Docket Nos. FWS-R9-ES-2011-0072, FWS-HQ-ES-2012-0096

COMMENTS

of

THE WASHINGTON LEGAL FOUNDATION

to the

U.S. FISH AND WILDLIFE SERVICE
and
NATIONAL MARINE FISHERIES SERVICE

Concerning

DEFINITION OF DESTRUCTION OR ADVERSE MODIFICATION OF CRITICAL HABITAT; IMPLEMENTING CHANGES TO THE REGULATIONS FOR DESIGNATING CRITICAL HABITAT

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED
AT *79 FED. REG. 27060, 27066* (May 12, 2014)

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Re: Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat.

Listing Endangered and Threatened Species & Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat

Dear Sir or Madam:

The Washington Legal Foundation (WLF) appreciates this opportunity to submit these comments to the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, "the Services") in connection with their two proposed rules that would: (1) amend the definition of "destruction or adverse modification" of critical habitat (set forth at 16 C.F.R. Part 402); and (2) amend the Services' regulations (set forth at 16 C.F.R. Part 424) governing the procedures and criteria used for designating and revising critical habitat.

WLF has no objection to many of the proposed amendments to Part 424. It does take issue with the proposed amendments, however, to the extent that they propose a substantial expansion of the circumstances under which an area under consideration for "critical habitat" designation will be deemed "occupied" by a species listed as either endangered or threatened. The Endangered Species Act (ESA) establishes two sets of criteria for determining whether an

area may be designated as "critical habitat"; one set of criteria applies when the area was "occupied" by the listed species at the time of listing, and the other set applies when the area was not "occupied." 16 U.S.C. § 1532(5)(A)(i) & (ii). The criteria for designation are much more stringent when the area was not occupied by the listed species at the time of listing. The proposed amendments would significantly loosen the definition of "occupied" and expand the definition of the types of features found in the occupied area that would qualify it for critical habitat designation. These proposed expansions are inconsistent with the statutory language and would significantly increase the likelihood that land will be encumbered by unwarranted "critical habitat" designations.

WLF also objects to the proposed revision to 50 C.F.R. § 402.2, which addresses the circumstances under which a federal action might be likely to lead to "destruction or adverse modification of [critical] habitat," thereby triggering the consultation provision of § 7(a) of the ESA, 16 U.S.C. § 1536(a). The second sentence of Proposed § 402.2 expands the meaning of the term "destruction or adverse modification of [critical] habitat" well beyond the meaning conveyed by the statutory language. In particular, the second sentence could dictate a "destruction or adverse modification" finding even in circumstances in which the proposed federal action had no effect on an area's physical or biological features that gave rise to the area's initial designation as critical habitat.

I. Interests of the Washington Legal Foundation

The Washington Legal Foundation is a public interest law firm and policy center based in Washington, D.C., with supporters in all 50 States. WLF devotes a substantial portion of its

resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF regularly appears before federal and state courts and administrative agencies to urge adoption of environmental policies that strike a proper balance between environmental safety and economic well-being. *See, e.g., Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) (challenging EPA's Clean Air Act "tailoring rule"); *United States v. King*, 660 F.3d 1071 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2740 (2012) (urging reasonable enforcement policies for Underground Injection Control programs).

In particular, WLF has regularly participated in judicial and regulatory proceedings that have addressed major issues regarding the scope of the Endangered Species Act. *See, e.g., Nat'l Assoc. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007); *Bennett v. Spear*, 520 U.S. 154 (1997); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); 73 Fed. Reg. 47868 (Aug. 15, 2008) (WLF comments on proposed amendments by FWS and NMFS to regulations governing the interagency consultation process under § 7 of the ESA).

WLF supports the ESA's goal to "conserve endangered species and threatened species." 16 U.S.C. § 1531(c). At the same time, WLF seeks to ensure that the ESA is implemented in a manner that does not unnecessarily interfere with private property rights.

II. The Statutory Framework for Regulating "Critical Habitat"

A. The ESA Carefully Defines the Circumstances Under Which an Area Can Be Designated as Critical Habitat for a Listed Species

Congress enacted the ESA in 1973 to prevent endangered and threatened species from becoming extinct. *See* 16 U.S.C. § 1531(b). To accomplish this goal, the ESA requires the Services to list species that are endangered or threatened. § 1533(a). Once a species has been listed, the ESA in most instances requires the Services to "designate critical habitat" for the species. § 1533(b)(2).

The prerequisites for designating land as critical habitat vary depending on whether that land was occupied by the listed species at the time of listing. *See* § 1532(5)(A)(i)-(ii). For *occupied* land to be designated as critical habitat, "physical or biological features . . . essential to the conservation of the species and . . . which may require special management considerations or protection" must be "found" on "specific area within the geographical area occupied by the species." § 1532(5)(A)(i).[1] In contrast, before the Services may designate any areas as critical habitat that were *not* occupied by the listed species at the time of listing, the Services must meet a significantly more stringent test; they must show that the unoccupied area is "essential to the conservation of the species." § 1532(5)(A)(ii).

B. The ESA Establishes a Consultation Process When Federal Action May Adversely Affect Critical Habitat

Once the Services have properly designated a critical habitat area, federal agencies must

[1] Under current regulations, the Services refer to physical or biological features that satisfy these requirements as "primary constituent elements." 50 C.F.R. § 424.12(b).

consult with the Services to "insure that any action authorized, funded, or carried out by such agency . . . . is not likely to result . . . in the destruction or adverse modification" of the designated areas. § 1536(a)(2). Regulations promulgated pursuant to the ESA establish an elaborate procedural framework for consultation.

First, the agency responsible for authorizing an action proposed by another agency or private party—the "action agency"—must decide whether that action "may affect" a listed species or its critical habitat. 50 C.F.R. § 402.14(a). If the action agency answers that question in the affirmative, the action agency generally must participate in formal consultation with FWS or NMFS. 50 C.F.R. §§ 402.14(a)-(c). However, the action agency may avoid formal consultation (and instead engage only in informal consultation) if it concludes, and the consulting Service agrees, that the proposed action "is not likely to adversely affect any listed species or critical habitat." 50 C.F.R. § 402.14(b)(1).

If the consulting Service disagrees that a proposed action is unlikely to adversely affect critical habitat, then the action agency must initiate formal consultation. *See* 50 C.F.R. § 402.14(a). Formal consultation procedures mandate that the consulting Service issue a biological opinion stating whether the proposed action "is likely to jeopardize the continued existence of a species or result in destruction or adverse modification of critical habitat." 50 C.F.R. § 402.14(g)(4). If the consulting Service concludes that a proposed action would result in destruction or adverse modification of critical habitat, the action agency must pursue reasonable and prudent alternative actions to avoid violating the ESA. 50 C.F.R. § 402.14(g)(5).

III. The Services' Proposed Amendments to the ESA's Implementing Regulations Would Expand the Definition of When a Listed Species "Occupies" an Area and Broaden the Circumstances Under Which Inter-agency Consultation Is Required

The Services propose amending 50 C.F.R. Parts 424 and 402, in order to modify their regulations regarding when an area should be deemed "occupied" by a listed species (an important element in determining whether the area may be designated as critical habitat) and when an action is likely to cause destruction or adverse modification of critical habitat (a key element in determining whether the action agency must consult with FWS or NMFS). These comments focus on only a portion of the proposed changes—namely, the Services' definitions of: (1) "geographical area occupied by the species"; (2) "physical or biological features"; and (3) "destruction or adverse modification."

First, the Services propose a new definition of "geographical area occupied by the species," as that term is used in 16 U.S.C. § 1532(5)(A)(i) in connection with the ESA's definition of "critical habitat." The proposed regulations would define "geographical area occupied by the species" as follows:

> An area which may generally be delineated around species' occurrences, as determined by the Secretary (i.e., range). Such areas may include those areas used throughout all or part of a 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).

Proposed 50 C.F.R. § 424.02, 79 Fed. Reg. at 27077.

The Services also seek to alter the process for designating critical habitat by removing the "primary constituent elements" framework from the ESA regulations and replacing it with a new definition of "physical or biological features" (a phrase that appears in 16 U.S.C.

§ 1532(5)(A)(i)). Under the current framework, "primary constituent elements" are features found in an area under consideration for designation as critical habitat that are "essential to the conservation of the species" and thus are the basis for qualifying the land for designation. 50 C.F.R. § 424.12(b). In place of that framework, the Services seek to define "physical or biological features" as follows:

> 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.*

Proposed § 424.02, 79 Fed. Reg. at 27077 (emphasis added). Significantly, the current regulatory scheme makes no mention of "ephemeral or dynamic habitat conditions" when enumerating the sorts of features that support a critical habitat designation. *See* 50 C.F.R. § 424.12(b) (listing "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" as examples of features that could properly be considered primary constituent elements of critical habitat).

The Services also propose a new definition of "destruction or adverse modification" in response to two federal appellate court decisions that invalidated the previous definition set forth at 50 C.F.R. § 402.02. Proposed § 402.02, 79 Fed. Reg. at 27066. The ESA requires, as part of consulting with the action agency, that the Services ensure that the proposed action "is not likely to jeopardize the continued existence" of listed species and will not result in the "destruction or adverse modification" of the designated critical habitat. 16 U.S.C. § 1536(a)(2). Both the Fifth

and Ninth Circuits faulted the current regulatory definition as inconsistent with § 1536(a)(2) because the ESA is designed to foster *both* survival *and* recovery of listed species, and the regulation could be read as exempting from consultation those modifications that did not adversely affect survival of a species yet *did* adversely effect recovery. *See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir. 2004); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 443 (5th Cir. 2001). The Services are proposing the following new definition of "destruction or adverse modification," supposedly in response to the two court decisions:

> A direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for the 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.

Proposed 50 C.F.R. § 402.02, 79 Fed. Reg. at 27066. The second sentence makes clear that the proposed definition, unlike the definition included in the current regulations, would not require the Services to conclude that actual damage will likely occur to physical or biological features of the critical habitat before they could find "adverse modification" of the habitat. Rather, under the new definition it is sufficient if the Services conclude that the proposed action could impede development of new features that are not yet present in the habitat—either at the time of listing or at the time of the proposed action.

IV. The Services' Definition of "Occupied by the Species" Conflicts with the Definition Set Forth in the ESA

The Services' proposed definition of "geographical area occupied by the species" does not conform to the more limited definition contemplated by the ESA. 16 U.S.C. § 1532(5)(A)(i). That error is critical because the ESA imposes more stringent requirements on the Services before they are permitted to assign a "critical habitat" designation to an area *not* occupied by the species at the time of listing.

The second sentence of the proposed definition states explicitly that the Services may define an area as one "occupied by the species" even though the area is used by the species in only a "part of the species' life cycle" and even though the area is not "used on a regular basis." Proposed 50 C.F.R. § 424.02, 79 Fed. Reg. at 27077. That proposed definition cannot be reconciled with the statutory language and is inconsistent with existing case law. The ESA states that an area is not "occupied" by a listed species unless the species is *present* in that area *at a very specific time*: "at the time it is listed" under the ESA as endangered or threatened. 16 U.S.C. § 1532(5)(A)(i). Thus, it is not sufficient for the Services to demonstrate that the listed species may have been present on an irregular basis in rough proximity to the date of listing; unless the Services can demonstrate that the listed species was regularly present at the time of listing (at the very least, regularly present during the year of listing), the ESA does not consider the area occupied.

WLF recognizes that the word "occupy" is not self-defining. Moreover, the area said to be occupied by a plant or animal will vary depending on the mobility of the species. Thus, for

example, a non-migratory bird (such as a spotted owl) does not sit in its nest all day long but rather is likely to fly off for up to several miles before returning to its nest. Accordingly, such a bird might be deemed to occupy the entire area within its normal flight range. On the other hand, other animals remain in a single location (*e.g.*, fairy shrimp spend their entire lives in a single small pool), and the area that such animals can be said to occupy is considerably smaller. But however large the area occupied by a given species, the ESA does not permit a finding that the species "occupied" a given area unless the species was actually present in that area on a regular basis "at the time it [was] listed."

The Service's proposed definition of the statutory phrase "geographical area occupied by the species" is inconsistent with the two federal appeals court decisions—one from the D.C. Circuit and one from the Ninth Circuit—that have addressed the meaning of that phrase. In *Otay Mesa Property, L.P. v. U.S. Department of Interior*, 646 F.3d 914 (D.C. Cir. 2011), the D.C. Circuit overturned an FWS decision to list 143 acres of private property as critical habitat for the endangered San Diego fairy shrimp, finding that FWS lacked substantial evidence that the land had been "occupied" by the creature at the time of its listing in 1997. The court noted that the FWS's only evidence that the San Diego fairy shrimp "occupied" the land was a surveyor's discovery of the species in a single location on the plaintiffs' property (in a tire rut on a dirt road) on a single occasion (in 2001). *Id.* at 917. Seven later government surveys did not find *any* fairy shrimp on the property. *Ibid.* The Court concluded:

> The failure to observe *any* San Diego fairy shrimp in later surveys of plaintiffs' property is in tension with the suggestion that the property was occupied by the San Diego fairy shrimp in 2001. It is likewise in tension with the agency's conclusion

> that the property was occupied in 1997 [at the time listing]. . . . Although the Service has tried to explain why a single sighting in 2001 means that the San Diego fairy shrimp occupied plaintiffs' property in 1997, that reasoning is at best strained.

Ibid.

The D.C. Circuit's reasoning is particularly relevant to the FWS's assertion that evidence gathered years after a species is listed can be sufficient to demonstrate that the designated area was "occupied" by the species at the time of listing. 79 Fed. Reg. at 27069. While the D.C. Circuit did not definitively rule out all possibility that such evidence could ever suffice to meet the Services' evidentiary burden, the court expressed extreme skepticism on that issue. *Otay Mesa*, 646 F.3d at 918. In attempting to justify reliance on such *ex post facto* evidence collection, the Services (in the preamble to their proposed regulations) complain that gathering sufficient evidence at the time of listing can be quite difficult:

> In the [ESA], the term "geographical area occupied by the species" is further modified by the clause, "at the time it is listed." However, if critical habitat is being designated or revised several years after the species was listed, it can be difficult to discern what was occupied at the time of listing. The known distribution of a species can change after listing for many reasons, such as discovery of additional localities, extirpation of populations, or emigration of individuals to new areas. In many cases, information concerning a species' distribution, particularly on private lands, is limited as surveys are not routinely carried out on private lands unless performed as part of an environmental analysis for a particular development proposal. Even then, such surveys typically focus on listed rather than unlisted species, and so our listing rule may not detail all areas occupied by the species at that time.

79 Fed. Reg. at 27069. The D.C. Circuit acknowledged that the Services often face great difficulty in gathering evidence that a listed species occupied a designated area on the date of listing. It nonetheless concluded that such difficulties did not justify a relaxation of the Services' burden to produce substantial evidence to support a decision to designate land as critical habitat:

> The [FWS] also contends that the evidence here suffices because the [ESA] requires the [FWS] to make critical habitat designations "on the basis of the best scientific evidence available." 16 U.S.C. § 1533(b)(2). The [FWS] argues, correctly, that it has no affirmative obligation to conduct its own research to supplement existing data. . . . But the absence of a requirement for the Service to collect more data on its own is not the same as an authorization to act without data to support its conclusions, even acknowledging the deference due to agency expertise.

Otay Mesa, 646 F.3d at 918 (citation omitted).

The language included in the second sentence of the proposed revised definition, set forth in Proposed § 424.02, is a transparent effort to permit the Services to make factual findings that an area was "occupied" despite the absence of substantial evidence that any such occupation existed at the time of listing. As such, that language should be deleted as inconsistent with the ESA's definition of "occupied," set forth in 16 U.S.C. § 1532(5)(A)(i). WLF emphasizes that adhering to the statutory definition will not create an insurmountable impediment to the designation of sufficient critical habitat to assist in the recovery of listed species. The ESA also permits, under appropriate circumstances, the designation of an area as critical habitat even in the absence of evidence that it was occupied by the listed species at the time of listing:

> The term "critical habitat" for a threatened or endangered species means— . . . specific areas outside the geographical area occupied by the species, at the time it is listed . . ., upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(ii). Of course, the Services will need to meet an additional evidentiary requirement (a showing that the designated areas "are essential for the conservation of the species") in order to designate an unoccupied area as critical habitat. But the ESA clearly contemplates that the Services should be required to meet that higher evidentiary standard if they

lack evidence that the area was occupied by the listed species at the time of its listing. The Services should not seek to evade that statutorily-imposed evidentiary burden by adopting regulations designed to excuse the absence of substantial evidence to support an "occupied" finding.

The proposed regulation is also inconsistent with the Ninth Circuit's decision in *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010). *Arizona Cattle* upheld an FWS determination that the Mexican spotted owl had "occupied" 8.6 million acres of Arizona land at the time of its listing in 1993, but it imposed a standard for judging the "occupied" question that is far stricter than the one proposed by the Services. Under the Ninth Circuit's "occupied" standard, "The 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." *Id.* at 1165. In sharp contrast, the Services' proposed definition of "occupied" would do away with any "regularity" requirement, declaring that sufficient support for an "occupied" finding includes evidence that the species is present "periodically," even if the area is "not used on a regular basis"—notably, with no requirement that the periodic use happen to coincide with the date of listing. Proposed § 424.02. See also 79 Fed. Reg. at 20769 (stating that the second sentence of the proposed definition is intended to "clarify that the meaning of the term 'occupied' includes areas that are used periodically or temporarily by a listed species during some portion of its life history.").

The proposed regulation states that evidence that an area is part of a "migratory corridor" for a listed species is sufficient to support an "occupied" finding. Accepting that definition

would result in an exponential increase in areas that qualify as "occupied" by migratory birds. But nothing in the ESA suggests that Congress contemplated that an area could qualify as critical habitat for a listed migratory bird simply because some of the birds have been known to fly over that area. Throughout the ESA's 40-year history, it has been interpreted much more narrowly than the Services are now proposing that it be interpreted. That history ought to give the Services pause before adopting such an expansive interpretation; it should suggest to the Services that Congress did not intend the term "occupied" to be construed in this expansive manner.

Finally, even if the Services' definition of "occupied" could be deemed a plausible interpretation of § 1532(5)(A)(i), WLF respectfully submits that the Services should not adopt that interpretation in light of the significant burden that such an expansive interpretation would impose on the property rights of private landowners. As the D.C. Circuit recognized, "Designation of property as critical habitat can impose significant costs on landowners." *Otay Mesa*, 646 F.3d at 915. Those costs are likely to be borne by private citizens because "approximately 75 percent of all listed species have habitat on private property." *See* M. Reed Hopper, *Habitat Conservation and Property Rights: Irreconcilable Differences or Just Growing Pains?*, 38 No. 5 ABA Trends 12 (2007).

The news media have reported numerous stories regarding significant economic losses suffered as a result of severe restrictions imposed on private land use by the ESA. For example, FWS has informed homeowners in Texas that they will face criminal charges if they build fences on their property in critical habitat of the golden-cheeked warbler. *Ibid.* Similarly, FWS has

told California homeowners in gnatcatcher critical habitat that they will be subject to fines or imprisonment if they clear brush off their property in an effort to prevent the spread of wildfires. *Ibid.* In the Klamath River Basin, federal agencies withheld water from farmers in drought-stricken areas to increase water flow to a protected fish species. *Ibid.* As a result of crop losses attributable to the withholding of water, farmers and their families lost nearly a year's income and witnessed a 90% drop in the value of their land. *Ibid.* Ranchers in New Mexico risk prosecution if their efforts to protect their cattle from the Mexican wolf end up harming any wolves. *Ibid.*

In addition to the specific examples above, critical habitat designation also imposes significant administrative costs on private property owners. *See* Andrew. J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 Envtl. L. Rep. News & Analysis 10678, 10680 (2013). Landowners first bear the cost of participating in the rulemaking process as soon as the Services propose a rule to designate critical habitat. *Ibid.* Also, once critical habitat is proposed, the consultation requirements of the ESA kick in even if the final critical habitat is not determined until much later. *Ibid.* Complying with the consultation requirements of ESA "often takes months or years, significantly delaying projects and resulting in substantial additional project costs, if not destroying the projects' economic viability." *Id.* at 10681.

WLF recognizes that all environmental regulation entails costs, and that adoption of the ESA signifies a willingness of the Nation to accept some of the costs described above as the price of protecting species that might otherwise become extinct. Nonetheless, the overly broad

definition of "occupied" proposed by the services threatens to increase those costs substantially. WLF urges the Services to refrain from adopting the proposed definition so as to avoid the unwarranted increased financial burdens that it would impose on private property owners. As an alternative, WLF proposes that the Services adopt the following definition of "geographical area occupied by the species," derived from the case law cited above :

> The geographical area that a listed species uses regularly enough that the species is likely to be found in that area at any reasonable time. Infrequent, isolated observations will not be considered sufficient evidence of regular use. Data, observations, or other evidence shall only be considered to the extent that it proves occupation at the time of listing. Property with favorable characteristics will not be considered occupied merely because it is suitable for future occupancy.

V. The Services' Definition of "Physical or Biological Features" Conflicts with the ESA

In addition to proposing a new definition of occupied, the Services propose a change to the standards for determining which specific locations within an occupied area have the necessary physical or biological features to qualify as "critical habitat." *See* 16 U.S.C. § 1532(5)(A)(i) (limiting critical habitat designation to those locations—within the area occupied by the listed species—on which specified "physical or biological features" are "found").

The current regulation (50 C.F.R. § 424.12(b)) requires the "physical or biological features" analysis to focus on the area's "primary [physical or biological] constituent elements" that are "essential to the conservation of the species." By way of illustration, the regulation explains, "Primary constituent elements may include, 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." *Ibid*. The Services propose eliminating any mention of "primary constituent elements" and replacing it with the following definition of "physical or biological features":

> 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.

Proposed § 424.02, 79 Fed. Reg. at 27077.

The proposed regulation is inconsistent with 16 U.S.C. § 1532(5)(A)(i) because it fails to comply with the statutory requirement that the requisite features actually be "found" at the location to be designated as critical habitat. The proposal's inclusion of "habitat characteristics that support dynamic or ephemeral conditions" would authorize the Services to designate land as critical habitat merely because the land is likely to develop essential features *in the future*; *i.e.*, "dynamic or ephemeral conditions" refers to conditions that do not exist at the time of listing but might exist (at least temporarily) in the future. That authorization is inconsistent with § 1532(5)(A)(i)'s use of the present tense: designation is limited to locations where features "essential to the conservation of the species" "are found." The statute says nothing to suggest that designation is authorized for locations where such features *might be found in the future*, regardless of the likelihood of such features arising.

The Services provide examples of how their proposed definition could be used to designate land lacking features essential to conservation of the species, merely because the land is capable of supporting such essential features. The Services posit that a listed species might require a special type of vegetation in its habitat to breed or feed. 79 Fed. Reg. at 27069. The

special vegetation begins growing only five to 15 years after a "local flooding event." *Ibid.* Under the proposed definition, the Services would deem an area's susceptibility to flooding as a current physical feature of the land and that such flooding could "result in the periodic occurrence of the suitable vegetation." *Id.* at 27070. Thus, even in the absence of the special vegetation the species needs for its survival, the Services state that their proposed definition would authorize them to designate the land as critical habitat "if there were documented occurrences of the particular habitat type in the area and a reasonable expectation of that habitat occurring again." *Ibid.* at 27070.

The Services' example well illustrates that their proposed definition of "physical or biological features" does not comport with statutory language. The statute states that critical habitat designation is permissible for locations at which certain physical or biological features "are found." The statute does not say "likely to be found in the future" or "may be found in the future." Yet, the proposed definition contemplates critical habitat designation for locations that will not possess the requisite features until decades in the future, if ever.

The case law cited by the Services in support of their proposed definition actually undercuts their position. *See Cape Hatteras Preservation Alliance v. DOI*, 344 F. Supp. 2d 108 (D.D.C. 2004). The case was a challenge to an FWS final rule designating critical habitat for the piper plover. The final rule conceded that some of the designated land did not include any physical or biological features that were essential to the conservation of the bird. The district court held that FWS violated § 1532(5)(A)(i) by designating critical habitat that lacked such features. *Id.* at 122-23. Rejecting the FWS's argument that it might be able to find the requisite

features on the designated land if given sufficient time, the court said, "The Services' argued-for interpretation, essentially that [the requisite features] will likely be found in the future, is simply beyond the pale of the statute." *Id.* at 123.

The Services are correct that the district court did not expressly reject the argument it makes in support of its proposed definition—that critical habitat designation is proper when current features of the land make it likely that at some point in the future the land will develop physical or biological features that are essential to the conservation of the species. *See* 79 Fed. Reg. at 27070 (citing *Cape Hatteras*, 344 F. Supp. 2d at 123 n.4). But the fact that a court did not expressly reject a statutory interpretation is a far cry from an endorsement, and nothing in the district court's opinion suggests that it would be open to the Services' proposed definition of "physical or biological features," a definition that runs counter to the language of § 1532(5)(A)(i).

VI. The Service's Definition of "Destruction or Adverse Modification" Conflicts with the ESA

Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), requires federal agencies to consult with the FWS or the NMFS to ensure that any action "authorized, funded, or carried out" by the agencies "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [the critical] habitat of such species." As a result of recent court decisions criticizing 50 C.F.R. § 402.02—the regulation that defines the phrase "destruction or adverse modification"—the Services are acting appropriately in proposing to amend the regulation. However, the Services are proposing an

amendment that goes well beyond what is required to respond to the court decisions, and they are thereby expanding the meaning of "destruction or adverse modification" beyond anything contemplated by the ESA.

As currently written, § 402.02 defines "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." Read literally, § 402.2 could be interpreted as excluding from that definition a modification of critical habitat that adversely affects recovery of a listed species so long as it does not also adversely affect survival of the species. As both the Fifth and Ninth Circuits pointed out, defining "destruction or adverse modification" in that manner conflicts with the ESA, which makes clear that consultation is required to ensure that critical habitat modifications do not adversely affect *either* survival *or* recovery of a listed species. *Gifford Pinchot*, 378 F.3d at 1071; *Sierra Club*, 245 F.3d at 443.

The first sentence of Proposed § 402.02 adequately addresses the problem identified by *Gifford Pinchot* and *Sierra Club*. However, the proposed definition includes a second sentence that creates new conflicts with the language of the ESA. The Services propose that the new definition of "destruction or adverse modification" read as follows:

> A direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for the 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.

Proposed 50 C.F.R. § 402.02, 70 Fed. Reg. at 27066.

The second sentence of the proposed definition conflicts with the ESA's definition of

what constitutes critical habitat because it assumes—contrary to 16 U.S.C. § 1532(5)(A)(i)—that critical habitat may be designated on the basis of "physical or biological features" not present on the land at the time of designation. The consultation contemplated by 16 U.S.C. § 1536(a)(2) is limited to modifications related to features that led to the initial critical habitat designation and does not apply to other modifications that have no effect on those features but that arguably impair development of new features that are favorable to the species. The preamble to the proposed rule seeks to explain the second sentence as follows:

> The second sentence of the Services' proposed definition of "destruction or adverse modification" simply acknowledges that some important physical or biological features *may not be present* or are present in a sub-optimal quantity or quality. This could occur when, for example, *the habitat has been degraded by human activity* or is part of an ecosystem adapted to a particular natural disturbance (e.g., fire or flooding), which does not constantly occur but is likely to recur. . . . The area may have been designated because of its potential to support the physical or biological features that fulfill the species' life-history needs and its potential recovery. 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. Thus, *an action that would preclude or significantly delay habitat regeneration* or natural succession process, to an extent that appreciably diminishes the conservation value of critical habitat, would result in destruction or adverse modification.

79 Fed. Reg. at 27061 (emphasis added).

That preamble statement does not explain how a feature not present on the designated land—either at the time of designation or at the time of the proposed federal action—could have any bearing on whether the current value of the designated habitat to the listed species is being

jeopardized by the proposed action.[2] It is irrelevant, for purposes of § 1532(5)(A)(i), that an area possessed features "essential to the conservation of the species" at a time prior to its designation but then lost those features because it was "degraded by human activity." If features are not "found" on land at the time of its designation as critical habitat, the Services lack statutory authority to block uses of the land that might prevent those features from appearing on the land at some point in the distant future.

Neither *Gifford Pinchot* nor *Sierra Club* supports the Services' efforts to expand the definition of "destruction or adverse modification." Indeed, in criticizing the current § 402.02, the Ninth Circuit suggested that the regulation could be brought into compliance with the ESA by changing the word "and" to "or" and thereby making clear that adverse modifications encompass actions likely to prevent the recovery of listed species in addition to actions that adversely affect the species' chances for survival. *Gifford Pinchot*, 378 F.3d at 1070 ("Where Congress in its statutory language required 'or,' the agency in its regulatory definition substituted 'and.'"). Both courts required a regulatory definition of modification that encompassed actions adversely affecting the *current* critical habitat features that promote

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[2] WLF recognizes that a different analysis is required in those unusual situations in which an area is designated as critical habitat despite the fact that the land is not occupied by the listed species. *See* 16 U.S.C. § 1532(5)(A)(ii) (permitting designation of unoccupied areas upon a determination by the Services that "such areas are essential for the conservation of the species.") But although the statute does not absolutely require that such areas contain "physical or biological features" that are "essential to the conservation of the species," it is difficult to imagine that the Services could ever, in the absence of such features, make the heightened "essential for the conservation of the species" finding required before unoccupied areas may be designated as critical habitat.

survival and recovery; those two courts said nothing about *future* critical habitat features.

Finally, WLF notes that the first sentence of Proposed § 402.02 retains the requirement that any modification of critical habitat not trigger the consultation process unless it would "appreciably" diminish the conservation value of the critical habitat. *Cf. Butte Environmental Council v. U.S. Army Corps of Engineers*, 620 F.3d 936, 948 (9th Cir. 2010) (destruction of only a minor portion of critical habitat did not "appreciably diminish" the value of the critical habitat to the listed species). WLF deems it highly unlikely that diminution in conservation value could ever be "appreciable" when the only effects of the proposed action relate to features that do not exist on the designated land and did not exist at the time of listing.

CONCLUSION

WLF respectfully urges the Services to revise their proposed rules in the manner outlined above.

Sincerely,

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