WESTERN ENERGY ALLIANCE

October 9, 2014

Submitted via Federal eRulemaking Portal: http://www.regulations.gov

Public Comments Processing
Attn: Docket No. FWS-R9-ES-2011-0072
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive, PDM–2042
Arlington, Virginia 22203

RE: Western Energy Alliance comments on U.S. Fish & Wildlife Service/National Marine Fisheries Service Proposed Rule on Definition of Destruction or Adverse Modification of Critical Habitat (Docket No. FWS-R9-ES-2011-0072)

Dear Sir or Madam:

Western Energy Alliance (the Alliance) submits the following comments to U.S. Fish & Wildlife Service and National Marine Fisheries Service (the Services) in response to the proposed rule on definition of destruction or adverse modification of critical habitat (Docket No. FWS-R9-ES-2011-0072). For the reasons explained below, we respectfully request that the Services withdraw, reconsider, and redraft this proposed policy. We believe that the policy, particularly the expansion of definitions and tightening of criteria, is an attempt to expand the Services' authority without proper justification. We oppose modifications to the definition of "adverse modification" that would provide the Services with significant additional authority, discretion, and flexibility to conclude that just about any action could be considered "destruction or adverse modification." This expanded authority is far beyond the statutory directives and regulations governing the ESA and creates vast regulatory uncertainty for those impacted by the rule.

The Alliance represents more than 480 companies engaged in all aspects of environmentally responsible exploration and production of natural gas and oil across the West. We support comments submitted on this matter by the National Endangered Species Act Reform Coalition, of which the Alliance is a member. This proposed rule would have significant impacts on the activities that drive the economies of local communities across the West, including oil, natural gas and renewable energy development, agriculture, and mining. Member companies of the Alliance have valid existing leases, current production, and plans for future leasing, exploration, and production activities in the areas that will be impacted by the proposed policy and therefore, a direct interest in the Services' proposed policy.

We appreciate the Services' efforts to clarify the definition of "adverse modification" in the wake of several court decisions that have questioned the existing regulatory definition. We strongly believe that the Services must ensure that the "adverse modification" definition complies with the statutory directives of the Endangered Species Act (ESA). The

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Services must also ensure that the definition of "adverse modification" can be practically applied to formal section 7 consultations in a manner that does not unreasonably complicate or hinder the process. Unfortunately, the Services have failed to perform these functions in this proposed rule. We therefore do not support the approach taken and encourage the Services to retain the current regulatory definition of "adverse modification," with only minor modifications to address the courts' concerns. We are also concerned that the Services rely on only selected cases to support the proposed rule, while ignoring others that do not support the broadening of actions that meet the adverse modification threshold as proposed by the Services.

The proposed rule would have significant impacts because it erects a policy whereby almost any action could trigger the "adverse modification" threshold and require formal section 7 consultation. This would in turn lead to significant and potentially unnecessary modifications of oil and natural gas projects, increased costs and delays, or potentially cause the development to not occur at all. In addition, there would be no consistency in how this new definition would be interpreted and implemented by the Services' regional offices. As such, we recommend that the Services revisit the definition based on the courts' basic issue with the existing question of whether survival and recovery is too high a threshold compared to survival or recovery.

We worry that the implementation of this rule may have impacts that are in fact the opposite of the Services' intent. By vastly expanding the threshold both for areas that meet the criteria for critical habitat designation and what constitutes adverse modification or destruction, the Services may ultimately forego focusing on areas and actions that may require significant attention.

Identification and Treatment of "Life History" Needs

Under the proposed rule, adverse modification or destruction of habitat that has the physical and biological features that support the life history of a species but is not occupied and may never be utilized will be considered a take in ESA. As a result, projects could be denied or unnecessary mitigation could be required through consultation even though the habitat could go unused by a species for many years. This type of scenario, which is probable under the proposed rule, is unreasonable, unjustified, and will do nothing to aid in the recovery of threatened and endangered species. We urge the Services to develop a specific process by which they would define the important life history needs of specific species prior to designating critical habitat.

Volume of Section 7 Consultations

The broader scope of what will be considered an "adverse modification" in the proposed rule will surely result in a higher volume of formal section 7 consultations, which is extremely concerning. At present, many FWS field offices do not have the staff or resources to keep up with the current number of biological opinions and formal consultations and are ill-prepared to deal with a dramatic upsurge. The Services must address how field offices will keep up with the increased workload that will result from this

proposed rule, as well as the Services' proposed rule regarding the definition of critical habitat (Docket No. FWS–HQ–ES–2012–0096).

Definition of "Conservation" Value

We oppose the Services' overbroad definition of what may be considered in determining "conservation" value for purposes of the adverse modification inquiry. Further, the Services' use of the preamble in the notice of proposed rulemaking (NOPR) to define factors and the process for identifying "conservation" value, rather than defining those factors through regulations, is inappropriate.

"Conservation value" should be narrowly defined so that affected entities have predictable and clear application. The Services state that the "determination of conservation value is based not only on the current status of the critical habitat but also, in cases where it is degraded or depends on ongoing ecological processes, on the potential for the habitat to provide further recovery support for conserving the species." *79 FR 27062*. We recognize that ecological successional processes are not always based on speculative assumptions. Nonetheless, we recommend that the Services create a clear process by which they will describe and provide documentation for the successional process that justifies including habitat which lacks appropriate physical and biological features in a critical habitat designation.

Climate Change and Associated Habitat Adaptation

In the proposed rule, the Services will seek to protect not only the current features essential to the conservation of the species, but any features that would develop in the future. The Services appear to be widely broadening the threshold of the adverse modification inquiry based on predictions and models related to climate change and associated habitat adaptation. The Services, however, do not have this authority under the ESA. Predictions related to impacts from climate change, potential habitat variations or other geophysical conditions are uncertain and not appropriate for use in the adverse modification inquiry. This approach would give the Services' vast authority and discretion to predict, potentially with little to no discernable evidence, that an action could adversely modify or destroy habitat that, at the time of the assessment, may have no features essential to conserve the species but *could* due to climate change modeling. This provides the Services with unimpeded authority to determine that a broad array of actions could result in adverse modification or destruction, which otherwise would not be considered based on current habitat conditions, by relying on forward-looking and speculative assumptions. The Services, however, do not have such broad authority under the statutory directives or regulations governing the ESA.

The determination of whether an action will result in an "adverse modification" should, rather, remain focused on the effects of the action on the present habitat elements, i.e. physical or biological features, protected under the critical habitat designation and within the context of the role of critical habitat in relation to all other measures to protect and recover the species. Triggering the adverse modification definition and potential resultant

formal section 7 consultation in habitat that *could* one day contain the features essential to the conservation of a species is entirely improper and represents a broad regulatory overreach.

It appears that the Services do not clearly explain how conservation value will be quantified. The Services state that that "conservation value" refers to its utility or importance, not a quantified value (*79 FR 27061*), but then state that to determine "conservation value" the quantity of features and habitat will be evaluated, along with other variables. *79 FR 27062*. It is therefore unclear how or if the Services will quantify conservation value. We recommend the following clarifications and improvements to determining conservation value when making an adverse modification inquiry: 1) conservation values should be determined in relationship to the entire critical habitat area, rather than small portions of the designated area; and 2) in order to ensure regulatory certainty, the factors associated with conservation value should not be a constantly changing or evolving standard.

Private Property Rights

The Services state that the proposed rule "would not present a barrier to all reasonable and expected beneficial use of private property" and "does not have significant takings implications." *79 FR 27065*. We disagree with both of these conclusions and feel that the Services did not adequately analyze the proposed rules' impact on private property rights, including federal oil and natural gas leases. Performing this analysis is required by Executive Order (EO) 12630, which requires agencies to evaluate actions on constitutionally protected property rights and identify the takings implications of proposed regulatory actions and address the merits of those actions. *53 FR 8859* and *8862*.

Importantly, the Services disregard many different scenarios in which the expanded definition of "destruction or adverse modification" under the proposed rule may result in the prohibition of actions under section 7 and therefore result in a taking of a federal oil and natural gas lease. For instance, an operator may propose to drill a well on a valid oil and natural gas lease that was designated as critical habitat for a threatened or endangered species after the lease was issued. After the operator submits an application for permit to drill, BLM and FWS may ultimately determine that the proposed well will adversely modify or destroy that critical habitat and that there are no reasonable alternatives. That denial could be considered a taking if the lease cannot be developed at all.

By expanding the definition of what would cause an action to result in "destruction or adverse modification" of critical habitat, the Services have vastly increased the possibility that a taking will result from the denial of a federal action. Further, the Services have ignored circumstances where the proposed rule could result in the prohibition of actions as a result of section 7 consultation and therefore result in a taking of a federal oil and natural gas lease. We urge the Services to reevaluate the takings implications of the proposed rule before issuing a final rule and ensure that their analysis complies with EO 12630.

Treatment of Preclusion or Delay of Physical and Biological Features

The Services' proposal that an action that precludes or delays recovery constitutes adverse modification is overbroad, vague, inconsistent with the ESA, and can be interpreted in many different ways. "Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery." *79 FR 27061*. The Services should not use aspirational goals and targets within a recovery plan to assert that preclusion or delay has occurred and therefore constitutes adverse modification.

We interpret this to mean that any actions that impede or delay the development of physical and biological features can be considered to be an adverse modification. This represents a much lower threshold in the adverse modification inquiry and will undoubtedly result in an upsurge of potentially unwarranted formal section 7 consultations. With this change, the Services would have much wider discretion to designate critical habitat without clear guidelines, criteria or processes to ensure that judgments about the future state of habitats are more than speculative.

Definition of "Appreciably Diminish"

Despite their attempt in the proposed rule, the Services have not adequately clarified what constitutes the definition of "appreciably diminish" as it relates to adverse modification. This lack of clarity will result in the inconsistent application of the definition and regulatory uncertainty. In addition, we challenge use of the NOPR preamble and guidance to interpret "appreciably diminish" as opposed to adoption of a specific regulatory definition. A specific regulatory definition provides the public and regulated community with much more certainty, and should use more understandable terms such as "considerable" or "substantial." Further, the Services' definition and interpretation of "appreciably diminish" would create a *de facto* "non-degradation" standard in that any recognizable diminishment without reference to its overall significance in quantitative terms would be considered to be appreciably diminishing critical habitat.

In the Section 7 consultation handbook, the Services define "appreciably diminish" as "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."[1] Judicial decisions addressing "adverse modification" have rejected the Handbook's definition because it was tied to both the survival and recovery of the species and the courts reasoned the definition should be tied to either the survival or recovery. Therefore, the existing definition of "appreciably diminish" should reference the "survival **or** recovery" [emphasis added] of a listed species. With this change of an "and" to an "or", we feel that the existing definition is satisfactory.

We also support the continued inclusion of "considerably" in the definition. The Services state that their use of the term "considerably" does not add any value to interpret

[1] *Final ESA Section 7 Consultation Handbook*, March 1998. Page x.

"appreciably diminish," leaving the question of how low the threshold will be to the Services on a case-by-case basis. *79 FR 27063*. Arguably, the threshold could be much lower without the term "considerably," which would likely require more proposed actions that require formal Section 7 consultation. This is especially concerning given the lack of staff the Services have at their disposal and the time formal Section 7 consultations take to complete.

Economic Impact

The overall costs and economic burden on states, private entities, landowners, and others that will result from the implementation of this rule has not been addressed or analyzed by the Services, as required by Section 7. We urge the Services to perform and make available for public comment such an analysis.

We disagree with the Services' conclusion that this "regulation would not have a significant economic effect on a substantial number of small entities" *79 FR 27065*. Many of the Alliance's member companies meet the criteria of a small business as defined by the Small Business Regulatory Enforcement Fairness Act (SBREFA). Due to the increased volume and frequency of section 7 consultations that will occur as a result of both this rule and the Services' proposed rule regarding critical habitat (Docket No. FWS–HQ–ES–2012–0096), small entities, including oil and natural gas companies, local governments, and others, will experience significant economic impacts.

We also disagree with the Services' conclusion that "Federal agencies are the only entities that are directly affected by this rule, and they are not considered to be small entities under SBA's size standards. No other entities are directly affected by this rule." *79 FR 27065.* Other entities, such as companies developing oil and natural gas on federal lands and other productive users of public lands will be impacted by the rules, not just federal agencies. Further, the Small Business Administration (SBA) Office of Advocacy has disagreed with the Services' position that critical habitat designations only affect federal agencies.[2] As such, we urge the Services to perform the required economic analysis under the regulatory flexibility analysis that describes the effect of the rule on small entities, i.e., small businesses, small organizations, and small government jurisdictions, under the SBREFA before these rules are finalized and implemented.

Applicable Case Law

We are concerned that the Services rely only on selected recent cases to support the proposed rule, while ignoring others that may not support the broadening of actions that meet the adverse modification threshold as proposed by the Services. Numerous courts have deferred to the Services' prior interpretation of "appreciably diminish" as

[2] Letter from SBA Office of Advocacy to FWS Director Ashe regarding designation of Critical Habitat for Gunnison Sage-Grouse (78 FR 57604). December 2, 2013. Available at: http://www.sba.gov/content/designation-critical-habitat-gunnison-sage-grouse-78-fed-reg-57604-1022013

"considerably reduce" in their Consultation Handbook.[3] The definition of "appreciably diminish" as "considerably reduce" in these cases is more straightforward to apply than the Services' proposed definition of "appreciably reduce." Further, the 2004 and 2005 memoranda from the Services that followed the court decisions striking down the definition of "adverse modification" asked "whether, with implementation of the proposed Federal action, critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species" when analyzing "appreciably diminish." Courts have deferred to this analysis, which is inconsistent with the proposed definition in the proposed rule.[4]

We believe that these cases, if considered, may have altered the overall proposed rule and the proposed definition of "adverse modification." As such, we urge the Services to analyze the significance of these cases before moving forward with the proposed rule.

Need for NEPA Analysis

The proposed rules, if finalized and implemented, would result in a great expansion of regulatory authority to determine whether an action constitutes "adverse modification" of critical habitat, presumably leading to a higher volume of section 7 consultations as a result, and increased restrictions on economic activities in critical habitat areas. We therefore believe that the implementation of these proposed rules represents a major federal action that should be reviewed and analyzed under the National Environmental Policy Act (NEPA) through an environmental impact statement (EIS).

The Alliance appreciates the opportunity to submit comments to the Services on this matter. For the reasons explained above, we respectfully request that the Services withdraw, reconsider, and redraft this proposed policy. Please contact me should you have questions about our comments or recommendations.

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[3] *In re Consol. Salmonid Cases*, 791 F. Supp. 2d 802, 871 (E.D. Cal. 2011);
Wild Equity Inst. v. San Francisco, No. C 11-00958 SI, 2011 WL 5975029, at *7 (N.D. Cal. Nov. 29, 2011);
Nw. Envtl. Def. Ctr. v. Nat'l Marine Fisheries Serv., 647 F. Supp. 2d 1221, 1234–35 (D. Or. 2009);
Pac. Coast Fed'n of Fisherman's Ass'ns v. Gutierrez, 606 F. Supp. 2d 1195, 1208-09 (E.D. Cal. 2008)

[4] *Rock Creek Alliance v. U.S. Forest Serv.*, 663 F.3d 439, 442 (9th Cir. 2011);
Alliance for the Wild Rockies v. Weber, 979 F. Supp. 2d 1118, 1133–34 (D. Mont. 2013);
Alliance for the Wild Rockies v. Krueger, 950 F.Supp.2d 1196, 1202 (D. Mont. 2013);
Salix v. U.S. Forest Serv., 944 F. Supp. 2d 984, 1000 (D. Mont. 2013);
Nw. Envtl. Def. Ctr. v. Nat'l Marine Fisheries Serv., 647 F. Supp. 2d 1221, 1230 (D. Or. 2009);
Natural Res. Def. Council v. Kempthorne, 506 F.Supp.2d 322, 380 (E.D. Cal. 2007)

Sincerely,

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