NESARC

NATIONAL ENDANGERED SPECIES ACT
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October 9, 2014

U.S. Fish and Wildlife Service
Public Comments Processing
Attn: FWS-R9-ES-2011-0104
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 Draft Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act

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 draft policy on exclusions from 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 policy to address exclusions from critical habitat designations pursuant to ESA section 4(b)(2).

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. 27,052 (May 12, 2014).
[2] *See* Appendix A.

I. Overview of Concerns

As a general matter, NESARC strongly supports the exclusion of areas subject to conservation measures when the Services are designating critical habitat. Such exclusions are essential to balance the benefits of critical habitat to listed species with the impacts to affected landowners whose property is included in any such designation. While the draft policy provides important guidance on when and how the Services will assess whether to exclude specific areas, the Services should make the following additional revisions and clarifications: (1) allow for an automatic exclusion for areas covered by a habitat conservation plan ("HCP"), candidate conservation agreement with assurances ("CCAA"), or safe harbor agreement ("SHA") upon a determination as to compliance with appropriate review criteria; (2) revise the criteria for evaluating private and non-federal conservation plans to make the process less intrusive and burdensome; (3) disclaim any use of the exclusion process to assert control or jurisdiction over a non-federal or private conservation program; (4) disregard the nature of land ownership (*i.e.*, private or governmentally-owned) and make the exclusion determination based on the existence of adequately protective measures for the listed species and its habitat; (5) take further measures to ensure that the Services fulfill their statutory duty to consider economic impacts of a potential designation of critical habitat in a transparent and timely manner; and (6) either end or significantly clarify any use of the term "conservation value" in weighing the benefits of inclusion against the benefits of exclusion.

II. Comments on Draft Policy

A. Exclusions for Conservation Efforts Undertaken Pursuant to ESA-Related Agreements

In the draft policy, the Services state that they "will always consider" areas covered by approved HCPs, CCAAs, and SHAs, and will "generally exclude" such areas based on three proposed criteria.[3] The Services must remove the conditionality of a potential exclusion for these agreements. Simply, if the criteria for exclusion are met, the exclusion should be automatic, not subject to further discretion of the Services.[4]

The Services are actively promoting the development of CCAAs, SHAs, and HCPs—often emphasizing that such plans and agreements can provide important certainty to the measures that will be required as protections for species and habitat that might be affected by a party. In discussing the benefits of these plans, the Services also have recognized that they allow for the "implement[ation of] conservation actions that the Services would be unable to accomplish without private landowners."[5] Moreover, participants in HCPs, CCAAs and SHAs expend considerable time and resources, and voluntarily incur the costs and burden for

[3] 79 Fed. Reg. at 27,054.

[4] The application of an automatic exclusion is within the Service's discretion to grant. As the Services have repeatedly noted in their explanation of the exclusions policy, the ESA provides that the Secretary "may" exclude an area from a critical habitat designation. Thus, while an exclusion is not required by law, the Secretary clearly has the discretion, not only to grant an exclusion, but to do so through the application of an automatic exclusion policy.

[5] 79 Fed. Reg. at 27,055.

implementing species and habitat protection measures. The designation of critical habitat overlying an area that is covered by an HCP, CCAA or SHA would create the specter of additional regulatory burdens being imposed upon such areas as part of an adverse modification inquiry under the section 7 consultation process. In turn, the loss of certainty and increased regulatory burdens would act as a significant disincentive for enrollment in such plans. In contrast, gaining the regulatory certainty that an area covered by an HCP, CCAA or SHA will not be designated as critical habitat (as long as the automatic exclusion criteria are met) would actually promote the development and implementation of these type of voluntary agreements. Further, through an HCP, CCAA or SHA, the Services already have the ability to ensure that appropriate habitat protection and enhancement measures are in place.

NESARC recognizes that an automatic exclusion process must still rely upon a set of minimum criteria for triggering the exclusion. Again, however, such criteria should not become a disincentive or obstacle to the adoption and implementation of voluntary conservation measures through an HCP, CCAA or SHA. NESARC urges the Services to adopt a straightforward set of minimum criteria. Specifically, automatic exclusion of an area subject to an HCP, CCAA and/or SHA should occur upon a determination that: (1) the HCP, CCAA and/or SHA is being implemented in accordance with its terms; and (2) the HCP, CCAA and/or SHA contains measures that provide for protection or enhancement of habitat for the subject species.

In the draft policy, the Services also propose to weigh the exclusion of an area covered by an HCP, CCAA and/or SHA based on whether such plan "meets the conservation needs of the species in the planning area." Such a criterion steps beyond the existing bounds of what is required for approval of an HCP, CCAA and/or SHA—thus, again increasing, rather than removing, regulatory burdens for parties considering development or participation in such plans. Accordingly, this criterion should be removed as duplicative and improperly imposing additional measures upon the proponents of such plans.

While a minimal level of review may be necessary to verify that HCPs, CCAs and SHAs are being properly implemented and address the relevant species and habitat, the Services' draft policy would impose an unnecessarily burdensome review process when assessing whether to exclude these areas from critical habitat. Particularly, the Services' conditions for exclusions of HCPs, CCAAs and SHAs from a critical habitat designation present the following concerns:

Proposed Exclusion Conditions for CCAAs, SHAs & HCPs	**NESARC Comments**
The permittee is properly implementing the CCAA/SHA/HCP and is expected to continue to do so for the term of the agreement. A CCAA/SHA/HCP is properly implemented if the permittee is and has been fully implementing the commitments and provisions in the HCP, Implementing Agreement, and permit.	NESARC agrees with the requirement that the CCAA/SHA/HCP is being properly implemented. However, the added requirement that the "permittee is expected to continue to do so for the term of the agreement" is overbroad and could be prone to abuse through extraction of further promises or assurances. The Services already assess the ability of the permittee to fully implement the agreement through its term as part of

Proposed Exclusion Conditions for CCAAs, SHAs & HCPs	NESARC Comments
	the initial CCAA, HCP or SHA approval. Thus, because a determination regarding implementation has already been made, the Services should not be revisiting this determination through the auspices of a critical habitat designation.
The species for which critical habitat is being designated is a covered species in the CCAA/SHA/HCP, or very similar in its habitat requirements to a covered species. The recognition that the Services extend to such an agreement depends on the degree to which the conservation measures undertaken in the CCAA/SHA/HCP would also protect the habitat features of the similar species.	NESARC agrees with the Services' proposal to exclude an area from habitat where the CCAA/ SHA/HCP protects a species "very similar in its habitat requirements to a covered species." However, the Services' caveat that such exclusion depends on the "degree to which [the measures]…protect the habitat features of the similar species" is overbroad and could be prone to abuse. The determination as to the "degree" of protection afforded would again require a further re-examination of the purposes and nature of the CCAA/SHA/HCP protection measures. Such an exclusion process cannot become a means for the Services to extract further measures or protections in exchange for an exclusion of a property from a critical habitat designation.
The CCAA/SHA/HCP specifically addresses that species' habitat (not just providing guidelines) and meets the conservation needs of the species in the planning area.	The approval of a CCAA/SHA/HCP already includes review and confirmation as to the required demonstration of benefit provided to the species under the applicable agreement.[6] The Services cannot now impose an additional standard that these plans and agreements meet the "conservation needs of the species in the planning area." Not only is the phrase "conservation needs" not defined in the draft policy, its imposition would graft an additional obligation onto conservation plans and agreements that is not specified in the applicable regulations and policies for CCAA/SHA/HCP development and approvals.

[6] *E.g.*, 64 Fed. Reg. 32,717 at 32,721 (June 17, 1999) (SHAs provide "incentives to property owners to restore, enhance, or maintain habitats and/or populations of listed species that result in a net conservation benefit to these species") (emphasis added); 64 Fed. Reg. 32,726 at 32,734 (June 17, 1999) (conservation measures in CCAA must provide conservation "benefits" such as increase in population; enhancement, restoration, or preservation of habitat; or removal of threat); 65 Fed. Reg. 35,242 at 35,251 (June 1, 2000) (Services will ensure that biological goals of the HCP are consistent with conservation actions needed to adequately minimize and mitigate impacts to the covered species)

B. Exclusions for Private or Other Non-Federal Conservation Plans or Programs

The Services state that they will "sometimes exclude specific areas" from a critical habitat designation based on the existence of a private or non-federal conservation plan or partnership.[7] When determining whether the benefits of exclusion outweigh the benefits of inclusion, the Services indicate that they will evaluate a variety of factors, including eight specifically identified factors.[8]

NESARC supports the recognition of private and other non-federal plans and programs as an adequate alternative to the designation of an area as critical habitat under the ESA. However, the factors identified by the Services are too intrusive and burdensome and impose obstacles that cannot be overcome in practice. Specifically, NESARC has the following concerns:

<table>
<tr><th>Factors for Exclusion of Lands Covered by Private and Non-Federal Conservation Plans and Programs</th><th>NESARC Comments</th></tr>
<tr><td>The degree to which the record supports a conclusion that a critical habitat designation would impair the realization of benefits expected from the plan, agreement, or partnership.</td><td>The need for exclusion should not merely be whether it would impair the purposes and implementation of the voluntary conservation measure. An exclusion also should be made where any designation of critical habitat would have the effect of creating a duplicative regime of protections and measures.</td></tr>
<tr><td>The extent of public participation in the development of the conservation plan.</td><td rowspan="3">The public participation, agency review and NEPA review factors will unnecessarily hinder meaningful and qualified, private voluntary conservation measures or programs. While public review and comments are appropriate procedures for governmental programs, it is inappropriate to obligate private entities to meet these standards as a prerequisite for exclusion.

To the extent that the Services believe public review and comment is necessary for the application of exclusion, such review and comment process can be addressed through the notice and comment process on the critical habitat designation. Specifically, as part of development of a draft critical habitat proposal, it is within the Services' discretion to solicit public comments on</td></tr>
<tr><td>The degree to which there has been agency review and required determinations.</td></tr>
<tr><td>Whether National Environmental Policy Act (NEPA) compliance was required.</td></tr>
</table>

[7] 79 Fed. Reg. at 27,054.

[8] The Services state that "we will evaluate the effect of conservation plans and partnerships on the benefits of inclusion and the benefits of exclusion of any particular area from critical habitat by considering a number of factors *including*….[the eight identified criteria]." NESARC assumes that this formulation is a drafting error and the Services did not intend to withhold disclosure of any criteria that they may actually apply. The Services should clarify their intentions as to the applicability of the identified criteria. Further, if the Services intend to use any other criteria, it is imperative that they clearly identify such criteria and allow for public comment on such criteria.

Factors for Exclusion of Lands Covered by Private and Non-Federal Conservation Plans and Programs	NESARC Comments
	areas that should be excluded from a particular habitat designation. Further, concurrent with the issuance of the draft critical habitat designation, the Services can likewise identify those areas already identified for exclusion and request public comment on such proposed exclusion as well as input on other areas that may be excluded. Such a process allows not only for public participation in the exclusion process, but also accomplishes that goal in an open and transparent manner.
The demonstrated implementation and success of the chosen mechanism.	NESARC agrees that a party must demonstrate that the voluntary conservation plan is being implemented consistent with its terms. However, the requirement to demonstrate "success" of the chosen mechanism is overbroad and would place an unreasonable threshold for appropriate recognition of voluntary conservation measures. Instead of attempting to measure "success," the Services should instead consider whether the party is meeting or exceeding the metrics or goals identified within the applicable plan.
The degree to which the plan or agreement provides for the conservation of the essential physical or biological features for the species.	The proposed factor is inappropriate for a finding as to exclusion and, as drafted, is unworkable. The determination of exclusion will be made at the time of a critical habitat designation and, thus, concurrent to the identification of essential physical or biological features. Since the voluntary measures are likely to be adopted prior to the critical habitat designation, a more appropriate criterion would be to determine: (i) whether the voluntary conservation measure or plan covers the species and habitat features that are the subject of the critical habitat designation process, and (ii) contains measures for the protection or enhancement of the species and habitat.
Whether there is a reasonable expectation that the conservation management strategies and actions contained in the management plan or agreement will be implemented.	As proposed, this factor appears to be duplicative of the "demonstrated implementation" factor.

Factors for Exclusion of Lands Covered by Private and Non-Federal Conservation Plans and Programs	NESARC Comments
Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.	This factor is unnecessary in light of the Services' overall "implementation" factor. Further, the Services do not necessarily have jurisdiction over voluntary private or non-federal conservation plans or measures to mandate adaptive management or the imposition of new conservation measures "in the future." To the extent that the Services retain this factor, the Services must further clarify use of the term "adaptive management." The concept of adaptive management is susceptible to a number of different interpretations and is highly dependent on the nature of the overall plan and conservation measures being undertaken.

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NESARC wishes to stress that the Services' factors for exclusion of lands covered by private or non-federal conservation plans or programs place unrealistic requirements on private and non-federal parties regarding the adequacy of their conservation measures. A particular concern raised by the Services' draft policy is the imposition of a series of public participation requirements. Such criteria would impose an intrusive and burdensome obligation on the development of any conservation plan or partnership and add significant delays and costs to their implementation. In many cases, broad public participation is not necessary for development and implementation of non-federal or private conservation measures and could provide a disincentive to the development of any conservation plans or partnerships. Moreover, the Services fail to explain the basis for such a requirement. As noted above, public notice and comment on the application of an exclusion can be addressed through a transparent integration of the exclusion process into the development of the draft critical habitat designation process.

The Services' consideration of whether NEPA compliance was required in the development of a non-federal or private land is equally troubling. First, NEPA is essentially a procedural statute that is triggered by a federal action. For non-Federal conservation measures, there will typically be no requisite federal action that would warrant NEPA review. Further, the merits of such a requirement are not readily apparent since the focus of an exclusion determination should not be whether a non-federal or private plan has been developed in compliance with NEPA but rather whether the conservation benefits that may be provided by such private or non-federal conservation plan or program render the application of a critical habitat designation duplicative and unnecessary.

C. Required Disclaimer for Application of Exclusion Criteria

As part of any final policy, NESARC respectfully requests that the Services explicitly recognize and clarify that their factors for exclusions do not give the Services jurisdiction or authority over the plans or agreements to require modifications based upon a designation of critical habitat. While the Services have the authority to determine whether an area may or may not be excluded from a critical habitat designation, this process does not afford the Services any further rights or jurisdiction with respect to the approval or implementation of such plans or programs.

D. Exclusion of Federal Lands

As part of their notice, the Services state that they "will focus our exclusions on non-Federal lands."[9] The question as to whether a particular parcel is owned by a federal, state, tribal, municipal or private entity should not be a determinative basis for whether an exclusion should occur. The simple question is whether there are existing conservation measures in place that render the designation of an area as critical habitat superfluous or duplicative. Instead of adopting a bias against exclusion of federal lands, the Services should look at the totality of factors when assessing whether the benefits of exclusion outweigh the benefits of inclusion irrespective of whether the land is federally owned or managed.

E. Exclusions Based on Economic Impacts

In the Draft Policy, the Services describe their approach to consideration of economic impacts within the designation of critical habitat and any decision to exclude areas from a designation. Specifically, the Services state that:

> *When the Services undertake a discretionary exclusion analysis with respect to a particular area, they will weigh the economic benefits of exclusion (and any other benefits of exclusion) against any benefits of inclusion (primarily the conservation value of designating the area). The conservation value may be influenced by the level of effort needed to manage degraded habitat to the point where it could support the listed species. The Services will use their discretion in determining how to weigh probable incremental economic impacts against conservation value. It is the nature of the probable incremental economic impacts, not necessarily a particular threshold level, that triggers considerations of exclusions based on probable incremental economic impacts. For example, if an economic analysis indicates high probable incremental impacts in a proposed critical habitat unit of low conservation value (relative to the remainder of the designation), the Services may consider exclusion of that particular unit.*[10]

As an initial matter, NESARC wishes to stress the importance of considering economic impacts of any critical habitat designation. Specifically, the first sentence of ESA section 4(b)(2) states

[9] *Id*.
[10] *Id*. at 27056 (emphasis added).

that "[t]he Secretary shall designate critical habitat, and make revisions thereto, … *after taking into consideration the economic impact*, and any other relevant impact of specifying any particular area as critical habitat."[11] This conveys a duty for the Secretary to consider economic impacts in all cases at the time of proposing the designation of critical habitat. The Services must ensure that this duty is fully and transparently implemented.

The development of an appropriate and sound economic impact analysis is a critical component of the critical habitat designation process. Specifically, this economic impact analysis spotlights key economic activities and local economies that can be adversely affected by a critical habitat designation. Further, it provides the Services with an effective tool to refine and target their critical habitat designations, including the appropriate and necessary exercise of authority to exclude particular areas from a critical habitat designation where the benefits of such an exclusion outweigh the benefits of inclusion of such area in any critical habitat designation. For these reasons, it is important that the implementing policies for critical habitat exclusions are workable and ensure a robust and transparent economic impact analysis.

F. Clarification as to the Use of "Conservation Value" in the Exclusion Process

In the Draft Policy, the Services now describe the "benefits of inclusion" to mean the "conservation value" of designating the area. Further, the Services propose to weigh such "conservation value" against the benefits of excluding an area from a critical habitat designation. This use of the term "conservation value" appears to adopt a concept that has been proposed in a parallel notice of proposed rulemaking[12] regarding a new definition for the term "destruction or adverse modification" as used in the section 7 consultation process. In that proposed rulemaking, however, the Services have stated that the term "value" in this phrase "refers to its utility or importance [and] does not refer to a quantified value."[13] Moreover, the Services have explained their intent 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."[14]

As an initial matter, NESARC opposes the proposed use of "conservation value" in the adverse modification inquiry. Further, NESARC has provided extensive comments on the appropriate interpretation of "conservation" within the broader context of the ESA. These comments are attached as an appendix to this comment letter and are equally applicable to any use of this same term within a policy guiding exclusion determinations from critical habitat designations under ESA section 4(b)(2).[15]

[11] 16 U.S.C. §1533(b)(2).
[12] 79 Fed. Reg. 27,060 (May 12, 2014).

[13] *Id.* at 27,061.

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

[15] *See* Appendix B, Sections II.A through II.C.

As a further matter, any use of "conservation value" as a proxy for the assessment of the benefits of including an area within a critical habitat designation is premature and requires further clarification as to its scope and purpose in this specific inquiry. Numerous questions arise with respect to the use of this concept, including:

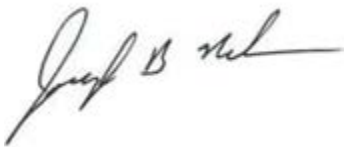
- Is there a consistent definition of "conservation value" that can be used in a comparative analysis of economic benefits of exclusion?
- Since economic benefits can be described both qualitatively and quantitatively, how would the Services ensure that conservation values are expressed in a manner that allows for an accurate comparison and weighting of the benefits of each?
- Can the Services project conservation values with the same level of certainty and precision that is applied to the valuation of economic benefits?
- How would the Services differentiate between a set of conservation values achieved through application of a voluntary conservation program or plan as compared to conservation values that could be projected based on application of a critical habitat designation?
- How would the Services compare and weigh costs incurred and benefits derived from a voluntary program with the costs incurred and benefits derived from projected protective measures imposed through application of an adverse modification inquiry?
- How would the conservation value achieved by a voluntary program be compared to the conservation value achieved by application of a critical habitat designation?

In short, the Services' proposed adoption of "conservation value" in the exclusion analysis is inadequately explained. Additionally, without further explanation, there is no basis from which to conclude that the use of this term (if retained) is even appropriate for such analysis framework.

III. Conclusion

NESARC greatly appreciates the opportunity to provide these comments to the Services and to initiate a further discussion on ways to improve the Services approach to the exclusion of lands from critical habitat. We respectfully request that you take these comments into full consideration and adopt the proposed revisions when finalizing the applicable policy.

Sincerely,



Joseph B. Nelson
NESARC Counsel

APPENDIX A

NATIONAL ENDANGERED SPECIES ACT
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National Endangered Species Act Reform Coalition
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American Agri-Women
Washington, D.C.

American Farm Bureau Federation
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American Forest and Paper Association
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Basin Electric Power Cooperative
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Central Electric Cooperative
Mitchell, South Dakota

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Coalition of Counties for Stable Economic Growth
Glenwood, New Mexico

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

Colorado River Energy Distributors Association
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Colorado River Water Conservation District
Glenwood Springs, Colorado

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Denver, Colorado

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Carlsbad, New Mexico

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Beryl, Utah

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Edison Electric Institute
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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
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National Alliance of Forest Owners
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National Association of Counties
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National Association of Conservation Districts
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National Rural Electric Cooperative Association
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National Water Resources Association
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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
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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

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October 9, 2014

U.S. Fish and Wildlife Service
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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).

Furthermore, as proposed, the Services would, to the maximum extent prudent and determinable, propose and finalize critical habitat determinations concurrent with the proposed and final listing rules. We recognize that the Services' resources are not unlimited and that the analysis required to properly (and narrowly) identify critical habitat may require significant resources to reach a level where the designation is prudent and determinable. We urge the Services to undertake its responsibility to designate critical habitat in a diligent manner -- including the identification of all necessary components for designation of critical habitat, identification of specific areas containing the necessary physical and biological features and/or PCEs and full consideration of areas to be excluded based on its economic impact analysis. Moreover, in those instances where the Services are constrained by resources to completing such a prudent and determinable process, the statute and the Services' own proposed regulatory text clearly provides, and allows, the Services to decline to designate critical habitat in such circumstances because the record is insufficient to make a prudent and determinable decision.

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.

[57] Proposed Rule at 27,071.

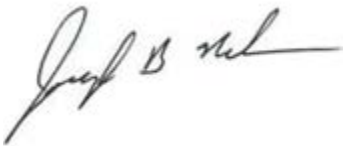
Proposed Action: The Services should modify 50 C.F.R. **§** 424.12 to include the following:

(___) 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.

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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