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Comments regarding the May 12, 2014 notices of proposed rules and policy on critical habitat under the U.S. Endangered Species Act

Submitted by:

Energy and Wildlife Action Coalition

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Public Comments Processing
Attn: Docket No. FWS–R9–ES–2011–0104
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The Energy and Wildlife Action Coalition (EWAC) submits these comments in response to the May 12, 2014 notices of proposed rules and policy on critical habitat under the U.S. Endangered Species Act ("ESA") published by the U.S. Fish and Wildlife Service and National Marine Fisheries Service (together, "Services"). EWAC is a national coalition formed in 2014; member companies consist of electric utilities, electric transmission providers, and renewable energy companies operating throughout the United States. EWAC's member companies have significant experience with wildlife laws and policy and have engaged extensively with federal agencies in this arena directly and indirectly (individually and through trade associations and other organizations). EWAC is unique in that it represents specific industries focused exclusively on federal wildlife issues. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent and cost-effective manner.

While we understand that each proposed rule and policy has its own docket number for comment submittal, these proposed rules and policy are intertwined to such a degree that we have prepared a single comment letter to address all three publications. Therefore this letter will be submitted as a comment response to:

(1) The Proposed Rule "Implementing Changes to the Regulations for Designating Critical Habitat" published in Volume79, page 27066 of the Federal Register on May 12, 2014 ("Proposed Rule").

(2) The Proposed Rule "Definition of Destruction or Adverse Modification of Critical Habitat" published in Volume 79 page 27060 of the Federal Register on May 12, 2014 ("Revised Definition"); and

(3) The Announcement of draft policy and solicitation of public comment "Regarding Implementation of Section 4(b)(2) of the [ESA]" published in Volume 79, page 27052 of the Federal Register on May 12, 2014 ("Policy").

Our comments below highlight some of the issues we have identified in the Proposed Rule, Revised Definition, and Policy (the "Proposals" when reference is made to all three together). We are concerned that the Proposals would: (i) constitute an invalid attempt to amend the statute by regulations; (ii) render ineffectual all criteria in the statutory definition of critical habitat that constrain the designation of critical habitat; (iii) expand the concept of critical habitat to the point that it need not be "critical" or even "habitat" to be designated by nullifying any distinction between critical habitat, habitat, or range; (iv) endorse employment of assumptions and other "indirect or circumstantial evidence" in critical habitat designations contrary to the statutory requirement that those decisions be made solely on the basis of the best scientific data available; (v) effectuate the Services' announced intent to evoke more frequently the authority to designate unoccupied habitat as critical habitat contrary to the expectation of Congress, as reflected in the language of the statutory definition; (vi) moot major federal court decisions that reviewed the statutory terms which govern and qualify the designation of critical habitat and required the Services to adhere to each of those terms; (vii) increase the regulatory burden on landowners and project proponents and the workload burden on the Services' personnel; and (viii) serve as a disincentive for initiatives of States and private landowners to protect significant habitat and thereby conserve species at risk due to habitat loss.

EWAC believes the proposed changes set forth in these Proposals produce an extraordinary number of highly significant issues of law and policy. They would affect numerous departures from over four decades of the Services' interpretation of, and practice under, the ESA. We find the flaws in the Proposals to be so crucial and all-encompassing that we recommend the Proposals be withdrawn. We suggest that any new proposals be developed in collaboration with all interested parties and would welcome the opportunity to participate in that effort.

I. Critical Habitat Basics

In order to understand the departures from the statutory provisions of the ESA and past Services' interpretations and practices that the Proposals would perceivably achieve, we begin with the statutory provisions that are related to critical habitat and should govern the allowable text of any proposed rules and policy. ESA Section 3 defines "critical habitat" and the definition includes several criteria for habitat to qualify as critical habitat – criteria that clearly are intended to constrain critical habitat designations:

> The term "critical habitat" for a threatened or endangered species means:
>
> (i) the *specific areas* within the *geographical area* [that is] *occupied* by the species *at the time it is listed*…on which are found those *physical or biological features* (I) [that are] *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… *upon a determination by the Secretary* that such areas are *essential for the conservation of the species*."[1]

Therefore, as currently written, the definition of critical habitat requires a showing of several criteria (emphasized in italics above) in order to qualify as critical habitat. The existence of critical habitat most directly affects consultations under ESA Section 7. ESA Section 7 requires that, in the course of its consultation obligations, an agency demonstrate that its actions "will not likely . . . result in the destruction or adverse modification of [critical] habitat."[2]

II. Critical Habitat Context

On a pure policy level, one of the most glaring aspects of the Proposals is that they seemingly overlook positions based on the ESA's critical habitat provisions previously expressed by Congressional leaders, cabinet and other Presidential appointees, and the Fish and Wildlife Service.

For example, in 2005, during House Committee on Resources markup of H.R. 3824, the "Threatened and Endangered Species Recovery Act of 2005," both the Subcommittee Chair Richard Pombo and the Ranking Minority Member George Miller voted in favor of an amendment to repeal the statutory critical habitat provisions altogether.

Similarly, during the Clinton Administration, Presidential appointees and the implementing agencies repeatedly disparaged the worth and workability, and therefore the necessity, of the ESA's critical

[1] 16 U.S.C. 1532(5)(A).
[2] 16 U.S.C. 1536(a)(2)

habitat provisions. In the preamble to a critical habitat designation required by court order, the Fish and Wildlife Service itself stated:

> Designation of critical habitat for endangered or threatened species has been among the most costly and controversial classes of administrative actions undertaken by the Service in administering the Act. Over 20 years of experience in designating critical habitat and applying it as a tool in conserving species leads the Service to seriously question its utility and the value it provides in comparison to the monetary, administrative, and other resources it absorbs. Although the Service is, in this case, designating critical habitat pursuant to a Court order that requires the Service to make a final determination, the Service believes that critical habitat is not an efficient or effective means of securing the conservation of species.[3]

The courts have taken notice of the Fish and Wildlife Service's view. For example the Tenth Circuit referred to the Fish and Wildlife Service's "long held policy position that [critical habitat designations] are unhelpful, duplicative, and unnecessary."[4]

Conservation leaders of the previous Democratic Administration (Secretary of the Interior Bruce Babbitt and Fish and Wildlife Service Director Jamie Rappaport Clark) declared the critical habitat provisions to be useless. In a 1999 hearing before a subcommittee of the Senate Committee on Appropriations, Secretary Babbitt said of critical habitat designations: "I have voiced my concerns about the way we are mandated to use the designation of critical habitat under the Endangered Species Act. It does not work. It does not produce good results."[5] In another 1999 hearing before a subcommittee of the Senate Committee on Environment and Public Works, Director Clark (now President and CEO of Defenders of Wildlife) testified that "in 25 years of implementing the Act, we have found that designation of critical habitat provides little additional protection…Federal agencies already consult with the Service on activities affecting listed species. In essence, these two processes often are identical, making critical habitat designation a redundant expenditure of conservation resources."[6]

Other Congressional initiatives have sought to rewrite the critical habitat provisions, including the omnibus 1997 measure, S. 1180, referred to as "the Kempthorne, Chafee, Baucus, Reid bill" and supported by the Clinton Administration, organized labor, and moderate business and environmental organizations. That bill would have removed the requirement that critical habitat designation occur simultaneously with listing decisions and made designation part of the recovery planning process. On May 18, 2005, six Senators, including Subcommittee Chair Hillary Clinton and Ranking Minority Member Michael Crapo, requested that the Keystone Institute convene a working group to review the critical habitat concept and, if deemed appropriate, propose one or more alternatives to the ESA's critical habitat provisions. Currently, two bills, S.2729 by Senator Pryor and H.R. 4319 by Representative Crawford, seek to amend ESA section 4(b)(2) to change from discretionary to mandatory the authority of the Services to exclude from critical habitat designations those areas where the benefits of exclusion outweigh the benefits of inclusion.

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[3] Endangered and Threatened Wildlife and Plants; Final Determination of Critical Habitat for the Southwestern Willow Flycatcher, 62 Fed. Reg. 39129, 39130-31 (July 22, 1997).

[4] *New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service*, 848 F.3d 1277, 1283 (10th Cir.2001).

[5] 145 Cong. Rec. S4423-4424 (daily ed. April 29, 1999).

[6] 1999 WL 350545 (F.D.C.H.) (May 27, 1999).

Certainly, the criticism of the critical habitat concept by the Secretary of the Interior, the Director of the Fish and Wildlife Service, and the Service itself was not directed at their own regulations; it was centered on the ESA's provisions. So too, the Congressional leaders looked to the statute and sought amendments to it as the appropriate means of addressing the critical habitat problems; they did not advocate more or different rules.

In order to overcome the manifold problems created by the *statutory* critical habitat, as perceived by some of our most distinguished public officials, the Proposals attempt to rewrite those provisions by *rulemaking* – a task that is necessary if those problems are to be remedied but nevertheless that is constitutionally invalid. Moreover, while decades of criticism of the critical habitat statutory provisions have questioned their very functionality, for the first time, these new Proposals attempt to transform these provisions into an imposing regulatory mechanism. Rather than work within the constraints of the statutory language to improve upon the functionality of the critical habitat concept, the Proposals would impose a significant regulatory burden on both the public, especially the regulated community, and the Services, without any clear benefit. Apparently, to remove the many problems they perceive with the critical habitat concept, the Services are intent on rewriting the offending statutory provisions through these Proposals. The new Proposals constitute an astonishing attempt by the Services to amend the statute by regulation to eliminate virtually all statutory standards that serve as constraints on the designation of critical habitat. The Services should reconsider.

III. Proposed Rule

The unprecedented changes in the ESA's critical habitat provisions that would be wrought by the Proposed Rule are problematic for several reasons. The Services acknowledge they expect to designate critical habitat in most cases and enforce its protection in the future, and the Proposed Rule paves the way.[7] The effect of the Proposed Rule is to essentially nullify the italicized criteria in the statutory definition of critical habitat (shown in Section I above) that serve as standards for, and thereby constraints on, the Services' ability to designate critical habitat. Two district court decisions held that the criteria of the ESA's critical habitat definition had to be demonstrated by the Services to be met before critical habitat could be designated: *Cape Hatteras Access Preservation Alliance v. U.S. Department of the Interior*[8] and *Home Builders Association of Northern California v. U.S. Fish and Wildlife Service*.[9] At first blush, this appears to be the Services' attempt to moot those precedents and any further lawsuits challenging the Services for their failures to identify and abide by these criteria in critical habitat designations. Focusing on the italicized criteria quoted in Section I, we turn to specific proposed changes that would serve to eliminate the ability of those criteria to serve as standards for, and constraints on, the designation of critical habitat.

a. *Occupied areas qualifying as critical habitat.*

In this subsection, we provide our three primary concerns with the proposed changes in the interpretation of the statutory definition (provided in Section I) of occupied habitat as critical habitat. First, the Proposed Rule abandons the concept of discrete occupied areas. In its statement that "the geographic area occupied by the species is thus the broader, coarser-scale area…is what is often referred to as the 'range' of the species," the Proposed Rule equates "specific areas within the geographic area"

[7] Proposed Rule at 27071.

[8] 344 F. Supp. 2d 108 (D.D.C. 2004).

[9] 268 F. Supp. 2d 1197 (E.D. Cal. 2003).

in the statutory definition to the entire range of a listed species.[10] The Proposed Rule proceeds to say that the proposed revised critical habitat rule would include even migratory corridors.[11] Whether "ranges" or "migratory corridors" are chosen they would remove any meaning from the "specific areas" criterion in the statutory definition, and, if applied, would result in the designation of critical habitat units of unrealistic and unmanageable size. In the case of the Indiana bat, for example, its range or migratory corridor covers all or most of 16 states. In the case of the Northern Long-Eared bat, all or parts of 38 states would be covered. The entire range of a species certainly can be extraordinarily more expansive than the statutory language of "specific areas." The same would be true of migratory corridors, instead of prominently occupied sites along the migratory routes. This approach directly contradicts statutory language by making "specific areas" so expansive as to include species' entire ranges and migratory corridors. .

Second, the Proposed Rule would revise the statutory criterion/standard that requires one element – "features" – to be "essential to the conservation of the species," and thereby rendering this criterion ineffective in constraining what areas are truly "critical habitat."[12] This unfortunate result would be accomplished in four ways: (i) The presence of "features"" is no longer necessary; simply circumstantial evidence that "features" may be present at some point in the future suffices under the Proposed Rule.[13] (ii) The Proposed Rule also would allow for *degraded* areas to be designated as critical habitat if they might serve a conservation purpose in the future through restoration action.[14] (iii) Particularly surprising, the Proposed Rule would allow for identification of new "features" long after the Services initially designate critical habitat for a species.[15] (iv) In all these changes, the Proposed Rule would, in effect, impermissibly amend the words "*are* essential to the conservation of the species" in the statutory definition of occupied critical habitat to read "*could possibly become* essential to…conservation..."

As we repeatedly emphasize in these comments, many of the changes in regulations the Proposals would make are contrary to law – that is, the ESA. This is particularly true here where earlier efforts of the Fish and Wildlife Service to designate occupied critical habitat on the basis of "future features" have been rejected by federal courts for the very same reason. A district court in California ruled as follows: "[T]he Service implicitly states that it included within critical habitat boundary areas that are 'likely to develop' essential habitat components, but do not contain them now. Yet, the ESA defines critical habitat for the area occupied by the species as the specific areas on which *are* found the features essential to the conservation of the species."[16] The D.C. district court followed: "The Service may not statutorily cast a net over tracts of land with the mere hope that they will develop [features] and be subject to [critical habitat] designation….The Service's argued-for interpretation, essentially that

[10] Proposed Rule at 27069.

[11] *Id.*

[12] Proposed Rule at 27070.

[13] Proposed Rule at 27069.

[14] Proposed Rule at 27073.

[15] Proposed Rule at 27072.

[16] *Home Builders Association of Northern California v. U.S. Fish and Wildlife Service*, 268 F. Supp.2d 1197, 1215 (E.D. Cal. 2003) (emphasis added).

designation is proper merely if [features] will likely be found in the future, is simply beyond the pale of the statute."[17]

Third, instead of effectively removing the third criterion/standard of possibly "require[ing] special management considerations or protection" for critical habitat designation, the Proposed Rule would expand it to the point that almost any land area or body of water that harbors one or more members of a listed species – certainly any species that is at risk due to overall habitat loss – would qualify for designation. This statutory criterion would be transformed from a constraint on designation to an open-ended invitation to designate. The Proposed Rule would eliminate a perfectly rational existing rule – one that serves the intended constraining purpose. The existing rule requires that, for areas to qualify for designation as critical habitat, they must be shown to need additional management over and above any existing management.[18] The replacement language of the Proposed Rule reduces special management to merely *any* management that is needed whether or not it is already in place.[19] In addition, he Proposed Rule would allow the Services to disregard the management situation at the time of designation by simply asserting that it does not matter if special management is or may not be needed now so long as it can be asserted that it may be needed at some time in the future.[20]

This Proposed Rule revision is particularly troublesome because it will likely have the very serious unintended consequence of discouraging efforts to provide protection to listed species' habitat. In short, this Proposed Rule would likely chill, if not eliminate, future state or private efforts to manage any habitats for species' benefit. It would de-incentivize most if not all efforts that would potentially allow for the avoidance of critical habitat designation altogether. States, local governments, and property owners would likely avoid undertaking species protection efforts because, under the Proposed Rule's revisions related to the "special management" criterion, their laudatory initiatives to protect species would provide instant, absolutely conclusive evidence to the Services of the need to designate critical habitat. Furthermore, why should non-federal parties spend their resources to manage areas that, under the Proposed Rule, would end up more likely to be designated as critical habitat despite these investments?

b. Unoccupied areas qualifying as critical habitat.

The Proposed Rule is consistent in its treatment of occupied and unoccupied critical habitat; it all but eliminates the criteria/standards for designating the latter as well as the former. Congress exhibited a clear intent that the authority to designate unoccupied habitat be used sparingly. First, the statutory definition requires that, for the designation of unoccupied habitat, the entire "area" must be found essential to the conservation of the species, not just "features" within occupied areas. Second, without legal effect since ESA section 4 assigns all species listing and critical habitat designation decisions to the "Secretary" but arguably further manifesting Congressional intent, Congress added the wording "upon a determination of the Secretary" to the provision addressing unoccupied habitat and omitted it from the provision addressing occupied habitat. And, unsurprisingly and appropriately, the existing rule for designating areas outside the occupied habitat accomplishes this Congressional intent, reflected in

[17] *The Cape Hatteras Access Preservation alliance v. U.S. Department of the Interior*, 344 F. Supp.2d 108, 122-23 (D.D.C. 2004).

[18] Proposed Rule at 27070.

[19] *Id.*

[20] *Id.*

the statutory language, by requiring a showing that unoccupied habitat designation is needed only where "a designation limited to its present range would be inadequate to ensure the conservation of a species."[21]

The Services, in the Proposed Rule, suggest that this provision is "unintentionally limiting" and would remove the higher standard for unoccupied habitat.[22] Since the current provision is explicit and its purpose readily discernible, we are puzzled as to why it is perceived as "unintentionally" limiting. The perceived limiting effect is described as follows: "Where the best available scientific data suggest that specific unoccupied areas are, or it is reasonable to infer from the record that they will eventually become, necessary to support the species' recovery, it may be appropriate to find that such areas are essential for the conservation of the species and thus meet the definition of 'critical habitat.'''[23] This "appropriate" designation authority is provided in the Proposed Rule by the removal of the existing requirement that designation of unoccupied habitat should occur only when "a designation limited to its present range would be inadequate to ensure the conservation of the species."[24] This proposed change essentially strips critical habitat of any requirement for being "critical" or even "habitat" at the time of designation. The Proposed Rule thereby removes any meaning from the "specific areas" criterion in the statutory definition of unoccupied critical habitat as it does for occupied critical habitat. But, apparently, even "ranges" and "migratory corridors" are too confining for designation of unoccupied habitat; the Services would reserve to themselves the authority to designate any land, waters, or air without listed species' presence in anticipation of changes in species' locations at any time in the future due to climate change or other causes that could be posited or assumed.[25] It is very difficult to discern where in the statutory definition of unoccupied critical habitat this authority is accorded to the Services.

Nevertheless, the Proposed Rule revisions, by effectively eliminating or not considering statutory criteria that would constrain designation of critical habitat, certainly would serve the announced expectation of the Services to make greater use of the authority to designate unoccupied habitat, no matter the Congressional intent that the authority be employed sparingly.[26] We believe both the Services' expectation and the proposed rule and policy changes to effectuate it constitute ill-advised policy and would be contrary to law if implemented.

IV. Revised Definition

The proposed revisions to the definition for the statutory standard for regulatory application of the critical habitat concept are problematic. The Revised Definition implicitly allows areas that lack physical and biological features to be designated as critical habitat.[27] The Revised Definition introduces the term "conservation value" and bases the finding of conservation value not only on the current status of the critical habitat but on the critical habitat's potential to support recovery.[28] This, like the Proposed

[21] Proposed Rule at 27073

[22] Proposed Rule at 27073.

[23] Proposed Rule at 27073.

[24] Proposed Rule at 27073.

[25] Proposed Rule at 27073.

[26] "The Services anticipate that critical habitat designations in the future will likely increasingly use the authority to designate specific areas outside the geographical area occupied by the species at he time of listing." Proposed Rule at 27073.

[27] Revised Definition at 27061.

[28] Revised Definition at 27062.

Rule, erodes any characteristics that differentiate "critical habitat" from any other tract of land that could speculatively contain conservation value for a species.

V. Policy

The Policy creates a number of issues with regard to the Services' discretion under ESA section 4(b)(2) to exclude areas from critical habitat. First, key to the Services' section 4(b)(2) evaluation is that the Services must rely on the "best scientific data available" when weighing the benefits versus detriments of including areas in critical habitat.[29] However, the Proposed Rule suggests that best scientific data available may include "indirect or circumstantial evidence."[30] This continues the "speculative" theme that is pervasive throughout the Proposals. Circumstantial evidence creates a flexible and discretionary platform from which the Services can wield regulatory authority based on designated critical habitat – thereby eroding any regulatory certainty or even predictability for private and public landowners or developers of likely constraints and costs to be imposed on their properties. We do not believe that the statutory requirement that the Services consider the "best scientific data available"[31] includes indirect, circumstantial or speculative notions to designate critical habitat.

Second, the Policy reverses the existing practice of excluding areas from critical habitat designation that are already covered, or about to be covered, by habitat conservation plans ("HCPs"), safe harbor agreements ("SHAs"), and candidate conservation agreements with assurances ("CCAAs"). Instead, the Policy will have the Services consider existing practices on a case-by-case basis.[32] Thus, project proponents could commit significant resources and time to obtain the regulatory assurances associated with those plans and agreements only to have those same covered areas later designated as critical habitat. This proposed retrenchment in critical habitat exclusions policy deprives virtually all benefit from both landowners and listed species provided by the No Surprises Assurances policy and rules developed and promulgated by Secretary Babbitt and the Fish and Wildlife Service specifically to encourage landowners to prepare these plans and enter these agreements for species conservation. Moreover, the possible imposition of critical habitat designation on lands already protected by the plans and agreements and accompanying ESA section 10 permits, as a number of other prospective changes discussed above, would wreak havoc on efforts to secure financing for development of critical infrastructure. And, like the Proposed Rule's changes to the "special management" criterion in the statutory definitions of both occupied and unoccupied critical habitat, this change in policy removes incentives for state, local, and private parties to expend resources on species or habitat conservation.

Also potentially problematic is one of the factors that will be considered in a case-by-case analysis. The Services state that they will consider whether "[t]he CCAA/SHA/HCP specifically addresses that species' habitat (and does not just provide guidelines) and meets the conservation needs of the species in the planning area."[33] This presents an interesting and troubling issue. We are concerned what it would mean for a property relying on a HCP if the Service determines that, for purposes of critical habitat designation, the HCP does not meet the conservation needs of the HCP-covered species in the planning

[29] 16 USC 1533(b)(2).

[30] Proposed Rule at 27069.

[31] 16 USC 1533(b)(2).

[32] Policy at 27054-55.

[33] Policy at 27054.

area. This would potentially undermine the Services' HCP staff that painstakingly evaluates the HCPs or agreements and recommended issuance of the ITPs or other ESA section 10 permits.

VI. Conclusion

The Proposed Rule, Revised Definition, and Policy deprive the terms "critical" and "habitat" of any useful meaning, in effect amend the ESA without Congressional action, and remove any sense of regulatory certainty. Any patch of property anywhere in, or even beyond, a species' present range or migratory corridor could arguably become critical habitat regardless of occupation or characteristics, simply based on speculation grounded in circumstantial or indirect evidence. There is no basis for the Services taking such a dramatic and expansive approach to critical habitat.

The Services do not possess the authority to ignore the statutory criteria that constrain designation of critical habitat. Moreover, the results of implementing these proposed changes would be scientifically questionable and speculative. And, it is entirely unclear how the already resource-challenged Services would implement this ramped up regulatory authority and burden. The Proposals do not relieve the "monetary, administrative, and other resources" burdens imposed by the ESA's critical habitat provisions that the Fish and Wildlife Service condemned in the quoted Federal Register notice in Section II above; they would greatly increase them.

The problems with these Proposals are so significant and all-encompassing that we believe the Proposals should be withdrawn. If the Services decide to accord the proper role to regulations and, in doing so, propose rules and policy that do not disturb statutory provisions but rather apply those provisions to correct problems or ambiguities discerned in the existing regulations by federal court opinions or the Services' personnel, they should begin again and issue new proposed rules and policy that are collaboratively drafted with interested and affected parties. We support species protection and rules that are based on sound science, consistent, cost-effective and beneficial to species. We appreciate the opportunity to provide these comments and are interested in meeting with the Services to discuss our concerns and participate in a process to create a workable and valuable set of regulations and policy.

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