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National Marine Fisheries Service
Office of Protected Resources
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Submitted via Federal eRulemaking Portal: http://www.regulations.gov
Docket No. FWS–HQ–ES–2018–0006

RE: NESARC Comments on the FWS/NMFS Proposed Revision of the Regulations for Listing Species and Designating Critical Habitat

Dear Ms. Fahey and Mr. Rauch,

On July 25, 2018, the U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively, "Services") issued a proposed rule to implement changes to the regulations for listing or delisting species and for designating critical habitat under the Endangered Species Act ("ESA").[1] Pursuant to the Federal Register notice, the National Endangered Species Act Reform Coalition ("NESARC") respectfully provides its comments and recommendations on the Services' Proposed Rule.

NESARC is the country's oldest broad-based, national coalition dedicated solely to achieving improvements to the ESA and its implementation. As detailed in the membership list[2] attached to these comments, NESARC includes farmers, cities and counties, rural irrigators, electric utilities, forest product companies, homebuilders, agricultural interests, mining companies, and other businesses and individuals throughout the United States. NESARC and its members are committed to promoting effective and balanced legislative and administrative improvements to the ESA that support the protection of fish, wildlife, and plant populations as well as responsible land, water, and resource management.

[1] 83 Fed. Reg. 35,193 (July 25, 2018) ("Proposed Rule").

[2] See Appendix A.

I. Overview of Comments

NESARC commends the Services on their effort to review and propose improvements to the existing regulations implementing Section 4 of the ESA. NESARC agrees that certain criteria relating to the listing of species and the designation of critical habitat are in need of clarification and revision. These components—and the application of the "foreseeable future" and the designation of unoccupied habitat in particular—have been contentious and warrant further interpretation. In addition, NESARC appreciates the Services' willingness to comprehensively reconsider any of the provisions in their part 424 regulations.

NESARC generally supports many of the revisions proposed by the Services. However, in some cases, further revisions or clarifications are necessary. In furtherance of the Services' consideration of improvements to their Section 4 regulations, NESARC provides the following comments, which are discussed in greater detail below:

- The Services should revise the foreseeable future framework to more clearly reflect that the duration will extend only so far as the Services can determine that the statutory threat factors and the species' response to those threats are accurately and reliability predicted to occur. The Services must also identify the point at which a species will be in danger of extinction and the likelihood of reaching that threshold must be foreseeable. See pages 4-13.

- NESARC supports the Services' proposed changes to the factors considered in delisting species. However, the Services should more clearly state that delisting decisions are not contingent upon the satisfaction of a recovery plan and should retain the explicit ability to delist or downlist a species when the original data for classification are found to be in error. See pages 14-16.

- NESARC supports the Services' removal of the restriction on referencing possible economic or other impacts of listing in the listing decision. See page 16-17.

- While NESARC supports the Services' proposed revisions to the criteria regarding a not prudent determination for the designation of critical habitat, the Services should retain the existing regulatory text reflecting that a designation is not prudent when one of the criteria exists. In addition, the Services should adopt a presumption that designation of critical habitat remains not prudent unless future unforeseen changed circumstances necessitate reconsideration of that determination. See pages 17-19.

- Regarding the designation of unoccupied critical habitat, NESARC supports restoring the prior regulatory requirement that the Services must first determine that occupied critical habitat would be inadequate to ensure the conservation of the species. NESARC also requests clarifications and revisions to the proposed procedures for designating unoccupied critical habitat, including: (1) unoccupied critical habitat can be designated only in areas that provide viable habitat for the species at the time of designation; (2) the determination that unoccupied habitat is essential must reflect that all physical and biological features necessary for occupancy are present and that future occupation will occur; (3) a designation should not be based on the likelihood of a Section 7 consultation; (4) the value of an area must be based

on both its ability to support occupancy and the likelihood of its contribution to the species' biological needs; and (5) the contribution of an area to the conservation of the species should be assessed based on active or ongoing conservation measures. Finally, prior to its adoption, the Services should provide additional information regarding the analytical framework (e.g., a benefit-cost analysis) and the process that would be applied when determining the efficiency of areas for designation. See pages 19-29.

- The definition of "geographical area occupied by the species" should be revised to reflect that an area of occupancy to be designated as critical habitat is not coextensive with the species' range, clarify that occupancy necessitates sustained or regular use of a specific area by the species, and acknowledge that occupancy cannot be determined based on "indirect or circumstantial evidence." See pages 29-32.

- The Services should reconsider or revise the definition of "physical or biological features." NESARC requests that the Services reinstate the use of primary constituent elements as the basis for designating occupied critical habitat. Alternatively, if the definition is retained, it should be revised to reflect that the identified features must support the essential biological needs of the species and cannot include "habitat characteristics that support ephemeral or dynamic habitat conditions." Further, the definition impermissibly elevates principles of conservation biology above other scientific considerations. See pages 32-36.

- The regulatory provisions for designating occupied and unoccupied critical habitat should be revised to reflect that a designation is limited to "specific areas" and not "at a scale determined by the Secretary to be appropriate." See pages 36-38.

- The Services should revise their critical habitat economic impacts analysis and provide additional certainty regarding the exclusion of areas from a critical habitat designation. Specifically, NESARC requests that the Services: (1) adopt a coextensive approach (and reject the existing with/without approach) to analyzing the impacts associated with the designation of critical habitat; (2) focus on the impacts associated with designating each "particular area" as critical habitat; (3) adopt a preference for the use of quantitative data and methodologies; (4) clarify how they "assign the weight" to any benefit for purposes of the exclusion analysis; and (5) adopt a presumption of exclusion for areas already included within certain existing conservation mechanisms. See pages 38-44.

- The Services should revise the definition of "conserve, conserving, and conservation" to delete the phrase "i.e., the species is recovered in accordance with § 402.02 of this chapter." See pages 44-45.

- Finally, the Services should revise their interpretation of "significant portion of its range" to state that a species that is only threatened or endangered within a significant portion of its range should only be listed within that portion of its range. See pages 45-47.

II. Comments on the Proposed Regulatory Revisions

A. Framework for Considering the Foreseeable Future when Determining Whether a Species is Threatened

The Services propose adding a new paragraph (d) to their regulations at 50 C.F.R. § 424.11 to provide a framework for how the Services will consider the "foreseeable future" when determining whether a species qualifies as a "threatened species" for purposes of listing under the ESA. NESARC generally supports the proposed addition as the phrase "foreseeable future" has previously been undefined and subject to various interpretations that have resulted in unpredictable and inconsistent determinations regarding the threatened status of different species. However, NESARC has the following concerns regarding the proposed framework that require further clarification and modification by the Services: (1) species should not be listed as threatened when their populations are currently healthy and not exhibiting a decline in numbers; (2) the foreseeable future should not be based on general "conditions," but must focus on the threats, and species' response to those threats, that are capable of being accurately and reliably predicted to occur; (3) the Services must provide further clarification on how uncertainty and variability associated with future predictions will be addressed; and (4) the Services must identify an extinction threshold for each species and assess the likelihood of the species' population trajectory reaching that point within the foreseeable future.

Proposed Action: As discussed below, NESARC recommends the following revisions to the proposed foreseeable future framework at 50 C.F.R. § 424.11(d) to address these issues:

> In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. To be listed as a threatened species, the Services must determine that the species is currently depleted in numbers and is likely to reach an extinction threshold within the foreseeable future. ~~The term foreseeable future extends only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable.~~ The Services will ~~describe~~identify the foreseeable future on a case-by-case basis, using the best scientific and commercial data available~~ data~~ and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time, but the foreseeable future extends only so far into the future as the Services can ~~may instead explain the extent to which they can reasonably~~ determine that both the ~~future~~ threats identified in ESA Section 4(a)(1) and the species' responses to those threats are ~~probable~~ accurately and reliably predicted to occur.

1. To be Considered for Listing as Threatened, a Species First Must be Depleted Due to a Current Threat

The Services should clarify that the ESA was not intended to protect currently healthy species that may experience a threat to their continued existence that will not manifest itself until some point in the future. Instead, to be considered for threatened status, a species must be experiencing the current effects of one or more of the five enumerated statutory listing factors.[3] The impacts of these threats must be affecting the species' population to such a degree that the corresponding population decline will result in the species being on the brink of extinction in the foreseeable future.

Congress enacted the ESA based on a concern that some "species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction."[4] Previous federal endangered species laws did not distinguish between endangered and threatened species and, in 1973, Congress provided this distinction by including separate definitions of "endangered species" and "threatened species."[5] The purpose of the two classifications was to provide the Services with flexibility to tailor protections for listed species based on the temporal proximity of the danger of extinction. For example, the Senate Commerce Committee report stated:

> The bill provides a broadened concept of an "endangered species" by affording the Secretary the additional power to list animals which he determines are likely within the foreseeable future to become threatened with extinction. This gives effect to the Secretary's ability to forecast population trends by permitting him to regulate these animals before the danger becomes imminent while long-range action is begun. By creating two-levels of protection, regulatory mechanisms may more easily be tailored to the needs of endangered animals.[6]

During floor debate, Senator Williams also noted the temporal distinction between the definitions of endangered and threatened, and stated:

> An animal's continued existence must actually be in peril before it may be considered endangered. It is absolutely essential that a species of wildlife be afforded protection before it reaches the endangered list and thereby the brink of extinction . . . . The endangered list will be composed of those species which are

[3] 16 U.S.C. § 1533(a)(1).

[4] *Id.* § 1531(a)(2) (emphasis added); *see also* H. Rep. No. 93-412 at 9 (1973) ("the decline and disappearance of species and subspecies is a matter of national and international concern, and that it is necessary . . . to reverse this decline.") (emphasis added); H.R. Rep. No. 97-567 at 12 (1982) (ESA applies to species that have "declined sufficiently to justify listing") (emphasis added).

[5] A "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20). An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range…." *Id.* § 1532(6).

[6] S. Rep. No. 93-307, at 3 (July 1, 1973); *id.* ("The bill must provide the Secretary with sufficient discretion in listing and delisting animals so that he may afford present protection to those species which are either in present danger of extinction or likely within the foreseeable future to become endangered.").

> in danger of extinction. The threatened list will be composed of those species which are not presently in danger of extinction, but which are likely to become endangered if protective measures are not taken.[7]

While the timing of the species becoming on the brink of extinction will dictate whether a species is endangered (imminent) or threatened (foreseeable future), the necessary predicate for both of these determinations is that the species' population is already "depleted in numbers." Thus, only species experiencing current threats that are impacting their population numbers may be considered for listing.

The structure and purpose of the Act also demonstrate Congress's intent to focus on vulnerable species that are already being affected by present threats. For example, following a listing decision, the Secretary is required (if prudent and determinable) to designate critical habitat for the species, which focuses on those physical or biological features (for occupied habitat) or specific areas (for unoccupied habitat) that are "essential for the conservation of the species."[8] In turn, "conservation" is defined, in part, 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."[9] Clearly, conservation does not apply to a healthy species that is not being affected by present threats to its existence because it would not be possible to "bring" that species "to the point" where the protections of the ESA "are no longer necessary."[10]

Similarly, upon listing a threatened species, the Secretary is generally required to develop and implement a recovery plan.[11] A recovery plan must include "site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species," and "objective, measurable criteria which, when met, would result in a determination . . . that the species be removed from the list."[12] For species that are not in a depleted state due to current threats, the obligation to prepare a recovery plan has no workable application. Recovery only becomes operable when it is necessary to increase previously reduced population numbers. A species cannot recover when its population is already healthy or robust.

NESARC requests that the Services clarify that a species must already be experiencing the effects of a threat, and be "depleted in numbers," to be considered for listing as threatened.[13]

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[7] Cong. Rec., Senate Consideration and Passage of S. 1983 (July 24, 1973, reprinted in Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1977, 1978, and 1980 at 375.

[8] 16 U.S.C. § 1533(a)(3)(A)(i); § 1532(5)(A)(i) & (ii).

[9] *Id*. § 1532(3) (emphasis added).

[10] *See id*. § 1533(d) ("Whenever any species is listed as a threatened species . . . , the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species.").

[11] *Id*. § 1533(f)(1).

[12] *Id*. § 1533(f)(1)(B)(i) & (ii).

[13] The Ninth Circuit has stated that the Services are not required to "wait and see" before determining that a species qualifies for listing as threatened. *Alaska Oil & Gas Assoc. v. Pritzker*, 840 F.3d 671, 683 (9th Cir. 2016). However, the Ninth Circuit's approach results in the untenable application of the ESA to potentially every species based on the possibility that climate-related threats may pose some effect at some remote time in the future.

Once this threshold determination is made, the Services would apply the foreseeable future framework to assess whether the identified threats, and the response of the species to those threats, are likely to cause the species to become on the brink of extinction within the time period that is foreseeable.

2. The Services Must Ensure that the Foreseeable Future Is Based on Threats and Responses that Can Be Accurately and Reliably Predicted to Occur

As part of the proposed regulatory framework, the Services state that "[t]he term foreseeable future extends only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable."[14] The Services provide no further definition or explanation of what the term "conditions" is intended to address, and it is not clear if the term only applies to threats to the species or also to the species' responses to those threats. In addition, by referencing conditions "potentially posing a danger of extinction," the Services are not incorporating the appropriate level of certainty with respect to whether the "conditions" will occur and the corresponding relationship to the future status of the species. Finally, the Services do not define or further explain the term "probable," and additional specificity is needed to ensure that predictions of the future are both accurate and reliable.

The Services' use of "conditions" is vague and does not sufficiently explain the criteria that will be considered when assessing the future status of the species. Presumably, the use of "conditions" is intended to include the threats to a species; in which case, the Services must be more specific regarding the factors that will be considered. When determining whether a species is threatened, the Services are required to focus on the following five statutorily-mandated factors: "(1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence."[15] While listing can be based on one or several of these threat factors, the statute does not allow for broader consideration of any "conditions" that are not encompassed within the five factors defined by Congress.

While the preamble and other provisions in the proposed regulatory text recognize that both threats and responses must be considered to properly determine that a species is likely to become in danger of extinction, the proper scope of the analysis is not reflected by the use of the word "conditions." It is well established that a species cannot be listed merely because there is an identified threat.[16] However, the use of "conditions" in the context of the proposed regulatory framework suggests that the Services will only examine the environmental conditions affecting a species (i.e., the threat factors), and not the corresponding response of the species to those threats

[14] Proposed Rule at 35,195 (emphasis added).

[15] 16 U.S.C. § 1533(a)(1)(A)-(E).

[16] *E.g.*, *Ctr. for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 955 (N.D. Cal. 2010) ("a downward trend in habitat by itself is not sufficient to establish that a species should be listed under the ESA"); *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1143 (9th Cir. 2001) ("A species with an exceptionally large historical range may continue to enjoy healthy population levels despite the loss of a substantial amount of suitable habitat.").

for purposes of determining the species' future population status. The Services must revise the regulatory text to clarify that the danger of extinction to a species is based both on the threats to a species as specified in ESA Section 4(a)(1) and the species' response to those threats.

The phrase "potentially posing" is vague and impermissibly introduces speculation and hypothetical possibilities into the listing analysis.[17] By stating that they will consider conditions "potentially posing" a danger of extinction, the Services are not clearly establishing the necessary connection between a threat and the risk posed to the species, or establishing any degree of certainty that those conditions will occur. The Services are also raising the possibility that a "benefit of the doubt" standard could erroneously be applied during the listing determination. As courts have recognized:

> Under Section 4, the default position for all species is that they are not protected under the ESA. A species receives the protections of the ESA only when it is added to the list of threatened species after an affirmative determination that it is "likely to become endangered within the foreseeable future." Although an agency must still use the best available science to make that determination, . . . an agency [cannot] "give the benefit of the doubt to the species" under Section 4 if the data is uncertain or inconclusive. Such a reading would require listing a species as threatened if there is any possibility of it becoming endangered in the foreseeable future. This would result in all or nearly all species being listed as threatened.[18]

The Services should delete the phrase "potentially posing" and, instead, acknowledge that the best available scientific and commercial data will dictate whether there are both threats and corresponding effects associated with the species' response to those threats that are of sufficient severity to cause the danger of extinction in the foreseeable future.

Similarly, the use of the word "probable" raises the same concerns because it is subject to multiple interpretations. On one hand, "probable" can mean "likely to be or become true or real." This interpretation would arguably be consistent with the statutory requirement that a threatened species is one that is "likely" to become endangered in the foreseeable future.[19] On the other hand, "probable" can mean "establishing a probability," which would simply imply that any range of probability of becoming endangered would suffice.[20] Under this interpretation, the word "probable" would be deprived of any measure of certainty with respect to its application.

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[17] *Bennett v. Spear*, 520 U.S. 154, 176 (1997) (the ESA cannot be "implemented haphazardly, on the basis of speculation or surmise."); *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011) ("[i]t is not enough for the Service to simply invoke 'scientific uncertainty' to justify its action. . . . Otherwise, we might as well be deferring to a coin flip.").

[18] *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 947 (D. Or. 2007); *see Lubchenco*, 758 F. Supp. 2d at 955 ("benefit of the doubt" does not apply to ESA listing decisions).

[19] 16 U.S.C. § 1532(20).

[20] Because the Services use both terms—"likely" and "probable"—in the proposed regulatory framework, the inconsistent terminology suggests that different meanings are contemplated. This undermines the Services' stated intent of ensuring reliability and avoiding speculation and preconception. Proposed Rule at 35,196.

Instead of "probable," the Services should state that both threats and the species' responses must be "accurately and reliably predicted to occur." By incorporating accuracy, the Services would ensure that the requisite data are available and sufficiently precise to allow for meaningful predictions. Thus, for example, if the Services lack adequate population data or cannot predict population trends, the foreseeable future would not be determinable.[21] Reliability would ensure that any predictions or modelling of future threats or species' responses have a sufficient degree of confidence that they would actually occur.[22] For example, the Services could establish reliability by only utilizing predictions up to the point where there is no divergence in outcome scenarios or where predictions are within a specified confidence interval (e.g., 95%). Both accuracy and reliability are necessary to ensure that predictions of the future can be utilized to assess the likelihood of a species declining to the point of being on the brink of extinction.

3. The Services Should Provide Additional Clarification Regarding How Life-History Characteristics, Threat-Projection Timeframes, and Environmental Variability Will be Considered

The Services propose to "describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability."[23] NESARC agrees that it is appropriate to identify the foreseeable future on a case-by-case basis as it will be dependent, in part, on circumstances that are specific to the particular species being considered for listing. However, the Services should provide additional clarification on how they will address future projections associated with a species' life-history characteristics and demographic factors, divergent projections associated with each threat-projection timeframe, and the inherent uncertainty associated with attempting to foresee environmental variability.

The Proposed Rule does not articulate how the Services will account for environmental variability when assessing the foreseeable future. The preamble text notes that the foreseeable future analysis "should, to the extent practicable, account for any relevant environmental variability, such as hydrological cycles or oceanographic cycles, which may affect the reliability of projections."[24] However, the Services do not explain how this would be accomplished or what constitutes, or is meant by, "to the extent practicable." The Services' inability to reliably predict future environmental variability has been one of the primary issues in litigation challenging decisions to list or not list species under the ESA.[25] Many of these issues involve the

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[21] *W. Watersheds Project v. Ashe*, 948 F. Supp. 2d 1166, 1180-81 (D. Idaho 2013) (upholding decision not to list pygmy rabbit when FWS lacked sufficient population data or data linking population trends and potential threats).

[22] *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 621 (9th Cir. 2014) (model must bear a "rational relationship to the characteristics of the data to which it is applied"); *Alaska Oil & Gas Assoc.*, 840 F.3d at 680 (Services must provide "a reasonable and scientifically supported methodology for addressing volatility in its long-term climate projections, and . . . fairly [represent] the shortcomings of those projections").

[23] Proposed Rule at 35,195.

[24] *Id.*

[25] *E.g., Center for Biological Diversity v. Zinke*, 2018 WL 3945543 at *14 (9th Cir. Aug. 17, 2018) (remand of decision not to list Arctic grayling); *Alaska Oil and Gas Ass'n v. Ross*, 722 Fed. Appx. 666, 668 (9th Cir. 2018) (upholding decision to list Arctic ringed seal); *Alaska Oil and Gas Ass'n*, 840 F.3d at 680 (upholding decision to list

consideration of future impacts associated with climate change—such as how to account for diverging emissions scenarios, differences in projection scales (hemispheric versus regional versus local), and interrelated environmental components (impacts of environmental conditions on prey base). Notwithstanding the foundational uncertainty associated with predicting multiple decades into the future, there are inherent uncertainties embedded in each projection, which become further amplified as various projections are collectively utilized to assess the risk of extinction.

The Services must provide clear standards for how environmental variability will be addressed and accounted for to ensure that predictions of the future are accurate and reliable. For example, the Intergovernmental Panel on Climate Change's ("IPCC") Fifth Assessment Report includes climate projections through 2100 based on four representative concentration pathways ("RCPs") that represent a range of greenhouse gas emissions.[26] These RCP projections are relatively consistent to mid-century (2036-2055) but exhibit much larger variability when projecting emissions and corresponding temperature changes by the end of the century (2081-2100). When considering these projections, or other projections exhibiting a similar divergence in potential outcomes, the Services should only rely upon them up to the point in time where the projections are consistent and have minimal divergence.[27] This would reduce uncertainty and ensure a higher degree of confidence in the projections.

In the preamble, the Services note that the data relevant to assessing the species' biological response includes: lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.[28] The Services should further explain how these responses will be predicted and explicitly state that the adaptability and resilience of a species to each operative threat will also be considered. For example, adaptability and resiliency are important considerations when contemplating the risk of extinction in relation to loss of range. As courts have recognized, "it simply does not make sense to assume that the loss of a predetermined percentage of habitat or range would necessarily qualify a species for listing. A species with an exceptionally large historical range may continue to enjoy healthy population levels despite the loss of a substantial amount of suitable habitat. . . ."[29] Furthermore, with respect to climate

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Beringia distinct population segment of bearded seal); *W. Watersheds Project*, 948 F.Supp.2d at 1181 (upholding decision not to list pygmy rabbit); *In re Polar Bear ESA Listing*, 709 F.3d 1, 15-16 (D.C. Cir. 2013) (upholding decision to list polar bear); *Greater Yellowstone Coalition*, 665 F.3d at 1028 (remanding decision to delist Yellowstone grizzly bear); *Lubchenco*, 758 F.Supp.2d at 965 (upholding decision not to list ribbon seal).

[26] IPCC, *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* at 57 (2014). The Services have acknowledged that the ESA is not the appropriate mechanism to control greenhouse gas emissions. *E.g.*, Solicitor's Opinion M-37017, *Guidance on the Applicability of the Endangered Species Act's Consultation Requirements to Proposed Actions Involving the Emission of Greenhouse Gases* (Oct. 3, 2008). However, climate projections have, and continue to be, a consideration in species' listing determinations. Please note that the use of the IPCC report as an example should not be interpreted as an endorsement of the report's conclusions by NESARC or any of its individual members.

[27] *Lubchenco*, 758 F. Supp. 2d at 965 (Given the "great divergence" in climate models post-2050, the court agreed that "models after 2050 were too variable to be part of the foreseeable future.").

[28] Proposed Rule at 35,195.

[29] *Defenders of Wildlife*, 258 F.3d at 1143 (rejecting an argument that listing the flat-tailed horned lizard was warranted based on a projected loss of 82% of habitat).

change, many species have existed for millennia and have persisted through several cycles of extreme global warming and cooling. This suggests that climate factors by themselves may not be the dictating factor with respect to whether a species would become in danger of extinction in the future.

While the foreseeable future will be dictated by species-specific considerations, the Services must also be fully transparent when discussing the underlying assumptions regarding the foreseeability of future threats and the species' response to those threats.[30] For any projections considered in the listing determination, the Services must clearly disclose the assumptions made, the data relied on when making those assumptions, and the uncertainties inherent in those assumptions. In addition, the Services must strive for consistency when interpreting specific threats. For example, FWS has relied on a foreseeable future extending to approximately mid-century when considering the listing of polar bear and Pacific walrus due to climate-related habitat alterations.[31] In contrast, based on the same climate-related threat, NMFS utilized a foreseeable future extending the end of the century for bearded seals and ringed seals.[32] These disparate interpretations of what constitutes the foreseeable future emphasize the need for common guidance and consistency of interpretation to ensure that such determinations are not made on an arbitrary basis.

4. While the Foreseeable Future May Not be Capable of Delineation to a Uniform Specific Period of Time, the Services Should Provide Additional Guidance Regarding How the Duration of the Foreseeable Future Will be Determined

The Services propose to adopt regulatory text stating that "[t]he Services need not identify the foreseeable future in terms of a specific period of time, but may instead explain the extent to which they can reasonably determine that both the future threats and the species' responses to those threats are probable."[33] In the preamble, the Services note that they "may find varying degrees of foreseeability with respect to the multiple threats and their effects on a particular species."[34] While the duration of the foreseeable future may vary depending upon the threat assessed and the species' response to each respective threat, the Services must provide additional criteria by which the relevant threat factors and species' responses will be evaluated with the requisite degree of accuracy and reliability.

NESARC recognizes that the foreseeable future may not be capable of being reduced to a uniform duration that encompasses all threats and species' responses. Each threat will trigger different responses at the species' individual and population levels. Accordingly, there will be varying degrees of foreseeability, as informed by the accuracy and reliability of the predictions,

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[30] *Alaska Oil & Gas Assoc.*, 840 F.3d at 681 (Services must "candidly disclose[] the limitations of the available data and [their] analysis")

[31] 73 Fed. Reg. 28,212, 28,239 (May 15, 2009) (polar bear); 82 Fed. Reg. 46,618, 46,643-44 (Oct. 5, 2017) (Pacific walrus).

[32] 77 Fed. Reg. 76,740, 76,741 (Dec. 28, 2012) (bearded seal); 77 Fed. Reg. 76,706, 76,707 (Dec. 28, 2012) (ringed seal).

[33] Proposed Rule at 35,195.

[34] *Id*.

associated with each threat and response. The Services should provide their assessment of the specific period of time during which each threat, and corresponding responses to that threat, are foreseeable.[35] This does not have to result in a uniform foreseeable future period in general but, at a minimum, the Services must identify the period of foreseeability for each operative threat and the species' response to that threat.

The Services should provide additional guidance by which the foreseeability of each threat and species' response will be assessed. These criteria should focus on the duration of time during which certain threats can be recognized and be reliably and accurately predicted to occur. In addition, the Services must clarify how the effects associated with a species' response to the foreseeable threats will be identified, assessed, and accurately and reliably predicted. The Services must rely on the best scientific and commercial data available to determine the extent of foreseeability attributable to each threat and response. When the best available science is limited or does not address all the necessary components of the listing inquiry, the Services cannot speculate or hypothesize about the possible future status of the species.[36] Each listing determination must be dictated by, and confined to the scope of, the available scientific information.[37] While quantitative and qualitative data can inform the listing decision, the Services should adopt a preference for quantitative data and methodologies to the maximum extent practicable. The Services should also give the most credence or weight to those threats and responses that have been observed and documented. Finally, it is imperative that the data considered during the listing process available to the public, and that any assumptions made are disclosed in a transparent manner. Given the fact-specific nature of each listing determination, and the general unavailability of the relevant scientific literature, providing access to the supporting scientific information (e.g., through an online database) is necessary to allow informed participation in the decision-making process.

The Services must also recognize that there are obvious temporal limitations on how far into the future projections can be utilized to yield accurate and reliable predictions. Beyond this point, extended projections simply devolve into haphazard speculation and hypothetical assumptions. The Services should adopt commonsense parameters, such as the divergence point of various projection scenarios or three generation lengths for long-lived species,[38] to dictate how

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[35] The Services state that "if the information or data are susceptible to such precision, it may be helpful to identify the time scale used." *Id*. at 35195. On the contrary, if data are available to specify the time scale, the Services would be required to rely upon that data. *E.g.*, *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006) (best available science requirement "prohibits [an agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on").

[36] *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 918 (D.C. Cir. 2011) ("the absence of a requirement for the Service to collect more data on its own is not the same as an authorization to act without data to support its conclusions, even acknowledging the deference due to agency expertise").

[37] NESARC is concerned about the Services' indication that, in some circumstances, they will rely on "the exercise of professional judgment by experts where appropriate." Proposed Rule at 35,195. The Services must provide additional safeguards and standards specifying when it is appropriate to rely on expert judgment and must ensure that the data and assumptions relied upon by the expert are disclosed. At a minimum, the Services should ensure that any incorporation of expert judgment is identified during the rulemaking process and specifically reviewed as part of the independent peer review process.

[38] For example, the listing determinations for polar bear and Pacific walrus considered a three generation time period as appropriate. 73 Fed. Reg. at 28,239 (polar bear); 82 Fed. Reg. at 46,643 (Pacific walrus).

foreseeability will be determined when long-range projections are being considered. Finally, if predictions are too speculative, the Services must acknowledge that listing the species is not warranted but that it could be subject to a future listing action once the underlying projections and data become sufficiently accurate and reliable.

5. The Services Must Identify at What Point a Species Will be in Danger of Extinction and the Likelihood of Reaching that Point Must be Foreseeable

In the Proposed Rule, the Services state that they must "explain the extent to which they can reasonably determine that both the future threats and the species' response to those threats are probable."[39] While foreseeability is dictated in part by the accuracy and reliability of both the predictions of threats to the species, and the species' response to those threats, the Services must also be able to foresee that the future population status of the species will decline such that the species becomes on the brink of extinction. This requires the Services to identify an extinction threshold for each species and the likelihood of the species' population trajectory reaching that point in the foreseeable future.

The ESA defines a "threatened species" as "any species which is likely to become [in danger of extinction] within the foreseeable future throughout all or a significant portion of its range."[40] To assess the likelihood of "becom[ing] in danger of extinction," the Services must first be able to identify the extinction threshold for that species. As NMFS has explained, "[a] species is 'threatened' if it exhibits a trajectory indicating that in the foreseeable future it is likely to be at or near a qualitative extinction threshold below which stochastic/depensatory processes dominate and extinction is expected."[41] Identification of the extinction threshold, and the criteria by which that threshold is determined, are essential components of the listing determination because it establishes the end point against which the likelihood of extinction can be assessed.

In addition to identifying the extinction threshold, the Services must be able to determine the "likelihood" of the species' population reaching that threshold within the timeframe that is foreseeable. This will be informed, in part, by the Services' assessment of the threats and species' responses that are accurately and reliably predictable. Foreseeability also requires that the Services be able to predict the degree to which these threats and responses will affect the species' population. As Congress explained, the threatened classification was included to "give[] effect to the Secretary's ability to forecast population trends."[42] If the Services lack the data or ability to identify future population trends, to assess the impact of population declines on the species' overall population status, or to establish an extinction threshold, it is not possible to determine or foresee the likelihood of future extinction for purposes of the listing determination.

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[39] Proposed Rule at 35,195.

[40] 16 U.S.C. § 1532(20).

[41] NMFS, *Interim Protocol for Conducting Endangered Species Act Status Reviews* at 12 (2007).

[42] S. Rep. No. 93-307 at 3 (July 1, 1973).

B. Factors Considered in Delisting Species

The Services propose to revise their regulations to clarify the factors that will be considered when determining whether to delist a species.[43] Notably, the Services state that they will "determine whether a species is a threatened species or an endangered species using the same standards regardless of whether a species is or is not listed at the time of the determination."[44] NESARC generally supports the Services' proposed changes. However, NESARC also recommends that the Services retain the ability to delist or downlist a species when the original data for classification is found to be in error.

Proposed Action: As discussed further below, NESARC recommends the following revisions to the proposed delisting factors at 50 C.F.R. § 424.11(e) to address these issues:

> The Secretary will delist or reclassify a species if the Secretary finds that, after conducting a status review based on the best scientific and commercial data available:
>
> (1) The species is extinct;
>
> (2) The species does not meet the definition of an endangered species or a threatened species. In making such a determination, the Secretary shall consider the same factors and apply the same standards set forth in paragraph (c) of this section regarding listing and reclassification; ~~or~~
>
> (3) The listed entity does not meet the statutory definition of a species~~.~~; or
>
> (4) The best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error.

1. Delisting and Downlisting Decisions Are Based on the Five Statutory Factors and Not Satisfaction of a Recovery Plan

The Services appropriately clarify that delisting and downlisting determinations are predicated on the same five statutory factors that are considered when initially listing the species. ESA Section 4(a)(1) requires that these five factors be applied when the Secretary "determine[s] whether any species is an endangered species or a threatened species."[45] These same statutory factors apply when determining whether to initially list a species and when determining whether to delist or downlist a species either on the Services' initiative or in response to a third-party petition. ESA Section 4(c)(2) specifies that decisions on removing, downlisting, or uplisting species must be made "in accordance with" the provisions of ESA Section 4(a).[46] Thus, these

[43] Proposed Rule at 35,196.

[44] *Id.*

[45] 16 U.S.C. § 1533(a)(1) (emphasis added).

[46] *Id.* § 1533(c)(2)(B); *Friends of Blackwater v. Salazar*, 691 F.3d 428, 432 (D.C. Cir. 2012) ("Section 4(a)(1) of the Act provides the Secretary 'shall' consider the five statutory factors when determining whether a species is

five statutory factors are the only relevant considerations when determining whether to delist or downlist an already listed species.[47]

The Service also should clarify that delisting decisions are not contingent upon the satisfaction of a recovery plan for that species.[48] Recovery plans are broad documents that include "site-specific management actions" to achieve a goal for the conservation and survival of the species and "objective, measurable criteria" that would result in a determination that a species be removed from listing.[49] However, it is well established that "recovery plans are for guidance purposes only."[50] As the D.C. Circuit has held, the ESA does not require "that the criteria in a recovery plan be satisfied before a species may be delisted pursuant to the factors in the Act itself."[51]

While satisfaction of the criteria in a recovery plan is not a necessary prerequisite for delisting a species, if such criteria are met, that should trigger a status review of the species for purposes of a delisting determination. The Services have a general obligation to conduct a status review of all listed species "at least once every five years."[52] However, the timing of this status review should not be based on rote (and often unachieved) timeframes. If the best scientific and commercial data demonstrate that the recovery criteria have been satisfied, the Services should initiate a status review irrespective of the five-year cycle to determine whether to delist the species.

2. Development of Criteria for Assessing Adequacy of State and Local Regulatory Programs

In addition, the Services should develop criteria to inform the assessment of the "adequacy" of state or local regulatory programs when making a delisting/downlisting determination.[53] For example, courts have indicated that an adequate state or local program is not required to be legally binding or to have legal certainty of implementation.[54] However, the assessment of such programs necessitates a substantive evaluation by the Services to determine and confirm their adequacy. To ensure that future delisting and downlisting decisions are fully

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endangered, and § 4(c) makes clear that a decision to delist "shall be made in accordance" with the same five factors.").

[47] Proposed Rule at 35,196.

[48] *See* 50 C.F.R. § 402.02 (defining "recovery" as "improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.") (emphasis added).

[49] 16 U.S.C. § 1533(f)(1)(B).

[50] *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996) (recovery plans are not documents with the force of law).

[51] *Friends of Blackwater*, 691 F.3d at 436.

[52] 16 U.S.C. § 1533(c)(2)(A).

[53] 16 U.S.C. § 1533(a)(1)(D) (consideration of "the inadequacy of existing regulatory mechanisms"); *see also id.* § 1533(b)(1)(A) (taking into account efforts by a State or subdivision of a State "to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices").

[54] *Defenders of Wildlife v. Zinke*, 849 F.3d 1077, 1084 (D.C. Cir. 2017).

explained, documented, and can proceed expeditiously, the Services should develop guidelines establishing the necessary criteria for the development, and the Services' review, of state and local regulatory mechanisms. Separate from this rulemaking proceeding, the Services should convene a working group that includes representatives of state and local governments and members of the regulated community to inform the development of the appropriate guidelines. The Services should also make these guidelines available for public review and comment prior to adoption.

3. Retention of Original Data for Classification in Error Standard

Finally, NESARC requests that the Services retain the existing regulatory criterion that a species' delisting or downlisting can be based on the "original data for classification in error" standard.[55] NESARC recognizes that much of the intent of this regulatory provision may be addressed by the proposed provisions in sections 424.11(e)(2) and (e)(3); however, there are other benefits to retaining the "original data in error" standard as part of the revised regulations. While an error in data may not necessarily negate an endangered or threatened determination, the Services should retain a process that allows for any errors in a listing decision to be identified and addressed. If there is an identified error in the original data, the Services should reevaluate the original listing decision through a new status review to determine if it remains appropriate.

C. Referencing Economic or Other Impacts of Listing Determination

The Services propose to remove the restriction on referencing possible economic or other impacts of listing in the listing determination.[56] NESARC supports the proposed revision as it will provide necessary transparency and additional information that will inform subsequent conservation and management decisions.

The ESA requires that listing determinations be made "solely on the basis of the best scientific and commercial data available."[57] So long as the Services ensure that listing determinations only consider and rely upon biological criteria, there is no statutory prohibition on what other information can be included and provided to the public as part of any proposed or final rule regarding the listing of a species. While the Services note that not all listing determinations will include a presentation of economic or other impacts,[58] the Services should commit to providing that information when it is readily available. Furthermore, the Services should provide or reference data that reflect the baseline conditions within areas that would be affected by the listing so that the economic and any other impacts associated with the listing can be identified.[59]

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[55] *See* 50 C.F.R. § 424.11(d)(3).

[56] Proposed Rule at 35,194.

[57] 16 U.S.C. § 1533(b)(1) (emphasis added).

[58] Proposed Rule at 35,195.

[59] NESARC notes that state and local governments have been compiling baseline economic data for areas within their jurisdictions, and these data should be identified or included as part of the information provided in a listing determination.

The Services' proposed approach would provide a variety of benefits with respect to implementation of the ESA. Notably, if provided early in the listing process (e.g., at the proposed rule stage), information on the economic and other impacts associated with a species listing would inform subsequent conservation and management decisions. For example, it could prompt the implementation of pre-listing conservation measures or the execution of candidate conservation agreements with assurances that could preclude the need to subsequently list the species. In addition, providing this information when making listing determinations would be consistent with the Services' mandatory consideration of the economic, national security, and other impacts of designating any particular area as critical habitat and would allow for a more informed identification of areas for exclusion from critical habitat.[60]

D. Not Prudent to Designate Critical Habitat

The Services propose to revise and clarify their regulations regarding the circumstances in which the Services may find that it is not prudent to designate critical habitat.[61] The Services note that, in the specified circumstances, they "would have the authority but would not be required to find that designation would not be prudent."[62] NESARC agrees with the Services' proposed revisions with additional clarifications.

Proposed Action: As discussed further below, NESARC recommends the following revisions to the proposed regulations for making not prudent determinations at 50 C.F.R. § 424.12(a)(1) to address these issues:

> ~~The Secretary may, but is not required to, determine that a~~A designation of critical habitat is~~would~~ not ~~be~~ prudent in the following circumstances:
>
> (i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;
>
> (ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;
>
> (iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;
>
> (iv) No areas meet the definition of critical habitat; or

[60] See 16 U.S.C. § 1533(b)(2).

[61] Proposed Rule at 35,196-97.

[62] *Id*.

(v) After analyzing the best scientific data available, the Secretary otherwise determines that designation of critical habitat would not be prudent.

The Services also should modify 50 C.F.R. **§** 424.12 to include the following:

(___) In any status review or other reconsideration of the designation of critical habitat for a species, the Secretary will not designate as critical habitat any area that has been previously determined to be not prudent pursuant to [**§** 424.12(a)(1)], unless the Secretary determines that unforeseen changed circumstances have occurred within such specific area to the point that the factors upon which the [**§** 424.12(a)(1)] determination was made no longer exist in such area.

1. The Services Should Not Reserve Discretion to Designate Critical Habitat that Meets the Not Prudent Criteria

NESARC requests that the Services retain the existing regulatory provision which states that "[a] designation of critical habitat is not prudent when any of the following situations exist[.]"[63] Instead, the Services propose to revise their regulations regarding not prudent determinations for critical habitat to state that "[t]he Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances[.]"[64] The Services' explanation for this revision simply notes the recognition of the value of critical habitat as a conservation tool and indicates that the Services expect to designate it in most cases. While the ESA states that the Secretary shall designate critical habitat to the "maximum extent prudent,"[65] the corollary to this requirement is that, when a designation of critical habitat is not prudent, the Secretary shall not proceed with the designation. By reserving broad discretion to designate critical habitat even when it satisfies the not prudent criteria, the Services undermine regulatory certainty and prevent the identified criteria from having operative effect.[66]

2. The Services Should Clarify When a Designation Would Provide Negligible Conservation Value for a Predominately Foreign Species

The Services propose to add a criterion providing a basis for a not prudent determination when "[a]reas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States."[67] The Services state that this determination would apply "where no areas under U.S.

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[63] 50 C.F.R. § 424.12(a)(1).

[64] *Id*. at 35,201.

[65] 16 U.S.C. § 1533(a)(3)(A) & (b)(6)(C)(ii).

[66] For example, the proposed regulation would allow the Services to make a not prudent determination when "no areas meet the definition of critical habitat." NESARC notes that the Services would be required to determine that designation in such circumstances is not prudent.

[67] Proposed Rule at 35,197.

jurisdiction contain features essential to the conservation of the species."[68] However, this does not appear to be the appropriate test because, without essential features, the areas within the United States would not meet the definition of critical habitat. Additional clarification (including illustrative examples) is needed for when the areas that could be designated as critical habitat within the United States would be considered to provide "negligible" conservation value for the species. The Services should compare the value of habitat areas within U.S. jurisdiction to the value of the species' habitat as a whole to determine whether the conservation value would be negligible.

3. The Services Should Adopt a Rebuttable Presumption that a Designation of an Area Remains Not Prudent Unless There are Unforeseen Changed Circumstances

In addition, the Services also should adopt procedures for the future treatment (within later status reviews) of areas that have been subject to a not prudent determination. If an area was not previously designated as critical habitat because it was "not prudent" to do so, a rebuttable presumption should be applied to the continuing application of that "not prudent" determination. An appropriate articulation of such a rebuttable presumption would be to provide that a status review or reconsideration of a critical habitat designation will apply a rebuttable presumption for a continued application of a "not prudent" determination for any areas that previously received such determination, provided that the presumption can be overcome where the Service determines that unforeseen changed circumstances have occurred to the point that the factors upon which "not prudent" determination were made no longer exist in such area.

E. Designation of Unoccupied Areas as Critical Habitat

The Services propose to revise their regulations at 50 C.F.R. § 424.12(b)(2) to clarify the procedures for designating unoccupied areas as critical habitat.[69] The Services would restore the prior regulatory requirement that the designation of unoccupied critical habitat is dependent on the Services finding that a designation limited to occupied areas would be inadequate for the conservation of the species. The Services also propose to incorporate additional criteria allowing the designation of unoccupied habitat if it would result in more efficient conservation of the species and to delineate those factors it will consider when determining that an unoccupied area would be essential for the conservation of the species.

NESARC supports the restoration of the requirement, consistent with the ESA, that unoccupied critical habitat will not be designated unless occupied critical habitat is inadequate for the conservation of the species. Thus, designating unoccupied critical habitat first requires a determination of the adequacy of occupied critical habitat.

NESARC further requests that the Services provide additional clarifications and revisions regarding the other criteria proposed for unoccupied critical habitat.[70] First, the Services must

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[68] *Id.*

[69] Proposed Rule at 35,197-99.

[70] The Services' designation of unoccupied critical habitat has long been an issue of significant controversy. For example, a challenge to the FWS's designation of unoccupied critical habitat for the dusky gopher frog is currently

recognize that unoccupied critical habitat can only be designated in areas that provide viable habitat for the species at the time of designation. Second, the Services should clarify that a determination that a specific area of habitat is "essential" is a separate and subsequent inquiry and is not dictated by any inadequacy or inefficiency associated with the occupied areas considered for designation. Third, NESARC's members have differing views regarding whether the Services should consider efficiency of conservation when designating unoccupied critical habitat. The Services should provide additional information regarding the analytical framework (e.g., a benefit-cost analysis) and the process that would be applied when determining the efficiency of areas for designation. Fourth, the Services must revise and clarify how they determine that an unoccupied area is essential based on its contributions to the conservation of the species, and the explanation for the determination that each specific area is essential must be provided within each proposed rule considering the designation of unoccupied critical habitat. Fifth, the Services should clarify that contribution to the conservation of the species must consider active or ongoing conservation measures. Finally, the Services should provide additional criteria to guide the assessment of "at the time it is listed" when designating critical habitat after a species is listed.

Proposed Action: As discussed further below, NESARC recommends the following revisions to the proposed regulations regarding the designation of unoccupied critical habitat at 50 C.F.R. § 424.12(b)(2) to address these issues:

> The Secretary will designate as critical habitat~~, at a scale determined by the Secretary to be appropriate,~~[71] specific areas <u>of habitat</u> outside the geographical area occupied by the species only upon a determination that such areas <u>provide viable habitat at the time of designation and</u> are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider <u>the designation of</u> unoccupied areas <u>of habitat</u>~~to be essential~~ where a critical habitat designation limited to geographical areas occupied <u>by the species</u> would be inadequate to ensure the conservation of the species or would result in less efficient conservation for the species. Efficient conservation for the species refers to situations where the conservation is effective, societal conflicts are minimized, and resources expended are commensurate with the benefit to the species. In addition, for an unoccupied area <u>of habitat</u> to be considered essential, the Secretary must determine that <u>such</u> habitat~~there~~ is <u>necessary and</u>~~a reasonable likelihood that the area~~ will contribute to the conservation of the species.

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pending before the Supreme Court in *Weyerhaeuser v. U.S. Fish & Wildlife Service* (No. 17-71). Notwithstanding, the Services should proceed with revising and clarifying their regulations regarding the designation of unoccupied critical habitat in a manner consistent with the comments provided below.

[71] Note, this provision is deleted in accordance with the comments raised below at Section IV.A.

1. The Services Must Clarify that Unoccupied Areas Can Only be Designated if the Areas are Habitat for the Species

The Services should acknowledge that critical habitat can only be designated within areas that are already habitat for the species. In the operative provision of ESA Section 4, the Secretary is authorized to "designate any habitat of such species which is then considered to be critical habitat."[72] This statutory directive clearly reflects that "habitat" establishes the scope of any critical habitat designation and dictates the narrower designation of occupied and unoccupied areas as critical habitat for a species.

Congress intended that critical habitat only be designated within areas that are habitable by the species and that unoccupied habitat should only be designated sparingly based on heightened criteria. Notably, Congress recognized that an area must first be functioning habitat for a species before the more specific areas of critical habitat could be designated within that habitat. For example, as amended, House Bill 14104 defined unoccupied critical habitat as:

> specific areas periodically inhabited by the species which are outside the geographic area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act (other than any marginal habitat the species may be inhabiting because of pioneering efforts or population stress), upon a determination by the Secretary at the time it is listed that such areas are essential for the conservation of the species.[73]

The House Committee on Merchant Marine and Fisheries noted that efforts to define critical habitat were driven by the concern that "the existing regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat."[74] Instead, the Committee directed the Secretary to "be exceedingly circumspect in the designation of critical habitat outside the presently occupied area of the species."[75]

The corresponding Senate Bill 2899 also included a definition of unoccupied critical habitat, which limited it to:

> 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, into which the species can be expected to expand naturally upon a determination by the Secretary

[72] 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added).

[73] 124 Cong. Rec. 38,154 (1978) (emphasis added).

[74] H.R. Rep. No. 95-1625, at 25 (1978) (emphasis added). During floor debate on House Bill 14104, Representative Bowen stated that "I believe the majority of the House is in agreement on that, that the Office of Endangered Species has gone too far in just designating territory as far as the eyes can see and the mind can conceive. What we want that office to do is make a very careful analysis of what is actually needed for survival of this species." 124 Cong. Rec. 38,131 (emphasis added).

[75] H.R. Rep. No. 95-1625, at 18 (1978) (emphasis added).

> at the time it is listed, that such areas are essential for the conservation of the species.[76]

For unoccupied areas, the Senate Committee on Environment and Public Works stated that "[t]here seems to be little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are critical to a species[‘] continued survival."[77]

The final bill passed by Congress included "[a]n extremely narrow definition of critical habitat, virtually identical to the definition passed by the House."[78] That definition remains in effect today. The legislative history clearly demonstrates that Congress was focused on habitat of species which could then be designated as either occupied or unoccupied critical habitat if the area satisfied the relevant definitional criteria. This habitability requirement was understood by Congress at the outset and incorporated into the operative provisions of the ESA.

Furthermore, properly interpreted, habitat can only be designated as critical habitat if that habitat exists at the time of the designation. The ESA states that, to the maximum extent prudent and determinable, the Services shall "concurrently with making a determination . . . that a species is [endangered or threatened], designate any habitat of such species which is then considered to be critical habitat."[79] This imposes a temporal requirement that an area must already possess the necessary physical or biological features comprising habitat for the species in order to qualify for the narrower critical habitat designation.[80] The Services cannot designate degraded or uninhabitable areas as critical habitat based on the possibility that sometime in the future those areas may somehow become habitat.[81] The habitat considered for designation must already exist and be capable of supporting the survival of the species.

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[76] 124 Cong. Rec. 21,355 (1978) (emphasis added).

[77] S. Rep. No. 95-874, at 10 (emphasis added). In explaining the role of critical habitat, Senator Garn stated that "[w]hen a Federal land manager begins consideration of a project, or an application for a permit, it is essential that he know, not only of the existence of an endangered species, but also of the extent and nature of the habitat that is critical to the continued existence of that species. Unless he knows the location of the specific sites on which the endangered species depends, he may irrevocably commit Federal resources, or permit the commitment of private resources to the detriment of the species in question." 124 Cong. Rec. 21,575 (1978) (emphasis added).

[78] 124 Cong. Rec. 38,665.

[79] 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added).

[80] Under the ESA, the critical habitat designation is required to be made concurrent with listing a species, but may later be revised or updated pursuant to other provisions of the Act. In each instance, at the time the designation is made, the Services must determine what areas can be categorized as habitat for the species and what portions of those areas should be designated as critical habitat.

[81] The designation of critical habitat is subject to the requirement to use the best scientific data available, which ensures that the ESA is not "implemented haphazardly, on the basis of speculation or surmise." *Bennett*, 520 U.S. at 176.

2. Restoring the Requirement to First Evaluate Areas Occupied by the Species is Necessary and Appropriate but Does Not Dictate Which Areas of Unoccupied Habitat Are Essential

When considering the designation of unoccupied critical habitat, the Services propose to revise their regulations to state that they will "first evaluate areas occupied by the species." As part of this evaluation, the Services "will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species or would result in less efficient conservation for the species."[82] NESARC supports these proposed revisions, subject to the clarifications below.

The designation of critical habitat on unoccupied areas is widely recognized as an intrusive act that warrants a high threshold for determination prior to such action. The proposed regulatory provisions ensure that the Services consider the amount of habitat that adequately fulfills the purpose of the critical habitat designation and prioritizes such designation to occupied habitat. These revisions are clearly consistent with the Congressional concerns that led to the enactment of the present definition (overbroad designation of occupied and unoccupied habitat). Further, this requirement is a biologically appropriate measure to prioritize designations in occupied habitat and places an appropriate checkpoint for the Services before proceeding to what is a more intrusive governmental action.

However, the Services should revise the proposed regulatory text to reflect that the inquiry conducted during the evaluation of occupied areas does not determine whether unoccupied areas are "essential" to the conservation of the species or establish which specific areas may be designated based on that standard. Unoccupied critical habitat is statutorily limited to those "specific areas outside the geographical area occupied by the species . . . upon a determination by the Secretary that such areas are essential for the conservation of the species."[83] Thus, the determination of essentiality focuses on the specific areas themselves and is not dictated by the inadequacy of a designation of occupied areas or the efficiency of the designation. Properly framed, this evaluation should not determine what areas may be essential but should focus on the threshold assessment of whether the Services need to proceed to the next step of identifying and designating unoccupied critical habitat. Only if the Services make an affirmative determination at this stage would they then identify those specific areas that are essential for the conservation of the species for purposes of inclusion in a designation of unoccupied critical habitat.

3. To Inform the Review of the Proposed "Less Efficient" Criterion, the Services Should Clarify and Provide Additional Information Regarding the Assessment that Would be Conducted When Determining Whether a Designation Limited to Occupied Areas Would Result in Less Efficient Conservation for the Species

The Services propose to consider designating unoccupied areas as critical habitat when, in part, a designation limited to occupied areas would "result in less efficient conservation for the

[82] Proposed Rule at 35,201 (emphasis added).

[83] 16 U.S.C. § 1532(5)(A)(ii) (emphasis added).

species."[84] The Services propose to define "efficient conservation for the species" to refer to "situations where the conservation is effective, societal conflicts are minimized, and resources expended are commensurate with the benefit to the species."[85] In the preamble, the Services note two circumstances where designation of unoccupied areas in addition to occupied areas could result in more efficient conservation for the species: (1) when a designation limited to occupied habitat would result in a geographically larger but less effective designation; and (2) when a designation of some unoccupied areas would result in the same or greater conservation for the species but would do so more efficiently.[86] However, the Services do not explain or provide an analytical framework for how they will determine efficiency of conservation for purposes of a critical habitat designation.

NESARC's members have differing views regarding whether the Services should include efficiency of conservation as a criterion when designating unoccupied critical habitat. In part, this is due to the lack of information and explanation provided in the Proposed Rule about the analytical framework that would be applied and the process that would be followed when determining the efficiency of the areas considered for designation. Prior to adopting this concept, the Services should provide additional clarification and take comment on the methodology to be employed and the specific factors to be considered when determining which areas considered for a critical habitat designation would result in efficient conservation for the species.

For example, it is not clear how the Services would determine the "effectiveness" or the "efficiency" of the overall designation or the contribution of occupied and unoccupied areas to those findings. These factors—effectiveness and efficiency—necessitate consideration of more than just the biological attributes and biological benefits of the designation. The Services would need to evaluate whether the designation of different occupied and unoccupied areas would result in varying degrees of impacts on, for example, ongoing conservation measures occurring in the respective areas as well as the direct and indirect economic impacts imposed on landowners and the regulated community.

If the "less efficient" criterion is retained, NESARC suggests that the Services employ a benefit-cost framework to inform the analysis. As an initial step, for the specific habitat areas being considered for designation, the Services would determine the relative biological value for the conservation of the species, taking into account the current condition of the physical or biological features necessary to support occupancy by the species. The Services would then assess the direct and indirect economic costs and other impacts associated with designating each specific area.[87] The Services would make the efficiency determination based on an analysis of the biological value and the corresponding impacts for each specific area and assess whether to

[84] Proposed Rule at 35,198.

[85] *Id*. at 35,201.

[86] *Id*. at 35,198. The Services also note that the efficient conservation of the species criterion will "allow the Services to focus agency resources thoughtfully in both designating critical habitat and conducting future consultations on the critical habitat." *Id*. While NESARC recognizes the concern regarding the allocation of the Services' resources, this factor should not be incorporated into a decision on whether to designate critical habitat.

[87] This component would help ensure that "societal conflicts are minimized."

include unoccupied critical habitat based upon a cost-effectiveness approach. Pursuant to this framework, it would be more efficient to designate areas with high benefits/low costs and less efficient to designate areas with low benefits/high costs.

4. The Services Must Clarify How They Will Determine that an Unoccupied Area is Essential Based on Its Contribution to Conservation of the Species

As the criterion for the designation of unoccupied critical habitat, the Services propose to adopt a standard that, "for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable likelihood that the area will contribute to the conservation of the species."[88] In the preamble, the Services explain that the "reasonable likelihood" determination will consider such factors as: (a) whether the area is currently or is likely to become usable habitat for the species; (b) the likelihood that an interagency Section 7 consultation will be triggered; and (c) how valuable the potential contribution of the area are to the biological needs of the species.[89]

As a threshold issue, the Services' proposed use of a "reasonable likelihood" standard does not reflect the required degree of certainty for determining whether an area is essential to the conservation of the species. Specifically, the statutory requirement for designating unoccupied habitat is that the "areas <u>are</u> essential."[90] This necessitates more certainty than the "likelihood" or the possibility that an area "may" be essential.[91] To be consistent with the plain statutory text, the Services should state that, for unoccupied habitat to be considered essential, "the Secretary must determine that such habitat is necessary and will contribute to the conservation of the species."

a. <u>Usability of an Area Should Reflect that All Physical and Biological Features Necessary for Occupancy by the Species Are Present and that Future Occupation is Certain to Occur</u>

The Services state that, when evaluating whether an area will be usable habitat, they will consider the current state of the area and extent to which extensive restoration would be needed for the area to become usable.[92] While not necessarily determinative, the Services indicate that an area may not be considered usable for purposes of contributing to the conservation of the species when it would require extensive restoration that a non-federal landowner or other necessary partner is not willing to undertake.

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[88] Proposed Rule at 35,201.

[89] *Id*. at 35,198.

[90] 16 U.S.C. § 1532(5)(A)(ii) (emphasis added).

[91] Proposed Rule at 35198; *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) ("The statute thus differentiates between 'occupied' and 'unoccupied' areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that <u>unoccupied areas are essential</u> for the conservation of the species.") (emphasis added); *Cape Hatteras Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("with unoccupied areas, it is not enough that the area's features be essential to conservation, the <u>area itself must be essential</u>") (emphasis added).

[92] Proposed Rule at 35,198.

As noted above, the inquiry determining whether unoccupied habitat should be designated must include a determination that the unoccupied area being considered accurately qualifies as habitat. If a landowner has agreed to undertake the necessary measures to make the area qualify as habitat, the threshold determination would be satisfied. Absent such a commitment, the issue of whether restoration is necessary should not be considered during the designation determination. Instead, the area in its current condition must contain those physical or biological features necessary to support future occupancy by the species. The Services' assessment of usability would focus on the present condition of those physical or biological features. Any unoccupied area that requires intervention to restore those features to support future use by the species should not be considered to qualify as habitat and designation should be explicitly precluded in the final regulations.

In addition, usability is not just contingent upon the unoccupied area being habitable. The Services also must take into account the proximity of the unoccupied area to currently occupied areas and whether the unoccupied area can be accessed by the species. The intent of Congress was that unoccupied critical habitat would be those areas "into which the species can be expected to expand naturally."[93] This precludes the designation of remote areas far removed from the geographic areas occupied by the species when there is no ability for the species to establish occupancy.

Finally, the Services must not assume coercive authority to dictate restoration activities or translocation of the species to areas considered for designation. Critical habitat should not be designated as a means to force landowners to undertake restoration or other habitat modifications through a future Section 7 consultation. As such, a landowner's expressed intentions regarding any restoration or other activities must be considered by the Services and treated as determinative. Should a landowner's intentions subsequently change, it would be appropriate for the Services to consider designating the area as critical habitat at that time.

b. <u>The Likelihood of a Section 7 Consultation Should Not Dictate the Designation of Unoccupied Critical Habitat</u>

The Services should not consider the likelihood of an interagency Section 7 consultation when determining whether unoccupied habitat is essential for the conservation of the species.[94] While Section 7 consultation ensures that areas designated as critical habitat are not destroyed or adversely modified,[95] that does not necessitate using the possibility of a future federal action to justify designating selective areas as critical habitat.

The Services' proposed approach would distort the implementation of the ESA. The designation of critical habitat (either occupied or unoccupied) must initially focus on the biological attributes of the specific areas under consideration, i.e., whether those areas are habitat for the species. The "essential to the conservation of the species" inquiry, through the statutory

[93] 124 Cong. Rec. 21,355 (1978).

[94] Proposed Rule at 35,198.

[95] 16 U.S.C. § 1536(a)(2).

definition of conservation, focuses on those functional effects ("to use and the use of all methods and procedures") that are necessary to conserve a species. The Section 7 consultation analysis is a separate process that is only triggered if a federal agency may affect a listed species or its critical habitat. Through the consultation process, an applicant or federal agency may adopt avoidance and minimization measures to reduce effects to critical habitat, or the Services may propose reasonable and prudent alternatives to avoid the destruction or adverse modification of critical habitat. However, the purpose of consultation is not to dictate areas that should be designated as critical habitat so that conservation measures could be imposed.[96]

c. The Value of an Area to the Biological Needs of the Species Must be Measured Based on Both its Ability to Support Occupancy and the Likelihood of its Contribution

The Services propose to adopt a sliding-scale for the designation of unoccupied habitat depending upon the value of a particular area versus its likely conservation contribution.[97] NESARC agrees that the value of an area to the biological needs of a species is an important consideration in determining whether the area is essential. However, the value of a particular habitat area does not justify its designation as critical habitat if it is not likely to contribute the conservation of the species.

As noted above, the designation of unoccupied critical habitat is predicated on a determination that the specific areas of habitat "are essential" for the conservation of the species.[98] To be "essential," the designated habitat must be "of the utmost importance" or "indispensable" for the conservation of a species.[99] Congress clearly understood that its use of "essential" would impose a stringent limitation on the areas that could be designated as critical habitat.[100] An area that is not likely to contribute to the conservation of the species cannot be essential, irrespective of whether it is extremely valuable for conservation purposes. The Services cannot use the value or unique attributes of a particular area as support for designating it as critical habitat when there is no reasonable certainty that the area will actually contribute to conservation.

In addition, the Services note the value of an area as critical habitat could be established if it is "the only potential habitat of its type (i.e., is uniquely able to support certain life history

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[96] NESARC notes that the likelihood that a critical habitat area may contribute to the conservation of the species may be greater when designated on federal lands through the application of ESA Section 7(a)(1). 16 U.S.C. 1536(a)(1) ("All other Federal agencies shall, in consultation [with the Services], utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of [listed species].")

[97] Proposed Rule at 35,198.

[98] 16 U.S.C. § 1532(5)(A)(ii).

[99] *Merriam-Webster's Collegiate Dictionary* 427 (11th ed. 2005).

[100] As Representative Duncan explained, "I think that in order to be consistent with the purposes of this bill to preserve critical habitat that there ought to be a showing that it is essential to the conservation of the species and not simply one that would appreciably or significantly decrease the likelihood of conserving it." 124 Cong. Rec. 38,154 (emphasis added).

functions of the species)."[101] The Services should clarify that this determination cannot be based on the value of a single habitat feature or component of the species' habitat in isolation. For example, the Services cannot designate a pond that only provides a breeding area for an aquatic species when other absent habitat features are also necessary to sustain the species in that habitat area. Thus, the Services' analysis of the value of a particular area should not focus on the ability to "support certain life functions" but must consider the suitability of the area as broader habitat to support the occupancy and survival of the species.

5. The "Contribution to the Conservation of the Species" Standard Should Focus on Active or Ongoing Conservation Measures

The Services should clarify that their consideration of a habitat area's "contribution to the conservation of the species" will focus on active or ongoing conservation measures that are actually occurring or are reasonably certain to occur.

The ESA defines "conservation" to mean "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."[102] In adopting this definition, Congress explicitly treated conservation as a function, namely "to use and the use of all methods and procedures," and not an end state. Thus, while the methods and procedures have a goal of achieving recovery, the use of "conservation" within the statute—including within the definition of critical habitat—is still referring to the functional efforts to conserve a species.

Thus, to effectuate the purpose of critical habitat, the Services must assess whether there are active or ongoing conservation measures occurring (or reasonably certain to occur) in the areas considered for designation. These conservation measures can include, for example, maintaining the existing condition of an area to provide the conservation function for a listed species. If there is no expectation of conservation activities, no conservation authority under ESA Section 7(a)(1), or no resources for conservation, the Services should not designate that area as critical habitat.

6. Interpretation of "At the Time It Is Listed" for Establishing the Geographical Area Occupied By the Species

In the preamble to the Proposed Rule, when designating critical habitat subsequent to listing a species, the Services propose to interpret the phrase "at the time it is listed" for purposes of delineating the geographical area occupied by the species to allow for the inclusion of data developed since the species was listed.[103]

Should the Services adopt this approach, NESARC requests that the Services clearly emphasize that several conditions apply to its determination. First, as the Services acknowledge,

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[101] Proposed Rule at 35,198.

[102] 16 U.S.C. § 1532(3) (emphasis added).

[103] 83 Fed. Reg. at 35,198.

when making a post-listing determination of occupancy, the Services must differentiate between actual changes to species occupancy since listing and the changes in the available information that support its determination. Second, the available information developed since the species was listed must satisfy the "best scientific data available" standard. Finally, the developed data must demonstrate that the designated area was in fact occupied at the time the species was listed.[104]

III. Comments on Additional Revisions Requested in the Proposed Rule

A. The Services' Definition of "Geographical Area Occupied by the Species" Must be Revised

In 2016, the Services promulgated the following regulatory definition for the phrase "geographical area occupied by the species":[105]

> An area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.*, range). Such areas may include those areas used throughout all or part of 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).[106]

This definition should be revised to only include areas with sustained or regular use by the species.[107] Occupation of an area requires a level of residency in or control over an area, not mere transient or temporary presence, and cannot be conflated with a species' range.

Proposed Action: As discussed further below, NESARC recommends the following revisions to the definition of "geographical area occupied by the species" at 50 C.F.R. § 424.02 to address these issues:[108]

> An area that may ~~generally~~ be delineated around species' occurrences, as determined by the Secretary, <u>when the best available scientific information includes documentation in support of such occurrences</u>~~(i.e., range)~~. Such areas ~~may include~~ <u>are</u> those areas ~~used~~ <u>that support a species' biological needs</u>

[104] *Otay Mesa Property, L.P.*, 646 F.3d at 917 ("Although the Service has tried to explain why a single sighting in 2001 means that the San Diego fairy shrimp occupied plaintiffs' property as of 1997, that reasoning is at best strained.").

[105] *Implementing Changes to the Regulations for Designating Critical Habitat; Final Rule*, 81 Fed. Reg. 7,414 (Feb. 11, 2016).

[106] 50 C.F.R. § 424.02.

[107] *Id*. § 424.02.

[108] The reference to "range" in 50 C.F.R. § 424.12(a)(1)(ii) should also be removed as follows: "Such designation of critical habitat would not be beneficial to the species. In determining whether a designation would be beneficial, the factors the Services may consider include, but are not limited to: The present or threatened destruction, modification or curtailment of a species habitat ~~or range~~ is not a threat to the species, or no areas meet the definition of critical habitat."

~~throughout all or part of the species' life cycle, even if not used~~ on a regular basis <u>for a reasonable period of time</u> (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals <u>or on a temporary basis</u>). <u>A specific area may be considered occupied where the species is documented to have periodic use or presence in the area that is of a repeating or reoccurring nature over multiple generations of such species.</u>

1. The Services Must Further Clarify the Treatment of "Range" Within the Critical Habitat Inquiry

The Services have explicitly acknowledged that use of "range" within the ESA only occurs within the context of a listing determination.[109] In fact, the Services go so far as to state that "[t]hus, the term 'range' is relevant to whether the Act protects a species, but not how that species is protected."[110] ESA Section 4(c) requires the Secretary to specify "over what portion of its range it is endangered or threatened, and specify any critical habitat <u>within such range</u>."[111] Thus, range is a broader concept than the geographic area occupied by a species because it encompasses areas that are both occupied and unoccupied critical habitat for the species.

The present definition of "geographical area occupied by the species" conflates occupancy with range. As noted above, the critical habitat inquiry looks to areas of importance within the species' range. Thus, critical habitat is not co-extensive with the range of the species. Moreover, an "occurrence" of a species does not rise to the level required to determine occupancy.

2. The Services Must Clarify the Meaning of "Occupied" to Require Sustained or Regular Use of an Area

In their preamble to the 2016 Final Rule, the Services explained that the term "occupied" includes areas that are "used only periodically or temporarily by a listed species during some portion of its life history, and is not limited to areas where the species may be found continuously."[112] This formulation remains capable of misinterpretation and should be further clarified.

The determination that an area is "occupied" should require documentation that there is sustained or regular use of a specific area by the species. This clarification is consistent with the Services' explanation that "[o]ccupancy by the listed species must be based on evidence of regular periodic use by the listed species during some portion of the listed species' life history."[113] Further, a requirement for persistent and regular use of an area is supported by

[109] 79 Fed. Reg. 37,578, 37,583 (Jul. 1, 2014).

[110] *Id*.

[111] 16 U.S.C. § 1533(c)(1) (emphasis added).

[112] 81 Fed. Reg. at 7,430.

[113] *Id.*

recent decisions such as *Arizona Cattle Growers' Ass'n v. Salazar*.[114] In this decision, the Ninth Circuit held that "[t]he FWS has authority to designate as 'occupied' areas that the owl uses with *sufficient regularity* that it is likely to be present during any reasonable span of time. This interpretation is sensible when considered in light of the many factors that may be relevant to the factual determination of occupancy."[115] However, the Services cite *Arizona Cattle Growers' Ass'n* to support their proposal that a species is "temporarily present" on critical habitat is a sufficient basis for deeming the area occupied, even if the species is not continuously present.[116] By including the word "temporary" and asserting a broad concept of temporary use, the Services have selectively interpreted the Ninth Circuit's decision (which makes no mention of the word "temporary") without regard to context.

The Services must not conflate temporary use with occupancy. Occupation of an area requires a level of residency or control over an area, not mere transient or temporary presence. For example, eagle nest counts often use the standard that a "breeding territory is considered to be 'occupied' if a pair of birds is observed in association with the nest and there is evidence of recent nest maintenance (e.g. well-formed cup, fresh lining, structural maintenance)." This approach is consistent with the common usage of the term "occupied." Namely, for an area to be occupied by a species, the Services must look at the extent and nature of the residency or control, rather than mere presence within an area. Further, the Service must focus its designation of critical habitat on those physical locations, within the occupied area, that are regularly used (even if not continuously used) and which possess the habitat features that have been identified as essential to the conservation of the species. This will ensure that critical habitat designations are effectively focused and have a direct relationship to existing species needs.

If the Services continue to evaluate whether a species is "temporarily present" in an area for purposes of critical habitat designation, the Services must establish that such temporary presence rises to the level of occupancy by a particular stage of the species' life cycle. A species' periodic or temporary use of an area must be documented as a reoccurring or repeating use that reflects a level of sustained or regular residence or use of the specific habitat. Further, such reoccurring or repeating periodic use must be documented to occur over multiple generations of the species. This further documentation will allow for the necessary differentiation between temporary presence in an area as opposed to a periodic use that maintains the attributes of sustained or regular use.

3. Use of Indirect or Circumstantial Evidence to Support a Determination that an Area is Occupied is Inappropriate

A determination of occupancy cannot be made on the basis of "indirect or circumstantial evidence."[117] This is inconsistent with the requirement that the determination make use of the best scientific data available. The basis of a determination that a habitat is "occupied" should not

[114] 606 F.3d 1160 (9th Cir. 2010).

[115] *Id.* at 1165-66 (emphasis added).

[116] 81 Fed. Reg. at 7,430.

[117] *Id.*

be casual observances or isolated incidents. Instead, there must be a sustained or regular use of an area that is documented through physical evidence. Speculation about the species' presence is an insufficient basis on which to find that habitat is occupied.[118]

4. The Services Should Clarify Use of "Life Cycle" in the Identification of Occupied Areas

The Services defined "geographic area occupied by the species" to encompass those areas used throughout all or a part of a species "life cycle."[119] Further, the Services then used a parenthetical to relate a species' life cycle to migratory corridors and seasonal habitats that may be "used by" the species. The Services' use of "life cycle" in this context is confusing and requires further clarification. In biological terms, the term "life cycle" is typically used to describe a series of developmental stages, such as progression from a zygote to final maturity.[120] In other words, a butterfly has life cycles in its development, namely as an egg, larva, chrysalis and adult.

A species' occupancy of an area and its habitat needs from such area may fundamentally change depending upon the species' life cycle stage. Further, an area and its supporting habitat features may be "essential" to conservation of the species in certain life stages, but not others. The Services must acknowledge and address these complexities by further detailing, in regulatory text, how they will identify the species' life cycle stages, and habitat features for such life cycle stages, requiring designation of critical habitat.

B. The Services Definition of "Physical or Biological Features" Must be Reconsidered or Revised.

In 2016, the Services promulgated the following regulatory definition for the previously undefined phrase "physical or biological features":[121]

> 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

[118] *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1244 (9th Cir.2001).

[119] 50 C.F.R. § 424.02.

[120] *See, e.g., Consol. Salmonid Cases*, 713 F. Supp. 2d 1116, 1132 (E.D. Cal. 2010) (describing salmonid life stages as "adults spawning in fresh water, to fry emergence from gravel, to downstream migration as smolts rear, and then to the species' salt-water life history"); *United States v. Lykes Bros. S. S. Co., Inc.*, 511 F.2d 218, 220 n. 2 (5th Cir. 1975) (testimony regarding life cycle discussing stages from birth through death).

[121] *Implementing Changes to the Regulations for Designating Critical Habitat; Final Rule*, 81 Fed. Reg. 7,414 (Feb. 11, 2016).

conservation biology, such as patch size, distribution distances, and connectivity.[122]

As a threshold matter, NESARC requests that the Services reconsider the initial promulgation of the "physical or biological features" definition and reinstate the use of "primary constituent elements" ("PCEs") as the basis for designating occupied critical habitat. Alternatively, if retained, the definition of "physical or biological features" must be revised to reflect that an occupied area cannot be designated based upon "habitat characteristics that support ephemeral or dynamic habitat conditions." In addition, the definition must be revised to recognize that "physical or biological features" are statutorily required to be "essential to the conservation of the species" which is a greater degree of biological significance than simply "support[ing] the life-history needs of the species."

Proposed Action: If retained, as discussed further below, NESARC recommends the following revisions to the definition of "physical and biological features" at 50 C.F.R. § 424.02 to address these issues:

> *Physical or biological features*. The features that support the ~~life-history~~ <u>essential biological</u> 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~~.

1. The Services Should Restore the Use of "Primary and Constituent Elements" in the Designation of Critical Habitat

The 2016 Final Rule removed PCEs from the process for determining critical habitat and replaced it with reference to "physical and biological features."[123] NESARC requests that the Services restore the use of PCEs in the designation of critical habitat. To be effective and serve its purpose through Section 7 of the ESA, critical habitat designations require a level of specificity that has been lacking following the removal of PCEs from consideration. Returning to the identification and consideration of PCEs would also maintain regulatory consistency for the vast majority of critical habitat designations that have been established.

Returning to the requirement to identify PCEs would promote the effective implementation of the adverse modification inquiry under ESA Section 7. Whether an action is likely to result in adverse modification of designated critical habitat necessarily depends on whether <u>specific</u> habitat conditions, i.e., PCEs, are adversely affected as well as the extent and nature of such adverse effects. Under the Services' definition, physical and biological features can encompass a broad scope of habitat characteristics and features that support a species' life-

[122] 50 C.F.R. § 424.02.

[123] 81 Fed. Reg. at 7,431.

history needs. As such, the identification of physical and biological features serves a higher level role in expressing the habitat needs of a species. However, such general "habitat characteristics" may actually be served or met by a number of different habitat types or elements, and this is where PCEs provided a key role in the critical habitat designation and implementation process. Application of the physical and biological features necessary for the species to the adverse modification inquiry is likely be too general in scope and not always specific to the action area under review. The identification of PCEs would provide that additional layer of granularity that is needed within an adverse modification analysis.

Restoring PCE considerations also will assist the Services in documenting the need for habitat protections and ensuring that the critical habitat designation actually serves its intended purpose of addressing areas essential to the species and upon which conservations can or will take place to assist the species in recovery. In developing the PCE approach, the Services were implementing the statutory definition of critical habitat, including the consideration of physical and biological features. Thus, identification and consideration of PCEs in the designation of critical habitat can take the broader prism of physical and biological features and apply that requirement to the more granular question of how such physical and biological features relate to specific habitat conditions that are essential to the species needs and to efforts to recover such species.

2. The Services' Have Not Defined or Explained What May Constitute a Habitat Characteristic Supporting an Ephemeral and Dynamic Habitat Condition

The Services' definition of physical or biological features states that such "[f]eatures may include habitat characteristics that support ephemeral or dynamic habitat conditions."[124] However, further clarity is required regarding how habitat characteristics may "support" ephemeral or dynamic habitat conditions. Further, the scope of what might be considered an ephemeral or dynamic habitat condition remains unbounded.

In the preamble to their 2016 final rule, the Services' discussion on the ephemeral or dynamic habitat condition factor was limited to a single example of riparian vegetation that occurs within limited years after flooding events, i.e., successional stage vegetation.[125] Further, the Services stated that "[t]he necessary features, then, may include not only the suitable vegetation itself, but also the flooding events, topography, soil type, and flow regime, or a combination of these characteristics and the necessary amount of the characteristics that can result in the periodic occurrence of the suitable vegetation."[126] However, under the Services' logic, the regular occurrence of tornadoes and hurricanes, like a flooding event, could most certainly affect habitat characteristics, which in turn might create ephemeral or dynamic habitat conditions. In fact, under the logic of the Services' example, rainfall itself is a "physical or biological feature" since its periodic occurrence will result in the growth of vegetation. NESARC reasonably assumes that the Services did not intend to make such a broad leap of logic to the point of designating critical habitat based on the occurrence of meteorological conditions.

[124] 50 C.F.R. § 424.02.

[125] 81 Fed. Reg. at 7,430.

[126] *Id*.

However, without a more precise definition of what is covered by its "ephemeral or dynamic habitat conditions" factor, that uncertainty of application exists.

NESARC recommends deleting reference to ephemeral and dynamic habitat conditions in the critical habitat designation context. If the ephemeral or dynamic habitat conditions concept is retained, the Services must define the scope of both "ephemeral" and "dynamic" as used in this feature. Both terms are often loosely defined and, without clear parameters for their use in this context, are susceptible to conflicting or inconsistent application of the dynamic/ephemeral condition factor for purposes of critical habitat designations.

3. ***The Services Must Focus on Specific Habitat Conditions Serving an Essential Biological Need for the Species Rather Than an Overbroad Characterization of Life History Needs***

Under the Services' definition of "physical and biological features," a key inquiry is whether the feature supports "the life-history needs of the species."[127] The Services provided no further definition or explanation of what the term "life-history needs" entails, other than they are what the species "needs throughout its different life stages to survive and thrive."[128]

Rather than integrating "life-history needs" as an undefined term into the definition of physical and biological features, the Services should build from the administrative record developed in the status review of the species in the listing process and focus on: (i) identifying those habitat conditions that serve a species' essential biological needs; (ii) assessing the quantity or quality of such habitat conditions; and (iii) determining the relevance of such habitat conditions to ongoing or planned efforts to conserve the species. From that collective data point, the Service can then consider those factors (i.e., essential biological needs, quantity and quality of habitat, and relevance to conservation efforts for the species) in the identification of specific areas that possess the necessary physical and biological features essential to the conservation of the species that warrant designation as critical habitat within the meaning and purpose of the ESA.

4. The Unilateral Adoption of the "Principles of Conservation Biology" Violates the Mandate for the Use of the Best Scientific Data Available

In the preamble to the 2016 final rule, the Services stated that they "will expressly translate the application of the relevant principles of conservation biology into the articulation of the features" for the determination of areas occupied by a listed species and warranting designation as critical habitat.[129] This direction was included within the adopted regulatory provisions. The elevation of the principles of conservation biology violates the ESA requirement for use of the best scientific data available. There is no basis or rationale provided by the Services to justify placing the principles of conservation biology on a higher plane than other schools of scientific theory. Moreover, these principles are neither conducive to, nor appropriate

[127] 50 C.F.R. § 424.02.

[128] 81 Fed. Reg. at 7,421-22.

[129] *Id.* at 7,433.

for "endorsement" for, use in the determination of what constitutes physical or biological features for designation of critical habitat.

The Services must use the best scientific data available in the designation of critical habitat. Any and all principles applied to the determination of a species' critical habitat must meet that standard, as applied in the context of the species under consideration, including any use of conservation biology principles within a specific critical habitat designation. Accordingly, the Services should strike any unilateral adoption of conservation biology principles from the critical habitat determination process.

IV. Comments on Additional Revisions to Other Regulations and Policies under 50 C.F.R. part 424

The Proposed Rule requests public comments recommending, opposing, or providing feedback on specific changes to any provisions in part 424 of the regulations, including but not limited to revising or adopting as regulations existing practices or policies, or interpreting terms or phrases from the Act.[130] NESARC respectfully requests that the Services consider the following when making additional revisions to the part 424 regulations.

A. The Statutory Mandate to Designate "Specific Areas" Does Not Allow for the Designation "At a Scale Determined by the Secretary to be Appropriate"

In 2016, the Services revised the regulatory criteria for the designation of occupied and unoccupied critical habitat to insert language reserving to the Secretary's sole discretion the determination of an appropriate scale of a critical habitat designation. Specifically, the Services conditioned the requirement to identify a "specific area" by stating that the Secretary will determine such area "at a scale determined by the Secretary to be appropriate."[131] In explaining this change, the Services declared that:

> the Secretary need not determine that each square inch, square yard, acre, or even square mile independently meets the definition of "critical habitat." Nor will the Secretary necessarily consider legal property lines in making a scientific judgment about what areas meet the definition of "critical habitat." Instead, the Secretary has discretion to determine at what scale to do the analysis.[132]

The Services impermissibly expanded their discretion to designate areas "at a scale determined by the Secretary to be appropriate." Instead, the scale of any critical habitat designation must be consistently applied and be at a level of specificity that ensures that homes, businesses, and other areas that do not contain essential physical or biological features (for occupied areas) or essential habitat (for unoccupied areas) are not broadly swept into a critical habitat designation.

[130] Proposed Rule at 35,194.

[131] 50 CF.R. § 424.12(b)(1) & (2)

[132] 81 Fed. Reg. at 7,432.

Proposed Action: The Services must remain fully compliant with the statutory requirement for the identification of specific areas within any designation of critical habitat. Therefore, 50 C.F.R. 424.12(b)(1) and (2) should be revised as follows:

> (b**)** Where designation of critical habitat is prudent and determinable, the Secretary will identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat.
>
> > (1) The Secretary will identify~~, at a scale determined by the Secretary to be appropriate,~~ specific areas within the geographical area occupied by the species for consideration as critical habitat. …
> >
> > AND
> >
> > (2) The Secretary will identify~~, at a scale determined by the Secretary to be appropriate,~~ specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species.

By claiming broad discretion to determine the scale of a critical habitat designation, the Services disregarded the plain meaning of the statute. The ESA requires the Secretary to designate the "specific area" that meets the definition of critical habitat. In fact, the Services' own regulations recognize that critical habitat is not determinable where "the biological needs of the species are not sufficiently well known to identify any area that meets the definition of critical habitat."[133] For geographic areas occupied by the species, critical habitat may only be designated where the specific area is determined to have physical or biological features (or PCEs) essential to the conservation of the species.[134] Likewise, for unoccupied areas, the Secretary must make a determination that the specific area is essential to the conservation of the species.[135] Neither formulation allows the Secretary the complete discretion to pick and choose the scale of the designation; rather, the scale still must be at a level of granularity that is sufficient to determine that the specific area possesses the physical or biological features that are essential to the conservation species (or other applicable criteria). For example, it would be improper for the Secretary to designate all waterways within a watershed to be critical habitat when the actual physical and biological features (or PCEs) necessary for the species only occur in streams or water bodies with certain stream flow characteristics.

The Services' claim of broad discretion to set the scale of a critical habitat designation conflicts with the Services' obligation to use the best available scientific information in designating critical habitat. When such information is available at a scale of individual parcel ownership, due process requires that the Services determine critical habitat at that level. The

[133] 50 C.F.R. § 424.12(a)(2)(ii).

[134] 16 U.S.C. § 1532(5)(A)(i).

[135] *Id.* § 1532(5)(A)(ii).

irony of the Services usurpation of the statutory mandate is that, today, through GIS databases and other computing and analytical tools, the Services are better equipped and able to identify specific areas actually meeting the criteria for designation of critical habitat than ever before. Given these tools, it would be wholly contradictory and arbitrary for the Services now to be unwilling to use satellite data, GIS information and other resources at their disposal to differentiate between areas in which the necessary features are and are not present.

B. The Services' Approach to the Critical Habitat Economic Impacts Analysis and the Exclusion of Areas Must be Revised

Since 2013, the Services have used an "incremental analysis" approach for the consideration of economic impacts, which only considers those impacts attributable to the designation of critical habitat itself, and have claimed unfettered discretion when conducting the impacts analysis and when considering the exclusion of particular areas from critical habitat.[136] This approach precludes the Services from considering the full economic impacts associated with the designation of occupied and unoccupied critical habitat, and allows the Services to make decisions regarding the designation of critical habitat and the exclusion of areas from such designations, in a manner that is not fully transparent or consistent with the parameters provided by the ESA, the Administrative Procedure Act, and other applicable federal statutes, regulations and executive orders.

The economic impacts of any critical habitat designation must be properly characterized and considered. The first sentence of ESA Section 4(b)(2) states that "[t]he Secretary shall designate critical habitat, and make revisions thereto, … *after taking into consideration the economic impact*, and any other relevant impact of specifying any particular area as critical habitat." This conveys a non-discretionary duty for the Secretary to consider economic impacts in all cases at the time of proposing the designation of critical habitat. Specifically, this economic impact analysis spotlights key economic concerns and communities that can be adversely affected by a critical habitat designation. Further, it provides the Services with an effective tool to refine and target their critical habitat designations, including their appropriate and necessary exercise of authority to exclude particular areas from a critical habitat designation where the benefits of such an exclusion outweigh the benefits of inclusion of such area in any critical habitat designation. For these reasons, it is important that the implementing regulations are workable and ensure a robust and transparent economic impact analysis.

Finally, the Services should adopt a presumption that areas covered by certain conservation plans or agreements are automatically excluded from a designation of critical habitat. To further promote and encourage the use of voluntary conservation measures, the Services should provide additional certainty to the landowners that critical habitat will not subsequently be designated for areas included within conservation agreements or plans that provide for the protection or enhancement of habitat for the applicable species.

Proposed Action: As discussed further below, NESARC recommends the following revisions to the regulations at 50 C.F.R. § 424.19 to address these issues:

[136] *Revisions to the Regulations for Impact Analyses of Critical Habitat*, 78 Fed. Reg. 53,058 (Aug. 28, 2013).

(b) Prior to finalizing the designation of critical habitat, the Secretary will consider the probable economic, national security, and other relevant impacts of the designation upon proposed or ongoing activities. The Secretary will consider impacts at a scale ~~that the Secretary determines to be appropriate,~~sufficient to ensure the evaluation of the benefits of exclusion versus inclusion of a particular area as required under ESA Section 4(b)(2). The Secretary will consider all of the impacts of the designation, regardless of whether those impacts are attributable to another cause~~and will compare the impacts with and without the designation~~. To the maximum extent practicable, impacts will~~Impacts may~~ be ~~qualitatively or~~ quantitatively described, though the Secretary may supplement such analysis through the use of qualitative assessments when quantitative data are unavailable.

(c) The Secretary has discretion to exclude any particular area from the critical habitat upon a determination that the benefits of such exclusion outweigh the benefits of specifying the particular area as part of the critical habitat. In identifying those benefits, in addition to the mandatory consideration of impacts conducted pursuant to paragraph (b) of this section, the Secretary may assign the weight given to any benefits relevant to the designation of critical habitat, provided that the weights are assigned using the best scientific and commercial data available, are evaluated using comparable benefits and costs to the maximum extent practicable, and are fully disclosed by the Secretary in the proposed designation. The Secretary, however, will not exclude any particular area if, based on the best scientific and commercial data available, the Secretary determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

(d) The Secretary shall exclude any area from the designation of critical habitat if that area is included within: a habitat conservation plan; a candidate conservation agreement with or without assurances; a safe harbor agreement; a private or other non-Federal conservation plan; the terms or conditions of a federal license, order, grant, authorization, or related settlement agreement; or any other similar agreement or plan. For an area to qualify for such exclusion, the Secretary must determine that the agreement or plan is being implemented in accordance with its terms and contains measures that provide for the protection or enhancement of habitat for the species.

1. The Services Should Adopt a "Co-extensive Approach" to the Analysis of the Impacts Associated with the Designation of Critical Habitat

Pursuant to 50 C.F.R.§ 424.19(b),[137] the Services will consider the probable economic, national security, and other relevant impacts of the designation upon proposed or ongoing

[137] The Services also explain their approach to analyzing the economic impacts of a critical habitat designation in their Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act. 81 Fed. Reg. 7226, 7232

activities and "will compare the impacts with and without the designation."[138] The Services use of a with/without incremental analysis is insufficient for fulfilling the economic impacts analysis required under ESA Section 4(b)(2). The "incremental cost" approach ignores the full costs of critical habitat designation. In order to ensure full consideration of economic impacts, a "co-extensive" approach should be adopted in order to consider all the economic costs impacting landowners in areas designated as critical habitat.

Nowhere within ESA Section 4(b)(2) is the economic impacts analysis: (1) limited to identifying incremental impacts or (2) contingent upon a particular definition of "destruction or adverse modification." Rather, Section 4(b)(2) directs that the Secretary consider "the economic impact, and any other relevant impact, of specifying a particular area as critical habitat" and must consider the benefits of exclusion versus inclusion of a particular area in the critical habitat designation. In effect, the Services' incremental with/without approach results in attributing essentially all of the regulatory burdens and economic costs arising under the ESA to the listing decision, and then (wrongly) utilizing an incremental economic analysis that identifies only those marginal costs that the Secretary "solely" attributes to a later designation of critical habitat.

A critical flaw in the use of a simple with/without analysis is that the Services ignore baseline economic conditions and fail to fully consider how a critical habitat designation will impact a particular area. For example, a with/without analysis makes no judgment as to the existing economic conditions in a particular area. Thus, the fact that an area already has extremely high unemployment, say 18% to 25%, is ignored in the context of whether unemployment may rise by a statistically small percentage overall. Yet, a 1% or 2% increase in unemployment can have a devastating impact to a particular area that is already struggling economically.

The ESA requires the Services to take into consideration the economic and other impacts of designating a particular area as critical habitat.[139] This directive is not limited by any qualifying language requiring that the impacts to be considered are solely derived from the critical habitat designation (as reflected by the incremental analysis approach). As Congress explained, the analysis of economic and other impacts under ESA Section 4(b)(2) is intended to provide a "counter-point to the listing of species without due consideration for the effects on land

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(Feb. 11, 2016). The Services should revise that Policy to be consistent with the requested revisions discussed below.

[138] In adopting this language, the Services explicitly departed from the Tenth Circuit's holding that use of an incremental analysis approach rendered implementation of the economic impact analysis meaningless. *New Mexico Cattlegrowers Ass'n v. FWS*, 248 F.3d 1277, 1285 (10th Cir. 2001) (directing the Services to analyze all impacts of a critical habitat designation whether or not such impacts may be attributable, co-extensively, to other causes). To rationalize this departure, the Services explained that the Ninth Circuit's subsequent invalidation of the definition of "destruction or adverse modification" of critical habitat required the abandonment of the approach taken by the Tenth Circuit. 78 Fed. Reg. at 53,062-63 (citing *Gifford Pinchot Task Force v. USFWS*, 378 F.3d 1059 (9th Cir. 2004)). Specifically, the Services stated that, following *Gifford Pinchot*, they were applying "destruction or adverse modification" in a way that allowed the Services to define the incremental effects of a critical habitat designation. *Id*. According to the Services, it then became appropriate to analyze the impacts of a critical habitat designation in the narrower context of assessing the incremental impacts and benefits of a proposed designation. However, as noted in our comments, this approach undercuts proper implementation of ESA Section 4(b)(2).

[139] 16 U.S.C. § 1533(b)(2).

use and other development interests."[140] Thus, consistent with the ESA and Congressional intent, the Services should adopt the co-extensive approach to ensure that the economic and other impacts of a critical habitat designation are fully taken into account.

2. Analysis of Impacts Must Address "Particular Areas"

The Services should revise their regulation to state that the evaluation of impacts associated with a designation, and the consideration of the benefits of exclusion versus inclusion, will focus on each "particular area" as required by ESA Section 4(b)(2). The present regulations provide the Secretary with unnecessarily broad discretion to "consider impacts at a scale that the Secretary determines to be appropriate."[141] This approach is inconsistent with the specific statutory directive to "tak[e] into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat."[142] The Services cannot continue to disregard the clear statutory mandate that the consideration of impacts be focused on "particular areas" that may be designated as critical habitat.

The exclusion process under section 4(b)(2) requires that the Services review habitat designation at a scale of detail that would allow individual parcels to be excluded. This is a particular concern because a broad-scale designation will sweep in towns, residences, farms and other parcels that support key economic activities even if they do not possess the physical and biological features intended to be protected. The Services are required to use the best available scientific and commercial data in determining exclusions from a critical habitat designation. The Services do not have the discretion to fail to use this information when it is available at the scale of individual parcels.[143] The use of individual parcel information, when available, promotes transparency in the actual application of the critical habitat designation since landowners or operators would have certainty as to whether their lands are within a particular critical habitat designation.

3. Impacts Should be Quantitatively Described to the Maximum Extent Practicable

The Services should revise their regulations governing the economic impacts analysis to apply a clear preference for the use of quantitative data and methodologies to the maximum extent practicable. At present, the Services state that the impact analysis and exclusions from critical habitat, the economic, national security, and other relevant impacts of a designation "may be qualitatively or quantitatively described."[144]

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[140] H.R. Rep. No. 97-567 at 12 (1982).

[141] 50 C.F.R.§ 424.19(b).

[142] 16 U.S.C. § 1533(b)(2) (emphasis added).

[143] *See, e.g., Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1149-50 (N.D. Cal. 2006) ("in relying on an unsubstantiated assumption that was critical to its exclusion decision, the Service did not rely on the 'best available scientific and commercial data available' as required by the ESA"); C*ity of Las Vegas v. Lujan*, 891 F.2d 927, 933 (D.C. Cir. 1989) (requirement to use best available scientific and commercial data "prohibits the Secretary from disregarding available scientific evidence that is in some way better than the evidence he relies on. Even if the available scientific and commercial data were quite inconclusive, he may-indeed must-still rely on it at that stage.").

[144] 50 C.F.R. § 424.19(b).

The purpose of impacts analysis under ESA Section 4(b)(2) can best be achieved through the use of quantitative data. This is particularly the case when evaluating the economic impacts associated with a designation, as such data and impacts are readily analyzed quantitatively. Further, to the extent quantitative data and analyses are available, the Services are required to utilize them pursuant to the best scientific data available standard. NESARC recognizes that not all impacts may be capable of quantitative analysis and that, in some instances, quantitative data may not be available. However, only in those circumstances should the Services resort to utilizing qualitative data and analytical approaches.[145] In such circumstances, the Services must ensure that any impacts assessed qualitatively are fully incorporated into the consideration of all economic and other impacts associated with the designation of any particular area as critical habitat.

4. Services Must Clarify and Provide Additional Guidelines Regarding How They "Assign the Weight Given to Any Benefit" When Determining Whether to Exclude an Area from Critical Habitat

Pursuant to 50 C.F.R. § 424.19(c), when determining the benefits of excluding versus including a particular area of critical habitat, the regulation states that "the Secretary may assign the weight given to any benefits relevant to the designation of critical habitat." This broad claim and exercise of discretion is prone to abuse given the lack of transparency and guidance regarding how the weighing of benefits is conducted. The Services should provide additional guidance on the factors considered in the weighing analysis and ensure that all assumptions and analyses regarding the weights assigned to the various impacts and benefits attributed to a particular area of critical habitat are fully disclosed and explained during the designation process.

NESARC recognizes that the Services have discretion in determining which benefits outweigh others and in assigning the weight given to any particular impact.[146] However, this discretion must be exercised in a consistent manner in accordance with established principles to ensure that the analysis is conducted in an even-handed and logical manner. In some cases, such as when weighing the economic benefits of exclusion versus the economic costs of inclusion, the variables considered (i.e., monetary impacts) may lend themselves to a relatively straight-forward comparison. However, in other circumstances, such as weighing the economic benefits of exclusion versus the biological benefits of inclusion, the analysis is more complicated due to the lack of directly comparable values. This difficulty in comparability has resulted in critical habitat being designated in particular areas that would have significant economic impact but relatively undefined biological benefits.[147]

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[145] *See Alaska Oil & Gas Assoc. v. Jewell*, 815 F.3d 544, 565 (9th Cir. 2016) (recognizing that impacts can be considered qualitatively when they are too uncertain or speculative to be calculated)

[146] *See* H. Rep. 95- 1625 at 17 (1 978) ("The consideration and weight given to any particular impact is completely within the Secretary's discretion.").

[147] *E.g., Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 848 F.3d 635, 653 (5th Cir. 2017) (imposition of up to $34 million in economic costs with "virtually nothing on the other side of the economic ledger.") (Jones, J., dissenting from Denial of Rehearing En Banc).

The Services must clarify their analytical framework, methodology, and standards to better address how to attribute and balance the weights assigned to the relevant impacts and benefits. At a minimum, the Services must make such weighting determinations on the basis of the best scientific and commercial data available. Furthermore, the Services must disclose and explain the methodologies used and the data and assumptions relied upon when assigning weights to particular impacts and benefits. Finally, the Services must provide a reasoned explanation for how they determined the weight attributable to each impact and benefit and for how they determined that the benefits of excluding or including a particular area from a critical habitat designation outweighed the other.

5. Adopt a Presumption of Exclusion for Any Areas Already Covered by an HCP, SHA, CCA/A or Other State or Local Governmental Program for the Protection or Enhancement of Species

NESARC requests that the Services adopt an automatic exclusion for any areas considered for designation as critical habitat that are already covered by a Candidate Conservation Agreement with or without Assurances ("CCA/A"), Safe Harbor Agreement ("SHA"), Habitat Conservation Plan ("HCP"), private or other non-Federal conservation plan, or the terms or conditions of a federal license, order, grant, authorization, or related settlement agreement. The Services have generally stated that, when undertaking a discretionary critical habitat exclusion analysis, they "will always consider" areas covered by a permitted CCA/A, SHA, and HCP, and that they "anticipate consistently excluding" such areas from a designation of critical habitat if certain conditions are satisfied.[148] The Services also have stated that they will "sometimes exclude specific areas" from a critical habitat designation based on private or other non-Federal conservation plans or agreements and their attendant partnerships.[149] These caveats should be removed, and an express exclusion of these areas is warranted. Areas with existing habitat management and protective measures (such as those provided by the agreements or plans above) render critical habitat designations redundant, and designation of those areas provides no added benefits for the species.

The Services promote and encourage the development of CCA/As, SHAs, and HCPs—often emphasizing that such plans and agreements can provide important certainty to the measures that will be required as protections for species and habitat that might be affected by a party. In discussing the benefits of these plans, the Services also have recognized that they allow for the "implement[ation of] conservation actions that the Services would be unable to accomplish without private landowners."[150] Moreover, participants in HCPs, CCA/As, and SHAs expend considerable time and resources and voluntarily incur the costs and burden for implementing species and habitat protection measures. The designation of critical habitat overlying an area that is covered by an HCP, CCA/A, or SHA would create the specter of additional regulatory burdens being imposed upon such areas as part of an adverse modification inquiry under the Section 7 consultation process. In turn, the loss of certainty and increased

[148] *Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act*, 81 Fed. Reg. 7,226, 7,230 (Feb. 11, 2016).

[149] *Id*. at 7,229.

[150] *Id*. at 7,230.

regulatory burdens act as a significant disincentive for enrollment in such plans. In contrast, gaining the regulatory certainty that an area covered by an HCP, CCA/A, or SHA will not be designated as critical habitat (as long as the automatic exclusion criteria are met) actually promotes the development and implementation of these type of voluntary agreements. Further, through an HCP, CCA/A, or SHA, the Services already have the ability to ensure that appropriate habitat protection and enhancement measures are in place.[151]

With respect to private or non-federal conservation plans or partnerships, when determining whether the benefits of exclusion outweigh the benefits of inclusion, the Services employ a variety of factors, including eight specifically identified factors. However, the factors identified by the Services are too intrusive and burdensome and impose obstacles and unrealistic requirements that cannot be overcome in practice.[152] For example, a particular concern is the imposition of a series of public participation requirements. In many cases, broad public participation is not necessary for development of non-federal or private conservation measures and could provide a disincentive or add significant delays and costs to the development and implementation of any conservation plans or partnerships. Public notice and comment on the application of an exclusion can be addressed through a transparent integration of exclusion considerations into the proposed rule designating critical habitat. Instead of imposing numerous restrictive factors, the Services should focus on whether the conservation benefits that may be provided by such private or non-federal conservation plan or program render the application of a critical habitat designation duplicative and unnecessary.

NESARC recognizes that an automatic exclusion process must still rely upon a set of minimum criteria for triggering the exclusion. Again, however, such criteria should not become a disincentive or obstacle to the adoption and implementation of voluntary conservation measures through an CCA/A, SHA, HCP, private or other non-Federal conservation plan, or the terms or conditions of a federal license, order, grant, authorization, or related settlement agreement. Specifically, automatic exclusion of an area subject to one of these agreements or plans should occur upon a: (1) determination that the agreement or plan is being implemented in accordance with its terms; and (2) the agreement or plan contains measures that provide for the protection or enhancement of habitat for the subject species.

C. Revise the Regulatory Definition of "Conserve, Conserving, and Conservation" to Conform to the Statute

NESARC requests that the phrase "i.e., the species is recovered in accordance with § 402.02 of this chapter" be deleted from the regulatory definition of "conserve, conserving, and

[151] Pursuant to the Exclusion Policy, the Services will weigh the exclusion of an area covered by an HCP, CCA/A, and/or SHA based on whether such plan "meets the conservation needs of the species in the planning area." *Id*. at 7,230. Such a criterion steps beyond the existing bounds of what is required for approval of an HCP, CCA/A, and/or SHA—thus again increasing, rather than removing, regulatory burdens for parties considering development or participation in such plans. Accordingly, this criterion should be removed as duplicative and improperly imposing additional measures upon the proponents of such plans.

[152] For a detailed assessment of the issues associated with these factors, see NESARC's comments on the Draft Policy on Exclusions from Critical Habitat (Oct. 9, 2014) (Docket No. FWS-R9-ES-2011-0072).

conservation."[153] When inserting this phrase, the Services explained that it was to "clarify[y] the existing link between conservation and recovery."[154] However, the phrase misstates the relationship between these two concepts, and should be deleted to ensure that the regulatory definition conforms to the statute.[155]

Proposed Action: As discussed below, NESARC recommends the following revision to the regulations at 50 C.F.R. § 424.02 to address this issue:

> *Conserve, conserving,* and *conservation.* To use and the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary~~, *i.e.*, the species is recovered in accordance with §402.02 of this chapter~~. 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.

The ESA defines "conservation" to mean "to *use and the use of all methods and procedures* which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."[156] In adopting this definition, Congress explicitly treated conservation as a function, namely, "to use and the use of" methods and procedures, and not an end state. Thus, while the methods and procedures have a goal of achieving recovery, the use of "conservation" within the statute—including within the definition of critical habitat—is still referring to the functional efforts to conserve a species.

When including the phrase "the species is recovered in accordance with § 402.02 of this chapter" in this regulatory definition, the Services failed to properly interpret and comply with the intent of "conserve, conserving, and conservation," as defined by Congress. Specifically, the Services improperly extended the focus of conservation beyond its proper *functional* role into a measure of "meeting recovery." These are distinct concepts under the ESA, and the Services should revise their regulatory definition to be consistent with the statutory definition of conservation as a set of methods and procedures that work towards recovery of a species.

D. Policy on Interpretation of Significant Portion of Its Range

In 2014, the Services published their Final Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered

[153] 50 C.F.R. § 424.02

[154] 81 Fed. Reg. at 7,417.

[155] NESARC also notes that, because the terms "conserve", "conserving", and "conservation" are already defined in the ESA, 16 U.S.C. § 1532(3), it is unnecessary to include this definition in the Services' regulations.

[156] 16 U.S.C. § 1532(3).

Species" and "Threatened Species."[157] In part, the Services adopted an interpretation that individuals of a species that are endangered or threatened throughout a significant portion of its range ("SPR") are protected wherever they are found.[158] NESARC requests that the Services revise this Policy to state that a species that is only threatened or endangered within a SPR should only be listed within that portion of its range.[159]

Proposed Action: As discussed below, NESARC recommends the addition of a new provision to the regulations at 50 C.F.R. § 424.11 to address this issue:

> (__) If a species is found to be endangered or threatened in only a significant portion of its range, the species shall be listed as endangered or threatened, respectively, only in that portion of its range, and the Act's protections shall apply solely to such identified portion of the species' range.

Because the Services recognize the SPR inquiry as a separate and independent basis for listing a species as threatened or endangered, the Services must apply such determination in a manner consistent with the structure of the ESA. Section 4(c)(1) definitively addresses this matter, providing that:

> Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range.[160]

This formulation clearly requires and accommodates designation of a species as threatened or endangered in a "portion of its range."[161] Accordingly, the Services should not conclude that a finding of threatened or endangered status within a significant portion of a species' range requires listing of the entire species on a range-wide basis. Instead, the Services must exercise their discretion to list a species as threatened or endangered in the portion of its range in which it is at risk, while recognizing the sufficiency and health of its population outside the area identified as a SPR. Importantly, this does not mean that the species is unprotected. Rather, such a listing determination gives independent meaning to the SPR inquiry, while reflecting the prioritization and flexibility of the ESA to protect the species where such measures are necessary.

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[157] 79 Fed. Reg. 37,578 (July 1, 2014). Notably, a federal court recently vacated the definition of "significant" in the SPR Policy as applied nationwide. *Desert Survivors v. U.S. Dep't of the Interior*, No. 16-cv-01165-JCS, 2018 WL 4053447 at *2 (N.D. Cal. Aug. 24, 2018).

[158] 79 Fed. Reg. at 37,580.

[159] For additional comments on the SPR Policy, please see NESARC's Comments on the FWS/NMFS Draft Policy on Interpretation of "Significant Portion of Range" (Mar. 8, 2012) (Docket No. FWS-R9-ES-2011-0031).

[160] 16 U.S.C. §1533(c)(1) (emphasis added).

[161] For example, the Services recognize that "[t]he SPR and [distinct population segment ("DPS")] authorities are distinct." 79 Fed. Reg. at 37,590; *see also* Solicitor's Opinion M-37013, *The Meaning of "In Danger of Extinction Throughout All or a Significant Portion of its Range"* at 15 n.22 (Mar. 16, 2007) ("no support in the language of the Act or its legislative history for the assertion that Congress included the DPS language to alter or limit the meaning of the SPR phrase").

The ESA does not dictate a one-size fits all approach. In fact, the courts have recognized it "appears that Congress added [the SPR] language in order to encourage greater cooperation between federal and state agencies and to allow the Secretary more flexibility in her approach to wildlife management."[162] This flexibility was explained during the 1973 Congressional debate on the ESA where it was discussed that:

> Under existing laws, a species must be declared "endangered" even if in a certain portion of its range, the species has experienced a population boom, or is otherwise threatening to destroy the life support capacity of its habitat. Such a broad listing prevents local authorities from taking steps to insure healthy population levels.
>
> Under S. 1983, however, the Secretary may list an animal as "endangered" through all or a portion of its range. An animal might be "endangered" in most States but overpopulated in some. In a State in which a species is overpopulated, the Secretary would have the discretion to list that animal as merely threatened or to remove it from the endangered species listing entirely while still providing protection in areas where it was threatened with extinction.[163]

Further, the Congressional debate emphasizes that this approach of focusing the ESA's protections in those regions where the species clearly warrants them allows healthy populations of the species to continue to be managed by the States.[164] Thus, limiting the scope of a SPR listing to the identified significant portion of the species' range is not only consistent with the inherent flexibility of the ESA, but also facilitates the ESA's continued recognition of the States' role in managing fish and wildlife populations within their borders.

V. Conclusion

NESARC greatly appreciates the opportunity to provide these comments to the Services. We respectfully request that you take these comments into full consideration and adopt the proposed revisions when finalizing the applicable regulatory language.

Sincerely,

Tyson C. Kade
NESARC Counsel

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[162] *Defenders of Wildlife*, 258 F.3d at 1144.

[163] 119 Cong. Rec. 15,662, 25,669 (Jul. 24, 1973) (statement of Sen. Tunney, floor manager supporting passage of S.1983).

[164] *Id.*

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Colorado River Energy Distributors Association
Phoenix, Arizona

Colorado River Water Conservation District
Glenwood Springs, Colorado

Colorado Rural Electric Association
Denver, Colorado

County of Eddy
Carlsbad, New Mexico

County of Sierra
Truth or Consequences, New Mexico

CropLife America
Washington, DC

Dixie Escalante Rural Electric Association
Beryl, Utah

Dugan Production Corporation
Farmington, New Mexico

Eastern Municipal Water District
Perris, California

Edison Electric Institute
Washington, DC

Frank Raspo & Sons
Vernalis, California.

Empire Electric Association, Inc.
Cortez, Colorado

Garrison Diversion Conservancy District
Carrington, North Dakota

High Plains Power, Inc.
Riverton, Wyoming

National Alliance of Forest Owners
Washington, DC

National Association of Counties
Washington, DC

National Association of Conservation Districts
Washington, DC

National Association of Home Builders
Washington, DC

National Association of Realtors
Washington, DC

National Association of State Departments of Agriculture
Arlington, Virginia

National Association of Wheat Growers
Washington, DC

National Cattleman's Beef Association
Washington, DC

National Rural Electric Cooperative Association
Washington, DC

National Water Resources Association
Arlington, Virginia

Nebraska Farm Bureau Federation
Lincoln, Nebraska

Northern Electric Cooperative, Inc.
Bath, South Dakota

Northwest Horticultural Council
Yakima, Washington

Northwest Public Power Association
Vancouver, Washington

Public Lands Council
Washington, DC

Renville-Sibley Cooperative Power Association
Danube, Minnesota

Salt River Project
Phoenix, AZ

San Luis Water District
Los Banos, California

Southwestern Power Resources Association
Tulsa, Oklahoma

Sulphur Springs Valley Electric Cooperative
Willcox, Arizona

Teel Irrigation District
Echo, Oregon

Washington State Potato Commission
Moses Lake, Washington

Washington State Water Resources Association
Yakima, Washington

Wells Rural Electric Company
Wells, Nevada

Western Energy Supply and Transmission (WEST) Associates
Tucson, AZ

West Side Irrigation District
Tracy, California

Western Business Roundtable
Lakewood, Colorado

Wheat Belt Public Power District
Sidney, Nebraska

Whetstone Valley Electric Cooperative, Inc.
Milbank, South Dakota

Wilder Irrigation District
Caldwell, Idaho

Wyrulec Company
Lingle, Wyoming

Y-W Electric Association, Inc.
Akron, Colorado