National Hydropower Association
25 Massachusetts Ave. NW, Ste. 450, Washington, D.C. 20001 • Tel 202-682-1700 • Fax 202-682-9478 • www.hydro.org

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U.S. Fish and Wildlife Service
Public Comments Processing
Attn: FWS-HQ-ES-2012-0096; FWS-R9-ES-2011-0072; FWS-R9-ES-2011-0104
Division of Policy and Directives Management
4401 N. Fairfax Drive, Suite 222
Arlington, VA 22203

RE: National Hydropower Association's Comments on the U.S. Fish and Wildlife Service and National Marine Fisheries Service Proposed Rules – *Implementing Changes to the Regulations for Designating Critical Habitat*, *Definition of Destruction or Adverse Modification of Critical Habitat*, and *Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act*.

Director Ashe and Assistant Administrator Sobeck:

On May 12, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the "Services") issued and requested comments on two proposed rules, *Implementing Changes to the Regulations for Designating Critical Habitat* and *Definition of Destruction or Adverse Modification of Critical Habitat*, and a draft policy, *Implementation of Section 4(b)(2) of the Endangered Species* Act (collectively, "Proposals"). The National Hydropower Association ("NHA")[1] is pleased to submit the following comments on the Proposals.

I. Introduction

NHA appreciates this opportunity to provide comments on the Services' initiative to revise existing regulations related to critical habitat under the Endangered Species Act ("ESA"). Regulatory policies, such as the ESA and its implementation, can significantly affect the hydropower industry, both in terms of daily operations and in long-term management and planning.

As America's leading renewable electricity resource, hydropower provides approximately eight percent of our nation's total electricity supply and the majority of America's total renewable electricity, resulting in hundreds of thousands of domestic jobs. NHA's members and hydroelectric facility owners and operators

[1] NHA is a national non-profit association dedicated exclusively to advancing the interests of the U.S. hydropower industry, including conventional, pumped storage, and new marine and hydrokinetic technologies. NHA's membership consists of almost 200 organizations, including consumer-owned utilities, investor-owned utilities, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys.

are stewards of the rivers where their facilities are located, and value river resources and a diverse ecosystem. Every year, the industry spends hundreds of millions of dollars on environmental conservation, mitigation, and protection and enhancement measures for endangered or threatened species under the ESA. Therefore, NHA has a particular interest in the Proposals.

Numerous recent studies have demonstrated tremendous growth potential in the tens of thousands of megawatts of clean, renewable power generation across the waterpower sector, including new conventional hydropower capacity.[2] As the hydropower industry prepares for this growth, review and revision of the Services regulations and processes, such as these Proposals, can be achieved in a way that benefits all stakeholders, maintains important protections for ESA-listed species and their habitat, and are responsive to the President's initiatives related to improving regulatory review, reducing regulatory burden, and modernizing infrastructure permitting.[3]

II. Executive Summary of Comments on Proposed Rules and Draft Policy

NHA appreciates the Services wanting to "clarify the procedures for designating and revising critical habitat" and aligning definitions so that they are more consistent with the ESA. NHA also supports the Services' attempt to remove the uncertainty associated with the definition of "destruction or adverse modification" following the court decisions invalidating the existing definition. These efforts can go a long way in creating certainty for the regulated community.

However, NHA is concerned that the Services' Proposals, as drafted, will result in even broader discretion when designating or revising occupied or unoccupied critical habitat. In addition, NHA believes that the Services' revisions to the adverse modification definition are significantly more expansive than necessary to address the concerns raised by the courts and would establish a much lower threshold when considering

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[2] See, Office of Energy Efficiency and Renewable Energy, Wind and Water Power Program, U.S. Dep't of Energy, *An Assessment of Energy Potential at Non-Powered Dams in the United States* (Apr. 2012), http://www1.eere.energy.gov/water/pdfs/npd_report.pdf; *New Stream Reach Development: A Comprehensive Assessment of Hydropower Energy Potential in the United States* (Apr. 2014), http://nhaap.ornl.gov/sites/default/files/ORNL_NSD_FY14_Final_Report.pdf; and, Bureau of Reclamation, U.S. Dep't of the Interior, *Site Inventory and Hydropower Energy Assessment of Reclamation Owned Conduits* (Mar. 2012), http://www.usbr.gov/power/CanalReport/FinalReportMarch2012.pdf;

[3] See, Exec. Order No. 13563, 14 Fed. Reg. 3821 (January 18, 2011) Improving Regulation and Regulatory Review; Exec. Order 13610, 93 Fed. Reg. 28469 (May 14, 2012) Identifying and Reducing Regulatory Burdens; Exec. Order No. 13604, 60 Fed. Reg. 18887 (March 22, 2012) Improving Performance of Federal Permitting and Review of Infrastructure Projects; and *Implementing Executive Order 13604 on Improving Performance of Federal Permitting and Review of Infrastructure Projects* (Jun. 15, 2012).

the effects of an action. Taken together, the Proposals will increase burdens on landowners and project proponents beyond what Congress intended, lead to more uncertainty in the regulated community and for species protection, create greater inefficiencies, reduce flexibility, and discourage innovation in the regulatory permitting process. All at a time when the Administration has laid out clear goals to modernize and streamline the federal regulatory and permitting process. The Proposals will only be meaningful if the Services' provide clarity and consistency throughout the Proposals and include clear factors and fair standards when designating and revising critical habitat and assessing when adverse modification occurs in the consultation process.

III. Implementing Changes to the Regulations for Designating Critical Habitat

In designating critical habitat, the Services are guided by the intent of Congress and the plain language of the ESA. Notably, the Services can only designate critical habitat that is "*essential* to the conservation of the species."[4] Thus, these areas must be "indispensable" or "of the utmost importance" to conserving the species.[5] By using essential, Congress made it clear that the purpose of designating critical habitat under the ESA was intended to serve a limited and specific purpose and was not to be a mechanism for broad reservations or withdrawal of habitat from other uses.

A. The Services Should Retain "where appropriate" in the Scope and Purpose

The Services are proposing to delete "where appropriate" in 50 C.F.R. 424.01(a) because the "Services believe that circumstances when critical habitat designations will be deemed not prudent are rare."[6] The proposed change has the potential to lead to a presumption of critical habitat designation, and undermines important statutory provisions laid out by Congress. NHA recommends retaining the words "where appropriate" in the regulation.

Section 3(5)(C) of the ESA requires deliberation about where critical habitat is appropriate: "[e]xcept in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied...."[7] Further, section 4(b)(2) of the ESA grants the Secretary considerable

[4] 16 U.S.C. § 1532(5)(A) (emphasis added).
[5] Merriam-Webster Dictionary (2014) (definition of "essential").
[6] 79 Fed. Reg. at 27,068.
[7] 16 U.S.C. §1532 (5)(C).

authority to exclude particular areas from a designation based on economic or other considerations.[8] In addition, the ability of the public to petition the Services to revise critical habitat would seem to require the Services to specifically address the "appropriateness" of the proposed revision. In these examples, the Services are removing needed flexibility in determining whether to designate critical habitat.

B. Geographical Area Occupied by the Species

Determining the geographical area occupied by a species is a threshold determination that informs the remainder of the critical habitat designation process. It is of the utmost importance that the Services provide clarity and certainty to the regulated community at this early stage in the designation process.

The Services are proposing "geographical area occupied by the species" to mean:

> the geographical area which may generally 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.)[9]

NHA believes the Services proposed definition is inconsistent with case law and should be revised to provide more clarity to ensure the definition is not applied in an overly broad manner.

1. The Area Occupied by a Species Is Not Coextensive with Its Range

The Services' explain that "the geographic area occupied by the species is thus the broader, coarser-scale area that encompasses the occurrences, and is what is often referred to as the 'range' of the species."[10] By relying upon "range" without additional explanation or precision, the Services have incorporated a vague and ambiguous term that would appear to include unoccupied areas within the definition of "geographic areas occupied by the species." By including an area that encompasses multiple species' occurrences, it appears that the Services are also including habitat with no occurrences (e.g., areas in-between occurrences or other areas outside documented occurrences).

The courts have determined that including areas without documented occurrences is not proper. For example, a district court invalidated a critical habitat designation that included migration corridors when

[8] *Id.* at § 1533(b)(2).
[9] 79 Fed. Reg. at 27,068-69.
[10] *Id*. at 27,069.

there was evidence that some of the included land was not, in fact, occupied by the species.[11] Further, a court has determined that the existence of a species in a general area, including outside a particular property, does not demonstrate that the property itself is occupied.[12] Finally, a court recognized that the Services cannot include parcels of land as occupied habitat merely because they are capable of supporting a listed species or those areas are suitable for future occupancy.[13] Thus, NHA believes that by defining the area occupied by the species as coextensive with "range" and including multiple areas of occurrence, the Services are expanding the geographic extent of occupied habitat beyond the limits of judicial interpretation.[14]

2. Occupation of an Area Requires More Permanence than Temporary Use

In explaining the second sentence of the "geographical area occupied by the species" definition, the Services' state that the term "occupied" is intended to 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."[15]

While recognizing that the definition of occupied will depend in part on the characteristics of a particular species, the courts have found that the term is limited to areas of consistent or regular use. For example, the Ninth Circuit stated that "FWS has authority to designate as 'occupied' areas that the owl uses with *sufficient regularity* that it is likely to be present during any *reasonable span of time*."[16] In addition, a district court upheld FWS's reliance on "areas with '*consistent use*,' which the Services' defined as those areas where 'observations over more than one wintering season' demonstrated plovers' presence."[17] NHA recommends that the Services incorporate this terminology and examples into their definition of "occupied" to provide more definitive boundaries regarding the types and durations of uses that would qualify a particular area for designation.

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[11] *Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Serv.*, 268 F.Supp.2d 1197, 1221 (E.D. Cal. 2003).
[12] *Otay Mesa Property, L.P. v. U.S. Dept of Interior*, 646 F.3d 914, 918 (D.C. Cir. 2011).
[13] *E.g.*, *Alaska Oil and Gas Ass'n v. Salazar*, 916 F.Supp.2d 974, 989 (D. Alaska 2013).
[14] Further, the Services are required to make the occupancy determination based upon occupation "at the time [the species] is listed." 16 U.S.C. § 1532(5)(A). This precludes reliance upon historic range and the discovery of additional post-listing occurrences. *See Otay Mesa Property*, 646 F.3d at 917 (noting that the Service's reasoning in attempting to explain why a single species sighting in 2001 means that the property was occupied in 1997 was "at best strained").
[15] 79 Fed. Reg. at 27,069.
[16] *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1165 (9th Cir. 2010) (emphasis added).
[17] *Cape Hatteras Access Preservation Alliance v. U.S. Dept of the Interior*, 344 F.Supp.2d 108, 120 (D.D.C. 2004) (emphasis added).

In contrast, in the proposed rule, the Services state that the periodic or temporary presence of a species would qualify an area as occupied for purposes of a critical habitat designation. However, the Services do not adequately explain what degree of occupancy is associated with being periodically or temporarily present. Further, the use of "temporary" is inconsistent with the Services' subsequent statement that "[o]ccupancy by the listed species must be based on evidence of *regular periodic use* by the listed species during some portion of the listed species' life history."[18] The only specificity provided is that vagrant wandering far from the known species range would not be sufficient to establish periodic use.

This explanation does not provide sufficient clarity or certainty with respect to the types of uses, the frequency of use, and the appropriate timeframe by which to establish that a species occupies a particular area at a particular time. NHA believes the Services' articulation of temporary presence is inconsistent with the courts' interpretation that occupation requires the regular or consistent use of an area within a reasonable period of time (e.g., seasonally or annually).

NHA recommends deleting or clarifying "even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals)" in the proposed definition of geographical area occupied by the species. The Services state that "Occupancy by the listed species must be based on evidence of regular periodic use by the listed species during some portion of the listed species' life history." The Service need to explain why habitat not used on a regular basis is necessary in determining the geographical area occupied by the species. The proposed definition is intended to implement Section 3(5)(A)(i) of the ESA, but by including language related to "habitat not used on a regular basis" the Services are introducing an element of unoccupied areas, which is reserved for section 3(5)(A)(ii) of the ESA, which is a more demanding process.

3. Occupancy Requires More than Indirect or Circumstantial Evidence

The Services state that they may rely upon "indirect or circumstantial evidence to determine occupancy."[19] However, the Services' are required to implement the ESA based upon the best scientific data available, and not upon speculation or surmise.[20] While this standard does not require absolute certainty as to where exactly a species may be found, it also prevents the Services from defining occupancy without data to

[18] 79 Fed. Reg. at 27,069.
[19] *Id.* at 27,069.
[20] 16 U.S.C. § 1533(b)(2); *Bennett v. Spear*, 520 U.S. 154, 176 (1997) ("ESA [is] not [to] be implemented haphazardly, on the basis of speculation or surmise.").

support their conclusions.[21] For example, speculation about a species' presence is an insufficient basis on which to find that habitat is occupied.[22] Accordingly, the Services should only designate areas as occupied based upon concrete scientific evidence that breeding, foraging, or migratory behaviors actually occur in that location on a regular or consistent basis.

C. Physical or Biological Features

After determining the "geographical area occupied by the species," the Services then have the discretion to designate critical habitat within that geographical area. Historically, the Services have designated critical habitat based on the geographical areas "primary constituent elements" ("PCE") within the occupied geographic area. However, under the proposed rule, the Services propose to delete all references to PCEs and will now rely on an area's "physical or biological features" ("PBF") when designating critical habitat.

PBFs were previously undefined, but the Services propose PBFs to mean:

> The features that support the life-history needs of the species, including but not limited to water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.[23]

1. *Transitioning from "primary constituent elements" to "physical or biological features"*

NHA appreciates the Services' attempt to clarify the regulations by removing confusing terms and relying on phrases that are used in the ESA. The Services' intent in removing all references to PCEs and relying on PBFs was to "simplify and clarify the process, and to remove redundancy, without substantially changing the manner in which critical habitat is designated."[24] Unfortunately, NHA believes that the proposed PBF definition incorporates different habitat characteristics than what were used under PCEs, and expands the scope of what habitat conditions may constitute an appropriate PBF.

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[21] *Home Builders Ass'n of Northern California*, 268 F.Supp.2d at 1221; *Otay Mesa Property*, 646 F.3d at 918.
[22] *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife,* 273 F.3d 1229, 1244 (9th Cir. 2001).
[23] 79 Fed. Reg. 27068-69.
[24] 79 Fed. Reg. at 27,071

First, the current definition of PCE includes, but are not limited to, the following, "roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types."[25] Although some of the same examples are used in the proposed definition, many are left out. If the Services want to "simplify and clarify the process", NHA recommends providing additional clarity related to the inconsistencies between the proposed definition and current definition of PCE.

Second, the phrase PCE has been in use for over thirty years. It has been subject to judicial interpretation, and the regulated community has developed some certainty and comfort with its use. Yet, the proposed definition of PBF adds complexity and ambiguity, which will reduce certainty and familiarity. The Services must provide an adequate definition and sufficient explanation to ensure that the implementation of the statutory phrase truly does not effectuate a substantial change compared to PCE.

2. *Emphasis Must be on the Physical or Biological Features "essential" to Conservation*

NHA recommends that the Services revise the definition and accompanying analysis to make it clear that PBFs must be essential to the life-history needs of the species, and not that they only need to "support" those needs. The preamble in this section of the proposed rule is absent on this point. However, under the *Criteria for Designating Critical Habitat*, the Services make it clear that PBFs must be essential in order to designate as critical habitat. "Within the geographical area occupied by the species, the Secretary must identify the specific areas on which are found those physical or biological features (1) essential to the conservation of the species…"[26] To be consistent with Congressional intent, NHA recommends the Services explain how they will determine whether a particular habitat feature is "essential" to the conservation of the species.

In the alternative, the Services need to provide additional clarity regarding what features "support" the life-history needs of the species. The Services proposed a variety of general formulations of what a feature may be, such as, a single habitat characteristic; a complex combination of habitat characteristics; characteristics that support ephemeral or dynamic habitat conditions; and terms relating to principles of conservation biology. Under the proposed rule, the scope of potential PBFs appears limitless. NHA

[25] 50 CFR §424.12
[26] 79 Fed. Reg. 27071.

recommends that the Services revise the definition based on the habitat conditions that serve a species' biological needs and the quantity or quality of such habitat conditions.

3. The Services Must Clarify the Use and Application of Physical or Biological Features and Life-History Needs

In the preamble of the Adverse Modification proposed rule, the Services state that PBFs:

> is intended to apply more broadly than in defining specific areas of critical habitat within the geographic area occupied by the species at the time of listing. All habitats are comprised of physical or biological features. Consistent with current practice, we anticipate that our analyses of the effects of the action to critical habitat will necessarily consider, in part, effects to features irrespective of whether the specific area was designated within or outside of the geographic area occupied by the species at the time it was listed.[27]

It appears that the Services are setting forth two different standards for determining a PBF, one standard for determining whether areas should be designated as critical habitat, and the other standard, more broadly, for determining adverse modification. The PBF analysis needs to be applied consistently in order to create certainty and NHA requests the Services to clarify which standard the Services will use.

Similarly, it appears that the Services are setting forth two standards for determining a species' "life-history" needs, one standard for determining PBF, and another standard for determining whether an action will result in adverse modification. Under the proposed definition of "Adverse Modification" the Services state that a species' life-history needs "may include, but are not limited to, food, water, light, shelter from predators, competitors, weather and physical space to carry out normal behaviors or provide dispersal or migratory corridors."[28] The "life-history" analysis should be the same under both scenarios (critical habitat designation and adverse modification) and NHA requests the Services to clarify which standard will be used.

4. The Services cannot rely upon ephemeral or dynamic characteristics

The proposed definition states that PBFs may include "ephemeral or dynamic habitat conditions". However, reliance on "ephemeral or dynamic habitat conditions" appears to be in direct conflict with the

[27] 79 Fed. Reg. 27061.
[28] 79 Fed. Reg. 27,061.

regulatory prohibition on using "ephemeral reference points (*e.g.,* trees, sand bars)… in any textual description used to clarify or refine the boundaries of critical habitat."[29]

Courts have stated that the physical or biological features must be "found" or "actually contained" on occupied land and cannot be based on speculation. In *Cape Hatteras Access Preservation Alliance v. U.S. Dept. of the Interior*, the court stated that PCEs "must be '*found*' on occupied land before that land can be eligible for critical habitat designation" and the Services cannot "statutorily cast a net over tracts of land with the *mere hope* that they will develop PCEs and be subject to designation."[30] Similarly, in *Alaska Oil and Gas Ass'n v. Salazar*, the court stated that the Services "must determine that the area *actually contains* physical or biological features essential for the conservation of the species" and the Services "*cannot simply speculate* as to the existence of such features."[31]

NHA recommends that the Services revise the definition and remove reliance on "ephemeral or dynamic characteristics".

D. Special Management Considerations or Protection

The Services are proposing to revise the definition of "special management considerations or protection" under § 424.02(j) by deleting "of the environment" and inserting "essential to". The current definition is "any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species." The proposed definition would read as follows, "any methods or procedures useful in protecting physical and biological features essential to the conservation of listed species."

NHA is concerned with the Services' new approach that "in determining whether an area has essential features that may require special management considerations is separate and distinct from whether management is currently in place", further elaborating that "the consideration of whether features in an area may require special management or protection occurs independent of whether any form of management or protection occurs in the area" or "whether that management is adequate."[32]

[29] 50 C.F.R. § 424.12(c).
[30] 344 F.Supp.2d 108, 122 (D.D.C. 2004) (emphasis added).
[31] 916 F.Supp.2d 974, 999 (D. Ak. 2013) (emphasis added).
[32] 79 Fed. Reg. 27070.

NHA's concern is compounded by the Services' statement that "in most circumstances, physical or biological features essential to the conservation of endangered species may require special management in all areas in which they occur…"[33] Special management considerations or protection is a statutory requirement that necessitates a factual finding that should take into account the existence of state, local, and voluntary management and protection measures that are occurring in the area proposed for critical habitat designation. NHA believes the Services are giving themselves very broad discretion that could lead to all PBFs being deemed essential and therefore require special management considerations or protections. NHA requests additional clarification on the process the Services will use in determining whether an area has essential features, such as whether the Services will utilize the best available science and technology.

NHA directs the Services to our comments below on the *Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act*, which describes private and non-federal conservation plans and partnerships, as well as Section 10 agreements that the hydropower industry is involved in that should not be discounted or ignored under the "special management considerations or protection" analysis.

E. Scale of the Critical Habitat Designating

The Services propose to completely revise section 50 C.F.R. 424.12(b) of the current regulations and reiterate their broad discretion in designating critical habitat "at a scale determined by the Secretary to be appropriate", further elaborating that the "Secretary cannot and need not make determinations at an infinitely fine scale. Thus, the Secretary need not determine that each square inch, yard, acre, or even mile independently meets the definition of 'critical habitat'…"[34] NHA agrees that making fine scale critical habitat determinations could be burdensome, but some precision is expected and reasonable. By utilizing new technologies such as Geographic Information Systems and remote sensing data, the Services should be able to make accurate determinations that limit the scope and scale of their determinations. NHA is concerned that, as drafted, the Services could designate a species' entire geographical area as critical habitat, which was not the intent of Congress.

[33] 79 Fed. Reg. 27070.
[34] 79 Fed. Reg. 27071.

F. Criteria for Designating Unoccupied Critical Habitat

1. The Services should not delete 50 C.F.R. § 424.12(e)

The Services propose that the new Section 424.12(b)(2) would subsume and supersede Section 424.12(e), effectively giving themselves wide discretion in designating unoccupied habitat not envisioned by Congress. NHA recommends that the Services retain Section 424.12(e).

Since 1980, the Services have taken the position, as codified by regulations, that it will designate unoccupied areas "only when a designation limited to its present range would be inadequate to ensure the conservation of the species."[35] The Services included that provision in 1980 to "implement the statutory requirement" that unoccupied areas may be designated "only if necessary to ensure the conservation of the species."[36]

Courts reviewing biological opinions have consistently affirmed the Services reliance on 50 C.F.R. § 424.12(e) and agreed that the requirements for establishing unoccupied habitat are more onerous than for occupied habitat.[37] The Services' statement in the proposed rule that "the Act does not require the Services to first prove that the occupied areas are insufficient before considering unoccupied areas," cannot be squared with these cases, the Services practice since 1980, or its statement in 1980 that 50 C.F.R. § 424.12(e) implements a "statutory requirement."

2. The Services should provide specific criteria for the designation of unoccupied habitat

The Services' statement that unoccupied critical habitat "need not have the features essential to the conservation of the species" so long as it is possible that those features "may develop features over time" is inconsistent with the ESA. As stated in Section 4, the Services "shall, concurrently with making a determination . . . that a species is an endangered species or a threatened species, designate any *habitat* of such species which is *then considered* to be critical habitat."[38] Thus, based on the plain language, the area

[35] 50 C.F.R. § 424.12(e).
[36] 45 Fed. Reg. at 13,110, 13,011, 13,016 (Feb. 27, 1980).
[37] *See, e.g.*, *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.,* 616 F.3d 983, 990 (9th Cir. 2010) ("Essential for conservation is the standard for unoccupied habitat and is a more demanding standard than that of occupied critical habitat." (citations omitted)); *Alliance for the Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, 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.' Thus, unlike with occupied habitat, the unoccupied area itself must be essential to the species." (citations omitted)).
[38] 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). This requirement applies equally to occupied and unoccupied areas.

must be habitat for the species, and the habitat must exist at the time of the designation. The Services are not authorized to designate areas that are not currently habitat (or that do not have the physical or biological features) based on a speculative belief that the areas may develop or be restored to habitat in the future.[39]

Under the proposed rule, the Services are arguably proposing a process for designating unoccupied habitat that is less onerous than the process for designating occupied habitat. The statutory definition of critical habitat is clear, unoccupied areas can only be designated where the "areas are essential for the conservation of the species."[40] An area cannot reasonably be "essential for the conservation of the species" if it does not, at the very least, have the kind of habitat that is essential to that species conservation.

Likewise, the suggestion that it is enough that unoccupied areas "may develop features over time" is foreclosed by the language of the ESA. Congress used the present tense ("are essential for the conservation of the species") not the future tense ("will be essential") and required the determination to be made "at the time [the species] is listed.[41] If events like climate change or management activities improve the features in an area in the future, the Services can revise their designation at that time, as expressly authorized by the ESA.[42] Indeed this is precisely the position the Services recently took in declining to designate unoccupied areas for the Canada Lynx based on future climate change scenarios, and instead explaining that "revisions to critical habitat may be necessary" once there are actual "shifts in the range of the essential physical and biological features and any corresponding shift in the range of lynx."[43]

The Services "anticipate" the need to designate more unoccupied habitat in the future based on climate change and changing distribution and migration patterns.[44] However, mere anticipation does not mean the Services have the authority to the make the unoccupied designation process less demanding. They must follow the statutory requirements outlined in Section 3(5)(A)(ii), and especially Section 3(5)(C) of the ESA, which states: "except in those circumstances determined by Secretary, critical habitat ***shall not*** include the entire geographical area which ***can*** be occupied by the threatened or endangered species."[45]

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[39] *See Cape Hatteras Access Pres. Alliance v. Dep't of Interior*, 344 F. Supp. 2d 108, 122-23 (D.C. Cir. 2004) (Services "may not statutorily cast a net over tracts of land with the mere hope that they will develop PCEs and be subject to designation").
[40] 16 U.S.C. § 1532(5)(A)(ii).
[41] *Id.*
[42] 16 U.S.C. § 1533(a)(3)(A)(ii).
[43] 79 Fed. Reg. 54,782, 54,811 (Sept. 12, 2014).
[44] 79 Fed. Reg. 27073.
[45] 16 U.S.C. § 1532(5)(C)(emphasis added).

NHA recommends the Services provide specific criteria and further describe the processes that they will use when designating unoccupied critical habitat. At a minimum, the Services should explain how the unoccupied area is essential to the conservation of the species. In doing so, the Services must be cognizant of natural and physical features, and a species' biological limitations, that may preclude an unoccupied area from becoming occupied in the future.

G. Other Considerations when Designating Critical Habitat

New proposed section 424.12(h) codifies amendments to the ESA that prohibit the Services from designating as critical habitat lands or other geographic areas owned or controlled by the Department of Defense, if those lands are subject to integrated natural resources management plans (INRMP) prepared under section 101 of the Sikes Act. If the Services conclude that an INRMP "benefits" the species, the area covered is ineligible for critical habitat designation.

NHA notes that hydropower licenses, settlement agreements, Section 10 Agreements, private and non-federal partnerships and other activities are providing benefits to listed species equal to INRMPs that should also be considered for ineligible treatment.

IV. Definition of Destruction or Adverse Modification of Critical Habitat

The Services' are proposing to redefine "destruction or adverse modification" of critical habitat based on previous court decisions that invalidated the current definition, but also in response to Executive Order 13563, *Improving Regulation and Regulatory Review*, aimed at streamlining regulations.

A. The Proposed Definition Adds Unnecessary Complexity and Speculation

Currently, the regulations define "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.[46]

[46] 79 Fed. Reg. 27060.

The Fifth and Ninth Circuits invalidated the first sentence in the current definition because it requires an impact to both the survival and recovery be diminished before triggering the ESA's prohibitions.[47] The Ninth Circuit explained that the problems with the first sentence was that it referred to survival and recovery conjunctively: "Congress in its statutory language required 'or,'" whereas "the agency in its regulatory definition substituted 'and.'"

The Services are proposing "destruction or adverse modification" to mean:

> 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.[48]

NHA believes the Services have included unnecessary complexity to the definition. The only change that is necessary to the current definition is to strike the word "both" and replace "and" with "or." The resulting first sentence of the definition would read as follows: "a direct or indirect alteration that appreciably diminishes the value of critical habitat for the survival *or* recovery of a listed species."[49] This recommendation is more in-line with the intent of Executive Order 13563, the court decisions, and would avoid the introduction of new regulatory phrases and interpretations that could unnecessarily confuse and complicate the current understanding of the adverse modification inquiry.

Indeed, the Ninth Circuit in *Butte Envtl. Council v. U.S. Army Corps of Engineers*[50] affirmed the Services' choice to disregard the "survival and recovery" phrase and instead use "survival *or* recovery" in biological opinions. Moreover, the court in *Butte* affirmed that the second sentence in 50 C.F.R. § 402.02 remains good law.[51] As such, only minor changes are warranted to the first sentence of the proposed definition.

No changes are necessary for the second sentence of the original definition, as it appropriately focuses on the PBFs "that were the basis for determining the habitat to be critical." The Services' proposed definition infuses an element of uncertainty and speculation by contemplating the impacts of an action that could

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[47] *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F. 3d 434, 441-42 (5th Cir. 2001); *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059, 1070 (9th Cir. 2004).
[48] 79 Fed. Reg. 27060.
[49] *See Am. Motorcycle Ass'n Dist. 37 v. Norton*, No. C 03-03807 SI, 2004 WL 1753366, at *11 (N.D. Cal. Aug. 3, 2004), *amended in part sub nom. Ctr. for Biological Diversity v. Bureau of Land Mgmt.,* No. C 03-02509 SI, 2004 WL 3030209 (N.D. Cal. Dec. 30, 2004 ("the proper definition of 'destruction or adverse modification' is: 'a direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for *either the survival or the recovery* of a listed species.'").
[50] 620 F.3d 936, 947 (9th Cir. 2010).
[51] *Id.* at 948.

"preclude or significantly delay the development of" PBFs that "support the life-history needs of the species for recovery."[52] NHA believes the Services are establishing an impermissibly low threshold in determining adverse modification, and at a minimum, NHA recommends replacing "that support" with "essential to".

B. Limiting "Appreciably Diminish" to Mere Recognition Sets an Impermissibly Low Threshold

The Services propose to revise their interpretation of how to determine whether the effects of an action "appreciably diminish" the value of critical habitat.[53] The Services explain that "diminish" means to "reduce, lessen, or weaken."[54] The Services then conclude that "appreciably" should mean to "recognize the quality, significance, or magnitude" or "grasp the nature, worth, quality or significance."[55] However, the Services' interpretation would essentially read the word "appreciably" out of the regulatory provision and establish an impermissibly low threshold. The word "diminish," taken by itself, already requires that an effect be recognizable or grasped for purposes of adverse modification.

In addressing this issue, the courts have rejected attempts to conflate the term "appreciably" with being perceived or recognized. For example, courts have stated that "interpretation of 'appreciably' to mean any 'perceptible' effect would lead to irrational results, making *any* agency action that had *any* effects on a listed species a 'jeopardizing' action."[56] Instead, the courts have upheld the interpretation that "appreciably" means significant or considerable biological effects.[57] Consequently, the term "appreciably" must be interpreted to mean more than capable of being merely recognized or grasped.

To have independent meaning, the definition of "appreciably" must incorporate a threshold of quantitative significance. For example, the existing definition in the Consultation Handbook states that "appreciably diminish" means, "to *considerably reduce the capability of designated or proposed critical habitat* to satisfy the requirements essential to both the survival and recovery of a listed species."[58] Notwithstanding that courts have invalidated the phrase "survival and recovery," the remaining definition demonstrates that

[52] NHA refers the Services' to our earlier comments on the inconsistent use and application of PBFs and life-history needs. See pg. 9, *The Services Must Clarify the Use and Application of Physical or Biological Features and Life-History Needs*.
[53] 79 Fed. Reg. at 27,063.
[54] *Id*.
[55] *Id*.
[56] *Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 606 F. Supp. 2d 1195, 1208 (E.D. Cal. 2008) (emphasis in original); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 875 (E.D. Cal. 2010) (same), *aff'd in part, rev'd in part sub nom. San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014).
[57] *E.g.*, *Forest Guardians v. Veneman,* 392 F.Supp.2d 1082, 1092 (D. Az. 2005) (refusing to apply dictionary definitions of appreciably and instead deferring to the Consultation Handbook's interpretation of appreciably to mean significant or considerable biological effects).
[58] Consultation Handbook at 4-36 (emphasis added).

"appreciably" requires more than mere recognition. While the Services now assert that "considerable" is ambiguous,[59] the context in which it is used in the Consultation Handbook belies that interpretation. To avoid the irrational results that were previously rejected, the Services should continue to interpret and implement the phrase "appreciably diminish" as requiring an assessment as to both the magnitude and significance of the effect upon designated critical habitat.

V. Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act

The draft policy is intended to "set forth the Services' position regarding how we consider partnerships and conservation plans, conservation plans permitted under Section 10 of the Act, tribal lands, national security and homeland security impacts and military lands, Federal lands, and economic impacts in the exclusion process" under Section 4(b)(2) of the ESA.[60]

Section 4 of the ESA requires the Services to designate critical habitat when prudent and determinable.[61] Section 4(b)(2) of the ESA was added by Congress in 1978 with a goal of balancing species' needs against the needs of the nation. The statute provides that "[t]he Secretary shall designate critical habitat, and make revisions thereto … after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." The ESA also gave the Services discretion to exclude any area from critical habitat if they determine that the "benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless ... failure to designate such area as critical habitat will result in the extinction of the species concerned."[62]

In a February 28, 2012 memorandum, the President highlighted the importance of cooperation among State and private landowners when deciding on species protections. The memorandum includes a strong preference for excluding state and private land from critical habitat in order to foster cooperation in land management, stating that "private and state lands are among the potential exclusions, based on a recognition that habitat typically is best protected when landowners are working cooperatively to promote forest health, and a recognition… that the benefits of excluding private and state lands may be greater than the benefits of including those in critical habitat."[63] NHA believes that the President's desire for

[59] 79 Fed. Reg. at 27,063 (noting that it could be interpreted to mean large in amount or extent, worthy of consideration, or measureable).
[60] 79 Fed. Reg. 27053.
[61] 16 U.S.C. § 1533(a)(3)(A).
[62] 16 U.S.C. § 1533(b)(2).
[63] Available at: http://www.whitehouse.gov/the-press-office/2012/02/28/presidential-memorandum-proposed-revised-habitat-spotted-owl-minimizing-

cooperation among State and private landowners will only be met if the Services limit their discretion in making exclusion decisions and treat private or other non-federal conservation plans and partnerships as equal to Section 10 agreements.

A. The Services Should Clarify their Discretion to Exclude Lands

The Draft Policy emphasizes that the Services have broad discretion to exclude lands under ESA Section 4(b)(2).[64] Since 1978, the Services' discretion and Section 4(b)(2)'s exclusion has been applied inconsistently. This inconsistency has hindered ESA implementation, and ultimately species conservation, because it results in litigation over proposed 4(b)(2) exclusions and creates unpredictability (and thus increased burden) for the regulated community and the Services alike.

To create certainty and reduce delay, the Services should explain when, and in what circumstances, the benefits of exclusion outweigh the benefits of inclusion, and how that balancing will be measured. Additional clarity is essential to understand how the Services intend to exercise their discretion. For example, the Services could develop and promulgate regulatory standards and criteria, open for public review and comment, which would govern decisions to grant or deny critical habitat exclusion requests and develop an appeals process for final exclusion decisions. These processes would meet the President's goal of increasing transparency, promoting predictability, and reducing uncertainty in the regulatory system.

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

The Draft Policy states that the Services "sometimes exclude specific areas from critical habitat designations in part based on the existence of private or other non-Federal conservation plans or partnerships."[65] The Services explain that a conservation plan "describes actions that minimize and/or mitigate impacts to species and their habitats."[66] In examining the benefits of exclusion versus inclusion of lands included within private or other non-federal conservation plans and partnerships, the Services propose to evaluate a variety of factors, including eight criteria, such as the extent of public participation, whether compliance with the National Environmental Policy Act ("NEPA") was required, and whether designation would impair benefits expected from the plan, agreement, or partnership.

[64] 79 Fed. Reg. at 27,053-54.
[65] *Id*. at 27,054.
[66] *Id*.

NHA supports the Services' willingness to exclude lands that are covered by private or non-federal conservation plans and partnerships from critical habitat. However, the eight review factors identified by the Services should be revised, as some are too intrusive, burdensome or impose obstacles that cannot be overcome in practice. For example, the Services should not limit exclusion to when designation would impair the realization of benefits expected from the plan. Instead, the Services should examine whether the designation of critical habitat would create a duplicative regime of protections and measures. Further, it is unclear how NEPA compliance for private or non-federal conservation measures would occur or what purpose it would provide. For non-Federal conservation measures, there will typically be no requisite federal action that would warrant NEPA review and any compliance with NEPA is not indicative of the conservation benefits that may be provided.

Further, the Services fail to explain why these types of plans and partnerships are subject to heightened review requirements and additional scrutiny when compared to plans prepared pursuant to Section 10 agreements. To the extent that the private or non-federal plans are analogous to Section 10 plans, or provide the same types of conservation benefits to species and their habitat, the same factors should apply when considering whether lands within private or non-federal conservation plans are excluded (e.g., is the species included within the plan, does the plan address that species' habitat, and is the plan being properly implemented).

The Services should take a broad view of what non-Section 10 plans or agreements would qualify an area for exclusion from critical habitat. Notably, the Services state that "achieving the conservation benefits of a particular existing plan is usually not a *benefit of exclusion*…" rather, the benefit of exclusion in these plans is the "maintenance of an existing partnership or the potential for creation of new conservation partnerships with the plans signatories or other parties."[67]

The hydropower licensing process provides a good example of the benefits of exclusion that the Services seek. Hydropower licenses, and the multi-party settlement agreements upon which they are often based, include measures to protect, mitigate and enhance (PM&E) affected resources, including ESA-listed species, other fish, wildlife and plants, and habitat features (e.g., water quality and quantity) critical to such species, for terms of up to 50 years.

[67] 79 Fed. Reg. 27054 (emphasis in original).

For example, hydropower licenses frequently include habitat enhancement funds or specific measures to protect and enhance species and their habitat. These conservation measures go beyond the consultation and impact minimization requirements of Section 7 of the ESA, and are designed and implemented in consultation with the appropriate Service, other resource agencies, state resource agencies and numerous NGOs, and includes multiple opportunities for public engagement and comment. As such, NHA recommends the Services favor exclusion where habitat is subject to approved conservation measures that already provide substantial habitat protections. Section 4(b)(2) was added to the ESA by Congress to promote just this kind of commonsense approach to species protection.

C. Exclusions for Section 10 Agreements

The Services state that they "will always consider" areas covered by approved habitat conservation plans (HCPs), candidate conservation agreements with assurances (CCAAs), and safe harbor agreements (SHAs), and will "generally exclude" such areas based on three proposed criteria.[68] NHA agrees with the Services approach in that they will "always" consider these plans and agreements when designating critical habitat; however, the Services should consider making the exclusion of such areas under these agreements mandatory upon satisfying the three criteria. Section 10 agreements provide protection for the included species and habitat, so including these areas as critical habitat is not necessary. In addition, the Services should also exclude the habitat for those species that are not covered by such a plan or agreement when their habitat is nonetheless protected by measures in the relevant HCP, CCAA, or SHA.

Participants in Section 10 plans and agreements expend considerable time and resources implementing species and habitat protection measures. Further, the Services are actively promoting the development of additional CCAAs, SHAs, and HCPs—with a particular emphasis that such plans and agreements can provide important certainty to the measures that will be required as protections for species and habitat that might be affected by a party. However, the potential for a designation of critical habitat to overlap an area that is covered by a Section 10 plan or agreement will present a significant disincentive for enrollment in these activities. A policy of excluding areas covered by a Section 10 plan or agreement would remove this impediment and further promote the development of these voluntary agreements.

While some level of review may be necessary to verify that HCPs, CCAs and SHAs are being properly implemented and address the relevant species and habitat, the Services' should not impose more

[68] 79 Fed. Reg. at 27,054.

burdensome review requirements. Notably, these Section 10 plans and agreements have already been reviewed and approved by the services, so any additional review process should be minimal. Further, as part of any review process, the Services should not use the designation of critical habitat as a means of requiring additional measures or protections in exchange for an exclusion of a property. Finally, the approval of a Section 10 plan or agreement already includes a determination regarding the benefit provided to the species, and the Services should not be imposing additional standards that would benefit exclusion.

Mandatory exclusion of Section 10 agreements and other approved voluntary conservation agreements would increase their use and cooperation among State agencies and stakeholders, would be a valuable tool for establishing early and significant conservation actions, and provide certainty to hydropower owners and operators regarding ESA compliance issues.

D. Exclusions of Federal Lands

The Services state that they "will focus our exclusions on non-Federal lands."[69] Instead of adopting a bias against exclusion of federal lands, the Services should look at the totality of factors when assessing whether the benefits of exclusion outweigh the benefits of inclusion irrespective of whether the land is federally owned or managed. In doing so, the Services should focus on whether there are existing conservation measures in place that render the designation of an area of federal land as critical habitat superfluous or duplicative.

E. Exclusion Based on Economic Impacts

The first sentence of Section 4(b)(2) of the ESA requires that the Services consider the economic impacts (as well as other relevant impacts) of designating critical habitat.[70] Economic impacts also play an important role in the discretionary exclusion analysis under the second sentence of section 4(b)(2).[71] The Draft Policy states that, "[i]n both contexts, the Services will consider the probable incremental economic impacts of the designation."[72]

[69] 79 Fed. Reg. 27056.
[70] 79 Fed. Reg. at 27,056.
[71] *Id.*
[72] *Id.*

NHA urges the Services' to provide additional examples of when the economic impacts of a designation could outweigh the critical habitat determination and lead to an exclusion. The Draft Policy only provides one scenario: "if an economic analysis indicates *high probable incremental impacts* in a proposed critical habitat unit of *low conservation value* (relative to the remainder of the designation), the Services may consider exclusion of that particular unit."[73] The language provides no guidance or criteria and NHA recommends the Services' provide clear factors and standards for evaluating incremental economic impacts, such as mitigation costs, permitting impacts and litigation costs associated with designating critical habitat.

VI. Conclusion

NHA and its members work closely with the Services' staff throughout the United States and together we are seeing tremendous results in managing, conserving, and recovering our valuable natural resources. Although our comments reflect our concern regarding aspects of the Services' Proposals, we want to recognize the dedication and hard work of the Services' staff.

NHA appreciates the opportunity to submit comments on the Proposals. These measures must reflect Congressional intent and the President's goals related to modernizing regulatory review and permitting. We commit to working with the Services and other stakeholders on creating a balanced and consistent approach to appropriately designating critical habitat under the ESA and relevant regulations, developing a workable definition of "destruction or adverse modification," and creating a critical habitat exclusion policy that appropriately outlines the Services' exercise of discretion.

Respectfully submitted,

Linda Church Ciocci
Executive Director
National Hydropower Association

[73] *Id.* (emphasis added).