WESTERN ENERGY ALLIANCE

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Public Comments Processing
Attn: Docket No. FWS–HQ–ES–2012–0096
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 Implementing Changes to the Regulations for Designating Critical Habitat (Docket No. FWS–HQ–ES– 2012–0096)

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 implementing changes to the regulations for designating critical habitat (Docket No. FWS–HQ–ES–2012–0096). For the reasons explained below, we respectfully request that the Services withdraw, reconsider, and redraft this proposed policy.

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.

The proposed rules vastly expand the Services' authority and discretion to designate areas as critical habitat, particularly unoccupied areas that may never aid in the recovery of threatened or endangered species or ever contain the features essential for their conservation. It appears that the proposed rule changes are largely driven by the Services' intent to expand their authority to address habitat changes resultant from climate change. This expansion greatly exceeds the Services' authority under the statutory directives and regulations governing the Endangered Species Act (ESA) and represents a broad regulatory overreach. We are also concerned that the Services rely on select recent cases to support the proposed rule, while ignoring others that may not support expanding the threshold for areas that meet the criteria for critical habitat designation as proposed by the Services.

We worry that the implementation of this rule may have impacts that are in fact the opposite of the Services' intent in this rulemaking. 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

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and actions that may require significant attention. For instance, by placing a greater emphasis on areas that are unoccupied at the present, the Services may ultimately neglect putting in place actions that are necessary to recover or conserve species in areas where they actually exist.

The proposed rules also will lead to the Services to be overly inclusive in their critical habitat designations, which will have major impacts on the activities that drive the economies of local communities across the West, including oil and natural gas and renewable energy development, agriculture, and mining. Member companies of the Alliance have valid existing leases, current oil and gas 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.

Lack of Authority to Designate Unoccupied Areas as Critical Habitat

The proposed rule will vastly increase the Services' authority to designate critical habitat even if the area is unoccupied by a threatened or endangered species. "The Services anticipate that critical habitat designations in the future will likely increasingly use the authority to designate specific areas outside the geographical area occupied by the species at the time of listing." *79 FR 27073*. This will likely result in the designation of unoccupied, historical, potential, or unknown habitat areas that may contain unsuitable habitat, habitat lacking the physical and biological features necessary to support the species, or habitat that may not be essential to the conservation of the species. This approach is improper, unjustified, and overly-expansive.

The proposed rule gives the Services' the authority and discretion to designate an area as critical habitat simply if it has the *potential* to develop physical and biological features necessary for the conservation of the species. "Unoccupied areas must be essential for the conservation of the species, but need not have the [physical and biological] features essential to the conservation of the species" *79 FR 27073.* The Services' seek this authority ostensibly to address threats due to changing conditions because of global climate change: "As the effects of global climate change continue to influence distribution and migration patterns of species, the ability to designate areas that a species has not historically occupied is expected to become increasingly important." *79 FR 27073.*

This approach would give the Services' the authority and discretion to designate presumably any area that *could become* essential for the conservation of the species at any point in the future. Those decisions may be based on completely speculative scientific information and would result in the designation of critical habitat that may never in fact be essential to the conservation of a threatened or endangered species. As a result, oil and natural gas development or other economic activities in that area could be prevented or inhibited despite the present or future absence of physical and biological features essential to the conservation of the species at question. As such, we strongly feel that this proposed rule affords the Services far more and unwarranted regulatory authority than what is provided through the statutory directives and regulations governing the ESA and represents a broad regulatory overreach. The proposed rule also disregards recent case

law, which definitively requires the Services to demonstrate the essential "physical or biological" features necessary to justify the designation of occupied areas as critical habitat. See *Alaska Oil and Gas Ass'n et. al v. Salazar*, Case No. 3:11-cv-0025-RRB; (Jan. 11, 2013).

We firmly believe that the designation of unoccupied habitat should be set at a higher threshold than the designation of occupied habitat. Unoccupied habitat should, in its totality, be essential for the conservation of the species, unlike occupied habitat, where only physical and biological elements must be essential. Further, the Services should reasonably demonstrate that unoccupied habitat is essential at the time of the listing. Unoccupied habitat should not be designated as critical habitat with the expectation that it will someday be essential.

We remind the Services that species recovery does not always require designation of critical habitat. Critical habitat designations represent one element of the overall recovery process for threatened and endangered species and should not be utilized too broadly without explicit scientific justification. Instead, designations should be limited in nature and focus on areas that actually contain the features that are essential to the conservation of the species, rather than areas that *may* contain those features based on speculation.

Applicable Case Law

We are concerned that the Services rely on select recent cases to support the proposed rule, while ignoring others that may not support expanding the threshold for areas that meet the criteria for critical habitat designation as proposed by the Services. The Services relied on one case to support the position they may base their determination of whether an area was occupied at the time of listing on data developed after listing, despite the fact that the case was overturned on appeal. [1]

The proposed rule allows the Services to designate areas within the geographic area occupied by the species as critical habitat if there are essential physical or biological features, regardless of whether the actual area is occupied. *79 FR 27069*. We interpret this to mean that as long as an area is within the occupied *range* of the species, the Services may designate it as critical habitat if it has essential features, regardless of whether the area designated as critical habitat is actually occupied. There are several cases, however, holding that each parcel of critical habitat within the "geographical area occupied by the species" must, in fact, be occupied.[2] Similarly, courts have rejected attempts to by FWS to characterize suitable habitat as within the "geographical area occupied by the species" when designating critical habitat.[3]

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[1] *Otay Mesa Property L.P. v. U.S. Department of the Interior*, 714 F. Supp.2d 73 (D.D.C. 2010), *rev'd on other grounds by Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior*, 646 F.3d 914 (D.C. Cir. 2011).
[2] *Otay Mesa Property, L.P. v. U.S. Dep't of the Interior*, 646 F.3d 914, 918 (D.C. Cir. 2011); *Cape Hatteras Access Preservation Alliance v. U.S. Dep't of the Interior*, 344 F.Supp.2d 108, 122 (D. D.C. 2004).
[3] *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1167 (9th Cir. 2010);

The Services' definition of "occupied" as "not used on a regular basis" is inconsistent with judicial interpretations of the term. *79 FR 27077*. Courts have held that "occupied" areas require *regular* use, even if the use is not continuous.[4] The Services also maintain that they may rely on incomplete survey data, "indirect or circumstantial evidence," and "reasonably inferred presence" of a species to determine occupancy. *79 FR 27069.* This position was rejected in *Otay Mesa Property, L.P. v. U.S. Department of the Interior*, 646 F.3d 914, 918 (D.C. Cir. 2011).

We believe that these cases, if considered and analyzed by the Services prior during this rulemaking, may have altered the breadth of the proposed rule. As such, we urge the Services to revisit the significance of these cases before moving forward with the proposed rule.

Geographical Area Occupied by Species

We question the Services' definition of the geographical area occupied by a species, which includes "area[s] 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.)" *79 FR 27077*. The inclusion of seasonal or periodic occurrence as a basis for determining if habitat is "occupied" is overbroad. Further the characterization of an occupied area as being "delineated around" species occurrence is vague. We recommend that the Services develop concise definitions of their terms, such as "vagrant," and develop and implement a clear and concise process by which habitat use by a specific species will be evaluated to facilitate the designation of critical habitat.

"Physical and Biological Features" Definition

The Services propose to designate ''physical or biological features'' as ''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." *79 FR 27069*. In the hypothetical scenario in the *Federal Register* notice, the Services would designate an unoccupied area as critical habitat because it could be possible that a flood would occur and within 5 to 15 years the resultant vegetation would be suitable to support a listed species. *79 FR 27069*. This would allow the Services to prospectively designate habitat that could support the "physical and biological features" in the future, even if it is only once every couple of years. Justifying a critical habitat designation relying on predictions that may be speculative at best is unreasonable and could result in numerous designations that may be ultimately ineffective at supporting conservation of a species. Here, we are particularly concerned that there may be scenarios

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Alaska Oil & Gas Ass'n v. Salazar, 916 F. Supp. 2d 974, 989 (D. Alaska 2013)

[4] *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1165 (9th Cir. 2010);
Cape Hatteras Access Preservation Alliance v. U.S. Dep't of the Interior, 344 F.Supp.2d 108, 120 (D. D.C. 2004);
Alaska Oil & Gas Ass'n v. Salazar, 916 F.Supp.2d 974, 989 (D. Alaska 2013)

in which future conditions cannot be predicted with a reasonably established level of certainty. Where known successional and/or ephemeral habitat occur, we request that Services develop a process with relative criteria by which those will be justified for designation as critical habitat.

In addition, the proposed scope of "life history" appears to be overly broad. To provide regulatory certainty, there should be clarity as to what "life history" includes for a species in conjunction with the designation of critical habitat. It appears "life history" features can be used individually or in combination to designate critical habitat, but one feature alone should not warrant critical habitat designation.

Removal of "Primary and Constituent Elements" Term

Generally, we do not see harm in eliminating the concept of primary and constituent elements (PCE) from the designation process. We do, however, oppose the replacement of PCEs with the proposed physical and biological features approach in the proposed rule because the Services' definition of "physical or biological features" is overly broad (see above). Adoption of "physical or biological features" in place of PCE creates significant uncertainty and risk of litigation. Further, the Services have not provided the rationale for removal of PCEs nor an adequate basis and rationale for its departure from the present approach for critical habitat designation using PCEs.

Application of "Special Management" Criterion in Critical Habitat Definition

We oppose the Services' proposed revision of the definition of ''special management considerations or protection." *79 FR 27070*. Through this revised definition, the Services, as a matter of policy, can assume that areas containing physical or biological features are in need of special management. The determination that special management considerations or protections may be required for an area must be a factual determination supported by an administrative record and must take into consideration the existence of state, local and voluntary and required management and protection measures, not solely based on whether the area contains the physical or biological features essential for conservation.

Removal of "Where Appropriate" Term

The Services have proposed to remove language that allows flexibility regarding whether to designate critical habitat. The Services "believe that circumstances when critical habitat designation will be deemed not prudent are rare" and therefore will remove the language "where appropriate" from section 424.01(a). *79 FR 27068.* This is an alarming policy shift away from regarding critical habitat as a tool for recovery of threatened or endangered species to a requirement in every situation. We therefore oppose the removal of "where appropriate" from section 424.01(a).

Discretion to Determine the "Scale" of Critical Habitat Designation

We oppose the Services' proposal to expand their discretion to determine the scale of a critical habitat designation: "the proposed regulations would emphasize that the Secretary would identify areas that meet the definition ''at a scale determined by the Secretary to be appropriate'." *79 FR 27071*. It appears that the Services propose that they need not determine that every acre or mile meets the definition of "critical habitat." The Services must use the best available scientific information in designating critical habitat, which may include varying levels of detail in terms of scale. Broad-scale designations are improper and designations should be based on a scale that is dictated by the best available science. Courts have held that the Services may only designate an area as critical habitat if the best available science demonstrates that an area meets the definition of "critical habitat." Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior, 646 F.3d 914, 915, 918 (D.C. Cir. 2011). Furthermore, the courts have held that the Services may not over-designate critical habitat and rely on section 7 consultations to later sort out their errors. Cape Hatteras Access Preservation Alliance v. U.S. Dep't of the Interior, 344 F. Supp.2d 108, 123 (D.D.C. 2004).

Where the best available scientific information is at a scale of individual parcel ownership, due process requires the determination of critical habitat at such level, with owners afforded notice and opportunity to comment on the applicability of the critical habitat determination to the individual owner's parcel(s). Because private property rights may be implicated by critical habitat designations as the designation may limit the Services' ability to issue section 10 permits, due process is critical as it relates to individual parcel ownership. The over-designation of lands as critical habitat, to be sorted out during section 7 consultation, essentially deprives the public of the opportunity to comment on the critical habitat designation. See Cape Hatteras Access Preservation Alliance v. U.S. Dep't of the Interior, 344 F. Supp.2d 108, 123 (D.D.C. 2004) and Otay Mesa Prop., L.P. v. U.S. Dep't of the Interior, 646 F.3d 914, 915, 918 (D.C. Cir. 2011).

Grandfathering Existing Critical Habitat Designations

Due to the potential ramifications of the proposed rule, oil and natural gas operators need certainty as to the treatment of existing critical habitat designations. If the Services do move forward with this proposed rule, we recommend that they completely grandfather existing designations and exempt any current designations from the new rule at the time of implementation. This will result in the highest level of regulatory certainty for companies. The Services likely do not have the staff or budget to revisit all existing critical habitat designations. At a minimum, the proposed rule should state that the Services are not obligated or required to revisit existing designations, in order to avoid risk of litigation.

Limitations on Designating Unoccupied Areas as Critical Habitat

The Services intend to depart from current regulations and legal precedents that limit the designation of unoccupied habitat to only those circumstances where existing occupied habitat is inadequate for recovery of the species. The Services have not provided

justification for this departure. Further, the Services have proposed to expand the definition of "'essential' as it relates to unoccupied areas." *79 FR 27073.* We interpret this to mean that the Services no longer have to exhaust the conservation adequacy of occupied habitat before justifying the inclusion of unoccupied areas. We oppose this approach and believe that the Services should continue to need to exhaust their analysis of occupied habitat before designating unoccupied areas as critical habitat. If the area actually occupied by the species is adequate to its conservation, then an unoccupied habitat area should not be deemed essential to the conservation of a species.

Economic Burden Associated with the Proposed Rule

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 We urge the Services to perform and make available for public comment such an analysis.

Regulatory Flexibility Act

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 27075*. 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 the revised definition of adverse modification (Docket No. FWS-R9-ES-2011-0072), 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 27075.* For the reasons stated above, we do believe that entities other than federal agencies will be impacted by both rules. Further, the Small Business Administration (SBA) Office of Advocacy has disagreed with the Services' position that critical habitat designations only affect federal agencies.[5] 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.

[5] 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

Need for NEPA Analysis

The proposed rules would result in a great expansion of regulatory authority to designate unoccupied areas as critical habitat, presumably higher amounts of habitat designated as critical due to the revised definitions therein, and consequent restrictions on economic activities in those 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).

Treatment of Climate Change in Critical Habitat Designation

The proposed rules would give the Services the ability to designate areas that species have not historically occupied based solely on predictions related to climate change and habitat adaptation. It appears that the proposed rule changes are largely driven by the Services' intent to expand their authority to address habitat adaptation resultant from climate change, not necessarily to directly improve or advance the recovery of threatened and endangered species. 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 a critical habitat designation. Per Section 4 of the ESA, designation of critical habitat must remain based on the best scientific information available and not on forward looking predictions that may be based on speculative information.

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 rule. We look forward to working cooperatively with the Services on this matter. Please contact me should you have questions about our comments or recommendations.

Sincerely,

Kathleen M. Sgamma
Vice President of Government & Public Affairs