WESTERN ENERGY ALLIANCE

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Public Comments Processing
Attn: Docket No. FWS–R9–ES–2011–0104
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 Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (Docket No. FWS–R9–ES–2011–0104)

Dear Sir or Madam:

Western Energy Alliance (the Alliance) submits the following comments to the U.S. Fish & Wildlife Service and National Marine Fisheries Service (the Services) in response to the proposed policy regarding implementation of Section 4(b)(2) of the Endangered Species Act (Docket No. FWS–R9–ES–2011–0104). 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.

This proposed policy will have significant 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 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. Our member companies also participate in conservation actions in areas that are or may be considered for exclusion from critical habitat designation.

We appreciate the Services' willingness to clarify and formalize the criteria for the consideration of partnerships and conservation plans on state, private, and federal lands when excluding areas from critical habitat designation. This effort is well intended, as excluding areas subject to a variety of public and private conservation actions from potential designation as critical habitat can be a critical factor in encouraging entities to undertake conservation actions in the first place. We also appreciate the Services' intent to provide "predictability and transparency regarding how the Services consider exclusions under section 4(b)(2)" *79 FR 27052.* Nonetheless, the criteria for exclusion proposed in the Services' draft policy is overly restrictive, particularly as it relates to the consideration of

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exclusions for conservation actions on federal lands. A reasonable exclusion policy should allow the Services to recognize and consider exclusions for all types of conservation projects, including those that occur on both federal and non-federal lands.

Excluding Federal Lands from Designations

We oppose the Service's intent to focus exclusions only on non-federal lands. The Services state that "[l]ands owned by the Federal government should be prioritized as sources of support in the recovery of listed species. To the extent possible, we will focus designation of critical habitat on Federal lands in an effort to avoid the real or perceived regulatory burdens on non-Federal lands." *79 FR 27057*. While we sympathize with the intent to reduce regulatory burdens on private lands, we oppose a policy that would disqualify exclusions on federal lands while prioritizing them for recovery.

We strongly believe that exclusions should be based on the criterion outlined in Section 4(b)(2) of the ESA, not simply because the land happens to be federal or non-federal. Section 4(b)(2) of the ESA provides the Secretary the discretion to ''exclude any area from critical habitat if [s]he determines that the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat," but does not delineate whether land ownership should play a factor in the decision to exclude lands from designation.

The Services also undercut the benefits, value, and efficacy of conservation activities on federal lands, which may be implemented solely by federal agencies or in conjunction with states and private entities. We disagree with the Services' conclusion that "while the benefits of excluding non-Federal lands include development of new conservation partnerships and fostering existing partnerships, those benefits do not generally arise with respect to Federal lands, because of the independent obligations of Federal agencies under section 7 of the Act." *79 FR 27056.* In fact, Alliance member companies and other public lands users often participate in conservation activities on federal lands.

Conservation actions on federal lands can be valuable, substantial and potentially critical to the recovery and conservation of threatened or endangered species, yet the Services discount the benefit of those actions and conclude that there would be little or no advantage of excluding the areas subject to them from critical habitat designation. For example, a candidate conservation agreement (CCA) for the Lesser Prairie-Chicken and Dunes Sagebrush Lizard on public lands in New Mexico has been incredibly successful at implementing on-the-ground conservation efforts. There are currently 1,461,248 acres enrolled in this CCA by ranchers and oil and natural gas operators alone, and over $1.3 million invested in conservation projects in 2013.[1]

The Services may elect to exclude both federal and non-federal lands from a critical habitat designation upon a finding that they will still be protected via other mechanisms,

[1] *Candidate Conservation Agreements for the Lesser Prairie-Chicken and Dunes Sagebrush Lizard 2013 Annual Report*. Center for the Excellence of Hazardous Materials Management. Available at: http://cehmm.org/docs/2013AnnualReport.pdf

including "management plans that take into consideration [a species'] status as an endangered species." *Ctr. for Biological Diversity v. Salazar*, 770 F. Supp. 2d 68, 89 (D.D.C. 2011); *accord Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05-0629 WBS-GGH, 2006 WL 3190518, at *29 (E.D. Cal. Nov. 2, 2006) (upholding the U.S. Fish and Wildlife Service (FWS) determination "that for certain lands protected by existing management plans and practices, the benefits of inclusion are likely to be minimal and outweighed by the benefits of exclusion"). Whether those mechanisms apply to federal or non-federal lands is not of consequence.

We disagree with the Services' conclusion that "the benefits of including Federal lands in a designation are greater than non-Federal lands because there is a Federal nexus for any project on Federal lands that may affect critical habitat, so section 7 consultation would be triggered and an analysis under the destruction and adverse-modification standard would always be conducted" *79 FR 27057.* It appears that the Services may have overestimated the benefits of designating federal lands as critical habitat. Even though section seven 7 consultation would be triggered under the analysis of an action on federal lands, that does not always mean that the benefits of designating federal lands as critical habitat necessarily outweigh the benefits of not doing so. A federal parcel at question could be subject to a federal, state, or local conservation program, like a CCA, and therefore merit exclusion. Further, while there could be little or no conservation benefit as a result of designating federal lands as critical habitat, the draft policy could preclude or even prohibit, as a matter of policy, the Services from ever making that determination and subsequently analyzing the benefits of exclusion.

We urge the Services to recognize that an increased emphasis on designating federal lands as critical habitat will impact private entities, including oil and natural gas lessees. Further, private entities may have committed to conservation actions on federal lands through CCAs. For example, federal oil and natural gas lessees agreed to myriad voluntary conservation actions under the CCA for the Lesser Prairie- Chicken and Dunes Sagebrush Lizard in New Mexico (see above). In many circumstances, federal lands that are subject to these conservation agreements should be eligible to be excluded from critical habitat designation.

An increased emphasis on designating federal lands as critical habitat, which is likely to occur as a result of this policy, will undoubtedly result in an increase in the volume of formal section 7 consultations in those areas. That effect is extremely concerning and has not been recognized or analyzed by FWS. 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 exclusion policy.

We appreciate the Services' willingness to recognize and consider conservation activities on non-federal lands that could merit exclusion from critical habitat designation, but believe that those actions should be regarded equivalently with actions on federal lands. In the West, multiple-use activities on federal lands, including oil and natural gas production,

renewable energy production, grazing, mining, recreation, and other activities, play a critical part in rural economic production. Multiple use activities also employ thousands of Americans across the region and are an important part in many western lifestyles. A policy decision to prioritize the exclusion of non-federal lands over federal lands from critical habitat will also impact crucial revenue, including royalties, fees, rentals, and bonuses, generated from multiple-use activities on federal lands that benefit local communities, states, and the U.S. Treasury. It appears that the Services have failed to address the importance of this revenue and socioeconomic impacts of multiple use activities on federal lands. As such, conservation actions on federal lands that could merit exclusion from critical habitat designations must be recognized and considered by the Services.

Exclusion Criteria

We oppose overly restrictive criteria for exclusion of lands subject to state, local or voluntary conservation measures. In the draft policy, the Services propose a series of factors which limit when exclusions will be made for lands and waters subject to general conservation measures as well as habitat conservation plans (HCP), candidate conservation agreements with assurances (CCAA), and Safe Harbor Agreements (SHA). *79 FR 27057.* We are very concerned that the criterion outlined in the draft policy is overly burdensome and will arbitrarily prevent lands with conservation actions from exclusion.

We also worry that overly restrictive exclusion criterion will discourage the development and implementation of voluntary or non-voluntary conservation measures in the first place. The presumption that federal and non-federal lands subject to conservation actions may be excluded from future critical habitat can be a critical factor in the decision to develop and execute such an action. The Services must recognize that overly-burdensome criterion for the discretionary exclusion of lands subject to conservation actions could prevent or delay states and others from undertaking those actions, thereby negatively impacting species populations and their habitat. We fully support excluding lands from critical habitat if those lands are subject to reasonable conservation measures. The policy should be flexible; rather than requiring a project to meet every single criterion, the policy should enable exclusion on lands subject to conservation actions that meet enough of the criteria to demonstrate effectiveness and a reasonable expectation of being implemented.

The draft policy appears to unreasonably prioritize exclusions for conservation actions that have been subject to National Environmental Policy Act (NEPA) analysis and compliance over those that have not. The Services must recognize that myriad state and local conservation efforts exist that have not been subject to NEPA analysis but have nonetheless provided substantial benefits to species and habitat and can be reasonably expected to be implemented. The value of these efforts should not be discounted or disregarded simply because they have not been subject to NEPA analysis.

Economic Burden Associated with the Proposed Policy

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.

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.

Sincerely,

Kathleen M. Sgamma
Vice President of Government & Public Affairs