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Office of the Executive Secretariat
Attention: Regulatory Reform
U.S. Department of the Interior
1859 C Street NW, Mail Stop 7328
Washington, DC 20240

Kelly Denit
National Marine Fisheries Service, NOAA
Office of Sustainable Fisheries
1315 East-West Highway
Silver Spring, MD 20910

Re: Docket Nos. DOI–2017–0003–0009; NOAA–NMFS–2017–006

To Whom it May Concern:

On June 22, 2017, the U.S. Department of the Interior (DOI or the Department) Regulatory Reform Task Force issued a request for public comment on existing policies and regulations that may warrant repeal, replacement, or modification. 82 Fed. Reg. 28,429 (June 22, 2017). On July 7, 2017, the National Oceanic and Atmospheric Administration (NOAA), through the National Marine Fisheries Service (NMFS) and the National Ocean Service, also issued a request for public comment on the agency's ongoing efforts to improve its regulations and regulatory processes. 82 Fed. Reg. 31,576 (July 7, 2017).

The Utility Water Act Group (UWAG) appreciates the opportunity to comment on the regulatory reform initiatives and identifies in the attached comments a number of regulations and policies promulgated by the U.S. Fish and Wildlife Service (FWS) and NMFS (together, the Services) pursuant to the Endangered Species Act (ESA) that may warrant repeal, replacement, or modification. Given the overlap of NMFS and FWS jurisdiction on ESA issues of importance to UWAG, these comments address regulatory reform issues for DOI and NOAA together, and will be filed under both dockets.

We look forward to the agencies' consideration of these important issues. Please do not hesitate to contact me with any questions.

Sincerely,

Kerry L. McGrath/rm

Kerry L. McGrath

Attachment

Filed electronically at www.regulations.gov
Docket Nos. DOI–2017–0003–0009; NOAA–NMFS–2017–0067

Comments of the Utility Water Act Group on the U.S. Department of the Interior's Regulatory Reform Initiative, 82 Fed. Reg. 28,429 (June 22, 2017), DOI–2017–0003–0009, and the National Oceanic and Atmospheric Administration's Regulatory Reform Initiative, 82 Fed. Reg. 31,576 (July 7, 2017), NOAA–NMFS–2017–0067

August 21, 2017

On June 22, 2017, the U.S. Department of the Interior (DOI or the Department) Regulatory Reform Task Force issued a request for public comment on existing policies and regulations that may warrant repeal, replacement, or modification. 82 Fed. Reg. 28,429 (June 22, 2017). On July 7, 2017, the National Oceanic and Atmospheric Administration (NOAA), through the National Marine Fisheries Service (NMFS) and the National Ocean Service, also issued a request for public comment on the agency's ongoing efforts to improve its regulations and regulatory processes. 82 Fed. Reg. 31,576 (July 7, 2017). Specifically, the agencies seek public assistance in identifying existing policies and regulations that:

- eliminate jobs or inhibit job creation;
- are outdated, unnecessary, or ineffective;
- impose costs that exceed benefits;
- create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies;
- [DOI:] rely in whole or in part on data or methods that are not publicly available or that are insufficiently transparent to meet the standard of reproducibility;
- [NOAA:] are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001; and/or
- derive from or implement Executive Orders (EOs) or other Presidential directives that have been subsequently rescinded or substantially modified.

82 Fed. Reg. at 28,430; 82 Fed. Reg. at 31,576.

The Utility Water Act Group (UWAG) appreciates the opportunity to comment on the regulatory reform initiatives and identifies in the comments below a number of regulations and policies promulgated by the U.S. Fish and Wildlife Service (FWS) and NMFS (together, the Services) pursuant to the Endangered Species Act (ESA) that may warrant repeal, replacement, or modification based on the factors listed above. Given the overlap of NMFS and FWS jurisdiction on ESA issues of importance to UWAG, these comments address regulatory reform issues for DOI and NOAA together and will be filed under both dockets.

UWAG is a voluntary, ad hoc, non-profit, unincorporated group of 163 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the American Public Power Association, and the National Rural Electric Cooperative Association. UWAG's purpose is, among other things, to participate on behalf of its members in

federal agency rulemakings under the Clean Water Act (CWA) and related statutes, such as the ESA, and in litigation arising from those rulemakings.

UWAG is comprised of a diverse and extensive range of public and private entities that construct, operate, and maintain a wide range of facilities across the nation, including steam electric power plants, combustion turbines, hydroelectric facilities, electric transmission and distribution lines, natural gas and oil distribution lines, railroad tracks, and an increasing array of renewable energy generation sites, including wind and solar facilities. Many of the individual energy companies that comprise UWAG have public service obligations to ensure a reliable and safe supply of electricity to their customers. The supply of electricity throughout the country requires the construction, operation, and maintenance of generation facilities, transmission and distribution lines, and other system control facilities. The administration of the ESA regulatory program, insofar as it affects the electric utility industry, is important for UWAG members and for the public at large, whose health, safety, and general welfare depend on the reliable delivery of affordable electricity. Yet various aspects of the ESA's regulatory framework impose costs that exceed environmental benefits and impose an unnecessary regulatory burden on the energy industry.

Accordingly, UWAG supports the Services' regulatory reform efforts and, in particular, UWAG supports efforts that serve the key goals of:

- Focusing cost and impact of ESA implementation on efforts demonstrated to deliver the greatest value for conservation and recovery of listed species;
- Shifting emphasis from unilateral use of restrictions toward collaborative, voluntary actions to conserve and recover species;
- Greater state involvement in ESA implementation and conservation;
- Listing decisions and critical habitat designations supported by sound scientific methods and data; and
- Establishment of streamlined and efficient methods for regulated parties to ensure ESA compliance.

To further these critical goals, UWAG provides the following specific recommendations as to how the Services can improve their regulatory processes, and identify regulations and policies that warrant repeal, replacement, or modification.

I. UWAG Urges the Services to Take the Following Actions to Improve Their Regulatory Programs.

A. The Services Must Use a Proper Baseline and Effects Analysis in ESA Section 7 Consultations.

In some recent instances, the Services have used an environmental baseline and effects analysis in ESA section 7 consultation that is contrary to the ESA and the Services' own regulations and policies. ESA section 7(a)(2) requires each federal agency to ensure, through

consultation with the Services, "that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of [listed] species . . . or result in the destruction or adverse modification of [designated critical] habitat . . . ." 16 U.S.C. § 1536(a)(2). Likewise, Congress specified that a biological opinion must "detail[] how the agency action affects the species or its critical habitat." *Id.* § 1536(b)(3)(A). The statute makes plain that the focus of the consultation is on the effects to species *that result from an agency's action*. Correspondingly, the consultation regulations specify that the "[e]ffects of the action" are the "direct and indirect effects of an action . . . that will be *added to the environmental baseline*." 50 C.F.R. § 402.02 (emphasis added).

The environmental baseline is critical to the analysis of potential jeopardy or adverse modification because it provides the biological and other environmental conditions against which the effects of the agency action are measured. The Services' regulations provide that the baseline is comprised of "*past and present* impacts" of activities, as well as anticipated impacts of other actions "that have *already undergone* formal or early section 7 consultation." *Id.* (emphases added). Echoing 50 C.F.R. § 402.02, the Services' Consultation Handbook provides that "[e]ffects of the action under consultation are analyzed together with the effects of other activities that are interrelated to, or interdependent with, that action." FWS & NMFS, Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act, at 4-26 (Mar. 1998), https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf (Consultation Handbook). The Consultation Handbook describes the environmental baseline as "a 'snapshot' of a species' health at a specified point in time . . . [which] does not include the effects of the action under review in the consultation." *Id.* at 4-22.

As the statute, regulations, and Consultation Handbook make plain, the Services must determine the effects of the action based on changes to current baseline conditions today, and not based on whether baseline conditions continue or on additional restrictions that the Services believe the action agency *could* impose as part of the action. Baseline effects that exist prior to and "continue" after an action are *not* effects of the action.

The Services recently misconstrued these important principles in their consultation on the U.S. Environmental Protection Agency's (EPA) final rule establishing requirements for cooling water intake structures (CWIS) at existing facilities under CWA section 316(b) (section 316(b) Rule). As EPA – the action agency – recognized, the section 316(b) Rule will have only beneficial effects, by requiring many owners and operators of CWIS to install new technology to reduce impingement mortality and entrainment of aquatic organisms. *See* EPA, ESA Biological Evaluation for CWA Section 316(b) Rulemaking at 77 (June 18, 2013). Rather than evaluating whether requiring existing facilities to meet the standards set by the section 316(b) Rule would cause jeopardy or adverse modification – the analysis the ESA requires – the Services instead decided to evaluate whether the section 316(b) Rule went far enough to reduce ongoing impacts from existing CWISs, on the misguided theory that "the operation of [existing] CWIS is within EPA's discretion." FWS & NMFS, Endangered Species Act Section 7 Consultation Programmatic Biological Opinion on the U.S. Environmental Protection Agency's Issuance and Implementation of the Final Regulations Section 316(b) of the Clean Water Act, at 28 (May 19, 2014), http://www.nmfs.noaa.gov/pr/consultation/opinions/biop_epa_cwa316b_2014.pdf. The Services attributed to the section 316(b) Rule all of the estimated effects of ongoing operation of

the CWIS, to the extent EPA's rule did not prevent those impacts. *See id.* In other words, they incorrectly treated the section 316(b) Rule as the proximate cause of the operation of those intakes. The Services' failure to include present and ongoing effects of CWIS operations in the environmental baseline led the Services to overestimate the actual effects of the section 316(b) Rule. This mistake, in turn, led the Services to exaggerate the measures supposedly needed to avoid jeopardy and adverse modification from the Rule.[1]

Consistent with applicable law, the Services must limit the scope of their section 7 consultation to the effects that the agency action would add to the environmental baseline. The Services may not expand consultation – and thus their own role in interpreting and implementing other federal statutes – by evaluating effects that existed prior to, and that will continue after, the agency action but which are not caused by the action. Such an approach would lead to the impossible result that agency rules and other agency actions violate the jeopardy prohibition even where those actions are not the proximate cause of the potential jeopardy. As discussed below, such a result cannot stand as a matter of law. *See DOT v. Pub. Citizen*, 541 U.S. 752, 767 (2004). Whatever more the Services may want a rulemaking agency to do to improve conditions for listed species, they may not force such an outcome by expanding the action to include what more the agency *might have done*. *See WildEarth Guardians v. EPA*, 759 F.3d 1196, 1209 (10th Cir. 2014) (requiring consultation on what more EPA might do to address mercury and selenium emissions, rather than focus on the actual EPA plan for regional haze, "would make meaningless the regulation requiring an agency seeking formal consultation to include '[a] description of the action to be considered'") (quoting 50 C.F.R. § 402.14(c)(1)). Indeed, "requiring consultation on everything the agency *might do* would hamstring government regulation in general and would likely impede rather than advance environmental protection." *Id.* (emphasis added).

Accordingly, it is critical that the Services clarify the proper determination of baseline conditions, which would serve the regulatory reform goal of clarifying policies that "create a serious inconsistency." *See* 82 Fed. Reg. at 28,430; 82 Fed. Reg. at 31,576. Such a clarification could be accomplished by regulatory amendment, revision to the Consultation Handbook (discussed in more detail below), and/or through other agency guidance.

B. The Services Should Clarify the Causation Standard for Effects Analyses.

Pursuant to the Services' section 7 consultation regulations, the Services must "[e]valuate the *effects of the action* and cumulative effects on the listed species or critical habitat." 50 C.F.R. § 402.14(g)(3) (emphasis added). In evaluating the effects of a federal action, such as issuing a CWA section 404 permit or an incidental take permit (ITP), the Services may attribute effects to an action only where those effects are *proximately caused* by the action. Other effects, such as effects of other activities or conditions (if relevant), must be included in the baseline or cumulative effects analysis where appropriate. For both the National Environmental Policy Act (NEPA) and ESA section 7 consultation effects analysis, a "but for" causal relationship is insufficient to make an agency responsible for a particular effect. Only those effects proximately

[1] For more discussion of the Services' consultation and resulting biological opinion on EPA's section 316(b) Rule, *see* Opening Brief of the Cooling Water Intake Structure Coalition, Utility Water Act Group, Entergy Corporation, and American Petroleum Institute, *Cooling Water Intake Structure Coalition, et. al. v. EPA*, No. 14-4645 (2d Cir. filed Feb. 6, 2017), ECF No. 304.

caused by the specific federal action (e.g., authorizing the discharge of dredged or fill material or authorizing incidental take) should be attributed to that action.

For example, in issuing an ESA section 10 ITP, "the Services are not authorizing the applicant's activities that are causing the take. Instead, the Services are authorizing the *incidental take* that results from the applicant's covered activities." FWS & NMFS, Habitat Conservation Planning and Incidental Take Permit Processing Handbook at 4-14 (Dec. 21, 2016), https://www.fws.gov/endangered/what-we-do/hcp_handbook-chapters.html (HCP Handbook) (emphasis added). This point is important because, as the HCP Handbook recognizes, the public is often confused about the scope of the Services' review.[2] The Services "must clearly and consistently distinguish between [the] proposed action (i.e., issuance of an ESA [ITP] for the purpose of authorizing incidental take for covered activities within the context of an HCP) and the specific activities of the applicant." *Id.* Thus, the proper scope of analysis includes the effects proximately caused by the authorization of incidental take, and not the effects caused by the proposed activities. Applying the proper scope of environmental analysis is critical to ensuring an efficient, effective, and lawful review process.

The case law and the HCP Handbook support this position. According to the Supreme Court, "a 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations. . . . NEPA requires a reasonably close causal relationship between the environmental effect and the alleged cause . . . [analogous] to the familiar doctrine of proximate cause from tort law." *Pub. Citizen*, 541 U.S. at 767 (internal quotation marks and citation omitted). The lower courts have likewise rejected "but for" causation as a basis for attributing effects to an agency action, including in the form of "indirect" effects. *See, e.g., Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269 (8th Cir. 1980) (rejecting application of "but for" causation to determine indirect effects and finding that NEPA analysis for federal permit authorizing construction of transmission line across the Missouri River was properly limited to the effects of the crossing authorized by the permit and did not have to consider the impacts of the entire line (including potential impacts on the bald eagle)). These same principles have been applied in the ESA context, as well. *See, e.g., Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644 (2007) (scope of section 7 consultation on EPA's decision to transfer CWA section 402 permitting authority to Arizona state agencies should not include potential harm from increased development because EPA has no discretion over the national pollutant discharge elimination system (NPDES) permitting transfer authority, and thus is not the legal cause of effects of the NPDES transfer); *Aransas Project v. Shaw,* 775 F.3d 641, 657-58 (5th Cir. 2014) (per curiam) ("[a]pplying a proximate cause limit to the ESA must therefore mean that liability may be based neither on the 'butterfly effect' nor on remote actors in a vast and complex ecosystem.").

The revised HCP Handbook also adopts a causation standard that reflects proximate – not "but for" – causation:

[2] "[S]takeholders often do not understand this concept, at least initially, so we find ourselves spending weeks or months responding to issues and concerns that are associated with an applicant's project . . . which the Services have no control over via our ESA authority." HCP Handbook at 4-14.

> [T]he specific activity that [an ITP] authorizes, the incidental take of endangered species, may be merely one component of a large project involving non-Federal activities that do not require Federal review or authorization. Determining whether our NEPA analysis should consider the impacts of that larger activity requires analysis of the extent of our '*control and responsibility*' over the applicant's overall project.

HCP Handbook at 13-4 (citing 40 C.F.R. § 1508.18) (emphasis added). Critically, the HCP Handbook specifies that "*[s]imple 'but for' causation is not enough*" and that "[t]here must be a reasonably close *causal relationship* between issuance of the ITP and the effects under consideration to require analysis under NEPA." *Id*. (emphases added).

Despite the Services' position in the Consultation Handbook and controlling case law and regulations, UWAG members have experienced instances where there is confusion regarding the causation standard for ESA section 7 consultation and ITPs. It is important that the Services use a causation standard that is consistent with applicable legal authority. To do otherwise (by attributing effects to the action that are not proximately caused by the action) would render the NEPA and ESA analyses factually, scientifically, and legally unsound. It would leave the analyses without a limiting principle, and impose upon the Services an arbitrary burden to address effects beyond their control. It would also require applicants to mitigate for effects of third party actions outside their control. Such an approach would create an unnecessary regulatory burden for project sponsors and generates an ineffective regulatory process.

Therefore, for all these reasons, the Services should amend the section 7 regulations, revise the ESA Section 7 Consultation Handbook, and/or issue guidance that clarifies that the Services may attribute effects to an action only where those effects are *proximately caused* by the action.

C. The Services Must Ensure Listing Decisions and Critical Habitat Designations Rely on Best Available Science.

The Services have a statutory obligation to observe the requirements of the ESA and to make reasoned, scientifically supported listing decisions and critical habitat designations. ESA section 4 authorizes listing only on the basis of "the best scientific and commercial data available," 16 U.S.C. § 1533(b)(1)(A), and only after consideration of specified statutory factors, in compliance with established listing procedures. *Id.* § 1533(a)(1).[3] Similarly, Congress specified that the designation of critical habitat must be "prudent and determinable." *Id.* § 1533(a)(3)(A). Under the Services' regulations, designation is not *prudent* if designation "would not be beneficial to the species." 50 C.F.R. § 424.12(a)(1)(ii). In addition, critical habitat designations must be based on the "best scientific data available," and the designation must "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). The "best scientific data available" standard is meant

[3] These factors are the "present or threatened destruction" of a species' habitat, overutilization, disease or predation, the inadequacy of existing regulatory mechanisms, and other natural or manmade factors affecting a species' continued existence. 16 U.S.C. § 1533(a)(1)(A)-(E).

to avoid listing decisions and critical habitat designations based on insufficient information or conjecture, in order to "ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise." *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997).

Consistent with these requirements, the Services must ensure that listing decisions and critical habitat designations are supported by sound scientific methods and data (i.e., all relevant hypotheses are developed based on information obtained through rigorous scientific methods and tests and demonstrated by repeatable results), not rushed or based on inadequate information. The Services may not list a species where the best scientific information available provides insufficient evidence to allow the agency to draw a conclusion one way or the other. *See, e.g.*, 78 Fed. Reg. 48,944, 48,994 (Aug. 12, 2013) (finding listing of blueback herring was not warranted and noting "uncertainties and data deficiencies."). Nor can the Services list species out of an abundance of caution. To do so would "result in all or nearly all species being listed as threatened." *See Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 947 (D. Or. 2007); *see also In re Polar Bear Endangered Species Act Listing & § 4(d) Rule Litig.*, 794 F. Supp. 2d 65, 110 n.53 (D.D.C. 2011) ("[Plaintiffs Center for Biological Diversity et al.] ha[ve] cited no instance where a court has found that the Service was required to list a threatened species as endangered based on the 'benefit of the doubt' standard, nor is the Court aware of any such authority.").[4]

In particular, given the inherent uncertainties and limitations of climate change modeling, consideration of speculative climate change effects in listings and critical habitat designations is contrary to the ESA's requirement to make decisions based on the "best scientific data available." Because climate change projections are based on large-scale models of future conditions, they could be erroneously applied when designating critical habitat on a local scale. As a result, FWS has recognized that there is significant disagreement and uncertainty regarding the sufficiency and accuracy of localized climate change projections for a species' habitat or population persistence. *See, e.g.*, 79 Fed. Reg. 47,522, 47,533 (Aug. 13, 2014) (withdrawal of proposal to list wolverine as threatened). Accordingly, any listing or critical habitat designation decision that is based, in whole or in part, on potential climate change effects is contrary to the terms and structure of the ESA, which guards against speculation.

Moreover, there have been instances where the Services have appeared to be pressured into rushed listing or designation decisions as the result of litigation, and/or have committed themselves to making listing or designation decisions in order to settle or resolve litigation. *See, e.g.*, 82 Fed. Reg. 39,160 (Aug. 17, 2017) (Atlantic sturgeon critical habitat designation). The Services should not allow litigation commitments to lead them to rush the scientific analysis required by the ESA, or to rely on speculative projections rather than sound scientific determinations. Doing so can result in listing decisions and critical habitat designations that are arbitrary and capricious, and that impose costs to regulated entities that far exceed benefits to the species.

[4] Likewise, where a listing petition does not present substantial scientific or commercial information that listing may be warranted under the five listing factors, the Services should make a 90-day finding that listing is not warranted. *See, e.g.*, 81 Fed. Reg. 1368, 1375 (Jan. 12, 2016) (FWS decision that status review of potential listing of Yellowstone bison as threatened or endangered is not warranted).

Consistent with the ESA's statutory requirements, the Services must ensure that listing decisions and critical habitat designations rely on the best available science, not on speculation and rushed decisionmaking.

D. The Services Should Revise the HCP Handbook to Remove or Modify Requirements to Assess Climate Change Impacts in HCPs.

On December 21, 2016, the Services announced the availability of the final, revised HCP Handbook. 81 Fed. Reg. 93,702 (Dec. 21, 2016). The HCP Handbook is intended to serve as a guide for the Services' staff and project proponents in developing HCPs, comprehensive planning documents that are required as part of an application for an ITP under ESA section 10. UWAG requests that the Services revise the HCP Handbook's ambiguous requirements for analysis of the effects of climate change and incorporation of those effects into conservation planning. As discussed above, any attempt to model climate change at a local or regional level is problematic, making analysis of such impacts complex, speculative, and fraught with uncertainties. As such, the Services should revise these provisions of the HCP Handbook to avoid confusion and increased costs and delays associated with HCP development.

To implement DOI's *Climate Change Adaptation Plan*, which mandates that FWS "integrate climate change adaptation strategies into its policies, planning, programs, and operations,"[5] the Services added guidance at various points throughout the Handbook instructing applicants and staff to address the effects of climate change in crafting and implementing HCPs. *See*, *e.g.*, HCP Handbook at 7-18, 9-48. UWAG members are concerned that, as a result of these new provisions, the Services will apply heightened, ambiguous requirements for ITP applicants to address the potential effects of climate change within an HCP. This will make developing an HCP more complex, in that consultants will have to address additional uncertainties and incorporate climate change models that may be new and/or untried. Moreover, it is not clear to what extent applicants will be required to analyze future impacts from climate change or account for those impacts with additional financial assurances.

For example, the Handbook provides that the applicant, in order to develop the HCP and analyze effects from plan implementation, will have to perform certain climate change analysis, and, "[g]iven the expected changes and effects to covered species and habitats from climate change . . . adjust the conservation strategy for those sensitive species to manage climate-related risks." HCP Handbook at 7-18 (emphasis omitted). This additional level of analysis may be new for many applicants and their consultants and could lead to additional delay and cost for project proponents. It would also increase the burden on the Services to review and coordinate with project proponents on this analysis. UWAG is concerned that more stringent requirements to provide particular analysis to account for the effects of climate change will lead to a more onerous and lengthy application process. Analysis of such impacts can be complex and fraught with uncertainties, and could lead to perpetual requests from the Services for more information.

[5] Department of the Interior, Climate Change Adaptation Plan, at 16 (2014), https://www.doi.gov/sites/doi.gov/files/migrated/greening/sustainability_plan/upload/2014_DOI_Climate_Change_Adaptation_Plan.pdf.

Accordingly, UWAG recommends that the Services amend the HCP Handbook to remove or modify requirements that a project proponent assess climate change impacts in their conservation plan. Repealing these requirements would be consistent with the Services' regulatory reform initiatives, the President's EO promoting energy independence,[6] which revoked certain energy and climate-related Presidential actions, including the Council on Environmental Quality's (CEQ's) 2016 greenhouse gas (GHG) guidance, and directed reconsideration of policies involving climate change. It would also be consistent with Secretary Zinke's concurrent order[7] directing the Department of the Interior to review, rescind, and/or modify its policies and guidance related to climate change, as appropriate.

E. The Services Should Issue a Revised Section 7 Consultation Handbook.

Section 7 requires federal agencies to consult with the Services whenever listed species or critical habitats may be affected by actions "authorized, funded, or carried out" by the agency, including authorizations of private parties' actions. 16 U.S.C. § 1536(a)(2). The federal agency, in consultation with the Services, must ensure that the proposed action is not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat. *Id.*

In 1998, the Services developed a handbook to assist staff and applicants navigate the consultation process. The goal of the Consultation Handbook is to provide examples and guidance to agency staff to encourage consistent implementation and application of consultation procedures. Although primarily targeted toward employees of the Services, other individuals participating in the consultation process, including other Federal agency staff, State, local, and tribal government staff, private individuals, consultants, and industry representatives, rely on the Consultation Handbook to help clarify and explain different aspects of the section 7 process.

The Consultation Handbook, however, is considerably out of date and should be updated to address important issues, such as the baseline and causation issues noted above. A revised handbook should provide a more streamlined approach to section 7 consultation to help reduce unnecessary burdens on Service staff, applicants, and action agencies and to allow the Services to better focus their efforts on more meaningful actions to conserve and recover species. Updating the Consultation Handbook would also serve the Services' regulatory reform goal of addressing policies that are outdated.

F. The Services Should Issue Guidance for Streamlined Section 10 Permitting.

To alleviate the regulatory burdens associated with the often lengthy and burdensome section 10 ITP process, the Services should allow for streamlined permitting in certain circumstances. The ESA authorizes the Services to issue permits for the "incidental" take of listed species for scientific purposes or for taking incidental to (and not the purpose of) the carrying out of an otherwise lawful activity. 16 U.S.C. § 1539(a)(1). Although FWS states that there is a one-year target permit processing time for an HCP requiring an Environmental Impact

[6] Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017).

[7] Sec'y of the Interior, Order No. 3349 (Mar. 29, 2017), https://www.doi.gov/sites/doi.gov/files/uploads/so_3349_-american_energy_independence.pdf (Zinke Order).

Statement (EIS) under NEPA,[8] for complex projects and activities, the process of completing an HCP and obtaining an ITP can take years.

For certain categories of industrial activities, it would be useful to have a general approach so that section 10 permits can be processed efficiently. For example, guidance establishing a streamlined approach to section 10 permits would be useful for facilities subject to EPA's section 316(b) Rule for existing facilities, discussed above. Streamlined section 10 permitting would serve the regulatory reform goal of making regulations more efficient and effective, and avoiding unnecessary costs.

G. The Services Should Repeal and/or Modify the Critical Habitat Rules.

The Services should repeal and/or modify the 2016 critical habitat and adverse modification rules.[9] The two rules amend the criteria for designating critical habitat and amend the regulatory definition of "adverse modification," thereby expanding and complicating the designation of critical habitat and adverse modification determinations. As a result, federal agency action subject to ESA section 7 consultation is much more likely to be found by the Services to result in a prohibited adverse modification of critical habitat. This, in turn, makes it more expensive, time-consuming, and difficult for UWAG members to conduct maintenance, repair, upgrades, expansion, and other projects. UWAG continues to have the same concerns that it raised in its comments on the proposed critical habitat and adverse modification rules.[10] UWAG also encourages DOI and the Department of Commerce to work together to address the issues it has raised. Repealing and/or modifying the critical habitat rules would serve the regulatory reform goals of addressing regulations that impose costs that exceed benefits, inhibit job creation, and are inconsistent with regulatory reform initiatives to alleviate unnecessary regulatory burdens.

II. FWS Should Withdraw or Modify Its 2016 Mitigation Policies.

On November 3, 2015, President Obama issued a formal memorandum directing key executive agencies, including FWS, to adopt policies incorporating federal principles for mitigation.[11] Specifically, the 2015 Presidential Memorandum directed FWS to finalize within one year a revised mitigation policy in support of the policy and principles outlined in the memorandum. 2015 Presidential Memorandum § 4(c), 80 Fed. Reg. at 68,746. In response, the

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[8] FWS, Endangered Species, HCPs – Frequently Asked Questions (last updated Apr. 14, 2015), https://www.fws.gov/midwest/endangered/permits/hcp/hcp_faqs.html.

[9] FWS & NMFS, Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat, Final Rule, 81 Fed. Reg. 7414 (Feb. 11, 2016); FWS & NMFS, Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat, Final Rule, 81 Fed. Reg. 7214 (Feb. 11, 2016).

[10] UWAG, et al., Comments on Three Endangered Species Act Critical Habitat Proposals of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service Published on May 12, 2014 (Oct. 9, 2014), Docket Nos. FWS-HQ-ES-2012-0096-0144, FWS-R9-ES-2011-0072-0126, FWS-R9-ES-2011-0104-0123; incorporated by reference and attached herein as Appendix 1.

[11] *See* Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, § 3 (Nov. 3, 2015), 80 Fed. Reg. 68,743, 68,745-46 (Nov. 6, 2015) (2015 Presidential Memorandum).

Service revised its 1981 Mitigation Policy, 46 Fed. Reg. 7644 (Jan. 23, 1981), and issued two new mitigation policies: an Overarching Policy and the ESA-specific Policy.[12] On March 28, 2017, President Trump issued an EO directing a review of the Obama Administration's energy and climate related policies. 82 Fed. Reg. 16,093 (Mar. 31, 2017). In particular, the EO rescinds the 2015 Presidential Memorandum. In accordance with the EO, on March 29, 2017, Secretary of Interior, Ryan Zinke, ordered[13] the DOI to review all DOI actions related to the 2015 Presidential Memorandum on mitigation for possible reconsideration, modification, or rescission.

As a result of the EO and the Zinke Order, FWS has been directed to review its mitigation policies. During this review, DOI should take into consideration UWAG's concerns expressed in detail in earlier comments[14] and UWAG's support for the withdrawal and/or modification of the mitigation policies. Below is a brief summary of UWAG's key concerns:

- Both policies raise significant questions regarding the Service's legal justification for the policies in light of the Service's limited legal authority to require mitigation under the ESA and the Service's previous determination that traditional mitigation is inappropriate for federal activities impacting listed species or their habitat.

- The policies create duplicative mitigation requirements that conflict with other agencies' regulatory requirements and are likely to lead to confusion regarding the overlapping regulatory requirements of the CWA section 404, NEPA, and ESA section 7.

- The FWS policies announced a mitigation goal to improve affected resources or a "net conservation gain" standard (instead of a "no net loss" standard). This is problematic because the Service does not have authority to require a "net gain." Moreover, a "net gain" standard lacks predictability and potentially conflicts with other federal mitigation programs.

- The FWS policies emphasize advance compensation, which is not always appropriate or feasible.

UWAG incorporates by reference and attaches herein as Appendix 2 its earlier comments on the mitigation policies. UWAG requests that both the Overarching Policy and ESA-specific Policy be withdrawn or modified. The policies would result in onerous mitigation requirements that are duplicative or conflict with other permitting program requirements and could result in major delays in federal permitting programs. This, in turn, would impose costs that exceed

[12] FWS, U.S. Fish and Wildlife Service Mitigation Policy, Notice of Final Policy, 81 Fed. Reg. 83,440 (Nov. 21, 2016) (Overarching Policy), and FWS, Endangered and Threatened Wildlife and Plants; Endangered Species Act Compensatory Mitigation Policy, Notice of Final Policy, 81 Fed. Reg. 95,316 (Dec. 27, 2016) (ESA-specific Policy).

[13] Zinke Order.

[14] UWAG, Comments on the Proposed Revisions to the FWS Mitigation Policy (May 9, 2016), Docket No. FWS-HQ-ES-2015-0126-0111; UWAG, Comments on Draft ESA Compensatory Mitigation Policy (Oct. 17, 2016), Docket No. FWS-HQ-ES-2015-0165-0088 (Appendix 2).

benefits, inhibit job growth, and increase regulatory burdens on the energy industry, in contrast to the Service's regulatory reform goals.[15]

III. UWAG Recommends that NMFS Take the Following Actions Specific to Its Jurisdiction.

A. NMFS Should Not List the Blueback Herring if the Best Scientific Information Available Is Insufficient to Draw Conclusions on the Species' Status.

The U.S. District Court for the District of Columbia recently remanded NMFS's decision not to list the blueback herring. *NRDC v. Rauch*, No. 15-198 (RDM), 2017 WL 1155688 (D.D.C. Mar. 25, 2017). The court directed that NMFS review the status of the blueback herring and publish by January 31, 2019, either a finding that listing is not warranted or a proposal to list the species as "threatened" or "endangered." Remedy Order at 1, *NRDC v. Rauch*, No. 15-198 (RDM) (D.D.C. May 31, 2017), ECF No. 58. The court held that the Service's conclusion that blueback herring are not threatened throughout their range was arbitrary and capricious because that conclusion depended on the Service's determination that the coast-wide stock complex and three of the four regional complexes were "stable," even though the NMFS conceded that it lacked statistically sufficient information to tell whether those discrete segments were actually stable or not. *Rauch* at *14-19, 2017 WL 1155688. Accordingly, the court ordered the Service on remand to conduct a new "through all of its range" analysis in which it may not, at least without rational explanation, accept evidence of regional declines as proof that the population is "stable." *Id.* at *21.

For all of the reasons discussed above, the Service must ensure that its decision on the blueback herring is based on the best available science, not on speculation and rushed decisionmaking. NMFS may not list a species where the best scientific information available provides insufficient evidence to allow the agency to draw a conclusion, and it may not list the blueback herring out of an abundance of caution. To do so would "result in all or nearly all species being listed as threatened." *See Trout Unlimited*, 645 F. Supp. 2d at 947. NMFS should not allow litigation commitments to lead it to rush the scientific analysis required by the ESA, or to rely on speculative projections rather than sound scientific determinations.

B. NMFS Should Modify and/or Withdraw the Critical Habitat Designation for Atlantic Sturgeon.

On August 17, 2017, NMFS issued its critical habitat designation for five listed distinct population segments of Atlantic sturgeon. 82 Fed. Reg. 39,160 (Aug. 17, 2017). NMFS designated collectively almost 4,000 river miles as critical habitat. The critical habitat designation is significant for UWAG members, many of which have facilities with cooling water intake structures or hydroelectric generating facilities located in waters within the Atlantic

[15] In addition, UWAG recommends that the Services consider identifying conservation and mitigation strategies not only in the context of incidental take permitting and section 7 consultation, but also prior to listing and in setting recovery goals for species.

sturgeon's range. This designation is one of the first major designations to rely on the Services' new critical habitat designation criteria and adverse modification definitions.

UWAG and the American Petroleum Institute (API) submitted extensive comments on the proposed designation expressing a number of concerns.[16] UWAG incorporates by reference and attaches herein as Appendix 3 those comments. Because the final designation raises many of the same issues, UWAG urges NMFS to reconsider the critical habitat designation for the Atlantic sturgeon. The designation exceeds the Service's statutory authority, is contrary to the ESA, and is arbitrary and capricious. Moreover, the broad designation is likely to impose significant costs without any real, commensurate conservation benefits for the Atlantic sturgeon.

In addition, it would be useful for NMFS to consider the current Atlantic States Marine Fisheries Commission stock assessment for the Atlantic sturgeon as part of their five-year review of the species status.

IV. Conclusion

UWAG appreciates the opportunity to comment on the agencies' important regulatory reform initiatives. We look forward to the agencies' thorough consideration of the foregoing recommendations to improve the ESA regulatory program.

[16] UWAG & API, Comments on Proposals to Designate Critical Habitat for Atlantic Sturgeon Distinct Population Segments, Docket ID Nos. NOAA-NMFS-2015-0107 & -0157 (Sept. 1, 2016), Docket Nos. NOAA-NMFS-2015-0107-0095, NOAA-NMFS-2015-0157-0182 (Appendix 3).

Appendix 1

October 9, 2014

Filed electronically at www.regulations.gov

Re: Comments on Three Endangered Species Act Critical Habitat Proposals of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service Published on May 12, 2014 (Docket Nos. FWS-HQ-ES-2012-0096, FWS-R9-ES-2011-0072, and FWS-R9-ES-2011-0104)

This letter provides the public comments of the American Petroleum Institute ("API"), Association of Oil Pipe Lines ("AOPL"), International Association of Geophysical Contractors ("IAGC"), Interstate Natural Gas Association of America ("INGAA"), Utility Air Regulatory Group ("UARG"), and Utility Water Act Group ("UWAG") (collectively, the "Energy Commenters") on three Endangered Species Act ("ESA") critical habitat proposals – two proposed rules and a draft policy – published by the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (collectively "the Services") on May 12, 2014.[1] Based on the close interrelationship of the three proposals, and the need for the regulated public and regulators to consider the proposals as a whole, the Energy Commenters have prepared one set of comments. We address each of the proposals separately herein.

The proposals would, if adopted as final rules and policy, significantly reshape and further complicate the critical habitat process, and unjustifiably expand the Services' authority to designate critical habitat. Land would be designated as critical habitat even if that land is "unoccupied" by the species, and contains none of the "physical or biological features" required by the species. Equally troubling, designations could rest on speculation about future conditions, such as *estimates* of future species needs and *projections* of local climate change impacts. At the same time, the proposals would vaguely define "adverse modification" as the direct or indirect *diminishment of the conservation value* of critical habitat. These and other aspects of the proposals would result in far more land designated as critical habitat, and far more activities restricted or blocked on the basis of adverse modification determinations. Significant cost, time, and regulatory burdens on the entities represented by the undersigned organizations, and harm to U.S. consumer and economic interests, would ensue, without commensurate benefit to listed species.

The proposals are undermined by a range of fundamental problems. The Services' expansive approach to the designation of critical habitat and adverse modification determinations ignores important statutory limits. The breadth of the Services' approach exceeds their statutory authority and lacks scientific justification, and the proposed terms are arbitrarily vague. The Services also fail to acknowledge or account for the significant economic burdens that would

[1] *See* 79 Fed. Reg. 27,066 (May 12, 2014) (Proposed Rule to Implement Changes to the Regulations for Designating Critical Habitat); 79 Fed. Reg. 27,060 (May 12, 2014) (Proposed Rule to Amend Definition of Destruction or Adverse Modification of Critical Habitat); and 79 Fed. Reg. 27,052 (May 12, 2014) (Policy Regarding the Implementation of Section 4(b)(2) of the Endangered Species Act).

result from the proposals. Substantial changes to, and narrowing of, the proposals are required as a matter of law and are warranted in the interest of sound policy. Specifically, the Services should reissue the proposed rules and policy after incorporating the recommendations in Section VI of these comments to allow meaningful and informed public comment.

We look forward to the Services' thorough consideration of the comments below.

Sincerely,

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Enclosure

Comments of American Petroleum Institute, Association of Oil Pipe Lines, International Association of Geophysical Contractors, Interstate Natural Gas Association of America, Utility Air Regulatory Group, and Utility Water Act Group on Three Endangered Species Act Critical Habitat Proposals of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service Published on May 12, 2014

October 9, 2014

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I. Introduction and Summary of Comments

The U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (collectively, "the Services") have proposed two rules and a new draft policy on critical habitat. First, the Services propose to amend the regulatory definition of "destruction or adverse modification" of critical habitat. 79 Fed. Reg. 27,060 (May 12, 2014). This proposal is based on the virtually unlimited concept of impacts to "conservation values" and would result in far more adverse modification determinations.

Second, the Services propose to amend those portions of the Endangered Species Act ("ESA" or the "Act") regulations that establish procedures for designating and revising critical habitat. 79 Fed. Reg. 27,066 (May 12, 2014). This rulemaking, if finalized, would allow the Services to designate land as critical habitat even where it is "unoccupied" by the listed species and contains none of the "physical or biological features" required by the species, based solely on *estimates* of future species needs, including estimates based on *projections* of climate change impacts in specific locations.

Finally, the Services request comment on a draft policy regarding exclusions from critical habitat designation. The Services state that the policy is intended to encourage voluntary private habitat conservation initiatives, 79 Fed. Reg. 27,052 (May 12, 2014), but the policy provides few assurances and appears to largely rely on onerous critical habitat requirements as encouragement for such initiatives.

For these reasons, and those explained in more detail below, the proposals exceed the Services' statutory authority, are contrary to the ESA, and are arbitrary and capricious. The proposed changes will result in broad, sweeping critical habitat designations that will impede critical economic growth, including activities undertaken by the undersigned organizations' members that are necessary to sustain the U.S. economy, without commensurate benefits to species. Substantial changes to and narrowing of the proposals are required as a matter of law and warranted as a matter of policy. American Petroleum Institute ("API"), Association of Oil Pipe Lines ("AOPL"), International Association of Geophysical Contractors ("IAGC"), Interstate Natural Gas Association of America ("INGAA"), Utility Air Regulatory Group ("UARG"), and Utility Water Act Group ("UWAG") (collectively, the "Energy Commenters") encourage the Services to adopt the recommendations discussed below in any final regulation or policy.

A. The Proposals Would Significantly Expand the Services' Approach to Designating and Protecting Critical Habitat.

Congress established important limits within the ESA governing the function of critical habitat. These limits were recognized by the Services in prior rulemakings. The Services' current proposals, however, would vastly expand their approach to designating and protecting critical habitat. As explained further below, the Energy Commenters believe that the proposed revisions are unsupported by the ESA and case law, and go far beyond the limits set by Congress.

The process for designating critical habitat must be narrowly and carefully tailored to serve its limited statutory purpose: allowing federal agencies to analyze whether a proposed agency action results in destruction or adverse modification of critical habitat. The Services must also recognize the extraordinary burdens, namely socio-economic impacts and restrictions on development of vital natural resources, that can result from designation of critical habitat, including an adverse modification finding. Finally, the regulations must account for the limits Congress imposed on the designation of critical habitat.

The three proposals ignore important statutory limits and exceed the Services' statutory authority. The proposed revisions to the definition of "adverse modification" would allow broader adverse modification determinations than authorized under the ESA. The proposed standard of "appreciably diminish conservation value" is arbitrarily vague, incorporates no meaningful limits, and is untethered to the statutory criteria. By defining "adverse modification" in a manner that includes effects that delay or preclude the growth or establishment of habitat features that would support species needs, the proposal would result in far more adverse modification and jeopardy determinations than under current regulations. In addition, the proposed revisions would allow adverse modification determinations based on new or future physical and biological features not present at the time of designation, which would be inconsistent with the record supporting designation. The vague "appreciably diminish" standard could be met in almost every instance, is inconsistent with case law, and cannot be applied to jeopardy determinations as the Services have suggested. Finally, the proposed adverse modification definition could result in significant confusion because the Services would apply the revised standard to critical habitat that was designated under prior regulatory criteria.

The proposed revisions to the Services' regulations on designating critical habitat would expand "occupied" critical habitat to include areas not (and likely never) *occupied* by the

species. The proposal removes "primary constituent elements" ("PCEs") from consideration in designating critical habitat, and replaces it with a broad and ambiguous requirement to identify "physical and biological features essential to the conservation of the species." *See* 79 Fed. Reg. 27,060 (May 12, 2014). The proposal inappropriately allows the Services to designate areas as critical habitat based on speculation about future conditions tied to climate change projections, rather than current features. The proposed revisions would thus allow for designation of areas based on speculation with no established methodology, rather than on the "best scientific data available," as the statute requires. Through adoption of a series of definitions and revisions to the regulations covering identification of critical habitat, this essentially limitless standard is contrary to the structure of the statute and Congressional intent.

Finally, the draft policy on voluntary conservation plans, such as habitat conservation plans ("HCPs"), Candidate Conservation Agreements with Assurances ("CCAAs"), and Safe Harbor Agreements ("SHAs"), may be intended to encourage private participation in such plans, but provides little assurance to property owners that participation in such measures would result in the exclusion of those areas from critical habitat designation. In most if not all cases, property owners should have assurances that areas covered by a voluntary conservation plan will be excluded from critical habitat designation. The emphasis on the Services' discretion, and the lack of incentives for property owners, undercuts the policy's "encouragement" of voluntary measures. Coupled with the onerous impacts likely to result from broader critical habitat designations and more frequent adverse modification findings, the draft policy would effectively shift federal land management obligations to nonfederal entities.

The Services also fail to acknowledge or account for the significant economic burdens that would result from the proposals. The Services assert that the rulemakings will not have a significant economic effect on small entities because the proposed rule merely "clarifies existing requirements for Federal agencies under the [ESA]," 79 Fed. Reg. at 27,065, 27,075, and thus only Federal agencies are directly affected by the rules. But this is far from the case. The proposals drastically change implementation of the ESA. The Energy Commenters' members, who are subject to consultation requirements under the ESA, would be significantly impacted by the increase in designation and adverse modification findings that would result from the proposed rules.

B. The Oil and Gas, Electric Utility, Land Development, and Other Key Industry Segments Would Be Harmed by the Proposals.

1. The Energy Commenters Represent a Wide Sector of Industry Impacted by These Proposals.

API is a nationwide, non-profit trade association that represents over 600 companies involved in all aspects of the petroleum and natural gas industry, from the largest integrated companies to the smallest independent oil and gas producers. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

AOPL is a national trade association that represents owners and operators of oil pipelines across North America and educates the public about the vital role oil pipelines serve in the daily lives of Americans. AOPL members transport more than 90 percent of the crude oil and refined petroleum products shipped through pipelines in the United States. AOPL members bring crude oil to the nation's refineries, natural gas liquids such as ethane, butane, propane, and carbon dioxide to manufacturers and industrial users, jet fuel to airports, and petroleum products to our communities, including all grades of gasoline, diesel, home heating oil, kerosene, propane, and biofuels. While the existing United States liquid pipeline network is extensive, new construction is required to transport energy liquids from new production areas across North America, including Oklahoma, Texas, North Dakota, Colorado, Montana, Pennsylvania, and Ohio, to existing refining and processing locations. Appropriate administration of the ESA regulatory program is essential to allow for necessary construction and maintenance of energy liquids pipelines to bring the benefits of the new domestic production to U.S. energy consumers. As an organization, AOPL represents its members before Congress, regulatory agencies, and the courts on key industry issues.

IAGC is the international trade association representing the industry that provides geophysical services (geophysical data acquisition, processing and interpretation, geophysical information ownership and licensing, and associated services and product providers) to the oil and natural gas industry. IAGC member companies play an integral role in the successful exploration and development of hydrocarbon resources through the acquisition and processing of geophysical data. Environmental issues, including ESA compliance, are a priority for IAGC

member companies. Over the years, IAGC member companies have consistently demonstrated their ability to conduct both land and seismic exploration in an environmentally responsible manner. IAGC proactively engages, on behalf of its members, with government agencies, such as the Services, in their development of regulations for both land and marine seismic operations.

INGAA is a non-profit trade association that represents the vast majority of the interstate natural gas transmission pipeline companies operating in the United States, as well as many comparable companies in Canada and Mexico. INGAA's United States members, which constitute approximately two-thirds of the interstate pipeline industry, operate a network of approximately 200,000 miles of pipelines. INGAA advocates regulatory and legislative positions of importance to the natural gas pipeline industry in North America, representing the interstate natural gas pipeline industry's interests in operational, engineering, environmental, safety, security and research and development matters before federal and state agencies.

Natural gas plays a prominent role in the nation's energy mix, and interstate natural gas pipelines are an integral part of the energy infrastructure. According to the 2014 INGAA Foundation study, *North American Midstream Infrastructure through 2035: Capitalizing on Our Energy Abundance*,[1] United States natural gas consumption is expected to approach 33 trillion cubic feet by 2035. The natural gas pipeline industry will need to add 338,800 miles of pipeline between 2014-2035. The INGAA Foundation report projected that the United States and Canada will need to invest $313 billion in the next twenty years on natural gas midstream assets, including new mainlines, natural gas storage fields, and lateral lines to and from storage, power plants, processing facilities, gas lease requirements, LNG export facilities, and related equipment. This amounts to approximately $14 billion per year through 2035 (using 2012 dollars).[2] Many of these projects may require consultation with the Services, and therefore clear and rational rules are important.

UARG is a voluntary, non-profit group of electric generating companies and organizations and national trade associations. UARG's purpose is to participate on behalf of its members collectively in rulemakings and other regulatory proceedings that affect the interests of

[1] INGAA Foundation, Inc., North American Midstream Infrastructure Through 2035: Capitalizing on Our Energy Abundance 19, 28 (March 18, 2014), *available at* http://www.ingaa.org/Foundation/Foundation-Reports/2035Report.aspx.

[2] *Id.*

electric generators and in litigation arising from those proceedings. Although UARG typically comments on matters arising under the Clean Air Act ("CAA"), UARG is submitting comments on the proposed rules because the issues presented have the potential to impact the electric generating industry in CAA proceedings.

UWAG is a voluntary, ad hoc, non-profit, unincorporated group of 191 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute, the National Rural Electric Cooperative Association, and the American Public Power Association. The individual energy companies operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. The Edison Electric Institute is the association of U.S. shareholder-owned energy companies, international affiliates, and industry associates. The National Rural Electric Cooperative Association is the association of non-profit energy cooperatives supplying central station service through generation, transmission, and distribution of electricity to rural areas of the United States. The American Public Power Association is the national trade association that represents publicly-owned (units of state and local government) energy utilities in 49 states, representing 16 percent of the market. UWAG's purpose is to participate on behalf of its members in federal agency rulemakings under the Clean Water Act ("CWA") and related statutes, such as the ESA, and in litigation arising from those rulemakings. UWAG is comprised of a diverse and extensive range of public and private entities whose activities are conducted nationwide. Many of the individual energy companies that comprise UWAG have public service obligations to ensure a reliable and safe supply of electricity to their customers. The supply of electricity throughout the country involves the construction, operation, and maintenance of electric generation facilities, transmission and distribution lines, and other system control facilities.[3] The construction of new generation facilities is needed to meet new federal and state energy and environmental requirements, and the construction of new transmission lines is needed to relieve congestion on the electrical grid, to wheel power between utilities, and to connect new

[3] Electrical transmission lines transfer bulk electrical energy from generation sources (such as power plants, wind farms, and solar facilities) to electrical substations located near areas of electrical energy demand centers, and electrical distribution lines transfer electrical energy from substations to customers in neighborhoods, commercial centers, industrial complexes, military and other government facilities, hospitals, and other facilities.

sources of electrical energy (such as wind and solar facilities) to the electrical grid – all of which serve to increase the reliability and diversity, and manage the cost, of electricity.[4] The administration of the ESA regulatory program, insofar as it affects the electric utility industry, is important not only to UWAG members, but also to the public at large, whose health, safety and general welfare depend on the reliable delivery of electricity.

The Energy Commenters' activities are essential to the reliable, safe and affordable supply of energy to U.S. consumers, which requires the construction and maintenance of thousands of miles of linear pipelines, electrical transmission and distribution lines, and power generation facilities.[5] As described further below, the proposals are likely to significantly impact the Energy Commenters' activities. For any proposed action that has a federal nexus, the Energy Commenters will be required to engage in lengthy and expensive consultation processes with the Services that may result in modification, delay, or other changes to their projects that will impact the Energy Commenters' ability to undertake, for example, utility line and pipeline construction and maintenance, with potentially significant adverse impacts on their customers' accessibility to reliable and secure energy supplies at a reasonable cost.

The proposals may also hinder generation from low-emission and renewable domestic resources, if the restrictions and burdens resulting from the proposals prevent the Energy Commenters' members from transitioning to such generation sources. As the push for low-emission and renewable energy increases, driven by national economic and security interests and environmental goals, the Energy Commenters' members are moving aggressively to undertake wind and solar projects to meet this demand. Electric utilities are also increasingly looking to

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[4] Pursuant to Congressional directive in the Energy Policy Act of 2005 to assess the reliability and adequacy of the bulk power system of North America, the North American Electric Reliability Corporation ("NERC") determined that construction of 17,833 miles of new high-voltage transmission lines is planned in the United States between 2011 and 2015, 84 percent of which is required for reliability purposes with the rest required to, among other things, address congestion and bring new resources on line. NERC, 2011 Long-Term Reliability Assessment, 34-36 (Nov. 2011), *available at* http://www.nerc.com/files/2011LTRA_Final.pdf.

[5] Steady and reliable energy is essential to our national security. *See* P. Parfomak, Cong. Research Serv., RL33347, *Pipeline Safety and Security: Federal Programs* 1 (Feb. 18, 2010) ("CRS Report"), *available at* https://opencrs.com/document/RL33347. For example, many of the Energy Commenters' members supply power or fuel to military installations, power plants and airports.

new natural gas generation plans for base load power. However, renewable energy projects often involve substantial footprints and require miles of new transmission lines to connect to the grid. New natural gas generation infrastructure is likely to face substantially greater costs and delays if the Services' proposals are adopted, greater swaths of land are designated as critical habitat, and the vague, overly broad standard proposed by the Services is adopted for adverse modification.

2. The Proposals Would Subject the Energy Commenters' Members to Additional Regulatory Requirements and Significant Expense.

The ESA protects critical habitat through section 7 consultation on federal agency action, which includes authorization of federal permits. Once critical habitat is designated, federal agencies are required to "insure," through ESA section 7 consultation with the Services, that any activity funded, carried out or authorized (*e.g.*, permits or rulemaking) is not likely to jeopardize the continued existence of a listed species or "result in the destruction or adverse modification" of critical habitat. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02. The Energy Commenters' members frequently undertake projects, such as oil and gas exploration and development, utility line maintenance and construction, pipeline operations and maintenance, and other energy projects, that require federal authorizations and thus trigger consultation under ESA section 7.

As discussed in more detail below, the Services' proposal to amend critical habitat designation criteria includes several new and revised definitions that would allow for broader critical habitat designations. These proposed changes would allow the Services to extend the reach of critical habitat well beyond what Congress intended, and the broader "adverse modification" standards will result in more adverse modification findings or more restrictions on activities to avoid such findings. These proposed revisions also indicate the Services' intent to increasingly designate areas not actually occupied by a listed species as critical habitat where the Services determine that, as a result of potential future or indirect effects (*e.g.*, climate change effects), the area is "essential to the species." The changes advanced in these proposals would result in substantial additional burdens, including costs and delays to the Energy Commenters, their members, supporting businesses, and consumers, and the inability to develop needed resources.

The Services' proposals give short shrift to the economic impacts of the proposed changes. The Services failed to consider the range and depth of costs the proposed rules would have on industry. The proposals impact activities on millions of acres of public and private land. For the Energy Commenters' members, the proposals will mean that more land that their

members use for power plants, transmission line corridors, oil and gas production, renewable energy facilities, or other important projects could be designated, now or in the future, as critical habitat.

The most obvious economic effects of critical habitat designations are increases in the costs of development, losses relating to the inability to proceed with development, and reductions in the size of projects because it will become more difficult to obtain necessary federal permits (*e.g.*, permits for renewable energy projects that may require miles of new transmission lines to connect to the grid and new natural gas generation plants). However, the economic effects of critical habitat designation go well beyond these costs.[6] As the Services well know, the process of land development and land use is complex, and numerous factors are involved. If land is set aside, or if the scale of the project is reduced, due to the presence of designated critical habitat, there could be market and regional effects from the designation. Other land will not necessarily be available or otherwise make up for project site reductions or losses due to designation. Critical habitat designation also impacts the development process, and any associated delay will impose additional costs on industry. The Services do not propose to compensate landowners, industry, or other regulated parties for any of these or other costs resulting from the designation of critical habitat.

The requirement to consult increases the cost to complete a project, and also imposes additional costs upon federal agencies involved with the consultation. Sources of costs to an applicant include the project applicant's own staff resources, and hiring outside consultants and attorneys to assist with the consultation process. For example, prior to the consultation and permitting process, a project applicant or its outside consultants will conduct desktop and field surveys for species and critical habitat. Desktop research is typically based on published information regarding the species and critical habitat features. Field surveys are done to confirm actual impacts as a basis for consultation and permitting. Both desktop and field surveys provide a basis for route and site planning and aid project teams in addressing avoidance, minimization and/or mitigation of impacts. If the Services' proposals are finalized, and the vague critical

[6] *See* David Sunding, "The Economic Impacts of Critical Habitat Designation," Giannini Foundation of Agricultural Economics, *available at giannini.ucop.edu/media/are-update/files/articles/v6n6_3.pdf*. In one example, Dr. Sunding estimates that total economic losses from critical habitat designations could be $1 million per acre of habitat conserved.

habitat designation language adopted, there could be confusion on survey protocols and inconsistent results. Moreover, there could be subjective and inconsistent guidance from the Services and their regional offices and staff. Ultimately, the Energy Commenters would expect an increase in economic burdens due to the need to expend additional resources during the consultation process.

Another direct cost of section 7 consultation is that the Services may require additional mitigation or avoidance measures above that required by the action agency. These requirements may not be established or utilized consistently across the Services' regional offices. For example, in the case of California vernal pools, the Services required that three acres of vernal pools be created for every one filled above the baseline. *See* David Sunding, "The Economic Impacts of Critical Habitat Designation," Giannini Foundation of Agricultural Economics, *available at giannini.ucop.edu/media/are-update/files/articles/v6n6_3.pdf*.

The section 7 consultation process may also force project proponents to redesign their project to avoid modification of certain areas deemed to be critical habitat. This project redesign typically reduces the output of the project. Using the vernal pool case as an example, additional section 7 conservation requirements consisted of avoidance of 85.7 percent of vernal pools located on the site, a condition that allowed only 14.3 percent of the project site to be developed. *Id.* Project redesign imposes additional costs and uncertainty on project proponents and property owners and has other impacts as well, including causing a shortage of available land for important projects.

Critical habitat designation can increase market prices for land not so designated (and, correspondingly, decrease the property value of land so designated), and thus it may impede a project proponent from undertaking a particular enterprise or reduce the scope of a proposed project in order to stay within a budget. It therefore can result in large costs where the numerous regulatory constraints bear on site selection. Moreover, critical habitat designations can create unfair advantages and disadvantages to companies within the same industry where, for example, one project is – and another project is not – subject to regulatory burdens from critical habitat designations. If critical habitat designations under the proposals increase, and additional swaths of land become too expensive or otherwise too difficult to use for commercial or other productive activities, affected entities are likely to find even fewer numbers of comparable sites that are available for their projects. The development process for many of the Energy

Commenters' projects is already highly constrained due to other physical and regulatory limitations on land use.

Critical habitat designation can also delay completion of projects. Delay affects project developers by pushing project deliverables further into the future, and delay of critical power line projects could harm grid resiliency. There is a strong national interest in a reliable and resilient electric grid. The cost impacts of critical habitat designation go well beyond the costs and outcome of the section 7 consultation process. The designation of critical habitat may also affect actions that do not have a federal nexus and thus are not subject to the provisions of section 7 through, for example, property value effects discussed above. Indirect impacts of critical habitat designation are those that may occur through other federal, state, or local actions.

Another concern is that designation of critical habitat, especially under the vague definitions proposed in these rulemakings, can impose costs on project proponents even if their project is not on critical habitat at all. Significant time, expertise, and expense is required to determine whether a parcel is actually included or not, and these additional costs will only rise under the proposals due to the vague and overbroad standards employed. Additional investigation will be required to determine the presence or absence of critical habitat on any given parcel. Thus, the practical effect is that the costs of critical habitat designation extend beyond the section 7 process.

The Services' failure to consider these economic impacts (and others) is a serious legal flaw. The Services should revise the proposals and prepare a draft economic analysis that fully considers the impacts of the revised proposals on regulated parties, the public, and, ultimately, the U.S. economy.

C. Substantial Changes to and Reissuance of the Proposals Are Required.

The Energy Commenters provide a number of recommendations throughout this document, as described below and summarized in the Conclusion. In short, the Energy Commenters recommend:

- The Services should abandon the "conservation value" standard and establish clear limits for adverse modification determinations using an existing, well-established methodology. If the Services insist on proceeding with the "conservation value" standard despite the serious objections explained in these comments, they must narrowly and clearly define the term.

- Areas should not be designated as critical habitat based on potential future effects. Future effects are best addressed through reviews and revisions to critical habitat, not at the time of designation.

- The draft policy should be streamlined, clarified, and provide assurances to participants in CCAAs/SHAs/HCPs that those areas will not later be designated as critical habitat.

- Based on the extent of the changes that are required as a matter of law and sound policy, the Services should reissue the proposed rules and policy after incorporating the recommendations in these comments to allow meaningful and informed public comment.

II. Statutory and Regulatory Background

A. When Congress Amended the ESA in 1978 to Address Designation of Critical Habitat, it Established Limited, Specific Conditions Governing Designation.

When the ESA was enacted in 1973, section 7(a)(2) of the Act required that federal agencies consult with the Services to insure that actions did not jeopardize listed species or "result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical." Pub. L. No. 93-205, 87 Stat. 884 (1973). The Act did not require the Services to designate critical habitat when listing a species as endangered or threatened, nor did it define the term "critical habitat." *Id.*

In 1978, following *TVA v. Hill*, 437 U.S. 153 (1978), in which the discovery of a small endangered fish delayed construction of the Tellico Dam, Congress revised the Act. The 1978 amendments included several new provisions relating to critical habitat, including a new requirement that, "to the maximum extent prudent," the Services "specify any habitat . . . considered to be critical" at the time it proposed to list a species. Pub. L. No. 95-632, 92 Stat. 3764 (1978) (codified at 16 U.S.C. § 1533(a)(3)(A)). Although procedurally tied to the listing of a species, Congress specified separate requirements and limits governing the Services' designation of land as critical habitat. For example, the designation of critical habitat must: (1) be "prudent and determinable," *id*. § 1533(a)(3)(A); (2) "tak[e] into consideration the economic impact" of designation, *id*. § 1533(b)(2); and (3) consider impacts on national security and any other relevant impacts, *id*.

These requirements are unique to critical habitat designation, and demonstrate Congress's intent to limit critical habitat designations and to ensure that the law strikes the proper balance between protecting species and allowing productive human activities. Indeed, the legislative history shows that Congress was concerned that, under then-current regulations, the Services

were treating areas covering the entire range of a species as "critical to the continued existence of a species" and, in particular, noted concern about "the implications of this policy when extremely large land areas are involved in a critical habitat designation." S. Rep. No. 95-874, at 948. For example, Senator Wallop from Wyoming stated:

> I share [Senator Garn's] concern that the entire Colorado River Basin could be, in one fell swoop, declared a critical habitat. I for my State and the Senator from Idaho for his State have expressed continued concern with the attempts of the Fish and Wildlife Service to designate enormous regions of our States as critical habitat for the grizzly bear.

95 Cong. Rec. S2899, at 1105-06 (July 19, 1978) (Statement by Sen. Wallop). Senator Wallop continued that the Senate bill's definition of critical habitat (which is substantially similar to the definition now contained in the law) "goes a long way" toward reducing the "rigidity" of the law. *Id.*

Accordingly, the 1978 amendments defined "critical habitat" narrowly and in detail. Congress described those features that must be found on the land to support designation and the steps that must be met to designate land as critical habitat – particularly unoccupied areas – as follows:

> (i) the *specific areas within the geographical area occupied by the species*, *at the time it is listed* in accordance with the provisions of section 4 of this Act, *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*; and (ii) *specific areas outside the geographical area occupied by the species at the time it is listed* in accordance with the provisions of section 4 of this Act, *upon a determination* by the Secretary *that such areas are essential for the conservation of the species*.

16 U.S.C. § 1532(5) (emphases added). Through this definition, Congress subjected the designation of *occupied* areas as critical habitat to five limits: (1) specific areas within the area occupied by the species; (2) at the time the species is listed; (3) on which are found physical or biological features; (4) essential to conservation of the species; and (5) may require special management considerations or protection.

Congress placed a further limit on the designation of *unoccupied* areas, requiring the Secretary to separately find that such designation is "*essential*" to the conservation of the species.[7] Moreover, Congress defined "conservation" in terms demonstrating that Congress did not intend designation of wide areas to be left fallow or unproductive, but instead *specific areas* where proactive efforts would be undertaken by government and other resource bodies to recover the species:

> … 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 this Act are *no longer necessary*. Such methods and procedures include, but are not limited to, all *activities* associated with *scientific resources management* such as *research, census, law enforcement*, *habitat acquisition and maintenance, propagation, live trapping, and transplantation*, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include *regulated taking*.

16 U.S.C. § 1532(3) (emphasis added).

Further demonstrating Congress's sensitivity to the impacts of designating critical habitat, even where designation would otherwise meet the statutory criteria, Congress provided that the Services may exclude areas where the benefits of exclusion outweigh the benefits of designation *unless* the Services determine that failure to designate the area "will result in the extinction of the species concerned." 16 U.S.C. § 1533(b)(2). Thus, Congress established limited, specific objectives for the designation of critical habitat, placed specific restrictions and limits on the Services governing that designation, and required the Services to consider all impacts – including economic impacts – of the designation of critical habitat. Congress

[7] The legislative history is instructive as to how Congress arrived at the requirement that such designation be "essential" to the conservation of the species. The House bill included a provision allowing for designation of critical habitat to include "specific areas *periodically inhabited by the species* which are outside the geographical area occupied by the species at the time of listing." 95 Cong. Rec. H14104, at 879 (Oct. 14, 1978) (Amendment Offered by Rep. Duncan) (emphasis added), while the Senate bill allowed for designation of critical habitat to include "specific areas outside the geographical area occupied by the species . . . . *into which the species can be expected to expand naturally*." S. 2899 (July 19, 1978) (emphasis added). During Conference, these provisions were removed, and the definition of "critical habitat" was revised to include only those unoccupied areas that are "*essential*" to conservation. Pub. L. No. 95-632, 92 Stat. 3764 (1978) (codified at 16 U.S.C. § 1532(5)).

specifically distinguished between occupied and unoccupied habitat by including more stringent requirements for designation of unoccupied habitat.

Finally, when viewed within the broader context of the overall statute, the limited purpose and function of critical habitat becomes all the more apparent. The overall framework and protection of the ESA focuses on species. Once a species is listed under the ESA, a wide range of protections are triggered. *See, e.g.*, 16 U.S.C. §§ 1533(f) (recovery planning), 1538(a) (prohibitions on take, impact, possession, transporting, etc.), 1535(c) (state cooperative agreements), 1533(d) (proactive regulations), 1533(e) (similarity of appearance measures), 1536(a)(1) (species conservation programs), 1536(a)(2) (interagency consultation), 1533(g) (species monitoring system). By contrast, only one limitation attaches to critical habitat under the ESA: during consultation, the Services must ensure that a proposed federal agency action does not adversely modify designated critical habitat. 16 U.S.C. §1536 (a)(2). Unlike listed species, critical habitat is not subject to the take prohibition, does not trigger a recovery plan, is not subject to monitoring after a species is delisted, and is otherwise not subject to the general statutory framework for listed species – all demonstrating Congress's intent that critical habitat serve a much more limited function under the ESA than the listing of a species.

B. When the Services Promulgated the Critical Habitat Regulations in 1984, They Recognized Many of These Important Statutory Limits.

The Services' 1984 critical habitat regulations provide that critical habitat should not be designated if doing so is not prudent or if critical habitat is not determinable. 50 C.F.R. § 424.12(a). Designation of critical habitat is not *prudent* under the current regulations if designation will increase the threat of taking or other human activity to the species and/or if designation would not be beneficial for the species. *Id.* § 424.12(a)(1). Designation of critical habitat is not *determinable* when information to analyze the impact of the designation is lacking and/or the biological needs of the species are not well known enough to enable identification of an area as critical habitat. *Id.* § 424.12(a)(2). The preamble to the 1984 regulations recognizes that all critical habitat designations must be based on finding that the "designated area contains features that are essential in order to conserve the species concerned. This finding of need will be a part of all designations of critical habitat, whether or not they extend beyond a species' currently occupied range." 49 Fed. Reg. 38,900, 38,903 (Oct. 1, 1984).

The statutory element of "physical or biological features essential to the conservation of the species," 16 U.S.C. § 1532(5), is emphasized in the current regulations by focusing

designations on the presence of PCEs essential to the species: "[w]hen considering the designation of critical habitat, the Secretary *shall focus on the principal biological or physical constituent elements* within the defined area that are essential to the conservation of the species." 50 C.F.R. § 424.12(b) (emphasis added). The regulations further provide that "[k]nown primary constituent elements *shall be listed* with the critical habitat description." *Id.* (emphasis added). The emphasis on the presence of such physical or biological features (or PCEs) for all designated areas, including unoccupied areas, is consistent with the function established by Congress for critical habitat – assessing the potential for adverse modification during section 7 consultation. This emphasis is reflected in the regulatory definition of adverse modification, which directly references the physical or biological features that were the basis for the critical habitat designation: "alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." *Id.* § 402.02.

The regulatory history further demonstrates that the Services intended unoccupied habitat to be designated only when designation of occupied habitat would be inadequate to ensure conservation. 50 C.F.R. § 424.12(e) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by the species *only when a designation limited to its present range would be inadequate* to ensure the conservation of the species.") (emphasis added).

The current regulations reflect not only important limits recognized by the Services following Congress's amendment of the ESA to provide for critical habitat designation – which represented a relatively contemporaneous interpretation of the various statutory limits and thus merits greater deference than a much later and contradictory interpretation – but also decades of regulatory practice and experience by the public. The Services have not sufficiently explained why they are undertaking a wholesale revision of the current regulations, which have been in place for decades.

III. The Proposed Definition of "Adverse Modification" Exceeds the Services' Statutory Authority, Is Contrary to Law, and Is Arbitrarily Vague.

The Services propose to revise the definition of "adverse modification" by introducing the amorphous concept of "conservation value," and allowing for adverse modification determinations based on new or future physical and biological features not present at the time of designation. *See* 79 Fed. Reg. 27,060 (May 12, 2014). Coupled with the Services' vague

interpretation of "appreciably diminish," these proposed revisions go beyond what the ESA authorizes and will result in overly broad adverse modification determinations.

A. The Legislative and Regulatory History Provides Important Context for the Limits Congress Established Governing the Function of Critical Habitat.

Federal agencies are required to "insure," through ESA section 7 consultation with the Services, that their actions (*e.g.*, permits or rulemaking) are not likely to jeopardize the continued existence of a listed species or "result in the destruction or *adverse modification*" of critical habitat. 16 U.S.C. § 1536(a)(2) (emphasis added); 50 C.F.R. § 402.02 (emphasis added). Although there is relatively little substantive discussion of the concept of "adverse modification" in the ESA's legislative history,[8] Congress placed specific limits on the designation of critical habitat.

Prior to Congress amending the ESA to define "critical habitat," the Services had promulgated a regulatory definition of the term: "any land, air, or water area . . . and constituent elements thereof, the loss of which would *appreciably decrease* the likelihood of conserving such species." *See* 43 Fed. Reg. 870, 874-75 (Jan. 4, 1978). In discussions leading up to the 1978 ESA Amendments, Congress expressed concern that the term "appreciably decrease" in the Services' initial regulatory definition of critical habitat could be misinterpreted to allow for designation of "all areas, the loss of which would cause any decrease in the likelihood of conserving the species so long as that decrease would be capable of being perceived or measured." *See* House Report No. 95-1625, at 749 (1978).

The House Committee was concerned that the previous regulatory definition of critical habitat "could conceivably lead to the designation of virtually all of the habitat of a listed species as critical habitat." *Id.* at 749. For this reason, though not adopted, the initial version of H.R.

[8] During Senate consideration of the 1973 ESA, Senator Cook noted that requiring federal agencies to consult to insure that actions "do not jeopardize the continued existence of endangered species" "did not go far enough as it did not protect the habitat of the endangered species," and he was therefore "pleased" that the bill included a provision that would require consultation to insure that actions would not result in the "destruction or modification of the critical habitat." Senate Consideration and Passage of S. 1983, with Amendments, at 397 (July 24, 1973) (Statement of Sen. Cook). The 1973 version of the ESA included the "destruction or modification of critical habitat" language. Pub. L. No. 93-205, 87 Stat. 884 (1973). The 1978 Amendments further narrowed the statutory standard by revising the language to read "destruction or *adverse* modification of critical habitat." Pub. L. No. 95-632, 92 Stat. 3764 (1978) (emphasis added).

14104 included that areas would be designated as critical habitat "only if their loss would *significantly decrease* the likelihood of conserving the species in question." *Id.* (emphasis added). Yet, as discussed below, the Services' proposed interpretation of "appreciably diminish" would result in the same type of sweeping determinations Congress specifically considered and sought to prevent.

In 1978, the Services promulgated regulations defining "destruction or adverse modification" as:

> a direct or indirect alteration of critical habitat which *appreciably diminishes* the value of that habitat for survival and recovery of a listed species. Such alterations include, but are not limited to those diminishing the requirements for survival and recovery listed in § 402.05(b). *There may be many types of activities or programs which could be carried out in critical habitat without causing such diminution*.

43 Fed. Reg. 870, 875 (Jan. 4, 1978) (emphasis added). The Services specifically noted that not every activity conducted in critical habitat areas would rise to the level of "adverse modification." Following the 1978 amendments, the Services modified the definition in the 1986 regulations, defining "destruction or adverse modification" as:

> a direct or indirect alteration that *appreciably diminishes* the value of critical habitat for *both* the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying *any of those physical or biological features that were the basis for determining the habitat to be critical*.

51 Fed. Reg. 19,926, 19,958 (June 3, 1986) (codified at 50 C.F.R. § 402.02 (2004)) (emphasis added). A portion of this definition was declared invalid by the U.S. Court of Appeals for the Fifth Circuit in *Sierra Club v. U.S. FWS*, 245 F.3d 434 (5th Cir. 2010), and the U.S. Court of Appeals for the Ninth Circuit in *Gifford Pinchot Task Force v. U.S. FWS*, 378 F.3d 1059 (9th Cir. 2004). Both courts held that the regulation set the threshold too high because it allowed an adverse modification finding only where an alteration appreciably diminished the value of critical habitat for "*both* the survival and recovery of a listed species," while the ESA establishes survival and recovery of listed species as separate goals. *Id.* Addressing these court decisions could have been as simple as deleting "both" and changing the "and" to an "or," rather than undertaking the wholesale and unwarranted changes the Services now propose.

After *Gifford Pinchot,* FWS issued guidance directing its regions not to use the regulatory definition of "destruction or adverse modification," but to rely instead on an analytical framework based on the language of the ESA itself, which requires that critical habitat be designated to achieve the twin goals of survival and conservation (*i.e.*, recovery) of listed species.[9] Thus, under current practice, the Services will find "adverse modification" if the impacts of a proposed action on a species' designated critical habitat would appreciably diminish the value of the habitat for *either* the survival or the recovery of the species.[10] The definition's focus on physical or biological features "that were the basis for designating the habitat to be critical" remains valid and appropriate under the current regulations.

B. The Proposed Adverse Modification Definition Is a Significant Departure from the Current Regulations.

The Services propose to amend the definition of adverse modification as follows:

> Destruction or adverse modification means a direct or indirect alteration that *appreciably diminishes* the *conservation value* of critical habitat for listed species. Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery.

79 Fed. Reg. at 27,061 (emphasis added).

The Services explain that:

> In consultation on a federal action, the Services will (1) determine the conservation value of the critical habitat that may be affected by the action; and (2) examine whether the effects of the action "appreciably diminish" that value of the critical habitat as a whole (i.e., whether recovery will be more difficult or less likely).

Id. at 27,064.

The Services' proposed definition replaces the concept of diminishment of the value of critical habitat for "survival and recovery," and the emphasis on the physical or biological features that were the basis for critical habitat designation, with a broad concept of diminishment of the "conservation value" of critical habitat. 79 Fed. Reg. at 27,061. The Services do not

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[9] Memorandum from FWS Acting Director Marshall Jones to Regional Directors, Region 1, 2, 3, 4, 5, 6, and 7, "Application of the 'Destruction or Adverse Modification' Standard under Section 7(a)(2) of the Endangered Species Act," Dec. 9, 2004.

[10] *Id.*

propose a definition for "conservation value." According to the preamble, however, "conservation value" is "the contribution the critical habitat provides, or has the ability to provide, to the recovery of the species." *Id*. at 27,062. The variables encompassing "conservation value" include: life-history needs of the species being provided for by critical habitat and current condition of the critical habitat, which requires consideration of the quantity and quality of features and habitat necessary to support the life-history needs of the species for recovery and the ability (or likelihood) for the critical habitat to fulfill its role in the recovery of the species. The term "conservation value" is both broad and undefined, leaving the regulated public to attempt to discern, the Services to interpret as they choose, and project opponents and litigants to argue as best suits their objectives. This broad, vague standard is inconsistent with the Services' previous definitions and interpretations and their view that "[t]here may be many types of activities or programs which could be carried out in critical habitat without causing such diminution." *See* 43 Fed. Reg. at 875. Consequently, the Services and the regulated public will have to interpret the meaning and define the application of a new term, which introduces further confusion, rather than clarity and certainty, into the regulations.

C. The "Conservation Value" Standard Violates the ESA, Is Overbroad, and Should Not Be Adopted.

In interpreting "conservation value," the Services rely on a standard set forth by the U.S. Court of Appeals for the Ninth Circuit in *NWF v. NMFS*, 543 F.3d 917 (9th Cir. 2008). The *NWF v. NMFS* decision was in the context of ESA section 7(a)(2) consultation and held that, for an action "to jeopardize" listed species, it has to cause "some deterioration in the species pre-action condition."[11] In the proposal, the Services analogize to this standard and state that "[w]e think the same is true for a finding of adverse modification (or destruction) of critical habitat – that is, in order for an action to be found to adversely modify critical habitat, it must in some way

[11] *NWF v. NMFS* stands for the proposition that a federal action that does not worsen the condition of the species cannot jeopardize listed species. The Ninth Circuit emphasized that action agencies are not required to include the "entire environmental baseline in the 'agency action' subject to review." 524 F.3d at 930. Instead, agencies are required to evaluate the effects of actions "within the context of other existing human activities that impact the listed species." *Id*. Thus, the proper focus is "whether the action effects, when added to the underlying baseline conditions, would tip the species into jeopardy." *Id.* at 929. Regardless of whether baseline conditions cause jeopardy to the species, the effect of the agency action must further jeopardize the species. *Id*.

cause the deterioration of the critical habitat's pre-action condition, which includes its ability to provide recovery support to the species based on ongoing ecological processes." 79 Fed. Reg. at 27,063.

The Services explain that determination of "conservation value" "is based not only on the current status of the critical habitat" but also includes "consideration of the likely capability, in the foreseeable future, of the critical habitat to support the species' recovery given the backdrop of past and present actions that may impede formation of the optimal successional stage or otherwise degrade the critical habitat." 79 Fed. Reg. at 27,062. Therefore, the Services state, "an action that would preclude or significantly delay the development or restoration of the physical or biological features needed to achieve that capability . . . is likely to result in destruction or adverse modification." *Id.* According to the proposed language, physical or biological features do not need to be present for adverse modification to occur. Preclusion or delay in the development of physical or biological features needed for recovery could be adverse modification. The inclusion of the term "conservation value" and the Services' proposed interpretation of that term are unsupportable for several reasons.

First, the proposal would establish a broad adverse modification standard with almost no limiting principle or accepted methodology. The Supreme Court's opinion in *UARG v. EPA* counsels that a statutory provision should not be interpreted as granting the agencies such essentially limitless authority. *UARG v. EPA,* 134 S. Ct. 2427, 2444 (2014). The Services' broad interpretation of "conservation value" focuses on effects that preclude or delay development of physical or biological features that support life history needs of species – in essence, anything that might slow an area of land to transitioning over time to a state beneficial to a species. Such a standard is without bounds and contrary to law. Virtually any area has the "potential to support" physical or biological features that support the life history needs of a species, especially in light of the Services' willingness to include areas "degraded by human activity." 79 Fed. Reg. at 27,061. Virtually any action, including an action that simply maintains the status quo (such as grounds maintenance), has the potential to "delay" the development of features. Accordingly, the potential for an adverse modification finding is nearly limitless.

Second, including the contribution critical habitat has to "the ability to provide" in the concept of "conservation value" introduces an element of speculation into "adverse

modification" determinations. Almost any area could be deemed to receive some "contribution" from critical habitat. This standard invites speculation about such potential contributions, which is contrary to the ESA requirement that agencies "use the best scientific and commercial data available" when conducting section 7 consultation. 16 U.S.C. § 1536(a)(2). *See also Bennett v. Spear*, 520 U.S. 154, 176 (1997) (confirming that the ESA must not be "implemented haphazardly, on the basis of speculation or surmise").

Third, this proposal creates a moving target whereby an action that would not be deemed adverse modification one day may be deemed adverse modification the next. The preamble states, "[w]ith time, new information may become available and enable us to refine our determination of the conservation value of the critical habitat." 79 Fed. Reg. at 27,062. Such uncertainty is arbitrary, will cause confusion and delay in section 7 consultations, and will lead the Services to violate basic administrative law principles if it makes adverse modification determinations based on factors that were not the basis for designation of the critical habitat.

The proposed "conservation value" standard is overbroad and violates the ESA. In practice, the broad interpretation would create significant uncertainty for the regulated public. This interpretation stands in sharp contrast to the specific definition of "conservation" used by Congress in the ESA, which focuses on proactive efforts by the government and other *actions* undertaken to protect or help a species, not on rendering land fallow in the hopes that it may become useful to species in the future. If the Services intend to proceed with the "conservation value" standard, they must narrowly and clearly define the term to ensure predictable, clear and statutorily supported application.

D. Finding Adverse Modification Based on New or Future Physical and Biological Features Is Arbitrary.

The Services propose to find adverse modification based on future, speculative effects. The proposed definition replaces the previous definition's inclusion of "alterations that adversely modify physical or biological features that were basis for determining the habitat to be critical," with the virtually unlimited concept of "effects that *preclude or delay development* of physical or biological features *that support life history needs of species.*" 79 Fed. Reg. at 27,061 (emphasis added). The Services state that an adverse modification finding may be made *even if* the area currently does not have the requisite "physical or biological features" and is "degraded by human activity," based on its "potential to support" those features in the future and the "delay" an action would cause to the development of those features. *Id.*

This approach would allow the Services to make adverse modification decisions based solely on impacts to unoccupied areas that are currently degraded by human activities and have no physical or biological features that support the life history needs of the species based solely on the potential of the area to support the future recovery of the species.[12]

Adverse modification based on new or future physical and biological features is arbitrary and inconsistent with the record supporting designation of critical habitat. For occupied areas, such physical and biological features must "*be found*" and in existence at the time of designation, not be based on the potential for such features to be found at some point in the future. 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Consideration of new physical and biological features of previously designated critical habitat during section 7(a)(2) consultation violates procedural and substantive provisions of the Administrative Procedure Act ("APA") because it is contrary to the basis for current designations and would effectively amend the basis for those designations without undertaking an APA-compliant rulemaking.[13] Consideration of future biological features also entails speculation, which is contrary to the "best scientific data available" standard and the Supreme Court's caution in *Bennett v. Spear* that the ESA must not be "implemented haphazardly, on the basis of speculation or surmise." 520 U.S. 154, 176.

E. The Proposed Standard for Determining "Appreciably Diminish" Is Vague and Contrary to Congressional Intent, Prior Regulatory Definitions of Adverse Modification, and Judicial Holdings.

The Services propose to define "destruction or adverse modification" as "a direct or indirect alteration that *appreciably diminishes* the conservation value of critical habitat for listed species . . . ." 79 Fed. Reg. at 27,061 (emphasis added). Currently, "appreciably diminish" means "to *considerably reduce* the capability of designated or proposed critical habitat to satisfy

[12] To the extent that designation of such an area would serve only experimental populations of a listed species, *see* 16 U.S.C. § 1539(j), critical habitat cannot be established for experimental populations unless such population is specifically found to be essential to the continued existence of a species. *Id.* § 1539(j)(2)(C)(ii). Moreover, Congress intended that regulations promulgated by the Services to designate experimental populations "should be viewed as an agreement among the Federal agencies, the state fish and wildlife agencies and any landowners involved." H.R. Rep. No. 567, 97th Cong., 2d Sess. Pt. 1 at 33-34 (1982).

[13] *See, e.g., Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 396 (D.C. Cir. 1973) ("[A] significant difference between techniques used by the agency in arriving at standards, and requirements presently prescribed for determining compliance with standards, raises questions about the validity of the standard.").

the requirements essential to both the survival and recovery of a listed species." FWS and NMFS, Joint Consultation Handbook at 4-36 (March 1998) (emphasis added). In their initial definition of adverse modification, the Services defined the term as an "alteration of critical habitat which *appreciably diminishes* the value of that habitat for survival and recovery of a listed species," and specifically stated that "[t]here may be many types of activities or programs which could be carried out in critical habitat without causing such diminution." 43 Fed. Reg. at 875.

Under the current proposal, when determining whether an action "appreciably diminishes" the value of critical habitat, the relevant inquiry will be whether there is "a diminishment to the value of the critical habitat that has some relevance because we can *recognize or grasp the quality, significance, magnitude, or worth* of the diminishment in a way that affects the conservation value of the critical habitat." 73 Fed. Reg. at 27,063 (emphasis added). The Services further state that "the question is whether the 'effects of the action' will appreciably diminish the conservation value of the critical habitat as a whole, not just in the area where the action takes place." *Id.* at 27,063. The Services will consider whether "recovery [will] be delayed, … more difficult, and … less likely." *Id.* at 27,064. Thus, under the proposed standard, the Services will look at aggregate effects of various actions on the conservation value of the critical habitat. *Id.*

The proposed standard is overbroad. The Services' new interpretation of "adverse modification" would allow for adverse modification findings based on any measurable effect. There would be few activities or programs that would not meet such a low standard of measureable effect. Mere recognition or discernibility of an effect is not enough to constitute "adverse modification." Such an interpretation is contrary to Congress's intent to strictly limit designations of critical habitat. Moreover, the proposed interpretation of "appreciably diminish" is inconsistent with case law that has upheld "no adverse modification determinations" in instances where there was a discernable loss in critical habitat. Indeed, courts have held that "[a]n area of a species' critical habitat can be *destroyed* without appreciably diminishing the value of critical habitat for the species' survival or recovery." *Butte Environmental Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 948 (9th Cir. 2010) (emphasis added) (finding FWS was not arbitrary in its no adverse modification determination where a portion of critical habitat for vernal pool fairy shrimp, vernal pool tadpole shrimp, and slender Orcutt grass would be

destroyed). *See also Forest Guardians v. Veneman*, 392 F. Supp. 2d 1082, 1092 (D. Ariz. 2005) (finding no adverse modification from a discernable loss in fairy shrimp habitat). The Services' proposed standard, which would allow for adverse modification determinations wherever there is some discernable diminishment in critical habitat, directly contradicts these holdings.

Even if the Services could use this flawed interpretation of "appreciably" to apply the adverse modification standard, they could not apply this interpretation to the "jeopardize the continued existence of" standard. 79 Fed. Reg. at 27,064 (noting that the Services intend to use this interpretation of "appreciably" when evaluating whether an action will "jeopardize the continued existence of" species). A new interpretation of the jeopardy standard incorporating the Services' new definition of the term "appreciably" is beyond the scope of this rulemaking. Nonetheless, according to the preamble, the proper inquiry for a jeopardy analysis will be, "[I]s the reduction one we can recognize or grasp the quality, significance, magnitude, or worth of in a way that makes a difference to the likely survival and recovery of the listed species?" *Id.* This goes well beyond the Services' current interpretation, which provides that the jeopardy analysis requires evaluation of whether "the species can be expected to both survive and recover." Consultation Handbook at 4-37. Nor does the proposed interpretation of "appreciably" make sense in the jeopardy context. Mere recognition of a change in population, for example, is not sufficient to establish jeopardy for that population. Thus, the Services should not apply their new interpretation of "appreciably" to their analysis of whether an action will "jeopardize the continued existence" of listed species, or at least not before undertaking a proper rulemaking consistent with the requirements of the APA.

In conclusion, the Services may not interpret "appreciably diminish" to mean any measurable or recognizable effect on critical habitat. Such an interpretation is far too broad, would lead to a situation in which any activity on critical habitat would result in adverse modification, and is contrary to Congressional intent, the ESA, and case law.

F. The Proposed Revisions Raise Retroactivity Concerns.

The Services' proposals assert that "[n]othing in these revised regulations is intended to require (now or at such time as these regulations may become final) that any previously completed biological opinions must be reevaluated on this basis." 79 Fed. Reg. at 27,062; 79 Fed. Reg. at 27,068. However, it is unclear how the proposed rules would apply to ongoing or

already completed consultations, or what the Services would do to ensure against improper retroactive application of the rules.

The proposals would create a situation where the Services will be applying the revised adverse modification standard to critical habitat that was designated under former regulatory criteria. For example, a particular area that was designated under the current regulatory framework would have been designated based on the presence of PCEs with the idea that adverse impacts to those PCEs could result in adverse modification. However, because the Services have removed the PCEs concept in the proposal, and, instead, are designating critical habitat based on potential effects to biological and physical features that may or may not have been absent at the time of designation, future adverse modification determinations are likely to not correlate with the original basis for the designation.

As discussed above, *Portland Cement* counsels that it is arbitrary and capricious to require compliance with a standard that is inconsistent with the original establishment of that standard. *See Portland Cement*, 486 F.2d at 396. Applying a new, revised adverse modification standard in section 7 consultation to critical habitat that was designated under a different regime raises questions about the new standard and is likely to result in a significant amount of confusion during section 7 consultation. As to completed consultations, re-initiation would be contrary to the principle that rules should apply prospectively only. *See, e.g., Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 215-16 (1988). With respect to consultations that are already underway at the time the rule is finalized, the new rules should not apply because they will cause confusion, the development of additional data and analysis, and thus delays that are completely contrary to the time limits on consultation specifically imposed by Congress.

G. The Implications for Oil and Gas, Electric Utility, Land Development, and Other Key Industries Are Substantial.

The Services have signaled their intent to make adverse modification a more searching inquiry in the section 7 consultation process. The proposal allows for a more expansive interpretation of the key term "adverse modification," gives the Services substantial discretion in interpreting the term, and suggests that the Services would take the position that adverse modification would result from any recognizable effect to critical habitat that has the potential to delay the development of physical or biological features. As a result, federal agency action subject to section 7 consultation is much more likely to be found by the Services to result in adverse modification of critical habitat. If a biological opinion reaches an adverse modification

conclusion, the Services must suggest reasonable and prudent alternatives ("RPAs"), such as those measures that avoid, minimize or mitigate the impacts to critical habitat. Currently, there are inconsistencies within the Services on the development, necessity, and effectiveness of RPAs. Nonetheless, such mitigation often requires costly and time consuming changes to the proposed project.[14]

Virtually every activity conducted on critical habitat could be argued to trigger an adverse modification finding. Any required project changes that may result from consultation and findings of adverse modification will make it more expensive, onerous, and difficult for the Energy Commenters to conduct their critical maintenance, compliance, repair, and expansion projects to supply the nation's energy needs.

Furthermore, the proposed revisions to the adverse modification definition will result in more confusion and less predictability for section 7 consultation on the Energy Commenters' projects. Because the standard is extremely vague and broad, whether the Services determine that a proposed action will result in adverse modification could vary, based on the particular regulator reviewing the issue. For example, if a gas company wants to run a transmission line across land that is not currently occupied by any listed species and has no physical or biological features essential to the conservation of species, but nonetheless is listed as critical habitat because the land might develop these characteristics and species might go there in the future, the company must figure out what it needs to do to avoid an adverse modification determination. This determination is not only daunting in and of itself (*e.g.*, should the mitigation be the preservation of land with no current conservation value but which may transition to potential critical habitat over the same time frame as the property subject to the proposed impacts), but

[14] For example, in its recent consultation with EPA regarding the Pesticide General Permit, NMFS provided a multi-pronged RPA that included measures such as a prohibition on the application of pesticide products within specified buffers of salmonid habitats. NMFS, Biological Opinion on the Effects of the Proposed Registration of Pesticide Products Containing Carbaryl, Carbofuran, and Methomyl (Apr. 2009), *available at* http://www.nmfs.noaa.gov/pr/pdfs/carbamate.pdf. EPA agreed to implement these measures identified by NMFS, with some modifications, to avoid both jeopardy and adverse modification of critical habitat. Letter from Richard P. Keigwin, Director, USEPA Pesticide Re-evaluation Division, to James H. Lecky, Director, NMFS Office of Protected Resources (May 14, 2010), *available at* http://www.nmfs.noaa.gov/pr/pdfs/consultations/epa_response_biop2.pdf.

ultimately may mean modifying the project, finding a new location for the transmission line, or agreeing to higher mitigation costs.

In addition, the proposed adverse modification standard could increase the Services' (and the Energy Commenters' members') vulnerability to litigation. Because the standard is vague and broad, there will be room for wide interpretation in its application, which is likely to result in challenges to the results or adequacy of section 7 consultation. Such litigation is costly, and often significantly delays the projects at issue. Where the Energy Commenters' projects involve critical upgrades to infrastructure, it is important that the Energy Commenters are able to rely on receiving their necessary authorizations in a timely manner to ensure that the work can be done on a predictable schedule.

IV. The Proposed Changes to Critical Habitat Designation Criteria Exceed the Services' Statutory Authority, Are Contrary to Law, and Are Arbitrarily Vague

A. Congress Established Limited Objectives for – and Placed Significant Limits on – the Designation of Critical Habitat.

The Services' proposal would amend the criteria for designating critical habitat, resulting in broader critical habitat designations of areas occupied by the species that go well beyond what was intended by Congress, and even beyond the areas the Services have historically deemed to be critical habitat. Section 4 of the ESA requires the Services to designate critical habitat for each newly listed species "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3)(A). As described above, Congress set forth specific considerations and requirements governing the designation of land as critical habitat including:

- the designation must be "prudent and determinable." *Id.* § 1533(a)(3)(A).
- the designation must "tak[e] into consideration the economic impact" of the designation. *Id*. § 1533(b)(2).
- the designation must consider impacts on national security and any other relevant impacts. *Id*. § 1533(b)(2).

Moreover, the legislative history and statute confirm that Congress defined "critical habitat" to carefully circumscribe those features that must be found on the land to support designation and the steps that must be met to designate unoccupied land as critical habitat. According to the statute, critical habitat is:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of

> section 4 of this Act, 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; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5).

Congress defined "conservation" in terms demonstrating that Congress did not have in mind designation of wide areas to be left fallow or unproductive, but instead specific areas where action would be taken by government and other resource bodies to recover the species:

> 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 this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

16 U.S.C. § 1532(3).

Congress also provided that the Services may exclude areas from the designation of critical habitat where the benefits of exclusion outweigh the benefits of designation unless the Services determine that failure to designate the area "will result in the extinction of the species concerned." *Id*. § 1533(b)(2).

B. The Proposed Rule's Attempt to Substantially Expand the Criteria for Designation of Critical Habitat Is Arbitrary and Contrary to Law.

The proposed changes to the procedures for designating critical habitat would afford the Services far greater latitude in designating critical habitat and result in more frequent and larger designations of critical habitat than permitted under the ESA. The proposed rule states the Services' intent to increasingly designate unoccupied areas where, for example, the Services find that the area will become "essential to the species" as a result of projected local climate change impacts (such as warming conditions). This approach is arbitrary, contrary to law, and will lead to onerous regulatory burdens on the public and regulators alike.

1. By Removing "Primary Constituent Elements" and Adding a New Definition of "Physical or Biological Features," the Proposed Rule Provides an Impermissibly Broad Standard.

The proposed rule would abandon the requirement that the Secretary focus upon and list PCEs when designating critical habitat. *See* 79 Fed. Reg. at 27,070. PCEs are quantifiable, scientifically-based criteria that provide a consistent, objective direct measure of potential critical habitat. Instead, the proposed rule adopts a broader, less objective requirement to identify "physical and biological features essential to the conservation of the species," which can include "dynamic or ephemeral" habitat features. *Id.* Thus, physical and biological features essential to a species would not need to be present so long as the habitat has the potential to support such features under the proposed rule.

The Act provides for designation of critical habitat in areas occupied by the species "on which *are found* those physical or biological features (I) essential to the conservation of the species and (ii) that may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i) (emphasis added). The Services' current regulations provide that, "[w]hen considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species." 50 C.F.R. § 424.12(b). Thus, the current regulations emphasize identification and listing of PCEs, which are defined as including roost sites, nesting grounds, spawning sites, water quality, soil type, etc. *Id.*

The proposal defines "physical or biological features" as "the features that support the life-history needs of the species, including but not limited to water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features." 79 Fed. Reg. at 27,069. According to the preamble, physical or biological features may include "habitat characteristics that support *ephemeral or dynamic habitat conditions*," such as vegetation that exists only 5 to 15 years after a flood event. *Id.* at 27,069. Thus, the Services could conclude that essential physical or biological features exist in a specific area, even if the features have been absent or are not expected to be present for years. *See id.* at 27,070. The proposed rule would allow for the designation of areas with the absence of physical and biological features based on a "reasonable expectation of that habitat occurring again." *Id.* at 27,070.

Designation of areas based on potential future occurrence of features is contrary to the Act's definition of critical habitat, which allows for designation of occupied areas on which

essential physical or biological features "are found." *See* 16 U.S.C. § 1532(5)(A)(i). The Act does not allow designations where such features *may* be found in the future. In fact, courts have rejected such a practice in the past. *See, e.g., National Home Builders Ass'n v. FWS*, 268 F. Supp. 2d 1197, 1216-17 (E.D. Cal. 2003) (invalidating FWS designation of areas "likely to develop essential habitat components, but do not contain them now," as occupied critical habitat for the Alameda whipsnake); *Cape Hatteras*, 344 F. Supp. 2d at 122–23 (vacating critical habitat that included areas FWS determined to be "occupied" by the piping plover but on which PCEs were not "found"); *Otay Mesa Property v. Dept. of Interior*, 646 F. 3d 914, 918 (D.C. Cir. 2011) (vacating designation of property as critical habitat because record did not support FWS's determination that property at issue was "occupied" at time of listing); *Alaska Oil and Gas Ass'n v. Salazar*, 916 F. Supp. 2d at 1001 (vacating designation of critical habitat for polar bear because Service had not established that such areas contained essential features, thereby violating the requirement that essential features be *found* in areas *before* designating them as critical habitat). The *Cape Hatteras* court concluded "[t]hat PCEs must be 'found' on an area is prerequisite to the designation of that area as critical habitat. The Service's argued-for interpretation, essentially that designation is proper merely if PCEs will likely be found in the future, is simply beyond the pale of the statute." 344 F. Supp. 2d at 123. The statute and case law are clear – the Services may not lawfully designate critical habitat based on features not actually present within the area at the time of designation.

In addition, the ESA requires that critical habitat determinations be based on the "best scientific data available." 16 U.S.C. § 1533(b)(2). Allowing for designation of areas based on physical or biological features that have been absent for years and may or may not occur again will result in overly broad critical habitat designations, is inconsistent with the ESA and case law and is speculative. *Bennett v. Spear*, 520 U.S. at 176.

In addition, the proposed rule would impermissibly allow the Secretary to ignore site-specific evidence that physical and biological features are not found on a particular property and designate critical habitat in the absence of features that are essential for the conservation of the species. Under the proposed revision, the Services would still identify physical and biological features essential for the conservation of the species, but only at a "scale determined by the Secretary to be appropriate." 79 Fed. Reg. at 27,071. In making this determination, the Secretary "may consider, among other things, the life history of the species, the scales at which

data are available, and biological or geophysical boundaries (such as watersheds)." *Id.* Thus, the proposed rule reserves broad discretion for the Services in determining the scope and "scale" of critical habitat designations. Areas could be designated as critical habitat despite having no features essential to a species simply because they fall within a larger area that has such features on a broader scale. This is both arbitrary and contrary to the "best available science" standard mandated by the ESA and the Supreme Court.

In sum, the proposed rule establishes an especially broad basis for designating critical habitat, which far exceeds the lines drawn by Congress with respect to "physical or biological features" found on occupied habitat and essential to actual "conservation" actions benefiting the species. In tandem with the Services' elimination of PCEs, the burdens on the regulated public will be extensive because the new standard will result in sweeping critical habitat designations and increased confusion during section 7 consultation.

2. The Proposed Rule's New Definition of "Geographical Area Occupied by the Species" Is Overbroad.

The current definition of critical habitat does not include a definition of "geographical areas occupied by the species." The proposed rule, for the first time, defines this term as:

> the geographical area which may be delineated around the species' occurrences, as determined by the Secretary (i.e., range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

79 Fed. Reg. at 27,069. This definition does not limit critical habitat to the set of areas occupied by the species. Rather, in addition to the areas actually occupied by the species, it includes a wider area *around* the species' occurrences at the time of listing and areas that are used only periodically or temporarily by the species.

The preamble asserts that "occupied" areas "include areas that are used only periodically or temporarily by a listed species during some portion of its life history, and is not limited to those areas where the listed species may be found more or less continuously." 79 Fed. Reg. at 27,069. But designating areas where species are not actually found as occupied critical habitat areas goes beyond what the statute allows. In the ESA, Congress specified that areas *outside* the geographical area occupied by the species may be designated only upon a separate, specific,

additional determination by the Secretary that doing so is essential to the conservation of the species.[15]

The Services claim that this definition is consistent with the U.S. Court of Appeals for the Ninth Circuit's decision in *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010). The Services characterize *Arizona Cattle Growers* as holding that temporary presence is a sufficient basis to include an area as designated critical habitat. *See* 79 Fed. Reg. at 27,069. Yet, the Services' proposed definition for areas occupied by the species goes well beyond *Arizona Cattle Growers*, which held that limiting areas "occupied" by the species to areas where the species "resides" was too narrow and "would exclude areas likely to be *regularly used* by the species." 606 F.3d at 1165 (emphasis added). The court concluded that "FWS has authority to designate as 'occupied' areas that the [species] uses *with sufficient regularity that it is likely to be present during any reasonable span of time*." *Id.* (emphasis added).[16] But, in the proposals, the Services ignore this limiting language and instead propose to designate habitat as occupied "even if *not* used on a regular basis." *See* 79 Fed. Reg. at 27,069 (emphasis added).

Rather than limit "occupied" critical habitat to areas that are likely to be used by species with some regularity, as the statute and *Arizona Cattle Growers'* require, the Services' circle-drawing approach would necessarily include areas not (and likely never) occupied by the species, such as ridgelines between valleys. This proposal is therefore unsupported by the statute or the case law.

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[15] The critical habitat definition in the House bill included the language "specific areas *periodically inhabited by the species* which are outside the geographic area occupied by the species . . . essential for the conservation of the species." 95 Cong. Rec. H14104, at 879 (Oct. 14, 1978) (Amendment Offered by Rep. Duncan) (emphasis added).

[16] *See also Cape Hatteras Access Preservation Alliance v. Dept. of the Interior*, 344 F. Supp. 2d 108 (2004) (deferring to the FWS interpretation of areas "occupied" by the piping plover where the Service looked for areas with "consistent use," where "observations over more than one wintering season" demonstrated plovers' presence); *Alaska Oil and Gas Ass'n v. Salazar*, 916 F. Supp. 2d 974, 988-89 (D. Alaska 2013) (deferring to FWS interpretation of areas "occupied" by the polar bear as "areas that the [species] uses with sufficient regularity that it is likely to be present during any reasonable span of time").

3. The Proposed Definition of "Special Management Considerations or Protection" Fails To Acknowledge the Statutory Purpose of Critical Habitat Designation in the First Place.

In determining what areas should be designated as critical habitat under the ESA, the Services must consider "those physical and biological features that are essential to the conservation of a given species and *that may require special management considerations or protection*." 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Consistent with Congress's definition of "conservation," the Services currently define "special management considerations or protection" as "any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species." 50 C.F.R. § 424.02(j).

The Services propose to revise the definition of "special management or protection" to insert the words "essential to" and delete "of the environment." The preamble states, "[w]e expect that, in most circumstances, the physical or biological features essential to the conservation of endangered species may require special management in all areas in which they occur." 79 Fed. Reg. at 27,070. The Services further state that, in light of the court decision in *Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090 (D. Ariz. 2003), and *Cape Hatteras*, 344 F. Supp. 2d 108, the Services no longer interpret the statute as requiring special management only if whatever management in place was inadequate and additional management is needed. 79 Fed. Reg. at 27,070. Nor will the Services interpret the statute to mean that a feature must currently require special management considerations or protections – only that it *may* require special management to meet the definition of "critical habitat." *Id.* Rather, the consideration of whether features in an area may require special management or protection will be made "independent of whether any form of management or protection occurs in the area" or "whether such management or protection is adequate." 79 Fed. Reg. at 27,070. Although there could be circumstances where essential features do not require special management because there are no applicable threats to the features that have to be managed for the conservation of the species, the Services "expect such circumstances to be rare." *Id.*

The Services' statements indicate that they intend to pay little attention to the requirement that areas should be designated as critical habitat only if they may require "special management considerations or protection." This proposed approach is contrary to the wording of the statute and to relevant case law, which recognizes that the Services cannot simply presume that the special management considerations or protections requirement is met for designation

purposes. "While the word 'may' indicates that the requirement for special considerations or protection need not be immediate," *Cape Hatteras*, 344 F. Supp. 2d at 123-24, "[u]nder the express language of the statute, particularly the use of the conjunction 'and,' it is mandatory that the specific area designated have features which, in the future, may require special consideration or protection." *Home Builders*, 268 F. Supp. 2d at 1218.

Moreover, the district court's decision in *Center for Biological Diversity v. Norton* fails to account for the remainder of the Act's emphasis on other management and fails to give any meaning to the term "special." The term "special" means additional or incremental and must take account of efficacy of existing management, which, if adequate, should mean that no critical habitat designation is needed. It is contrary to the ESA to say that an area which is adequately managed may require "special management consideration," unless there is a documented basis for believing the current management will fail. Thus, the Services' interpretation ignores the structure of the ESA, which takes account of state management in listing and strongly encourages state and private conservation efforts.

The Services must give this requirement meaningful consideration. Prior to designating a particular area as critical habitat, the Services must make a finding that the area in question might require special management considerations now or in the reasonably foreseeable future and that current or projected management will not be adequate to protect the species.[17] By essentially eliminating a criterion set by Congress for designating areas occupied by the species as critical habitat, the Services fail to acknowledge the statutory purpose of critical habitat designation – designation of areas for the purpose of conservation.

4. The Services' Interpretation of "Interbreeds When Mature" Is Unlawful.

The ESA defines the term "species" to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which *interbreeds when mature*." 16 U.S.C. § 1532(16) (emphasis added). The term "interbreeds when mature" is not defined in the statute or the regulations. The Services do not propose to

[17] *See Cape Hatteras*, 344 F. Supp. 2d at 124 (vacating and remanding critical habitat determination where FWS failed to assess special management or protection "in any meaningful way"); *Home Builders*, 268 F. Supp. 2d at 1218 (vacating and remanding critical habitat determination where FWS failed to make a finding that the area in question might require special management considerations and protections at some time in the future).

make any revisions to the regulations to clarify this ambiguous term; instead, in the preamble, the Services "inform the public of [their] longstanding interpretation of this phrase." 79 Fed. Reg. at 27,070. According to the Services, "interbreeds when mature" means that a distinct population segment ("DPS") must consist of "members of the same species or subspecies that in the wild that would be biologically capable of interbreeding if given the opportunity but all members need not actually interbreed with each other." *Id.*

This interpretation allows for listing of a broader DPS made up of different populations that do not actually interbreed and effectively removes the "interbreeds when mature" requirement from the statutory definition of DPS. There is no legal support for this interpretation, which goes further than what Congress intended: species that are actually interbreeding, not "capable of interbreeding." Again, the Services seek to expand definitions of key concepts beyond what the ESA allows to enable broader critical habitat designations.

C. The Proposal Inappropriately Attempts to Designate Unoccupied Areas as Critical Habitat Based on Potential Effects, Including Climate Change.

The preamble indicates that the Services increasingly intend to designate specific areas not actually occupied by the species at the time of listing. *See* 79 Fed. Reg. at 27,073. Thus, the proposal removes the presumption in the existing regulations that unoccupied areas will only be designated as critical habitat where the species' present range would be "inadequate" to ensure the conservation of the species. Designating areas as critical habitat based on potential effects, including climate change, results in impermissibly broad designations of critical habitat and is contrary to law.

1. The Proposed Revisions Arbitrarily Alter the Services' Prior Interpretation That Designation of Occupied Areas Must Be Inadequate in Order for Unoccupied Areas To Be Essential.

The current regulations provide, "[t]he Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). The Services now assert that the provision is "unnecessary" and "limiting," and thus propose to remove it. *See* 79 Fed. Reg. at 27,073.

The Energy Commenters oppose this revision. As it relates to unoccupied areas, the term "essential" means that without those areas being designated (*i.e.*, if only occupied areas are designated), the remaining designated habitat would not be adequate for conservation of the

species. Thus, to determine whether unoccupied areas are "essential" to the conservation of the species, the Services must first consider occupied habitat. The proposed revision ignores the current regulatory requirement that unoccupied habitat is essential only if occupied habitat is inadequate. The Ninth Circuit in *Arizona Cattle Growers* recognized the distinction in the ESA between occupied and unoccupied areas, noting that the ESA imposes a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species." 606 F.3d at 1163; *see also Cape Hatteras*, 344 F. Supp. 2d at 125 ("Designation of unoccupied land is a more extraordinary event than designation of occupied lands."). The Services' proposed new approach is contrary to law. Current regulations require the Services to first establish that designation of occupied areas is insufficient before considering the designation of unoccupied areas because if designation of occupied areas would be adequate, then the unoccupied areas cannot be "essential."

2. The Designation of Unoccupied Areas Based on Potential To Support Life Needs Is Unlawful.

Under the proposed regulation, the Services will determine whether unoccupied areas are essential for the conservation of the species by considering "the life history, status, and conservation needs of the species." 79 Fed. Reg. at 27,073. The Services state that "unoccupied areas must be essential for the conservation of the species, but need not have the features essential to the conservation of the species . . . ." *Id.* Therefore, the Services assert that they may designate areas "that do not yet have the features, or degraded or successional areas that once had the features, or areas that contain sources of or provide the processes that maintain the features as areas essential to the conservation of the species . . . This proposed section is intended to be flexible." *Id.*

With this proposal and the "flexible" standard, the Services inappropriately attempt to make it easier to support a finding that unoccupied areas should be designated. This is contrary to the ESA and case law.[18] An interpretation that ignores or shifts this dynamic would "nullify

[18] Moreover, this standard for the designation of unoccupied areas is essentially limitless. The Supreme Court's recent decision in *UARG v. EPA* explains that the Supreme Court expects Congress to provide a clear directive if it intends to allow for such vast regulatory authority. 134 S. Ct. 2427, 2444 (2014). In *UARG*, the Court held that despite the fact that the law may assume a general definition (or an "act-wide" definition in the case of the Clean Air Act), it may be appropriate to infer a more narrow definition in the context of a specific provision. *Id.* at 2442

the distinction between occupied and unoccupied land, a distinction Congress expressly included within the ESA." *Home Builders*, 268 F. Supp. at 1221.

In addition, designating unoccupied areas based on potential circumstances is speculative and not based on the "best available science" as the Act and the Supreme Court require. *See Bennett v. Spear*, 520 U.S. at 176. Moreover, allowing for such imprecise, flexible, and speculative critical habitat designations is contrary to the structure of the statute and implementing regulations, which provide for revision of critical habitat (at any time) when supported by actual evidence of the habitat having developed features essential for the conservation of the species. 16 U.S.C. § 1533(a)(3)(A)(ii); 50 C.F.R. § 424.12(g). This statutory provision governing revision is intended to allow changes to critical habitat based on actual evidence of the need for such expansion and reinforces the view that current designations should be based on actual evidence, not speculation, because when and if new evidence arises demonstrating the need for changes to any designated critical habitat, the review will evaluate that evidence and make any appropriate proposals for revision. For these reasons, the proposed revision to allow for designation of unoccupied habitat based on potential to support life needs is unlawful under the ESA.

3. The Proposal Inappropriately Attempts To Base Designations on Climate Change.

The preamble to the proposal indicates that the Services intend to increasingly rely on the authority to designate specific areas not actually occupied by the species at the time of listing. 79 Fed. Reg. at 27,073. The Services specifically note that, "[a]s the effects of climate change continue to influence distribution and migration patterns of species, the ability to designate areas that a species has not historically occupied is expected to become increasingly important." *Id.* As an example, the Services suggest that, if a butterfly depends on a host plant and the host plant's range has been moving up slope in response to warming temperatures resulting from climate change, the Services could rationally conclude that the butterfly's range will move up

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(referring to the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" recognized by *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120 (2000)). This is all the more true where the more general definition would lead to absurd or limitless results, or where it would transform the provision so as to allow government to reach conduct that Congress did not seemingly intend. *Id.* at 2444.

slope and would designate those up slope areas as critical habitat even if they are not currently occupied by the butterfly. *Id*.

As currently proposed, FWS will have authority to make broader designations of areas to account for species' *projected and speculative* future response to climate change. Speculation is not science, much less best science. Projections are compilations of assumptions and controversial modeling. The Energy Commenters believe that it is inappropriate to rely on speculative climate change projections over a lengthy time period, without documented cause and effect relationships linking observable or reliably predictable data on climate change to demonstrable effects in specific areas, and without evidence of current species impacts as a basis for designation of critical habitat or determination of adverse modification. Indeed, projections of any future air quality scenario, which can differ significantly from actual outcomes, are inappropriate bases for critical habitat designations. Such designations must instead be based on natural evidence of the existence of features that are essential to species, not open ended and speculative projections. Otherwise, critical habitat designations could be amended at any time.

Contrary to the Act's requirement to make designations based on the "best available science," 16 U.S.C. § 1533(b)(2), critical habitat designations based on projected climate change impacts are speculative. *See Bennett v. Spear*, 520 U.S. at 176. The science and modeling do not provide reliable predictions of species' response to climate change, nor do they provide reliable predictions of climate change impacts in specific geographic ranges that would be sufficient to support designation of critical habitat pursuant to the ESA.

These significant limitations have been recognized by the Intergovernmental Panel on Climate Change ("IPCC") in its most recent evaluation of the state of climate modeling science.[19] Climate models are "the primary tools available for investigating the response of the climate system to various forcings, for making climate predictions on seasonal to decadal time scales and for making projections of future climate over the coming century and beyond." IPCC AR5 at 746. Models vary considerably in complexity and application but are, in general, mathematical representations of the climate system, expressed as computer codes, and run on powerful computers. *Id.* at 749. Even the most complex models have limitations and no model

[19] IPCC, Climate Change 2013: The Physical Science Basis, Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2013) ("IPCC AR5"), *available at* http://www.ipcc.ch/report/ar5/index.shtml.

accurately simulates all climate-related processes. The IPCC describes in detail the many limitations and uncertainties that characterize current models. *E.g., id*. at 751-755. As a result of these limitations, models cannot at this time accurately replicate climate over the observable past, *id*. at 755, 767, 769-72, and even if models could replicate past climate, "there is no direct means of translating quantitative measures of past performance into confident statements about fidelity of future climate predictions," *id*. at 745. The Services' proposal to revise critical habitat designation criteria fails to acknowledge the limitations of climate change models and the significant uncertainty inherent in these projections. Moreover, the current state of climate science does not support impact projections below a continental or regional scale,[20] and particularly not to the localized and highly complex habitat of any particular species.

Recently, FWS withdrew the proposed rule to list the DPS of the North American Wolverine as a threatened species under the ESA based on its conclusion that "the factors affecting the DPS as identified in the proposed rule are not as significant as believed at the time of the proposed rule…."[21] The proposed rule was based in large part upon impacts of climate change on wolverine habitat and ecology. FWS acknowledged the disagreement and uncertainty over its biological conclusions associated with localized climate change projections. FWS recognized specifically comments regarding the high degree of uncertainty with projections made using downscaled global climate modeling, which FWS used to analyze the impacts of climate change on wolverine habitat and ecology: "As a result of these comments and peer reviews, there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to our listing determination." 79 Fed. Reg. 6874, 6875 (Feb. 2, 2014). In its decision to withdraw the proposed rule, FWS concluded that "differences in elevation and topography [in the Mountain West] make fine-scale prediction of climate impacts ambiguous" and "based on all the information available, we simply do not know enough about the ecology of the wolverine and when or how it will be affected by a changing climate to conclude at this time

[20] *Id*. at 810-17 (describing the flaws and biases present in each methodology for obtaining regional modeling results and noting that downscaling for regional impacts "does not guarantee credible regional climate information"); see also id. at 826 ("correlations between local to regional climatological values and projected changes are small except for a few regions").

[21] 79 Fed. Reg. 47,522 (Aug. 13, 2014).

that it is likely to be in danger of extinction within the foreseeable future."[22] The Services' critical habitat proposal, however, fails to acknowledge the limitations of climate change models and the significant uncertainty inherent in those projections.

In addition to the limitations of climate change science, the ESA is not an appropriate mechanism to regulate climate change. Congress did not intend the ESA to be used to regulate greenhouse gas ("GHG") emissions, climate change, or air quality in general, and the Services do not have the expertise, authority, or resources to regulate these matters through the ESA. The Obama and Bush Administrations and the courts have recognized that the ESA is not suited to address climate change or GHG emissions.[23] In fact, the Supreme Court has affirmed EPA's primacy among agencies to regulate GHGs, stating that "Congress designated an expert agency, here, EPA as best suited to serve as primary regulator of greenhouse gas emissions." *Am. Electric Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011).

The Energy Commenters firmly believe that any final proposal that designates critical habitat based on potential climate changes effects would be contrary to law and subject to litigation. Because speculative projections are based on unproven and unsupportable assertions about distant future conditions, they could be used to support the designation of practically any area as critical habitat. Moreover, such an approach is contrary to the terms and structure of the ESA, which guard against speculation and allow review and potential revision of critical habitat designations based on actual evidence of emergency of features essential to species. Finally, any

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[22] Press Release, U.S. Fish and Wildlife Serv., Service Determines Wolverine Does Not Warrant Protection Under Endangered Species Act (Aug. 12, 2014), http://www.fws.gov/news/ShowNews.cfm?ID=CB5069E7-CFB9-BC06-C70E63988DF271A7. This decision was supported by a "consensus recommendation" of the agency's three regional directors for the Mountain-Prairie, Pacific Northwest, and Pacific Southwest.

[23] Dirk Kempthorne, Sec'y, DOI, Remarks of Secretary Dirk Kempthorne at the Press Conference on Polar Bear Listing (May 14, 2008), *available at* https://votesmart.org/public-statement/346134/remarks-by-secretary-kempthorne-press-conference-on-polar-bear-listing# (Using the ESA to regulate GHG emissions "would be a wholly inappropriate use of the Endangered Species Act. ESA is not the right tool to set U.S. climate policy."); Press Release, U.S. Fish & Wildlife Serv., Salazar Retains Conservation Rule for Polar Bears Underlines Need for Comprehensive Energy and Climate Change Legislation (May 8, 2009), *available at* http://www.fws.gov/news/ShowNews.cfm?ID=20FB90B6-A188-DB01-04788E0892D91701 ("[T]he Endangered Species Act is not the proper mechanism for controlling our nation's carbon emissions. Instead, we need a comprehensive energy and climate strategy that curbs climate change and its impacts.").

reliance on projected impacts from climate change to support the designation of critical habitat would be arbitrary and capricious. We urge the Services to revise the proposal.

D. Requiring Critical Habitat Designations at the Time of Listing Would Deplete the Services' Limited Resources.

The Services propose to revise 50 C.F.R. § 424.12(a) to reflect their view that case law requires the Services to designate critical habitat in most instances. The provision also would be revised to require that critical habitat be "*finalized* concurrent with listing" rather than simply *proposed* concurrent with listing.[24] 79 Fed. Reg. at 27,070 (emphasis added). It would also require the Services to produce the evaluations of economic and other impacts of proposed critical habitat designation within the very constrained timeframes imposed on listing decisions.

Adding these specific requirements will increase the regulatory burdens on the Services. Already, the Services' resources are strained as they struggle to keep up with a 6-year work plan for the listing program resulting from settlement agreements in multi-district litigation.[25] According to the Director of FWS, in FY 2011, FWS spent 75 percent of its $20.9 million in funding for endangered species listing and critical habitat designation taking the substantive actions required by court orders or settlement agreements resulting from litigation.[26] The FWS regions are also feeling the strain. Region 8, for example, has stated, "[b]ased on limited staff resources, we anticipate that we will not be able to meet regulatory timeframes with some degree of frequency," including ESA section 7 timeframes for issuing biological opinions and

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[24] The provision includes more specific details on the limited circumstances in which the Services may find that a designation of critical habitat would not be beneficial to the species (*e.g.*, destruction or modification of habitat is not a threat to species because the species is threatened primarily by disease). *Id.* at 27,070-71. The Energy Commenters support the Services not designating critical habitat where designation would not be beneficial to the species. However, the proposal, as it current exists, is overly burdensome.

[25] *See* Stipulated Settlement Agreement, *WildEarth Guardians v. Salazar*, No. 10-377 (D.D.C. filed May 10, 2011), *available at* http://www.fws.gov/endangered/improving_esa/exh_1_re_joint_motion_FILED.PDF; *Center for Biological Diversity v. Salazar*, No. 10-cv-0230 (D.D.C. filed July 12, 2011), *available at* http://www.fws.gov/endangered/improving_ESA/WILDLIFE-218963-v1-hhy_071211_exh_1_re_CBD.PDF.

[26] Testimony of Hon. Dan Ashe, Director, U.S. Fish and Wildlife Service before the House Natural Resources Committee at 5 (Dec. 6, 2011), *available at* http://naturalresources.house.gov/uploadedfiles/ashetestimony12.06.11.pdf.

timeframes for issuing ESA section 4 findings.[27] Indeed, the FWS is so underfunded that industry has been required to fund employee salaries in order to have conservation plans approved. Therefore, it seems unlikely that the Services will have sufficient funding to comply with the revisions they propose.

With this proposed change to require final critical habitat designations concurrent with listing, the Services set themselves up for failure and invite lawsuits challenging their failure to comply with the regulations. As with the multi-district litigation, such lawsuits have the potential to result in settlements that bind the Services to inappropriate commitments and cut out the regulated public. The Services should not revise this provision and should continue to require that critical habitat "shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing." *See* 50 C.F.R. § 424.12(a).

E. The Proposed Changes to Critical Habitat Designation Criteria Would Harm Oil and Gas, Electric Utility, Land Development, and Other Key Industries.

These new provisions would provide an especially broad basis for designating critical habitat. If the Services can designate critical habitat based on potential effects, such as climate change, and not on the best available science, the Energy Commenters and other regulated parties could be placed at the mercy of the Services' discretion whether to designate a particular area as critical habitat.

Considerable regulatory burdens and corresponding economic costs are borne by property owners, companies, state and local governments, and other entities as a result of critical habitat designations. These burdens begin before critical habitat is designated. Once the Services propose a rule to designate critical habitat, property owners and others with an interest in the lands identified for critical habitat designation must participate in the rulemaking by presenting information to the Services during the rulemaking process if they want to ensure that the Services consider impacts to those interests and other relevant information. 50 C.F.R. Part 424 states that members of the public who face negative consequences as a result of critical habitat designation may provide information on "any significant activities that would … likely … be affected by the designation" and the "probable economic and other impacts of the designation

[27] *See* Memorandum to Regional Director, Pacific Southwest Region from Michael Fris, Assistant Regional Director, Ecological Services regarding Ecological Services Workload Prioritization at 1-2 (May 2014).

upon proposed or ongoing activities," and may address whether the Services should "exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat." 50 C.F.R. § 424.19.

Despite the Services' claim that the proposal will have no economic impact, critical habitat designation imposes significant costs on land use and ownership. The expanse of a critical habitat designation for a species can be extensive, and can overlap with critical habitat for other species, often covering thousands or millions of acres of land. For example, FWS recently revised its designated critical habitat for the marbled murrelet and, even with the Service's removal of certain areas from the designation, the designation covers 3,698,100 acres of land in Washington, Oregon, and northern California.[28] In addition, the mere proposal of critical habitat triggers ESA conference requirements for any federal agency action. Once critical habitat is designated, persons who own or otherwise lease, permit, or have other interests in the designated land face immediate and significant restrictions on their otherwise lawful uses of the land; expensive and time-consuming new procedural requirements on ongoing and future projects; litigation risk; and significant diminution in the value of the property.[29]

With these revisions to critical habitat designation criteria leading to broader critical habitat designations, combined with the proposed revisions to the definition of "adverse modification" leading to more frequent adverse modification findings, the Services are much more likely to find, during their review of a permit application, that the proposed activity or project will result in the destruction or adverse modification of critical habitat. This in turn would trigger recommendations by the Services of control measures to avoid adverse modification and have significant impacts as described above on the Energy Commenters' members' ability to perform necessary and critical activities to supply our nation's energy needs.

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[28] Endangered and Threatened Wildlife and Plants; Revised Critical Habitat for the Marbled Murrelet, 76 Fed. Reg. 61599 (Oct. 5, 2011).

[29] David Sunding, "The Economic Impacts of Critical Habitat Designation," Giannini Foundation of Agricultural Economics, *available at: giannini.ucop.edu/media/are-update/files/articles/v6n6_3.pdf*.

V. The Draft Policy on Exclusions from Critical Habitat Could Inappropriately Shift Federal Land Management Burdens to Nonfederal Entities and Private Lands

The Energy Commenters support the Services' use of partnership and conservation plans to avoid the need to designate areas as critical habitat. However, the Draft Policy Regarding the Implementation of Section 4(b)(2) of the ESA, 79 Fed. Reg. 27,052 (May 12, 2014) ("draft policy") is lacking incentives and reassurances required for private property owners to be willing to undertake costly voluntary conservation measures. The Energy Commenters also believe that the significant discretion afforded to the Services to exclude or not exclude critical habitat, even if there is a viable, sufficiently protective voluntary conservation plan in place, may have the effect of discouraging private property owners from partnering with the Services.

A. The Services Should Exclude Areas from Critical Habitat Designation Where the Benefits of Exclusion Outweigh the Benefits of Designation.

Consistent with its intent to find a balance "between the Endangered Species Act's mandate to protect and manage endangered and threatened species and other legitimate national goals and priorities such as providing energy, economic development and other benefits to the American people," S. Rep. No. 95-874, at 940 (1978), Congress provided that the Services may exclude an area from critical habitat designation if the benefits of such exclusion outweigh the benefits of designation, *i.e.*, on economic or other public interest grounds. 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.19.

Congress wanted the Services to have the "discretion" and "flexibility" to consider relevant non-biological factors, specifically including, but not limited to, economic factors, in deciding which areas to exclude from critical habitat. *See* H.R. Rep. No. 95-1625, at 17 (1978). As the Solicitor of the Department of the Interior recognized:

> Congress wanted the Secretary to understand the costs on human activity of making a designation before he made a decision and thereby provide an opportunity to minimize potential future conflicts between species conservation and other relevant priorities at an early opportunity.[30]

[30] Memorandum from David Longly Bernhardt, Solicitor, DOI, to Deputy Sec'y, DOI, "The Secretary's Authority to Exclude Areas from a Critical Habitat Designation Under Section 4(b)(2) of the Endangered Species Act," at 4 (Oct. 3, 2008), *available at* http://www.doi.gov/solicitor/opinions/M-37016.pdf.

Accordingly, under ESA section 4(b)(2), the Services are to consider economic impacts when designating critical habitat. The regulations require the Services, in considering an area for designation, to "identify the significant activities that would . . . affect an area considered for designation . . . and consider the reasonably probable economic and other impacts of the designation upon such activities." 50 C.F.R. § 424.19. The Services are authorized to exclude an area from critical habitat if they determine that the benefits of the exclusion outweigh the benefits of inclusion." *Id.* We encourage the Services to use this authority to avoid economic impacts of designating critical habitat that will not provide commensurate benefits to listed species.

B. The Draft Policy's "Encouragement" of Voluntary Measures Should Not Be Coupled with Onerous Application of the Proposed Rules to Compel Private Conservation Actions.

The Services state that the purpose of the draft policy is to "provide predictability and transparency regarding how the Services consider exclusions under section 4(b)(2)." 79 Fed. Reg. at 27,053. The Energy Commenters support the development of a transparent, predictable process for excluding areas from critical habitat designation. However, the draft policy provides little predictability for property owners participating in conservation agreements and plans. Indeed, coupled with the onerous impacts likely to result from broader critical habitat designations and more frequent adverse modification findings, the draft policy could effectively shift federal land management obligations to non-federal entities by compelling (rather than encouraging) them to pursue private conservation actions in an effort to avoid the burdens of critical habitat designation.

The Services can exclude specific areas from critical habitat designations in part based on the existence of private or other non-Federal conservation plans or partnerships. The draft policy distinguishes between private or other non-federal conservation plans and partnerships "in general," and those that are "related to permits under section 10 of the Act." A conservation plan can be developed by private entities with no Service involvement, or in partnership with the Services for the purpose of obtaining an incidental take permit under section 10 of the ESA. Such partnerships include HCPs, SHAs, and CCAAs.

The draft policy lists several factors (*e.g.*, public participation, National Environmental Policy Act compliance) that the Services will consider when determining whether areas should be excluded from critical habitat designation based on the existence of a general conservation

plan or partnership. *See* 79 Fed. Reg. at 27,054. The policy stresses the Services' view that the decision to exclude an area from critical habitat designation is "always completely discretionary." 79 Fed. Reg. at 27,054; 79 Fed. Reg. at 27,051 ("Under the terms of the policy as proposed, the Services retain a great deal of discretion in making decisions with respect to exclusions from critical habitat."). But the determination whether critical habitat may be excluded should not simply be left up to the discretion of the Services. The regulations provide for a balancing test where the Services should determine whether "the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat." 50 C.F.R. § 424.19. This provision authorizes consideration of economic and other impacts of the designation upon proposed or ongoing activities. *Id.* Moreover, the Services' decisions to designate areas of critical habitat are bounded by statutory limits and fully reviewable under the APA.

The draft policy states that the Services "generally exclude" areas covered by an approved CCAA/SHA/HCP from a designation of critical habitat if three conditions are met:

1. The permittee is properly implementing the CCAA/SHA/HCP and is expected to continue to do so for the term of the agreement;

2. The species for which critical habitat is being designated is a covered species in the CCAA/SHA/HCP or very similar in its habitat requirements to a covered species; and

3. The CCAA/SHA/HCP specifically addresses that species' habitat . . . and meets the conservation needs of the species in the planning area.

See 79 Fed. Reg. at 27,054. The preamble states that the Services will undertake a "case-by-case analysis" to determine whether these conditions are met and whether the area covered by the plan should therefore be excluded from critical habitat designation. *Id.* This language does not provide the assurance required to encourage private landowners to go through the costly and onerous process of developing a CCAA, SHA, or HCP. With all of these requirements, and no assurance for private property owners that participation in voluntary conservation measures will avoid designation of critical habitat, there is little incentive for private entities to participate.

Accordingly, the Services can and should exclude completed CCAAs, SHAs, and HCPs from critical habitat designation, as long as the plans relate directly or indirectly to the listed species for which critical habitat designation is being considered, because these plans are designed to be sufficiently protective, such that the benefits of exclusion outweigh the benefits of inclusion. *See, e.g., Home Builders Ass'n of N. Cal. v. U.S. FWS*, 2006 WL 2190518, at *30

(E.D. Cal. 2006) (finding it was appropriate to exclude an area covered by an HCP that addressed the species at issue and noting that the Secretary found that the HCP provided more protection than can be provided by a critical habitat designation). The exclusion of completed CCAAs, SHAs, and HCPs from designated critical habitat is appropriate and should be incorporated in most, if not all, cases because land covered by a CCAA, SHA, or HCP already has appropriate protections and management measures in place. In addition, CCAA, SHA, and HCP permittees typically agree to do more for the conservation of the species and their habitats on private lands than the designation of critical habitat would alone provide.

VI. Conclusion and Recommendations

The proposed changes to the "adverse modification" definition and critical habitat designation criteria would result in overly broad designations and adverse modification findings. The proposals would unduly increase regulatory burdens on industry, states, and the federal government, and would have substantial socio-economic impacts that the Services have not justified. The proposals are contrary to the ESA, Congressional intent and case law. Given the significant legal flaws and inadequacy of the science underlying certain parts of the proposals, the Energy Commenters believe that the best course of action would be to issue a new set of proposed rules that makes only modest, and narrowly targeted, changes to the existing regulations consistent with our comments above. Any new or revised rulemaking should also include a draft economic analysis.

A. Recommendations Regarding Adverse Modification Proposal.

The Services should revise and take further comment on its proposed definition of "adverse modification," and should:

- Make only narrow and modest changes to the definition, such as deletion of the word "both" and substitution of the word "or" for "and" between the words "survival" and "recovery."

- Eliminate the concept of "conservation value" or, alternatively, narrowly and clearly define the term.

- Eliminate the proposal to find adverse modification based on future, speculative effects and potential of an area to support the future recovery of a species.

- Clarify how section 7 consultations will work when applying the proposed regulatory adverse modification standards to critical habitat designated under previous standards.

B. Recommendations Regarding Critical Habitat Designation Proposal.

The Services should revise and take further comment on these proposals to ensure that critical habitat designation criteria is within the limits set by Congress and does not allow for designation of critical habitat based on speculative effects. Moreover, the Services should explain that future effects are best addressed through subsequent reviews and revisions to critical habitat, not at the time of designation when such effects remain speculative. In particular, the Services should:

- Revise the proposed definition of "geographical area occupied by the species" to limit occupied critical habitat to areas that the species uses with sufficient regularity that it is likely to be present during any reasonable span of time.

- Maintain the requirement that the Services identify and list "primary constituent elements."

- Remove the proposed definition of "physical or biological features" that would allow for designation of areas based on potential future reoccurrence of features. This definition should account for the ESA's requirement that designation of occupied areas must be limited to areas where essential physical or biological features "are found," not may be found.

- Interpret the term "special management considerations or protection" to be a meaningful requirement and not just presume that all areas satisfy this requirement. If existing management is adequate for a particular area, it should mean that no critical habitat designation is needed.

- Maintain the regulatory provision that requires that the designation of occupied areas must be inadequate in order for unoccupied areas to be essential.

- Explain that areas may not be designated as critical habitat based on speculative, potential climate change effects.

- Continue to require that critical habitat be *proposed* concurrent with listing, and not impose a new requirement that *final* critical habitat designations be made concurrent with listing.

- Interpret the term "interbreeds when mature" to mean species that are actually interbreeding, not just capable of interbreeding.

C. Recommendations Regarding Draft Policy on Exclusions.

The Energy Commenters support the Services' use of partnership and conservation plans to avoid the need to designate areas as critical habitat. However, the Draft Policy should be revised to include greater incentives and reassurances in order to justify the costly voluntary

conservation measures required for CCAAs, SHAs, and HCPs. In particular, the Services should:

- Provide assurances for CCAA, SHA, and HCP participants that such areas will not be designated as critical habitat as to the species effectively covered by the plans.

- Reduce the significant discretion the Services have afforded to themselves which, coupled with lack of incentives for property owners, undercuts the policy's "encouragement" of voluntary measures.

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The Energy Commenters urge the Services to fully consider and incorporate these suggestions.

Sincerely,

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Appendix 2

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Public Comments Processing
Attention: Docket No. FWS-HQ-ES-2015-0165
Division of Policy, Performance and Management Programs
U.S. Fish and Wildlife Service, MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Comments of the Utility Water Act Group on the Draft Endangered Species Act Compensatory Mitigation Policy, 81 Fed. Reg. 61,032 (Sept. 2, 2016), FWS-HQ-ES-2015-0165.

Dear Sir or Madam:

On September 2, 2016, the U.S. Fish and Wildlife Service (FWS or the Service) released a draft Endangered Species Act (ESA) Compensatory Mitigation Policy. 81 Fed. Reg. 61,032 (Sep. 2, 2016) (Draft ESA Policy). The Utility Water Act Group (UWAG) appreciates the opportunity to submit comments on the Draft ESA Policy.

The Draft ESA Policy adopts and implements the mitigation principles presented in the Service's overarching draft mitigation policy published earlier this year. 81 Fed. Reg. 12,380 (Mar. 8, 2016) (Draft FWS Policy). On May 9, 2016, UWAG submitted extensive comments on the key principles included in the Draft FWS Policy. The Draft ESA Policy raises many of the same concerns that UWAG raised in its comments on the overarching Draft FWS Policy. Accordingly, UWAG attaches and incorporates by reference its earlier comments on the Draft FWS Policy.

As with the Draft FWS Policy, UWAG provides the following key recommendations for the Draft ESA Policy:

- The Service should clarify that it is adopting a "no net loss" standard. A "net conservation gain" standard would lack predictability and potentially conflict with other federal mitigation programs.

- The Service should explain the legal justification for this policy in light of the Service's limited legal authority to require mitigation under the ESA and the Service's previous

determination that traditional mitigation is inappropriate for federal activities impacting listed species or their habitat.

- The Service's "preference" in both policies is for compensatory mitigation in advance of impacts. Because advance compensation is not always appropriate or feasible, the Service should revise both policies to allow more flexibility for the timing of mitigation.

- The Draft ESA Policy should not be applied retroactively to impose new mitigation standards for previous actions or ongoing review processes. Section 7 consultation and section 10 permitting often take months or years to complete, and project proponents should not be required to reopen discussions on mitigation in the middle of a process under the new criteria. To avoid causing unwarranted delay, the Service should clarify that the ESA Policy will apply only to section 7 and 10 processes initiated *after* the publication of the final policy.

- The Service should clarify that this is a not a binding rulemaking and does not change any existing regulations. The Draft ESA Policy sets new standards for compensatory mitigation under the ESA in language that could be read to produce binding effects on the public. If the Service is establishing new requirements on the regulated public, it must follow the Administrative Procedure Act's notice and comment rulemaking procedures.

Thank you for your attention to this matter.

Sincerely,

Kerry L. McGrath
Counsel for Utility Water Act Group

Enclosure

COMMENTS OF THE UTILITY WATER ACT GROUP
ON THE PROPOSED REVISIONS TO THE
U.S. FISH AND WILDLIFE SERVICE MITIGATION POLICY
81 Fed. Reg. 12,380 (Mar. 8, 2016)
Docket No. FWS-HQ-ES-2015-0126

May 9, 2016

May 9, 2016

Filed electronically at www.regulations.gov
Docket No. FWS-HQ-ES-2015-0126

Comments of the Utility Water Act Group
on the Proposed Revisions to the U.S. Fish and Wildlife Service Mitigation Policy
81 Fed. Reg. 12,380 (Mar. 8, 2016)

On March 8, 2016, the U.S. Fish and Wildlife Service (FWS or Service) published Proposed Revisions to the FWS Mitigation Policy (policy or proposed policy), 81 Fed. Reg. 12,380 (Mar. 8, 2016). The Utility Water Act Group (UWAG) appreciates the opportunity to comment on the proposed policy and provides the following key recommendations:

- The Service should clarify that it is adopting a "no net loss" standard. A "net conservation gain" standard would lack predictability and potentially conflict with other federal mitigation programs.

- The Service should explain the legal justification for this policy in light of the Service's previous determination that traditional mitigation is inappropriate for federal activities impacting listed species or their habitat.

- The Service should clarify and provide more specific criteria for key concepts in the proposed policy, such as "high-value" habitat.

- The Service should allow for more flexibility for the timing of mitigation. Advance compensation is not always appropriate or feasible.

- The Service should clarify that there are circumstances in which avoidance of *all impacts* to "high-value" habitat is not necessary or practicable. Such a requirement would conflict with other federal mitigation programs.

I. Introduction

On November 3, 2015, the President issued a formal memorandum directing key executive agencies, including FWS, to adopt policies incorporating federal principles for mitigation "[t]o the extent permitted by each agency's legal authorities . . . ." *See* Presidential Memorandum: Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, § 3 (Nov. 3, 2015) (Presidential Memorandum). Specifically, the Presidential Memorandum directed FWS to finalize within one year a revised mitigation policy in support of the policy and principles outlined in the memorandum.

In response, the Service has proposed revisions to its 1981 Mitigation Policy, 46 Fed. Reg. 7,644 (Jan. 23, 1981), to account for "advances in conservation science" and incorporate the federal principles outlined in the Presidential Memorandum. 81 Fed. Reg. at 12,380. Notably, the 1981 Mitigation Policy expressly excluded the conservation of species listed as threatened or endangered under the Endangered Species Act (ESA). *See* 46 Fed. Reg. at 7,656

("This policy does not apply to threatened or endangered species."). The Service states that its revisions to the 1981 policy "[b]roaden its scope to address all resources for which the Service has authorities to recommend or require mitigation . . ." and "provide an updated framework for applying mitigation measures . . . ." 81 Fed. Reg. at 12,380. The proposed policy is applicable to all actions for which the Service "has specific authority to recommend or require the mitigation of impacts to fish, wildlife, plants, and their habitats." *Id.* at 12,383. This would include activities subject to ESA § 7 consultation, activities requiring ESA § 10 incidental take authorization, and activities for which the Service is the lead or a co-lead agency for National Environmental Policy Act (NEPA) compliance purposes.

II. UWAG Has an Important Interest in the Service's Mitigation Framework.

UWAG is a voluntary, ad hoc, non-profit, unincorporated group of 210 individual energy companies, which own and operate over 50 percent of the nation's total generating capacity, and three national trade associations of energy companies: the Edison Electric Institute, the American Public Power Association, and the National Rural Electric Cooperative Association. UWAG's purpose is, among other things, to participate on behalf of its members in federal agency rulemakings under the Clean Water Act (CWA) and related statutes, such as the ESA, and in litigation arising from those rulemakings.

UWAG is comprised of a diverse and extensive range of public and private entities whose activities are conducted nationwide. Many of the individual energy companies that comprise UWAG have public service obligations to ensure a reliable and safe supply of electricity to their customers, which require the construction and maintenance of thousands of miles of electrical transmission and distribution lines, and power generation facilities.[1] The supply of electricity throughout the country involves the construction, operation, and maintenance of electric generation facilities, transmission and distribution lines, and other system control facilities. The administration of the ESA regulatory program, insofar as it affects the electric utility industry, is important for UWAG members and for the public at large, whose health, safety, and general welfare depend on the reliable delivery of electricity.

UWAG members construct, operate, and maintain a wide range of facilities across the nation, including steam electric power plants, combustion turbines, hydroelectric facilities, electric transmission and distribution lines, natural gas and oil distribution lines, railroad tracks, and an increasing array of renewable energy generation sites, including wind and solar facilities. A diverse electric generation portfolio is not only important to the electric energy industry and energy consumers, but also critical to the nation's energy security, and is an important element of this Administration's focus on improving energy independence. As the push for low-emission and renewable energy increases, UWAG's members are undertaking more wind and solar projects to meet this demand. Electric utilities are also increasingly looking to new natural gas generation plants for base load power. Often, these projects involve substantial footprints and require miles of new transmission lines to connect to the grid.

[1] Steady and reliable energy is essential to our national security. *See* Kristy Hartman, National Conference of State Legislatures, *Protecting the Nation's Energy Infrastructure: States Address Energy Security* 1 (2013).

The varied types of projects undertaken by UWAG members are subject to complex and diverse permitting obligations. UWAG members' projects often require permits under CWA § 404, thereby triggering NEPA review of environmental impacts and review of wildlife impacts through ESA § 7 consultation. Issuance of CWA § 404 permits is typically conditioned on completion of specified mitigation measures to offset the project's impacts. UWAG members' facilities also typically require National Pollution Discharge Elimination System (NPDES) permits and contain cooling water intake structures that are subject to the requirements of the Environmental Protection Agency's (EPA's) recent CWA § 316(b) Rule for existing facilities. 79 Fed. Reg. 48,300 (Aug. 15, 2014) (§ 316(b) Rule). Under the § 316(b) Rule, National Marine Fisheries Service (NMFS) and FWS (collectively, the Services) perform a "technical assistance" review of NPDES permit applications and provide ESA recommendations that must be incorporated into the draft NPDES permit by the permit writer; otherwise EPA has suggested it will veto the permit. *See id.* at 48,383.

Through these permitting programs, UWAG members' facilities and projects are already subject to robust mitigation requirements. Due to clear distinctions between wetlands and habitat mitigation, the proposed mitigation policy will likely result in significant changes to how UWAG members must plan for projects that have natural resource impacts and require approval from States, EPA, the U.S. Army Corps of Engineers (Corps), FWS, and/or NMFS. As discussed in more detail below, as proposed, the Service's policy is likely to result in heightened mitigation requirements that may be duplicative and/or conflict with existing mitigation requirements, thereby resulting in delays and unpredictability in the permit process. Moreover, if there is a separate NMFS proposal, there will likely be additional inconsistencies. Predictability and efficiency in federal permitting is critical for UWAG members' ability to undertake, for example, utility line construction and maintenance, and ensure customers' accessibility to reliable and secure electricity at a reasonable cost.

III. UWAG Recommends Important Revisions to the Proposed Policy.

UWAG's primary concern is that the proposed policy presents conflicting standards and/or duplicative requirements that would cause delays and unpredictability in permitting associated with existing CWA permitting programs. UWAG is also concerned that the Service has not identified statutory authority that authorizes the Service to impose many of the policy's proposed mitigation requirements. The purpose of UWAG's comments is to provide recommendations to the Service for addressing the issues presented below to help ensure the policy does not interfere with the efficient administration of federal permitting programs.

A. The Service Must Address Legal and Procedural Deficiencies.

1. The Service should explain the legal justification for this policy.

The Service has previously recognized that traditional mitigation is not necessary for ESA resources in light of the ESA's framework. Referring to the ESA § 7 process, in its 1981 policy, the Service stated, "[I]t is clear to the Service that Congress considered the traditional concept of mitigation to be inappropriate for Federal activities impacting listed species or their critical habitat." 46 Fed. Reg. at 7,656. With the exception of the Federal Power Act and ESA § 10, all of the authorities cited in Appendix A of the proposed policy were in effect when the

Service issued its 1981 policy. At that time, the Service determined that mitigation was not appropriate or required for ESA resources, and that enhancements – recommendations which improve wildlife resources "beyond that which would exist without the project" – are outside the scope of the Service's mitigation policy. *Id.* The Service has not explained what has changed or pointed to new statutory authority for the proposed expansion of the scope of the Service's mitigation recommendations. Although the Presidential Memorandum provides certain federal directives, it does so with the qualifier that such principles be implemented "[t]o the extent permitted by each agency's legal authorities." Presidential Memorandum § 3. The Presidential Memorandum does not create any new legal authority for the Service's broadened mitigation framework.

2. The Service should clarify that this is not a binding rulemaking and does not change any existing regulations.

The mitigation policy risks being taken not merely as an interpretation of existing law, but as "significantly broaden[ing]" and "in effect amend[ing]" existing law, making it vulnerable to being vacated for not undergoing the rulemaking procedures mandated under the Administrative Procedure Act (APA). *See Appalachian Power Co. v. EPA*, 208 F. 3d 1015, 1028 (D.C. Cir. 2000).

As drafted, the proposed policy represents a major change in the Service's position on its authority to require mitigation. It substantially expands the 1981 policy, which did not apply to ESA resources, and set a mitigation planning goal of "no net loss" for certain resource categories. *See* 46 Fed. Reg. at 7,646. This contrasts with the proposed policy, which would apply to "all actions for which [the Service] has specific authority to recommend or require the mitigation of impacts to fish, wildlife, plants, and their habitats," and, as described in more detail below, would establish a mitigation goal of "net conservation gain" or, at a minimum, "no net loss." 81 Fed. Reg. at 12,383, 12,384.

Future Service policies and guidances will be based on the mitigation framework contained in this policy. *Id.* at 12,380 (The policy serves as "a single umbrella policy under which the Service may issue more detailed policies or guidance documents covering specific activities in the future."). The policy states that the Service "intends to adapt Service program-specific policies, handbooks, and guidance documents, consistent with applicable statutes, to integrate the spirit and intent of this policy." *Id.* at 12,383. It also indicates that the public will be bound to follow the mitigation recommendations provided by the Service under this mitigation policy, stating: "The Service will provide mitigation recommendations under an explicit expectation that the action proponent or the applicable authorizing agency is fully responsible for implementing or enforcing the recommendations." *Id.* at 12,392. This language could be read to produce binding effects on the public. If the Service is establishing new requirements on the regulated public, it must follow APA notice and comment rulemaking procedures. *Am. Tort Reform Ass'n v. Occupational Safety & Health Admin.*, 738 F.3d 387, 395 (D.C. Cir. 2013) ("Notice and comment rulemaking procedures are required under the APA when . . . [rules produce] significant effects on private interests") (citation and internal quotation marks omitted).

The Service, therefore, should clarify that the mitigation policy is not a binding rulemaking and does not alter any existing regulations. Moreover, the Service should revise the policy to ensure that it is not unlawfully broadening or amending its existing policy.

3. The policy should not apply to actions under review at the time of promulgation.

The proposed policy suggests its new requirements can be applied to actions that "are under review as of the date of [the policy's] final publication." 81 Fed. Reg. at 12,384. This approach fails to recognize the potential for disruption of ongoing projects, particularly those for which the Service's review is a lengthy process. For example, according to the FWS, the processing time for a Habitat Conservation Plan (HCP) needed to obtain an ESA § 10 permit may take up to 12 months.[2] And experience shows that ESA § 7 consultation and § 10 permitting can often take many months or years. If the final version of this policy is issued in the middle of the Service's review of a particular project, it would unreasonably disrupt the permit process and lengthen the processing time to require the applicant to start over under a new standard. Such retroactive application of the policy would also fail to account for the reasonable expectations of applicants of the scope of environmental review and the potential mitigation costs associated with their project. To avoid such unfair and disruptive results, the final policy should clearly state that it does not apply to actions for which a completed permit application has been submitted and that are under review at the time of promulgation.

4. Policies, guidance, and handbooks revised to conform to this mitigation policy should be made available for public comment.

UWAG appreciates the opportunity to provide comments on the proposed policy, and the Service should continue this transparency in later guidance or handbooks implementing any final policy. The Service states that it "anticipate[s] publishing a Service policy specific to compensatory mitigation under the ESA that will align with the guidance described herein while providing additional operational detail." 81 Fed. Reg. at 12,383. The Service should make such handbook and policy revisions available for public review and comment because the specific details and implementation have direct impacts on the regulated community.

B. The Service Should Make Several Key Clarifications on the Policy's Main Concepts and Framework.

1. Several of the key concepts in the proposed policy are vague and must be clarified to avoid conflict and delays in the regulatory process.

Predictable outcomes and expectations are necessary for regulated industries to navigate the permit process. The proposed policy, however, leaves many details unexplained, making it hard to anticipate how the policy would be implemented and how it would alter or affect existing permitting processes.

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[2] FWS, Habitat Conservation Plans: Section 10 of the Endangered Species Act, at 2, *available at* https://www.fws.gov/endangered/esa-library/pdf/HCP_Incidental_Take.pdf.

To begin, the policy fails to provide metrics for calculating mitigation credits. To determine predicted impacts (and how much mitigation is required), the Service provides general criteria for effects assessment methodologies. But the policy states that "[w]here appropriate effects assessment methods or technologies useful in valuation of mitigation are not available, Service employees will apply *best professional judgment* supported by best available science to assess impacts and develop mitigation recommendations." 81 Fed. Reg. at 12,388 (emphasis added). Without the necessary metrics to calculate credits (*e.g.*, value, loss of function), there could be significant disagreement about the mitigation required, resulting in unpredictability and inconsistency across Service field offices. Instead, the Service should provide more concrete metrics for effects assessments. Such determinations should not be left to the best professional judgment of Service employees.

In addition, the Service should provide more specific criteria for determinations that habitat is of "high value." The Service plans to identify the value of specific habitats "to determine the relative emphasis the Service will place on avoiding, minimizing, and compensating for impacts to habitats of evaluation species." *Id*. For habitats the Service determines to be of "high value,"[3] the Services will seek avoidance of *all* impacts. *Id.* at 12,389. However, the policy fails to give specific criteria for determining whether habitat is "high value." Instead, the policy gives the Service wide discretion and "flexibility" to determine whether a habitat is "high value" and should be completely avoided. *Id.* Again, without metrics for determining that an area is "high value," there is no predictability or consistency. Permit applicants will not be able to design their projects in advance to avoid impacts to "high-value" habitat areas because they will not be able to identify such "high-value" habitat areas prior to the Service's review and determination. Such a vague concept will spur disagreement and slow down the permitting process. Particularly in light of the significance this policy assigns to a determination that habitat is "high value," the Service should provide specific criteria for making such a determination.[4] Leaving both the calculation of mitigation credits and the determination of "high-value" habitat to the discretion of Service personnel would lead to inconsistent results and delays in permitting UWAG members' activities. The Service should provide clear, specific criteria for these key concepts.

2. The policy should clarify that it is adopting a "no net loss" standard.

One of the driving factors in any agency's mitigation policy is the applicable mitigation standard. EPA and the Corps, in their 1990 Memorandum of Agreement, stated the goal of the CWA § 404 permitting program was to ensure "no overall net loss to wetlands." Memorandum of Agreement Between the EPA & the Dep't of the Army, The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, § II.B (Feb. 6, 1990) (1990 MOA).

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[3] The Service will apply three parameters to analyze whether habitat is of "high value": (1) *Scarcity* ("relative spatial extent . . . of the habitat type in the landscape context."); (2) *Suitability* ("relative ability of the affected habitat to support one or more elements of the evaluation species' life history . . ."); and *Importance* (high importance habitats are "irreplaceable or difficult to replace, or are critical to evaluation species by virtue of their role in achieving conservation objectives within the landscape."). *Id.* at 12,388-89.

[4] Similarly vague provisions that would have granted the Corps too much discretion in the proposed 2008 Mitigation Rule were amended in the final rulemaking. *See* 73 Fed. Reg. 19594, 19,598 (Apr. 10, 2008) ("[the Corps and EPA] carefully evaluated all of the discretionary language in the proposed rule, and replaced it with binding and/or more clearly articulated requirements where appropriate.")

The agencies acknowledged this was a lofty standard and "recognized that no net loss of wetlands functions and values may not be achieved in each and every permit action." *Id.* When the goal outlined in the 1990 MOA was codified by the Corps in the 2008 Mitigation Rule, the Corps again acknowledged that this is a global, programmatic goal. In response to a comment that a "no net loss" goal may not be attainable for each and every permit action, the Corps explained that the "no net loss" goal is "more accurately presented as achieving an interim goal of 'no overall net loss' of the nation's remaining wetlands base as measured by acreage and function, with a long-term goal of increasing the quality and quantity of the nation's wetlands." 73 Fed. Reg. at 19,603.

It is surprising, then, that the FWS has announced a standard of mitigation that could be interpreted to require a higher level of mitigation than the Corps. The proposed policy states that the Service's "mitigation planning goal is to improve (*i.e.*, a net gain) or, at minimum, to maintain (*i.e.*, no net loss) the current status of affected resources . . . ." 81 Fed. Reg. at 12,384. UWAG has a number of concerns with such a requirement. As discussed in more detail below, requiring a net conservation gain would conflict with the Corps' "no net loss" policy and create issues in the permitting process. Beyond that, a net gain conservation standard would have no limiting principle and would not be grounded in statutory authority.

The proposed mitigation policy does not articulate a clear mitigation standard, likely resulting in confusion among applicants and unpredictable results.[5] A standard of "improving" or "at a minimum, maintaining" affected resources is puzzling. Under the FWS standard, will the Service require project proponents to mitigate to a level of net conservation gain, or will no net loss be sufficient? If it requires a net conservation gain, how much gain is enough? Without an upper limit, mitigation requirements could range from small habitat improvements to large compensatory conservation measures, regardless of impacts or loss of function. Many of UWAG's members are subject to the Corps' "no net loss" standard and plan for future projects anticipating mitigation requirements to comply with that standard. A standard of "improving" or "at a minimum, maintaining" affected resources, however, would leave too much discretion to FWS employees developing permit conditions and would not allow for such planning.

Further, the Service points to no legal authority that would justify the requirement of measures that improve wildlife resources beyond that which would exist without the project. Under the proposed policy, applicants could be required to improve wildlife resources to a level greater than if no development occurred. The Service has not identified statutory or regulatory authority that would support such a requirement. In fact, in the 1981 Mitigation Policy, the Service noted that "enhancements" – "measures which improve fish and wildlife resources beyond that which would exist without the project" – were beyond the scope of the mitigation policy. *See* 46 Fed. Reg. at 7,656 ("this policy does not apply to Service recommendations related to the enhancement of fish and wildlife resources."). Although the Service seeks to conform its policy to section three of the Presidential Memorandum – "*to the extent permitted by each agency's legal authorities*" agencies should "establish a net benefit goal, or at a minimum,

[5] FWS officials recognize they, and other federal agencies, do not have experience implementing a net conservation gain standard. *See* Alan Kovski, *Net Benefits in Environmental Mitigation Weighed*, Daily Env't Rep. (BNA) (May 4, 2016) ("[FWS is] not aware of any agencies that have really moved forward to make decisions applying that standard, but we will be in the future.").

a no net loss goal," – the Presidential Memorandum does not provide statutory authority for the Service to require net conservation gain. The Service cannot implement a net conservation gain standard without identifying clear statutory authority for imposing such a requirement.

A net conservation gain standard would lack meaningful criteria and a statutory basis, and would be arbitrary. Instead of requiring a net conservation gain, the Service's mitigation framework should provide for mitigation requirements based on what is practicable and capable, in terms of replacing lost functions or habitat. To correct these issues and to avoid conflict with the Corps' mitigation framework, the Service should clarify that it is adopting a "no net loss" standard.

3. The policy should allow for more flexibility for the timing of mitigation.

The proposed FWS policy emphasizes a preference for advance compensatory mitigation, stating: "The Service will recommend or require that compensatory mitigation be implemented *before* the impacts of an action occur and be additional to any existing or foreseeably expected conservation efforts planned for the future." 81 Fed. Reg. at 12,385 (emphasis added). However, a requirement for advance compensation is not always appropriate or feasible, and, in many cases, would compound the cost of the permitting process.

Concurrent or advance mitigation may not be feasible for any number of reasons. Depending on the resources at issue, mitigation may take a significant amount of time to restore and/or establish lost functions and years of monitoring and assessment, delaying the start of development. In addition, the application process is lengthy, and final permits are commonly issued close to the start of construction, leaving little time to perform mitigation before development. Also, since the revenue stream needed to pay the costs of mitigation might not be attained until years after the project is completed, generally, applicants are given time to achieve some return on investment before fulfilling any mitigation requirements. If, however, applicants are required to complete mitigation before breaking ground, the cost of the project and the cost of financing are exacerbated. Moreover, requiring advance mitigation could discourage proponents from avoiding and minimizing impacts unless there is a process to reconcile anticipated versus actual impacts. If advance mitigation is required, then any excess mitigation – or mitigation that goes beyond the degree of impacts – should be available to the project proponent as mitigation credits for use in future projects.

The Corps recognizes such constraints in its mitigation policy, noting "it is usually not feasible to require full functionality of a compensatory mitigation project to be achieved before the permitted impacts occur." 73 Fed. Reg. at 19,638; *see also id.* at 19,628 ("Since there are time lags associated with all sources of compensatory mitigation . . . our focus is on reducing temporal losses to the extent practicable."). Accordingly, to account for temporal losses, "[d]istrict engineers can require additional compensatory mitigation to offset temporary losses of aquatic resource functions if the compensatory mitigation project cannot be implemented in advance of, or concurrent with, the permitted impacts." *Id.* at 19,638. This policy is "intended to minimize temporal losses of aquatic resource functions, to the extent practicable." *Id.* at 19,638.

A requirement for advance compensation would be in tension with requirements for other federal permitting agencies, like the Corps, that do not require advance compensation in all circumstances, and is made even more difficult by the lack of agency approved mitigation banks and in-lieu fee programs. The proposed advance compensation requirement appears to ignore years of Corps experience. The Service should revise its policy to allow for simultaneous compensation and, like the Corps, allow higher compensation ratios to account for time lag or temporal loss in compensation.

4. The policy should recognize that there are circumstances in which avoidance of *all impacts* to "high-value" habitats is not necessary or practicable.

As noted above, under the Corps' CWA § 404 mitigation framework, project proponents must "take all appropriate and practicable steps to avoid and minimize impacts to waters of the United States." 33 C.F.R. § 332.1(c). In other words, some unavoidable impacts may be authorized to achieve the project purpose. Under the proposed mitigation policy, however, for habitat the Service determines to be of "high value," the Service will seek avoidance of *all* impacts. 81 Fed. Reg. at 12,388-89 (emphasis added). The policy as proposed would inappropriately give FWS wide discretion and "flexibility" to determine when habitat is "high value" and, thus, must be completely avoided. See discussion, *supra* § III.B.1 & n.3. This could give FWS an unprecedented level of authority to halt projects encroaching on designated "high-value" habitat.

Requiring or suggesting avoidance of *all impacts* to "high-value" habitat would be an inappropriate prejudgment of the outcome because avoidance of all "high-value" habitat is not always necessary or practicable. For example, the construction and maintenance of transmission and distribution lines to ensure grid reliability often involve upgrades and maintenance to existing lines which may already be located within or upon "high-value" land. Thus, given the location of some existing infrastructure, it may not be practicable to avoid *all* impacts. Moreover, such impacts may not have significant adverse effects on wildlife resources. Depending on the species, the habitat may not lose any value or function, particularly if the project has only temporary impacts. Indeed, as the Service recognizes, "the resilience of fish and wildlife populations . . . will inform the scale, nature, and location of mitigation . . . ." 81 Fed. Reg. at 12,385.

A requirement to avoid all impacts to "high-value" habitat areas is also inconsistent with the Service's statement elsewhere in the policy that an impact is "unavoidable" "where an appropriate and practicable alternative to the proposed action that would not cause the impact is unavailable." 81 Fed. Reg. at 12,389. According to the policy, if an "appropriate and practicable alternative . . . is unavailable," then impacts to "high-value" habitats may be "unavoidable." The Policy should clarify and recognize this reality. Like the Corps, the Service should consider the practicability of avoidance of impacts to "high-value" habitat areas and should remove any bright-line requirement to avoid *all* impacts to any area deemed to be "high value."

C. The Service Should Be Careful to Avoid Duplication of or Conflict with Existing Mitigation Requirements.

The ESA protects threatened or endangered species and their habitat through § 7 consultation for federal agency action, which includes authorization through federal permits, and ESA § 9 take prohibitions. Each federal agency is required to "insure," through ESA § 7 consultation with the Services, that any activity funded, carried out, or authorized (*e.g.*, permits or rulemaking) is not likely to jeopardize the continued existence of a listed species or "result in the destruction or adverse modification" of critical habitat. 16 U.S.C. § 1536(a)(2). UWAG members frequently undertake projects, such as utility line maintenance and construction, and other energy projects, that require federal authorizations – specifically, CWA § 404 permits – and thus trigger consultation under ESA § 7.

The CWA § 404 permit process is consistently cost-intensive and time-consuming. *See Rapanos v. United States*, 547 U.S. 715, 721 (2006) (Scalia, J., plurality) ("The average applicant for an individual permit spends 788 days and $271,596 in completing the process . . . not counting costs of mitigation or design changes.") (citing Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 NATURAL RESOURCES J. 59, 74-76 (2002)). The proposed policy would impose new (and potentially inconsistent) requirements on top of the onerous CWA § 404 permitting process, thereby resulting in delay, unpredictability, and higher costs. To avoid increasing the cost and time it takes a permittee to successfully complete the CWA § 404 permit process, the Service should draw from the Corps' mitigation experience and ensure that the proposed policy's framework does not conflict with the Corps' mitigation framework. *See* 81 Fed. Reg. at 12,396 ("The Service has the opportunity to engage several thousand Corps permit actions . . . annually . . . ."). This could minimize the potential for unnecessary delays and disagreements during formal consultation.

One area in which the Service can avoid friction during CWA § 404 permit consultation is the mitigation goal. Explained in more detail above, the Corps generally applies an overall goal of "no net loss" of aquatic resources in determining the extent of mitigation required by a CWA § 404 permit. The application of functional assessment methodologies (or, where such methodologies are not available, a 1:1 ratio between impacts and mitigation) is conducive to objectively measuring reasonable mitigation conditions, limits the discretion of the permitting officer, and ensures replacement of lost aquatic resource functions. *See* 33 C.F.R § 332.3(f); 40 C.F.R. § 230.93(f). The Service's proposed policy, in contrast, could suggest an unlimited mitigation standard; a net *gain* in conservation value. Without a consistent standard, the Corps and the Service will likely have difficulty reaching consensus on the appropriate mitigation during ESA § 7 consultation, leading to a delay in issuing the permit.

Additionally, the proposed requirement for avoidance of all impacts to "high-value" habitat areas would in many cases conflict with the Corps' standard, which requires avoidance to the extent practicable. *See* 1990 MOA § II.C; *see also* 40 C.F.R. § 230.10. The Corps recognizes that in many circumstances, in order to achieve the project purpose, some environmental impacts may be unavoidable. This is why the Corps identifies the "least environmentally damaging practicable alternative," and the Corps' consideration of practicability takes into account the overall project purpose. 40 C.F.R. § 230.10(a); 1990 MOA § II.C.1. The

Corps does not reject all alternatives that have impacts on aquatic resources. The Corps' 404(b)(1) Guidelines analysis and determinations on avoidance and minimization are firmly grounded in statutory and regulatory authority. *See* CWA § 404(b)(1); 40 C.F.R. § 230.10. The proposed FWS policy, however, suggests that impacts to "high-value" habitat areas will be avoided in all scenarios. This proposed avoidance policy, which is at odds with the Corps', would undoubtedly lead to conflict between the Corps and the Service. FWS should clarify that avoidance of "high-value" habitat is not always practicable. Moreover, in light of the Corps' experience and statutory authority, the Service should defer to the Corps' avoidance determinations in the context of the CWA § 404 program.

The concept of "project purpose" described by the Service is also inconsistent with the Corps' definition of project purpose. The proposed FWS policy defines project purpose to include conservation objectives, 81 Fed. Reg. at 12,401, which should not be part of the project purpose when assessing alternatives. UWAG recommends that the Service adopt the Corps' concept of project purpose, *see* 33 C.F.R., Part 325, Appendix B, 9.b.(4), and corresponding NEPA regulations, 40 C.F.R. §1502.13, as a better model.

While there are certainly distinctions between wetlands and species mitigation, the more discrepancies between the two policies, the more time and cost will be spent to complete the permitting process. In addition to revising its policy to avoid conflicts with the Corps' mitigation program, the Service should consider working with the Corps (and other relevant federal agencies) to develop a Memorandum of Agreement or some other concrete mechanism for resolving future disputes in establishing mitigation requirements during federal permitting processes. In particular, for CWA § 404 permitting, the Service should defer to the Corps' determinations and mitigation recommendations.

Duplicative efforts and agency disagreements may also arise during the NPDES permitting process for facilities subject to EPA's § 316(b) Rule for existing facilities, which provides for the Services to perform a "technical assistance" role and provide ESA recommendations to state permit writers.[6] As such, the Service should also consider taking steps to avoid conflicts with State permitting authorities on mitigation requirements during the NPDES permitting process.

IV. Conclusion

UWAG urges the Service to make these recommended revisions to its proposed mitigation policy to avoid overbroad, conflicting, and/or duplicative mitigation requirements.

[6] The proposed policy references several examples of minimization related to cooling water intake structures. *See, e.g.*, 81 Fed. Reg. at 12,390 ("[i]nstall screens and other measures necessary to reduce aquatic life entrainment/impingement in water intake structures;" "maintain or replace equipment and structures to prevent losses of fish and wildlife resources due to equipment failure (e.g., cleaning and replacing trash racks and water intake structures) . . . ."). These examples indicate that the Service may seek to apply this mitigation policy to the NPDES permitting process for the facilities with cooling water intake structures subject to the § 316(b) Rule.

Appendix 3

September 1, 2016

Submitted via www.regulations.gov

Re: **Comments on Proposals to Designate Critical Habitat for Atlantic Sturgeon Distinct Population Segments, Docket ID Nos. NOAA-NMFS-2015-0107 & -0157**

This letter provides the comments of the Utility Water Act Group (UWAG) and the American Petroleum Institute (API) (collectively, the Energy Commenters) on two proposed rules published by National Marine Fisheries Service (NMFS): Critical Habitat for the Endangered Carolina and South Atlantic Distinct Population Segments of Atlantic Sturgeon, 81 Fed. Reg. 36,078 (June 3, 2016), and Designation of Critical Habitat for the Gulf of Maine, New York Bight, and Chesapeake Bay Distinct Population Segments of Atlantic Sturgeon, 81 Fed. Reg. 35,701 (June 3, 2016) (together, Proposals). Based on the close interrelationship of the two proposed rules, and the need for the public and regulators to consider the Proposals as a whole, the Energy Commenters have prepared one set of comments that addresses both of the Proposals.

In a push to satisfy a privately negotiated litigation deadline, NMFS has proposed sweeping critical habitat designations undermined by a range of fundamental problems. NMFS's expansive approach, which would result in the designation of over 4,200 river miles as critical habitat for the Atlantic sturgeon, ignores important statutory limits. The undifferentiated extent of the designation lacks scientific justification and runs contrary to the fundamental statutory principle that only habitat that is *critical* should be designated. Moreover, NMFS fails to acknowledge or account for the significant economic burdens that would result from the broad reach of the Proposals. Finally, NMFS has failed to provide the public with sufficient time to address specific concerns and problems with such a large geographic designation of proposed critical habitat.

As discussed in the enclosed comments, substantial changes to, and narrowing of, the Proposals are required as a matter of law and are warranted in the interest of sound policy. Specifically, NMFS should reissue the proposed rules after incorporating the recommendations summarized in Section I.B. of these comments to allow meaningful and informed public comment.

We look forward to NMFS's thorough consideration of the comments below.

Sincerely,

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COMMENTS OF THE UTILITY WATER ACT GROUP AND THE AMERICAN PETROLEUM INSTITUTE ON PROPOSALS TO DESIGNATE CRITICAL HABITAT FOR ATLANTIC STURGEON DISTINCT POPULATION SEGMENTS
DOCKET NOS. NOAA-NMFS-2015-0107 AND -0157
81 FED. REG. 36,078 (JUNE 3, 2016) AND
81 FED. REG. 35,701 (JUNE 3, 2016)

Comments of the Utility Water Act Group and the American Petroleum Institute on Proposals to Designate Critical Habitat for Atlantic Sturgeon Distinct Population Segments, Docket ID Nos. NOAA-NMFS-2015-0107 and -0157

September 1, 2016

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I. Introduction

The National Marine Fisheries Service (NMFS) has published two proposals to designate critical habitat for listed distinct population segments (DPSs) of Atlantic sturgeon. 81 Fed. Reg. 36,078 (June 3, 2016) (Carolina and South Atlantic DPSs); 81 Fed. Reg. 35,701 (June 3, 2016) (Gulf of Maine, New York Bight, and Chesapeake Bay DPSs) (together, Proposals). The proposed designations exceed NMFS's statutory authority, are contrary to the Endangered Species Act (ESA), and are arbitrary and capricious. Substantial changes to and narrowing of the Proposals are required as a matter of law and warranted as a matter of policy.

The Utility Water Act Group (UWAG) and the American Petroleum Institute (API) (collectively, the Energy Commenters) request that NMFS reissue the Proposals, adopting the recommendations discussed below, for additional review and comment.

A. The Proposed Designations Would Have Significant Implications for UWAG and API Members.

The sweeping critical habitat designations would impede critical economic growth, including activities undertaken by UWAG's and API's members that are necessary to sustain the U.S. economy, without commensurate benefits to the Atlantic sturgeon.

UWAG is a voluntary, ad hoc, non-profit, unincorporated group of 211 individual energy companies and three national trade associations of energy companies: the Edison Electric Institute (EEI), the National Rural Electric Cooperative Association (NRECA), and the American Public Power Association (APPA).[1] UWAG members operate power plants and other facilities that generate, transmit, and distribute electricity to residential, commercial, industrial, and institutional customers. UWAG's purpose is to participate on behalf of its members in federal agency rulemakings under the Clean Water Act (CWA) and related statutes, such as the ESA, and in litigation arising from those rulemakings.

Many of the individual energy companies that comprise UWAG have public service obligations to ensure a reliable and safe supply of electricity to their customers. The administration of the ESA regulatory program, insofar as it affects the electric utility industry, is important not only to UWAG members, but also to the public at large, whose health, safety, and general welfare depend on the reliable delivery of electricity. The Proposals are of particular importance to UWAG members, many of whom have facilities with cooling water intake structures or hydroelectric generating facilities located in waters within the areas that NMFS proposes to designate as critical habitat for the Atlantic sturgeon.

[1] EEI is the association of U.S. shareholder-owned energy companies, international affiliates, and industry associates. EEI members serve 220 million Americans in all 50 states, approximately 70 percent of all retail electricity customers in the country. NRECA is the association of not-for-profit energy cooperatives supplying central station service through generation, transmission, and distribution of electricity to rural areas of the United States. APPA is the national service organization for the more than 2,000 not-for-profit, community-owned electric utilities in the U.S. Collectively, APPA members serve more than 48 million Americans in 47 states, representing 16 percent of the market.

API is a nationwide, non-profit trade association that represents over 650 companies involved in all aspects of the petroleum and natural gas industry, from the largest integrated companies to the smallest independent oil and gas producers. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

The Energy Commenters' activities are essential to the reliable, safe and affordable supply of energy to U.S. consumers. Supplying this energy requires the construction, operation, and maintenance of power generation facilities, electrical transmission and distribution lines, thousands of miles of linear pipelines, and other system control facilities. As described further below, the Proposals are likely to significantly impact the Energy Commenters' activities.

Energy Commenters' members frequently undertake projects, such as utility line maintenance and construction, oil and gas exploration and development, pipeline operation and maintenance, and other energy projects, that can require federal authorizations and thus trigger ESA section 7 consultation requirements. Many of the projects' impacts are minimal (*e.g.*, placing a pole on an islet or bar to allow an electric line to cross a river) and would not be likely to impact the Atlantic sturgeon, but would trigger time-consuming and costly section 7 consultation requirements if they intersect and may affect areas designated as critical habitat. Consultation with NMFS often results in modification, delay, or other changes to projects that can impact the Energy Commenters' ability to undertake, for example, utility line or pipeline construction and maintenance, with potentially significant adverse impacts on their customers' access to reliable and secure energy supplies at a reasonable cost, and without commensurate (if any) demonstrated benefit to the listed species.

B. Summary of Comments and Recommendations

The Proposals are flawed on factual, scientific, and legal grounds, including:

- NMFS has not provided adequate opportunity for public comment given the sweeping magnitude of the Proposals.
- NMFS has rushed to act under a litigation deadline of its own making.
- The proposed designation of large, undifferentiated areas—extending bank to bank for over 4,200 river miles without any attempt to exclude less essential areas—is contrary to the fundamental principle that only *critical* habitat is to be designated.
- The proposed designations rely on new, flawed critical habitat designation criteria.
- The Proposals would designate areas that do not have, and likely never will have, characteristics essential for the conservation of the species.
- The Proposals fail to draw connections between essential features and specific areas designated.

- A close look at the Proposals reveals that they are not supported by best available science.

- The economic costs of the Proposals are considerable, yet were ignored by NMFS.

In order to remedy these significant flaws, UWAG and API recommend that NMFS:

- Remedy the significant flaws pointed out in the following comments;

- Issue revised Proposals with more limited, focused designations of critical habitat;

- Provide the public with more time for review and comment on the revised Proposals; and

- Include meaningful consideration of the Proposals' economic impacts.

II. The ESA Places Significant Limits on the Designation of Critical Habitat.

A. When Congress Amended the ESA in 1978 to Address Designation of Critical Habitat, It Established Limited, Specific Conditions Governing Designation.

When the ESA was enacted in 1973, section 7(a)(2) of the Act required that federal agencies consult with the U.S. Fish and Wildlife Service (FWS) and NMFS (together, the Services) to ensure that actions did not jeopardize listed species or "result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical." Pub. L. No. 93-205, 87 Stat. 884 (1973). The Act did not require the Services to designate critical habitat when listing a species, nor did it define the term "critical habitat." *Id.*

In 1978, following *TVA v. Hill*, 437 U.S. 153 (1978), in which the discovery of a small endangered fish delayed construction of the Tellico Dam, Congress revised the Act. The 1978 amendments included several new provisions relating to critical habitat, including a new requirement that, "to the maximum extent prudent," the Services "specify any habitat . . . considered to be critical" at the time it proposed to list a species. Pub. L. No. 95-632, 92 Stat. 3764 (1978) (codified at 16 U.S.C. § 1533(a)(3)(A)).

The Act defines critical habitat as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, 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; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

Although procedurally tied to the listing of a species, Congress established separate requirements and limits governing the Services' designation of critical habitat. In particular, Congress specified that the designation of critical habitat must be "prudent and determinable." 16 U.S.C. § 1533(a)(3)(A). Under the Services' regulations, designation is not *prudent* if designation "would not be beneficial to the species." 50 C.F.R. § 424.12(a)(1). In addition, critical habitat designations must be based on the "best scientific data available," and the designation must "take[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2).

B. Congress Imposed Stringent Requirements Designed to Avoid Overly Broad Critical Habitat Designations.

Congress established requirements that are unique to critical habitat designation, and that demonstrate Congress's intent to limit critical habitat designations and ensure a proper balance between protecting species and avoiding undue constraints upon productive human activities. Indeed, the legislative history shows that Congress was concerned that, under regulations in effect in 1978, FWS was treating areas spanning the entire range of listed species as "critical to the continued existence of a species" and, in particular, noted concern about "the implications of this policy when extremely large land areas are involved in a critical habitat designation." S. Rep. No. 95-874, at 948 (1978).

For example, Senator Wallop from Wyoming stated, "I share [Senator Garn's] concern that the entire Colorado River Basin could be, in one fell swoop, declared a critical habitat . . . ." 124 Cong. Rec. 21574 (July 19, 1978) (Statement by Sen. Wallop). Senator Wallop continued that, to address that concern, the Senate bill's definition of critical habitat (which is substantially similar to the definition now contained in the law) "goes a long way" toward reducing the potential "rigidity" of the ESA. *Id.* Accordingly, the 1978 ESA amendments defined "critical habitat" narrowly and in detail.

Congress defined the term "conservation," as it is used within the definition of critical habitat, in terms demonstrating that it did not intend designation of critical habitat to leave broad areas fallow or unproductive, but instead intended designation of *specific areas* where targeted, proactive efforts would be undertaken by government and other resource bodies to recover the species. Accordingly, the ESA defines "conservation" as:

> 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 this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

16 U.S.C. § 1532(3).

Further demonstrating Congress's sensitivity to the impacts of designating critical habitat, even where designation would otherwise meet the statutory criteria, Congress provided that the Services may exclude areas where the benefits of exclusion outweigh the benefits of designation *unless* the Services determine that failure to designate the area "will result in the extinction of the species concerned." 16 U.S.C. § 1533(b)(2). Moreover, the designation (and later revision) of critical habitat must be by a "regulation promulgated" through notice and comment rulemaking. *Id*. §§ 1533(a)(3)(A), 1533(b)(4), (5), and (6) (referencing APA rulemaking provisions at 5 U.S.C. § 553). The Services must publish a proposed regulation to establish critical habitat in the *Federal Register*, and invite interested members of the public to submit comments. *Id.* § 1533(b)(5). The Services also must provide notice of the proposed rule to, and invite comment from, relevant state agencies and local jurisdictions. *Id.* The final rule designating critical habitat must respond to public comments and explain the basis for the Services' determination. *Id.* § 1533(b)(8).

Thus, Congress established limited, specific objectives for the designation of critical habitat, placed specific restrictions and limits on the Services governing the process for that designation, and required the Services to consider all impacts—including economic impacts—of the designation of critical habitat. The procedures that govern critical habitat rulemaking are well-defined, and demonstrate Congress's concern that the Services take their time, involve the public, and make careful, circumscribed decisions.

III. The Rulemaking Process is Improper Because NMFS is Rushing to Meet a Litigation Deadline of Its Own Making.

The driving force behind the proposed critical habitat designations has been the pressure and deadlines of litigation, not the underlying science or an urgent need to designate critical habitat to protect the Atlantic sturgeon.[2] As a result, with these Proposals, NMFS has not taken sufficient time to make careful critical habitat determinations, nor has it afforded the public a sufficient opportunity for meaningful participation.

Indeed, NMFS rejected calls from the public for sufficient time to comment on the Proposals. NMFS's rejection of the requests lacks justification, especially given its initial conclusion (as the expert agency) that critical habitat was "not determinable" for the Atlantic sturgeon DPSs. *See* 77 Fed. Reg. 5,880, 5,910 (Feb. 6, 2012); 77 Fed. Reg. 5,914, 5952 (Feb. 6, 2012). But NMFS's current sense of urgency appears to track back to March 18, 2014, when several NGOs filed suit in the U.S. District Court for the District of Columbia to force NMFS to designate critical habitat. NMFS promptly entered into a court-approved consent decree, which (as modified) committed it to propose critical habitat for the five listed DPSs of Atlantic sturgeon by May 30, 2016, and to publish final designations within one year from the published proposed rule. Consent Decree, *Delaware Riverkeeper Network v. U.S. Dep't of Commerce*, No. 14-434, (D.D.C. Nov. 25, 2014).

[2] In fact, to the contrary, the preambles are replete with statements acknowledging the lack of data on Atlantic sturgeon habitat and the physical and biological features essential to the conservation of the species. And, as discussed in more detail in Section VII, NMFS's economic analysis suggests there is little, if any, benefit to designating critical habitat for the Atlantic sturgeon.

"The purpose of the notice and comment requirement is to provide for meaningful public participation in the rulemaking process." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F. 3d 1392, 1404 (9th Cir. 1995). In light of the magnitude and complexity of the Proposals, UWAG sought an extension of the comment period to allow the public sufficient time to provide meaningful comments. Letter from Kerry L. McGrath to Lisa Manning, NMFS Office of Protected Resources, NOAA-NMFS-2015-0157-0006 (Aug. 1, 2016). NMFS rejected UWAG's request, noting that the court-ordered settlement agreement requires NMFS to publish final critical habitat designations by June 3, 2017—one year from the date of the publication of the proposed rules. Letter from Donna S. Wieting, Director, Office of Protected Resources, NMFS, to Kerry L. McGrath (Aug. 2, 2016) (Attachment 1). NMFS stated, "We would not be able to meet this important conservation milestone and legal obligation if we extend the comment period further." *Id.*

The public has not had a sufficient time to review and provide useful comments on the Proposals, which propose to designate thousands of river miles as critical habitat. The Proposals are long on pages and short of meaningful information, and provide no roadmap as to what NMFS relied on in crafting its proposed designations. There is no way for the public to collect or provide new scientific information for NMFS's consideration given the sheer size and extent of the waterbodies proposed for designation. Rather than affording the public an adequate opportunity to comment on the Proposals, NMFS has allowed a self-imposed litigation deadline to drive the timing of the rulemaking. NMFS should not rush to issue a final rule without allowing sufficient time for the public to review the Proposals and underlying scientific support.

IV. These Proposals Employ Improper Designation Criteria to Designate Unduly Broad Swaths of Habitat.

The Proposals rely on the Services' new, flawed critical habitat designation criteria (promulgated in February 2016), and are, in part, flawed for the same reasons. In purporting to implement the newly promulgated designation criteria, NMFS has proposed to designate vast, undistinguished areas as critical habitat for the Atlantic sturgeon, running afoul of important statutory limits.

The Proposals follow the Services' recent joint critical habitat rules that amended the criteria for designation of critical habitat and amended the definition of "adverse modification" respectively. 81 Fed. Reg. 7,414 (Feb. 11, 2016); 81 Fed. Reg. 7,214 (Feb. 11, 2016). Among other things, the Services' new criteria for designation of critical habitat:

- Adopted a broad definition of "geographical area occupied by the species" that includes areas used only periodically or temporarily by the species. *See* 81 Fed. Reg. at 7439, 50 C.F.R. § 424.02.

- Adopted a broad definition of "[p]hysical or biological features" that includes ephemeral habitat characteristics and features that allow for future development of habitat characteristics usable by the species. *Id.*

- Allows for broader inclusion of "unoccupied areas" because the Services are no longer required to first prove that the inclusion of "occupied areas" in a designation is

insufficient to conserve the species before considering unoccupied areas and the new criteria do not require the presence of "physical and biological features" for designation of unoccupied areas. 81 Fed. Reg. at 7,424. The Services need only determine that the area is "essential [to] conservation" of the species. *Id.* 81 Fed. Reg. at 7,439, 50 C.F.R. § 424.12(b)(2).

Energy Commenters submitted extensive joint comments,[3] incorporated here by reference, that detailed the flaws with the new designation criteria as well as the new "adverse modification" definition. One of the major concerns Energy Commenters raised is that the revised designation criteria expand "occupied" critical habitat to include areas not (and potentially never) *occupied* by the species. Energy Comments on Three Critical Habitat Proposals at 32-33. Energy Commenters also pointed out that the revised criteria inappropriately allow the Services to designate areas as critical habitat based on speculation about future conditions (*e.g.*, climate change projections) rather than current features. *Id.* at 37-41. Indeed, the criteria allow for designation of areas based on speculation with no established methodology, rather than on the "best scientific data available," as the statute requires. Under the new criteria, as the proposed designations for the Atlantic sturgeon demonstrate, almost any area can be considered critical habitat. There is no meaningful limiting principle tied to law or science. In sum, the revised criteria substantially expand the Services' approach to designating critical habitat, contrary to the structure of the statute and Congressional intent.

For the same reasons that the new critical habitat designation criteria are unlawful, any conclusions NMFS draws for the Atlantic sturgeon critical habitat based on those criteria are unlawful. As discussed in more detail in the following sections, NMFS has applied these new, improper criteria here to propose designation of broad and largely undifferentiated swaths of aquatic habitat for the Atlantic sturgeon, including hundreds of miles of unoccupied areas. NMFS proposes to designate collectively over 4,200 river miles as critical habitat, extending to all aquatic habitat (*e.g.*, below the high tide line) of selected main stem rivers flowing into a coastal estuary. 81 Fed. Reg. at 35,710; 81 Fed. Reg. at 36,078, 36,093-95. NMFS defines each critical habitat unit by an upriver landmark (dams, bridges, etc.) on the main stem river, and the designation would extend to all waters of the main stem downriver of that landmark to where the waters empty the river's mouth to an identified waterbody. *Id.*

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[3] Comments of the American Petroleum Institute ("API"), Association of Oil Pipe Lines ("AOPL"), International Association of Geophysical Contractors ("IAGC"), Interstate Natural Gas Association of America ("INGAA"), Utility Air Regulatory Group ("UARG"), and Utility Water Act Group ("UWAG") on Three Endangered Species Act Critical Habitat Proposals of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, Docket No. FWS-HQ-ES-2012-0096-0144; 79 Fed. Reg. 27,066 (May 12, 2014) (Proposed Rule to Implement Changes to the Regulations for Designating Critical Habitat); 79 Fed. Reg. 27,060 (May 12, 2014) (Proposed Rule to Amend Definition of Destruction or Adverse Modification of Critical Habitat); and 79 Fed. Reg. 27,052 (May 12, 2014) (Policy Regarding the Implementation of Section 4(b)(2) of the Endangered Species Act) (Docket Nos. FWS-HQ-ES-2012-0096, FWS-R9-ES-2011-0072, and FWS-R9-ES- 2011-0104) (hereinafter "Energy Comments on Three Critical Habitat Proposals") (Attachment 2).

With the proposed broad Atlantic sturgeon designations based on the new, broad designation criteria, UWAG and API member activities are much more likely to trigger ESA section 7 consultation. Additional section 7 review is all the more significant because NMFS will use the new, broad "adverse modification" standard to determine whether the activity will result in "adverse modification or destruction of critical habitat." *See* 81 Fed. Reg. at 7226; 50 C.F.R. § 402.02. The joint comments filed by Energy Commenters explained the overbreadth and implications of the new "adverse modification" definition, under which Energy Commenters' activities are more likely to be found by NMFS to result in adverse modification of critical habitat. Energy Comments on Three Critical Habitat Proposals, at 16-26. As a result, a facility owned by a UWAG or API member located along one of the numerous rivers proposed for designation could now trigger, through ESA section 7 consultation, wide-ranging review of whether the facility's operations result in "adverse modification" of designated areas.

The proposed Atlantic sturgeon critical habitat designations are flawed, in large part, because they employ the Services' new and problematic critical habitat designation criteria. Taken together with the new, broad "adverse modification" standard, the result of these Proposals is that Energy Commenters' activities will more frequently be subject to section 7 consultation and will be more likely to be found by NMFS to result in "adverse modification" of Atlantic sturgeon critical habitat.

Even if the Services' new critical habitat designation criteria were lawful, NMFS's Proposals go beyond what the statute, relevant case law, and the best available science allows. As discussed in more detail in the following sections, NMFS has not justified the broad proposed designation, nor has it adequately considered the significant economic burdens that will result.

V. The Proposed Designations of Occupied Areas Are Overbroad and Unsupported.

One of the most problematic aspects of the Proposals is that the areas of "occupied habitat" NMFS has proposed for designation are overbroad and unsupported by facts or science. NMFS identifies and proposes to designate sweeping areas of "occupied habitat" that undoubtedly capture many areas that do not have, and likely never will have, physical or biological characteristics essential for the conservation of the species. The broad net cast by the Proposals is not surprising given that NMFS has rushed to designate without gathering the requisite scientific data to support its designations. However, the proposed overbroad designations of occupied area are contrary to the statutory limits and must be substantially revised and then republished for public comment.

A. The Act Subjects Designation of "Occupied Areas" to Specific Limits.

Occupied critical habitat includes:

> the *specific areas* within the geographical area 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.

16 U.S.C. § 1532(5) (emphases added); *see also* 50 C.F.R. § 424.12(b).

Thus, the Act calls for specific consideration with respect to "occupied" areas. In particular, Congress subjected the designation of *occupied* areas as critical habitat to five important limits:

(1) specific areas within the geographical area occupied by the species;
(2) at the time the species is listed;
(3) on which are found physical or biological features;
(4) essential to conservation of the species; and
(5) may require special management considerations or protection.

16 U.S.C. § 1532(5). As discussed in more detail in the following section, NMFS has largely ignored these important limits in identifying critical habitat areas occupied by the Atlantic sturgeon DPSs.

B. NMFS Uses An Overly Broad Concept of "Geographical Area Occupied by the Species."

Many of the deficiencies with the Proposals stem from NMFS's use of an overly broad "geographical area occupied by the species." *Id.* NMFS determined the areas "occupied" by the Atlantic sturgeon based on presence of Atlantic sturgeon in the area, presence in a *similar* area within the boundaries of the otherwise established DPS range, and all areas downstream of the farthest known upstream location of Atlantic sturgeon belonging to that DPS in that river. *See* 81 Fed. Reg. at 35,707. NMFS determined the "geographical area occupied" was the entire "aquatic habitat (*e.g.*, below the high tide line)" of those areas that are currently accessible to the Atlantic sturgeon. *Id.* Thus, NMFS included not just areas actually occupied by the species, but also a wider area *around* the species' occurrences and areas that *may* be used only temporarily or periodically by the species, if at all. Thus, areas identified as occupied include vast areas where there is no evidence the species even *occurs*, much less "occupies."

In treating areas in which the species is not actually found as the "geographical area occupied by the species" NMFS goes beyond what the statute allows. In crafting the current statutory definition of "critical habitat," many members of Congress expressed concern that under the previous definition, FWS was treating areas spanning the entire range of a species as critical habitat. *See* S. Rep. No. 95-874, at 948. As a result, Congress distinguished between *occupied* and *unoccupied* areas, and specified that areas *outside* the geographical area occupied by the species may be designated only upon a separate, specific additional determination by the Secretary that doing so is essential to the conservation of the species. 16 U.S.C. § 1532(5)(ii).

Furthermore, case law confirms that to be included in the "geographical area occupied by the species," the area should be *regularly used by the species*. As the Ninth Circuit explained, NMFS "has authority to designate as 'occupied' areas that the [species] uses with sufficient regularity that it is likely to be present during any reasonable span of time." *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1165 (9th Cir. 2010); *see also Cape Hatteras Access Pres. Alliance v. Dept. of the Interior*, 344 F. Supp. 2d 108, 120 (D.D.C. 2004) (areas "occupied" by the piping plover where there was "consistent use" and where "observations over more than one wintering season" demonstrated plovers' presence) (internal quotation marks and citations omitted). Likewise, NMFS's own Consultation Handbook provides that occupied critical habitat

is "critical habitat that contains individuals of the species at the time of the project analysis." FWS, NMFS, *Consultation Handbook, Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* at 4-36 (1998), http://www.nmfs.noaa.gov/pr/pdfs/laws/esa section 7 handbook.pdf.

With the proposed designations of Atlantic sturgeon critical habitat, however, NMFS ignores the limitations set by the statute and recognized by the courts to establish a "geographical area occupied by the species" and fails to provide evidence of actual occupation (i.e., "use with sufficient regularity that it is likely to be present during any reasonable span of time"). Instead, it proposes an area so broad and widespread that it includes areas that may not be used by the Atlantic sturgeon at all, let alone with any regularity. *See* 81 Fed. Reg. at 36,081; 81 Fed. Reg. at 35,707. Contrary to the statute and to case law, this broad area essentially amounts to much of the species' entire inshore range, and more. *See Arizona Cattle Growers Ass'n*, 606 F.3d at 1167 ("[T]he agency may not determine that areas unused by owls are occupied merely because those areas are suitable for future occupancy. Such a position would ignore the ESA's distinction between occupied and unoccupied areas."). Areas with no evidence of the regular presence of sturgeon may not be included in the "geographical area occupied by the species."

This error in the threshold determination of the geographical area occupied by the species taints the remainder of the proposed designation. To remedy this issue (and the problems it creates for later steps of the critical habitat analysis), NMFS should reassess the "geographical area occupied by" the Atlantic sturgeon and limit that area to areas that the Atlantic sturgeon uses regularly.

C. NMFS's Determination of Physical or Biological Features Essential to the Conservation of the Atlantic Sturgeon is Based on Speculation.

The statute requires NMFS to identify "physical or biological features essential to conservation of the species" that "are found" in the "geographical area occupied by the species." 16 U.S.C. §§ 1532(5)(A)(i). The Services' regulations define "physical or biological features" as:

> the features that support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

50 C.F.R. § 424.02.

NMFS must "[i]dentify physical and biological features essential to the conservation of the species at an appropriate level of specificity using the best available scientific data." 50 C.F.R. § 424.12(b)(1)(ii). NMFS cannot act purely based on speculative evidence. *Arizona Cattle Growers Ass'n*, 273 F.3d at 1244.

For all five DPSs of Atlantic sturgeon, NMFS determined that it "could not at this time identify the physical or biological features of estuaries for foraging and growth that are essential to the conservation" of the species "[d]ue to the paucity of data . . . on specific habitat or resource utilization . . . ." 81 Fed. Reg. at 35,709; *see also* 81 Fed. Reg. at 36,081. Nor could it "identify [features] essential to conservation in the marine environment" "due to the paucity of data on the DPSs' offshore needs and specific habitat utilization." 81 Fed. Reg. at 36,081; *see also* 81 Fed. Reg. at 35,709.

Given the lack of data on features essential for marine habitat and for successful foraging for growth and survival of subadults and adults, NMFS instead focuses solely on features essential for Atlantic sturgeon reproduction and recruitment. Even with reproduction and recruitment, however, NMFS acknowledges many unknowns in identifying features essential for conservation. *See, e.g.*, 81 Fed. Reg. at 35,708 ("[T]he number of known spawning rivers for each DPS is still limited . . . .") ("[W]e do not know how successful reproduction is for any of the known spawning rivers . . . .") ("The complex relationship between dissolved oxygen, temperature, and salinity, as well as other factors . . . makes it difficult for us to specify water quality parameters necessary to support Atlantic sturgeon use of reproduction and recruitment habitat."); 81 Fed. Reg. at 36,082 ("[T]he exact location of spawning sites on many rivers (particularly in the Southeast) is not known, or can change from time to time . . . .") ("Velocity data are lacking for many rivers, and where data are available, the wide fluctuations in velocity rates on a daily, monthly, seasonal, and annual basis make it difficult to identify a range of water velocity necessary for the conservation of the species."). Recent studies further underscore the lack of science on "the number and genetic diversity of reproductively mature adults spawning in each river"[4] and that the "spawning areas in most U.S. rivers have not been well defined."[5]

Perhaps because NMFS is under pressure from litigants to designate *something*, NMFS refuses to acknowledge that the data are also too speculative to identify those features essential to the reproduction and recruitment of the Atlantic sturgeon. Instead, NMFS identifies several physical and biological features "essential for reproduction and recruitment" of the Atlantic sturgeon, but each is presented in very broad terms that fail to provide notice to the regulated public of *which* features would be included or how their location and limits can be positively determined:

- Hard bottom substrate in low salinity waters;
- Aquatic habitat with a gradual downstream salinity gradient of 0.5 to 30 parts per thousand and soft substrate downstream of spawning sites;
- Water of appropriate depth and absent physical barriers to passage; and

[4] Shannon J. O'Leary, et al., *Genetic Diversity and Effective Size of Atlantic Sturgeon, Acipenser Oxyrhinchus Oxyrhinchus River Spawning Populations Estimated From the Microsatellite Genotypes of Marine-Captured Juveniles*, 15 Conserv Genet 1173, 1174 (2014).

[5] See NMFS, Biological Opinion for Continued Operations of Salem and Hope Creek Nuclear Generating Stations, NER-210-6581, at 58 (July 17, 2014).

- Water with the temperature, salinity, and oxygen values that, combined, support spawning, survival, growth, development, and recruitment.

81 Fed. Reg. at 35,708-09; 81 Fed. Reg. at 36,083.

NMFS's extrapolation of very limited data to broadly define what constitutes "essential features" for the entire inshore range of the Atlantic sturgeon inevitably results in identification of features that are not actually essential to the sturgeon population. For example, while NMFS asserts that "hard bottom substrate" and a certain gradual downstream salinity gradient are essential for all five Atlantic sturgeon DPSs, in a different context, NMFS previously recognized different spawning habitat characteristics for Atlantic sturgeon in the Hudson River. There, NMFS characterized one spawning area as being "freshwater year round with bedrock, silt and clay substrates and waters depths of 12-24 m," and another area as having "clay, silt, and sand substrates" and water "approximately 21-27 m deep." NMFS, Biological Opinion for Continued Operations of the Indian Point Generating Station, Units 2 and 3, NER 2012-2252 at 42 (Jan. 30, 2013) (citations omitted). This variation in spawning habitat characteristics may occur because the sturgeon is using habitat that is available, not because each and every characteristic of the habitat is essential. For example, studies in a river with no or little gravel would not show gravel to be an important habitat feature, but given a choice in other rivers, gravel may be the preferred habitat for the fish. As such, NMFS's use of very limited data to speculate as to the features essential for the species' entire range is unsound.

Moreover, with such vague and broad essential features, the regulated public cannot objectively determine whether those identified features are present. For example, NMFS acknowledges that "[a]ppropriate temperature and oxygen values will vary interdependently, and depending on salinity in a particular habitat," so it is unclear how the regulated public can be expected to identify which areas of aquatic habitat have the necessary water quality conditions to be essential for the sturgeon's spawning, survival, growth, development, and recruitment. *See* 81 Fed. Reg. at 36,083. Even if the public could determine how the descriptions of each of these features are to be interpreted and applied, regulated entities have no way to know which specific areas contain these features, or where the boundaries are to be drawn. For example, NMFS asserts that one essential feature is aquatic habitat *downstream of spawning sites* with a certain gradual downstream salinity gradient, but readily acknowledges elsewhere in the preamble that there is a dearth of data on the locations of Atlantic sturgeon spawning sites in these rivers. *See* 81 Fed. Reg. at 35,708; 81 Fed. Reg. at 36,082.

Accordingly, the Proposals purport to establish *sine qua non* of occupied habitat – essential features – but in terms so broad and vague that those features cannot be known by a member of the public without asking NMFS for a case-specific determination. Thus, the Proposals fail to meet the most basic requirement of a critical habitat *designation*. NMFS cannot designate critical habitat based on vagaries or speculation. It should acknowledge that it lacks the data to determine which physical and biological features are essential to the conservation of the Atlantic sturgeon, and propose critical habitat only when it is able to notify and sufficiently inform the public by providing specific, knowable identifications of and limits for such features.

D. NMFS Does Not Adequately Support Its Determination That Identified Features "May Require Special Management Considerations or Protection."

NMFS must "[d]etermine which of [the identified essential] features may require special management considerations or protection." § 424.12(b)(1)(iv). The Services' regulations define "special management considerations or protection" as "methods or procedures useful in protecting the physical or biological features essential to the conservation of listed species." § 424.02. The term "special" means additional or incremental, and must take account of efficacy of existing management, which, if adequate, should mean that no critical habitat designation is needed. It is contrary to the ESA to say that an area that is adequately managed may require "special management consideration," unless there is a documented basis for believing the current management of that area of habitat is not adequate and that additional management would be furthered by critical habitat designation.

As such, NMFS cannot simply *deem* the special management considerations requirement met for designation purposes. Prior to designating a particular area, NMFS must make a finding that the area in question may require special management considerations now or in the reasonably foreseeable future, and that current or projected management will not be adequate to protect the species. *See Cape Hatteras Access Pres. Alliance v. DOI*, 344 F. Supp. 2d at 124 (vacating and remanding critical habitat designation where FWS failed to assess special management or protection "in any meaningful way"); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.,* 268 F. Supp. 2d 1197, 1218 (E.D. Cal. 2003) (vacating and remanding critical habitat designation where FWS failed to make a finding that the area in question might require special management considerations and protections at some point in the future).

NMFS does not meet its burden here. The Proposals' discussion of special management considerations is limited to a very general discussion regarding how barriers, water withdrawals, and dredging can generally affect water flow, quality, and depth and/or alter hard substrate. *See* 81 Fed. Reg. at 36,083. FWS and NMFS half-heartedly adds that special management for the essential physical and biological features may be required "as a result of global climate change." 81 Fed. Reg. at 35,709; 81 Fed. Reg. at 36,083. This assertion is so cursory and non-specific that, under this standard, virtually any area in the country "may require special management." Such a result runs contrary to the intent of the ESA in imposing this specific requirement, and effectively reads those words out of the "critical habitat" definition.

Nor does NMFS provide any assessment of current management or protections in place and whether those are adequate for the conservation of the Atlantic sturgeon. NMFS must consider whether any of the proposed critical habitat units are presently under special management or protection for Atlantic sturgeon. Indeed, there has been considerable management attention focused on the Atlantic sturgeon,[6] and it seems that there are several relevant conservation efforts of which NMFS is aware. NMFS's Economic Analysis acknowledges that "there are several federal, state, and local resource management areas that overlap with the final designation of Atlantic sturgeon critical habitat." NMFS, *Designation of*

[6] K. J. Dunton, et al., *Genetic Mixed-Stock Analysis of Atlantic Sturgeon Acipenser Oxyrinchus Oxyrinchus in a Heavily Exploited Marine Habitat Indicates the Need for Routine Genetic Monitoring*, 80 J. Fish Biology 207, 208 (2012).

Critical Habitat for the Gulf of Maine, New York Bight, and Chesapeake Bay Distinct Population Segments of Atlantic Sturgeon: Draft Biological Information and ESA Section 4(b)(2) Source Document with the Draft Economic Analysis and Initial Regulatory Flexibility Analysis, NOAA-NMFS-2015-0107-0002, at 133 (Northeastern DPSs Source Document). For example, the Cape Fear River Partnership is a partnership among NOAA, state agencies, NGOs, and industry groups that, among other things, takes actions to improve water quality and fish habitat conditions. *See* http://www.capefearriverwatch.org/about-us/the-cape-fear-river-partnership. NMFS must assess these initiatives to determine whether they are sufficient, and what further management actions may benefit from critical habitat designation, before it designates expansive critical habitat that may result in duplicative protections with added costs.

NMFS should consider each feature and specific area proposed and assess current management to make an actual determination as to whether special management may be needed in the reasonably foreseeable future, what that management would be, and how critical habitat designation would further that management. NMFS is capable of doing this properly. In its critical habitat designation for the green sturgeon, for example, NMFS at least identified activities that may affect the identified features and may necessitate the need for special management considerations or protection within each area of the geographic area occupied by the species. 74 Fed. Reg. 52,300, 52,328 (Oct. 9, 2009). NMFS should revisit the special management considerations for the Atlantic sturgeon with at least similar specificity. It cannot cut corners by making general, sweeping statements on special management as it has done in these Proposals.

E. NMFS Has Not Adequately Identified *Specific* Areas Where Essential Physical or Biological Features *Are Found*.

In the Proposals, NMFS describes (over-inclusively) the "geographical area occupied by the species," and purports to describe the "physical and biological features essential to the conservation" of the Atlantic sturgeon, but fails to take the critical next step of "[d]etermin[ing] the *specific areas* within the geographical area occupied by the species that *contain* the physical or biological features essential to the conservation of the species." 50 C.F.R. § 424.12(b)(1)(iii) (emphasis added). This is a fundamental error. Indeed, Congress specified that, "[e]xcept in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." 16 U.S.C. § 1532(5)(C). Critical habitat must be defined by specific limits, and cannot use ephemeral reference points. 50 C.F.R. § 424.12(c). NMFS's failure to analyze which areas within the geographic range contain the essential features results in a proposed designation that, contrary to the statute, spans almost the entire geographical area.

While the proposed designation for the southeastern DPSs (Carolina and South Atlantic) provides a river-by-river analysis with at least *some* discussion of which physical and biological features are found in each river (and identifies several rivers that do not have the requisite physical features), 81 Fed. Reg. 36,084-88, the proposal for the northeastern DPSs (Gulf of Maine, New York Bight, Chesapeake Bay) makes no such attempt. Even in the Source Document for the northeastern DPSs, NMFS gives only a wholesale discussion of features

generally found in river segments in the "geographical area occupied by the species." *See* Northeastern DPSs Source Document at 21-22.[7]

"[T]here is no evidence that Congress intended to allow [FWS] to regulate any parcel of land that is merely capable of supporting a protected species." *Arizona Cattle Growers Ass'n v. U.S. Fish and Wildlife Serv.*, 273 F.3d 1229, 1244 (9th Cir. 2001). The analysis provided by NMFS, particularly for the northeastern DPSs, is cursory at best, and results in an overly broad designation that undoubtedly sweeps in many areas that do not actually contain the identified essential features, even under the broad and vague definition of those features proposed by NMFS. Indeed, the proposed designations cover areas that are not important to the species, such as manmade features below the mean high water mark that cannot or would not be accessed by the species (*e.g.*, outfalls, enclosures and quays)[8] and industrialized areas used by ocean-going vessels.[9]

That NMFS has not evaluated these specific areas demonstrates that NMFS has not completed the requisite analysis of whether these areas within the geographic range occupied by the Atlantic sturgeon contain the essential features. Instead, based on generalizations, NMFS designates undifferentiated critical habitat for thousands of miles of entire river segments, extending from bank to bank.

NMFS must show that each specific area to be designated contains one or more physical or biological features that require special management considerations. For example, in the critical habitat designation for green sturgeon, NMFS identified specific areas within the geographical area occupied by the species that contain at least one feature that may require special management considerations. 74 Fed. Reg. at 52,325. The Energy Commenters do not assert that the critical habitat designation for the green sturgeon is without flaws, but at least there, NMFS provided detailed information for each specific area, including a description of the features present, special management considerations or protections that may be needed, and the

[7] For one river in the "geographical area occupied by the species," the Service acknowledges "there is no evidence that sturgeon are using the Union River for spawning now or that they used the Union historically for spawning." Northeastern DPSs Source Document at 21.

[8] The proposed designation for the southeastern DPSs explicitly exempts "areas containing existing . . . federally authorized or permitted man-made structures where the physical features are not expected to be found, such as aids-to-navigation (ATONs), artificial reefs, boat ramps, docks, or pilings within the legal boundaries." 81 Fed. Reg. 41,926, 41,927 (June 28, 2016). The proposal for the northeastern DPSs, however, provides no such exemptions in the regulatory text.

[9] There are likely many other examples of areas that are not likely to contain essential features within the proposed designations. These are just a few examples that could be identified within the limited timeframe provided to the public to evaluate the vast areas proposed for designation. In any event, the burden is not on commenters to show that a species does *not* exist in the designated occupied area. *Cf. Arizona Cattle Growers v. U.S. Fish and Wildlife Serv.*, 273 F.3d at 1244 ("It would be improper to force [plaintiff] to prove that the species does not exist on the permitted area . . . both because it would require [plaintiff] to meet the burden statutorily imposed on the agency, and because it would be requiring it to prove a negative.").

presence and distribution of the green sturgeon. *See id.* As it did for the green sturgeon, NMFS must revise the Atlantic sturgeon Proposals to explain how each specific critical habitat unit to be designated contains the physical or biological features essential to the conservation of the species.

To provide proper and sufficient notice to the regulated public, NMFS should demarcate (including on delineated maps and/or through the use of coordinates) the specific areas that are properly designated as critical habitat. However, even if NMFS could properly take the approach of mapping broader areas and then including as designated critical habitat, only those areas with discretely defined essential features (*see, e.g.*, 54 Fed. Reg. 27,377, 27378 (June 29, 1989) (designated critical habitat for the concho water snake)), it has failed to limit the mapped areas in these Proposals to such essential features (and, as explained above, has failed to provide appropriately circumscribed descriptions of those features), nor has NMFS mapped features that it has identified as potential threats to the Atlantic sturgeon (*e.g.*, manmade structures, dredging areas). These are fundamental flaws in the proposed designations that require correction and republication for public notice and comment prior to any final designation of critical habitat.

VI. NMFS Fails to Show That The Unoccupied Areas Proposed for Designation Are Essential for the Conservation of the Atlantic Sturgeon.

Like the proposed designations of "occupied" habitat, NMFS's proposal to designate unoccupied areas goes too far and is not based on a proper determination that such areas are essential to the conservation of the Atlantic sturgeon. As explained above, Congress distinguished between *occupied* and *unoccupied* areas, and specified that areas *outside* the geographical area occupied by the species may be designated only upon a separate, specific additional determination by the Secretary that doing so is essential to the conservation of the species. 16 U.S.C. § 1532(5)(A)(ii).

Consistent with the statutory language, until recently, the Services long recognized that unoccupied habitat may be designated only when designation of occupied habitat would be *inadequate* to ensure conservation. *See* 50 C.F.R. § 424.12(e) (1984) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species *only when a designation limited to its present range would be inadequate* to ensure the conservation of the species.") (emphasis added). In the preamble to the 1984 regulations, the Services further described the limited situations in which it is appropriate to designate unoccupied areas, providing, "Designations of critical habitat outside current range are normally undertaken when essential to a species' conservation *and to provide for natural range expansion into adjacent suitable habitat or to assure proper management of resources.*" 49 Fed. Reg. 38,900, 38,904 (Oct. 1, 1984).

Similarly, courts have recognized the distinction in the ESA between occupied and unoccupied areas, noting the more rigorous standard for unoccupied areas. The Ninth Circuit, in *Arizona Cattle Growers Ass'n*, explained that the ESA imposes a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are "essential for the conservation of the species." 606 F. 3d at 1163; *see also Cape Hatteras*, 344 F. Supp. 2d at 125 ("Designation of unoccupied land is a more extraordinary event than designation of occupied lands.").

Yet, ignoring Congressional intent and judicial precedent, in its recently amended critical habitat designation criteria, the Services have abandoned their longstanding step-wise approach to unoccupied habitat. *See* 81 Fed. Reg. at 7,434. Here, NMFS has failed to perform the critical step of determining whether designation of unoccupied habitat is warranted or necessary on the basis that designation of occupied habitat is inadequate to ensure the conservation of the Atlantic sturgeon. *See* 81 Fed. Reg. at 36,088.

NMFS determined that "unoccupied areas" are those "completely inaccessible" to the Atlantic sturgeon. 81 Fed. Reg. at 35,710. NMFS does not propose to designate unoccupied areas for the northeastern DPSs, but has proposed designation of some unoccupied areas for the southeastern DPSs. In particular, NMFS proposes to designate three unoccupied areas above dams on particular river systems (a portion of the Cape Fear River, portions of several rivers in the Santee-Cooper basin, and a portion of the Savannah River) that are not currently accessible to the Atlantic sturgeon, but that NMFS finds "need to be protected until [they] become[] accessible to the species." 81 Fed. Reg. at 36,088. According to NMFS, data suggest that these unoccupied areas "did historically or could, serve as spawning habitat for the Atlantic sturgeon *should* they become accessible in the future." 81 Fed. Reg. at 36,088 (emphasis added). NMFS concludes that because Atlantic sturgeon are *likely* attempting to move upstream to spawning habitat located beyond current barriers, this historical spawning habitat is "essential to the conservation" of the DPSs. *Id.* at 36,088.

However, NMFS has skipped an important step. That an area is or could be "accessible" does not necessarily mean that it is "essential" for the conservation of the Atlantic sturgeon DPS. Moreover, NMFS has not provided sufficient data or analysis why these areas – which are not accessible to the Atlantic sturgeon – are "essential to the conservation of the species." *See* 81 Fed. Reg. at 36,088-89; NMFS, *Draft Impact Analysis of Critical Habitat Designation for the Carolina and South Atlantic Distinct Population Segments of Atlantic Sturgeon*, NOAA-NMFS-2015-0157-0003 (May 2016) (Southeastern DPS Draft Impact Analysis) at 19-20. The standard is not whether such areas *may be essential* in the future, but whether they *actually are essential*. *See Markle Interests LLC v. U.S. Fish and Wildlife Serv.*, No. 14-31008, 2016 WL 3568093, at *22 (5th Cir. June 30, 2016) (Owen, J., dissenting). Allowing for designation of unoccupied habitat based on potential future changes in conditions that *could* make an area essential would create a standard so broad that any area could be designated as unoccupied habitat.

Because it is very unlikely that these unoccupied areas are "essential to the conservation of the species," NMFS should revise the Proposals to remove the proposed designation of the unoccupied areas. If the areas later become at least accessible to the species, NMFS could propose their designation at that time. Even where NMFS properly could designate selected unoccupied areas, it must at least explain and provide support for any determination that such areas are essential to the conservation of the species.

VII. NMFS Fails to Acknowledge or Account for the Significant Economic Burdens That Would Result from the Broad Reach of the Proposals.

NMFS proposes to designate vast undifferentiated areas as critical habitat for the Atlantic sturgeon without giving meaningful consideration to the significant economic burden that these far-reaching designations would impose. Energy Commenters urge NMFS to substantially revise

the economic analyses to account for the significant costs of the proposed designations, as the statute requires. NMFS should also consider whether the costly designations will have any real, commensurate conservation benefits for the Atlantic sturgeon DPSs.

A. NMFS Underestimates Costs of Section 7 Consultation That Will Result From the Broad Designations.

A critical habitat designation must "take[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). As a previous Solicitor of the Department of the Interior explained:

> Congress wanted the Secretary to understand the costs on human activity of making a designation before he made a decision and thereby provide an opportunity to minimize potential future conflicts between species conservation and other relevant priorities at an early opportunity.[10]

This required consideration of economic impacts is crucial to ensure that critical habitat designations do not impede critical economic growth without commensurate benefits to species.

Like many other aspects of these Proposals, NMFS's economic analyses are cursory and deficient. Ignoring the considerations highlighted by Congress, NMFS concludes that the "administrative cost of conducting ESA section 7 consultations" is the "primary source of economic impacts" that would result from the proposed designations of Atlantic sturgeon critical habitat. NMFS assumes that the majority of the section 7 consultation costs would already be incurred based on the listing of the Atlantic sturgeon itself, and finds that "[i]t is extremely unlikely that [project] modifications that would be required to avoid destruction or adverse modification of critical habitat would not also be required because of adverse effects to the species." 81 Fed. Reg. at 35,712. Based on this conclusion, and the false premise that the proposed designations encompass only those waters with essential features, NMFS grossly underestimates the additional section 7 costs that will be incurred as a result of the proposed designation, and draws into question what function or additional benefit it believes will flow from the proposed designation.

First, NMFS underestimates the number of consultations that will result from the Proposals. NMFS wrongly concludes that the Atlantic sturgeon critical habitat designations will not result in increased numbers of sections 7 consultations in the areas subject to the proposed designations. 81 Fed. Reg. at 35,711. It finds "projects that adversely affect the proposed essential features are likely to always also adversely affect the species and the project impacts would not be incremental." 81 Fed. Reg. at 36,091. As a result, NMFS uses the consultation record over the past ten years to estimate the number of consultations likely to affect the proposed critical habitat over the next ten years, without accounting for the substantial increase in consultations that is likely to result from a broad designation of Atlantic sturgeon critical habitat. 81 Fed. Reg. at 35,711. This assumption is without support. Because NMFS has not

[10] Memorandum from David L. Bernhardt, Solicitor, DOI, to Deputy Sec'y, DOI, "The Secretary's Authority to Exclude Areas from a Critical Habitat Designation Under Section 4(b)(2) of the Endangered Species Act," at 3-4 (Oct. 3, 2008).

identified the specific areas that have essential features, it cannot reasonably conclude that all activities in the vast areas proposed for designation would have previously triggered an analysis of whether such activities cause jeopardy to the species.

In fact, these sweeping designations, particularly in areas of unoccupied habitat proposed for the southeastern DPSs, are likely to impose a new requirement for consultation for activities in areas in which the Atlantic sturgeon is not expected to be found. In such areas, the action agency would have previously concluded that consultation is not necessary because the Atlantic sturgeon is not present and therefore the activities would be likely to either have no effect or no adverse effect on the species. For example, many of Energy Commenters' members' impacts are very minimal (*e.g.*, placing a pole on an islet or bar to allow an electric line to cross a river) and would not be likely to impact the Atlantic sturgeon in many areas proposed for inclusion in the designation, but would *automatically* trigger time-consuming and costly section 7 consultation requirements if these areas are designated as critical habitat, and the area itself was affected by the activity (even though the species is not). Many of Energy Commenters' members' projects involving river crossings have received "no effect" or "not likely to adversely affect" determinations in the past, but they are concerned that with these proposed critical habitat designations, consultation will be triggered. This will undoubtedly result in a substantial increase in the frequency and cost of section 7 consultations.

Moreover, the proposed designations could also have impacts for not just the sweeping areas proposed to be designated critical habitat, but also the surrounding areas. For example, several members have experience with the Services imposing restrictions and requiring project modifications for projects *nearby* designated critical habitat areas to obtain a "not likely to adversely affect" concurrence.

Next, NMFS underestimates the costs of those consultations. Because NMFS determines there will not be a substantial increase in consultations, it estimates that any potential incremental, economic impacts of the Proposals "would be very small" and "would consist solely of the administrative costs of consultation: no project modifications are projected to be required to address impacts solely to the proposed critical habitat." 81 Fed. Reg. at 35,713. NMFS explains that administrative costs include "the cost of time spent in meetings, preparing letters, and in some cases, developing a biological assessment and biological opinion, identifying and designating reasonable and prudent measures (RPMs), and so forth." 81 Fed. Reg. at 36,091. NMFS projects that each formal consultation will result in the following additional costs to address critical habitat: $1,400 in NMFS costs; $1,600 in action agency costs; $880 in third party (*e.g.*, permittee) costs, if applicable, and $1,200 in costs to the action agency or third party to prepare the biological assessment. *Id.* This significantly underestimates the true costs to a permittee, who often must employ biologists and other consultants as well as legal support, all at considerable costs not even acknowledged by NMFS, to navigate the consultation process. Consultation may also lead to project modification, additional avoidance, or require additional mitigation above what was required by the action agency. For example, the direct, out-of-pocket, costs of section 7 consultation for a single-family housing project are estimated to be several thousand dollars *per* house.[11] Beyond the consultation process itself, avoidance and

[11] *See* David Sunding, *The Economic Impacts of Critical Habitat Designation*, Gianni Foundation of Agricultural Economics at 8-9 (2003), (Sunding 2003),

mitigation requirements imposed as a result of critical habitat designation can result in economic losses of millions of dollars.[12]

As a result of these gross underestimations, NMFS estimates a total cost of $1,474.84 per critical habitat unit for the northeastern DPSs. 81 Fed. Reg. at 35,711. For the southeastern DPSs, it estimates per-unit costs that range from $147 to $23,051 per critical habitat unit. 81 Fed. Reg. at 36,091. By severely underestimating the number of consultations that will be triggered by the proposed designations and the costs of those consultations, NMFS fails provide a meaningful analysis of section 7 consultation costs.

B. NMFS Ignores Many Important Costs That Will Result from the Proposed Designations.

With this economic analysis, NMFS wrongly limits its evaluation of economic impacts to direct ESA section 7 impacts. This paints an incomplete picture and ignores many of the important economic impacts of critical habitat designation.

Although it is widely understood that designation of critical habitat will have economic impacts outside of the context of section 7 consultation, NMFS ignores these effects. NMFS acknowledges, "[E]conomic impacts may include changes in real estate prices and project values resulting from stigma effects, project delays, and uncertainty resulting from the designation, as well as related indirect impacts on regional markets and economies." Southeastern DPS Draft Impact Analysis at 89. Yet, NMFS claims it "did not find any information that would support non-speculative assessment of any of these indirect impacts from the proposed designation," and therefore limits its analysis of impacts to direct section 7 impacts associated with the designation. *Id.* at 90.

In addition to administrative costs, there are many other significant costs of designating critical habitat, including the costs of mitigation, project modifications and redesign, delay in completion of projects, and decrease in property values. Sunding 2003 at 8-9. For example, one member is required by a Federal Energy Regulatory Commission license to keep an open navigation channel in one of the river areas proposed for designation. The member also maintains markers in this channel (and replaces the markers when they are destroyed by boaters) on a regular basis. The member is concerned that, as a result of the proposed designations, these dredging and maintenance activities could now trigger ESA section 7 consultation that was not previously required, thereby resulting in increased costs, delays, and additional requirements.

The delays of section 7 consultation, in particular, can be significant. Consultations can take years and hold up projects indefinitely. Such delays often slow the installation of service and can sometimes prevent member companies from meeting transmission in-service deadlines, resulting in contractual penalties. The Energy Commenters are concerned not just about delays that result from new consultations, but also delays for ongoing consultations that would now

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http://s.giannini.ucop.edu/uploads/giannini_public/57/da/57da3d2a-d591-419b-a739-02883a5edb31/v6n6_3.pdf

[12] *Id.* at 9.

have to include an analysis of adverse modification for Atlantic sturgeon critical habitat, as well as previous consultations that NMFS could decide to reopen based on the new critical habitat designation.

NMFS must revise the economic analyses to assess these significant impacts of designation. It must quantify and consider the many important costs that are incurred in addition to administrative costs from section 7 consultation.

C. NMFS's Economic Analysis Suggests There Is Little, If Any, Benefit to Designating of Critical Habitat for the Atlantic Sturgeon.

If there are no categories of permits or other federal activities that would be impacted solely or even primarily affected by consultation over impacts to designated critical habitat (rather than impacts to the listed species) as NMFS alleges, what is the purpose of designating critical habitat? If designation of critical habitat is "not prudent," NMFS should not make such a designation. 50 C.F.R. § 424.12(a). A designation of critical habitat is not prudent when such a designation "would not be beneficial to the species." *Id*. § 424.124(a)(1)(ii). NMFS has not explained, much less demonstrated, that the designation of critical habitat for Atlantic sturgeon would be beneficial for the species (particularly where it estimates such small regulatory compliance costs for the public).

NMFS makes no attempt to establish any connection between the threats to the Atlantic sturgeon and the areas proposed as critical habitat. In listing the Atlantic sturgeon DPSs, NMFS identified several threats that have contributed to the decline of the species, including habitat alteration/destruction, overutilization, and injury/death through commercial bycatch. 75 Fed. Reg. 61,904, 61,916-21 (Oct. 6, 2010); 75 Fed. Reg. 61,872, 61,882-88 (Oct. 6, 2010). More recent studies demonstrate that while overfishing or habitat degradation can be problematic, bycatch mortality as a result of inshore trawling is now considered to be the most significant marine threat to the sturgeon's recovery.[13] As NMFS has recognized, "Because Atlantic sturgeon mix extensively in marine waters and may access multiple river systems, they are subject to being caught in multiple fisheries throughout their range."[14] Even where Atlantic sturgeon are taken as bycatch but released alive, the related stress or injury may result in "increased susceptibility to other threats," "reduced ability to perform major life functions, such as foraging," and/or "post-capture mortality."[15]

NMFS has not evaluated or explained how designation of critical habitat will help address injury/death resulting from inshore trawling or overfishing. And in light of its position that any project modifications that would be required to avoid destruction or adverse modification of critical habitat would already be required to avoid jeopardy to the species,

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[13] K. J. Dunton, et al., Genetic Mixed-Stock Analysis of Atlantic Sturgeon Acipenser Oxyrinchus Oxyrinchus in a Heavily Exploited Marine Habitat Indicates the Need for Routine Genetic Monitoring, Journal of Fish Biology at 209 (2012).

[14] National Marine Fisheries Service, Biological Opinion for Continued Operations of Salem Unit 1, Unit 2, and Hope Creek, at 64 (July 17, 2014).

[15] *Id.*

NMFS fails to explain how the designation of these vast areas would provide new or additional minimization of habitat alteration or destruction.

Nor do the Proposals attempt to quantify or characterize the conservation benefits of designating specific areas. NMFS alleges that "it is not possible at this time to quantify or monetize [conservation benefits, educational awareness benefits, and impacts on natural resources agencies] . . . ." Northeastern DPSs Source Book at 126. Instead, NMFS only describes conservation benefits for all critical habitat units combined. *Id.* NMFS states, "While we cannot quantify nor monetize [the conservation benefits of designation], we believe they are not negligible and would be an incremental benefit of this designation." 81 Fed. Reg. at 36,092.

NMFS's speculation that there *could* be conservation benefits does not justify the costly designation of critical habitat. NMFS should consider whether this proposed designation is prudent, rather than designating in response to litigation.

VIII. NMFS Fails to Evaluate Whether It Should Exclude Specific Areas From Critical Habitat Designation.

The Proposals to designate thousands of miles of undifferentiated areas as critical habitat for the Atlantic sturgeon are all the more problematic because NMFS failed to perform the requisite analysis of whether certain areas should be excluded. NMFS makes no attempt to carve out less valuable areas based on economic, national security, or other relevant impacts.

To address its concern over the significant impacts of designating critical habitat, even where designation would otherwise meet the statutory criteria, Congress authorized the Services to exclude areas where the benefits of exclusion outweigh the benefits of designation *unless* the Services determine that failure to designate the area "will result in the extinction of the species concerned." 16 U.S.C. § 1533(b)(2). Congress recognized that designating areas for protection under the ESA is far different and potentially far more costly and burdensome than designating species for protection. This provision demonstrates Congress's intent to find a balance "between the Endangered Species Act's mandate to protect and manage endangered and threatened species and other legitimate national goals and priorities such as providing energy, economic development and other benefits to the American people," S. Rep. No. 95-874, at 940 (1978).

Here, NMFS essentially bypasses this consideration. Without analysis of any specific areas other than those for which the Department of Defense expressed concern, NMFS determines that there are no categories of activities that would solely affect critical habitat (and not the species itself). 81 Fed. Reg. at 35,711; 81 Fed. Reg. at 36,090. NMFS concludes that the "administrative cost of conducting ESA section 7 consultations" is the "primary source of economic impacts" that would result from the proposed designations, and finds that "[i]t is extremely unlikely that [project] modifications that would be required to avoid destruction or adverse modification of critical habitat would not also be required because of adverse effects to the species." 81 Fed. Reg. at 35,712. NMFS therefore estimates that any potential incremental, economic impacts of the Proposals "would be very small" (approximately $1,474.84 per critical habitat unit) and "would consist solely of the administrative costs of consultation: no project modifications are projected to be required to address impacts solely to the proposed critical habitat." 81 Fed. Reg. at 35,713.

Based on this significant underestimation of the costs that would result from the Proposals, as discussed above, NMFS determines that it will not exclude any particular areas from critical habitat designation based on economic, national security, or other relevant impacts. 81 Fed. Reg. at 35,713. Here, again, NMFS's analysis is cursory and grossly inadequate. Presumably because NMFS has decided across the board that the economic impacts would be "very small," it does not evaluate whether the benefits of exclusion outweigh the economic costs of designation for particular areas that will be designated (aside from areas of concern to the Navy). *See* 81 Fed. Reg. at 35,712-13.

As explained above, NMFS makes no attempt to quantify or characterize the conservation benefits of designating specific areas. *See* Northeastern DPS Source Book at 126 ("[I]t is not possible at this time to quantify or monetize [conservation benefits, educational awareness benefits, and impacts on natural resources agencies] . . . ."). NMFS then concludes that "there is no basis to exclude any particular area from the proposed critical habitat units." 81 Fed. Reg. at 35,713. But how can NMFS make such a determination when it has not evaluated particular critical habitat units to determine whether the benefits of exclusion outweigh the benefits of designation?

Although NMFS has discretion to decide whether to exclude any particular areas of critical habitat, it cannot do so without actually evaluating the impacts for particular areas. For example, in the critical habitat for the green sturgeon, NMFS identified low and ultra-low conservation areas where sturgeon have not been documented to use the areas extensively and, therefore, excluding those areas would not significantly impede conservation. 74 Fed. Reg. 52,300, 5,2334-37 (Oct. 9, 2009). Similarly, for the critical habitat designation for the gulf sturgeon, FWS and NMFS excluded certain major shipping channels in several of the critical habitat units because they determined that although these channels contained primary constituent elements, "[i]n areas that are frequently maintained by dredging . . . the primary constituent elements for sturgeon that are still present in the channels are unlikely to be appreciably diminished from their current baseline by Federal actions in the channels." 68 Fed. Reg. 13,370, 13,401 (Mar. 19, 2003).

To comply with its statutory mandate to consider whether the benefits of excluding areas from the critical habitat designation outweigh the benefits of designation, NMFS must provide some specific analysis of the conservation benefits of designating specific areas as compared to the economic costs of designating those areas. It cannot just rely on unsupported, sweeping general statements.

IX. Conclusion

The proposed critical habitat designations are flawed on factual, scientific, and legal grounds. Instead of making specific, circumscribed proposed designations, NMFS has proposed a sweeping, undifferentiated designation of thousands of river miles contrary to the fundamental principles of the ESA. In rushing to act under a litigation deadline, NMFS has provided only a cursory analysis at all turns, and has not allowed the public a meaningful opportunity for public comment despite the magnitude of the Proposals.

NMFS should focus on whether there is a need to designate critical habitat to conserve the species, especially given NMFS's view that designation will not materially change implementation of the ESA in the context of human activities. NMFS should compare actual likely costs of designation, including increased section 7 consultations and resulting constraints on federally permitted projects, with anticipated conservation benefits, if any. To the extent that NMFS determines that any designation is necessary, that designation should be tailored to include only these areas that comprise all sturgeon habitat which is duly critical—that is "specific areas" that have those features which are essential to the continuation of the species. NMFS should propose to designate unoccupied areas only where it makes a reasoned finding that occupied habitat does not suffice. Finally, NMFS should examine exclusion of potential areas of critical habitat to minimize impacts of designation on human activity, unless failure to designate such areas will result in the extinction of the relevant Atlantic sturgeon DPS.

Consistent with the foregoing comments, UWAG and API urge NMFS to issue revised proposals with more limited, focused designations of Atlantic sturgeon critical habitat based on sound analysis and scientific support, provide the public with more time for comments on the revised proposals, and include meaningful consideration of the proposals' economic impacts.