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Public Comment Processing
Attn: Docket Nos.
FWS-HQ-ES-2018-0006
FWS-HQ-ES-2018-0007
FWS-HQ-ES-2018-0009

U.S. Fish and Wildlife Service
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National Marine Fisheries Service, Office of Protected Resources
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Re: Comments of the American Exploration and Production Council and the Western Energy Alliance on Proposed Changes to Endangered Species Act Regulations. FWS-HQ-ES-2018-0006, FWS-HQ-ES-2018-0007, and FWS-HQ-ES-2018-0009.

Dear Sir/Madam

This letter provides comments from the American Exploration and Production Council ("AXPC") and the Western Energy Alliance ("the Alliance") (collectively, "the Associations") on the U.S. Fish and Wildlife Service's ("FWS's") proposed Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants,[1] and FWS' and the National Marine Fisheries Service's ("NMFS's") (collectively, "the Services'") jointly proposed Revision of the Regulations for Interagency Consultation[2] and Revision of the Regulations for Listing Species and Designating Critical Habitat.[3] For consistency and ease of review, the Associations are providing comment on all three proposals in a single letter, but will separately file this comment letter in the respective dockets for each proposal.

[1] 83 Fed. Reg. 35,174 (July 25, 2018)/ FWS-HQ-ES-2018-0007
[2] 83 Fed. Reg. 35,178 (July 25, 2018)/ FWS-HQ-ES-2018-0009
[3] 83 Fed. Reg. 35,193 (July 25, 2018)/ FWS-HQ-ES-2018-0006

The Associations share the Services' interest in clarifying and improving regulations promulgated pursuant to the Endangered Species Act ("ESA" or "the Act") and are broadly supportive of the changes proposed in these three actions. We are submitting these comments to memorialize that support, to provide real world examples to demonstrate the importance of and justification for making these proposed changes, to identify additional statutory and legal support for the proposed changes, and to identify areas for further improvement of the Act and its implementing regulations. The Associations are grateful for the Services' effort and this opportunity to provide feedback.

I. SUMMARY OF COMMENTS

As we more fully explain the detailed comments that follow, the Associations welcome the Services' efforts to update their regulations implementing the ESA and broadly support the changes proposed in these three actions. In addition to describing the basis for our support for the Services' various proposed changes, the Associations provided some recommendations for further regulatory reform. For ease of review, we are providing a list of these additional recommendations below.

- Proposed Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants:
    - These proposed changes are necessary to harmonize FWS's approach with that of the NMFS, and can help improve conservation by requiring FWS to identify and implement prohibitions that more-precisely target harmful actions and which are tailored to complement State, local, and voluntary conservation efforts.
    - The proposed revision is, at a minimum, within FWS's discretion, and arguably a mandatory construction of the ESA.
    - The Associations request that FWS apply this revision, not just to species newly listed as threatened, but to currently listed species during the mandatory five-year status review that FWS must conduct for each listed species. FWS can utilize existing status reviews as opportunities to: (1) remove the blanket 4(d) provision on species currently listed as threatened and (2) develop customized protections for species conservation, based on best available scientific and commercial data.
- Proposed Revision of the Regulations for Listing Species and Designating Critical Habitat:
    - Reasonable and responsible revisions to the listing and critical habitat processes can provide the Services a legally defensible means of avoiding speculative or overly precautionary listings and designations while preserving a pathway though which truly at-risk species and habitats can be protected.
    - The Associations support the Services' proposal to allow references to and discussions of the potential economic impact of a listing decision, and we agree that such references are permissible under the ESA.

- While the Associations strongly support and appreciate the Services' proposed revision, we respectfully suggest that the revision likely does not reflect the full breadth of the Services' authority to consider economic impacts in listing decisions.

- The Associations support the Services' proposal to memorialize the M-Opinion and its clear and statutorily sound interpretation of "foreseeable future" in the Code of Federal Regulations.

- The Services' proposed interpretation of the ESA's standards for delisting reflect this understanding, are reasonable, and are supported by the text of the Act.

- The Associations further support the Services' proposed process for delisting entities that are not recognized taxonomic species, subspecies, or "distinct population segments."

- While the Associations support the Services' proposed process for delisting taxonomic groups that do not meet the ESA's definition of species, we request that the Services also consider adopting some objective standards and criteria for the Services' taxonomic determinations.

- To help maintain the ESA's high standard for listing species, the Associations recommend that the Services memorialize their interpretation that "in danger of extinction" means "currently on the brink of extinction" and that "extinction" be defined (as it is commonly understood) as ceasing to exist.

- The Associations request that the Services examine their DPS Policy to ensure that it is being implemented in an objective and scientifically defensible manner.

- The Associations support the Services' proposal to remove the existing regulatory language stating that it is not prudent to designate critical habitat when "designation of critical habitat would not be beneficial to the species."[4]

- The Associations support the Services' proposed clarification that designation of critical habitat is not prudent when the species is not threatened by habitat destruction, modification, or curtailment; where threats to species' habitat cannot be addressed through the critical habitat designation or the Section 7 consultation that critical habitat can trigger; and where areas within the jurisdiction of the United States do not provide meaningful conservation value to the species.

- The Associations support the Services' effort to restore the statutory distinction between occupied and unoccupied areas.

- The Associations believe, however, that the Services' current proposal does not go far enough in correcting the current impermissible approach to designating critical habitat in areas occupied by species.

[4] 50 C.F.R. §424.12(a)(1).

- The Associations support the Services' proposal to rescind a 2016 rule that radically altered the standard for designating unoccupied areas as critical habitat by illogically interpreting the ESA such that the evidentiary burden for designating unoccupied areas was lower than the burden for designating areas actually occupied by the species.

- The Associations recommend that the Services abandon the incremental-baseline approach that produces unquestionably unrealistic cost estimate impacts for critical habitat designations.

- The Associations urge the Services to revise the 4(b)(2) Policy to provide standards to the 4(b)(2) exclusion process and remove the Policy's claims of limitless discretion to ignore the disproportionality of costs and benefits in deciding whether to exclude areas from critical habitat designations.

- Proposed Revision of the Regulations for Interagency Consultation:

  - The revisions proposed by the Services appropriately recognize the need for greater efficiency, and they responsibly tailor the Services' Section 7 regulations to preserve the consultation process's role in promoting conservation of listed species.

  - The Associations support each of the Services' proposed changes to their interpretation of the phrase "destruction or adverse modification."

  - The Associations agree with the Services that the current regulatory requirements for evaluating the effects of actions have led to substantial confusion and inconsistent outcomes. We also agree with the Services' approach to simplifying these regulations.

  - The Associations support the Services' proposed definition of "Environmental Baseline" and support inclusion of the additional clarification discussed on page 35,184 of the Federal Register preamble.

  - The Associations support the Services' proposed definition of programmatic consultation and view it as consistent with the Services' current interpretation of the phrase.

  - Because Section 7 consultation is intended to inform and guide agency decision-making, the Associations do not believe that consultation serves any beneficial role when effects cannot be reliably predicted or measured at the scale of a listed species' current range, would result at most in an extremely small and insignificant impact on a listed species or critical habitat, or are such that the potential risk of harm to a listed species or critical habitat is remote.

  - As such, the Associations support the Services' proposal to limit Section 7 consultation requirements to those situations where its consultation can actually inform agency decisions and improve conservation outcomes.

- The Associations welcome the Services' recognition that the consultation process needs to be more streamlined and efficient.

- The Associations support the Services' proposed changes to the procedures and data requirements for Biological Opinions, the proposed expedited consultation pathway for actions with minimal impacts, and the reasonable restraints on the types of changes that require reinitiation of consultation.

II. DETAILED COMMENTS

a. The Associations' Interests

AXPC is a national trade association representing 32 of America's largest and most active independent natural gas and crude oil exploration and production companies. AXPC's members are "independent" in that their operations are limited to the exploration for and production of natural gas and crude oil. Moreover, its members operate autonomously, unlike their fully integrated counterparts, which operate in additional segments of the energy business, such as downstream refining and marketing. AXPC's members are leaders in developing and applying the innovative and advanced technologies necessary to explore for and produce crude oil and natural gas, and that allow our nation to add reasonably priced domestic energy reserves in environmentally responsible ways.

The Alliance represents over 300 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. Alliance members are independents, the majority of which are small businesses with an average of fifteen employees.

Member companies ("members") of the Associations own valid and existing federal, state, and private oil and gas leases across the nation, both on and offshore. Their ability to explore for, develop, and transport oil and natural gas resources on these and future leases is directly impacted by the listing of species under the Act, designations of critical habitat, consultation processes under Section 7 of the Act, special rules under Section 4 of the Act, operational restrictions under Section 9 of the Act, and other regulatory actions implementing the Act by the Services.

Members of the Associations also perform myriad measures to protect and conserve both listed and unlisted species and their habitat, including the implementation of voluntary and other measures that go above and beyond those required under state and federal law and regulations. The Associations, on behalf of their members, regularly advocate for prudent and reasonable improvements to the Act and its implementing regulations that would decrease regulatory uncertainty, increase certainty in capital investment in new oil and natural gas exploration and development, enhance the speed and efficiency of the consultation process, and result in a more equitable and reasonable application of the law and its regulations.

b. Proposed Revisions of the Regulations for Prohibitions to Threatened Species

The Associations support the FWS's proposal to revise its regulations under Section 4(d) of the ESA. These proposed changes are necessary to harmonize FWS's approach with that of the NMFS, and can help improve conservation by requiring FWS to identify and implement appropriately-tailored restrictions for species listed as threatened, and complementing State, local, and voluntary conservation efforts. The proposed revision is also consistent with the ESA and within the Service's discretion to adopt.

1. Proposed Revisions are Consistent with Statute

The listing of a species on the ESA triggers a number of specific prohibitions that apply to individuals, businesses, private landowners, and governmental entities.[5] These restrictions prohibit the import, export, interstate trafficking, possession of, or the "take" of endangered species. Originally, "take" was understood to mean some direct application of force, but a 1995 Supreme Court ruling has been read to broadly define the term to include virtually any type of activity that may harm a species – including modifications to habitat.[6] Since the 1995 decision, many land use activities are at risk of resulting in what could be considered prohibited takes unless they are deemed to cause a "minimal or unforeseeable harm."[7]

While court inquiries into the scope and foreseeability of harms are fact-specific, many courts have supported broad interpretations of "take." A person does not need to fire a rifle or set a snare to violate the ESA. In some cases, cutting a tree, clearing brush, driving a car, or even making noise are prosecuted (rightly or wrongly) as a prohibited "take" under the ESA. Violations of the ESA's "take" prohibitions are punishable through civil and criminal penalties and can be enforced by the listing agencies as well as through citizen suits. [8]

Given the stringency of these prohibitions, Congress directed that they be automatically[9] imposed for endangered species, which are defined as those presently in danger of extinction throughout all or a significant portion of their range.[10] For threatened species, which are not presently in danger of extinction but are likely to become so within the foreseeable future,[11] Congress granted the Services the discretion to impose or not impose the full suite of protections that the ESA mandates for endangered species.[12] The Services were instead directed to promulgate regulations that were "necessary and advisable" in order to conserve threatened species.[13] NMFS exercised its discretion to extend Section 9 prohibitions on an individual basis to threatened species.[14] As such,

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[5] 16 U.S.C. § 1538.
[6] *Sweet Home Chapter of Communities for a Greater Or. v. Babbitt*, 515 U.S. 687 (1995).
[7] *Id.*
[8] 16 U.S.C. § 1538.
[9] The ESA provides additional exemptions to the automatic application of "take" restrictions, including for plants and pursuant to issuance of Incidental Take Permits under Section 10.
[10] 16 U.S.C. § 1532(6).
[11] *Id.* § 1532(20).
[12] 16 U.S.C. § 1533(d).
[13] 16 U.S.C. § 1533(d).
[14] 50 C.F.R. pt. 223.

for threatened species under NMFS jurisdiction, Section 9 prohibitions do not apply until NMFS promulgates a rule to impose those prohibitions.[15]

FWS, on the other hand, has since 1978 automatically imposed all the Section 9 prohibitions on threatened species without any species-specific consideration unless it promulgates a special "4(d) Rule" to exclude certain activities from Section 9's broad prohibitions.[16] Courts have found this blanket application of prohibitions to threatened species to be within FWS's discretion[17], and would therefore likely find a subsequent decision to apply these prohibitions on a species-specific basis is also within FWS's discretion. This is particularly true, where, as here, the decision is the product of several decades of agency expertise and a clear and transparent interest in improving the FWS's approach to conserving threatened species.

Indeed, the ESA's requirement that the Services promulgate regulations that are "necessary and advisable"[18] to conserve threatened species arguably compels FWS to adopt a species-specific approach to imposing protections on threatened species. While we acknowledge that various appellate courts have previously upheld FWS's blanket application of prohibitions to threatened species, recent U.S. Supreme Court case law has admonished that "[f]ederal administrative agencies are required to engage in 'reasoned decisionmaking.'"[19] "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational."[20] "It follows that agency action is lawful only if it rests 'on a consideration of the relevant factors.'"[21]

While there can be reasonable dispute about precise "relevant factors" requiring FWS's consideration in this context, there should be little dispute that it is unreasonable to altogether avoid consideration of relevant factors. But that is precisely what FWS does when it imposes blanket prohibitions on threatened species without any examination of the propriety or necessity of those prohibitions on the species at issue. As acknowledged by FWS in the proposed revision and in the discussion below, there is strong evidence to suggest that precisely tailored protections will be more effective at conserving threatened species than the automatic blanket application of all Section 9 prohibitions, regardless of species. Even if it were not the case, however, Supreme Court case law suggests that the ESA's requirement that FWS promulgate threatened species regulations that are "necessary and advisable" requires FWS to make reasoned decisions for individual threatened species.

More specifically, in *Michigan v. EPA*, the Supreme Court evaluated whether the U.S. Environmental Protection Agency ("EPA" or "the Agency") had properly promulgated an air regulation. In particular, the Court considered whether the Clean Air Act's requirement that the

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[15] 50 C.F.R. pt. 223.
[16] 50 C.F.R. § 17.31(a).
[17] *See Sweet Home Chapter of Communities for a Great Or. V. Babbitt*, 1 F.3d 1, 7 (D.C. Cir. 1993)*' See also In re Polar Bear Endangered Species Act Listing*, 818 F. Supp. 2d. 214 (D.C. Cir. 2011).
[18] 16 U.S.C. § 1533(d).
[19] *Michigan v. EPA*, 135 S. Ct. 2699, quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U. S. 359, 374 (1998) (internal quotation marks omitted).
[20] *Ibid.*
[21] *Michigan v. EPA*, 135 S. Ct. 2699, quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983).

Agency promulgate rules that were "appropriate and necessary" to control power plant emissions mandated consideration of cost. A majority of the Supreme Court concluded that the phrase "appropriate and necessary" did amount to a congressional mandate to consider cost. More importantly, however, the Court found that this congressional mandate was not exclusively embodied in the phrase "appropriate and necessary:"

> Agencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions. It also reflects the reality that 'too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems.'[22]

The Supreme Court in *Michigan v. EPA* further held that:

> One would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits. In addition, 'cost' includes more than the expense of complying with regulations; any disadvantage could be termed a cost. EPA's interpretation precludes the Agency from considering any type of cost— including, for instance, harms that regulation might do to human health or the environment. The Government concedes that if the Agency were to find that emissions from power plants do damage to human health, but that the technologies needed to eliminate these emissions do even more damage to human health, it would still deem regulation appropriate. . . . No regulation is 'appropriate' if it does significantly more harm than good.[23]

Moreover, while the dissent in *Michigan v. EPA* disagreed with the majority on the precise point in the rulemaking process that EPA was required to evaluate costs under the CAA, the dissenting justices agreed with the majority that agencies must consider costs in all instances unless expressly prohibited:

> Cost is almost always a relevant—and usually, a highly important—factor in regulation. Unless Congress provides otherwise, an agency acts unreasonably in establishing a standard-setting process that ignores economic considerations. At a minimum, that is because such a process would threaten to impose massive costs far in excess of any benefit. And accounting for costs is particularly important in an age of limited resources available to deal with grave environmental problems . . .[24]

While the phrase "appropriate and necessary" was at issue in *Michigan v. EPA*, both the majority and the minority clearly indicated that EPA's obligation to consider costs in rulemaking was

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[22] *Michigan v. EPA*, quoting *Entergy Corp. v. Riverkeeper, Inc.*, 556 U. S. 208, 233 (2009) (BREYER, J., concurring in part and dissenting in part).
[23] *Michigan v. EPA* at 7.
[24] *Michigan v. EPA* at 6-7.

inherent in the Agency's obligation to engage in "reasoned decision-making," and not a function of that precise phrase. Indeed, the ESA's phrase "necessary and advisable" is closely akin to the phrase "appropriate and necessary" as they both reflect "the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors."[25] As Judge Kavanaugh noted in dissent in the United States Court of Appeals decision on the rule that was appealed to the Supreme Court in *Michigan v. EPA*, where the "only statutory discretion is to decide whether it is 'appropriate' to go forward with the regulation ... common sense and sound government practice" warrant consideration of both costs and benefits.[26]

Regardless of whether *Michigan v. EPA* can be interpreted to require FWS to consider actual monetary costs against benefits under the "necessary and advisable" standard, as opposed to broadly considering the pros and cons of imposing Section 9 prohibitions to threatened species, it is difficult to suggest that the ESA's "necessary and advisable" standard and case law interpreting similar standards would allow FWS to refrain from any species-specific consideration of necessary protections. The Associations therefore support the proposed revision as, at a minimum, within FWS's discretion, and arguably a mandatory construction of the ESA.

While the Associations support this proposed revision, we do not believe that FWS should limit its application to new listings. Section 4(c)(2) of ESA requires the FWS to review the status of each listed species at least once every five years to ensure appropriate levels of protection under ESA. Through this process, FWS determines whether the species listed status should remain the same, be removed (delisted) or reclassified (uplisted or downlisted). The Associations request that FWS utilize this existing status review to: (1) remove the blanket 4(d) provision on species currently listed as threatened and (2) develop customized protections for species conservation, based on best available scientific and commercial data. This method would not trigger a separate rulemaking, unless FWS recommended a change to the listing status of the species.

1. Proposed Revisions are Necessary

Regardless of whether the proposed species-specific approach to imposing Section 9 protections is compelled, it is an important step toward improving conservation decisions, incentivizing voluntary conservation, and furthering the ESA's approach to cooperative federalism. Indeed, while the Section 9 prohibition on "take" is one of the conservation mechanisms with which the ESA is most frequently identified, it is neither the ESA's sole conservation tool, nor its most effective tool.

The ESA was created to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate" to achieve those goals.[27] Congress defined the terms "conserve," "conserving," and "conservation" to mean "to use and the use of *all methods and procedures* which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to

[25] *Michigan v. EPA* at 6, citing 748 F. 3d, at 1266 (opinion of Kavanaugh, J.).
[26] *White Stallion Energy Ctr, LLC v. Envtl. Prot. Agency*, No. 12-1100 (D.C. Cir. 2014) (Kavanaugh, J. dissenting).
[27] 16 U.S.C. § 1531(b).

this Act are no longer necessary."[28] FWS's authority to impose Section 9 prohibitions therefore represents a tool in furtherance of this mandate—not the mandate itself.

In drafting the ESA, Congress understood that the Services would need to meet their conservation mandate through actions outside of its Section 9 authority, like:

> [E]ncouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.[29]

Adopting a species-specific approach to Section 9 prohibitions would certainly help encourage States and other stakeholders to participate in conservation. Tailored prohibitions, and the increased likelihood of more tailored prohibitions, allow States the opportunity to undertake conservation measures with less risk that FWS will impose redundant or contradictory prohibitions. Tailored prohibitions also provide other landowners and land use industries the incentive to undertake conservation measures in exchange for FWS's imposition of a narrower suite of Section 9 prohibitions for threatened species. FWS recognized this in the proposed revisions and has also recognized this fact in numerous instances where the Service promulgated special 4(d) rules to allow voluntary or state-led conservation programs to flourish.

The 4(d) rule for the Northern long-eared bat ("NLEB") provides a great example of how FWS's use of tailored protections helped to promote state and voluntary conservation efforts. The overwhelming threat to the NLEB is white-nose syndrome, which is a naturally occurring fungus that has led to significant mortality among cave-dwelling bats. While the oil and natural gas industry was not the cause of white-nose syndrome, it partnered with states and other industries to provide a solution. In particular, many of the Associations' members voluntarily accepted development restrictions in important hibernation areas, conducted surveys in other potentially important areas, and agreed to seasonal and operational restrictions.[30] They have also partnered with hundreds of federal, state and tribal agencies, international governments, non-profit organizations, and academic institutions to address white-nose syndrome through research, disease monitoring and management, conservation, and outreach.[31] As a result of these efforts, in the United States alone, more than $45 million in public and private funding has been committed to protecting the NLEB and addressing white-nose syndrome.[32] FWS could never have leveraged this level of funding and commitment through heavy-handed and inflexible protections. The Associations' members were glad to participate in voluntary conservation programs such as these, and strongly believe that such cooperative approaches advance the ESA's conservation mandate far more than the formulaic imposition of Section 9 prohibitions.

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[28] *Id*. § 1533(3) (emphasis added).
[29] *Id*. § 1531(a)(5).
[30] 81 Fed. Reg. 1900 (Jan. 14, 2016).
[31] See https://www.fws.gov/midwest/news/816.html.
[32] See https://www.fws.gov/midwest/news/816.html.

This is particularly true for habitat-based threats on private land. Many consider habitat fragmentation and loss to be the primary threats to endangered and threatened species,[33] and nearly 75% of listed species rely on habitat that is located, in whole or in part, on private land.[34] Meeting the ESA's conservation mandate therefore requires FWS to succeed in protecting species and habitat on private land. Take prohibitions on private land, however, are difficult to enforce and only successful if landowners perceive a credible threat of enforcement.[35] "Whatever successes the ESA has had in other contexts . . . the regulatory model has failed on private land. As *Science* reported in 2005, 'it's become clear over three decades that its regulatory hammer isn't enough.'"[36]

Voluntary conservation succeeds where Section 9 prohibitions fail because it can leverage the funding and resources that FWS cannot provide and because it incentivizes landowners to protect and improve habitat on private land. Species-specific tailoring of Section 9 prohibitions therefore engages landowners in a way blanket prohibitions cannot. Tailored protections help foster the development of conservation plans that encourage habitat improvements and provide landowners assurance against potentially more heavy-handed restrictions in the future. Because landowners are provided assurances against more prohibitive restrictions, they are more willing to provide the access, insight, and superior data that make conservation plans more effective.

Species-specific tailoring of Section 9 prohibitions also improves conservation of threatened species by requiring FWS to meaningfully evaluate the specific threats to the species, and therefore the specific prohibitions and management actions necessary to mitigate those threats. A 2011 study examined different types of resource allocations that can help meet the ESA's conservation mandate and identified a relationship between conservation benefits and recovery planning/implementation of recovery plans.[37] This relationship between recovery planning and conservation was based in large part on the ESA Section 4(f) requirement that recovery plans describe any site-specific management actions necessary to conserve the species.[38]

Notwithstanding the clear benefits of recovery planning, of the 2,344 listed species, fewer than half (1,164) are covered by FWS's 604 recovery plans.[39] It will take significant time and resources for FWS to plan for the recovery of the species it has listed. FWS need not delay, however, in analyzing the specific measures necessary to protect threatened species. It can and should undertake that analysis through species-specific tailoring of Section 9 prohibitions. The Associations therefore support FWS's proposed revision of its 4(d) regulations to abandon the "blanket prohibition" approach to threatened species that limited this important consideration.

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[33] *See* Adler, *supra* note 28; David S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United States*, 48 BIOSCIENCE 607, 609 (1998).
[34] Adler, *supra* note 28.
[35] *See* Ferraro, *supra* note 33, at 256.
[36] *See* Adler, *supra* note 28 (citing Erik Stokstad, *What's Wrong with the Endangered Species Act*, 30 SCIENCE 2150, 2152 (2005)).
[37] Madeleine C. Bottrill et al., *Does Recovery Planning Improve the Status of Threatened Species?*, 144 BIOLOGICAL CONSERVATION 1595 (2011).
[38] 16 U.S.C. § 1533(f)(1)(B).
[39] Summary of Listed Species Listed Populations and Recovery Plans, U.S. FISH & WILDLIFE SERVICE http://ecos.fws.gov/tess_public/reports/box-score-report

c. Proposed Revisions of the Regulations for Listing Species and Designating Critical Habitat

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

For the Associations' members, this overreaching approach to listing species and designating critical habitat results in reduced access, increased costs, unwarranted or unjustified permit requirements, delays, and a multitude of operational constraints that significantly impact their ability to responsibly explore for, develop and transport oil and natural gas resources. Indeed, these constraints are the precise reason a handful of interest groups have so aggressively used the ESA to petition for the listing of species that may not warrant listing and sue the Services when they fail to meet statutory timelines for listing decisions. To be clear, these groups use the ESA not for conservation, but as a highly effective tool to advance anti-development or anti-hydrocarbon policies, lock up or limit areas from development, and limit, delay, or fully preclude oil and gas activities.[40]

For these groups, exponentially expanding the number of listed species and acres of land designated as critical habitat is a means to control industry, increase industry's operational costs, slow development, shut down operations on both public and private land, and, more generally, to stop the development and use of resources like fossil fuels. The oil and natural gas industry, however, is not the sole target of this misuse of the ESA's conservation tools. Consider, for example, the northern spotted owl. After the northern spotted owl was listed as threatened under the ESA in 1990, more than 30 timber sales were immediately halted, over 24 million acres of federal land (85% of the available timber area) were administratively withdrawn from active management resulting in the closure of over 400 lumber mills, and the loss of over 35,000 jobs in Oregon, Washington, Idaho, Montana, and California.[41]

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

> The Northern Spotted Owl is the wildlife species of choice for old-growth protection, and I've often thought that thank goodness the spotted owl evolved in

[40] See Jonathan Adler in *Rebuilding the Ark: New Perspectives on Endangered Species Act Reform*: "Both environmentalist groups and development interests wage legal wars over the listing and delisting of species as a proxy for fights over policy and regulatory development."

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

> the Northwest, for if it hadn't, we'd have to genetically engineer it. It's the perfect species to use as a surrogate.[42]

In light of this acknowledged misuse of the ESA and the realistic assumption that the Services will never enjoy limitless resources, reasonable efforts to reign in the listing process can actually further the ESA's conservation goals. So too with the designation of critical habitat, the procedures and elements for which were substantially changed in rules promulgated in 2015 and 2016. As discussed further below, these rules effectively stripped away the ESA's standards for designating critical habitat and left the Services with a rudderless process under which they could designate expansive areas for conservation benefits that are either minute or speculative.

Reasonable and responsible revisions to the listing and critical habitat processes can provide the Services a legally defensible means of avoiding speculative or overly precautionary listings and designations while preserving a pathway though which truly at-risk species and habitats can be protected. It is though this prioritization that the Services will once again be able to prioritize their conservation efforts, incentivize state and private partners, and focus the ESA's powerful conservation tools on protecting those species and habitats that face genuine risks.

The Associations therefore support these the proposed revisions and offer a few additional recommendations for improving the means by which the Services list species and designate critical habitat.

1. Proposed Changes to Listing Regulations

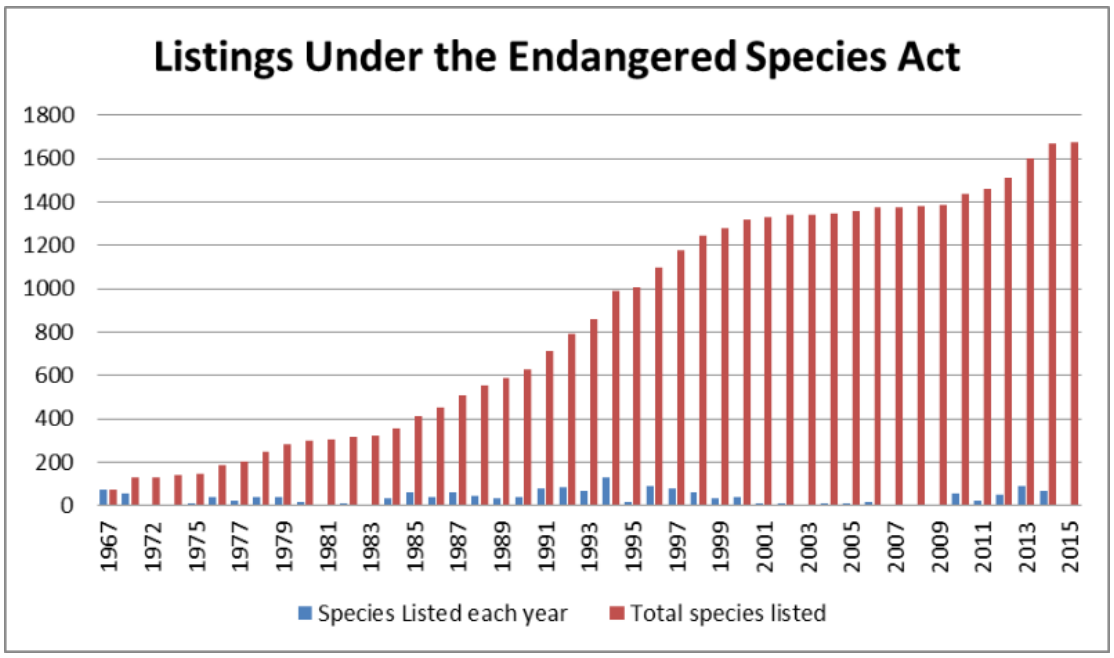
The number of listed species has grown to a level that Congress could scarcely have imagined when it drafted and amended the ESA from 72 in 1967[43] to the present level of 2,344.[44] In recent years, the Services listed an average of 41.38 species each year, with a high of 89 species in one year.[45]

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

[43] *U.S. Federal Endangered and Threatened Species by Calendar Year*, U.S. FISH & WILDLIFE SERVICE, http://ecos.fws.gov/tess_public/reports/species-listings-count-by-year-report

[44] *Summary of Listed Species*, *supra* note 25.

[45] *U.S. Federal Endangered and Threatened Species by Calendar Year*, *supra* note 47.



As referenced above, much of the precipitous increase in ESA listings is attributable to a handful of groups using the ESA, and litigation pursuant to the ESA, to achieve policy objections entirely distinct from conservation. These organizations exploit the ESA's citizen suit provisions to compel FWS to list as many species as possible regardless of conservation benefit—in fact, at the price of fulfilling its conservation mandate. According to a law review article published by an Attorney-Advisor at the DOI directly involved with the issue:

> The [Service's] program to list species under the [ESA] has been mired in litigation and controversy for decades. Much of that litigation has addressed not substantive decisions, but FWS's inability to comply with the ESA's deadlines for taking action. With limited resources, effectively unlimited workload, and strict statutory deadlines, each management or litigation strategy that FWS has used to try to address this conundrum ultimately failed. As a result, court orders and settlement agreements swamped the listing program and FWS lost any ability to prioritize its efforts and get the most bang for the buck in protecting imperiled species. This race-to-the-courthouse environment decreased the program's efficiency and further limited the number of species actually listed and protected by the ESA.[46]

The means by which these groups compelled this shift from a conservation-driven agenda to a listing-volume agenda are numerous and beyond the scope of these comments. The result of this shift, however, is relevant and alarming.

In a settlement executed with the FWS's primary litigants (the "2011 Settlement"), FWS agreed to undertake hundreds of listing actions and refrain from finding, as the ESA allows, that listing

[46] Benjamin Jesup, *Endless War or End This War? The History of Deadline Litigation Under Section 4 of the Endangered Species Act and the Multidistrict Litigation Settlements*; Vermont Journal of Environmental Law (Vol. 14, Dec. 2013).

some species was precluded by higher priority species.[47] Not only did the 2011 Settlement prohibit FWS from triaging at-risk species, it removed this resource-based prioritization authority at a time when resources were most scarce.[48] According to FWS, the 2011 Settlement limited "the extent to which [the Service] can undertake additional actions within the Listing Program through FY2017, beyond what is required by the [2011 Settlement]."[49] This petitioning and litigation continues to dominate FWS conservation expenditures. The Center for Biological Diversity ("CBD") filed in August of 2016 a Notice of Intent to sue the FWS over their alleged failure to make 12-month findings for 417 species. Using the FWS's estimate that it costs approximately $100,690 to prepare a 12-month finding, meeting the litigants' demands will cost nearly $42 million.

Prior to the 2011 Settlement, FWS reported spending "virtually all" listing appropriations on litigation and administrative costs.[50] ESA litigation constitutes DOI's largest legal expense, accounting for over $22 million in fees and, often, payment of their opponents' fees.[51] Any effort that improves the manner in which the Services approach new listings in therefore necessary and welcome.

i. Consideration of Economic Impacts

The Associations support the Services' proposal to allow references to and discussions of the potential economic impact of a listing decision, and we agree that such references are permissible under the ESA. We also acknowledge the Services' view that, although they are permitted to reference economic impacts, the Services may not base listing decisions solely on presumed economic impacts. While the Associations agree that the ESA does not allow the Services to refrain from listing a species based on a cost-benefit analysis, we do not agree that the ESA requires the Services to ignore all economic data when making listing decisions.

The ESA requires the Services to make listing decisions "solely on the basis of the best scientific and commercial data available . . ."[52] We agree that this phrase indicates a congressional preference for decisions based on biological data, but also believe that the reference to "commercial data" preserves for the Services some flexibility to consider economic data in making listing decisions. Consideration of economic data in listing decisions does not mean that the

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[47] *In re Endangered Species Act Section 4 Deadline Litigation*, No. 10-377 [EGS], MDL Docket No. 2165 (D.D.C. May 10, 2011).

[48] The 2011 Settlement prohibited FWS from utilizing its foremost tool for incentivizing partnership and leveraging non-Agency resources—the Candidate Species list. Candidate species are those which may meet the definition of threatened or endangered status, but for which development of listing is precluded by other higher-priority actions. *See* U.S. FISH & WILDLIFE SERVICE, CANDIDATE SPECIES: SECTION 4 OF THE ENDANGERED SPECIES ACT (Dec. 2014), *available at* http://www.fws.gov/endangered/esa-library/pdf/candidate_species.pdf. The candidate species list has been an incubator of conservation collaboration. Public and private stakeholders in the range of candidate species were made aware of emerging threats and FWS used the prospect of listing and take restrictions to facilitate recovery programs.

[49] 80 Fed. Reg. 80,584, 80,590 (Dec. 24, 2015).

[50] *See* 69 Fed. Reg. 77,167, 77,172 (Dec. 27, 2004).

[51] *See* ENDANGERED SPECIES ACT CONGRESSIONAL WORKING GROUP, REPORT, FINDINGS AND RECOMMENDATIONS 29 (Feb. 4, 2014), *available at* http://valadao.house.gov/UploadedFiles/ESAWorkingGroupReportandrecommendations.pdf.

[52] 16 U.S.C. § 1533(b).

Services would be required to weigh the interests of a species against the interests of the regulated community. On the contrary, economic data can be considered in listing decisions as a means of improving the conservation of petitioned and listed species. Given the Services' inherent resource constraints and the large number of listed species, it would not be unreasonable for the Services to consider the impact on their conservation budget of the cost of listing a new species, the threats to which are remote or speculative. Similarly, given the ESA's requirement that the Services consider State and private conservation efforts, it would not be unreasonable for the Services to evaluate whether refraining from listing a species would allow the Services to leverage more conservation resources from other parties.

As noted above, "[f]ederal administrative agencies are required to engage in 'reasoned decisionmaking.'"[53] "It follows that agency action is lawful only if it rests 'on a consideration of the relevant factors.'"[54] The Services know that listing decisions have economic impacts and that those economic impacts can have consequences for listed species. Therefore, economic considerations are "relevant factors" that should be considered in listing decisions – particularly so given the ESA's allowance for consideration of "commercial data." While the Associations strongly support and appreciate the Service's proposed revision, we respectfully suggest that the revision likely does not reflect the full breadth of the Services' authority to consider economic impacts in listing decisions, and ask the Services to consider further changes to recognize this consideration in this or future rulemakings.

ii. Foreseeable Future

The Associations support the Services' decision to memorialize the 2009 opinion from the Department of the Interior's Office of the Solicitor ("M-Opinion"),[55] which has, for nearly a decade, provided a clear and legally defensible interpretation of the phrase "foreseeable future." The opinion faithfully interprets the text of the ESA and case law interpreting the same, and it is therefore well within the Service's discretion to memorialize the M-Opinion within the Code of Federal Regulations.

Substantively, the Associations support the interpretation embedded in the M-Opinion because it accurately conveys the ESA's limitation on the Service's ability to list species as threatened. More specifically, the ESA defines an "endangered" species as one presently in danger of extinction throughout all or a significant portion of its range.[56] A "threatened" species is one that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.[57]

[53] *Michigan v. EPA*, 135 S. Ct. 2699, quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U. S. 359, 374 (1998) (internal quotation marks omitted).
[54] *Michigan v. EPA*, 135 S. Ct. 2699, quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U. S. 29, 43 (1983).
[55] M-37021 (Jan. 16, 2009).
[56] 16 U.S.C. § 1532(6).
[57] 16 U.S.C. § 1532(20).

The Services have interpreted the phrase "in danger of extinction" as "currently on the brink of extinction."[58] Accordingly, a "threatened species" is one which is likely to face the brink of extinction within the foreseeable future throughout all or a significant portion of its range. Importantly, this means that the ESA prohibits the Services from listing a species as threatened absent some demonstration that future extinction throughout all or a significant portion of its range is both *likely and foreseeable*.

When evaluating the likelihood and foreseeability of extinction, the Services must utilize "the best scientific and commercial data available."[59] While this standard allows consideration of uncertain information, it does not supplant the ESA's definitional prohibition on listing as threatened any species for which extinction is not likely or foreseeable. Courts have universally held that the decision to list a species may not be based on speculation or an intent to err on the side of conservation:

> Under Section 4, the default position for all species is that they are not protected under the ESA. A species receives the protections of the ESA only when it is added to the list of threatened species after an affirmative determination that it is "likely to become endangered within the foreseeable future." Although an agency must still use the best available science to make that determination, *Conner* [*v. Burford,* 848 F.2d 1441 (9th Cir. 1988)] cannot be read to require an agency to "give the benefit of the doubt to the species" under Section 4 if the data is uncertain or inconclusive. Such a reading would require listing a species as threatened if there is any possibility of it becoming endangered in the foreseeable future. This would result in all or nearly all species being listed as threatened.[60]

With this context in hand, the importance of the M-Opinion's interpretation of "foreseeable future" is plainly apparent. By defining the phrase "foreseeable future," the M-Opinion draws the line between more reliable threat projections that require the Services to list species as threatened and the more speculative threat projections that do not allow the Services to list species as threatened. As noted in the M-Opinion, the foreseeable future extends only so far as the Services "can explain reliance on the data to formulate a reliable prediction."[61]

> What must be avoided is reliance on assumption, speculation, or preconception. Thus, for a particular species, the Secretary may conclude, based on the extent or nature of data currently available, that a trend has only a degree or period of

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[58] *In re Polar Bear Endangered Species Act Listing & 4(d) Litig*, 794 F. Supp. 2d 65, 89 (D.D.C. 2011), aff'd sub. nom. *In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig*. – MDL No. 1993, 709 F.3d 1 (D.C. Cir. 2013).

[59] 16 U.S.C. § 1533(b)(1)(A).

[60] *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 947 (D. Or. 2007); *see also Center for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 955 (N.D. Cal. 2010) (finding the "benefit of the doubt" concept does not apply in the listing context); *Oregon Natural Resources Council v. Daley,* 6 F. Supp. 2d 1139, 1152 (D. Or. 1998) (ESA requires a determination as to the likelihood—rather than the mere prospect—that a species will or will not become endangered in the foreseeable future); *Federation of Fly Fishers v. Daley*, 131 F. Supp. 2d 1158, 1165 (N.D. Cal. 2000) ("The ESA cannot be administered on the basis of speculation or surmise.").

[61] M-Opinion at 8.

> reliability, and to extrapolate that trend beyond that point would constitute speculation.[62]

For instance, the Service can, and should, credibly question the reliability of certain climate change projections that purport to predict precise habitat-scale climatological changes and changes in precipitation on time horizons beyond what climate model builders or even the Intergovernmental Panel on Climate Change ("IPCC") suggest can be reliably predicted. This is not to say that the Services can never consider potential future climate change impacts on species or habitat. This does mean, however, that the Services must refrain from listing species as threatened by pushing the climate models on which they rely, both spatially and temporally, well beyond the limits of their reliability, and that the Services must not ignore the significant uncertainty inherent in modeling specific climatological changes on incredibly small geographic scales or preposterously long time horizons.

For example, in 2012, NMFS listed two distinct population segments of the Pacific bearded seal as threatened based on 100-year climate projections about sea ice levels and the species' presumed response to projected declines in sea ice.[63] NMFS did so notwithstanding the fact that the global population of nearly 1 million seals has persisted for over 11 million years, through enormous swings in the earth's climate, including ice-free conditions.[64] More importantly, NMFS determined that the bearded seal's extinction was foreseeable even after its scientific experts conceded that they could not reliably predict how the species would adopt to modeled climate changes as far out as 2095, and further disclaimed that they had no evidence of adverse responses to present day changes to sea ice conditions. While the Ninth Circuit determined that NMFS's listing determination was entitled to deference, the court did not consider the broader issue of the Service's incremental erosion of the common notion of "foreseeability."

Indeed, evaluating the foreseeable future requires analysis of not only "the foreseeability of threats, but also … the foreseeability of the impact of the threats on the species."[65] The M-Opinion explained that "in each case the Secretary must be able to make reliable predictions about the future. The further into the future that is being considered, the greater the burden to explain how the future remains foreseeable for the period being assessed." [66] This means that, in order for threats to be foreseeable, the Services must not only be able to reliably predict complex climatological changes specifically the species' habitat, they must be able to reliably predict the species' response to those changes. Listing as a species as threatened would therefore require reliable information about future habitat changes, reliable analysis that the species will not be able to adapt or overcome that change, and a reliable basis to conclude that the species' inability to adapt to the changed conditions will be severe enough to push the species to the brink of extinction.

This is a high bar. And, importantly, this high bar is precisely what Congress intended. Absent a demonstration that future extinction throughout all or a significant portion of a species' range is both likely and foreseeable, the Services are statutorily prohibited from listing the species as

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[62] M-Opinion at 8.
[63] 77 Fed. Reg. 76,739 (Dec. 28, 2012).
[64] *See Alaska Oil and Gas Association* petition for certiorari 17-133 (July 21, 2017).
[65] Solicitor (2009) at p. 10.
[66] Solicitor (2009) at p. 10

"threatened." The Services cannot list a species because it is viewed as important, iconic, or deserving of conservation. Nor can the Services list species based on a finding that they are being harmed, may be harmed in the future, or that certain threats are adversely impacting their abundance.[67] Listing status is measured by the prospect that the species will cease to exist. Assessing the prospect that a species will cease to exist is necessarily imprecise, but the question the ESA requires the Services to answer is unambiguous: Is this species at risk of *extinction* today, or is a risk of *extinction* likely to arise in the foreseeable future? The Associations therefore support the Services' proposal to memorialize the M-Opinion and its clear and statutorily sound interpretation of "foreseeable future" in the CFR.

iii. Delisting Standards

The ESA establishes the factors for listing and delisting a species. Species are to be listed and delisted depending on whether they meet (or fail to meet) the ESA's definitions of endangered or threatened species. That determination is based on the five-factor analysis supported by the best available scientific and commercial information. Milestones identified in recovery plans do not trump the ESA's listing and delisting standards. If a species does not meet the definition of an endangered or threatened species after examination of the five listing factors and best available information, it must be delisted regardless of whether the milestones in recovery plans are met.

This is not to say that recovery plans are unimportant. Recovery plans reveal the Services' understanding of the status of and threats to an individual species and outline what the Services believe is necessary to overcome those threats so that the species can be delisted. These plans, however, cannot and should not be used to change the ESA's definitions of threatened and endangered species by creating a higher bar for determining that a listed species no longer meets the definition of a threatened or endangered species. It should also be noted that FWS does not develop recovery plans for all listed species. In some cases, species have advanced toward recovery or may be considered recovered without the existence of species-specific recovery plans with associated milestones or benchmarks.

The Services' proposed interpretation of the ESA's standards for delisting reflect this understanding, are reasonable, and are supported by the text of the Act. In fact, the U.S. Court of Appeals for the District of Columbia Circuit has already said so.[68] As such, the Associations support the Service's proposal to incorporate this mandatory construction of the ESA into the Services' regulations.

The Associations further support the Services' proposed process for delisting entities that are not recognized taxonomic species, subspecies, or "distinct population segments" ("DPS"). The ESA allows the Services to list a species, which by ESA definition, "includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife

[67] *See Tucson Herpetological Soc. v. Salazar*, 566 F.3d 870, 879 (9th Cir. 2009) (citing *Cook Inlet Beluga Whale v. Daley*, 156 F. Supp. 2d 16, 21–22 (D.D.C. 2001) (holding that the ESA does not require listing "simply because the agency is unable to rule out factors that could contribute to a population decline").

[68] *Friends of the Blackwater v. Salazar*, 691 F.3d 428 (D.C. Cir. 2012) ("We hold the Secretary reasonably interpreted the Endangered Species Act as not requiring that the criteria in a recovery plan be satisfied before a species may be delisted pursuant to the factors in the Act itself.")

which interbreeds when mature."[69] The ESA, however, does not allow the Services to create a species that does not yet exist so that the Services can then list the newly created species as threatened or endangered.

Even though the ESA does not confer the Services authority to create species and subspecies classifications that are typically in the purview of independent scientific organizations, the Services issued regulations seemingly conferring to itself authority to "rely not only on standard taxonomic distinctions, but also on the biological expertise of the agency and the scientific community, to determine if the relevant taxonomic group is a 'species' for purposes of the ESA."[70] Critically, this regulation did not impose any standards for the Services' exercise of their "biological expertise" in unilaterally adopting otherwise unrecognized species and subspecies classifications.

The absence of any standards for this broad exercise of "biological expertise" has led to some unfortunate results. For instance, in responding to a petition to list the Caribbean electric ray (*Narcine bancroftii*), NMFS determined, "based on the information presented in the petition, along with information readily available in our files," that the Caribbean electric ray was a "valid species."[71] The taxonomic information in NMFS's files and in the listing petition consisted of a single unpublished doctoral thesis from 1999 that suggested that *Narcine bancroftii* was a species distinct from the more abundant, widespread, and morphologically identical species, *Narcine brasiliensis*. NMFS's files also contained comments citing to numerous credible sources which identified *N. brasiliensis* and *N. bancroftii* as synonymous names for the same species. Even the author of the unpublished doctoral thesis stated that the only difference between *N. brasiliensis* and *N. bancroftii* is that the term "*N. brasiliensis*" is used when the species is found in the South Atlantic and the term "*N. bancroftii*" is used when the species is found in the Gulf of Mexico, Caribbean, and North Atlantic.[72]

While NMFS ultimately declined to list the Caribbean electric ray as a threatened or endangered species based on the absence of threats, the lack of any regulatory standards for determining if a taxonomic group is a species under the ESA allowed FWS to essentially create a species that, with the exception of a single unpublished doctoral thesis, was not recognized by the scientific community.[73] As such, while the Associations support the Services' proposed process for delisting taxonomic groups that do not meet the ESA's definition of species, we request that the Services also consider adopting some objective standards and criteria for the Services' taxonomic determinations.

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[69] 16 U.S.C. § 1532(16).

[70] 50 C.F.R. § 424.11.

[71] 81 Fed. Reg. 47,775 (July 22, 2016).

[72] McEachran, J.D., and M.R. do Carvalho. 2002. Batoid Fishes. Pp. 508-589 in K.E. Carpenter (ed), The Living Marine Resources of the Western Central Atlantic. Vol. 1 FAO Species Identification Guide for Fishery Purposes and American Society of Ichthyologists and Herpetologists, Special Publication No. 5. FAO. Rome.

[73] NMFS has similarly proposed to create – and list as endangered – a new subspecies of Bryde's whales in the Gulf of Mexico. 81 Fed. Reg. 88,639 (Dec. 8, 2016). If NMFS did so, NMFS would be the entity to recognize such a subspecies. The putative subspecies is not recognized by International Commission on Zoological Nomenclature, Integrated Taxonomic Information System, Society of Marine Mammalogy, the International Whaling Commission, or any other scientific body.

iv. Other Needed Changes to Listing Regulations

While the Associations support and appreciate the Services' proposed revisions to their listing regulations, our experience with prior listing decisions compels us to at least identify for the Services other problematic aspects of the listing process.

- Consider Defining Extinction: As noted above, Congress structured the ESA to provide a high standard for listing a species as threatened or endangered. An "endangered" species is statutorily defined as one that is presently in danger of extinction throughout all or a significant portion of its range.[74] A "threatened" species is one that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.[75] When evaluating the status of a species, the Services must consider the following five factors: (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors that affect the species' continued existence.[76] In making these assessments, the Services must use "the best scientific and commercial data available" after conducting a review of the status of the species and taking into account the efforts being made by any nation or political subdivision of a nation to protect the species, including through predator control, protection of habitat and food supply, or other conservation practices.[77]

Whether a species should be listed on the ESA (or not) is not a question of whether the species is important, iconic, or deserving of conservation. Nor can species be listed based on a finding that they are being harmed, may be harmed in the future, or that certain threats are adversely impacting their abundance. Listing status is supposed to be measured by the prospect that the species will cease to exist.

Notwithstanding the ESA's clear directives, the Services have increasingly listed species, not based on credible analyses that those species are genuinely at risk of extinction, but on a desire to use the listing process to protect species from threats or population declines even if their extinction is not likely or foreseeable. This was the case with FWS's 2016 threatened listings for the Big Sandy Crayfish and Guyandotte River Crayfish.[78] Although the best available information evidenced increased occurrences of the Big Sandy Crayfish in multiple river systems and provided no survey information or evidence of decline for the Guyandotte River Crayfish, FWS concluded that coal mining and oil and natural gas development would degrade river systems to such a degree that it was likely that these species would cease to exist in the foreseeable future.[79] In so concluding, FWS failed to consider existing regulatory mechanisms to reduce runoff from well pads and protect against stream degradation, failed to consider that coal mines operated in the area for decades without observable adverse impact on the species, and largely ignored that mining activity has slowed significantly in recent years.[80] Absent credible evidence of a risk of extinction,

[74] 16 U.S.C. § 1532(6).
[75] *Id.* § 1532(20).
[76] *Id.* § 1533(a)(1).
[77] *Id.* § 1533(b)(1)(A).
[78] 81 Fed. Reg. 20,449 (April 7, 2016).
[79] 81 Fed. Reg. 20,449 (April 7, 2016).
[80] See comments from the West Virginia Oil and Natural Gas Association (June 8, 2015).

many have identified these crayfish listings as an example of the ESA being used for constraint rather than conservation.

Many have similarly identified the Greater Sage Grouse as an example of the misuse of the ESA. While in 2015, FWS ultimately declined to list the Greater Sage-Grouse in 2015, a species with over 500,000 individuals across its range and objectively nowhere near a real risk of extinction, FWS did so only after the Bureau of Land Management vastly expanded surface use restrictions for the species by amending Resource Management Plans across its range.[81] These amendments have greatly impacted multiple-use activities across millions of acres across the Rocky Mountain West and are currently subject to another amendment by the Department of Interior.

While some may consider it admirable to list species that are not reasonably in danger of extinction in order to protect them and/or increase their abundance, it is not permissible under the ESA to do so. Nor is it a valid use of limited resources when the Services are struggling to aid in the recovery of species that are actually at risk of extinction or likely to become so. As such, we recommend that the Services issue a regulation to memorialize their informal interpretation that "in danger of extinction" means "currently on the brink of extinction." Such an interpretation would help the Services hold themselves to the ESA's high listing standards and limit listings to those species at risk of ceasing to exist or likely to be on the brink of ceasing to exist in the foreseeable future.

Maintaining the ESA's high standard for listing species preserves resources for species that are truly in peril and, importantly is not necessarily detrimental to those species that do not meet the ESA's high listing standard. Indeed, the mere act of listing a species is not an effective conservation tool. As of August 28, 2018, a total of 2,344 species were listed under the ESA,[82] and only 76 have been delisted.[83] Of those 76 species, roughly half (47) were delisted based on recovery.[84] In most cases, the recovery was attributed to factors other than listing.[85] For instance, the bald eagle and California condor recovered after the Environmental Protection Agency banned the use of a common insecticide (DDT) that caused eggshell thinning.[86] Even attributing each of 47 recovered species to the ESA, however, those delistings represent a recovery rate of 1.9%.

Researchers attribute the ESA's 1.9% recovery rate to two fundamental impediments: (1) inadequate resources to plan and implement recovery programs; and (2) the impracticality of using "take" prohibitions to control action on private land—and often the disadvantageous responses from landowners fearful of being deprived of the use of their land. According to a 2007 study, listing a species without allocating the species significant funding for recovery can actually be injurious to species on private land.[87] The study hypothesized that the ESA's "take" prohibitions

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[81] See https://www.fws.gov/greatersagegrouse/findings.php.

[82] *Summary of Listed Species Listed Populations and Recovery Plans*, U.S. FISH & WILDLIFE SERVICE (June 1, 2016 11:05 AM), http://ecos.fws.gov/tess_public/reports/box-score-report [hereinafter *Summary of Listed Species*].

[83] *Delisting Report*, U.S. FISH & WILDLIFE SERVICE, https://ecos.fws.gov/tess_public/reports/delisting-report (accessed June 1, 2016).

[84] *Id.* 29 were delisted because of extinction or taxonomic misclassification. *See Delisting Report*, *supra* note 26.

[85] *See* Jonathan Adler, *The Leaky Ark*, AMERICAN ENTERPRISE INSTITUTE (Oct. 5, 2011), https://www.aei.org/publication/the-leaky-ark/.

[86] *See DDT and Other Organochlorine Insecticides*, U.S. FISH & WILDLIFE SERVICE, http://www.fws.gov/contaminants/info/ddt.html (accessed Dec. 18, 2015).

[87] Paul J. Ferraro, Craig McIntosh, & Monica Ospina, *The Effectiveness of the U.S. Endangered Species Act: An Econometric Analysis Using Matching Methods*, 54 J. ENVTL. ECON. & MGMT. 245, 246 (2007).

can only be effective when matched with a credible threat of enforcement—which is very difficult on private land.[88] Listing may also incentivize landowners to make their property less suitable as habitat for listed species.[89] Additionally, several studies found that the designation of critical habitat confers no conservation benefit on listed species.[90] Notably, the Department of the Interior reached the same conclusion.[91]

In the few instances where benefits from listing were identified, they accrued only on public land and only when listing was accompanied by funding for conservation. Yet, even when the Services allocate significant funds pursuant to the listing, "ESA-related spending is more effective in preventing deterioration than in promoting improvement in recovery status."[92] "[I]ncreased funding reduced the probability that FWS will classify a species as extinct or declining," but "evidence does not support the hypothesis that increased spending leads to increases in the probability that a species is stable or improving."[93]

Accordingly, as a modest effort to maintain the ESA's high standard for listing species, the Associations recommend that the Services memorialize their interpretation that "in danger of extinction" means "currently on the brink of extinction" and that "extinction" be defined (as it is commonly understood) as ceasing to exist. These definitional changes are within the Services' discretion to make, consistent with the ESA, will result in more prudent and effective use of limited resources, and necessary to maintain a high listing standard that benefits conservation and the regulated community alike.

- Consider Regulations to Reign in Misuse of "Distinct Population Segments": As noted above, the ESA applies to distinct taxonomic species, "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife that interbreeds when mature."[94] The aspects of this definition that relate to DPS were intensely scrutinized during congressional debate for fear that, through recognition of DPS, the ESA could be manipulated to disaggregate a species to such an extent that even healthy and abundant species could be found to be endangered.

The 1978 addition of the phrase "DPS" was, in fact, designed to constrain language in the ESA of 1973, which extended the reach of the statute to "any other group of fish or wildlife of the same species or smaller taxa in common special arrangement that interbreed when mature." Still, the U.S. General Accounting Office ("GAO") warned that use of a DPS could lead to unnecessary

[88] Ferraro, *supra* note 33, at 256.
[89] *See id.* at 246 (internal citations omitted).
[90] *See, e.g.*, Timothy D. Male & Michael J. Bean, *Measuring Progress in US Endangered Species Conservation*, 8 ECOLOGY LETTERS 986, 988 (2005); J. Alan Clark et al., *Improving U.S. Endangered Species Act Recovery Plans: Key Findings and Recommendations of the SCB Recovery Plan Project*, 16 CONSERVATION BIOLOGY 1510, 1515 (Dec. 2002).
[91] News Release, U.S. Department of the Interior, Endangered Species Act "Broken" – Flood of Litigation Over Critical Habitat Hinders Species Conservation (May 28, 2003), *available at* https://www.doi.gov/sites/doi.gov/files/archive/news/archive/03_News_Releases/030528a.htm ("Designating critical habitat for species already on the endangered species list provides little conservation benefit to species").
[92] Joe Kerkvliet & Christian Langpap, *Learning from Endangered and Threatened Species Recovery Programs: A Case Study Using U.S. Endangered Species Act Recovery Scores*, 63 ECOLOGICAL ECON. 499, 506 (2007).
[93] *Id.* at 508.
[94] 16 U.S.C. § 1532(16).

subdivision that did little more than lead to the listing of segments of healthy and abundant species.[95] In response to such concerns, Congress noted in the Conference Report on the ESA Reauthorization recognition that it "is aware of the great potential for abuse of this authority," and included an admonition that the Services use their DPS authority "sparingly and only when then biological evidence indicates that such action is warranted."[96]

In the ensuing decades, the Services have generally respected the high bar that Congress demanded be used to designate a DPS. In 1991, the Services established a policy outlining criteria for designating Pacific salmon by DPS.[97] Under the policy, DPS status was restricted to "evolutionarily significant units" ("ESU") that are substantially reproductively isolated and which represent an important component of the evolutionary legacy of the species.[98] In 1996, the Services established a new, more encompassing DPS policy that, like the ESU policy and consistent with congressional intent, maintained a high bar to designate a DPS.[99] For a population segment to be considered a DPS under the 1996 policy, the segment must meet two criteria: (1) it must be discrete; and (2) it must be significant.[100] Discreteness requires conspicuous separation from the remainder of the species, but separation alone is not enough to be a DPS.[101] Even if the species is markedly discrete, the Services, at Congress's direction, instruct that the discrete segment be significant in some unique biological manner or that the segment provide some significant role in the species as a whole.[102] "When a species exists across a wide range of ecological settings, . . . the fact that it persists in one particular location . . . says little about whether the population in that location is important to the species as a whole."[103]

The DPS Policy provides a high hurdle – appropriately so. The Services must use their DPS designation authority with care, lest a proliferation of taxonomic units lead to an enormous drain on agency resources with little or no conservation benefit to the species.

Numerous listing actions over the past several years suggest, however, that the DPS Policy is not sufficiently protecting against the type of unfounded taxonomic deconstruction that Congress admonished the Services to avoid. For instance, when deciding whether to list the North American wolverine, FWS determined that the estimated +/- 350 wolverines in the conterminous United States were a DPS that was markedly separate from the 15,000 to 18,000 wolverines directly across the border in western Canada.[104] FWS determined that wolverines in the contiguous United States were discrete—not based on a physical, physiological, ecological, behavioral, morphological, or

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[95] See U.S. General Accounting Office, Endangered Species: A Controversial Issue Needing Resolution (1979).
[96] S. Rep. No. 95-151, at 7 (1979), reprinted in ESA Legislative History, *supra* note 144, at 1397.
[97] 56 Fed. Reg. 58612 (Nov. 20, 1991).
[98] *Id* at 58518.
[99] 61 Fed. Reg. 4722 (Feb. 7, 1996).
[100] *Id* at 4725. If the species is both discrete and significant, it is considered a DPS, but that DPS is not then protected under the ESA unless and until the listing agency determines that the DPS is either threatened or endangered under the ESA.
[101] *Id*.
[102] *Id*.
[103] *Center for Biological Diversity v. Jewell*, No. CV-12-02296-PHX-DGC, 2014 WL 5703029, at *6 (D. Ariz. Nov. 5, 2014).
[104] 75 Fed. Reg. 78,030 (Dec. 14, 2010).

genetic distinction – but because of the international boundary between the United States and Canada.[105]

The Associations therefore request that the Services examine their DPS Policy to ensure that it is being implemented in an objective and scientifically defensible manner. While the DPS Policy allows the Services to consider conservation policy alongside biological data, this allowance should not be expanded to allow DPS designation authority to be used a validation tool for preexisting conclusions. Whether the Services opt to amend the DPS Policy or provide guidelines for restraining its use, the Associations believe that the Services should take steps to fulfill Congress' instruction that DPS authority be used "sparingly and only when then biological evidence indicates that such action is warranted."[106]

2. Proposed Changes to Critical Habitat Regulations

i. Clarifying when Designation is "Not Prudent"

The ESA allows the Services to designate critical habitat only after determining that designation is "prudent and determinable."[107] The ESA, however, does not define the phrase "prudent and determinable." In the absence of a statutory definition, the Services have identified a narrow set of circumstances under which they would decline to designate critical habitat because it would be imprudent.[108] Some courts that have misinterpreted the Services' intended approach have then further narrowed the applicability of this statutory phrase.[109] In order to meaningfully give effect to Congress's decision to limit critical habitat designation authority to situations where designations are prudent, it is therefore necessary to revise the Services' existing interpretation of this term. And the Associations support the Services' proposed approach to doing so.

To begin with, the Associations support the Services' proposal to remove the existing regulatory language stating that it is not prudent to designate critical habitat when "designation of critical habitat would not be beneficial to the species."[110] Although it is reasonable and logical for the Services to refrain from designating critical habitat when designation would not benefit the species, some courts have inverted the standard to suggest that the Services *must* designate critical habitat whenever even a remote, indirect, or speculative benefit can be theorized.[111] Notwithstanding other courts' rejection of this interpretation of the Services' regulations,[112] the Services have, in many instances, also inverted their own standard to suggest that they must designate critical habitat whenever any potential benefit can be theorized. A particularly striking

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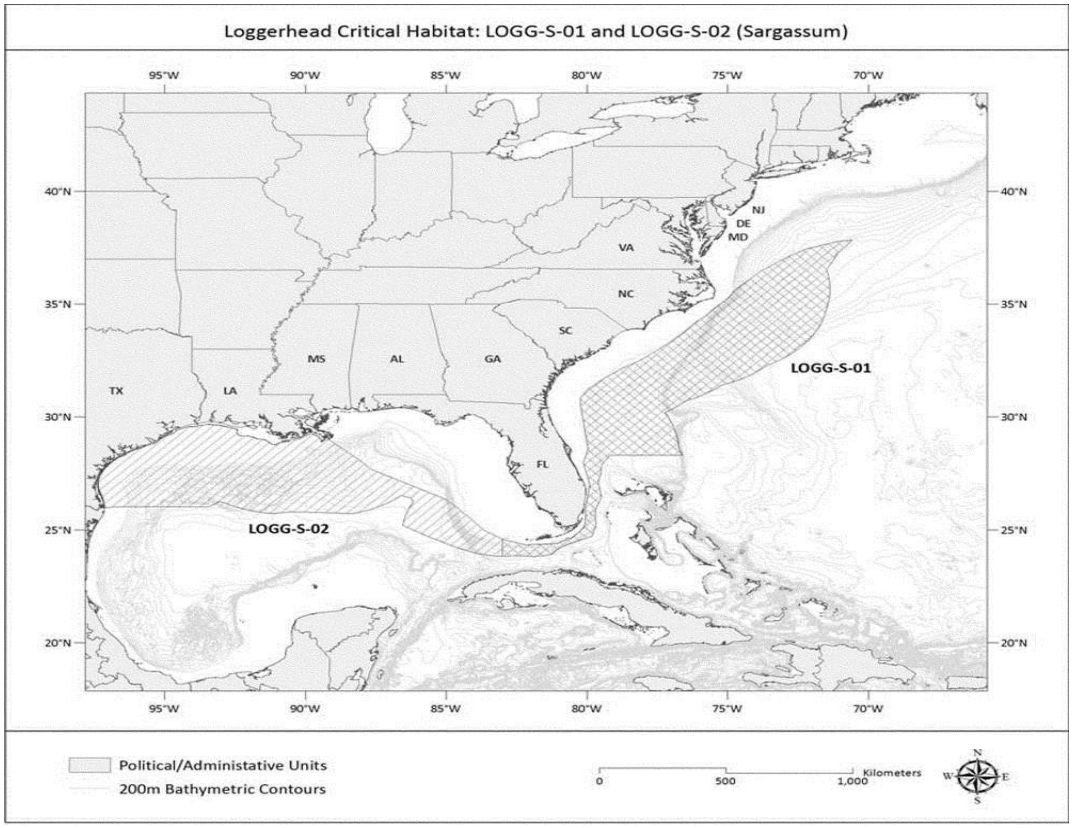
[105] 75 Fed. Reg. at 78,040.
[106] S. Rep. No. 95-151, at 7 (1979), reprinted in ESA Legislative History, *supra* note 144, at 1397.
[107] 16 U.S.C. § 1533(a)(3).
[108] 50 C.F.R. §424.12(a).
[109] *See Natural Resources Defense Council v. DOI*, 113 F.3d 1121 (9th Cir. 1997); *See also Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Haw. 1998); *See also Center for Biological Diversity v. Norton*, 240 F. Supp. 2d. 1090 (D. AZ 2003).
[110] 50 C.F.R. §424.12(a)(1).
[111] *See Natural Resources Defense Council v. DOI*, 113 F.3d 1121 (9th Cir. 1997); *See also Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Haw. 1998); *See also Home Builders Ass'n of N. Cal. V. FWS*, 268 F. Supp. 1197 (E.D. CA 2003)
[112] *Sierra Club v. FWS*, 245 F.3d 434 (5th Cir. 2001).

example of this flawed interpretation can be found in NMFS's designation of critical habitat for loggerhead turtles.[113]

"Loggerheads are circumglobal, occurring throughout the temperate and tropical regions of the Atlantic, Pacific, and Indian Oceans . . . [and] are the most abundant species of sea turtle found in U.S. coastal waters."[114] Loggerheads have been protected under the ESA as threatened species since 1978, and have also benefitted from extensive state and private conservation efforts.[115] As a result of these efforts, loggerhead nesting and abundance has increased, and continued to increase for decades.

Notwithstanding these existing protections and the species' large and growing population, in 2014, NMFS designated over 317,000 square miles of critical habitat for the loggerhead's Northwest Atlantic DPS.[116]



This critical habitat designation – roughly the size of Texas and Alabama combined – is one of the largest critical habitat areas ever designated by the Services, and yet NMFS could scarcely identify any conservation benefit to this historic designation. Because there are so many meaningful

[113] 79 Fed. Reg. 39,856 (July 10, 2014).
[114] NMFS Loggerhead Species Page. http://www.nmfs.noaa.gov/pr/species/turtles/loggerhead.htm.
[115] https://www.fws.gov/northflorida/seaturtles/turtle%20factsheets/loggerhead-sea-turtle.htm.
[116] 79 Fed. Reg. 39,856 (July 10, 2014).

measures already in place to protect loggerheads, the Draft Economic Analysis of Critical Habitat Designation of Marine Habitat for the Northwest Atlantic Ocean Distinct Population Segment of the Loggerhead Sea Turtle ("DEA"), concluded, in numerous places and in numerous contexts, that designation of critical habitat "is not expected to change the level or types of conservation efforts undertaken."[117] The DEA further explained,

> This analysis finds that the impacts of critical habitat designation will most likely be limited to incremental administrative effort to consider potential adverse modification as part of future section 7 consultations. According to NMFS, it is unlikely that critical habitat will generate new or different recommendations for conservation efforts. This is because the conservation efforts that would be recommended to avoid jeopardy would most likely also avoid adverse modification of critical habitat.[118]

The sole benefit identified in NMFS's determination that a critical habitat designation of this size was "prudent" was that "because there is value in highlighting critical habitat, including for planning and educational purposes, designation of critical habitat does contribute to the conservation of the species."[119]

Congress's obvious intent in conferring the authority to designate critical habitat was to provide the Services a tool for conserving listed species by protecting their habitat. The requirement that critical habitat designations actually benefit the species is therefore embedded with the ESA itself. The ESA does not require, nor should the ESA be interpreted to require, mandatory designation of critical habitat when there are no benefits to the designation or the when the benefits are remote or speculative. The loggerhead critical habitat designation demonstrates the absurd consequences of such interpretations and provides ample justification for the Services' proposal to remove the regulatory language that led to these flawed interpretations.

For the same reasons, the Associations support the Services' proposed clarification that designation of critical habitat is not prudent when the species is not threatened by habitat destruction, modification, or curtailment; where threats to species' habitat cannot be addressed through the critical habitat designation or the Section 7 consultation that critical habitat can trigger; and where areas within the jurisdiction of the United States do not provide meaningful conservation value to the species. As the Services have long recognized, the sole reason Congress equipped the Services with authority to designate critical habitat was to provide a tool to aid in the conservation of listed species.

Critical habitat is a tool to guide Federal agencies in fulfilling their conservation responsibilities by requiring them to consult with the Service if their actions may 'destroy or adversely modify' critical habitat for listed species. A critical habitat designation helps to protect areas— occupied and within reason and in very limited cases, unoccupied—necessary to conserve a species. Critical habitat has value in requiring the Service to gather more detailed information about a species than

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[117] Economic Analysis of Critical Habitat Designation of Marine Habitat for the Northwest Atlantic Ocean Distinct Population Segment of the Loggerhead Sea Turtle; Draft Report (July 11, 2013), at 7-1

[118] DEA at ES-2.

[119] 79 Fed. Reg. at 39,858.

what is required for listing, thereby increasing knowledge to share with Federal agencies—and, in turn, increasing their effectiveness to conserve a listed species.[120]

Consequently, it is not prudent for the Services to designate critical habitat when doing so is unlikely to aid in the conservation of species. The circumstances identified in the Services' proposal (no habitat threats, no habitat threats that can be mitigated through designation, or no meaningful conservation value in U.S. jurisdiction) clearly represent situations where designation of critical habitat will not meaningfully aid in the conservation of species. In circumstances such as these, where none of the ESA's stated goals are served by designating critical habitat, it is unquestionably imprudent for promulgate a designation. The Associations therefore support the Services' proposed identification of these non-beneficial circumstances and further support the underlying premise that critical habitat should not be designated unless such a designation can be shown, based on the "best scientific data available . . .,"[121] that such a designation will provide a meaningful and non-speculative conservation benefit to the species.

ii. Designating Critical Habitat in Occupied and Unoccupied Areas

In 2016, the Services finalized revisions that significantly changed the Services' approach to designating unoccupied areas as critical habitat ("2016 Rule").[122] As the Associations noted in comments submitted at the time,[123] we believe these changes exceeded the Services' authority under the ESA.

The ESA expressly envisions two types of critical habitat:

- "specific areas within the geographical areas occupied by the species, at the time it is listed . . ., on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection . . ."[124]

- "specific areas outside the geographical area occupied by the species at the time it is listed . . . .upon a determination . . . that such areas are essential for the conservation of the species."[125]

Geographic Areas Occupied by the Species - The impermissibility of the 2016 Rule begins with its attempt to redefine "geographical areas occupied by the species" to include areas that are not occupied by the species. More specifically, the 2016 Rule claimed authority to designate areas as "occupied critical habitat" even when the species is not actually present in the area(s) in question. The preamble to the 2016 Rule states that the Services could designate "occupied critical habitat" based upon a given species' habitat range, including areas such as migratory corridors, or even areas only used sporadically by the species. This definition of "geographical areas occupied by the species" therefore effectively eliminated the need for the Services to demonstrate "occupancy"

[120] https://www.fws.gov/endangered/esa-library/pdf/critical_habitat.pdf.
[121] 16 U.S.C. § 1533(b)(2).
[122] 81 Fed. Reg. 7,414 (Feb. 11, 2016).
[123] FWS-HQ-ES-2012-0096-0099.
[124] 16 U.S.C. § 1532(5)(A)(i)-(ii).
[125] Id. § 1532(5)(A)(ii).

by a species. According to the 2016 Rule, the Services can define areas as "occupied critical habitat" based on presumed migratory corridors for a given species that could include millions of acres of potential habitat. That makes little sense given that the very purpose of critical habitat is to protect those areas that are essential for a species' survival. The Associations therefore support the Service's effort to restore the statutory distinction between occupied and unoccupied areas.

The Associations believe, however, that the Services' current proposal does not go far enough in correcting the 2016 Rule's impermissible approach to designating critical habitat in areas occupied by species. The legislative history surrounding Congress' decision to amend the ESA in 1978 to limit critical habitat designation to areas that "may require special management considerations or protections" is instructive in this regard. Prior to 1978, the ESA had no express definition of critical habitat, which led the Services to designate broadly all areas occupied by the species as critical habitat. Congress was concerned that this practice resulted in designations "as far as the eye can see and the mind can conceive."[126] To address these concerns, Congress created the current definition of critical habitat that limits critical habitat designations to "specific areas" that contain "the physical or biological features . . . essential to the conservation of the species" *and* that "may require special management considerations or protections."[127] This narrower definition was designed to significantly constrain overbroad designations that were simply not useful for the conservation of threatened or endangered species.

The 2016 Rule attempted to tack around Congress's intended limitations in several ways. First, the final regulatory definition of "physical or biological features" enables the Services to avoid identifying specific physical features on the landscape, but instead designate critical habitat based upon conservation principals, such as habitat connectivity or presumed migration corridors. This regulatory definition is clearly contrary to the statutory definition of "occupied critical habitat" that requires both the species and the specific physical biological features to be present in the area being designated. Nor can the Services include areas as occupied critical habitat merely because there is a possibility for such features to develop in the future.

Second, the 2016 Rule also attempted to relieve the Services of their statutory authority to identify "specific areas" within the occupied area that contain the requisite "physical or biological features." Instead, the 2016 Rule asserted the flexibility to "designate critical habitat at a scale determined by the [Services] as appropriate." According to the Services, the purpose of this change is to relieve it from having to demonstrate every square inch, square acre, or even square mile of designated critical habitat actually meets the Service's new regulatory definition of occupied critical habitat for a specific species.

Finally, with respect to occupied habitat, the 2016 Rule effectively removed the statutory limitation allowing critical habitat to only be designated in areas where physical or biological features "may require special management considerations or protection." "Special management considerations or protection[s]" means "any methods or procedures useful in protecting physical or biological features of the environment for the conservation of the listed species." The obvious intent of this

[126] See Legislative History of the Endangered Species Act at 823 (reprinting House Consideration and Passage of H.R. 14104, with amendments, Oct. 14, 1978).
[127] 16 U.S.C. § 1532(5)(A).

regulation is to provide for habitat designation only where doing so will trigger some "methods or procedures" that will be "useful" in conserving the species.

Notwithstanding the obvious intent of the "special management considerations or protection" provision, in the 2016 Rule, the Services claimed authority to designate critical habitat even when the physical or biological features do not require any management above what is already provided via the species' listing, in recovery plans, or through any state or private conservation. Nor would the 2016 Rule require the Services to even demonstrate that any feature presently requires management at all – they need only show that the area may requirement management at some point. In other words, the 2016 Rule interpreted the ESA's requirement that critical habitat designations be limited to areas with features that "may require special management considerations or protection" as any management or any potential future need for management. As with the loggerhead critical habitat designation, this interpretation seeks to disconnect the Services' authority to designate critical habitat from any obligation to demonstrate the need or benefit of the designation. This is inconsistent with the ESA and the Associations therefore urge the Services to consider revisions to these aspects of the 2016 Rule as well.

Specific Areas Outside the Geographical Area Occupied by the Species – The ESA allows the Services to designate unoccupied areas as critical habitat only upon a showing that the area is "essential for the conservation of the species." Notwithstanding this high bar, the 2016 Rule attempted to radically alter the standard for designating unoccupied areas as critical habitat by illogically interpreting the ESA such that the evidentiary burden for designating unoccupied areas was lower than the burden for designating areas actually occupied by the species.

The 2016 Rule claimed authority to change the statutory standard that allowed the designation of unoccupied areas only to the extent necessary to supplement the present lack of essential "physical and biological features" in occupied areas to a standard that would allow the designation of unoccupied areas even if the occupied areas are currently sufficient to ensure the conservation of the species, and even if the unoccupied areas only have the potential to develop certain features in the future that may (or may not) become essential to the conservation of the species, depending on the anticipated effects of climate change or other factors. This was clearly an impermissible interpretation and the Associations welcome the Services' apparent recognition of that illegality.

First, the ESA only grants the Services the authority "to designate any habitat of [a species that has just been listed] which is then considered to be critical habitat" (emphasis added).[128] It does not grant them the authority to designate habitat which "is [not] then considered to be critical habitat," but that may become critical habitat at some point in the future, depending on the effects of climate change or other factors. The ESA provides the Services with the authority to deal with changes that may occur in the critical habitat of a species in the future by authorizing the Services to make changes in their designations as it becomes clear what those changes are; the ESA states that the Services "may, from time-to-time thereafter [*i.e.*, after the designation of habitat that is critical habitat at the time of listing] as appropriate, revise such designation."[129] What the ESA does not grant the Services is the authority to speculate on what changes may be necessary in the

[128] 16 U .S.C. § 1533(a)(3)(A).
[129] 16 U .S.C. § 1533(a)(3)(A).

future and to designate habitat as critical now that is not presently needed but that may (or may not) be needed in the future.

Second, the ESA grants the Services the authority to designate unoccupied areas as critical habitat only if those areas are "essential for the conservation of the species."[130] Logically, an unoccupied area cannot be "essential for the conservation of [a] species" if the occupied area is adequate to insure its conservation. Thus, contrary to the 2016 Rule, the Services must necessarily first determine whether the occupied areas are adequate to insure the conservation of a species before they can determine whether unoccupied areas are "essential" to the achievement of that purpose. It is simply not possible to say that an unoccupied area is "essential for the conservation of [a] species" without knowing how the species would fare if the unoccupied area were not designated. The Associations are pleased that the Services have proposed revisions to address this logical premise.

Finally, and most fundamentally, the 2016 Rule effectively attempted to remove the essentiality requirement that Congress placed as a restriction on the Services' authority to designated unoccupied areas as critical habitat. The meaning of the word "essential" undoubtedly vests the Services with significant discretion in determining if an area is "essential" to the conservation of a species, but there are limits to a word's meaning and hence the Service's discretion. The Service's interpretation of "essential for the conservation of the species" in the 2016 Rule went beyond the boundaries of what "essential" can reasonably be interpreted to mean. As the Supreme Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."[131]

The 2016 Rule's construction of the meaning of "essential for the conservation of the species" is not entitled to deference because it exceeds the boundaries of the latitude given to an agency in construing a statute. The term "essential" cannot reasonably be construed to encompass land that is not in fact "essential for the conservation of the species." When the only possible basis for designating an area as "critical habitat" is its potential use as actual habitat, an area cannot be "essential for the conservation of the species" if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species. Even if an area could be purposely modified or modified through potential climatological processes so that it may one day sustain a species, there must be some basis for concluding that it is likely that the area will be so modified. Otherwise, the area could not and will not be used for conservation of the species and therefore cannot be "essential" to the conservation of the species.

While the 2016 Rule memorialized this flawed interpretation, it had been used by the Services in specific critical habitat designations. A particularly egregious example comes from FWS's critical habitat designation for the Gunnison Sage Grouse.[132] Nearly 645,000 acres of this 1,430,000 acre critical habitat designation was unoccupied by the species at the time of designation.[133] In response to comments noting that much of the unoccupied area was not suitable habitat because it did not contain "Primary Constituent Elements" ("PCEs"), FWS responded that "unoccupied habitat does

[130] 16 U .S.C. § 1532(5).
[131] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994) (*citing Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113, 109 S.Ct. 414, 102 L.Ed.2d 408 (1988)).
[132] 79 Fed. Reg. 69,312 (Nov. 20, 2014).
[133] 79 Fed. Reg. at 69,347.

not need to contain the PCEs, the standard is instead 'essential to the conservation of the species.'"[134] In other words, FWS interpreted the ESA's requirement that unoccupied habitat be "essential to the conservation of the species" as presenting a lower threshold for designating critical habitat than the ESA's modest requirement that occupied habitat have elements necessary for the species survival. This construction of the statute is neither logical nor defensible.

The proposed rule changes strongly imply that these concerns – previously articulated by the Associations and other in numerous contexts – have been recognized by the Services. The changes proposed by the Services are necessary to bring the Services' regulation back in line with the requirements of the ESA. The Associations therefore support the revisions and respectfully request the Services to address our suggestions to further correct the approach embodied in the 2016 Rule.

iii. Other Needed Changes to Critical Habitat Regulations

In 2013, the Services issued a final rule clarifying how and when it will consider economic impacts stemming from the designation of critical habitat.[135] The final rule codified changes to the existing regulations found at 50 CFR § 424.19 governing the process the Services follow during critical habitat designation and the preparation of the statutorily required economic analysis under the ESA §4(b)(2).

Through this rule, the Services announced their decision to officially abandon the "co-extensive" approach, which allowed the Services to consider all the economic costs related to designation of critical habitat, regardless of when or why those costs were incurred. In place of the co-extensive approach, the Services utilized an "incremental baseline" approach under which the Services consider only the "incremental costs" resulting from a critical habitat designation.[136]

Under an incremental approach, the Services exclude any economic costs they believe are attributable to the species' listing and only examine those economic costs that are uniquely imposed by the designation of the critical habitat itself. For example, under an incremental approach, the Services could exclude the economic impacts occurring in areas identified as occupied critical habitat because future development in these areas was already restricted by virtue of the species being listed. In other words, the critical habitat designation would not impose any additional restrictions or obligations above and beyond those imposed by the initial listing.

It was by using this incremental baseline analysis that NMFS calculated that its designated critical habitat of over 317,000 square miles of important shipping, commercial fishing, and resource development areas would result in annualized costs of only $110,000.[137] This estimate, which purports to include all costs to the government and each impacted industry, is far too unrealistic to meaningfully inform the Services' statutorily mandated consideration of costs.

FWS has reached similarly unrealistic conclusions using this same incremental baseline approach. In 2015, when the FWS designated nearly 1,430,000 acres of important oil and natural gas

[134] 79 Fed. Reg. at 69,316.
[135] 78 Fed. Reg. at 53,058 (August 28, 2013).
[136] 78 Fed. Reg. at 53,076 (August 28, 2013); 50 C.F.R. §424.19(a)
[137] 79 Fed. Reg. 39,856 (July 10, 2014).

development areas as critical habitat, the Service estimated impacts on the mineral and fossil fuel industry of only $1.1 million over 20 years.[138] As the Associations pointed out in comments, this estimate failed to consider mitigation costs, potential losses from future BLM leases, delay costs, or other administrative costs.[139] Accordingly, the Associations believe that the incremental-baseline approach that produces unquestionably unrealistic cost estimates such as this must be viewed as inconsistent with the ESA.

The Services' problematic approach to statutorily mandated economic analyses is not limited, however, to problems with the Services' method for calculating impacts of critical habitat designations. In the 2016 Policy Regarding Implementation of ESA Section 4(b)(2)("4(b)(2) Policy")[140], the Services also attempted to changes the rules by which they must use economic analyses in making decisions about designating critical habitat.

ESA Section 4(b)(2) states that the Services "may exclude any area from critical habitat if [the Services] determine[] that the benefits of such exclusion outweigh the benefits of specifying such area as part of critical habitat, unless . . .the failure to designate such area as critical habitat will result in extinction of the species concerned." Congress inserted this provision into the ESA so that the Services could, *inter alia*, avoid designating critical habitat when economic cost far exceeds conservation benefits. The 4(b)(2) Policy's interpretation of this provision, however, claims that the Services have full and unmitigated discretion to designate critical habitat no matter how high the economic cost and no matter how small the economic benefit. The Policy acknowledges that the ESA requires the Services to consider economic impacts, but claims that Congress's inclusion of the word "may" in Section 4(b)(2) allows the Services to ignore product of the statutorily mandated economic analysis.

Moreover, the 4(b)(2) Policy imposes on the Services no standards, criteria, or required methodology for deciding whether to exclude or not exclude certain areas from critical habitat. Nor does the policy even require the Services to provide notice or an explanation of decisions to exclude or not exclude areas under Section 4(b)(2). According to the 4(b)(2) Policy, notices and explanations are unnecessary because impacted stakeholders have no right to participate in Section 4(b)(2) decisions and no right to seek judicial review of those decisions.

On the contrary, section 4(b)(2) was inserted into the ESA by Congress to provide the Services with a way to avoid designations where economic costs are disproportionate to conservation gains. While the Associations acknowledge that Congress provided the Service discretion in making these decisions, we do not believe it is reasonable to interpret this discretion as unlimited, standard-less, immune from public scrutiny, and unreviewable. Once again, the Supreme Court's decision in *Michigan v. EPA* is instructive: "Federal administrative agencies are required to engage in 'reasoned decisionmaking.'"[141] "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational."[142] In light of this holding and this Administration's interest in transparent decision-making, the

[138] See Final Economic Analysis for Gunnison Sage Grouse critical habitat designation at ES-8.
[139] See comment at FWS-R6-ES-2011-0111-0417
[140] 81 Fed. Reg. 7,226 (Feb. 11, 2016).
[141] *Michigan v. EPA*, 135 S. Ct. 2699, quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U. S. 359, 374 (1998) (internal quotation marks omitted).
[142] *Ibid.*

Associations urge the Services to revise the 4(b)(2) Policy to provide standards to the 4(b)(2) exclusion process and remove the Policy's claims of limitless discretion to ignore the disproportionality of costs and benefits in deciding whether to exclude areas from critical habitat designations.

d. Proposed Revision of Regulations for Interagency Cooperation

The consultation process has proven too complex for simple permits and inadequate for application to complex regulatory actions. The Services should improve the process by streamlining their existing Section 7 procedures, clarifying certain regulatory definitions, and ensuring that the implementation of biological opinions is more cost-effective and reliable. In addition, the Services should encourage greater collaboration with applicants so that reasonable, workable solutions can be identified and achieved, and consultation can be concluded within the deadlines provided by the ESA.

The Associations believe that these revisions to the ESA Section 7 consultation regulations are necessary to improve the efficiency of the process and furthermore believe that increased efficiency need not come at the expense of conservation. The revisions proposed by the Services appropriately recognize the need for greater efficiency, and they responsibly tailor the Services' Section 7 regulations to preserve the consultation process's role in promoting conservation of listed species. The Associations therefore support the Services' proposed revisions to its regulations for interagency cooperation.

1. Revised Definition of Destruction/Adverse Modification

ESA Section 7 requires federal agencies to consult with the Services to insure that their actions are not likely to "jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species." The ESA does not define "destruction or adverse modification," and so the Services have engaged in multiple efforts to interpret the phrase, including most recently in 2016. In the 2016 revision ("2016 Section 7 Rule), the Services adopted the following definition:

> Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.[143]

The Associations opposed this interpretation when it was proposed,[144] and appreciate the Services present effort to address many of those concerns. For instance, the 2016 Section 7 Rule's interpretation that an adverse modification may occur when a direct or indirect alteration "appreciably diminishes the value of critical habitat for the conservation of listed species" appeared too ambiguous to prevent exceptionally small sub-habitat scale diminishments of conservation value from triggering Section 7 consultation. Given that many actions can depreciate the conservation value of small areas without adversely impacting listed species or increasing

[143] 81 FR 7214, February 11, 2016.
[144] FWS-R9-ES-2011-0072-0096.

habitat-based threats, this ambiguity risks substantially increasing the number of Section 7 consultations for small actions with little or no potential to adversely impact listed species or their habitat.

The Services' proposal to include the phrase "as a whole" after the phrase "appreciably diminishes the value of critical habitat" reduces the ambiguity and provides the requisite scale through which these determinations will be made. While this revision represents a change from the Services' prior definition, it is not inconsistent with the Services prior approach. As such, the Associations support this revision as a valid exercise of the Services' discretion.

The 2016 Section 7 Rule's addition of the phrase "or significantly delay development of such features" in the second sentence also raised concerns about the potential for unwarranted increases in Section 7 consultation as well as concerns about the legality of the standard under the ESA. Section 7 requires the Services to consider the potential impact of an action on conditions presently in existence.

The ESA defines "critical habitat" as those areas on which are found the physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection. Thus, the grant of authority is clearly and only for the purpose of providing the special management considerations or protection necessary to preserve the essential features presently found in the area; it is not a license to protect the area generally in such a way as to insure that certain features might develop there in the future. The 2016 Section 7 Rule, however, attempted to bootstrap the authority to protect features that are present into authority to protect features that may someday be present.

The Associations therefore support the Services' proposal to delete the second sentence "Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features." The Services are correct that is impossible for a definition of "destruction or adverse modification" to identify each potential type of modification, and the Services are further correct that their inclusion of this partial list created more ambiguity than it resolved.

2. Revised Definition of Effects of Action

Once an agency has determined that a program or activity is an "agency action" under the ESA, it must then evaluate the "effect" of the action. Determining the effect of the action is important because the result of that evaluation governs whether a time-consuming formal consultation process will be triggered. The Associations agree with the Services that the current regulatory requirements for evaluating the effects of actions have led to substantial confusion and inconsistent outcomes. We also agree with the Services' approach to simplifying these regulations.

The Services' current regulations correctly recognize that agency actions can have either direct or indirect effects, and the Services' current regulations also correctly note that agencies must consider both of these effects. As the proposed revisions note, however, while these effects differ in type, the test for evaluating them is the same. "An effect or activity is caused by the proposed

action when two tests are satisfied: First, the effect or activity would not occur but for the proposed action, and second, the effect or activity is reasonably certain to occur."[145]

Given the singularity of the analytical requirements, the distinction the current regulation makes between direct and indirect effects is meaningless and serves only to create confusion. The Services' proposal to remove the unnecessary references to direct and indirect effects from regulation's definition of "effects of the action" therefore eliminates this significant source of confusion while preserving the existing test for evaluating the effects of an agency action.

As described in the proposed revisions, that test incorporates the principles of proximate causation and reasonable certainty. There must be a close causal and measurable connection between the proposed action and any effects—i.e., the action must "directly produce" the resulting effect on the species or critical habitat. An effect should not be included if it will occur irrespective of the proposed action. Nor should an effect be considered if it is speculative, only a mere possibility, or otherwise not reasonably likely to occur. The Services' proposed revision clearly and accurately articulates this test. The Associations therefore support this important clarification.

3. Revised Definition of Environmental Baseline

The purpose of Section 7 consultation is to gain an advance understanding of the potential impact of an agency action and to use that understanding to inform agency decision-making. For an analysis of "effects" to be useful, it is therefore necessary to distinguish the action under review from baseline conditions and the contemporaneous or evolving impacts of other Federal, State, local, or private actions that may also effect species or habitat. Given the breadth of many critical habitat designations and the variety of activities that may have effects in that habitat, environmental baselines can be difficult to establish. Regardless of difficulty, credible environmental baselines are essential to the Section 7 review because they provide the status quo from which the potential impacts of a proposed action must be measured.

There is no regulatory revision that can reduce the difficulty of these baseline analyses and no formula that could standardize how the Services' establish environmental baselines. The conditions under review are likely too variable and dynamic for formulaic approaches. What the Services can provide, however, is a clear articulation of the types of actions and conditions that must be included as part of baseline environmental conditions. The Associations therefore support the Services' proposed definition of "Environmental Baseline" and support inclusion of the additional clarification discussed on page 35,184.[146]

[145] 83 Fed. Reg. at 35.184.

[146] "Environmental baseline is the state of the world absent the action under review and includes the past, present and ongoing impacts of all past and ongoing Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions in the action area which are contemporaneous with the consultation in process. Ongoing means impacts or actions that would continue in the absence of the action under review."

4. New Definition of Programmatic Consultation

As entities that rely on reasonable access to land to do their business, the Associations' members are routinely impacted by Federal actions undertaken pursuant to programmatic consultations. We believe that programmatic consultations can provide an efficient means of evaluating agency action and informing agency decision-making while eliminating the need to separately evaluate thousands of small or site-specific decisions or actions. The Associations support the Services' proposed definition of programmatic consultation and view it as consistent with the Services' current interpretation of the phrase.

5. Clarifying when Section 7 Consultation is Required

The Associations believe that the Services should exercise their discretion to clarify certain circumstances when agencies would not be required to consult under ESA Section 7. At its base, Section 7 was intended to obtain advance understanding of the potential impacts of agency actions, and to use that understanding to better inform agency decisions, including decisions to mitigate or eliminate impacts. Implicit within Section 7's goals and requirements is the expectation that there are actions and decisions within the control and purview of the action agencies that would allow those agencies to avoid creating or mitigate the impacts of their actions. Absent some agency ability to measurably change a condition to which an agency action may contribute, there is no benefit or purpose to Section 7 consultation. Stated differently, if the potential risk to species or habitat effectively remains the same irrespective of the agency action, than protracted analyses of the agency action provide nothing more than empty bureaucratic exercises.

This reasonable premise is already embodied in the Services' regulations requiring consultation only when "there is discretionary Federal involvement or control."[147] This premise is also supported by the Supreme Court in upholding the Services' regulation limiting consultations to situations where "there is discretionary Federal involvement or control."[148] As the Supreme Court noted in that case:

> We conclude that this interpretation is reasonable in light of the statute's text and the overall statutory scheme, and that it is therefore entitled to deference under Chevron. Section 7(a)(2) requires that an agency 'insure' that the actions it authorizes, funds, or carries out are not likely to jeopardize listed species or their habitats. To 'insure' something . . . means '[t]o make certain, to secure, to guarantee (some thing, event, *etc.*).' The regulation's focus on 'discretionary' actions accords with the commonsense conclusion that, when an agency is required to do something by statute, it simply lacks the power to 'insure' that such action will not jeopardize endangered species.[149]

This reasoning is further supported by the Supreme Court's decision in *Department of Transportation v. Public Citizen*.[150] That case concerned safety regulations that were promulgated by the Federal Motor Carrier Safety Administration ("FMCSA") and had the effect of triggering a

[147] 50 C.F.R. § 402.03
[148] *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 US 664 (2007).
[149] *Id.* Internal citations omitted.
[150] 541 U.S. 752, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004).

Presidential directive allowing Mexican trucks to ply their trade on United States roads. The Court held that the National Environmental Policy Act ("NEPA") did not require the agency to assess the environmental effects of allowing the trucks entry because "the legally relevant cause of the entry of the Mexican trucks is *not* FMCSA's action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while simultaneously limiting FMCSA's discretion."[151] The Court thus concluded that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant `cause' of the effect."[152]

The circumstances described in the Services' proposal reflects the same principles applied in these court decisions. When the effects that the agency action allegedly contributes to are manifested through global processes that will or will not occur regardless of the agency action, then the agency action is not a legally relevant cause of the effect. Section 7 consultation in such instances is therefore unnecessary. So too with activities, areas, and effects outside the jurisdictional control and responsibility of the regulatory agency. These items are not under the control of the agency, and therefore the need to consult should be precluded.

Finally, because Section 7 consultation is intended to inform and guide agency decision-making, the Associations do not believe that consultation serves any beneficial role when effects cannot be reliably predicted or measured at the scale of a listed species' current range, would result at most in an extremely small and insignificant impact on a listed species or critical habitat, or are such that the potential risk of harm to a listed species or critical habitat is remote. Section 7 consultation is similarly unnecessary when the action would result in effects to listed species or critical habitat that are either wholly beneficial or are not capable of being measured or detected in a manner that permits meaningful evaluation. If effects are too small to reliably measure or if benefits are too speculative to calculate, then Section 7 consultation will not result in more informed decision-making. As such, the Associations support the Services' proposal to limit Section 7 consultation requirements to those situations where it consultation can actually inform agency decisions and improve conservation outcomes.

6. Consultation Deadlines and Streamlining

The Associations support the revisions the Services are proposing in order to reduce delay and uncertainty in the consultation process. We particularly welcome the Services' proposed restoration of deadlines for informal consultation. As we have observed with respect to formal consultation, however, agencies have too often and too easily evaded deadlines by avoiding the official initiation of review and by leveraging consent for extensions from agencies and applicants. The Associations therefore urge the Services to adopt measures to more strictly enforce deadlines for formal and informal consultation, including requirements that the Services engage with action agencies in an informal role earlier during the analysis of proposed projects under NEPA. All too often the Services may be uninformed by the interactions between the project proponent and action agency regarding elements that should be ultimately recognized in the biological assessments and opinions, including the utilization of applicant committed measures.

[151] *Id*., at 769, 124 S.Ct. 2204 (emphasis in original).
[152] *Id*., at 770, 124 S.Ct. 2204.

The Associations also welcome the Services' recognition that the consultation process needs to be more streamlined and efficient. The Services' proposal to clarify the information they will require in consultation and to provide more flexibility in utilizing information compiled in other contexts can substantially improve review and coordination. The Associations also support the Services' proposed changes to the procedures and data requirements for Biological Opinions, the proposed expedited consultation pathway for actions with minimal impacts, and the reasonable restraints on the types of changes that require reinitiation of consultation. We believe the cumulative effect of these actions will be the reduction of delay, production of more focused and relevant data, and the establishment of a process that satisfies the ESA's informational goals without unnecessarily constraining or prolonging agency approvals and actions.

e. Conclusion

The Associations appreciate the Services' efforts to update and improve their regulatory approaches under the ESA, and further appreciate the opportunity to provide these comments and recommendations. If you have any questions or would like to discuss these comments, please feel free to contact Tripp Parks (the Alliance) at (303) 623-0987/ TParks@WesternEnergyAlliance.org or Bruce Thompson (AXPC) at (202) 742-4540 /BThompson@AXPC.us.

Respectfully submitted,

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