PACIFIC LEGAL FOUNDATION

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Public Comments Processing
Attn: Docket No. FWS-HQ-ES-2012-0096
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
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VIA regulations.gov

Re: Comments Re: Proposed Rule To Amend the Regulations for Designating Critical Habitat

INTRODUCTION

Pacific Legal Foundation (PLF) is a non-profit legal organization heavily involved in environmental litigation, particularly with respect to critical habitat designations. PLF appreciates the opportunity to comment on the proposed rulemaking to clarify the process for designating critical habitats. PLF advocates a balanced approach to environmental law, and would like to comment on two aspects of the proposed rule, one of which threatens to upset this balance, the other of which could help to restore it.

First, two parts of the rulemaking contain unreasonable interpretations of the Endangered Species Act (ESA) under *Chevron U.S.A., Inc. v. Natural Resources Defense Council*:[1]

(a) The proposed definition of "geographical area occupied by the species" is inconsistent with the structure of the ESA, leads to bad policy consequences that Congress did not intend, and also raises serious constitutional problems. Therefore it constitutes an unreasonable interpretation of the statute under *Chevron*.

(b) The removal of 50 C.F.R. § 424.12(e) and its substitution with the revised section 424.12(b)(2) is based on an interpretation of "essential" that is inconsistent with both the plain meaning of "essential" and the legislative history. Therefore, this, too, would constitute an unreasonable interpretation of the ESA under *Chevron*.

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[1] 467 U.S. 837 (1984).

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Second, although PLF does not object to the proposed rule's clarification of when designation would be "reasonable and prudent," we recommend that the proposed rule add a further clarification: It will seldom if ever be reasonable and prudent to designate an unoccupied, unsuitable area as critical habitat.

I

TWO PARTS OF THE PROPOSED RULE CONSTITUTE UNREASONABLE INTERPRETATIONS OF THE ESA

A. "Geographical area occupied by the species"

The rulemaking proposes to define "geographical area occupied by the species" as:

> "[T]he geographical area which may generally be delineated around the species' occurrences, as determined by the Secretary [of the Interior] (*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)."[2]

This definition does not contain a principle for the Secretary to consult when determining the size and shape of the area "around the species' occurrence." Instead, it gives the Secretary absolute discretion in establishing the size and shape of the area. If the Secretary has absolute discretion in defining the size and shape of the occupied habitat, then he or she could define this area to encompass whichever areas he or she wants to designate as critical habitat. The structure of section 3 shows that the ESA does not contemplate giving the Secretary this discretion.

The standard for designating an unoccupied critical habitat is "more demanding" than the standard for designating an occupied critical habitat.[3] By giving the Secretary absolute discretion in determining the size and shape of occupied critical habitat, the proposed rule's interpretation of "geographical area occupied by the species" would obviate the need for the Secretary ever to

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[2] Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat, 79 Fed. Reg. 27,068-69 (proposed May 12, 2014) (citation omitted) (to be codified at 50 C.F.R. pt. 424) (hereinafter Proposed Rule).

[3] *Home Builders Ass'n of N. Cal. v. United States Fish and Wildlife Serv.*, 616 F.3d 983, 990 (9th Cir. 2010); *see also Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (describing the procedure for designating unoccupied critical habitat as "more onerous" than the procedure for designating occupied critical habitat).

designate a given portion of land as unoccupied. It would therefore circumvent the more demanding standards for designating unoccupied critical habitat. Congress created a more stringent standard for unoccupied critical habitat because, where appropriate, it intended for the Secretary to designate some areas as unoccupied. It did not mean for "occupied" critical habitat to be interpreted so broadly as to subsume unoccupied critical habitat. Because the proposed rule gives the Secretary absolute discretion to designate all critical habitats as occupied critical habitat, it is an unreasonable interpretation of the statute.[4]

Such a broad interpretation of "geographical area occupied by the species" would also cause significant economic problems for private property owners. There is no evidence that Congress intended these consequences. The proposed interpretation could apply to large swaths of land on which the species did not exist at the time of listing, and which are unsuitable for the species. The ongoing case of *Markle Interests, LLC v. United States Fish and Wildlife Service*[5] illustrates this problem. There, the Fish and Wildlife Service (FWS) designated as critical habitat an unsuitable area in which the dusky gopher frog did not exist at the time of listing, and where the estimated economic impact on landowners was $33.9 million.[6] The proposed rule could lead to more such cases because FWS had not provided an interpretation of the statute that contained an appropriate limiting principle.

The vagueness of the proposed rule's interpretation of "geographical area occupied by the species" also makes it impossible to predict where it would apply. This would have harmful effects even on landowners who know both that the relevant species has never appeared near their land and that their land is unsuitable for the species. In such a case, one of two perverse results could occur. First, the landowner could plan and begin a development project under the assumption that he or she would not need to pay costs associated with section 7 consultation requirements, but then be blindsided by these costs due to an unpredictable critical habitat designation. Second, the landowner could refrain from engaging in an individually and socially beneficial development project for fear that potential section 7 consultation costs would render the project prohibitively expensive, even though the costs would have never actually materialized because FWS did not designate the relevant land as critical

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[4] Whether or not the Secretary ever will exercise such boundless discretion is irrelevant as a matter of statutory interpretation. *Cf. Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001) (holding that agencies cannot change statutes by failing to exercise powers that Congress has granted).

[5] No. 13-234 (E.D. La. Feb. 7, 2013).

[6] Motion for Summary Judgment at 5, *Markle Interests, LLC v. United States Fish and Wildlife Serv.*, No. 13-234 (E.D. La. Dec. 9, 2013).

habitat.[7] There is no evidence that Congress intended for its definition of occupied critical habitat to have these effects.

Another reason that Congress would not have intended for its definition to be so sweeping is that the Supreme Court has struck down statutory geographical terms so vague that it was impossible to determine how they would be applied.[8] Vague laws do not provide fair warning to individuals who will be subject to them, in violation of the Due Process Clause.[9] Without a limiting principle on "geographical area occupied by the species," many persons, particularly private landowners, would lack fair warning: They would have no way of knowing in advance whether their private land would be subject to increased federal permitting requirements resulting from the need for federal agencies to engage in section 7 consultation, and hence whether their activities on these lands would subject them to extreme economic disadvantage. Therefore, to avoid constitutional difficulty, the definition of "geographical area occupied by the species" must contain a limiting principle.

Because the interpretation at issue contains no limiting principle, it raises constitutional difficulties. And, it is a widely accepted canon of statutory interpretation that statutory terms should be construed so as to avoid "serious constitutional problems."[10] Thus, because construing "geographical area occupied by the species" not to contain a limiting principle raises serious constitutional problems (namely, vagueness), proper respect for Congress implies that such a construction is unreasonable.

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[7] These effects would multiply if the Army Corps of Engineers' and the Environmental Protection Agency's proposed rule that significantly expands the Clean Water Act's definition of "waters of the United States" is adopted. *See* Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22,188 (proposed Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328; 40 C.F.R. pts. 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401).

[8] *See, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 56-59 (1999) (holding that a statute that required gang members to follow a police officer's order to "disperse and remove themselves from the area" was unconstitutionally vague partly because it provided no specification of what "area" meant); *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926) (holding that the term "locality," without any definition, was void for vagueness because there was no way for people to know what the boundaries of the locality were).

[9] *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. . . . Vague laws may trap the innocent by not providing fair warning.").

[10] *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989).

One might object that, in fact, the proposed rule does contain a limiting principle because it states that habitats are not occupied if they are used "solely by vagrant individuals."[11] But this does not solve the problem because it simply pushes the question back one step: What is the size and shape of the relevant habitat that is not occupied solely by vagrant individuals? The proposed rule gives the Secretary absolute discretion in determining this as well. Thus, under the proposed rule, the Secretary always could avoid the problem of vagrant individuals by finding that the habitat in question is not inhabited solely by vagrant individuals because it includes areas that non-vagrant individuals occupy. The vagrancy provision does not provide a limiting principle at all.

The recent critical habitat designation for the jaguar illustrates this problem. FWS concluded that the jaguar occupied huge swaths of land in Arizona and Mexico at the time of listing. It based this conclusion on two jaguar sightings in the ten years before and after listing in 1972,[12] and six or seven jaguar detections in the next thirty years.[13] If so few detections are not evidence of vagrancy, it is unclear what could be.[14] Nevertheless, FWS concluded that this area was part of the jaguar's general

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[11] Proposed Rule, *supra* note 2, at 27,077.

[12] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Jaguar, 79 Fed. Reg. 12,572, 12,580 (Mar. 5, 2014) (to be codified at 50 C.F.R. pt. 17).

[13] *Id.* at 12,581.

[14] In its jaguar designation, FWS argued that non-detection does not necessarily indicate absence. It could always make a similar argument concluding that a small number of detections does not necessarily indicate mere vagrancy, particularly—and perversely—when the area under consideration is large. After all, when the ratio of individuals to surface area is small, it will always be possible to say that the infrequent observation of a given species is consistent with the species being there permanently but simply not being observed due to a low probability of human contact. Therefore, it will always be possible to infer occupancy (*i.e.*, non-vagrancy) from the mere detection of a species. And if the area is too small for this argument to be plausible, FWS could simply expand the relevant area until the argument becomes plausible. As shown in the main text, there is nothing in the proposed rule's interpretation to stop this. This is another reason why the vagrancy provision is not an effective limiting principle.

occupied area, and did not apply the vagrancy provision.[15] It could do this because the vagrancy provision does not limit the occupied area in the first place.

The ESA unambiguously limits the Secretary's authority to designate occupied critical habitats, yet the proposed rule contains no such principle. The intent of Congress in this matter is clear. Because Congress clearly intended to limit the scope of this power, the proposed rule exceeds the Service's discretion and authority.

B. "Essential"

Currently, section 424.12(e) of the ESA's implementing regulations requires the Secretary to designate unoccupied areas as critical habitat only when designating all occupied areas would be "inadequate to ensure the conservation of the species."[16] This is based on the plain language of the ESA, which requires unoccupied critical habitat to be "essential for the conservation of the species."[17] The proposed rule eliminates section 424.12(e), asserting other meanings of "essential" and that section 1532(5)(A)(ii) of the ESA[18] "does not necessarily translate into a mandate to avoid designation of any unoccupied areas unless relying on occupied areas alone would be insufficient."[19] The proposed rule also claims that there is nothing in the legislative history to support the proposition that the Secretary is required to exhaust all occupied critical habitats before designating unoccupied ones.[20]

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[15] FWS might respond that it did not contemplate a vagrant individuals exception at the time of the jaguar's designation. This is implausible because the proposed rule seeks to "clarify the criteria for designating critical habitat." Proposed Rule, *supra* note 2, at 27,066. That is a clarification and not a change suggests that FWS has already been using the practices described in the proposed rule. This is bolstered by the fact that the jaguar designation occurred only a few months prior to the promulgation of the proposed rule.

[16] 50 C.F.R. § 424.12(e).

[17] 16 U.S.C. § 1532(5)(A)(ii).

[18] This section defines unoccupied critical habitat.

[19] Proposed Rule, *supra* note 2, at 27,073.

[20] *Id.*

These arguments are wrong. While the proposed rule claims that there are other meanings of "essential" that can lead to its interpretation of section 1532(5)(A)(2), it does not provide any. This is because there are none.

In fact, the legislative history of the 1978 amendments to the ESA (the amendments that added the definition of "critical habitat") contains an extensive discussion of the meaning of "essential." Senator Bartlett proposed to amend the definition of "endangered species," which read (and still reads): "The term 'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range . . . ."[21] Senator Bartlett proposed to change "a significant portion" to "the essential portion" based on the difference between the meanings of "significant" and "essential."[22] He recited contemporary dictionary meanings of "significant" and "essential."[23] The relevant definition of "significant" from Webster's New World Dictionary was "important; momentous." The relevant definition of "essential" was "absolutely necessary; indispensable; requisite."[24] Other senators did not contest the difference between the meanings of the two words.

The legislative history and contemporary dictionaries show that the proposed rule's interpretation of "essential" is incorrect because it equates "essential" with "significant." They also show that "essential" in this portion of the ESA means "absolutely necessary." Section 424.12(e) of the current implementing regulations correctly reflects this meaning. If designating only occupied areas would be sufficient to satisfy the purposes of the ESA, then, *by definition*, designating unoccupied habitat is not "absolutely necessary" or "essential" to satisfy the purposes of the Act. Understanding "essential" any other way contradicts its plain meaning and constitutes an unreasonable interpretation of the statute, especially given its legislative history.

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[21] 16 U.S.C. § 1532(6).

[22] Congressional Research Service, *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980*, 1126-30 (1978) (statement of Sen. Bartlett).

[23] *Id.* at 1127-28 (statement of Sen. Bartlett).

[24] *Id.* at 1128 (statement of Sen. Bartlett).

II

IT WILL SELDOM IF EVER BE REASONABLE AND PRUDENT TO DESIGNATE AN UNOCCUPIED, UNSUITABLE AREA AS CRITICAL HABITAT

The proposed rule adds a second sentence to 50 C.F.R. § 424.12(a)(1)(ii) to clarify what it means for a designation to be beneficial to a 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.[25]

We do not disagree that, in these cases, designation would not be beneficial to a species, and therefore would not be reasonable and prudent. However, we recommend that the proposed rule add an additional clarification: Designating unoccupied, unsuitable areas as critical habitat would not be beneficial to the species, and therefore would not be reasonable and prudent under the ESA. For the purposes of this comment letter, an area is unsuitable for a particular species if, without special management or modification, the land would not contain enough of the primary constituent elements for the species to survive there for a significant portion of its life cycle.

By our definition, unsuitable areas do not contain the features essential for the conservation of the species. Without these features, the species cannot live there, and therefore the designation of such an area as critical habitat would not benefit the species. For example, in the *Markle* case, the dusky gopher frog cannot live in some of the areas designated as critical habitat without those areas undergoing costly management. Thus, the only way in which an unoccupied, unsuitable area could benefit a species is if the area were altered. Management could create the features essential to the conservation of the relevant species that the current unsuitable area lacks for any parcel, regardless of its present condition. However, the ESA makes clear that unoccupied critical habitat is not such that it may require management to support the species.

When the ESA defines occupied critical habitat, it includes the term "may require special management considerations or protection."[26] But, when the ESA defines unoccupied critical habitat,

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[25] Proposed Rule, *supra* note 2, at 27,077.

[26] 16 U.S.C. § 1532(5)(A)(i).

it conspicuously omits that such habitat may require management.[27] The Supreme Court has held that, "'[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"[28] This is even more persuasive when the statutory terms are next to each other, as is the case here. Because the definition of occupied critical habitat states that occupied critical habitat may include management and omits any mention of management in the definition of unoccupied critical habitat, the implication is that unoccupied critical habitat may not require management.[29] Therefore, the only unoccupied areas that may be designated are those that already contain the features essential for the conservation of the species.[30] Thus, designating currently unoccupied, unsuitable areas as critical habitat would not be appropriate. Since the proposed rule attempts to clarify what it means for a designation to benefit a species, now would be an opportune time to add this further clarification.

CONCLUSION

While PLF supports the effort to define terms that statutes leave ambiguous, these definitions must comport with the statute. The proposed rule's definition of "geographical area occupied by the species" does not comport with the statute because it gives the Secretary unbridled discretion in determining occupied areas, causes bad results that there is no evidence that Congress intended, and raises serious constitutional problems. Moreover, the proposed rule's interpretation of the ESA, which allows the Secretary to designate unoccupied habitat as critical even when designating only occupied habitat would be sufficient for the conservation of the species, violates the plain meaning of "essential" and is inconsistent with the legislative history. Finally, the proposed rule should

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[27] *See* 16 U.S.C. § 1532(5)(A)(ii).

[28] *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

[29] Since "may" is permissive, there actually are two logically possible negative implications flowing from the omission of management in section 1532(5)(A)(ii): unoccupied critical habitat *may not* require management, and unoccupied critical habitat *must* require management. The former is correct because the latter is absurd.

[30] One rare exception occurs if a given area will, without management, acquire the essential features that it currently lacks. However, in this case, "The [Fish and Wildlife] Service may not statutorily cast a net over tracts of land with the mere hope that they will develop [primary constituent elements] and be subject to designation." *Cape Hatteras Access Pres. Alliance v. United States Dep't of Interior*, 344 F. Supp. 2d 108, 122 (D.D.C. 2004).

include a clarification that designating an unoccupied, unsuitable area as critical habitat will seldom if ever be reasonable and prudent.

Respectfully submitted,

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