August 21, 2023

Comments Regarding the June 22, 2023 Proposed Rule Regarding Revision of Regulations for Listing and Delisting Endangered and Threatened Species and Designating Critical Habitat

Department of the Interior
U.S. Fish and Wildlife Service

Department of Commerce
National Marine Fisheries Service

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Public Comments Processing
Attn: Docket No. FWS–HQ–ES–2021–0107
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

National Marine Fisheries Service
Office of Protected Resources
1315 East-West Highway
Silver Spring, MD 20910

Docket No. FWS–HQ–ES–2021–0107

The Energy and Wildlife Action Coalition ("EWAC")[1] submits these comments in response to the United States Fish and Wildlife Service ("USFWS") and National Marine Fisheries Service (together the "Services") June 22, 2023 proposed rule ("Proposed Rule")[2] to revise portions of the regulations that implement section 4 of the Endangered Species Act ("ESA") regarding the procedures and criteria used for listing, reclassifying, and delisting federally protected species and designating critical habitat.

As described in greater detail below, while EWAC anticipates that a number of the changes described in the Proposed Rule will be beneficial, other proposed changes are unlikely to serve the interests of the agencies, the public, the renewable energy industry, or the energy transmission and distribution industry. The Services' failure to sufficiently improve these issues in the listing, delisting, and designation of critical habitat will result in increased burdens on the Services and the regulated community.

The purposes of this comment letter are to:

- provide support for the aspects of the Proposed Rule that will result in greater consistency and clarity in the Services' actions;
- identify aspects of the Proposed Rule that may create further confusion regarding the Services' listing determinations;
- provide feedback on the Services' proposed changes to delisting decisions; and
- provide input on the Services' proposed changes to the designation of critical habitat.

EWAC is committed to supporting the Services' efforts to improve the listing, delisting, and designation of critical habitat processes and welcomes additional discussion with the Services on solutions that result in greater regulatory clarity and effective conservation for listed and sensitive species.

I. Support for Certain Provisions of the Proposed Rule

In the following sections, we highlight several aspects of the Proposed Rule that we believe will be particularly valuable and should be included in any final rule. Generally, EWAC appreciates the Services' continued desire to add clarity to its listing, delisting, and critical habitat designation procedures. EWAC supports the Services taking a measured approach to the proposed regulatory revisions instead of attempting a wholesale revision or rescission of the regulations.

[1] EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. 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. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

[2] 88 Fed. Reg. 40,764 (June 22, 2023) ("Proposed Rule").

Consistent application of the ESA regulations over time and throughout the Services' field offices provides regulatory certainty.

EWAC also supports the Services' additional language stating that it must base its unoccupied critical habitat designations on the best available science.[3] The Services state this added language serves to "emphasize the statutory requirement that the determination of whether a specific area is essential for the conservation of the species must be driven by the best available science."[4] This position is consistent with the requirements of the ESA and codifying these requirements improves the clarity of the critical habitat designation process for project developers and operators.

EWAC commends the Services for retaining the language from the regulations emphasizing that listing, delisting, and reclassification determinations must be based "*solely* on the basis of the best scientific and commercial information regarding a species' status"[5] and that when the Services consider delisting a species, the agencies must apply the listing factors found in ESA section 4(a)(1) to determine whether the species at issue continues to meet the definition of an endangered or threatened species.[6] These regulations provide a clear framework for Services' personnel to make species status determinations.

Lastly, EWAC supports the Services' clarification that the agencies are not limited to considering the same exact considerations when delisting a species as were contemplated at the time of listing.[7] The Services note this change clarifies that the Services' delisting analysis is not "limited to those same specific factors that initially led [the Services] to list that particular species."[8] Such a position is consistent with the best available science standard and appropriately allows the Services to consider new and/or different information that may arise after a Services' listing determination indicates a species should be delisted.

II. Concerns Related to Determinations Listing Species as Threatened

A. The Services should maintain the "reasonable determination" language in the foreseeable future standard

In the context of listing species as threatened, the existing language states: "[t]he term foreseeable future extends only so far into the future as the Services can ***reasonably determine*** that both the future threats and the species' responses to those threats ***are likely***."[9] The Services now propose to change the foregoing regulatory language to state "[t]he term foreseeable future extends as far into the future as the Services can ***reasonably rely*** on information about the threats

[3] *Id.* at 40,771.
[4] *Id.*
[5] 50 C.F.R. 424.11(b) (emphasis in the original); *see also* 84 Fed. Reg. 45,020, 45,052 (Aug. 27, 2019) ("2019 Rule").
[6] 50 C.F.R. 424.11(e); see also 2019 Rule at 45,052.
[7] *See* Proposed Rule at 40,768.
[8] *Id.*
[9] 50 C.F.R. § 424.11(d) (emphasis added).

to the species and the species' responses to those threats."[10] The Services state this change would help align the regulatory language more closely with previous guidance documents and would clarify that the Services do not need to have "absolute certainty about the information [they] use."[11] However, EWAC is concerned that what the Services have done is fully adopt the precautionary principle, allowing the Services to rely on worst-case scenarios instead of "likely" outcomes.[12] Under the Proposed Rule, instead of making a reasonable determination that a species' response to future threats is likely, the Services would be able to simply rely on information regarding the species' responses, whether or not those outcomes are likely to occur. The ESA does not permit the Services to exercise the precautionary principle in favor of the species when making listing determinations.[13] As the D.C. Circuit recently stated, "[t]he [ESA] is focused upon "likely" outcomes, not worst-case scenarios."[14] EWAC is concerned that the proposed revisions, taken as a whole, may result in the Services improperly relying on sources or making assumptions which are unlawfully pessimistic concerning a species' trajectory.

Courts have held that in determining how far into the foreseeable future agencies may look in order to assess whether a species meets the definition of a "threatened" species, the Services must apply "the best data available for a particular species and its habitat."[15] For example, in *Natural Resources Defense Council v. Coit*, plaintiffs challenged the USFWS's decision to project threats and responses out 12 to 18 years when making a listing determination regarding the river herring.[16] Plaintiffs asserted that instead of 12 to 18 years, the best available science actually supported a projection of threats of over 80 years into the future.[17] However, the court upheld the USFWS's use of the shorter foreseeable future timeframe, due to uncertainty of the data beyond the 12- to 18-year window.[18] In essence, the court held that requiring the agency to project threats and responses beyond the 12- to 18-year timeframe would have resulted in reliance on uncertain data.[19] Third parties frequently challenge the decision of the Services to list or decline to list

[10] Proposed Rule at 40,774, 40,766.
[11] *Id.* at 40,766.
[12] The often-cited definition of the precautionary principle is that "[w]here there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1), Annex I (Aug. 12, 1992), available at: https://undocs.org/en/A/CONF.151/26/Rev.1(vol.I).
[13] *Nat'l Lobstermen's Ass'n v. Nat'l Marine Fisheries Servs.*, 70 F.4th 582, 597-98 (D.C. Cir. 2023) (stating that "when the Congress wants an agency to apply a precautionary principle, it says so," and finding that the ESA does not ordain the application of the precautionary principle). In *National Lobstermen's Ass'n*, the court further stated that the ESA "requires the Service to use the best available scientific data, not the most pessimistic. The word 'available' rings hollow if the Service may hold up an agency action by merely presuming that unavailable data, if only they could be produced, would weigh against the agency action." *Id.*
[14] *Id.*
[15] *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 681 (9th Cir. 2016) (stating that the ESA requires the Services to "consider the best and most reliable scientific and commercial data and to identify the limits of that data when making a listing determination").
[16] 597 F.Supp.3d 73, 86-87 (D.D.C. 2022).
[17] *Id.* The court noted that the plaintiffs' argument "lean[ed] heavily on the foreseeability of the climate change threat" but ignored the species' responses to those threats. *Id.* at 87.
[18] *Id.* at 87.
[19] *Id.*

species as threatened, and courts often defer to the Services' determination of how far out they can justifiably utilize information relating to future impacts.[20] Therefore, in light of the Services' statutory mandates under the ESA and further guidance provided by federal courts, EWAC urges the Services to maintain the requirement that the agencies must make a "reasonable determination" that both future threats and species' responses to those threats are likely, and in timeframes supported by best scientific and commercially available data.[21]

In the event the Services still desire to eliminate the phrase "reasonable determination" in the regulation, EWAC proposes that the Services instead change the language to state "the term foreseeable future extends ~~only so~~ as far into the future as the Services can reasonably ~~determine that both the future~~ rely on information finding that the threats to the species and the species' responses to those threats are likely."[22]

B. The Services should not rescind the foreseeable future provision in reliance on the 2009 M-Opinion 37021 Guidance

In the preamble to the Proposed Rule ("Preamble"), the Services state they are considering entirely deleting the foreseeable future regulatory language at 50 C.F.R. section 424.11(d) in favor of relying on its previous 2009 M-Opinion 37021 Guidance ("M-Opinion").[23] EWAC encourages the Services not to rescind the existing regulatory provisions in order to rely on guidance documents, which lack regulatory effect. In the Preamble to the Proposed Rule, the Services state the changes in the regulations are aimed at being more consistent with the M-Opinion, and as such, the redundancy with the guidance may only create more confusion. Despite the Services' intentions, EWAC is concerned that in practice, removing the foreseeable future provisions from the regulations and relying on the M-Opinion alone will result in decreased reliability on a key aspect of the listing determination process.

---

[20] *See, e.g.*, *Ctr. for Biological Diversity v. Jewell*, No. CV-15-4, 2016 WL 4592199, at *6 (D. Mont. Sept. 2, 2016) (The court upheld a decision that the listing of the DPS of Arctic grayling was not warranted even though plaintiffs claimed that the Service ignored certain data including climate change impacts to the species. The court held that the Service properly determined that the plaintiffs' proffered data was "no longer accurate."); *Ctr. for Biological Diversity v. Lubchenco*, 758 F.Supp.2d 945, 966-68 (N.D. Cal. 2010) (The plaintiffs challenged the U.S. Fish and Wildlife Service's decision to limit its foreseeable future projection to 2050, stating that further projections show future harm to the species. The court upheld the Service's decision to not go beyond 2050, because after 2050, the models "showed a great divergence."); *Colo. River Cutthroat Trout v. Salazar*, 898 F.Supp.2d 191, 206-07 (D.D.C. 2012) (rejecting claim that the U.S. Fish and Wildlife Service should have considered climate change impacts even though the impacts lacked sufficient evidence); *Sw. Ctr. of Biological Diversity v. Babbitt*, No. CV-95-03688, 1998 WL 141321, at *2 (9th Cir. Mar. 25, 1998) (decision not to list coastal cactus wren was consistent with best available evidence because there was "little objective scientific evidence" to support a finding otherwise).

[21] Prior caselaw has noted that "[t]he ESA requires a determinatio***n*** as to the ***likelihood***—rather than merely the ***prospect***—that a species will not become endangered in the foreseeable future. *Or. Nat. Res. Council v. Daley*, 6 F.Supp.2d 1139, 1152 (D. Or. 1998) (emphasis added).

[22] EWAC has provided the strikethroughs and underlines to demonstrate the changes EWAC proposes from the current regulations located at 50 C.F.R. section 424.11(d). The added language is underlined and any deletions shown in strikethrough.

[23] Proposed Rule at 40,766.

Congress has not defined what constitutes the "foreseeable future,"[24] And this lack of a clear definition has led to decades of litigation over the proper interpretation of the phrase.[25] As a result, in 2009, the U.S. Department of the Interior sought to clarify how the Services should interpret the "foreseeable future" when making listing determinations by issuing the M-Opinion,[26] which did not receive public review or comment. A decade later, and through promulgation of the 2019 Rule, the Services sought to provide a more durable framework for applying the "foreseeable future" in listing determinations. While the 2019 Rule was based, in part, on the M-Opinion's guidance, the 2019 Rule did not adopt the M-Opinion wholesale.[27] Rather, the Services took public comments on the framework in promulgating the final rule, in accordance with the Administrative Procedure Act ("APA"). Through the Proposed Rule, the Services now propose to revert back to reliance on the M-Opinion, which does not carry the same predictable, or binding effect as the existing regulations, and, unlike the 2019 Rule, did not benefit from public notice and comment.

EWAC has frequently stated that the Services should be careful when placing too much reliance on guidance in lieu of rules which have gone through the proper notice and comment procedures. In doing so, the agencies run the risk of improperly treating guidance as regulation. In *Appalachian Power Co. v. E.P.A.*, the D.C. Circuit held that one indication of improper reliance on guidance is if the agency "treats the document in the same manner as it treats a legislative rule."[28] Similarly, EWAC cautions the Services from engaging in the practice of repealing rules that have gone through proper notice and comment, so it can instead rely on mere guidance documents that received no such treatment – thereby depriving the public of meaningful participation in the regulatory process as required under the APA.

III. EWAC's Concerns Relating to Delisting Decisions

In the Proposed Rule, the Services present several revisions to the procedures and standards applied when making delisting decisions.[29] First, the Services propose to add the phrase "the species is recovered" as an express example of when a species may no longer meet the definition of a threatened or endangered species.[30] The Services state this addition is intended to highlight that a species' recovery is an "express, important example of when a species should be delisted."[31]

---

[24] Memorandum from the Office of the Solicitor on the Meaning of "Foreseeable Future" in Section 3(20) of the Endangered Species Act, M-37021 at 13 (Jan. 16, 2009), available at: https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37021.pdf (hereinafter M-Opinion).

[25] *See, e.g.*, *Or. Nat. Res. Council v. Daley*, 6 F.Supp.2d 1139, 1151-52 (D. Or. 1998) (finding that NMFS failed to properly apply the foreseeable future standard); *Nat. Res. Def. Council, Inc. v. Coit*, 597 F.Supp.3d 73, 85 (D.D.C. 2022) (alleging that the Fish and Wildlife Service's foreseeable future timeframe of 12-18 years of was too short); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 488 F.Supp.3d 1219, 1227 (S.D. Fla. 2020) (challenging the Fish and Wildlife Service's foreseeable future timeframe of 60 years as being too short).

[26] *See* M-Opinion at 1.

[27] *Id.*

[28] 208 F.3d 1015, 1021 (D.C. Cir. 2000).

[29] Proposed Rule at 40,767. The Services proposes three substantive changes to the delisting regulations located at 50 C.F.R. section 424.11(e). Two of the changes are address in Section III here and the other is addressed above in Section I.

[30] Proposed Rule at 40,767.

[31] *Id.*

While EWAC supports this clarification, we are also concerned this addition may result in the failure of the Services to delist species that may not have strictly met the elements of the relevant recovery plan. Not all listed species have a recovery plan and courts have held a "[recovery] plan is a statement of intention, not a contract," and serves only as guidance for delisting decisions, and a species can be recovered without meeting the elements of its recovery plan.[32]

Second, in the Proposed Rule, the Services propose to revise language indicating the Services must delist a species when the delisting criteria are met.[33] The Services propose to change the regulatory delisting language from a mandatory requirement to a discretionary one. The current language in the Listing Regulations states that where a delisting criterion is met, the Services "***shall*** delist" the relevant species.[34] By contrast, the Proposed Rule would revise the language to state that where a delisting criterion is met, it "is ***appropriate***" to delist the relevant species.[35] The Services state the reason for his change is to emphasize the importance of the formal delisting rulemaking process.[36] While the Services believe this change is not substantive, EWAC disagrees.[37] The proposed change could be interpreted as placing full discretion with the Services not to delist a species even where the best scientific and commercial data available indicate delisting is warranted and could result in the Services declining to delist species that no longer meet the criteria for listing.[38] According to the ESA, once the Services determine—on the basis of such data—that one or more of the criteria for delisting have been met, the agencies must delist.[39]

Finalizing the Proposed Rule, as written, could result in the Services maintaining regulatory oversight where such oversight not only is contrary to law, but also could impede the Biden Administration's clean energy goals by subjecting project proponents to regulatory processes, enforcement risk, and third-party lawsuits for species no longer warranting the protections. Additionally, unnecessarily maintaining species listed as threatened or endangered would continue to expend Service resources that could be focused, instead, on conserving truly imperiled species.[40]

---

[32] *Friends of Blackwater v. Salazar*, 691 F.3d 428, 433-34 (D.D.C. 2012); *see also Ctr. for Biological Diversity v. Bernhardt*, 509 F.Supp.3d 1256 (D. Mont. 2020) (stating that "recovery plans do not bind an agency into any single course of action"); *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996) ("Section 1533(f) makes it plain that recovery plans are for guidance purposes only."). A study from 2018 found that over 350 listed species do not have a recovery plan. Jacob W. Malcom & Ya-Wei Li, *Missing, Delayed, and Old: The Status of ESA Recovery Plans*, 11 J. of the Soc'y for Conservation Biology at 3 (2018), available at: https://doi.org/10.1111/conl.12601.

[33] *See* Proposed Rule at 40,774. The current language in the Listing Regulations state that where a delisting criterion is met, the Services "shall delist" the relevant species. 50 C.F.R § 424.11(e). By contrast, the Proposed Rule would revise the language to state that where a delisting criterion is met, it "is appropriate" to delist the relevant species.

[34] 50 C.F.R. § 424.11(e) (emphasis added).

[35] Proposed Rule at 40,767 (emphasis added).

[36] *Id.*

[37] *Id.*

[38] Listing determinations must be made solely on the basis of the best scientific and commercial data available. 16 U.S.C. § 1533(b)(1)(A).

[39] *Id.* § 1533(a), (c).

[40] Throughout the history of the ESA, a very small number of the species listed have been delisted. According to the U.S. Fish and Wildlife Service, 2,386 species have been listed under the ESA, while only 54 species have been delisted as a result of recovery. *See* U.S. Fish & Wildlife Service, *U.S. Fish & Wildlife Service Proposes Delisting 23 Species*

In lieu of the Services' proposed changes, EWAC suggests an alternative regulatory revision that retains the mandatory delisting language, "shall," while still achieving the Services' goal. The revised regulation should read: "The Secretary shall delist a species in accordance with the proper rulemaking procedures if the Secretary finds that, after conducting a status review based on the best available scientific and commercial data available . . . ."[41] EWAC believes the foregoing language would strike the proper balance of allowing the Services to confirm that they will comply with the proper notice and comment rulemaking procedures prior to any delisting while maintaining consistency with the delisting requirements under the ESA.

IV. Concerns Relating to the Designation of Critical Habitat

A. The Services should not designate unoccupied critical habitat based on climate change factors

EWAC cautions the Services from removing the regulatory language allowing for not-prudent determinations in circumstances where the threats to the species' habitat are caused exclusively by non-anthropogenic sources.[42] In the 2019 Rule, the Services added language indicating that designation of critical habitat would not be prudent if the threats to the species arose "***solely*** from causes that cannot be addressed through management actions resulting from consultation under section 7(a)(2) of the Act."[43] When the Services adopted this provision of the 2019 Rule, they explicitly cited to climate-based changes, such as reduced snowpack or rising sea levels, as an example of circumstances that could not be addressed through Section 7 consultation.[44] In the proposed 2019 Rule, the Services stated that "[i]n such cases, a critical habitat designation and any resulting section 7(a)(2) consultation, or conservation effort identified through such consultation, could not prevent glaciers from melting, sea levels from rising, or increase the snowpack."[45] The Services further explained that in those circumstances, a not-prudent determination may be proper because a critical habitat designation "may not contribute to the conservation of the species" and would "create a regulatory burden without providing any conservation value to the species concerned."[46] This addition in the 2019 Rule was consistent with the Services' "categorical requirement" to consider the economic and other relevant impacts of designating critical habitat because in those situations, designating critical habitat would impose considerable burdens with negligible benefit.[47]

---

from Endangered Species Act Due to Extinction (Sept. 29, 2021), available at: https://www.fws.gov/press-release/2021-09/us-fish-and-wildlife-service-proposes-delisting-23-species-endangered-species; U.S. Fish & Wildlife Service, *Listed Species Summary* (July 27, 2023), available at: https://ecos.fws.gov/ecp/report/boxscore.

[41] EWAC has provided the underlines to demonstrate the changes EWAC proposes from the current regulations located at 50 C.F.R. section 424.11(e). The added language is underlined.

[42] *See* Proposed Rule at 40,768.

[43] 50 C.F.R. § 424.12(a)(1)(ii) (emphasis added).

[44] 83 Fed. Reg. 35,193, 35,197 (Sept. 24, 2018) ("2019 Proposed Rule").

[45] *Id.*

[46] *Id.*

[47] 16 U.S.C. § 1533(b)(2); *see also Bennett v. Spear*, 520 U.S. 154, 172 (1997) (stating that the ESA imposes a "categorical requirement" that the Services consider the impacts of critical habitat designation); *N. New Mexico Stockman's Ass'n v. U.S. Fish & Wildlife Serv.*, 30 F.4th 1210, 1229-31 (10th Cir. 2022) (stating the same).

In the Proposed Rule, however, the Services simply state they intend to consider anticipated climate-change impacts in the context of critical habitat designations, but fail to reconcile this new position with the balancing considerations referenced above. Therefore, in the final rule it is EWAC's strong recommendation that the Services adhere to the stated position in the 2019 Rule. Multiple times, the Services have indicated that designation of critical habitat has little to no economic impact on the regulated community because critical habitat considerations only occur when a given project has a federal nexus.[48] Given those prior statements, the approach taken by the 2019 Rule—that areas should only be designated where threats can be addressed through measures required under ESA section 7 consultations—seems more consistent with the agencies' longstanding view of the purpose of critical habitat designations. EWAC is concerned the Services' view in the Proposed Rule, permitting designation of critical habitat based on climate change and other non-anthropogenic factors, may result in the Services needlessly expending their resources on threats to habitat that cannot be addressed by management actions developed through consultation. These determinations would not only stymie the Services, but the costs of these designations would be borne to a large degree by the regulated community, who will be required to undergo consultation even where there are no measures a project proponent could take at an individual level to ameliorate threats like climate change.

B. The Services should not remove the requirement to determine whether occupied critical habitat is inadequate for a species' conservation before designating unoccupied critical habitat

In the 2019 Rule, the Services prioritized the designation of occupied areas over unoccupied areas by stating the Services would "only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species" (hereinafter referred to as the "exhaustion requirement").[49] In the Proposed Rule, the Services now consider removing the exhaustion requirement.[50] However, this removal ignores the fact that the existing exhaustion requirement is consistent with the statutory requirement, legislative history, and recent case law interpretations. First, section 3 of the ESA states critical habitat for a species is an area that is "***essential*** for the conservation of the species."[51] Second, the legislative history from prior ESA amendments confirms the legislature favored the designation of occupied habitat over the designation of unoccupied habitat. Specifically, in a 1978 House Report from the House Committee for Merchant Marine and Fisheries, the committee stated the Services "should be exceedingly circumspect in the designation

[48] *See, e.g.*, 85 Fed. Reg. 57,578, 57,594 (Sept. 15, 2020) (finding that the Georgetown salamander critical habitat designation would have "minor" incremental costs because "[a]ll activities with a Federal nexus occurring within the proposed critical habitat designations will be subject to section 7 consultation regardless of critical habitat designation due to the presence of listed species); 87 Fed. Reg. 71,466, 71,482 (Nov. 22, 2022) (finding the same for the designation of critical habitat for the federally endangered Florida bonneted bat).
[49] 2019 Final Rule at 45,053.
[50] Proposed Rule at 40,769.
[51] 16 U.S.C. § 1532(5)(A)(ii) (emphasis added).

of critical habitat outside of the presently occupied area of the species."[52] Further, in recent caselaw, the Ninth Circuit held the foregoing statutory requirement and the requirement of the Services to determine currently occupied areas are inadequate for conservation of the species prior to designating unoccupied areas is simply the same requirement, phrased in a different way.[53] The Services claim the existing exhaustion requirement undermines their abilities to designate critical habitat and serves as a mere "unnecessary constraint[]."[54] However, EWAC posits instead that the existing exhaustion requirement serves as a proper guide for the Services to maintain consistency with the intent of the statute.

In the Proposed Rule, the Services justify this change by stating that "[n]either the [ESA] nor the legislative history creates a requirement to exhaust occupied areas before considering designation of unoccupied."[55] Thus, the Services state they can fill this statutory "gap" with their "reasonable interpretation" presented in the Proposed Rule.[56] EWAC recognizes that under current judicial precedent, if a statute is ambiguous or contains gaps, then the implementing agency (here, the Services) is granted wide deference in its statutory interpretation.[57] In such circumstances, the agency's interpretation need only be reasonable to be considered a "permissible construction of the statute."[58] However, in the final rule, EWAC encourages the Services to aim to promulgate rules that are not just permissible statutory interpretations, but are the best interpretations. EWAC believes that the Services' adoption of regulations that are most consistent with the statutory language and legislative intent will result in a rule that is predictable and can better withstand judicial scrutiny. As demonstrated above, the current exhaustion requirement is consistent with the statutory language and legislative history and thus, EWAC urges the Services to retain the existing requirement.

C. The Services should not remove the requirement that unoccupied critical habitat contain habitat features for the species

EWAC strongly objects to the Services' proposed removal of the language indicating that unoccupied critical habitat areas must contain habitat ("biological or physical") features for the species,[59] as a plain reading of section 4 of the ESA does not lend itself to such an interpretation.

---

[52] H.R. Rep. No. 96-1625, at 25 (1978). The Services quoted this language from the legislative history in the Proposed Rule. *See* Proposed Rule at 40,769.

[53] *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) (stating that "if certain habitat is essential, it stands to reason that if the Service did not designate this habitat, whatever the Service otherwise designated would be inadequate . . . . The regulation provides only elaboration and not an additional requirement or restriction") (quoting the lower court's reasoning in *Bear Valley Mut. Water Co. v. Jewell*, No. 11-01263-JVS, 2012 WL 5353353, at *22 (C.D. Cal. Oct. 17, 2012)); *see also Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 67 F.4th 1027, 1037 (9th Cir. 2023) ("If occupied critical habitat is adequate to conserve a protected species, then unoccupied areas *necessarily* are not essential to conservation. But, if occupied critical habitat is inadequate for conservation, then designation of unoccupied critical habitat may be essential.") (emphasis in original).

[54] Proposed Rule at 40,769.

[55] *Id.*

[56] *Id.*

[57] *See Chevron v. U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (applying the two-prong test).

[58] *Id.* at 843.

[59] *Id.* at 40,769-70.

The ESA states unoccupied critical habitat must be "essential for the conservation of the species," and the Services fail to provide sufficient justification as to how habitat could be considered essential when it lacks any physical or biological features essential to the conservation of the species. Furthermore, the Services' interpretation appears to be in direct conflict with the Supreme Court's reasoning in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*.[60] In the Proposed Rule, the Services engage in a selective reading of *Weyerhaeuser* to assert that the court did not resolve how to define critical "habitat" for unoccupied habitat and then goes on to propose a "better reading of the statute" that achieves the Services' goals.[61] However, this proposal is contrary to the court's reasoning in *Weyerhaeuser* wherein the court plainly and broadly stated that "[a]ccording to the ordinary understanding of how adjectives work, 'critical habitat' must also be habitat" and held that habitat cannot include areas where the species cannot currently survive in the designated area even with modification.[62] In addition, courts have consistently held that the standards for designating unoccupied critical habitat "is a more demanding standard than that of occupied critical habitat."[63] EWAC is concerned the proposed change will increase ambiguity and weaken the intentionally "demanding" requirement for designating unoccupied critical habitat.

Removing the requirement that unoccupied critical habitat must have biological or physical features essential to the conservation of the species creates uncertainty for the regulated community. Making informed project siting decisions, particularly for large-scale renewable energy and electric infrastructure projects, would be far more difficult if potential critical habitat is not required to have the characteristics one would expect a species to need. The language in the 2019 Rule also provides better guidance to Services staff implementing the ESA as they can rely on more durable and straightforward critical habitat regulations.

Taken together, the removal of the exhaustion requirement and the additional emphasis on climate change factors may result in designation of unoccupied critical habitat based solely or primarily on speculative threats. EWAC urges the Services not to remove the noted language from existing regulations requiring unoccupied areas under consideration for critical habitat designation to contain one or more physical or biological features essential to the species' conservation. In the event the Services finalize the change, however, EWAC encourages the Services to include a requirement for the Services to demonstrate with reasonable certainty that unoccupied areas not containing physical or biological features essential for species' conservation will support such features in the reasonably foreseeable future.

V. Conclusion

EWAC members believe that clear and consistent application of the Services' listing, delisting, and designation of critical habitat regulations will serve the interests of the agencies, the

[60] 139 S. Ct. 361 (2018).
[61] Proposed Rule at 40,770.
[62] *Weyerhaeuser*, 139 S. Ct 368-69.
[63] *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 990 (9th Cir. 2010); *see also Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (stating that the ESA "impos[es] a more onerous procedure or the designation of unoccupied areas"); *Markle Ints., LLC v. U.S. Fish & Wildlife Serv.*, 848 F.3d 635, 648 (5th Cir. 2017) (recognizing a "more demanding" standard for the designation of unoccupied critical habitat); *Otay Mesa Prop., LP v. U.S. Dep't of the Interior*, 344 F.Supp.3d 355, 374 (D.D.C. 2018) (stating the same).

public, and the renewable energy industry and broader electric power sector. Clear and consistent application of the Services' regulations will also aid the Biden Administration in achieving its climate change goals. EWAC looks forward to continuing to work with the Services in their efforts to improve implementation of the ESA and would welcome further dialogue with the Services on any of the topics above.

***

Please feel free to contact the following EWAC representatives:

Jennifer A. McIvor, EWAC Policy Chair, jennifer.mcivor@brkenergy.com, 712-352-5434

John M. Anderson, EWAC Executive Director, janderson@energyandwildlife.org, 202-508-5093

Brooke Marcus, Nossaman LLP, bmarcus@nossaman.com, 512-813-7941