Submitted via www.regulations.gov

August 21, 2023

Public Comments Processing
Attention: FWS–HQ–ES–2021-0107; 230607-0142

Martha Williams
U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Comments on FWS's Proposed Rulemaking on Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat, 88 Fed. Reg. 40,742 (June 22, 2023); RIN 1018–BF95; 0648-BK47

Dear Director Williams:

Western Energy Alliance (the Alliance) offers the following comments on the U.S. Fish and Wildlife Service and National Marine Fisheries Service's (collectively the services) proposed revisions to their regulations governing listing endangered and threatened species and designating critical habitat under the Endangered Species Act (ESA) (proposed rule), 88 Fed. Reg. 40,742 (June 22, 2023).

Western Energy Alliance is the leader and champion for independent oil and natural gas companies in the West. Working with a vibrant membership base for over 50 years, the Alliance stands as a credible leader, advocate, and champion of industry. Our expert staff, active committees, and committed board members form a collaborative and welcoming community of professionals dedicated to abundant, affordable energy and a high quality of life for all. The majority of independent producers are small businesses, with an average of fourteen employees.

Comments on the Services' Listing Determinations and Critical Habitat Designations

In recent years, the Alliance has observed a gradual erosion of the standards for listing species and designating critical habitat. In the face of intense litigation pressure, the Services have listed species that do not credibly meet the ESA's definition of threatened or endangered species and designated critical habitat on such massive scales, including areas deemed as historic habitat or unoccupied. The result of this overreach is not more conservation – the result is more competition for the Services' limited resources and inability to prioritize the conservation efforts for those species facing the greatest peril or protections for the habitats facing the greatest risks.

For the Alliance's members, this overreaching approach to listing species and designating critical habitat results in reduced access, increased costs, unwarranted or unjustified permit requirements, delays, and a multitude of operational constraints that significantly impact members' ability to responsibly explore for, develop, and transport oil and natural gas resources. These constraints are the precise reason a handful of interest groups have aggressively used the ESA to petition for the listing of species that may

not warrant listing and sue the Services when they fail to meet statutory timelines for listing decisions. These groups use the ESA not for conservation, but as a highly effective tool to advance anti-development or anti-hydrocarbon policies, lock up or limit areas from development, and limit, delay, or fully preclude oil and gas activities.

For these groups, exponentially expanding the number of listed species and acres of land designated as critical habitat is a means to control industry, increase industry's operational costs, slow development, shut down operations on both public and private land, and, more generally, to stop the development and use of resources like fossil fuels. The oil and natural gas industry, however, is not the sole target of this misuse of the ESA's conservation tools. Consider, for example, the northern spotted owl. After the northern spotted owl was listed as threatened under the ESA in 1990, more than 30 timber sales were immediately halted, over 24 million acres of federal land (85% of the available timber area) were administratively withdrawn from active management resulting in the closure of over 400 lumber mills, and the loss of over 35,000 jobs in Oregon, Washington, Idaho, Montana, and California.[1]

What would seem to be a cautionary tale for most was tremendous victory for the more radical elements of the environmental movement. The victory for many groups, however, was not that the owl was protected – it was that the owl was successfully used to constrain the timber industry. As disclaimed by the Executive Director of the Forest Service Employees for Environmental Ethics at the time:

> The Northern Spotted Owl is the wildlife species of choice for old-growth protection, and I've often thought that thank goodness the spotted owl evolved in the Northwest, for if it hadn't, we'd have to genetically engineer it. It's the perfect species to use as a surrogate.[2]

In light of this acknowledged misuse of the ESA and the realistic assumption that the Services will never enjoy limitless resources, reasonable efforts to reign in the listing process can actually further the ESA's conservation goals. Reasonable and responsible revisions to the listing and critical habitat processes can provide the Services a legally defensible means of avoiding speculative or overly precautionary listings and designations while preserving a pathway though which truly at-risk species and habitats can be protected. This prioritization will enable the Services to prioritize their conservation efforts, incentivize state and private partners, and focus the ESA's powerful conservation tools on protecting those species and habitats that face genuine risks.

With these observations in mind, the Alliance offers the following comments on specific provisions of the Proposed Rule.

<u>Section 424.11 – Factors for Listing, Delisting, or Reclassifying Species</u>

1. Revisions to Section 424.11(b) – Consideration of Economic Factors

The Proposed Rule would revise section 424.11(b) to eliminate any reference to the economic impacts of a listing determination:

[1] http://esaworkinggroup.hastings.house.gov/uploadedfiles/finalreportandrecommendations-113.pdf

[2] Brian E. Gray, *The Endangered Species Act: Reform or Refutation?*, p.7, 13 Hastings w.. Nw. J. Envtl. L. & Pol'y 1 (2007).

> The Secretary shall make any determination required by paragraphs (c), (d), and (e) of this section solely on the basis of the best available scientific and commercial information regarding a species' status, **without reference to possible economic or other impacts of such determination**.

Compare 88 Fed. Reg. at 40,774 *with* 50 C.F.R. § 424.11(b) (2022).

The Alliance opposes the Services' proposal to revise section 424.11(b) to restrict their ability to reference economic impacts when determining whether to list, delist, or reclassify a species under the ESA. Although the Alliance acknowledges that the Services may not base listing decisions solely on presumed economic impacts, the ESA does not require the Services to ignore, and does not prohibit the Services from disclosing, economic data when making listing decisions.

Neither the ESA nor its legislative history indicates that Congress intended to completely prohibit the Services from compiling economic information about potential listings. Rather, circumstances may exist when referencing economic or other impacts would inform the public. The ESA requires the Services to make listing decisions "solely on the basis of the best scientific and commercial data available . . . ." 16 U.S.C. § 1533(b). Although this phrase indicates a congressional preference for listing decisions based on biological data, the reference to "commercial data" preserves for the Services some flexibility to account data that could be considered "economic" in nature. For example, given the Services' inherent resource constraints and the large number of listed species, the Services may consider the cost of listing a new species on their conservation budget, particularly when the species faces remote or speculative threats. Similarly, given the ESA's requirement that the Services consider State and private conservation efforts, the Services may reasonably evaluate whether refraining from listing a species affords the Services to leverage more conservation resources from other parties.

Consideration of such data in listing decisions does not mean that the Services are required to weigh the interests of a species against the interests of the regulated community. On the contrary, these data may be considered in listing decisions as a means of improving the conservation of petitioned and listed species. The Services should continue to permit reference to certain economic impacts in making these ESA determinations.

2. Revisions to Section 424.11(d) – "Foreseeable Future"

The ESA defines a threatened species as one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20). In 2009, the Solicitor of the Interior released a memorandum outlining the meaning of the "foreseeable future" as used in the ESA. *See* Solicitor Opinion No. M-37021 (Jan. 16, 2009) ("M-Opinion"). In 2019, the Services memorialized elements of the M-Opinion in 50 C.F.R. § 424.11(d). *See* 84 Fed. Reg. 45,020 (Aug. 27, 2019).

In the Proposed Rule, the Services propose to revise the discussion of the "foreseeable future" in section 424.11(d) as follows:

> In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The term foreseeable future extends **as** ~~only so~~ far into the future as the Services

> can reasonably **rely on information about** ~~determine that both~~ the ~~future~~ threats **to the species** and the species' responses to those threats~~ are likely~~. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time.

Compare 88 Fed. Reg. at 40,774 *with* 50 C.F.R. § 424.11(d) (2022). The Services also requested public comment on the idea of rescinding this paragraph in its entirety. 88 Fed. Reg. at 40,766. The Alliance maintains the Services should not rescind or revise this paragraph.

a. The Services Should Not Rescind the Codification of the M-Opinion.

The Alliance opposes any rescission of the codification of the M-Opinion in section 424.11(d). A regulatory explanation of the "foreseeable future" is necessary to advise the public on how the Services will evaluate proposals to list species as threatened.

The Services' decision in 2019 to memorialize the M-Opinion was well within the Services' discretion. The interpretation articulated in the M-Opinion accurately conveys the ESA's limitation on the Services' ability to list species as threatened. Accordingly, the Services appropriately codified elements of the M-Opinion into its governing regulations.

The Alliance disagrees with the Services' suggestion that they should rely only the interpretation set forth in the M-Opinion—which is informal agency guidance—rather than in formal regulations subject to notice and public comment. Particularly, the Services stated that "[w]hile the -Opinion standing alone does not have the force of law and is not binding on [the National Marine Fisheries Service], both Services nonetheless continue to find it is a reasonable interpretation of the statute and intend to continue relying on it to support their listing decisions." 88 Fed. Reg. at 40,766. This position, however, ignores that informal agency guidance can be changed without public notice or comment and therefore fails to provide the public with certainty as to how the Services will make decisions. The Services should retain this subsection and not rescind it.

b. The Services Should Retain Section 424.11(d) In Its Current Form.

The Alliance encourages the Services to retain section 424.11(d) in its current form and not adopt the proposed revisions to it. The proposed revisions would improperly expand what the Services consider to be the "foreseeable future." Specifically, the proposed revisions would replace the concept that the 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**," 50 C.F.R. § 424.11(d) (2022) (emphasis added), with the concept that the foreseeable future "extends **as far** into the future as the Services can **reasonably rely** on **information about** the threats to the species and the species' responses to those threats," 88 Fed. Reg. at 40,774 (emphasis added). Thus, the proposed revisions would eliminate (a) limiting language that emphasizes that the "foreseeable future" is "only" as far in the future as the Services can predict, (b) the requirement that the Services be able to "determine" future threats and species' responses, and (c) the requirement that the Services assess the likelihood of future threats and species' responses. Without these elements, the proposed revisions expands the concept of the "foreseeable future" to the point it lacks any meaningful sideboards.

Additionally, the proposed improperly shift the focus of the “foreseeable future” from the Services’ **predictions** regarding threats to a species to the **information** on which the Services rely to determine the foreseeable future. *See* 88 Fed. Reg. at 40,774 (the foreseeable future “extends as far into the future as the Services can reasonably rely on information about the threats to the species and the species’ responses to those threats”). Section 424.11(d) should emphasize and focus on the predictions the Services will ultimately draw regarding a species’ threats. Moreover, by tying the concept of “reasonably foreseeable” to information on which the Services can “reasonably rely,” the Proposed Rule is inconsistent with the findings of the Solicitor and courts that the “foreseeable future” should be based on “best data available.” *Alaska Oil & Gas Ass’n v. Pritzker*, 840 F.3d 671, 681 (9th Cir. 2016); M-Opinion at 13.

Finally, the Services’ willingness to abandon the changes to section 424.11(d) that they adopted in 2019 reflects arbitrary decisionmaking. When a new agency policy “rests on factual findings that contradict those which underlay its prior policy,” the agency must “provide a more detailed justification than what would suffice for a new policy created on a blank slate.” *FCC v. Fox*, 556 U.S. 502, 515 (2009). In the preamble to the Proposed Rule, the Services identify no problems with implementation of section 424.11(d). *See* 88 Fed. Reg. at 40,766–77. They also identify no judicial decisions invalidating or questioning the legality of section 424.11(d). *See id.* Rather, the Services’ justification for revising section 424.11(d) rests on speculative concerns, which the Services did not express when finalizing the 2019 rule. *See id.* at 40,766 (observing that this section may be “potentially confusing to the public”). These newfound concerns are arbitrary. For these reasons, the Services must reject the proposed revisions to section 424.11(d) and retain this section in its current form.

3. Revisions to Section 424.11(e) - Delisting

In the Proposed Rule, the Services propose to revise section 424.11(e) as follows:

> (e) **It is appropriate to** ~~The Secretary shall~~ delist a species if the Secretary finds ~~that~~, after conducting a status review based on the best scientific and commercial data available**, that**:
>
> (1) The species is extinct;
>
> (2) The species **is recovered or otherwise** does not meet the definition of **a threatened or** ~~an~~ endangered species ~~or a threatened species~~. In making such a determination, the Secretary shall consider the ~~same~~ factors and apply the ~~same~~ standards set forth in paragraph (c) of this section regarding listing and reclassification; or
>
> (3) The listed entity does not meet the statutory definition of a species.

Compare 88 Fed. Reg. at 40,774 *with* 50 C.F.R. § 424.11(e) (2022).

The Alliance supports the Services’ proposed revision to section 424.11(e) that would expressly recognize that the Services must delist a species when it has recovered. This regulatory change emphasizes the fundamental objective of the ESA—to recover species so that they no longer are threatened or endangered. This change also encourages the Services to delist any species that has recovered.

The Alliance, however, disagrees with the proposed revision to section 424.11(e) that would replace the mandatory language that the Services "shall" delist a species when the relevant criteria are met with the more flexible language stating it is "appropriate" to delist a species when the relevant criteria are met. Listing a species carries regulatory burdens and financial costs for land users. *See* 16 U.S.C. §§ 1538, 1540. The Services cannot be permitted to allow a species to remain listed, and allow land users to suffer unnecessary and burdensome regulation, when the best available science demonstrates that the species has recovered. The Services should retain the current language of section 424.11(e) directing that the Services "shall" delist species that have recovered or no longer meet the definition of a threatened or endangered species.

Section 424.12 – Criteria for Designating Critical Habitat

1. Revisions to Section 424.12(a) – When Designation of Critical Habitat Is Not Prudent

In the Proposed Rule, the Services propose to revise section 424.12(a)(1) as follows:

> (1) **Designation of critical habitat may-not be prudent in circumstances such as, but not limited to, the following:** ~~The Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances:~~
>
> ***
>
> (ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species;~~, or~~ ~~threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;~~

Compare 88 Fed. Reg. at 40,774 *with* 50 C.F.R. § 424.12(a) (2022).

The Alliance supports the Services' proposal to expand the language of section 424.12(a)(1) to clarify that it sets forth a non-exclusive list of circumstances in which the designation of critical habitat is not prudent. The Services should not unnecessarily or artificially constrain the circumstances in which the designation of critical habitat is not prudent.

The Alliance, however, maintains that the Services should reinstate language that existed in section 424.12(a)(1)(ii) before the 2019 amendments. Particularly, section 424.12(a)(1)(ii) recognized that a critical habitat designation is not prudent when the "designation of critical habitat would not be beneficial to the species." *See* 50 C.F.R. § 424.12(a)(1)(ii) (2018). Congress' intent in conferring the authority to designate critical habitat was to provide the Services with a tool for conserving listed species by protecting their habitat. The requirement that critical habitat designations actually benefit the species is therefore inherently embedded with the ESA itself. The ESA does not require, nor should the ESA be interpreted to require, mandatory designation of critical habitat when there are no benefits to species from the designation or when any benefits are remote or speculative.

Similarly, the Alliance opposes the Services' proposed deletion of language in section 424.12(a)(1)(ii) stating that designation of critical habitat is not prudent when "threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act." The Services should not designate critical habitat when it unlikely to

aid in the conservation of species. If none of the ESA's stated goals is served by designating critical habitat, the Services unquestionably act imprudently by doing so. The Services should retain the existing language in section 424.12(a)(1)(ii).

2. Revisions to Section 424.12(b)(2) – Unoccupied Habitat as Critical Habitat

In the Proposed Rule, the Services propose to revise section 424.12(b)(2) as follows:

> (2) **After identifying areas occupied by the species at the time of listing, t**~~T~~he Secretary will **identify** ~~designate as critical habitat~~, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species **at the time of listing that the Secretary determines** ~~that such areas~~ are essential for the conservation of the species. **Such a determination must be based on the best scientific data available.**~~When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will 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. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.~~

Compare 88 Fed. Reg. at 40,774 *with* 50 C.F.R. § 424.12(b) (2022).

The Alliance opposes the Services' proposed revisions to section 424.12(b)(2) because they introduce ambiguity, lower the threshold for the Services to designated unoccupied areas as critical habitat, and improperly eliminate the requirement that unoccupied critical habitat contain features essential to conservation of a species.

a. The Proposed Revisions Could be Construed as Mandating the Designation of Unoccupied Critical Habitat.

Initially, the proposed language of section 424.12(b)(2) is flawed because it appears to compel the Services to always designate unoccupied areas as critical habitat:

> After identifying areas occupied by the species at the time of listing, the Secretary **will identify**, at a scale determined by the Secretary to be appropriate, **specific areas outside the geographical area occupied by the species at the time of listing** that the Secretary determines are essential for the conservation of the species.

88 Fed. Reg. at 40,7744 (emphasis added).

By contrast, the existing language of section 424.12(b)(2) contains limiting language that reinforces that the Services may designate unoccupied areas as critical habitat "**only** upon a determination that such areas are essential for conservation of the species." 50 C.F.R. § 424.12(b)(2) (2022) (emphasis added). The proposed revisions, if final, will lead to confusion by the Services and the public and may result in occupied areas unnecessarily and improperly designated as critical habitat.

b. The Two-Step Process for Designating Unoccupied Critical Habitat Provides Rational and Necessary Safeguards.

The Alliance also opposes the Services' proposal to delete the following language in section 424.12(b)(2), which outlines a "two-step process" for designating unoccupied habitat as critical habitat:

> When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will 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.

Compare 88 Fed. Reg. at 40,774 *with* 50 C.F.R. § 424.12(b)(2) (2022).

This language is necessary to protect against the designation of unnecessary or superfluous areas as critical habitat. First, by requiring that the Services first determine that occupied areas are inadequate to ensure the conservation of a species before designating unoccupied areas as critical habitat, this language prioritizes the designation of critical habitat in areas where the species already exists. Therefore, the existing language of section 424.12(b)(2) best captures the legislative intent that "the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 96-1625, at 25 (1978).

Additionally, this language is necessary to ensure that designations of unoccupied areas align with the ESA itself. The ESA grants the Services the authority to designate unoccupied areas as critical habitat only if those areas are "essential for the conservation of the species." 16 U.S.C. § 1532(5). Logically, an unoccupied area cannot be "essential for the conservation of [a] species" if occupied areas are adequate to insure the species' conservation. The Services must necessarily first determine whether the occupied areas are adequate to insure the conservation of a species before they can determine whether unoccupied areas are "essential" to the achievement of that purpose. It is simply not possible to say that an unoccupied area is "essential for the conservation of [a] species" without knowing how the species would fare if the unoccupied area were not designated.

Finally, the Services' proposal to eliminate the two-step process that prioritizes the designation of occupied habitat over unoccupied habitat is arbitrary. When a new agency policy "rests on factual findings that contradict those which underlay its prior policy," the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *FCC v. Fox*, 556 U.S. 502, 515 (2009). In the Proposed Rule, the Services question and revisit their justifications for the current section 424.12(b)(2). *See* 88 Fed. Reg. at 40,769. The Services, however, have identified no difficulties in implementing section 424.12(b)(2) and no judicial decisions setting it aside. The Services' proposal to eliminate the two-step process in section 424.12(b)(2) for designating unoccupied habitat as critical habitat therefore is arbitrary. The Services should retain this provision in any final rule.

c. Unoccupied Critical Habitat Must Contain Features Essential to the Conservation of a Species.

Finally, the Alliance opposes the Services' proposal to delete the following language in section 424.12(b)(2):

> In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the

> conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

Compare 88 Fed. Reg. at 40,774 *with* 50 C.F.R. § 424.12(b)(2) (2022).

The Services should retain this language in section 424.12(b)(2). By requiring that an unoccupied area contain physical or biological features essential to conservation of the species, this language prevents the Services from designating areas as critical habitat that do not even function as "habitat." The Services cannot rationally or reasonably claim that an area is habitat—much less critical habitat—if it is both unoccupied and lacks a physical or biological feature essential to conservation of the species. The fact that an area may become habitat at some point in the future does not render it habitat at the time of a designation.

Existing section 424.12(b)(2) provides a necessary safeguard against overly broad and arbitrary critical habitat designations. This safeguard is particularly critical in light of the Services' withdrawal of the regulatory definition of "habitat" last year, *see* 87 Fed. Reg. 37,757 (June 24, 2022), and prior unsustainable critical habitat designations, *see Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018). Accordingly, the Services should leave 424.14(b)(2) intact and not implement the proposed revisions.

The Alliance appreciates the opportunity to provide comments on the Proposed Rule and thanks the Services for their consideration of these comments.

Sincerely,

Kathleen M. Sgamma
President