubt that what the government has done [by designating unoccupied habitat] is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property."[47]

The present regulation merely ensures that the Services consider the amount of habitat that adequately fulfills the purpose of the critical habitat designation, and prioritizes such designation to occupied habitat. This provision clearly is consistent with the Congressional concerns that led to the enactment of the present definition (overbroad designation of occupied and unoccupied habitat). Further, this requirement is a biologically appropriate measure to prioritize designations in occupied habitat and places an appropriate checkpoint for the Services before proceeding to what is always an intrusive governmental action.

2. Designation of Occupied or Unoccupied Habitat May Not be Based on the "Potential" for Development of Necessary Habitat Features

NESARC opposes any attempt by the Services to use the mere potential for development of habitat characteristics as the basis for designating a specific, occupied or unoccupied area as critical habitat.

[46] *Markle Interests, LLC. v. U.S. Fish and Wildlife Service*, 2014 WL 4186777 (Aug. 22, 2014).

[47] *Id.,* Slip. Op. at 11.

The ESA is clear that occupied areas may be designated as critical habitat where essential physical and biological features "are found."[48] Further, the courts have clearly rejected attempts to designate occupied areas based on an assumption or expectation that such features may be found in the future.[49]

The designation of unoccupied areas as critical habitat requires similar treatment with regards to the identification of physical or biological features and PCEs. In defining critical habitat for unoccupied areas, Congress made a realistic assumption that physical and biological features for a species are not present—and thereby it did not include a reference to those areas on which such features are "found" as occurs for occupied areas. However, it would be incongruous for the Services to suggest that the absence of that phrase now frees them to broadly designate unoccupied areas on the hope or speculation that such areas will develop the physical and biological features essential to the species needs.

The Services cannot be arbitrary and capricious in their designation of critical habitat for unoccupied areas and, therefore, must still examine and establish why it is reasonably foreseeable to conclude that the potential critical habitat will develop physical or biological features essential to the conservation of the species at some point in the future. The courts have made clear that the Services "may not statutorily cast a net over tracts of land with the mere hope that they will develop PCEs and be subject to designation."[50] This same principle applies in any designation of unoccupied areas based on the potential development of physical and biological features. Further, there must not only be a reasonably foreseeable basis for determining that the physical and biological features may develop, there also must be a clear showing that, with the development of such features, the specific area would meet the high threshold of being essential to the conservation of the species.

[48] 16 U.S.C. § 1532(5)(A)(i).

[49] *See e.g., National Home Builders Ass'n v. U.S. Fish and Wildlife Serv.*, 268 F.Supp. 1197, 1216-17 (E.D. Cal. 2003) (invalidating designation of areas for critical habitat of the Alameda whipsnake were essential habitat components did not exist in such areas at the time of the designation); and *Cape Hatteras Access Preservation Alliance v Dep't of Interior*, 344 F.Supp.2d 108, 122-23 (D.C. Cir. 2004) (vacating piping plover critical habitat designation that included areas in which PCEs were not found).

[50] *Cape Hatteras Access Preservation Alliance v. Dep't of Interior*, 344 F. Supp. 2d 108, 122-23 (D.C. Cir. 2004) ("…to the extend [sic] it has designated areas lacking PCEs, appears to rely on hope. Agencies must rely on facts in the record and its decisions must rationally relate to those facts.").

Proposed Action: In accordance with the comments provided in this Section I.J., the Services should ensure that:

(1) 50 C.F.R. § 424.12(e) remains in its present form; and

(2) The procedures for designation of unoccupied habitat are modified as follows:

> 50 C.F.R. § 424.12(b)(2).
>
> (2) The Secretary will identify~~, at a scale determined by the Secretary to be appropriate,~~ specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species. For a specific unoccupied area to be designated as critical habitat, it must be reasonably foreseeable that such area will develop the physical and biological features necessary for the species and that such features will be developed in an amount and quality that the specific area will serve an essential role in the conservation of the species.

J. The Services Must Establish Specific Criteria for the Designation of Unoccupied Areas as Critical Habitat

The Proposed Rule also fails to provide specific criteria for the designation of unoccupied habitat. Without such limitations, the Services run the risk of inconsistency in determining when an unoccupied area meets the standards as being essential for conservation of the species.

A critical question for the designation of any critical habitat is the adequacy and suitability of an area to support a species' development. For example, agricultural areas often present open space, foraging and other habitat for species. However, in active cultivation, other factors such as disturbance patterns may ultimately make such areas unsuitable for species development--even though key habitat characteristics may be present. Any potential criteria needs to be able to distinguish between suitable unoccupied habitat that has the potential to become occupied, and unoccupied habitat that is not suitable as habitat because of existing land use, invasive species, isolation from occupied areas, or other factors. Further, the Services must take into consideration the difference between unoccupied habitat that may become occupied in the future and unoccupied habitat that contains biological or physical factors that support species within the occupied habitat (e.g., unoccupied areas that provide resources such as water, sand, prey to an adjoining, occupied habitat).

Proposed Action: The Services must adopt a set of criteria to apply to the designation of unoccupied areas as critical habitat. NESARC proposes that the Services apply the following criteria, each which must be met, for the designation of an unoccupied area as critical habitat:

1. A determination that special management considerations or protections are required for specific physical and biological features (or identified primary constituent elements thereof) that are either present or under development within the unoccupied area;

2. A finding that active restoration or enhancement of physical and biological features (including identified primary constituent elements) is essential to the conservation of the species and such efforts can be undertaken within the specific area;

3. A determination, that, based on the best available scientific data, it is reasonably foreseeable that the area, through special management efforts, will develop the physical and biological features (or identified primary constituent elements thereof) necessary for the species and that such features or elements will be developed in an amount and quality that the specific area will serve an essential role in the conservation of the species, with such finding of the essential nature of such specific area considering:
    a. Extent of the area in comparison to occupied habitat;
    b. Current land use;
    c. Proximity and accessibility to occupied areas;
    d. Projected frequency of use by the species;
    e. Presence of invasive species and level of threat to restoration of the habitat; and
    f. Reasonably foreseeable timeframe for restoration of physical and biological features (or identified primary constituent elements thereof) essential to the conservation of the species.

K. Climate Change or Adaptation Needs are Not at a Sufficient Scale to be Used as a Basis for Critical Habitat Designation

The Services discuss their anticipation of the increasing frequency of designating critical habitat in specific areas outside the geographical area occupied by the species at the time of listing.[51] Further, they cite the effects of climate change as an influence causing changes in distribution and migration patterns of species, and the increasing importance of historically unoccupied areas. Though climate change may be creating large scale shifts at the hemispheric level, predictions about potential habitat variations or other geophysical conditions are too uncertain and not at a scale appropriate for use in a critical habitat designation.

[51] Proposed Rule at 27,073.

Designation of critical habitat must remain based on the best scientific information available. The present scientific information on climate change available to the federal government and other entities relies primarily on large-scale modeling of potential climate change impacts, not on phenomena that can generally be observed or reproduced. Furthermore, in the context of climate change, the existing models do not have the capability to show how individual emissions affect species populations, much less individual populations in specific areas.

L. The Services Must Not Reopen Existing Critical Habitat Designations

In general, when an agency issues a rule, the rule is prospective unless specifically allowed by statute to be retroactive.[52] The Proposed Rule reinforces this principle and states that:

> …the Services are establishing *prospective standards* only. Nothing in these proposed revised regulations is intended to require (now or at such time as these regulations may become final) that any previously completed critical habitat designation must be reevaluated on this basis.[53]

Further clarification of the Services' intent on this matter is required. Notwithstanding the apparent commitment within the preamble, the actual proposed regulatory text contradicts this principle, providing that *"[t]he Secretary may revise existing designations of critical habitat according to procedures in this section as new data become available."*[54] Read carefully, it appears the Services preamble statement is nothing more than a statement that the prior critical habitat designations will not be *required* to be reviewed but, pursuant to the regulations actually still *"may"* occur.

Without clarification, the discrepancy between the Services' commitment and the regulatory text leaves open the possibility that the Services might reopen existing critical habitat designations via petition or five year status reviews to be assessed using the new criteria. Such a policy would be detrimental for multiple reasons. As of October 2014, 703 listed species had designated critical habitat. Those existing critical habitat designations were based on data available at the time and were made under the existing standards and procedures for determination of physical and biological features as required under the ESA. For most, this meant that the critical habitat designations were based on the identification of PCEs consistent

[52] 5 U.S.C. § 551; *Hem v. Maurer*, 458 F.3d 1185 (10th Cir. 2006); *Monoson v. United States*, 516 F.3d 163 (3d Cir. 2008).

[53] Proposed Rule at 27,068.

[54] *Id.* at 27,078.

with existing practices for critical habitat designation. Changes to existing critical habitat designations should only be made on the basis of solid scientific data, not on a set of forward looking standards. There is extremely limited benefit to reopening and reviewing existing designations based on these new criteria.

Subjecting existing critical habitat designations to later review and potential reconfiguration using the Services' modified criteria for critical habitat designations would take away from the certainty landowners have relied upon to conduct activities on or near critical habitat areas. Reopening existing designations also could result in changes to designated areas based on new criteria rather than new information, and unwarranted restrictions on development could follow. Such re-designation of critical habitat could adversely affect existing projects that were developed and put into place based on a clear understanding of the scope and nature of a particular species' critical habitat designation. Wholesale revision of designations would destroy regulatory certainty for such designations without any associated benefit to species protection. In addition, many of the existing critical habitat designations have been the subject of lawsuits that have been resolved by settlement. Application of the new standards and procedures virtually ensures those critical habitat designations will be open to further rounds of contentious litigation, which will be unnecessary, burdensome and, again, without commensurate benefit to the species.

With the concerns noted above, NESARC recognizes that there may be limited circumstances where both the public and the species will benefit from a review and reconfiguration of a critical habitat determination using the Services' revised procedures. However, there should be further criteria applied to such determinations to protect the reasonable expectations of entities and individuals that have undertaken activities, including species protection measures, within or near existing critical habitat that may be adversely affected by a reconfiguration of the designated critical habitat.

Proposed Action: The Services must further clarify and identify a limited set of circumstances where those critical habitat designations that are in existence as of the effective date of these new regulations may be revisited and re-configured using the new procedures (including delineation of critical habitat using any new definition of physical and biological features or other core elements informing the scope of a critical habitat designation). Further, the Services must adopt procedures for their transition between approaches.

Accordingly, for any review of an existing critical habitat designation, the Services must:

1. Determine what changes have occurred to the PCEs identified in the original critical habitat designations.

2. Use the best scientific data available to determine the physical and biological features necessary for the species at the time of status review or changes to critical habitat, including the continuing identification of PCEs.

3. Directly correlate the newly identified physical and biological features to breeding, feeding, sheltering and/or recovery of the species.

4. Identify any new or modified PCEs that reflect the physical and biological features that have been identified by the Service as essential to the conservation of the species.

5. Compare the newly identified physical and biological features to the changed PCEs and explain the basis for any differences.

6. Adjust the proposed modifications in critical habitat to reflect economic impacts, in particular on land and activities that would be affected by the change, in keeping with ESA section 4(b)(2).

7. Disclose data for public review.

8. Make a determination that based on the best scientific data available, the existing critical habitat designation is not consistent with the purposes set forth for critical habitat under the ESA.

Further, the Services must clearly provide that an existing critical habitat designation may be reduced in scope and areas previously included may be excluded from any revised delineation of critical habitat using such procedures.

M. The Services Must Adopt Transparency Measures and Allow Full Public Participation Throughout the Designation Process

A key element missing from the Services' Proposed Rule are further improvements to the critical habitat review process to allow for better public participation. Specifically, when implementing the critical habitat designation process, the Services must step beyond a simple *Federal Register* notice and, instead, notify private citizens, businesses, relevant state, county and local jurisdictions and other entities and organizations that are within all areas being considered for designation of critical habitat. Further, all interested individuals and entities must be provided an adequate opportunity for access to the relevant data as well as sufficient time to comment on the applicability of the designation to specific areas, including down to individual parcels of land. Not only will such a notice and comment period allow individuals, organizations and governmental authorities the opportunity to share their views and information, it will allow

interested landowners or operators the chance to explain to the Service why their land may be eligible for exclusion from critical habitat under Section 4(b)(2) of the Act.

N. The Services Should Issue Critical Habitat Designations Concurrently with a Listing Decision

Section 4(a)(3) of the ESA provides for the designation of critical habitat concurrent with the listing of a species.[55] Further, Section 4(b)(6) allows for an extension of a final critical habitat determination for six months, in those instances where there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the critical habitat determination.[56] As part of this Proposed Rule, the Services now propose regulatory text requiring the designations of critical habitat at the same time as a species is listed.

The concurrent designation of critical habitat will allow for more consistency between the listing determination and any designation of critical habitat. Further, this improvement will alleviate the issues raised when critical habitat designations are based on information different from that used for the listing decision. Such consistency is essential for both the protection of the species as well as predictability for landowners with lands potentially within the areas to be designated as critical habitat.

While NESARC supports the timely issuance of critical habitat determinations, it also wishes to clarify that adoption of this timing requirement in the regulatory text should not override the statutory provisions allowing for an extension of time to address scientific disagreements regarding the accuracy or sufficiency of data relevant to the critical habitat determination. Simply put, the requirement to designate critical habitat concurrent with a listing determination should not become a rush to judgment. For example, we understand and expect that the undertaking of proper species listing and critical habitat designations take time and resources that may be in limited availability. At the same time, the Services still must develop an adequate administrative record to support any critical habitat determinations. Where the data available is insufficient or there are disagreements as to its adequacy, a six-month extension may be warranted to resolve such concerns. To remedy any confusion on this point, the Services also should insert regulatory text explicitly recognizing the process for extending the time frame of a critical habitat determination due to disagreement regarding underlying science or data relevant to the determination.

[55] 16 U.S.C. §1533(a)(3).

[56] 16 U.S.C. §1533(b)(6).

O. The Services' Clarification as to Treatment of Circumstances Where Designation is Not Beneficial is Appropriate

The Services propose to add a sentence to Section 424.12(a)(1)(ii) further explaining factors informing a determination that designation of critical habitat would not be prudent when "[s]uch designation of critical habitat would not be beneficial to the species."[57] Specifically, the Services propose to list factors the Services would use in determining whether designation would not be beneficial to the species. These factors include the present or threatened destruction, modification or curtailment of a species habitat or range is not a threat to the species, or no areas meet the definition of critical habitat. NESARC agrees with the Services' clarification.

Further improvements to the Services treatment of "not prudent" determinations are warranted. Specifically, the Services also should adopt procedures for the future treatment (within later status reviews) of areas that have been subject to a "not prudent" determination. If an area was not previously designated as critical habitat because it was "not prudent" to do so, a rebuttable presumption should be applied to the continuing application of that "not prudent" determination. An appropriate articulation of such a rebuttable presumption would be to provide that a status review or reconsideration of a critical habitat designation will apply a rebuttable presumption for a continued application of a "not prudent" determination for any areas that previously received such determination provided that the presumption can be overcome where the Service determines that unforeseen changed circumstances have occurred to the point that the factors upon which "not prudent" determination were made no longer exist in such area.

Proposed Action: The Services should modify 50 C.F.R. **§** 424.12 to include the following:

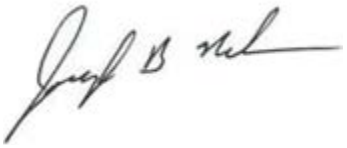
> (___) In any status review or other reconsideration of the designation of critical habitat for a species, the Secretary will not designate as critical habitat any area that has been previously determined to be excluded pursuant to [**§** 424.12(a)(1)(ii)], unless the Secretary determines that unforeseen changed circumstances have occurred within such specific area to the point that the factors upon which the [**§** 424.12(a)(1)(ii)] determination was made no longer exist in such area.

[57] Proposed Rule at 27,071.

III. Conclusion

NESARC greatly appreciates the opportunity to provide these comments to the Services. We respectfully request that you take these comments into full consideration and adopt the proposed revisions when finalizing the applicable regulatory language.

Sincerely,



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