October 9, 2014

Filed electronically at www.regulations.gov

Re: Comments on Three Endangered Species Act Critical Habitat Proposals of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service Published on May 12, 2014 (Docket Nos. FWS-HQ-ES-2012-0096, FWS-R9-ES-2011-0072, and FWS-R9-ES-2011-0104)

This letter provides the public comments of the American Petroleum Institute ("API"), Association of Oil Pipe Lines ("AOPL"), International Association of Geophysical Contractors ("IAGC"), Interstate Natural Gas Association of America ("INGAA"), Utility Air Regulatory Group ("UARG"), and Utility Water Act Group ("UWAG") (collectively, the "Energy Commenters") on three Endangered Species Act ("ESA") critical habitat proposals – two proposed rules and a draft policy – published by the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (collectively "the Services") on May 12, 2014.[1] Based on the close interrelationship of the three proposals, and the need for the regulated public and regulators to consider the proposals as a whole, the Energy Commenters have prepared one set of comments. We address each of the proposals separately herein.

The proposals would, if adopted as final rules and policy, significantly reshape and further complicate the critical habitat process, and unjustifiably expand the Services' authority to designate critical habitat. Land would be designated as critical habitat even if that land is "unoccupied" by the species, and contains none of the "physical or biological features" required by the species. Equally troubling, designations could rest on speculation about future conditions, such as *estimates* of future species needs and *projections* of local climate change impacts. At the same time, the proposals would vaguely define "adverse modification" as the direct or indirect *diminishment of the conservation value* of critical habitat. These and other aspects of the proposals would result in far more land designated as critical habitat, and far more activities restricted or blocked on the basis of adverse modification determinations. Significant cost, time, and regulatory burdens on the entities represented by the undersigned organizations, and harm to U.S. consumer and economic interests, would ensue, without commensurate benefit to listed species.

The proposals are undermined by a range of fundamental problems. The Services' expansive approach to the designation of critical habitat and adverse modification determinations ignores important statutory limits. The breadth of the Services' approach exceeds their statutory authority and lacks scientific justification, and the proposed terms are arbitrarily vague. The Services also fail to acknowledge or account for the significant economic burdens that would

[1] *See* 79 Fed. Reg. 27,066 (May 12, 2014) (Proposed Rule to Implement Changes to the Regulations for Designating Critical Habitat); 79 Fed. Reg. 27,060 (May 12, 2014) (Proposed Rule to Amend Definition of Destruction or Adverse Modification of Critical Habitat); and 79 Fed. Reg. 27,052 (May 12, 2014) (Policy Regarding the Implementation of Section 4(b)(2) of the Endangered Species Act).

result from the proposals. Substantial changes to, and narrowing of, the proposals are required as a matter of law and are warranted in the interest of sound policy. Specifically, the Services should reissue the proposed rules and policy after incorporating the recommendations in Section VI of these comments to allow meaningful and informed public comment.

We look forward to the Services' thorough consideration of the comments below.

Sincerely,

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Enclosure

Comments of American Petroleum Institute, Association of Oil Pipe Lines, International Association of Geophysical Contractors, Interstate Natural Gas Association of America, Utility Air Regulatory Group, and Utility Water Act Group on Three Endangered Species Act Critical Habitat Proposals of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service Published on May 12, 2014

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I. Introduction and Summary of Comments

The U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (collectively, "the Services") have proposed two rules and a new draft policy on critical habitat. First, the Services propose to amend the regulatory definition of "destruction or adverse modification" of critical habitat. 79 Fed. Reg. 27,060 (May 12, 2014). This proposal is based on the virtually unlimited concept of impacts to "conservation values" and would result in far more adverse modification determinations.

Second, the Services propose to amend those portions of the Endangered Species Act ("ESA" or the "Act") regulations that establish procedures for designating and revising critical habitat. 79 Fed. Reg. 27,066 (May 12, 2014). This rulemaking, if finalized, would allow the Services to designate land as critical habitat even where it is "unoccupied" by the listed species and contains none of the "physical or biological features" required by the species, based solely on *estimates* of future species needs, including estimates based on *projections* of climate change impacts in specific locations.

Finally, the Services request comment on a draft policy regarding exclusions from critical habitat designation. The Services state that the policy is intended to encourage voluntary private habitat conservation initiatives, 79 Fed. Reg. 27,052 (May 12, 2014), but the policy provides few assurances and appears to largely rely on onerous critical habitat requirements as encouragement for such initiatives.

For these reasons, and those explained in more detail below, the proposals exceed the Services' statutory authority, are contrary to the ESA, and are arbitrary and capricious. The proposed changes will result in broad, sweeping critical habitat designations that will impede critical economic growth, including activities undertaken by the undersigned organizations' members that are necessary to sustain the U.S. economy, without commensurate benefits to species. Substantial changes to and narrowing of the proposals are required as a matter of law and warranted as a matter of policy. American Petroleum Institute ("API"), Association of Oil Pipe Lines ("AOPL"), International Association of Geophysical Contractors ("IAGC"), Interstate Natural Gas Association of America ("INGAA"), Utility Air Regulatory Group ("UARG"), and Utility Water Act Group ("UWAG") (collectively, the "Energy Commenters") encourage the Services to adopt the recommendations discussed below in any final regulation or policy.

A. The Proposals Would Significantly Expand the Services' Approach to Designating and Protecting Critical Habitat.

Congress established important limits within the ESA governing the function of critical habitat. These limits were recognized by the Services in prior rulemakings. The Services' current proposals, however, would vastly expand their approach to designating and protecting critical habitat. As explained further below, the Energy Commenters believe that the proposed revisions are unsupported by the ESA and case law, and go far beyond the limits set by Congress.

The process for designating critical habitat must be narrowly and carefully tailored to serve its limited statutory purpose: allowing federal agencies to analyze whether a proposed agency action results in destruction or adverse modification of critical habitat. The Services must also recognize the extraordinary burdens, namely socio-economic impacts and restrictions on development of vital natural resources, that can result from designation of critical habitat, including an adverse modification finding. Finally, the regulations must account for the limits Congress imposed on the designation of critical habitat.

The three proposals ignore important statutory limits and exceed the Services' statutory authority. The proposed revisions to the definition of "adverse modification" would allow broader adverse modification determinations than authorized under the ESA. The proposed standard of "appreciably diminish conservation value" is arbitrarily vague, incorporates no meaningful limits, and is untethered to the statutory criteria. By defining "adverse modification" in a manner that includes effects that delay or preclude the growth or establishment of habitat features that would support species needs, the proposal would result in far more adverse modification and jeopardy determinations than under current regulations. In addition, the proposed revisions would allow adverse modification determinations based on new or future physical and biological features not present at the time of designation, which would be inconsistent with the record supporting designation. The vague "appreciably diminish" standard could be met in almost every instance, is inconsistent with case law, and cannot be applied to jeopardy determinations as the Services have suggested. Finally, the proposed adverse modification definition could result in significant confusion because the Services would apply the revised standard to critical habitat that was designated under prior regulatory criteria.

The proposed revisions to the Services' regulations on designating critical habitat would expand "occupied" critical habitat to include areas not (and likely never) *occupied* by the

species. The proposal removes "primary constituent elements" ("PCEs") from consideration in designating critical habitat, and replaces it with a broad and ambiguous requirement to identify "physical and biological features essential to the conservation of the species." *See* 79 Fed. Reg. 27,060 (May 12, 2014). The proposal inappropriately allows the Services to designate areas as critical habitat based on speculation about future conditions tied to climate change projections, rather than current features. The proposed revisions would thus allow for designation of areas based on speculation with no established methodology, rather than on the "best scientific data available," as the statute requires. Through adoption of a series of definitions and revisions to the regulations covering identification of critical habitat, this essentially limitless standard is contrary to the structure of the statute and Congressional intent.

Finally, the draft policy on voluntary conservation plans, such as habitat conservation plans ("HCPs"), Candidate Conservation Agreements with Assurances ("CCAAs"), and Safe Harbor Agreements ("SHAs"), may be intended to encourage private participation in such plans, but provides little assurance to property owners that participation in such measures would result in the exclusion of those areas from critical habitat designation. In most if not all cases, property owners should have assurances that areas covered by a voluntary conservation plan will be excluded from critical habitat designation. The emphasis on the Services' discretion, and the lack of incentives for property owners, undercuts the policy's "encouragement" of voluntary measures. Coupled with the onerous impacts likely to result from broader critical habitat designations and more frequent adverse modification findings, the draft policy would effectively shift federal land management obligations to nonfederal entities.

The Services also fail to acknowledge or account for the significant economic burdens that would result from the proposals. The Services assert that the rulemakings will not have a significant economic effect on small entities because the proposed rule merely "clarifies existing requirements for Federal agencies under the [ESA]," 79 Fed. Reg. at 27,065, 27,075, and thus only Federal agencies are directly affected by the rules. But this is far from the case. The proposals drastically change implementation of the ESA. The Energy Commenters' members, who are subject to consultation requirements under the ESA, would be significantly impacted by the increase in designation and adverse modification findings that would result from the proposed rules.

B. The Oil and Gas, Electric Utility, Land Development, and Other Key Industry Segments Would Be Harmed by the Proposals.

1. The Energy Commenters Represent a Wide Sector of Industry Impacted by These Proposals.

API is a nationwide, non-profit trade association that represents over 600 companies involved in all aspects of the petroleum and natural gas industry, from the largest integrated companies to the smallest independent oil and gas producers. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

AOPL is a national trade association that represents owners and operators of oil pipelines across North America and educates the public about the vital role oil pipelines serve in the daily lives of Americans. AOPL members transport more than 90 percent of the crude oil and refined petroleum products shipped through pipelines in the United States. AOPL members bring crude oil to the nation's refineries, natural gas liquids such as ethane, butane, propane, and carbon dioxide to manufacturers and industrial users, jet fuel to airports, and petroleum products to our communities, including all grades of gasoline, diesel, home heating oil, kerosene, propane, and biofuels. While the existing United States liquid pipeline network is extensive, new construction is required to transport energy liquids from new production areas across North America, including Oklahoma, Texas, North Dakota, Colorado, Montana, Pennsylvania, and Ohio, to existing refining and processing locations. Appropriate administration of the ESA regulatory program is essential to allow for necessary construction and maintenance of energy liquids pipelines to bring the benefits of the new domestic production to U.S. energy consumers. As an organization, AOPL represents its members before Congress, regulatory agencies, and the courts on key industry issues.

IAGC is the international trade association representing the industry that provides geophysical services (geophysical data acquisition, processing and interpretation, geophysical information ownership and licensing, and associated services and product providers) to the oil and natural gas industry. IAGC member companies play an integral role in the successful exploration and development of hydrocarbon resources through the acquisition and processing of geophysical data. Environmental issues, including ESA compliance, are a priority for IAGC

member companies. Over the years, IAGC member companies have consistently demonstrated their ability to conduct both land and seismic exploration in an environmentally responsible manner. IAGC proactively engages, on behalf of its members, with government agencies, such as the Services, in their development of regulations for both land and marine seismic operations.

INGAA is a non-profit trade association that represents the vast majority of the interstate natural gas transmission pipeline companies operating in the United States, as well as many comparable companies in Canada and Mexico. INGAA's United States members, which constitute approximately two-thirds of the interstate pipeline industry, operate a network of approximately 200,000 miles of pipelines. INGAA advocates regulatory and legislative positions of importance to the natural gas pipeline industry in North America, representing the interstate natural gas pipeline industry's interests in operational, engineering, environmental, safety, security and research and development matters before federal and state agencies.

Natural gas plays a prominent role in the nation's energy mix, and interstate natural gas pipelines are an integral part of the energy infrastructure. According to the 2014 INGAA Foundation study, *North American Midstream Infrastructure through 2035: Capitalizing on Our Energy Abundance*,[1] United States natural gas consumption is expected to approach 33 trillion cubic feet by 2035. The natural gas pipeline industry will need to add 338,800 miles of pipeline between 2014-2035. The INGAA Foundation report projected that the United States and Canada will need to invest $313 billion in the next twenty years on natural gas midstream assets, including new mainlines, natural gas storage fields, and lateral lines to and from storage, power plants, processing facilities, gas lease requirements, LNG export facilities, and related equipment. This amounts to approximately $14 billion per year through 2035 (using 2012 dollars).[2] Many of these projects may require consultation with the Services, and therefore clear and rational rules are important.

UARG is a voluntary, non-profit group of electric generating companies and organizations and national trade associations. UARG's purpose is to participate on behalf of its members collectively in rulemakings and other regulatory proceedings that affect the interests of

[1] INGAA Foundation, Inc., North American Midstream Infrastructure Through 2035: Capitalizing on Our Energy Abundance 19, 28 (March 18, 2014), *available at* http://www.ingaa.org/Foundation/Foundation-Reports/2035Report.aspx.

[2] *Id.*

electric generators and in litigation arising from those proceedings. Although UARG typically comments on matters arising under the Clean Air Act ("CAA"), UARG is submitting comments on the proposed rules because the issues presented have the potential to impact the electric generating industry in CAA proceedings.

UWAG is a voluntary, ad hoc, non-profit, unincorporated group of 191 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. The individual energy companies operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. The Edison Electric Institute is the association of U.S. shareholder-owned energy companies, international affiliates, and industry associates. The National Rural Electric Cooperative Association is the association of non-profit energy cooperatives supplying central station service through generation, transmission, and distribution of electricity to rural areas of the United States. The American Public Power Association is the national trade association that represents publicly-owned (units of state and local government) energy utilities in 49 states, representing 16 percent of the market. UWAG's purpose is to participate on behalf of its members in federal agency rulemakings under the Clean Water Act ("CWA") and related statutes, such as the ESA, and in litigation arising from those rulemakings. UWAG is comprised of a diverse and extensive range of public and private entities whose activities are conducted nationwide. Many of the individual energy companies that comprise UWAG have public service obligations to ensure a reliable and safe supply of electricity to their customers. The supply of electricity throughout the country involves the construction, operation, and maintenance of electric generation facilities, transmission and distribution lines, and other system control facilities.[3] The construction of new generation facilities is needed to meet new federal and state energy and environmental requirements, and the construction of new transmission lines is needed to relieve congestion on the electrical grid, to wheel power between utilities, and to connect new

[3] Electrical transmission lines transfer bulk electrical energy from generation sources (such as power plants, wind farms, and solar facilities) to electrical substations located near areas of electrical energy demand centers, and electrical distribution lines transfer electrical energy from substations to customers in neighborhoods, commercial centers, industrial complexes, military and other government facilities, hospitals, and other facilities.

sources of electrical energy (such as wind and solar facilities) to the electrical grid – all of which serve to increase the reliability and diversity, and manage the cost, of electricity.[4] The administration of the ESA regulatory program, insofar as it affects the electric utility industry, is important not only to UWAG members, but also to the public at large, whose health, safety and general welfare depend on the reliable delivery of electricity.

The Energy Commenters' activities are essential to the reliable, safe and affordable supply of energy to U.S. consumers, which requires the construction and maintenance of thousands of miles of linear pipelines, electrical transmission and distribution lines, and power generation facilities.[5] As described further below, the proposals are likely to significantly impact the Energy Commenters' activities. For any proposed action that has a federal nexus, the Energy Commenters will be required to engage in lengthy and expensive consultation processes with the Services that may result in modification, delay, or other changes to their projects that will impact the Energy Commenters' ability to undertake, for example, utility line and pipeline construction and maintenance, with potentially significant adverse impacts on their customers' accessibility to reliable and secure energy supplies at a reasonable cost.

The proposals may also hinder generation from low-emission and renewable domestic resources, if the restrictions and burdens resulting from the proposals prevent the Energy Commenters' members from transitioning to such generation sources. As the push for low-emission and renewable energy increases, driven by national economic and security interests and environmental goals, the Energy Commenters' members are moving aggressively to undertake wind and solar projects to meet this demand. Electric utilities are also increasingly looking to

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[4] Pursuant to Congressional directive in the Energy Policy Act of 2005 to assess the reliability and adequacy of the bulk power system of North America, the North American Electric Reliability Corporation ("NERC") determined that construction of 17,833 miles of new high-voltage transmission lines is planned in the United States between 2011 and 2015, 84 percent of which is required for reliability purposes with the rest required to, among other things, address congestion and bring new resources on line. NERC, 2011 Long-Term Reliability Assessment, 34-36 (Nov. 2011), *available at* http://www.nerc.com/files/2011LTRA_Final.pdf.

[5] Steady and reliable energy is essential to our national security. *See* P. Parfomak, Cong. Research Serv., RL33347, *Pipeline Safety and Security: Federal Programs* 1 (Feb. 18, 2010) ("CRS Report"), *available at* https://opencrs.com/document/RL33347. For example, many of the Energy Commenters' members supply power or fuel to military installations, power plants and airports.

new natural gas generation plans for base load power. However, renewable energy projects often involve substantial footprints and require miles of new transmission lines to connect to the grid. New natural gas generation infrastructure is likely to face substantially greater costs and delays if the Services' proposals are adopted, greater swaths of land are designated as critical habitat, and the vague, overly broad standard proposed by the Services is adopted for adverse modification.

2. The Proposals Would Subject the Energy Commenters' Members to Additional Regulatory Requirements and Significant Expense.

The ESA protects critical habitat through section 7 consultation on federal agency action, which includes authorization of federal permits. Once critical habitat is designated, federal agencies are required to "insure," through ESA section 7 consultation with the Services, that any activity funded, carried out or authorized (*e.g.*, permits or rulemaking) is not likely to jeopardize the continued existence of a listed species or "result in the destruction or adverse modification" of critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. The Energy Commenters' members frequently undertake projects, such as oil and gas exploration and development, utility line maintenance and construction, pipeline operations and maintenance, and other energy projects, that require federal authorizations and thus trigger consultation under ESA section 7.

As discussed in more detail below, the Services' proposal to amend critical habitat designation criteria includes several new and revised definitions that would allow for broader critical habitat designations. These proposed changes would allow the Services to extend the reach of critical habitat well beyond what Congress intended, and the broader "adverse modification" standards will result in more adverse modification findings or more restrictions on activities to avoid such findings. These proposed revisions also indicate the Services' intent to increasingly designate areas not actually occupied by a listed species as critical habitat where the Services determine that, as a result of potential future or indirect effects (*e.g.*, climate change effects), the area is "essential to the species." The changes advanced in these proposals would result in substantial additional burdens, including costs and delays to the Energy Commenters, their members, supporting businesses, and consumers, and the inability to develop needed resources.

The Services' proposals give short shrift to the economic impacts of the proposed changes. The Services failed to consider the range and depth of costs the proposed rules would have on industry. The proposals impact activities on millions of acres of public and private land. For the Energy Commenters' members, the proposals will mean that more land that their

members use for power plants, transmission line corridors, oil and gas production, renewable energy facilities, or other important projects could be designated, now or in the future, as critical habitat.

The most obvious economic effects of critical habitat designations are increases in the costs of development, losses relating to the inability to proceed with development, and reductions in the size of projects because it will become more difficult to obtain necessary federal permits (*e.g.*, permits for renewable energy projects that may require miles of new transmission lines to connect to the grid and new natural gas generation plants). However, the economic effects of critical habitat designation go well beyond these costs.[6] As the Services well know, the process of land development and land use is complex, and numerous factors are involved. If land is set aside, or if the scale of the project is reduced, due to the presence of designated critical habitat, there could be market and regional effects from the designation. Other land will not necessarily be available or otherwise make up for project site reductions or losses due to designation. Critical habitat designation also impacts the development process, and any associated delay will impose additional costs on industry. The Services do not propose to compensate landowners, industry, or other regulated parties for any of these or other costs resulting from the designation of critical habitat.

The requirement to consult increases the cost to complete a project, and also imposes additional costs upon federal agencies involved with the consultation. Sources of costs to an applicant include the project applicant's own staff resources, and hiring outside consultants and attorneys to assist with the consultation process. For example, prior to the consultation and permitting process, a project applicant or its outside consultants will conduct desktop and field surveys for species and critical habitat. Desktop research is typically based on published information regarding the species and critical habitat features. Field surveys are done to confirm actual impacts as a basis for consultation and permitting. Both desktop and field surveys provide a basis for route and site planning and aid project teams in addressing avoidance, minimization and/or mitigation of impacts. If the Services' proposals are finalized, and the vague critical

[6] *See* David Sunding, "The Economic Impacts of Critical Habitat Designation," Giannini Foundation of Agricultural Economics, *available at giannini.ucop.edu/media/are-update/files/articles/v6n6_3.pdf*. In one example, Dr. Sunding estimates that total economic losses from critical habitat designations could be $1 million per acre of habitat conserved.

habitat designation language adopted, there could be confusion on survey protocols and inconsistent results. Moreover, there could be subjective and inconsistent guidance from the Services and their regional offices and staff. Ultimately, the Energy Commenters would expect an increase in economic burdens due to the need to expend additional resources during the consultation process.

Another direct cost of section 7 consultation is that the Services may require additional mitigation or avoidance measures above that required by the action agency. These requirements may not be established or utilized consistently across the Services' regional offices. For example, in the case of California vernal pools, the Services required that three acres of vernal pools be created for every one filled above the baseline. *See* David Sunding, "The Economic Impacts of Critical Habitat Designation," Giannini Foundation of Agricultural Economics, *available at giannini.ucop.edu/media/are-update/files/articles/v6n6_3.pdf*.

The section 7 consultation process may also force project proponents to redesign their project to avoid modification of certain areas deemed to be critical habitat. This project redesign typically reduces the output of the project. Using the vernal pool case as an example, additional section 7 conservation requirements consisted of avoidance of 85.7 percent of vernal pools located on the site, a condition that allowed only 14.3 percent of the project site to be developed. *Id.* Project redesign imposes additional costs and uncertainty on project proponents and property owners and has other impacts as well, including causing a shortage of available land for important projects.

Critical habitat designation can increase market prices for land not so designated (and, correspondingly, decrease the property value of land so designated), and thus it may impede a project proponent from undertaking a particular enterprise or reduce the scope of a proposed project in order to stay within a budget. It therefore can result in large costs where the numerous regulatory constraints bear on site selection. Moreover, critical habitat designations can create unfair advantages and disadvantages to companies within the same industry where, for example, one project is – and another project is not – subject to regulatory burdens from critical habitat designations. If critical habitat designations under the proposals increase, and additional swaths of land become too expensive or otherwise too difficult to use for commercial or other productive activities, affected entities are likely to find even fewer numbers of comparable sites that are available for their projects. The development process for many of the Energy

Commenters' projects is already highly constrained due to other physical and regulatory limitations on land use.

Critical habitat designation can also delay completion of projects. Delay affects project developers by pushing project deliverables further into the future, and delay of critical power line projects could harm grid resiliency. There is a strong national interest in a reliable and resilient electric grid. The cost impacts of critical habitat designation go well beyond the costs and outcome of the section 7 consultation process. The designation of critical habitat may also affect actions that do not have a federal nexus and thus are not subject to the provisions of section 7 through, for example, property value effects discussed above. Indirect impacts of critical habitat designation are those that may occur through other federal, state, or local actions.

Another concern is that designation of critical habitat, especially under the vague definitions proposed in these rulemakings, can impose costs on project proponents even if their project is not on critical habitat at all. Significant time, expertise, and expense is required to determine whether a parcel is actually included or not, and these additional costs will only rise under the proposals due to the vague and overbroad standards employed. Additional investigation will be required to determine the presence or absence of critical habitat on any given parcel. Thus, the practical effect is that the costs of critical habitat designation extend beyond the section 7 process.

The Services' failure to consider these economic impacts (and others) is a serious legal flaw. The Services should revise the proposals and prepare a draft economic analysis that fully considers the impacts of the revised proposals on regulated parties, the public, and, ultimately, the U.S. economy.

C. Substantial Changes to and Reissuance of the Proposals Are Required.

The Energy Commenters provide a number of recommendations throughout this document, as described below and summarized in the Conclusion. In short, the Energy Commenters recommend:

- The Services should abandon the "conservation value" standard and establish clear limits for adverse modification determinations using an existing, well-established methodology. If the Services insist on proceeding with the "conservation value" standard despite the serious objections explained in these comments, they must narrowly and clearly define the term.

- Areas should not be designated as critical habitat based on potential future effects. Future effects are best addressed through reviews and revisions to critical habitat, not at the time of designation.

- The draft policy should be streamlined, clarified, and provide assurances to participants in CCAAs/SHAs/HCPs that those areas will not later be designated as critical habitat.

- Based on the extent of the changes that are required as a matter of law and sound policy, the Services should reissue the proposed rules and policy after incorporating the recommendations in these comments to allow meaningful and informed public comment.

II. Statutory and Regulatory Background

A. When Congress Amended the ESA in 1978 to Address Designation of Critical Habitat, it Established Limited, Specific Conditions Governing Designation.

When the ESA was enacted in 1973, section 7(a)(2) of the Act required that federal agencies consult with the Services to insure that actions did not jeopardize listed species or "result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical." Pub. L. No. 93-205, 87 Stat. 884 (1973). The Act did not require the Services to designate critical habitat when listing a species as endangered or threatened, nor did it define the term "critical habitat." *Id.*

In 1978, following *TVA v. Hill*, 437 U.S. 153 (1978), in which the discovery of a small endangered fish delayed construction of the Tellico Dam, Congress revised the Act. The 1978 amendments included several new provisions relating to critical habitat, including a new requirement that, "to the maximum extent prudent," the Services "specify any habitat . . . considered to be critical" at the time it proposed to list a species. Pub. L. No. 95-632, 92 Stat. 3764 (1978) (codified at 16 U.S.C. § 1533(a)(3)(A)). Although procedurally tied to the listing of a species, Congress specified separate requirements and limits governing the Services' designation of land as critical habitat. For example, the designation of critical habitat must: (1) be "prudent and determinable," *id*. § 1533(a)(3)(A); (2) "tak[e] into consideration the economic impact" of designation, *id*. § 1533(b)(2); and (3) consider impacts on national security and any other relevant impacts, *id*.

These requirements are unique to critical habitat designation, and demonstrate Congress's intent to limit critical habitat designations and to ensure that the law strikes the proper balance between protecting species and allowing productive human activities. Indeed, the legislative history shows that Congress was concerned that, under then-current regulations, the Services

were treating areas covering the entire range of a species as "critical to the continued existence of a species" and, in particular, noted concern about "the implications of this policy when extremely large land areas are involved in a critical habitat designation." S. Rep. No. 95-874, at 948. For example, Senator Wallop from Wyoming stated:

> I share [Senator Garn's] concern that the entire Colorado River Basin could be, in one fell swoop, declared a critical habitat. I for my State and the Senator from Idaho for his State have expressed continued concern with the attempts of the Fish and Wildlife Service to designate enormous regions of our States as critical habitat for the grizzly bear.

95 Cong. Rec. S2899, at 1105-06 (July 19, 1978) (Statement by Sen. Wallop). Senator Wallop continued that the Senate bill's definition of critical habitat (which is substantially similar to the definition now contained in the law) "goes a long way" toward reducing the "rigidity" of the law. *Id.*

Accordingly, the 1978 amendments defined "critical habitat" narrowly and in detail. Congress described those features that must be found on the land to support designation and the steps that must be met to designate land as critical habitat – particularly unoccupied areas – as follows:

> (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*.

16 U.S.C. § 1532(5) (emphases added). Through this definition, Congress subjected the designation of *occupied* areas as critical habitat to five limits: (1) specific areas within the area occupied by the species; (2) at the time the species is listed; (3) on which are found physical or biological features; (4) essential to conservation of the species; and (5) may require special management considerations or protection.

Congress placed a further limit on the designation of *unoccupied* areas, requiring the Secretary to separately find that such designation is "*essential*" to the conservation of the species.[7] Moreover, Congress defined "conservation" in terms demonstrating that Congress did not intend designation of wide areas to be left fallow or unproductive, but instead *specific areas* where proactive efforts would be undertaken by government and other resource bodies to recover the species:

> … 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*. Such methods and procedures include, but are not limited to, all *activities* associated with *scientific resources management* such as *research, census, law enforcement*, *habitat acquisition and maintenance, propagation, live trapping, and transplantation*, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include *regulated taking*.

16 U.S.C. § 1532(3) (emphasis added).

Further demonstrating Congress's sensitivity to the impacts of designating critical habitat, even where designation would otherwise meet the statutory criteria, Congress provided that the Services may exclude areas where the benefits of exclusion outweigh the benefits of designation *unless* the Services determine that failure to designate the area "will result in the extinction of the species concerned." 16 U.S.C. § 1533(b)(2). Thus, Congress established limited, specific objectives for the designation of critical habitat, placed specific restrictions and limits on the Services governing that designation, and required the Services to consider all impacts – including economic impacts – of the designation of critical habitat. Congress

[7] The legislative history is instructive as to how Congress arrived at the requirement that such designation be "essential" to the conservation of the species. The House bill included a provision allowing for designation of critical habitat to include "specific areas *periodically inhabited by the species* which are outside the geographical area occupied by the species at the time of listing." 95 Cong. Rec. H14104, at 879 (Oct. 14, 1978) (Amendment Offered by Rep. Duncan) (emphasis added), while the Senate bill allowed for designation of critical habitat to include "specific areas outside the geographical area occupied by the species . . . . *into which the species can be expected to expand naturally*." S. 2899 (July 19, 1978) (emphasis added). During Conference, these provisions were removed, and the definition of "critical habitat" was revised to include only those unoccupied areas that are "*essential*" to conservation. Pub. L. No. 95-632, 92 Stat. 3764 (1978) (codified at 16 U.S.C. § 1532(5)).

specifically distinguished between occupied and unoccupied habitat by including more stringent requirements for designation of unoccupied habitat.

Finally, when viewed within the broader context of the overall statute, the limited purpose and function of critical habitat becomes all the more apparent. The overall framework and protection of the ESA focuses on species. Once a species is listed under the ESA, a wide range of protections are triggered. *See, e.g.*, 16 U.S.C. §§ 1533(f) (recovery planning), 1538(a) (prohibitions on take, impact, possession, transporting, etc.), 1535(c) (state cooperative agreements), 1533(d) (proactive regulations), 1533(e) (similarity of appearance measures), 1536(a)(1) (species conservation programs), 1536(a)(2) (interagency consultation), 1533(g) (species monitoring system). By contrast, only one limitation attaches to critical habitat under the ESA: during consultation, the Services must ensure that a proposed federal agency action does not adversely modify designated critical habitat. 16 U.S.C. §1536 (a)(2). Unlike listed species, critical habitat is not subject to the take prohibition, does not trigger a recovery plan, is not subject to monitoring after a species is delisted, and is otherwise not subject to the general statutory framework for listed species – all demonstrating Congress's intent that critical habitat serve a much more limited function under the ESA than the listing of a species.

B. When the Services Promulgated the Critical Habitat Regulations in 1984, They Recognized Many of These Important Statutory Limits.

The Services' 1984 critical habitat regulations provide that critical habitat should not be designated if doing so is not prudent or if critical habitat is not determinable. 50 C.F.R. § 424.12(a). Designation of critical habitat is not *prudent* under the current regulations if designation will increase the threat of taking or other human activity to the species and/or if designation would not be beneficial for the species. *Id.* § 424.12(a)(1). Designation of critical habitat is not *determinable* when information to analyze the impact of the designation is lacking and/or the biological needs of the species are not well known enough to enable identification of an area as critical habitat. *Id.* § 424.12(a)(2). The preamble to the 1984 regulations recognizes that all critical habitat designations must be based on finding that the "designated area contains features that are essential in order to conserve the species concerned. This finding of need will be a part of all designations of critical habitat, whether or not they extend beyond a species' currently occupied range." 49 Fed. Reg. 38,900, 38,903 (Oct. 1, 1984).

The statutory element of "physical or biological features essential to the conservation of the species," 16 U.S.C. § 1532(5), is emphasized in the current regulations by focusing

designations on the presence of PCEs essential to the species: "[w]hen considering the designation of critical habitat, the Secretary *shall focus on the principal biological or physical constituent elements* within the defined area that are essential to the conservation of the species." 50 C.F.R. § 424.12(b) (emphasis added). The regulations further provide that "[k]nown primary constituent elements *shall be listed* with the critical habitat description." *Id.* (emphasis added). The emphasis on the presence of such physical or biological features (or PCEs) for all designated areas, including unoccupied areas, is consistent with the function established by Congress for critical habitat – assessing the potential for adverse modification during section 7 consultation. This emphasis is reflected in the regulatory definition of adverse modification, which directly references the physical or biological features that were the basis for the critical habitat designation: "alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." *Id.* § 402.02.

The regulatory history further demonstrates that the Services intended unoccupied habitat to be designated only when designation of occupied habitat would be inadequate to ensure conservation. 50 C.F.R. § 424.12(e) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by the species *only when a designation limited to its present range would be inadequate* to ensure the conservation of the species.") (emphasis added).

The current regulations reflect not only important limits recognized by the Services following Congress's amendment of the ESA to provide for critical habitat designation – which represented a relatively contemporaneous interpretation of the various statutory limits and thus merits greater deference than a much later and contradictory interpretation – but also decades of regulatory practice and experience by the public. The Services have not sufficiently explained why they are undertaking a wholesale revision of the current regulations, which have been in place for decades.

III. The Proposed Definition of "Adverse Modification" Exceeds the Services' Statutory Authority, Is Contrary to Law, and Is Arbitrarily Vague.

The Services propose to revise the definition of "adverse modification" by introducing the amorphous concept of "conservation value," and allowing for adverse modification determinations based on new or future physical and biological features not present at the time of designation. *See* 79 Fed. Reg. 27,060 (May 12, 2014). Coupled with the Services' vague

interpretation of "appreciably diminish," these proposed revisions go beyond what the ESA authorizes and will result in overly broad adverse modification determinations.

A. The Legislative and Regulatory History Provides Important Context for the Limits Congress Established Governing the Function of Critical Habitat.

Federal agencies are required to "insure," through ESA section 7 consultation with the Services, that their actions (*e.g.*, permits or rulemaking) are not likely to jeopardize the continued existence of a listed species or "result in the destruction or *adverse modification*" of critical habitat. 16 U.S.C. § 1536(a)(2) (emphasis added); 50 C.F.R. § 402.02 (emphasis added). Although there is relatively little substantive discussion of the concept of "adverse modification" in the ESA's legislative history,[8] Congress placed specific limits on the designation of critical habitat.

Prior to Congress amending the ESA to define "critical habitat," the Services had promulgated a regulatory definition of the term: "any land, air, or water area . . . and constituent elements thereof, the loss of which would *appreciably decrease* the likelihood of conserving such species." *See* 43 Fed. Reg. 870, 874-75 (Jan. 4, 1978). In discussions leading up to the 1978 ESA Amendments, Congress expressed concern that the term "appreciably decrease" in the Services' initial regulatory definition of critical habitat could be misinterpreted to allow for designation of "all areas, the loss of which would cause any decrease in the likelihood of conserving the species so long as that decrease would be capable of being perceived or measured." *See* House Report No. 95-1625, at 749 (1978).

The House Committee was concerned that the previous regulatory definition of critical habitat "could conceivably lead to the designation of virtually all of the habitat of a listed species as critical habitat." *Id.* at 749. For this reason, though not adopted, the initial version of H.R.

[8] During Senate consideration of the 1973 ESA, Senator Cook noted that requiring federal agencies to consult to insure that actions "do not jeopardize the continued existence of endangered species" "did not go far enough as it did not protect the habitat of the endangered species," and he was therefore "pleased" that the bill included a provision that would require consultation to insure that actions would not result in the "destruction or modification of the critical habitat." Senate Consideration and Passage of S. 1983, with Amendments, at 397 (July 24, 1973) (Statement of Sen. Cook). The 1973 version of the ESA included the "destruction or modification of critical habitat" language. Pub. L. No. 93-205, 87 Stat. 884 (1973). The 1978 Amendments further narrowed the statutory standard by revising the language to read "destruction or *adverse* modification of critical habitat." Pub. L. No. 95-632, 92 Stat. 3764 (1978) (emphasis added).

14104 included that areas would be designated as critical habitat "only if their loss would *significantly decrease* the likelihood of conserving the species in question." *Id.* (emphasis added). Yet, as discussed below, the Services' proposed interpretation of "appreciably diminish" would result in the same type of sweeping determinations Congress specifically considered and sought to prevent.

In 1978, the Services promulgated regulations defining "destruction or adverse modification" as:

> a direct or indirect alteration of critical habitat which *appreciably diminishes* the value of that habitat for survival and recovery of a listed species. Such alterations include, but are not limited to those diminishing the requirements for survival and recovery listed in § 402.05(b). *There may be many types of activities or programs which could be carried out in critical habitat without causing such diminution*.

43 Fed. Reg. 870, 875 (Jan. 4, 1978) (emphasis added). The Services specifically noted that not every activity conducted in critical habitat areas would rise to the level of "adverse modification." Following the 1978 amendments, the Services modified the definition in the 1986 regulations, defining "destruction or adverse modification" as:

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

51 Fed. Reg. 19,926, 19,958 (June 3, 1986) (codified at 50 C.F.R. § 402.02 (2004)) (emphasis added). A portion of this definition was declared invalid by the U.S. Court of Appeals for the Fifth Circuit in *Sierra Club v. U.S. FWS*, 245 F.3d 434 (5th Cir. 2010), and the U.S. Court of Appeals for the Ninth Circuit in *Gifford Pinchot Task Force v. U.S. FWS*, 378 F.3d 1059 (9th Cir. 2004). Both courts held that the regulation set the threshold too high because it allowed an adverse modification finding only where an alteration appreciably diminished the value of critical habitat for "*both* the survival and recovery of a listed species," while the ESA establishes survival and recovery of listed species as separate goals. *Id.* Addressing these court decisions could have been as simple as deleting "both" and changing the "and" to an "or," rather than undertaking the wholesale and unwarranted changes the Services now propose.

After *Gifford Pinchot,* FWS issued guidance directing its regions not to use the regulatory definition of "destruction or adverse modification," but to rely instead on an analytical framework based on the language of the ESA itself, which requires that critical habitat be designated to achieve the twin goals of survival and conservation (*i.e.*, recovery) of listed species.[9] Thus, under current practice, the Services will find "adverse modification" if the impacts of a proposed action on a species' designated critical habitat would appreciably diminish the value of the habitat for *either* the survival or the recovery of the species.[10] The definition's focus on physical or biological features "that were the basis for designating the habitat to be critical" remains valid and appropriate under the current regulations.

B. The Proposed Adverse Modification Definition Is a Significant Departure from the Current Regulations.

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

> Destruction or adverse modification means a direct or indirect alteration that *appreciably diminishes* the *conservation value* of critical habitat for listed species. Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery.

79 Fed. Reg. at 27,061 (emphasis added).

The Services explain that:

> In consultation on a federal action, the Services will (1) determine the conservation value of the critical habitat that may be affected by the action; and (2) examine whether the effects of the action "appreciably diminish" that value of the critical habitat as a whole (i.e., whether recovery will be more difficult or less likely).

Id. at 27,064.

The Services' proposed definition replaces the concept of diminishment of the value of critical habitat for "survival and recovery," and the emphasis on the physical or biological features that were the basis for critical habitat designation, with a broad concept of diminishment of the "conservation value" of critical habitat. 79 Fed. Reg. at 27,061. The Services do not

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

[10] *Id.*

propose a definition for "conservation value." According to the preamble, however, "conservation value" is "the contribution the critical habitat provides, or has the ability to provide, to the recovery of the species." *Id*. at 27,062. The variables encompassing "conservation value" include: life-history needs of the species being provided for by critical habitat and current condition of the critical habitat, which requires consideration of the quantity and quality of features and habitat necessary to support the life-history needs of the species for recovery and the ability (or likelihood) for the critical habitat to fulfill its role in the recovery of the species. The term "conservation value" is both broad and undefined, leaving the regulated public to attempt to discern, the Services to interpret as they choose, and project opponents and litigants to argue as best suits their objectives. This broad, vague standard is inconsistent with the Services' previous definitions and interpretations and their view that "[t]here may be many types of activities or programs which could be carried out in critical habitat without causing such diminution." *See* 43 Fed. Reg. at 875. Consequently, the Services and the regulated public will have to interpret the meaning and define the application of a new term, which introduces further confusion, rather than clarity and certainty, into the regulations.

C. The "Conservation Value" Standard Violates the ESA, Is Overbroad, and Should Not Be Adopted.

In interpreting "conservation value," the Services rely on a standard set forth by the U.S. Court of Appeals for the Ninth Circuit in *NWF v. NMFS*, 543 F.3d 917 (9th Cir. 2008). The *NWF v. NMFS* decision was in the context of ESA section 7(a)(2) consultation and held that, for an action "to jeopardize" listed species, it has to cause "some deterioration in the species pre-action condition."[11] In the proposal, the Services analogize to this standard and state that "[w]e think the same is true for a finding of adverse modification (or destruction) of critical habitat – that is, in order for an action to be found to adversely modify critical habitat, it must in some way

[11] *NWF v. NMFS* stands for the proposition that a federal action that does not worsen the condition of the species cannot jeopardize listed species. The Ninth Circuit emphasized that action agencies are not required to include the "entire environmental baseline in the 'agency action' subject to review." 524 F.3d at 930. Instead, agencies are required to evaluate the effects of actions "within the context of other existing human activities that impact the listed species." *Id*. Thus, the proper focus is "whether the action effects, when added to the underlying baseline conditions, would tip the species into jeopardy." *Id.* at 929. Regardless of whether baseline conditions cause jeopardy to the species, the effect of the agency action must further jeopardize the species. *Id*.

cause the deterioration of the critical habitat's pre-action condition, which includes its ability to provide recovery support to the species based on ongoing ecological processes." 79 Fed. Reg. at 27,063.

The Services explain that determination of "conservation value" "is based not only on the current status of the critical habitat" but also includes "consideration of the likely capability, in the foreseeable future, of the critical habitat to support the species' recovery given the backdrop of past and present actions that may impede formation of the optimal successional stage or otherwise degrade the critical habitat." 79 Fed. Reg. at 27,062. Therefore, the Services state, "an action that would preclude or significantly delay the development or restoration of the physical or biological features needed to achieve that capability . . . is likely to result in destruction or adverse modification." *Id.* According to the proposed language, physical or biological features do not need to be present for adverse modification to occur. Preclusion or delay in the development of physical or biological features needed for recovery could be adverse modification. The inclusion of the term "conservation value" and the Services' proposed interpretation of that term are unsupportable for several reasons.

First, the proposal would establish a broad adverse modification standard with almost no limiting principle or accepted methodology. The Supreme Court's opinion in *UARG v. EPA* counsels that a statutory provision should not be interpreted as granting the agencies such essentially limitless authority. *UARG v. EPA,* 134 S. Ct. 2427, 2444 (2014). The Services' broad interpretation of "conservation value" focuses on effects that preclude or delay development of physical or biological features that support life history needs of species – in essence, anything that might slow an area of land to transitioning over time to a state beneficial to a species. Such a standard is without bounds and contrary to law. Virtually any area has the "potential to support" physical or biological features that support the life history needs of a species, especially in light of the Services' willingness to include areas "degraded by human activity." 79 Fed. Reg. at 27,061. Virtually any action, including an action that simply maintains the status quo (such as grounds maintenance), has the potential to "delay" the development of features. Accordingly, the potential for an adverse modification finding is nearly limitless.

Second, including the contribution critical habitat has to "the ability to provide" in the concept of "conservation value" introduces an element of speculation into "adverse

modification" determinations. Almost any area could be deemed to receive some "contribution" from critical habitat. This standard invites speculation about such potential contributions, which is contrary to the ESA requirement that agencies "use the best scientific and commercial data available" when conducting section 7 consultation. 16 U.S.C. § 1536(a)(2). *See also Bennett v. Spear*, 520 U.S. 154, 176 (1997) (confirming that the ESA must not be "implemented haphazardly, on the basis of speculation or surmise").

Third, this proposal creates a moving target whereby an action that would not be deemed adverse modification one day may be deemed adverse modification the next. The preamble states, "[w]ith time, new information may become available and enable us to refine our determination of the conservation value of the critical habitat." 79 Fed. Reg. at 27,062. Such uncertainty is arbitrary, will cause confusion and delay in section 7 consultations, and will lead the Services to violate basic administrative law principles if it makes adverse modification determinations based on factors that were not the basis for designation of the critical habitat.

The proposed "conservation value" standard is overbroad and violates the ESA. In practice, the broad interpretation would create significant uncertainty for the regulated public. This interpretation stands in sharp contrast to the specific definition of "conservation" used by Congress in the ESA, which focuses on proactive efforts by the government and other *actions* undertaken to protect or help a species, not on rendering land fallow in the hopes that it may become useful to species in the future. If the Services intend to proceed with the "conservation value" standard, they must narrowly and clearly define the term to ensure predictable, clear and statutorily supported application.

D. Finding Adverse Modification Based on New or Future Physical and Biological Features Is Arbitrary.

The Services propose to find adverse modification based on future, speculative effects. The proposed definition replaces the previous definition's inclusion of "alterations that adversely modify physical or biological features that were basis for determining the habitat to be critical," with the virtually unlimited concept of "effects that *preclude or delay development* of physical or biological features *that support life history needs of species.*" 79 Fed. Reg. at 27,061 (emphasis added). The Services state that an adverse modification finding may be made *even if* the area currently does not have the requisite "physical or biological features" and is "degraded by human activity," based on its "potential to support" those features in the future and the "delay" an action would cause to the development of those features. *Id.*

This approach would allow the Services to make adverse modification decisions based solely on impacts to unoccupied areas that are currently degraded by human activities and have no physical or biological features that support the life history needs of the species based solely on the potential of the area to support the future recovery of the species.[12]

Adverse modification based on new or future physical and biological features is arbitrary and inconsistent with the record supporting designation of critical habitat. For occupied areas, such physical and biological features must "*be found*" and in existence at the time of designation, not be based on the potential for such features to be found at some point in the future. 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Consideration of new physical and biological features of previously designated critical habitat during section 7(a)(2) consultation violates procedural and substantive provisions of the Administrative Procedure Act ("APA") because it is contrary to the basis for current designations and would effectively amend the basis for those designations without undertaking an APA-compliant rulemaking.[13] Consideration of future biological features also entails speculation, which is contrary to the "best scientific data available" standard and the Supreme Court's caution in *Bennett v. Spear* that the ESA must not be "implemented haphazardly, on the basis of speculation or surmise." 520 U.S. 154, 176.

E. The Proposed Standard for Determining "Appreciably Diminish" Is Vague and Contrary to Congressional Intent, Prior Regulatory Definitions of Adverse Modification, and Judicial Holdings.

The Services propose to define "destruction or adverse modification" as "a direct or indirect alteration that *appreciably diminishes* the conservation value of critical habitat for listed species . . . ." 79 Fed. Reg. at 27,061 (emphasis added). Currently, "appreciably diminish" means "to *considerably reduce* the capability of designated or proposed critical habitat to satisfy

[12] To the extent that designation of such an area would serve only experimental populations of a listed species, *see* 16 U.S.C. § 1539(j), critical habitat cannot be established for experimental populations unless such population is specifically found to be essential to the continued existence of a species. *Id.* § 1539(j)(2)(C)(ii). Moreover, Congress intended that regulations promulgated by the Services to designate experimental populations "should be viewed as an agreement among the Federal agencies, the state fish and wildlife agencies and any landowners involved." H.R. Rep. No. 567, 97th Cong., 2d Sess. Pt. 1 at 33-34 (1982).

[13] *See, e.g., Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 396 (D.C. Cir. 1973) ("[A] significant difference between techniques used by the agency in arriving at standards, and requirements presently prescribed for determining compliance with standards, raises questions about the validity of the standard.").

the requirements essential to both the survival and recovery of a listed species." FWS and NMFS, Joint Consultation Handbook at 4-36 (March 1998) (emphasis added). In their initial definition of adverse modification, the Services defined the term as an "alteration of critical habitat which *appreciably diminishes* the value of that habitat for survival and recovery of a listed species," and specifically stated that "[t]here may be many types of activities or programs which could be carried out in critical habitat without causing such diminution." 43 Fed. Reg. at 875.

Under the current proposal, when determining whether an action "appreciably diminishes" the value of critical habitat, the relevant inquiry will be whether there is "a diminishment to the value of the critical habitat that has some relevance because we can *recognize or grasp the quality, significance, magnitude, or worth* of the diminishment in a way that affects the conservation value of the critical habitat." 73 Fed. Reg. at 27,063 (emphasis added). The Services further state that "the question is whether the 'effects of the action' will appreciably diminish the conservation value of the critical habitat as a whole, not just in the area where the action takes place." *Id.* at 27,063. The Services will consider whether "recovery [will] be delayed, … more difficult, and … less likely." *Id.* at 27,064. Thus, under the proposed standard, the Services will look at aggregate effects of various actions on the conservation value of the critical habitat. *Id.*

The proposed standard is overbroad. The Services' new interpretation of "adverse modification" would allow for adverse modification findings based on any measurable effect. There would be few activities or programs that would not meet such a low standard of measureable effect. Mere recognition or discernibility of an effect is not enough to constitute "adverse modification." Such an interpretation is contrary to Congress's intent to strictly limit designations of critical habitat. Moreover, the proposed interpretation of "appreciably diminish" is inconsistent with case law that has upheld "no adverse modification determinations" in instances where there was a discernable loss in critical habitat. Indeed, courts have held that "[a]n area of a species' critical habitat can be *destroyed* without appreciably diminishing the value of critical habitat for the species' survival or recovery." *Butte Environmental Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 948 (9th Cir. 2010) (emphasis added) (finding FWS was not arbitrary in its no adverse modification determination where a portion of critical habitat for vernal pool fairy shrimp, vernal pool tadpole shrimp, and slender Orcutt grass would be

destroyed). *See also Forest Guardians v. Veneman*, 392 F. Supp. 2d 1082, 1092 (D. Ariz. 2005) (finding no adverse modification from a discernable loss in fairy shrimp habitat). The Services' proposed standard, which would allow for adverse modification determinations wherever there is some discernable diminishment in critical habitat, directly contradicts these holdings.

Even if the Services could use this flawed interpretation of "appreciably" to apply the adverse modification standard, they could not apply this interpretation to the "jeopardize the continued existence of" standard. 79 Fed. Reg. at 27,064 (noting that the Services intend to use this interpretation of "appreciably" when evaluating whether an action will "jeopardize the continued existence of" species). A new interpretation of the jeopardy standard incorporating the Services' new definition of the term "appreciably" is beyond the scope of this rulemaking. Nonetheless, according to the preamble, the proper inquiry for a jeopardy analysis will be, "[I]s the reduction one we can recognize or grasp the quality, significance, magnitude, or worth of in a way that makes a difference to the likely survival and recovery of the listed species?" *Id.* This goes well beyond the Services' current interpretation, which provides that the jeopardy analysis requires evaluation of whether "the species can be expected to both survive and recover." Consultation Handbook at 4-37. Nor does the proposed interpretation of "appreciably" make sense in the jeopardy context. Mere recognition of a change in population, for example, is not sufficient to establish jeopardy for that population. Thus, the Services should not apply their new interpretation of "appreciably" to their analysis of whether an action will "jeopardize the continued existence" of listed species, or at least not before undertaking a proper rulemaking consistent with the requirements of the APA.

In conclusion, the Services may not interpret "appreciably diminish" to mean any measurable or recognizable effect on critical habitat. Such an interpretation is far too broad, would lead to a situation in which any activity on critical habitat would result in adverse modification, and is contrary to Congressional intent, the ESA, and case law.

F. The Proposed Revisions Raise Retroactivity Concerns.

The Services' proposals assert that "[n]othing in these revised regulations is intended to require (now or at such time as these regulations may become final) that any previously completed biological opinions must be reevaluated on this basis." 79 Fed. Reg. at 27,062; 79 Fed. Reg. at 27,068. However, it is unclear how the proposed rules would apply to ongoing or

already completed consultations, or what the Services would do to ensure against improper retroactive application of the rules.

The proposals would create a situation where the Services will be applying the revised adverse modification standard to critical habitat that was designated under former regulatory criteria. For example, a particular area that was designated under the current regulatory framework would have been designated based on the presence of PCEs with the idea that adverse impacts to those PCEs could result in adverse modification. However, because the Services have removed the PCEs concept in the proposal, and, instead, are designating critical habitat based on potential effects to biological and physical features that may or may not have been absent at the time of designation, future adverse modification determinations are likely to not correlate with the original basis for the designation.

As discussed above, *Portland Cement* counsels that it is arbitrary and capricious to require compliance with a standard that is inconsistent with the original establishment of that standard. *See Portland Cement*, 486 F.2d at 396. Applying a new, revised adverse modification standard in section 7 consultation to critical habitat that was designated under a different regime raises questions about the new standard and is likely to result in a significant amount of confusion during section 7 consultation. As to completed consultations, re-initiation would be contrary to the principle that rules should apply prospectively only. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 215-16 (1988). With respect to consultations that are already underway at the time the rule is finalized, the new rules should not apply because they will cause confusion, the development of additional data and analysis, and thus delays that are completely contrary to the time limits on consultation specifically imposed by Congress.

G. The Implications for Oil and Gas, Electric Utility, Land Development, and Other Key Industries Are Substantial.

The Services have signaled their intent to make adverse modification a more searching inquiry in the section 7 consultation process. The proposal allows for a more expansive interpretation of the key term "adverse modification," gives the Services substantial discretion in interpreting the term, and suggests that the Services would take the position that adverse modification would result from any recognizable effect to critical habitat that has the potential to delay the development of physical or biological features. As a result, federal agency action subject to section 7 consultation is much more likely to be found by the Services to result in adverse modification of critical habitat. If a biological opinion reaches an adverse modification

conclusion, the Services must suggest reasonable and prudent alternatives ("RPAs"), such as those measures that avoid, minimize or mitigate the impacts to critical habitat. Currently, there are inconsistencies within the Services on the development, necessity, and effectiveness of RPAs. Nonetheless, such mitigation often requires costly and time consuming changes to the proposed project.[14]

Virtually every activity conducted on critical habitat could be argued to trigger an adverse modification finding. Any required project changes that may result from consultation and findings of adverse modification will make it more expensive, onerous, and difficult for the Energy Commenters to conduct their critical maintenance, compliance, repair, and expansion projects to supply the nation's energy needs.

Furthermore, the proposed revisions to the adverse modification definition will result in more confusion and less predictability for section 7 consultation on the Energy Commenters' projects. Because the standard is extremely vague and broad, whether the Services determine that a proposed action will result in adverse modification could vary, based on the particular regulator reviewing the issue. For example, if a gas company wants to run a transmission line across land that is not currently occupied by any listed species and has no physical or biological features essential to the conservation of species, but nonetheless is listed as critical habitat because the land might develop these characteristics and species might go there in the future, the company must figure out what it needs to do to avoid an adverse modification determination. This determination is not only daunting in and of itself (*e.g.*, should the mitigation be the preservation of land with no current conservation value but which may transition to potential critical habitat over the same time frame as the property subject to the proposed impacts), but

[14] For example, in its recent consultation with EPA regarding the Pesticide General Permit, NMFS provided a multi-pronged RPA that included measures such as a prohibition on the application of pesticide products within specified buffers of salmonid habitats. NMFS, Biological Opinion on the Effects of the Proposed Registration of Pesticide Products Containing Carbaryl, Carbofuran, and Methomyl (Apr. 2009), *available at* http://www.nmfs.noaa.gov/pr/pdfs/carbamate.pdf. EPA agreed to implement these measures identified by NMFS, with some modifications, to avoid both jeopardy and adverse modification of critical habitat. Letter from Richard P. Keigwin, Director, USEPA Pesticide Re-evaluation Division, to James H. Lecky, Director, NMFS Office of Protected Resources (May 14, 2010), *available at* http://www.nmfs.noaa.gov/pr/pdfs/consultations/epa_response_biop2.pdf.

ultimately may mean modifying the project, finding a new location for the transmission line, or agreeing to higher mitigation costs.

In addition, the proposed adverse modification standard could increase the Services' (and the Energy Commenters' members') vulnerability to litigation. Because the standard is vague and broad, there will be room for wide interpretation in its application, which is likely to result in challenges to the results or adequacy of section 7 consultation. Such litigation is costly, and often significantly delays the projects at issue. Where the Energy Commenters' projects involve critical upgrades to infrastructure, it is important that the Energy Commenters are able to rely on receiving their necessary authorizations in a timely manner to ensure that the work can be done on a predictable schedule.

IV. The Proposed Changes to Critical Habitat Designation Criteria Exceed the Services' Statutory Authority, Are Contrary to Law, and Are Arbitrarily Vague

A. Congress Established Limited Objectives for – and Placed Significant Limits on – the Designation of Critical Habitat.

The Services' proposal would amend the criteria for designating critical habitat, resulting in broader critical habitat designations of areas occupied by the species that go well beyond what was intended by Congress, and even beyond the areas the Services have historically deemed to be critical habitat. Section 4 of the ESA requires the Services to designate critical habitat for each newly listed species "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3)(A). As described above, Congress set forth specific considerations and requirements governing the designation of land as critical habitat including:

- the designation must be "prudent and determinable." *Id.* § 1533(a)(3)(A).
- the designation must "tak[e] into consideration the economic impact" of the designation. *Id*. § 1533(b)(2).
- the designation must consider impacts on national security and any other relevant impacts. *Id*. § 1533(b)(2).

Moreover, the legislative history and statute confirm that Congress defined "critical habitat" to carefully circumscribe those features that must be found on the land to support designation and the steps that must be met to designate unoccupied land as critical habitat. According to the statute, critical habitat is:

> (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.

16 U.S.C. § 1532(5).

Congress defined "conservation" in terms demonstrating that Congress did not have in mind designation of wide areas to be left fallow or unproductive, but instead specific areas where action would be taken by government and other resource bodies to recover the species:

> 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. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

16 U.S.C. § 1532(3).

Congress also provided that the Services may exclude areas from the designation of critical habitat where the benefits of exclusion outweigh the benefits of designation unless the Services determine that failure to designate the area "will result in the extinction of the species concerned." *Id*. § 1533(b)(2).

B. The Proposed Rule's Attempt to Substantially Expand the Criteria for Designation of Critical Habitat Is Arbitrary and Contrary to Law.

The proposed changes to the procedures for designating critical habitat would afford the Services far greater latitude in designating critical habitat and result in more frequent and larger designations of critical habitat than permitted under the ESA. The proposed rule states the Services' intent to increasingly designate unoccupied areas where, for example, the Services find that the area will become "essential to the species" as a result of projected local climate change impacts (such as warming conditions). This approach is arbitrary, contrary to law, and will lead to onerous regulatory burdens on the public and regulators alike.

1. By Removing "Primary Constituent Elements" and Adding a New Definition of "Physical or Biological Features," the Proposed Rule Provides an Impermissibly Broad Standard.

The proposed rule would abandon the requirement that the Secretary focus upon and list PCEs when designating critical habitat. *See* 79 Fed. Reg. at 27,070. PCEs are quantifiable, scientifically-based criteria that provide a consistent, objective direct measure of potential critical habitat. Instead, the proposed rule adopts a broader, less objective requirement to identify "physical and biological features essential to the conservation of the species," which can include "dynamic or ephemeral" habitat features. *Id.* Thus, physical and biological features essential to a species would not need to be present so long as the habitat has the potential to support such features under the proposed rule.

The Act provides for designation of critical habitat in areas occupied by the species "on which *are found* those physical or biological features (I) essential to the conservation of the species and (ii) that may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i) (emphasis added). The Services' current regulations provide that, "[w]hen considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species." 50 C.F.R. § 424.12(b). Thus, the current regulations emphasize identification and listing of PCEs, which are defined as including roost sites, nesting grounds, spawning sites, water quality, soil type, etc. *Id.*

The proposal defines "physical or biological features" as "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." 79 Fed. Reg. at 27,069. According to the preamble, physical or biological features may include "habitat characteristics that support *ephemeral or dynamic habitat conditions*," such as vegetation that exists only 5 to 15 years after a flood event. *Id.* at 27,069. Thus, the Services could conclude that essential physical or biological features exist in a specific area, even if the features have been absent or are not expected to be present for years. *See id.* at 27,070. The proposed rule would allow for the designation of areas with the absence of physical and biological features based on a "reasonable expectation of that habitat occurring again." *Id.* at 27,070.

Designation of areas based on potential future occurrence of features is contrary to the Act's definition of critical habitat, which allows for designation of occupied areas on which

essential physical or biological features "are found." *See* 16 U.S.C. § 1532(5)(A)(i). The Act does not allow designations where such features *may* be found in the future. In fact, courts have rejected such a practice in the past. *See, e.g., National Home Builders Ass'n v. FWS*, 268 F. Supp. 2d 1197, 1216-17 (E.D. Cal. 2003) (invalidating FWS designation of areas "likely to develop essential habitat components, but do not contain them now," as occupied critical habitat for the Alameda whipsnake); *Cape Hatteras*, 344 F. Supp. 2d at 122–23 (vacating critical habitat that included areas FWS determined to be "occupied" by the piping plover but on which PCEs were not "found"); *Otay Mesa Property v. Dept. of Interior*, 646 F. 3d 914, 918 (D.C. Cir. 2011) (vacating designation of property as critical habitat because record did not support FWS's determination that property at issue was "occupied" at time of listing); *Alaska Oil and Gas Ass'n v. Salazar*, 916 F. Supp. 2d at 1001 (vacating designation of critical habitat for polar bear because Service had not established that such areas contained essential features, thereby violating the requirement that essential features be *found* in areas *before* designating them as critical habitat). The *Cape Hatteras* court concluded "[t]hat PCEs must be 'found' on an area is prerequisite to the designation of that area as critical habitat. The Service's argued-for interpretation, essentially that designation is proper merely if PCEs will likely be found in the future, is simply beyond the pale of the statute." 344 F. Supp. 2d at 123. The statute and case law are clear – the Services may not lawfully designate critical habitat based on features not actually present within the area at the time of designation.

In addition, the ESA requires that critical habitat determinations be based on the "best scientific data available." 16 U.S.C. § 1533(b)(2). Allowing for designation of areas based on physical or biological features that have been absent for years and may or may not occur again will result in overly broad critical habitat designations, is inconsistent with the ESA and case law and is speculative. *Bennett v. Spear*, 520 U.S. at 176.

In addition, the proposed rule would impermissibly allow the Secretary to ignore site-specific evidence that physical and biological features are not found on a particular property and designate critical habitat in the absence of features that are essential for the conservation of the species. Under the proposed revision, the Services would still identify physical and biological features essential for the conservation of the species, but only at a "scale determined by the Secretary to be appropriate." 79 Fed. Reg. at 27,071. In making this determination, the Secretary "may consider, among other things, the life history of the species, the scales at which

data are available, and biological or geophysical boundaries (such as watersheds)." *Id.* Thus, the proposed rule reserves broad discretion for the Services in determining the scope and "scale" of critical habitat designations. Areas could be designated as critical habitat despite having no features essential to a species simply because they fall within a larger area that has such features on a broader scale. This is both arbitrary and contrary to the "best available science" standard mandated by the ESA and the Supreme Court.

In sum, the proposed rule establishes an especially broad basis for designating critical habitat, which far exceeds the lines drawn by Congress with respect to "physical or biological features" found on occupied habitat and essential to actual "conservation" actions benefiting the species. In tandem with the Services' elimination of PCEs, the burdens on the regulated public will be extensive because the new standard will result in sweeping critical habitat designations and increased confusion during section 7 consultation.

2. The Proposed Rule's New Definition of "Geographical Area Occupied by the Species" Is Overbroad.

The current definition of critical habitat does not include a definition of "geographical areas occupied by the species." The proposed rule, for the first time, defines this term as:

> the geographical area which may be delineated around the 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 on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

79 Fed. Reg. at 27,069. This definition does not limit critical habitat to the set of areas occupied by the species. Rather, in addition to the areas actually occupied by the species, it includes a wider area *around* the species' occurrences at the time of listing and areas that are used only periodically or temporarily by the species.

The preamble asserts that "occupied" areas "include areas 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." 79 Fed. Reg. at 27,069. But designating areas where species are not actually found as occupied critical habitat areas goes beyond what the statute allows. In the ESA, Congress specified that areas *outside* the geographical area occupied by the species may be designated only upon a separate, specific,

additional determination by the Secretary that doing so is essential to the conservation of the species.[15]

The Services claim that this definition is consistent with the U.S. Court of Appeals for the Ninth Circuit's decision in *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010). The Services characterize *Arizona Cattle Growers* as holding that temporary presence is a sufficient basis to include an area as designated critical habitat. *See* 79 Fed. Reg. at 27,069. Yet, the Services' proposed definition for areas occupied by the species goes well beyond *Arizona Cattle Growers*, which held that limiting areas "occupied" by the species to areas where the species "resides" was too narrow and "would exclude areas likely to be *regularly used* by the species." 606 F.3d at 1165 (emphasis added). The court concluded that "FWS has authority to designate as 'occupied' areas that the [species] uses *with sufficient regularity that it is likely to be present during any reasonable span of time*." *Id.* (emphasis added).[16] But, in the proposals, the Services ignore this limiting language and instead propose to designate habitat as occupied "even if *not* used on a regular basis." *See* 79 Fed. Reg. at 27,069 (emphasis added).

Rather than limit "occupied" critical habitat to areas that are likely to be used by species with some regularity, as the statute and *Arizona Cattle Growers'* require, the Services' circle-drawing approach would necessarily include areas not (and likely never) occupied by the species, such as ridgelines between valleys. This proposal is therefore unsupported by the statute or the case law.

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[15] The critical habitat definition in the House bill included the language "specific areas *periodically inhabited by the species* which are outside the geographic area occupied by the species . . . essential for the conservation of the species." 95 Cong. Rec. H14104, at 879 (Oct. 14, 1978) (Amendment Offered by Rep. Duncan) (emphasis added).

[16] *See also Cape Hatteras Access Preservation Alliance v. Dept. of the Interior*, 344 F. Supp. 2d 108 (2004) (deferring to the FWS interpretation of areas "occupied" by the piping plover where the Service looked for areas with "consistent use," where "observations over more than one wintering season" demonstrated plovers' presence); *Alaska Oil and Gas Ass'n v. Salazar*, 916 F. Supp. 2d 974, 988-89 (D. Alaska 2013) (deferring to FWS interpretation of areas "occupied" by the polar bear as "areas that the [species] uses with sufficient regularity that it is likely to be present during any reasonable span of time").

3. The Proposed Definition of "Special Management Considerations or Protection" Fails To Acknowledge the Statutory Purpose of Critical Habitat Designation in the First Place.

In determining what areas should be designated as critical habitat under the ESA, the Services must consider "those physical and biological features that are essential to the conservation of a given species and *that may require special management considerations or protection*." 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Consistent with Congress's definition of "conservation," the Services currently define "special management considerations or protection" as "any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species." 50 C.F.R. § 424.02(j).

The Services propose to revise the definition of "special management or protection" to insert the words "essential to" and delete "of the environment." The preamble states, "[w]e 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." 79 Fed. Reg. at 27,070. The Services further state that, in light of the court decision in *Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090 (D. Ariz. 2003), and *Cape Hatteras*, 344 F. Supp. 2d 108, the Services no longer interpret the statute as requiring special management only if whatever management in place was inadequate and additional management is needed. 79 Fed. Reg. at 27,070. Nor will the Services interpret the statute to mean that a feature must currently require special management considerations or protections – only that it *may* require special management to meet the definition of "critical habitat." *Id.* Rather, the consideration of whether features in an area may require special management or protection will be made "independent of whether any form of management or protection occurs in the area" or "whether such management or protection is adequate." 79 Fed. Reg. at 27,070. Although there could be circumstances where essential features do not require special management because there are no applicable threats to the features that have to be managed for the conservation of the species, the Services "expect such circumstances to be rare." *Id.*

The Services' statements indicate that they intend to pay little attention to the requirement that areas should be designated as critical habitat only if they may require "special management considerations or protection." This proposed approach is contrary to the wording of the statute and to relevant case law, which recognizes that the Services cannot simply presume that the special management considerations or protections requirement is met for designation

purposes. "While the word 'may' indicates that the requirement for special considerations or protection need not be immediate," *Cape Hatteras*, 344 F. Supp. 2d at 123-24, "[u]nder the express language of the statute, particularly the use of the conjunction 'and,' it is mandatory that the specific area designated have features which, in the future, may require special consideration or protection." *Home Builders*, 268 F. Supp. 2d at 1218.

Moreover, the district court's decision in *Center for Biological Diversity v. Norton* fails to account for the remainder of the Act's emphasis on other management and fails to give any meaning to the term "special." The term "special" means additional or incremental and must take account of efficacy of existing management, which, if adequate, should mean that no critical habitat designation is needed. It is contrary to the ESA to say that an area which is adequately managed may require "special management consideration," unless there is a documented basis for believing the current management will fail. Thus, the Services' interpretation ignores the structure of the ESA, which takes account of state management in listing and strongly encourages state and private conservation efforts.

The Services must give this requirement meaningful consideration. Prior to designating a particular area as critical habitat, the Services must make a finding that the area in question might require special management considerations now or in the reasonably foreseeable future and that current or projected management will not be adequate to protect the species.[17] By essentially eliminating a criterion set by Congress for designating areas occupied by the species as critical habitat, the Services fail to acknowledge the statutory purpose of critical habitat designation – designation of areas for the purpose of conservation.

4. The Services' Interpretation of "Interbreeds When Mature" Is Unlawful.

The ESA defines the term "species" to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which *interbreeds when mature*." 16 U.S.C. § 1532(16) (emphasis added). The term "interbreeds when mature" is not defined in the statute or the regulations. The Services do not propose to

[17] *See Cape Hatteras*, 344 F. Supp. 2d at 124 (vacating and remanding critical habitat determination where FWS failed to assess special management or protection "in any meaningful way"); *Home Builders*, 268 F. Supp. 2d at 1218 (vacating and remanding critical habitat determination where FWS failed to make a finding that the area in question might require special management considerations and protections at some time in the future).

make any revisions to the regulations to clarify this ambiguous term; instead, in the preamble, the Services "inform the public of [their] longstanding interpretation of this phrase." 79 Fed. Reg. at 27,070. According to the Services, "interbreeds when mature" means that a distinct population segment ("DPS") must consist of "members of the same species or subspecies that in the wild that would be biologically capable of interbreeding if given the opportunity but all members need not actually interbreed with each other." *Id.*

This interpretation allows for listing of a broader DPS made up of different populations that do not actually interbreed and effectively removes the "interbreeds when mature" requirement from the statutory definition of DPS. There is no legal support for this interpretation, which goes further than what Congress intended: species that are actually interbreeding, not "capable of interbreeding." Again, the Services seek to expand definitions of key concepts beyond what the ESA allows to enable broader critical habitat designations.

C. The Proposal Inappropriately Attempts to Designate Unoccupied Areas as Critical Habitat Based on Potential Effects, Including Climate Change.

The preamble indicates that the Services increasingly intend to designate specific areas not actually occupied by the species at the time of listing. *See* 79 Fed. Reg. at 27,073. Thus, the proposal removes the presumption in the existing regulations that unoccupied areas will only be designated as critical habitat where the species' present range would be "inadequate" to ensure the conservation of the species. Designating areas as critical habitat based on potential effects, including climate change, results in impermissibly broad designations of critical habitat and is contrary to law.

1. The Proposed Revisions Arbitrarily Alter the Services' Prior Interpretation That Designation of Occupied Areas Must Be Inadequate in Order for Unoccupied Areas To Be Essential.

The current regulations provide, "[t]he Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). The Services now assert that the provision is "unnecessary" and "limiting," and thus propose to remove it. *See* 79 Fed. Reg. at 27,073.

The Energy Commenters oppose this revision. As it relates to unoccupied areas, the term "essential" means that without those areas being designated (*i.e.*, if only occupied areas are designated), the remaining designated habitat would not be adequate for conservation of the

species. Thus, to determine whether unoccupied areas are "essential" to the conservation of the species, the Services must first consider occupied habitat. The proposed revision ignores the current regulatory requirement that unoccupied habitat is essential only if occupied habitat is inadequate. The Ninth Circuit in *Arizona Cattle Growers* recognized the distinction in the ESA between occupied and unoccupied areas, noting that the ESA imposes a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species." 606 F.3d at 1163; *see also Cape Hatteras*, 344 F. Supp. 2d at 125 ("Designation of unoccupied land is a more extraordinary event than designation of occupied lands."). The Services' proposed new approach is contrary to law. Current regulations require the Services to first establish that designation of occupied areas is insufficient before considering the designation of unoccupied areas because if designation of occupied areas would be adequate, then the unoccupied areas cannot be "essential."

2. The Designation of Unoccupied Areas Based on Potential To Support Life Needs Is Unlawful.

Under the proposed regulation, the Services will determine whether unoccupied areas are essential for the conservation of the species by considering "the life history, status, and conservation needs of the species." 79 Fed. Reg. at 27,073. The Services state that "unoccupied areas must be essential for the conservation of the species, but need not have the features essential to the conservation of the species . . . ." *Id.* Therefore, the Services assert that they may designate 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 . . . This proposed section is intended to be flexible." *Id.*

With this proposal and the "flexible" standard, the Services inappropriately attempt to make it easier to support a finding that unoccupied areas should be designated. This is contrary to the ESA and case law.[18] An interpretation that ignores or shifts this dynamic would "nullify

[18] Moreover, this standard for the designation of unoccupied areas is essentially limitless. The Supreme Court's recent decision in *UARG v. EPA* explains that the Supreme Court expects Congress to provide a clear directive if it intends to allow for such vast regulatory authority. 134 S. Ct. 2427, 2444 (2014). In *UARG*, the Court held that despite the fact that the law may assume a general definition (or an "act-wide" definition in the case of the Clean Air Act), it may be appropriate to infer a more narrow definition in the context of a specific provision. *Id.* at 2442

the distinction between occupied and unoccupied land, a distinction Congress expressly included within the ESA." *Home Builders*, 268 F. Supp. at 1221.

In addition, designating unoccupied areas based on potential circumstances is speculative and not based on the "best available science" as the Act and the Supreme Court require. *See Bennett v. Spear*, 520 U.S. at 176. Moreover, allowing for such imprecise, flexible, and speculative critical habitat designations is contrary to the structure of the statute and implementing regulations, which provide for revision of critical habitat (at any time) when supported by actual evidence of the habitat having developed features essential for the conservation of the species. 16 U.S.C. § 1533(a)(3)(A)(ii); 50 C.F.R. § 424.12(g). This statutory provision governing revision is intended to allow changes to critical habitat based on actual evidence of the need for such expansion and reinforces the view that current designations should be based on actual evidence, not speculation, because when and if new evidence arises demonstrating the need for changes to any designated critical habitat, the review will evaluate that evidence and make any appropriate proposals for revision. For these reasons, the proposed revision to allow for designation of unoccupied habitat based on potential to support life needs is unlawful under the ESA.

3. The Proposal Inappropriately Attempts To Base Designations on Climate Change.

The preamble to the proposal indicates that the Services intend to increasingly rely on the authority to designate specific areas not actually occupied by the species at the time of listing. 79 Fed. Reg. at 27,073. The Services specifically note that, "[a]s the effects of climate change continue to influence distribution and migration patterns of species, the ability to designate areas that a species has not historically occupied is expected to become increasingly important." *Id.* As an example, the Services suggest that, if a butterfly depends on a host plant and the host plant's range has been moving up slope in response to warming temperatures resulting from climate change, the Services could rationally conclude that the butterfly's range will move up

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(referring to the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" recognized by *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120 (2000)). This is all the more true where the more general definition would lead to absurd or limitless results, or where it would transform the provision so as to allow government to reach conduct that Congress did not seemingly intend. *Id.* at 2444.

slope and would designate those up slope areas as critical habitat even if they are not currently occupied by the butterfly. *Id*.

As currently proposed, FWS will have authority to make broader designations of areas to account for species' *projected and speculative* future response to climate change. Speculation is not science, much less best science. Projections are compilations of assumptions and controversial modeling. The Energy Commenters believe that it is inappropriate to rely on speculative climate change projections over a lengthy time period, without documented cause and effect relationships linking observable or reliably predictable data on climate change to demonstrable effects in specific areas, and without evidence of current species impacts as a basis for designation of critical habitat or determination of adverse modification. Indeed, projections of any future air quality scenario, which can differ significantly from actual outcomes, are inappropriate bases for critical habitat designations. Such designations must instead be based on natural evidence of the existence of features that are essential to species, not open ended and speculative projections. Otherwise, critical habitat designations could be amended at any time.

Contrary to the Act's requirement to make designations based on the "best available science," 16 U.S.C. § 1533(b)(2), critical habitat designations based on projected climate change impacts are speculative. *See Bennett v. Spear*, 520 U.S. at 176. The science and modeling do not provide reliable predictions of species' response to climate change, nor do they provide reliable predictions of climate change impacts in specific geographic ranges that would be sufficient to support designation of critical habitat pursuant to the ESA.

These significant limitations have been recognized by the Intergovernmental Panel on Climate Change ("IPCC") in its most recent evaluation of the state of climate modeling science.[19] Climate models are "the primary tools available for investigating the response of the climate system to various forcings, for making climate predictions on seasonal to decadal time scales and for making projections of future climate over the coming century and beyond." IPCC AR5 at 746. Models vary considerably in complexity and application but are, in general, mathematical representations of the climate system, expressed as computer codes, and run on powerful computers. *Id.* at 749. Even the most complex models have limitations and no model

[19] IPCC, Climate Change 2013: The Physical Science Basis, Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2013) ("IPCC AR5"), *available at* http://www.ipcc.ch/report/ar5/index.shtml.

accurately simulates all climate-related processes. The IPCC describes in detail the many limitations and uncertainties that characterize current models. *E.g., id*. at 751-755. As a result of these limitations, models cannot at this time accurately replicate climate over the observable past, *id*. at 755, 767, 769-72, and even if models could replicate past climate, "there is no direct means of translating quantitative measures of past performance into confident statements about fidelity of future climate predictions," *id*. at 745. The Services' proposal to revise critical habitat designation criteria fails to acknowledge the limitations of climate change models and the significant uncertainty inherent in these projections. Moreover, the current state of climate science does not support impact projections below a continental or regional scale,[20] and particularly not to the localized and highly complex habitat of any particular species.

Recently, FWS withdrew the proposed rule to list the DPS of the North American Wolverine as a threatened species under the ESA based on its conclusion that "the factors affecting the DPS as identified in the proposed rule are not as significant as believed at the time of the proposed rule…."[21] The proposed rule was based in large part upon impacts of climate change on wolverine habitat and ecology. FWS acknowledged the disagreement and uncertainty over its biological conclusions associated with localized climate change projections. FWS recognized specifically comments regarding the high degree of uncertainty with projections made using downscaled global climate modeling, which FWS used to analyze the impacts of climate change on wolverine habitat and ecology: "As a result of these comments and peer reviews, there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to our listing determination." 79 Fed. Reg. 6874, 6875 (Feb. 2, 2014). In its decision to withdraw the proposed rule, FWS concluded that "differences in elevation and topography [in the Mountain West] make fine-scale prediction of climate impacts ambiguous" and "based on all the information available, we simply do not know enough about the ecology of the wolverine and when or how it will be affected by a changing climate to conclude at this time

[20] *Id*. at 810-17 (describing the flaws and biases present in each methodology for obtaining regional modeling results and noting that downscaling for regional impacts "does not guarantee credible regional climate information"); see also id. at 826 ("correlations between local to regional climatological values and projected changes are small except for a few regions").

[21] 79 Fed. Reg. 47,522 (Aug. 13, 2014).

that it is likely to be in danger of extinction within the foreseeable future."[22] The Services' critical habitat proposal, however, fails to acknowledge the limitations of climate change models and the significant uncertainty inherent in those projections.

In addition to the limitations of climate change science, the ESA is not an appropriate mechanism to regulate climate change. Congress did not intend the ESA to be used to regulate greenhouse gas ("GHG") emissions, climate change, or air quality in general, and the Services do not have the expertise, authority, or resources to regulate these matters through the ESA. The Obama and Bush Administrations and the courts have recognized that the ESA is not suited to address climate change or GHG emissions.[23] In fact, the Supreme Court has affirmed EPA's primacy among agencies to regulate GHGs, stating that "Congress designated an expert agency, here, EPA as best suited to serve as primary regulator of greenhouse gas emissions." *Am. Electric Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011).

The Energy Commenters firmly believe that any final proposal that designates critical habitat based on potential climate changes effects would be contrary to law and subject to litigation. Because speculative projections are based on unproven and unsupportable assertions about distant future conditions, they could be used to support the designation of practically any area as critical habitat. Moreover, such an approach is contrary to the terms and structure of the ESA, which guard against speculation and allow review and potential revision of critical habitat designations based on actual evidence of emergency of features essential to species. Finally, any

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[22] Press Release, U.S. Fish and Wildlife Serv., Service Determines Wolverine Does Not Warrant Protection Under Endangered Species Act (Aug. 12, 2014), http://www.fws.gov/news/ShowNews.cfm?ID=CB5069E7-CFB9-BC06-C70E63988DF271A7. This decision was supported by a "consensus recommendation" of the agency's three regional directors for the Mountain-Prairie, Pacific Northwest, and Pacific Southwest.

[23] Dirk Kempthorne, Sec'y, DOI, Remarks of Secretary Dirk Kempthorne at the Press Conference on Polar Bear Listing (May 14, 2008), *available at* https://votesmart.org/public-statement/346134/remarks-by-secretary-kempthorne-press-conference-on-polar-bear-listing# (Using the ESA to regulate GHG emissions "would be a wholly inappropriate use of the Endangered Species Act. ESA is not the right tool to set U.S. climate policy."); Press Release, U.S. Fish & Wildlife Serv., Salazar Retains Conservation Rule for Polar Bears Underlines Need for Comprehensive Energy and Climate Change Legislation (May 8, 2009), *available at* http://www.fws.gov/news/ShowNews.cfm?ID=20FB90B6-A188-DB01-04788E0892D91701 ("[T]he Endangered Species Act is not the proper mechanism for controlling our nation's carbon emissions. Instead, we need a comprehensive energy and climate strategy that curbs climate change and its impacts.").

reliance on projected impacts from climate change to support the designation of critical habitat would be arbitrary and capricious. We urge the Services to revise the proposal.

D. Requiring Critical Habitat Designations at the Time of Listing Would Deplete the Services' Limited Resources.

The Services propose to revise 50 C.F.R. § 424.12(a) to reflect their view that case law requires the Services to designate critical habitat in most instances. The provision also would be revised to require that critical habitat be "*finalized* concurrent with listing" rather than simply *proposed* concurrent with listing.[24] 79 Fed. Reg. at 27,070 (emphasis added). It would also require the Services to produce the evaluations of economic and other impacts of proposed critical habitat designation within the very constrained timeframes imposed on listing decisions.

Adding these specific requirements will increase the regulatory burdens on the Services. Already, the Services' resources are strained as they struggle to keep up with a 6-year work plan for the listing program resulting from settlement agreements in multi-district litigation.[25] According to the Director of FWS, in FY 2011, FWS spent 75 percent of its $20.9 million in funding for endangered species listing and critical habitat designation taking the substantive actions required by court orders or settlement agreements resulting from litigation.[26] The FWS regions are also feeling the strain. Region 8, for example, has stated, "[b]ased on limited staff resources, we anticipate that we will not be able to meet regulatory timeframes with some degree of frequency," including ESA section 7 timeframes for issuing biological opinions and

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[24] The provision includes more specific details on the limited circumstances in which the Services may find that a designation of critical habitat would not be beneficial to the species (*e.g.*, destruction or modification of habitat is not a threat to species because the species is threatened primarily by disease). *Id.* at 27,070-71. The Energy Commenters support the Services not designating critical habitat where designation would not be beneficial to the species. However, the proposal, as it current exists, is overly burdensome.

[25] *See* Stipulated Settlement Agreement, *WildEarth Guardians v. Salazar*, No. 10-377 (D.D.C. filed May 10, 2011), *available at* http://www.fws.gov/endangered/improving_esa/exh_1_re_joint_motion_FILED.PDF; *Center for Biological Diversity v. Salazar*, No. 10-cv-0230 (D.D.C. filed July 12, 2011), *available at* http://www.fws.gov/endangered/improving_ESA/WILDLIFE-218963-v1-hhy_071211_exh_1_re_CBD.PDF.

[26] Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before the House Natural Resources Committee at 5 (Dec. 6, 2011), *available at* http://naturalresources.house.gov/uploadedfiles/ashetestimony12.06.11.pdf.

timeframes for issuing ESA section 4 findings.[27] Indeed, the FWS is so underfunded that industry has been required to fund employee salaries in order to have conservation plans approved. Therefore, it seems unlikely that the Services will have sufficient funding to comply with the revisions they propose.

With this proposed change to require final critical habitat designations concurrent with listing, the Services set themselves up for failure and invite lawsuits challenging their failure to comply with the regulations. As with the multi-district litigation, such lawsuits have the potential to result in settlements that bind the Services to inappropriate commitments and cut out the regulated public. The Services should not revise this provision and should continue to require that critical habitat "shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing." *See* 50 C.F.R. § 424.12(a).

E. The Proposed Changes to Critical Habitat Designation Criteria Would Harm Oil and Gas, Electric Utility, Land Development, and Other Key Industries.

These new provisions would provide an especially broad basis for designating critical habitat. If the Services can designate critical habitat based on potential effects, such as climate change, and not on the best available science, the Energy Commenters and other regulated parties could be placed at the mercy of the Services' discretion whether to designate a particular area as critical habitat.

Considerable regulatory burdens and corresponding economic costs are borne by property owners, companies, state and local governments, and other entities as a result of critical habitat designations. These burdens begin before critical habitat is designated. Once the Services propose a rule to designate critical habitat, property owners and others with an interest in the lands identified for critical habitat designation must participate in the rulemaking by presenting information to the Services during the rulemaking process if they want to ensure that the Services consider impacts to those interests and other relevant information. 50 C.F.R. Part 424 states that members of the public who face negative consequences as a result of critical habitat designation may provide information on "any significant activities that would … likely … be affected by the designation" and the "probable economic and other impacts of the designation

[27] *See* Memorandum to Regional Director, Pacific Southwest Region from Michael Fris, Assistant Regional Director, Ecological Services regarding Ecological Services Workload Prioritization at 1-2 (May 2014).

upon proposed or ongoing activities," and may address whether the Services should "exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat." 50 C.F.R. § 424.19.

Despite the Services' claim that the proposal will have no economic impact, critical habitat designation imposes significant costs on land use and ownership. The expanse of a critical habitat designation for a species can be extensive, and can overlap with critical habitat for other species, often covering thousands or millions of acres of land. For example, FWS recently revised its designated critical habitat for the marbled murrelet and, even with the Service's removal of certain areas from the designation, the designation covers 3,698,100 acres of land in Washington, Oregon, and northern California.[28] In addition, the mere proposal of critical habitat triggers ESA conference requirements for any federal agency action. Once critical habitat is designated, persons who own or otherwise lease, permit, or have other interests in the designated land face immediate and significant restrictions on their otherwise lawful uses of the land; expensive and time-consuming new procedural requirements on ongoing and future projects; litigation risk; and significant diminution in the value of the property.[29]

With these revisions to critical habitat designation criteria leading to broader critical habitat designations, combined with the proposed revisions to the definition of "adverse modification" leading to more frequent adverse modification findings, the Services are much more likely to find, during their review of a permit application, that the proposed activity or project will result in the destruction or adverse modification of critical habitat. This in turn would trigger recommendations by the Services of control measures to avoid adverse modification and have significant impacts as described above on the Energy Commenters' members' ability to perform necessary and critical activities to supply our nation's energy needs.

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[28] Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Marbled Murrelet, 76 Fed. Reg. 61599 (Oct. 5, 2011).

[29] David Sunding, "The Economic Impacts of Critical Habitat Designation," Giannini Foundation of Agricultural Economics, *available at: giannini.ucop.edu/media/are-update/files/articles/v6n6_3.pdf*.

V. The Draft Policy on Exclusions from Critical Habitat Could Inappropriately Shift Federal Land Management Burdens to Nonfederal Entities and Private Lands

The Energy Commenters support the Services' use of partnership and conservation plans to avoid the need to designate areas as critical habitat. However, the Draft Policy Regarding the Implementation of Section 4(b)(2) of the ESA, 79 Fed. Reg. 27,052 (May 12, 2014) ("draft policy") is lacking incentives and reassurances required for private property owners to be willing to undertake costly voluntary conservation measures. The Energy Commenters also believe that the significant discretion afforded to the Services to exclude or not exclude critical habitat, even if there is a viable, sufficiently protective voluntary conservation plan in place, may have the effect of discouraging private property owners from partnering with the Services.

A. The Services Should Exclude Areas from Critical Habitat Designation Where the Benefits of Exclusion Outweigh the Benefits of Designation.

Consistent with its intent to find a balance "between the Endangered Species Act's mandate to protect and manage endangered and threatened species and other legitimate national goals and priorities such as providing energy, economic development and other benefits to the American people," S. Rep. No. 95-874, at 940 (1978), Congress provided that the Services may exclude an area from critical habitat designation if the benefits of such exclusion outweigh the benefits of designation, *i.e.*, on economic or other public interest grounds. 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.19.

Congress wanted the Services to have the "discretion" and "flexibility" to consider relevant non-biological factors, specifically including, but not limited to, economic factors, in deciding which areas to exclude from critical habitat. *See* H.R. Rep. No. 95-1625, at 17 (1978). As the Solicitor of the Department of the Interior recognized:

> Congress wanted the Secretary to understand the costs on human activity of making a designation before he made a decision and thereby provide an opportunity to minimize potential future conflicts between species conservation and other relevant priorities at an early opportunity.[30]

[30] Memorandum from David Longly Bernhardt, Solicitor, DOI, to Deputy Sec'y, DOI, "The Secretary's Authority to Exclude Areas from a Critical Habitat Designation Under Section 4(b)(2) of the Endangered Species Act," at 4 (Oct. 3, 2008), *available at* http://www.doi.gov/solicitor/opinions/M-37016.pdf.

Accordingly, under ESA section 4(b)(2), the Services are to consider economic impacts when designating critical habitat. The regulations require the Services, in considering an area for designation, to "identify the significant activities that would . . . affect an area considered for designation . . . and consider the reasonably probable economic and other impacts of the designation upon such activities." 50 C.F.R. § 424.19. The Services are authorized to exclude an area from critical habitat if they determine that the benefits of the exclusion outweigh the benefits of inclusion." *Id.* We encourage the Services to use this authority to avoid economic impacts of designating critical habitat that will not provide commensurate benefits to listed species.

B. The Draft Policy's "Encouragement" of Voluntary Measures Should Not Be Coupled with Onerous Application of the Proposed Rules to Compel Private Conservation Actions.

The Services state that the purpose of the draft policy is to "provide predictability and transparency regarding how the Services consider exclusions under section 4(b)(2)." 79 Fed. Reg. at 27,053. The Energy Commenters support the development of a transparent, predictable process for excluding areas from critical habitat designation. However, the draft policy provides little predictability for property owners participating in conservation agreements and plans. Indeed, coupled with the onerous impacts likely to result from broader critical habitat designations and more frequent adverse modification findings, the draft policy could effectively shift federal land management obligations to non-federal entities by compelling (rather than encouraging) them to pursue private conservation actions in an effort to avoid the burdens of critical habitat designation.

The Services can exclude specific areas from critical habitat designations in part based on the existence of private or other non-Federal conservation plans or partnerships. The draft policy distinguishes between private or other non-federal conservation plans and partnerships "in general," and those that are "related to permits under section 10 of the Act." A conservation plan can be developed by private entities with no Service involvement, or in partnership with the Services for the purpose of obtaining an incidental take permit under section 10 of the ESA. Such partnerships include HCPs, SHAs, and CCAAs.

The draft policy lists several factors (*e.g.*, public participation, National Environmental Policy Act compliance) that the Services will consider when determining whether areas should be excluded from critical habitat designation based on the existence of a general conservation

plan or partnership. *See* 79 Fed. Reg. at 27,054. The policy stresses the Services' view that the decision to exclude an area from critical habitat designation is "always completely discretionary." 79 Fed. Reg. at 27,054; 79 Fed. Reg. at 27,051 ("Under the terms of the policy as proposed, the Services retain a great deal of discretion in making decisions with respect to exclusions from critical habitat."). But the determination whether critical habitat may be excluded should not simply be left up to the discretion of the Services. The regulations provide for a balancing test where the Services should determine whether "the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat." 50 C.F.R. § 424.19. This provision authorizes consideration of economic and other impacts of the designation upon proposed or ongoing activities. *Id.* Moreover, the Services' decisions to designate areas of critical habitat are bounded by statutory limits and fully reviewable under the APA.

The draft policy states that the Services "generally exclude" areas covered by an approved CCAA/SHA/HCP from a designation of critical habitat if three conditions are met:

1. The permittee is properly implementing the CCAA/SHA/HCP and is expected to continue to do so for the term of the agreement;

2. 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; and

3. The CCAA/SHA/HCP specifically addresses that species' habitat . . . and meets the conservation needs of the species in the planning area.

See 79 Fed. Reg. at 27,054. The preamble states that the Services will undertake a "case-by-case analysis" to determine whether these conditions are met and whether the area covered by the plan should therefore be excluded from critical habitat designation. *Id.* This language does not provide the assurance required to encourage private landowners to go through the costly and onerous process of developing a CCAA, SHA, or HCP. With all of these requirements, and no assurance for private property owners that participation in voluntary conservation measures will avoid designation of critical habitat, there is little incentive for private entities to participate.

Accordingly, the Services can and should exclude completed CCAAs, SHAs, and HCPs from critical habitat designation, as long as the plans relate directly or indirectly to the listed species for which critical habitat designation is being considered, because these plans are designed to be sufficiently protective, such that the benefits of exclusion outweigh the benefits of inclusion. *See, e.g., Home Builders Ass'n of N. Cal. v. U.S. FWS*, 2006 WL 2190518, at *30

(E.D. Cal. 2006) (finding it was appropriate to exclude an area covered by an HCP that addressed the species at issue and noting that the Secretary found that the HCP provided more protection than can be provided by a critical habitat designation). The exclusion of completed CCAAs, SHAs, and HCPs from designated critical habitat is appropriate and should be incorporated in most, if not all, cases because land covered by a CCAA, SHA, or HCP already has appropriate protections and management measures in place. In addition, CCAA, SHA, and HCP permittees typically agree to do more for the conservation of the species and their habitats on private lands than the designation of critical habitat would alone provide.

VI. Conclusion and Recommendations

The proposed changes to the "adverse modification" definition and critical habitat designation criteria would result in overly broad designations and adverse modification findings. The proposals would unduly increase regulatory burdens on industry, states, and the federal government, and would have substantial socio-economic impacts that the Services have not justified. The proposals are contrary to the ESA, Congressional intent and case law. Given the significant legal flaws and inadequacy of the science underlying certain parts of the proposals, the Energy Commenters believe that the best course of action would be to issue a new set of proposed rules that makes only modest, and narrowly targeted, changes to the existing regulations consistent with our comments above. Any new or revised rulemaking should also include a draft economic analysis.

A. Recommendations Regarding Adverse Modification Proposal.

The Services should revise and take further comment on its proposed definition of "adverse modification," and should:

- Make only narrow and modest changes to the definition, such as deletion of the word "both" and substitution of the word "or" for "and" between the words "survival" and "recovery."

- Eliminate the concept of "conservation value" or, alternatively, narrowly and clearly define the term.

- Eliminate the proposal to find adverse modification based on future, speculative effects and potential of an area to support the future recovery of a species.

- Clarify how section 7 consultations will work when applying the proposed regulatory adverse modification standards to critical habitat designated under previous standards.

B. Recommendations Regarding Critical Habitat Designation Proposal.

The Services should revise and take further comment on these proposals to ensure that critical habitat designation criteria is within the limits set by Congress and does not allow for designation of critical habitat based on speculative effects. Moreover, the Services should explain that future effects are best addressed through subsequent reviews and revisions to critical habitat, not at the time of designation when such effects remain speculative. In particular, the Services should:

- Revise the proposed definition of "geographical area occupied by the species" to limit occupied critical habitat to areas that the species uses with sufficient regularity that it is likely to be present during any reasonable span of time.

- Maintain the requirement that the Services identify and list "primary constituent elements."

- Remove the proposed definition of "physical or biological features" that would allow for designation of areas based on potential future reoccurrence of features. This definition should account for the ESA's requirement that designation of occupied areas must be limited to areas where essential physical or biological features "are found," not may be found.

- Interpret the term "special management considerations or protection" to be a meaningful requirement and not just presume that all areas satisfy this requirement. If existing management is adequate for a particular area, it should mean that no critical habitat designation is needed.

- Maintain the regulatory provision that requires that the designation of occupied areas must be inadequate in order for unoccupied areas to be essential.

- Explain that areas may not be designated as critical habitat based on speculative, potential climate change effects.

- Continue to require that critical habitat be *proposed* concurrent with listing, and not impose a new requirement that *final* critical habitat designations be made concurrent with listing.

- Interpret the term "interbreeds when mature" to mean species that are actually interbreeding, not just capable of interbreeding.

C. Recommendations Regarding Draft Policy on Exclusions.

The Energy Commenters support the Services' use of partnership and conservation plans to avoid the need to designate areas as critical habitat. However, the Draft Policy should be revised to include greater incentives and reassurances in order to justify the costly voluntary

conservation measures required for CCAAs, SHAs, and HCPs. In particular, the Services should:

- Provide assurances for CCAA, SHA, and HCP participants that such areas will not be designated as critical habitat as to the species effectively covered by the plans.

- Reduce the significant discretion the Services have afforded to themselves which, coupled with lack of incentives for property owners, undercuts the policy's "encouragement" of voluntary measures.

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The Energy Commenters urge the Services to fully consider and incorporate these suggestions.

Sincerely,

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