

Case No. 14-31008

IN THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

MARKLE INTERESTS, L.L.C.; P&F LUMBER COMPANY 2000, L.L.C.; PF
MONROE PROPERTIES, L.L.C.,

Plaintiffs - Appellants

v.

UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL M. ASHE,
Director of United States Fish & Wildlife Service, in his official capacity;
UNITED STATES DEPARTMENT OF INTERIOR; SALLY JEWELL, in her
official capacity as Secretary of the Department of Interior,

Defendants - Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION
NETWORK,

Intervenor Defendants - Appellees

Cons/w 14-31021

WEYERHAEUSER COMPANY,

Plaintiff - Appellant

v.

UNITED STATES FISH AND WILDLIFE SERVICE; DANIEL M. ASHE,
Director of United States Fish & Wildlife Service, in his official capacity;
UNITED STATES DEPARTMENT OF INTERIOR; KENNETH SALAZAR,
Secretary of the Department of Interior, in his official capacity; SALLY JEWELL,
in her official capacity as Secretary of the Department of Interior,

Defendants - Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION
NETWORK,

Intervenor Defendants – Appellees

ON APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA (NEW ORLEANS)

BRIEF OF *AMICI CURIAE*
AMERICAN FARM BUREAU FEDERATION
NATIONAL ALLIANCE OF FOREST OWNERS
NATIONAL ASSOCIATION OF HOME BUILDERS
IN SUPPORT OF PLAINTIFFS-APPELLANTS

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The Plaintiffs-Appellants have set forth the interested parties in this case in their opening brief. Pursuant to Fifth Circuit Local Rule 29.2, which requires a “supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief,” undersigned counsel of record certifies that, in addition to the persons listed in the parties’ statements, the following listed entities have an interest in this Brief, but no financial interest in this litigation. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), *Amici Curiae* the American Farm Bureau Federation, National Alliance of Forest Owners, and National Association of Home Builders are nonprofit corporations with no parent corporations. No publicly-traded company owns ten percent or more of the stock in any of these *Amici Curiae*.

This brief is submitted pursuant to Federal Rule of Appellate Procedure 29(a). No counsel for a party authored this brief in whole or in part; no counsel or party made a monetary contribution intended to fund preparation or submission of this brief; and no person, other than the *Amici Curiae*, its members or its counsel, contributed money that was intended to fund preparing or submitting this brief.

Respectfully submitted,

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INTERESTS OF AMICI CURIAE

The *Amici Curiae* respectfully submit this brief to assist the Court in addressing the central legal question of whether the U.S. Fish and Wildlife Service’s (“USFWS”) designation of an unoccupied area as critical habitat for the dusky gopher frog was consistent with the Endangered Species Act (“ESA”).

The designation of private property as critical habitat is an intrusive action that imposes significant burdens on landowners and restricts their ability to fully utilize their property. By authorizing the designation of unoccupied areas as critical habitat only when the area is essential for the conservation of the species, Congress clearly struck a balance between the need to protect habitat for threatened and endangered species and the need to ensure that the exercise of regulatory powers affecting the economic and productive use of land is wielded with focused circumspection. Here, the USFWS designated an unoccupied area as critical habitat in a manner that violated statutory and regulatory requirements and without support within the administrative record that the area is essential for the conservation of the listed species.

The **American Farm Bureau Federation** (“AFBF”) is an independent, non-governmental, voluntary general farm organization with nearly 6 million member families in all 50 states and Puerto Rico. Established in 1919, AFBF’s primary function is to advance and promote the interests and betterment of farming

and ranching; the farming, ranching, and rural community; and the individual families engaged in farming and ranching. This effort involves protecting, promoting and representing the business, economic, social and educational interests of American farmers and ranchers. In furtherance of this purpose, AFBF represents its members in legal, regulatory and legislative matters relating to the ESA.

The **National Alliance of Forest Owners** (“NAFO”) is a trade association that represents owners and managers of over 80 million acres of private forests in 47 states. NAFO was incorporated in March 2008, and has been working aggressively since then to sustain the ecological, economic, and social values of forests and to assure an abundance of healthy and productive forest resources for present and future generations. NAFO has members that will be directly and negatively affected by the designation of their land as critical habitat, particularly where, as here, the land is unoccupied by the relevant species and lacks features that would render it capable of functioning as viable habitat for that species.

The **National Association of Home Builders** (“NAHB”) is a national trade association incorporated in the State of Nevada with its headquarters in Washington, D.C. Founded in 1942, NAHB is a federation of more than 800 state and local associations located in all 50 states. NAHB represents 140,000 members nationwide. These members are involved in all aspects of the home building

industry, from acquiring real property to final sale, and eventual remodeling. Each year, NAHB's builder members construct about 80% of the new homes built in the United States. NAHB represents its members in legal, regulatory, and legislative matters that may affect the use and development of their land. Many of NAHB's members rely on it to effectively advocate on their behalf concerning national issues, including regulatory and legislative matters pertaining to the ESA.

SUMMARY OF ARGUMENT

When designating critical habitat for the dusky gopher frog under the ESA, the USFWS included an unoccupied area (“Unit 1”) that is presently inadequate to support the species. Furthermore, Unit 1 is located about 50 miles from existing occupied areas, and natural dispersal of the species into the area is not possible. By including Unit 1 as critical habitat, USFWS acted in derogation of the statutory construct that Congress enacted to provide defined boundaries and heightened thresholds for the designation of unoccupied areas. This statutory construct includes (in order): (1) the overarching requirement to use the best scientific data available; (2) the identification of defining habitat characteristics; (3) a preference for designating occupied habitat; (4) requiring an inadequacy determination prior to consideration of unoccupied habitat; and (5) the limitation that the entire designated area must be essential for the conservation of the species. Because USFWS failed to follow these basic procedures and requirements, the designation of critical habitat for the dusky gopher frog must be vacated.

ARGUMENT

Congress provided rigid guidelines to constrain the discretion of USFWS to designate critical habitat and imposed a heightened threshold and more onerous procedures for the designation of unoccupied areas.

Pursuant to ESA Section 4, upon determining that a species is threatened or endangered, the Secretary shall “to the maximum extent prudent and determinable . . . designate any habitat of such species which is then considered to be critical habitat.” 16 U.S.C. § 1533(a)(3)(A)(i) (2012). The Secretary must base any designation of critical habitat upon “the best scientific data available . . . after taking into consideration the economic impact, . . . and any other relevant impact, of specifying any particular area as critical habitat.” 16 U.S.C. § 1533(b)(2).

The ESA distinguishes between the designation of occupied and unoccupied habitat areas, and clearly reflects Congressional intent that designation of unoccupied habitat be a more extraordinary event. For occupied habitat, the designated area must contain “those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection.” 16 U.S.C. § 1532(5)(A)(i). Unoccupied habitat can only be designated “upon a determination by the Secretary that such areas are essential for the conservation of the species.” 16 U.S.C. § 1532(5)(A)(ii). Consistent with this framework, the applicable regulations require that, before

considering the designation of unoccupied habitat, the Secretary must first determine that a critical habitat designation limited to occupied habitat is inadequate for the conservation of the species. 50 C.F.R. § 424.12(e) (2014).

In addition, when designating unoccupied habitat, USFWS must determine that the entire area is essential for the conservation of the species. 16 U.S.C. § 1532(5)(A)(ii). The determination of whether an area meets this standard requires reasonable certainty that the area be capable of re-occupation by the species through natural expansion or reintroduction, and can support conservation measures for the species. In addition, the area, as a whole, must not be merely important or significant for the conservation of the species, but must be “essential” (*i.e.*, absolutely necessary and indispensable). USFWS failed to make these requisite determinations when designating Unit 1 as critical habitat.

I. Congress Intended that Unoccupied Habitat Only be Designated Sparingly Based Upon Heightened Criteria

As originally enacted in 1973, the ESA did not contain a definition of “critical habitat” or specify how it was to be designated. Responding to the Supreme Court’s expansive reading of the ESA in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), and concerns that USFWS was attempting overly expansive designations, Congress amended the ESA in 1978 to explicitly define critical habitat and limit the scope of such designations. As indicative of

Congressional concerns, during floor debate on the House bill, H.R. 14104, Representative Bowen explained:

The present law provides no definition of what critical habitat is, and this law makes some steps in that direction. It points out that the critical habitat for endangered species must include the range the loss of which would significantly decrease the likelihood of preserving such species. So we have given some fairly rigid guidelines.

. . . 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.¹

Congress emphasized that critical habitat must be “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 (1978), *reprinted in* ESA Legis. Hist. at 880 (statement of Rep. Duncan).

Further, Congress distinguished between the designation of occupied and unoccupied habitat, and made clear that unoccupied habitat should only be designated sparingly. Notably, in response to a USFWS proposal to designate broad areas of currently unoccupied areas as critical habitat for grizzly bears, the Senate Committee on Environment and Public Works stated:

¹ 124 Cong. Rec. 38,131 (1978), *reprinted in* U.S. Senate Comm. on Env’t and Pub. Works, 97th Cong., A Legislative History of the Endangered Species Act of 1973, As Amended in 1976, 1977, 1978, and 1980 (Feb. 1982) at 817 (statement of Rep. Bowen) (hereinafter “ESA Legis. Hist.,” *available at* <http://www.eswr.com/lh/>).

[U]nder present regulations the Fish and Wildlife Service is now using the same criteria for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species. The committee feels that the rationale for this policy ought to be reexamined by the Fish and Wildlife Service. There 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.²

Likewise, the House Committee on Merchant Marine and Fisheries directed the Secretary to “be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species.” H.R. Rep. No. 95-1625, at 18 (1978) (emphasis added), *reprinted in* ESA Legis. Hist. at 742.

USFWS recognized Congressional intent that the designation of unoccupied habitat would be a more extraordinary event. The implementing regulations recognize a sequential process for the designation of critical habitat.³ The Secretary must first identify the requisite physical and biological features that comprise occupied critical habitat. Before unoccupied habitat can be designated, the Secretary must find that “a designation limited to its present range would be inadequate to ensure the conservation of the species.” 50 C.F.R. § 424.12(e).⁴

² S. Rep. No. 95-874, at 9-10 (1978) (emphasis added), *reprinted in* ESA Legis. Hist. at 947-48.

³ See 50 C.F.R. § 424.12.

⁴ See also Memorandum from Kenneth Stansell, Acting Deputy Director, USFWS to Regional Director, Regions 1, 2, 3, 4, 5, 6 and 7 and California Nevada Operations Office Manager at 8 (Dec. 19, 2006) (“Only if the habitat identified in steps 1 & 2 is not believed sufficient to conserve the species, would we consider designating habitat that is ‘unoccupied.’”) (hereinafter “USFWS Critical Habitat Memorandum”). While not binding, the USFWS Critical Habitat

Following such a finding, the Secretary can only designate unoccupied habitat based upon a “determination” that the area itself is “essential for the conservation of the species.” 16 U.S.C. § 1532(5)(A)(ii). Given the statutory constraints that Congress imposed on the designation of unoccupied habitat, the courts have aptly characterized this as a “more onerous procedure” and a “more demanding standard” than the designation of occupied habitat. *E.g.*, *Ariz. Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010); *Home Builders Ass’n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 990 (9th Cir. 2010).

II. The Secretary Must Make an Independent Threshold Determination that Occupied Habitat is Inadequate Following a Rigorous Examination

Following the 1978 amendments establishing the present statutory framework for critical habitat designations, the USFWS and National Marine Fisheries Service (collectively, the “Services”) promulgated regulations elaborating that, before designating unoccupied habitat, the Secretary must make a threshold finding that “a designation limited to its present range would be inadequate to ensure the conservation of the species.” 50 C.F.R. § 424.12(e). Notably, the Services explained that the inadequacy determination is an integral

Memorandum provides insight into the agency’s practice and interpretation of its own regulations. USFWS did not reference this memorandum in the dusky gopher frog designation, and its present use within USFWS is unclear.

part of the ESA statutory scheme.⁵ Only after making this threshold determination of inadequacy may the Secretary consider whether the unoccupied habitat area is “essential for the conservation of the species.”

In designating critical habitat for the dusky gopher frog,⁶ USFWS failed to make the requisite finding that a designation limited to occupied habitat would be inadequate. It is a long-held principle of administrative law that an agency’s determinations, required by statute, must be independently made and its reasoning fully explained. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made’”) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)); *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008) (a court “may not infer an agency’s reasoning from mere silence”). Where USFWS fails to comply with the fundamental statutory and regulatory requirements, the designation of critical habitat must be vacated as arbitrary and capricious. *Cape Hatteras Access Pres. Alliance v. U.S. Dep’t of Interior*, 344 F. Supp. 2d 108, 133 (D. D.C. 2004) (“the Service may not designate

⁵ Rules for Listing Endangered and Threatened Species, Designating Critical Habitat, and Maintaining the Lists, 45 Fed. Reg. 13,010, 13,016 (Feb. 27, 1980) (“This subsection implements the statutory requirement for designating as Critical Habitat an area outside the geographic range of the species.”).

⁶ Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,118 (June 12, 2012) (“Final Rule”).

habitat regardless of the quality of the underlying scientific data, unless it follows statutory and regulatory requirements”). The USFWS’s designation of critical habitat for the dusky gopher frog failed to meet these fundamental tenets and failed to fully carry out an integral step in its statutory and regulatory framework for critical habitat determinations.

While USFWS recognized that a finding of inadequacy is necessary before designating unoccupied habitat,⁷ the Final Rule merely recites this obligation but does not contain an explicit finding of inadequacy or any USFWS explanation supporting such a determination. Instead, USFWS references comments provided by several peer reviewers suggesting that USFWS examine areas beyond the proposed occupied habitat. 77 Fed. Reg. at 35,123-24. Other than these comments, however, there is no indication that USFWS rigorously examined the adequacy of the proposed occupied areas for the conservation of the species or made a definitive, independent determination that such areas would, in fact, be inadequate.⁸ Because this finding of inadequacy was not made, USFWS’s designation of Unit 1 is fundamentally flawed and must be vacated. *See Cape Hatteras*, 344, F. Supp. 2d at 125.

⁷ 77 Fed. Reg. at 35,128.

⁸ *See* Defendants’ Response to Plaintiff Weyerhaeuser’s Statement of Material Facts and Defendants’ Statement of Material Facts in Support of their Cross-Motion for Summary Judgment at 14-19, Case No. 13-234 (E.D. La. Feb. 21, 2014), ECF No. 91-2 (USFWS Statement of Facts).

III. USFWS Exceeded its Statutory Authority in Designating Unoccupied Habitat for the Dusky Gopher Frog

While USFWS has authority to designate unoccupied habitat as critical habitat, any such designation must conform to the narrow grant of authority provided by Congress. Specifically, the Secretary can only designate unoccupied habitat upon a determination that the entire area is “essential for the conservation of the species.” 16 U.S.C. § 1532(5)(A)(ii); *Arizona Cattle Growers’ Ass’n*, 606 F.3d at 1163. In addition, this determination must be based upon the “best scientific data available,” which prevents USFWS from designating areas based upon speculation and surmise. 16 U.S.C. § 1533(b)(2); *Bennett v. Spear*, 520 U.S. 154, 176 (1997). By failing to adhere to these statutory constraints, USFWS’s designation of Unit 1 as unoccupied critical habitat exceeded its statutory authority.

A. USFWS Failed to Determine that Unit 1 is Essential for the Conservation of the Species

In defining critical habitat, Congress did not provide an explicit definition of what is “essential” for the conservation of the species. However, its ordinary meaning as well as its use within the statute makes clear that, in enacting the 1978 ESA amendments, Congress clearly selected and relied upon the word “essential”

to curtail USFWS’s discretion to designate critical habitat.⁹ As explained by the House Committee on Merchant Marine and Fisheries, Congress was responding to the following deficiency in the Services’ regulations:

Under the present regulations, the Secretary could designate as critical habitat all areas, the loss of which would cause any decrease in the likelihood of conserving the species so long as that decrease would be capable of being perceived or measured.

In the Committee’s view, the existing regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat.

H.R. Rep. No. 95-1625, at 25 (1978), *reprinted in* ESA Legis. Hist. at 748. To address this issue, the initial House bill, H.R. 14104, authorized the designation of areas as critical habitat “only if their loss would significantly decrease the likelihood of conserving the species in question.” *Id.* (recognizing that the definition “narrows the scope of the term as defined in the existing regulations”) (emphasis added).

However, during subsequent debate, the House recognized that the proposed statutory definition was not a sufficient constraint on the Services’ discretion to designate critical habitat. Accordingly, Representative Duncan offered a floor amendment “to define critical habitat to be the area essential to the preservation and conservation of the species,” and explained that “if we are concerned with

⁹ *E.g., Kornman & Assoc. v. United States*, 527 F.3d 443, 451 (5th Cir. 2008) (“A fundamental canon of statutory construction instructs that in the absence of a statutory definition, we give terms their ordinary meaning.”).

critical habitat, that word ‘critical’ implies essential to its survival.” 124 Cong. Rec. 38,131 (1978), *reprinted in* ESA Legis. Hist. at 818 (emphasis added). Representative Duncan stated that the Committee had “failed miserably” to provide an acceptable definition of critical habitat because it merely relied upon the Services’ regulatory definition and “changed only the word ‘appreciably’ to the word ‘significantly.’” 124 Cong. Rec. 38,154 (1978), *reprinted in* ESA Legis. Hist. at 880. Representative Duncan explained that:

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.

I think this goes to the heart of the problem which every Member has felt in his district. It is entirely consistent with good biological practices and furthermore it maintains intact the purpose of this bill, which is to prevent the extinction of species who require this critical habitat.

Id. (emphasis added). The House adopted Representative Duncan’s amendment, and Congress enacted the conference bill the next day with the word “essential” included as part of the statutory definition of occupied and unoccupied critical habitat. 16 U.S.C. § 1532(5)(A)(i), (ii).

Congress clearly intended the “essential” determination to require a heightened showing that the loss of such area would do more than merely “appreciably or significantly decrease the likelihood of conserving [the species].”

124 Cong. Rec. 38,154 (1978), *reprinted in* ESA Legis. Hist. at 880 (statement of Rep. Duncan). Importantly, this is not simply about the existence of a feature or habitat element (which is the focus of designating occupied habitat) but rather about a consideration as to whether the habitat area, taken as a whole, is essential for the conservation of the species. Or, as informed by the commonly understood definition of “essential,” the designated habitat must be “absolutely necessary,” “extremely important,” or “indispensable” for the conservation of the species.¹⁰

USFWS failed to make a threshold showing that the unoccupied area designated as Unit 1 is “essential”—*i.e.*, “absolutely necessary” or “indispensable” for the conservation of the species. While USFWS focused on a specific feature, namely the existence of a pond complex, that it considers essential,¹¹ USFWS failed to rationally explain how the unoccupied area comprising Unit 1, as a whole area, is absolutely necessary or indispensable for species conservation. USFWS has previously explained that “to be designated as [unoccupied] critical habitat, it is not sufficient for habitat to be suitable, or even important; rather, the habitat must be indispensable to the species long-term persistence.” USFWS Critical Habitat Memorandum at 8 (emphasis added). Yet, the administrative record clearly reflects that Unit 1 is not suitable, and portions are only included based

¹⁰ See, e.g., USFWS Critical Habitat Memorandum at 5 (“essential is absolutely necessary or indispensable”); Oxford Online English Dictionary, *available at* <http://www.oxforddictionaries.com/definition/english/essential>.

¹¹ 77 Fed. Reg. at 35,132.

upon the speculative belief that they are “restorable with reasonable effort.” 77 Fed. Reg. at 35,135.

B. To be Essential for Conservation, USFWS Had to Establish that the Unoccupied Area Will be Re-occupied and Under Active Conservation

In order to fulfill its purpose as being “essential for the conservation of the species,” USFWS must demonstrate that the unoccupied Unit 1 will be re-occupied by the species and that measures to conserve the species are reasonably certain to occur. USFWS has previously explained that, “[t]ypically, unoccupied areas should have significant potential for re-occupation by the species, either by natural means through dispersal from currently occupied sites, or by future reintroduction efforts.” USFWS Critical Habitat Memorandum at 8. However, the evidence in the record demonstrates that neither avenue for re-occupation is reasonably certain to occur. First, the dusky gopher frog cannot re-occupy Unit 1 through natural dispersal because the maximum distance an individual is known to migrate is less than half a mile from its breeding site, and Unit 1 is approximately 50 miles from any occupied area. 77 Fed. Reg. at 35,130. Second, regarding reintroduction, USFWS recognizes that “frog translocations to the site[] cannot be implemented without the cooperation and permission of the landowner.” *Id.* at 35,123.

Accordingly, the only evidence in the record on the viability of this option definitively shows that it will not occur.¹²

By designating an unoccupied area as critical habitat, without any rational basis for believing it will eventually become populated by the species and subject to active conservation measures, the designation of Unit 1 is in contravention of the statute and Congressional intent. The plain language of Section 3(5) explicitly links the designation of the unoccupied area to the listed species—the area must be “essential for the conservation of the species.” 16 U.S.C. § 1532(5)(C)(ii). With no evidence establishing that the species will eventually occupy the area or that conservation measures will be adopted for such area, USFWS has no rational basis from which to conclude that the area can fulfill the statutory purpose of the designation.¹³ Furthermore, USFWS’s designation runs afoul of Congress’s admonishment that the Service “has gone too far in just designating territory as far as the eye can see and the mind can conceive.” 124 Cong. Rec. 38,131 (1978),

¹² *E.g.*, Statement of Uncontested Material Facts Filed in Connection with Poitevent Landowners’ Motion for Summary Judgment at ¶ 46, Case No. 13-234 (E.D. La. Dec. 9, 2013), ECF No. 70-12 (“The Poitevent Landowners have told the FWS on many occasions that they will not allow their lands to be converted to frog habitat and will not allow the frogs to be moved there.”) (“Poitevent Statement of Facts”).

¹³ In rejecting the plaintiffs’ argument that “Unit 1 can not be ‘essential’ for the conservation of the frog because the frog does not even live there,” the district court focused on the “clear mandate of the ESA” which allows the designation of unoccupied areas as critical habitat. *Markle Industries, LLC v. USFWS*, 2014 WL 4186777, at *12 (E.D. La. Aug. 22, 2014). Unfortunately, the district court missed the point. While unoccupied areas can clearly be critical habitat given the requisite findings, habitat with no expectation of occupancy by the species cannot be critical.

reprinted in ESA Legis. Hist. at 817 (statement of Rep. Bowen). While Congress recognized that unoccupied habitat could be designated, it clearly intended that such designations be limited in scope and location to “the area in which [the species] might be expected to naturally expand.” 124 Cong. Rec. 21,355 (1978), *reprinted in* ESA Legis. Hist. at 1066 (Statement of Sen. McClure). With no evidence establishing an expectation that the species will re-occupy Unit 1, USFWS’s designation of this area as critical habitat is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

C. The Designation of Unoccupied Areas Must be Based on the Best Available Science and Not Speculative Assumptions

Any designation of critical habitat, either occupied or unoccupied areas, must be based on the “best scientific data available.” 16 U.S.C. § 1533(b)(2). The Supreme Court has recognized that the purpose of this requirement is to “ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise.” *Bennett*, 520 U.S. at 176. In addition, the Services “may not statutorily cast a net over tracts of land with the mere hope that they will develop PCEs and be subject to designation.” *Cape Hatteras*, 344 F. Supp. 2d at 122.¹⁴ While the instant question is not whether primary constituent elements (“PCEs”) will develop, this same principle applies in considering whether an unoccupied area is

¹⁴ *See also Cape Hatteras*, 344 F. Supp. 2d at 123 (“to the extent [sic] it has designated areas lacking PCEs, [it] appears to rely on hope. Agencies must rely on facts in the record and its decisions must rationally relate to those facts.”).

essential for the conservation of a species. USFWS cannot rely on hope or speculation that an area, at some unforeseen future time, may be able to support conservation of the species. Rather, at the time of its designation, there must be administrative record support for the conclusion that the area is essential (*i.e.*, absolutely necessary or indispensable) for the conservation of the species.¹⁵

The administrative record clearly shows that any use of Unit 1 for conservation of the species would have to be preceded by restoration efforts and the reintroduction of the species. As USFWS explained, “Unit 1 consists of five ponds (ephemeral wetland habitat) and their associated uplands.” 77 Fed. Reg. at 35,135. While the ponds are purported to be of “remarkable quality,” USFWS acknowledged that “the surrounding uplands are poor-quality terrestrial habitat” and “do not currently contain the essential physical or biological features of critical habitat.” *Id.* at 35,133, 35,135. At best, USFWS believes that these upland areas could be “restorable with reasonable effort.” *Id.* at 35,135. However, USFWS concedes that this belief is merely aspirational:

[a]lthough we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, we hope to work with

¹⁵ When an unoccupied area does not meet the statutory definition of critical habitat, USFWS has other tools through which it can seek to promote restoration and recovery. Under ESA Section 5, USFWS can acquire land to conserve fish, wildlife and plants that are listed as threatened or endangered. 16 U.S.C. § 1534; *Babbitt v. Sweet Home Chapter of Cmities. for a Greater Or.*, 515 U.S. 687, 703 (1995) (“[t]he Secretary may also find the § 5 authority useful for preventing modification of land that is not yet but may in the future become habitat for an endangered or threatened species”).

the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there.

Id. at 35,123. Where there are no existing agreements or other active conservation measures planned for an area, the “hope” of restoration is not sufficient to support the designation of the entire area within Unit 1 as critical habitat.

USFWS’s determination is impermissibly based upon speculative future events, and not upon the best scientific data available. USFWS states that Unit 1 “provides important breeding sites for recovery” and “includes habitat for population expansion outside of core population areas.” *Id.* at 35,135. However, this characterization is not scientifically supported by the administrative record. While the ephemeral ponds may provide suitable breeding habitat for the species, Unit 1 does not contain the essential nonbreeding habitat in the surrounding uplands areas. Without speculative restoration activities, the entire area in Unit 1 is not capable of supporting population expansion or recovery of the species.¹⁶ Instead, USFWS is impermissibly attempting to “designate backup habitat in the hope it will someday become useful to the [frog].” *Alliance for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1142-43 (D. Mont. 2010).

¹⁶ Aspirational goals for the restoration of habitat are more appropriately addressed in an ESA Section 4(f) recovery plan for the species. See 16 U.S.C. § 1533(f)(1)(B). The designation of critical habitat requires far more concrete findings and certainty. 16 U.S.C. § 1532(5)(A)(ii) (areas “are” essential); see also *Cape Hatteras*, 344 F. Supp. 2d at 122 (USFWS cannot rely on “hope” that features develop).

IV. USFWS Must Determine that the Entire “Area” of Unoccupied Habitat Is Essential

While both occupied and unoccupied areas can be designated as critical habitat, Congress clearly distinguished between the two and provided different procedures for their designation. 16 U.S.C. § 1532(5)(C)(i), (ii). As the courts have explained, compared to occupied areas, the ESA imposes “a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.” *Arizona Cattle Growers’ Ass’n*, 606 F.3d at 1163. Thus, for unoccupied areas, “it is not enough that the area’s features be essential to conservation, the area itself must be essential.” *Cape Hatteras*, 344 F. Supp. 2d at 119.

Congress felt compelled in 1978 to adopt a definition of critical habitat, in part, to significantly constrain the Services’ ability to designate unoccupied habitat. Notably, the Senate found that there is “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.” S. Rep. No. 95-874 at 10 (1978), *reprinted in* ESA Legis. Hist. at 948. The House directed the Services to be “exceedingly circumspect in the designation of critical habitat outside the presently occupied area of the species.” H.R. Rep. No. 95-1625 at 18 (1978), *reprinted in* ESA Legis. Hist. at 742.

In addition, USFWS has recognized that critical habitat, either occupied or unoccupied, must contain essential features for the species. Notably, in amending its procedures to comply with 1982 amendments to the ESA, the Services stated that:

any designation of critical habitat must be based on a finding that such designated area contains features that are essential in order to conserve the species concerned. This finding of need will be a part of all designations of critical habitat, whether or not they extend beyond a species' currently-occupied range.¹⁷

Thus, to be designated as critical, an unoccupied area must be habitat that is not only suitable (by containing essential features), but also indispensable to the active conservation of the species.

The Final Rule fails for an elemental reason—Unit 1 in its current condition is not suitable for conservation of the species. It is axiomatic that, for an area to be critical habitat, it must first be habitat for the species—and such determination is without respect to whether it is occupied or unoccupied. *See* 16 U.S.C. § 1533(a)(3)(A)(i) (Secretary shall “designate any habitat of such species which is then considered to be critical habitat”). USFWS repeatedly emphasizes that Unit 1 contains ephemeral ponds, one of the features classified as a PCE for purposes of designating occupied habitat; however, breeding ponds in isolation do not constitute suitable habitat. Notably, Unit 1 still fails to attain suitable status

¹⁷ Amended Procedures to Comply With the 1982 Amendments to the Endangered Species Act, 49 Fed. Reg. 38,900, 38,903 (Oct. 1, 1984) (emphasis added).

because the designated upland areas are “poor-quality” and “do not currently contain the essential physical or biological features.” 77 Fed. Reg. at 35,133, 35,135. Based on the reported condition of these uplands areas, there is no record support for determining that the area presently is capable of serving as habitat for the species, let alone that such area is essential for the conservation of the species.¹⁸

V. USFWS Misapplied the “Essential for the Conservation of the Species” Inquiry

USFWS has no authority under the ESA to mandate the restoration of potential habitat, and cannot base a critical habitat designation upon the speculative outcome of potential restoration activities. Instead, the inquiry into what is essential to the conservation of the species has to be undertaken within the context intended by Congress.

As discussed previously, the impetus for Congressional action on a definition of “critical habitat” was a concern that the “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.” 124 Cong. Rec. 38,131 (1978), *reprinted in* ESA Legis. Hist. at 817 (statement of Rep. Bowen). Acting on this concern, Congress sought

¹⁸ The owners and lessee of Unit 1, who have first-hand knowledge of the condition of the area, have submitted detailed factual evidence regarding the lack of suitability of this area as habitat for the dusky gopher frog at present and in the future. Weyerhaeuser’s Statement of Uncontested Material Facts at ¶¶ 15-22, Case No. 13-234 (E.D. La. Dec. 9, 2013), ECF No. 67-2; Poitevent Statement of Facts at ¶¶ 36-46.

to require that the Services undertake “a very careful analysis of what is actually needed for survival of this species” and that the designation of critical habitat occurs within the context of “fairly rigid guidelines.” *Id.* Thus, the legislative history is clear that the primary concern was ensuring the protection of specific core or critical areas and not to be a vehicle for designation of restoration habitat.

A. “Conservation” Relates to “Methods and Procedures” and Not the Status of the Species

A key element used by Congress to limit the Services’ authority to designate critical habitat was ensuring that the role of “conservation” was placed in the narrower concept of what is “essential for the conservation” of the species for purposes of designating critical habitat. 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 [under the ESA] are no longer necessary.”¹⁹ In adopting this definition, Congress explicitly treated conservation as a function, namely, “to use and the use

¹⁹ 16 U.S.C. § 1532(3). In dicta, many courts have summarily equated the terms conservation and recovery under the ESA. While certainly related, these terms have independent meaning and use within the ESA statutory construct, and are not interchangeable. As evidenced by Congress’s explicit definition, “conservation” means the use of measures which are intended to achieve a point of species health where the protections of the ESA are unnecessary (*i.e.*, recovery). In other words, conservation is the methods and procedures by which the goal of recovery may be achieved. However, it remains a process or set of measures to be actively taken, and in determining what is essential to conservation (*i.e.*, the process of attempting to achieve recovery) of a species, the focus must be on understanding the nature of measures planned or being undertaken for the species—and the role such area plays in the implementation of such measures.

of” methods and procedures, and not the ultimate status of the species. 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—still refers to functional efforts to conserve a species.

Moreover, meaning must be given to the use of the modifying adjective “essential” in relation to conservation of the species. The common definition of “essential” refers to a state of being absolutely necessary, extremely important, or indispensable.²⁰ Placing both the term “essential” and the statutory definition of “conservation” together, the focus of the complete phrase “essential for the conservation of the species” is upon the identification of those areas which are absolutely necessary or indispensable (*i.e.*, essential) to the use of conservation methods and procedures for the species.

To support the designation of unoccupied habitat, USFWS must find that conservation measures for the species are in place or are reasonably certain to occur. *Cf. Am. Rivers v. U.S. Army Corps of Eng’rs*, 271 F. Supp. 2d 230, 253 (D. D.C. 2003) (“A no jeopardy finding under the ESA must have a reasonable certainty of occurring, not just a reasonable chance”) (emphasis in original). For example, under ESA Section 7, in order to justify a determination that an action is not likely to jeopardize the continued existence of a listed species, USFWS cannot

²⁰ See *supra* note 10.

rely upon purely voluntary measures. Instead, “[m]itigation measures under the ESA must be reasonably specific, certain to occur and subject to deadlines or other forcible obligations.” *E.g.*, *Florida Key Deer v. Brown*, 364 F. Supp. 2d 1345, 1355 (S.D. Fla. 2005) *aff’d sub nom. Florida Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008); *Ctr. for Biological Diversity v. Rumsfeld*, 198 F. Supp. 2d 1139, 1152 (D. Ariz. 2002) (conservation measures must be “reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards”). Notably, courts have concluded that “even a sincere general commitment to” implement conservation measures is insufficient “absent specific and binding plans.” *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 935-36 (9th Cir. 2008).

In designating Unit 1, USFWS conceded that the requisite habitat features in portions of that area (the upland, nonbreeding habitat) do not exist. Instead, USFWS included these uplands areas because the “essential physical or biological features . . . [are] believe[d] . . . to be restorable with reasonable effort.” 77 Fed. Reg. at 35,135. However, USFWS acknowledged that there are “no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog.” *Id.* at 35,123. In addition, the landowners and

lessee have stated that no such conservation activities are planned, and that they have no intention of allowing them to occur.²¹ Thus, there is nothing in the administrative record to indicate, let alone to establish with reasonable certainty, that the requisite conservation activities will ever occur in Unit 1.

B. Designation of Critical Habitat Is Not a Restorative Function

The designation of critical habitat is not a mechanism for achieving restoration of habitat. Identification of such opportunities is properly the function of a recovery plan under 16 U.S.C. § 1534(f). As USFWS recognizes, the “[d]esignation of critical habitat only affects activities authorized, funded, or carried out by Federal agencies.” 77 Fed. Reg. at 35,142. While limited in scope, such activities trigger the consultation procedures under ESA Section 7, which requires that “[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action . . . is not likely to . . . result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical.” 16 U.S.C. § 1536(a)(2). Thus, the effect of establishing critical habitat is to prevent subsequent federal actions from resulting in the destruction or adverse modification of the designated area.

²¹ *E.g.*, Poitevent Statement of Material Facts at ¶ 46 (“The Poitevent Landowners have told the FWS on many occasions that they will not allow their lands to be converted to frog habitat and will not allow the frogs to be moved there.”).

The ESA does not, however, grant USFWS or any other federal agency the authority to require the restoration of potential habitat on private property so that it might become capable of supporting species populations in the future.²² Rather, the designation of critical habitat serves to protect the functionality of the habitat present at the time of its designation. Indeed, other measures under the ESA, notably land acquisition authorities under Section 5, provide the potential tools by which the USFWS can seek to undertake restorative efforts. As recognized by the Supreme Court, “[t]he Secretary may also find the § 5 authority useful for preventing modification of land that is not yet but may in the future become habitat for an endangered or threatened species.” *Sweet Home*, 515 U.S. at 703.

²² In the Final Rule, USFWS explicitly conceded this point, stating that “actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner.” 77 Fed. Reg. at 35,123.

CONCLUSION

The *Amici Curiae* respectfully request that this Court reverse the district court's determination and remand this matter for further proceedings.

Respectfully submitted,

December 10, 2014

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CERTIFICATE OF COMPLIANCE

I hereby certify that the following statements are true:

1. This brief complies with the type-volume limitations imposed by Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), in that it contains 6,834 words, excluding the parts of the brief exempted by Fifth Cir. R. 32.2 and by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), in that it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in 14-point Times New Roman font, except footnotes which are in 12-point Times New Roman font.

s/ Paul Korman
Paul Korman
Attorney for Amici Curiae

Dated: December 10, 2014

ECF CERTIFICATION

I hereby certify that (i) the required privacy redactions have been made pursuant to 5th Cir. R. 25.2.13; (ii) this electronic submission is an exact copy of the paper document pursuant to 5th Cir. R. 25.2.1; (iii) this document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses; and (iv) the original paper document was signed by the attorney of record and will be maintained for a period of three years after mandate or order closing the case issues, pursuant to 5th Cir. R. 25.2.9.

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Dated: December 10, 2014

ADDENDUM



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240

DEC 19 2006

IN REPLY REFER TO:

In Reply Refer To:
FWS/AES/DCC/025398

Memorandum

To: Regional Director, Regions 1, 2, 3, 4, 5, 6, and 7
California Nevada Operations Office Manager

From: Acting Deputy Director *Kenneth Stansell*

Subject: Policy on Designating Critical Habitat Under the Endangered Species Act

This policy provides guidance on the process of designating critical habitat for species listed as threatened or endangered under the Endangered Species Act of 1973, as amended (Act). Critical habitat and the determination process are defined in the Act and in its implementing regulations found at 50 CFR 424.12, and further elaborated on in the U.S. Fish and Wildlife Service Endangered Species Listing Handbook, March 1994. This policy supersedes the guidance in the 1994 Listing Handbook, the April 28, 2004, Endangered Species Guidance Letter No. 2, Critical Habitat, memorandum from the Assistant Secretary for Fish and Wildlife and Parks, and guidance otherwise provided informally.

ADVANCED BRIEFING PAPER

For all proposed critical habitat designations, the preparation of an advanced briefing paper outlining PCEs, methodology, exclusions, and noteworthy inclusions helps facilitate final review and minimize changes. This advanced briefing paper should be forwarded to the Assistant Director, Endangered Species (via the Division of Conservation and Classification), who will forward it to the Director and Assistant Secretary's office. The briefing paper is due 6 months prior to the due date for the proposed critical habitat designation. Briefing papers for proposed rules should focus on the methodology and criteria for selecting critical habitat. Briefing papers for final rules are optional, and should focus on exclusions and any significant responses to comments.

TIMELINES AND EXAMPLES

Included with this policy are two appendices: Appendix 1 is a timeline for critical habitat designations. This contains required dates and responsible parties for the various steps in designating critical habitat. The second appendix contains examples of how to write proposed and final rules. These appendices are expected to change over time.

Please check with the Washington Office and/or at [WEBSITE] to determine the current version of these documents when assigned a critical habitat designation.

PRUDENCY AND DETERMINABILITY DETERMINATIONS:

Pursuant to section 4(a)(3) of the Act and the implementing regulations at 50 CFR 424.12, the Secretary shall, to the maximum extent prudent and determinable, make a determination of critical habitat for any threatened or endangered species concurrently with the listing of the species. Prior to developing a designation of critical habitat, one must first make a determination critical habitat is prudent and determinable.

(1) A designation of critical habitat shall be considered not prudent when any of the following situations exist:

- (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; or
- (ii) Such designation of critical habitat would not be beneficial to the species because:
 - (A) Habitat is not a limiting factor; or
 - (B) Threats are not habitat-based; or
 - (C) No areas meet the definition of critical habitat.

Further explanation for (i) - if an increase in the degree of threat to the species through a designation can be supported by the information in the five listing factors, subsequent substantial information, or through the absence of occurrence distribution information available to the general public, then a not prudent determination may be appropriate. However, if information on the distribution is readily available to the public and an increased degree of threats to the species cannot be supported by the information in the listing factors or through other information, then a designation of critical habitat may be prudent.

Further explanation for (ii) - if threats to a species habitat are minimal, i.e., not the rationale for the species being listed, and there may be no benefit to providing regulatory protection to the species habitat, then a designation may not be prudent. Conversely, if the rationale for listing the species was due to threats to the species' habitat, then a designation may be beneficial and thus prudent. In addition, if habitat is not the limiting factor for the species, even though it may be moderately threatened, it might not be beneficial to designate critical habitat for the species. Also, if no area meets the definition of critical habitat, for example because they do not require special management, then critical habitat cannot be designated.

(2) Critical habitat is not determinable when one or both of the following situations exist:

- (i) Data sufficient to perform required analyses are lacking; or
- (ii) The biological needs of the species are not sufficiently well known to identify any area as critical habitat.

If sufficient information exists to conduct our required analyses (economics, biological impacts, etc.) and to adequately define primary constituent elements for the species and map specific areas defined by those elements or which are otherwise essential to the conservation of the species, then a designation of critical habitat would be determinable.

There are three possible outcomes following an evaluation of prudence and determinability: 1) not prudent; 2) prudent but not determinable; and, 3) prudent and determinable. If critical habitat is determined not to be prudent, then that determination would constitute a final agency decision on critical habitat for that species. This determination of not prudent should be well supported by the information in the five listing factors. This determination should be clearly iterated in the proposed listing rule for the species if being done concurrently with listing or in a separate notice if following the listing of the species. If critical habitat is prudent, but not determinable, then the reasons why critical habitat is not determinable must be clearly iterated in the rulemaking document. If the determination is that critical habitat is prudent but not determinable, then by section 4(b)(6)(C)(ii), the Secretary may extend the statutory time frame by up to one year from the time of the proposed listing rule for completing a final designation. If critical habitat is both prudent and determinable, then a proposed and final designation of critical habitat for the species shall be developed.

DEFINITION OF CRITICAL HABITAT:

Critical habitat is defined in section 3(5)(A) of the Act as:

- (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of [the] Act, on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
- (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of [the] Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

Critical habitat, within the geographical range occupied by the species at the time it is or was listed, is defined by those physical and biological features which may require special management or protection. Physical and biological features that are essential to the conservation means Primary Constituent Elements (PCEs) arranged in the quantity, spatial and temporal characteristics necessary for conservation (See criteria section for more information on this).

SPECIAL MANAGEMENT

Special management is the second prong of the definition of critical habitat in areas within the geographic area of the species. "Critical habitat" is defined in section 3(5)(a) of the Act as (i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection.

The Service is required to make a finding, prior to designating a particular area as critical habitat, that the area in question may require special management considerations and protection. To make this finding the Special Management section or the unit descriptions should include, unit by unit, a description of the threats that may warrant special management. If there is no threat to habitat in a particular area, then it does not need special management.

CRITICAL HABITAT DESIGNATION:

Designating critical habitat is an iterative process that must be well supported by the information in the rule listing the species, or information that becomes subsequently available. Further, as for any public rulemaking, the information used shall be supported by the administrative record for the rulemaking and the text of the notice shall clearly iterate the rationale, methods, and justification for the designation.

PRIMARY CONSTITUENT ELEMENTS

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR § 424.12, in determining what areas are critical habitat, we shall consider those physical and biological features that are essential to the conservation of the species. These generally include, but are not limited to the following:

- 1) Space for individual and population growth, and for normal behavior;*
- 2) food, water, air, light, minerals, or other nutritional or physiological requirements;*
- 3) cover or shelter;*
- 4) sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and*
- 5) habitats that are protected from disturbance or are representative of the historical geographical and ecological distributions of a species.*

"Physical and biological features that are essential to the conservation" means Primary Constituent Elements (PCEs) arranged in the quantity, spatial and temporal characteristics necessary for conservation. Primary constituent elements may include, but are not limited to, the following: roost sites; nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality indicators or quantity, host species or plant pollinators, geological formations, vegetation types, tides, and specific soil types (See 50 CFR § 424.12).

Development of PCEs

PCEs must clearly define the physical and biological features essential to the conservation of the species. When beginning the evaluation of what physical and biological features are essential to the conservation of a species, ask what specific features would provide for the five life history requisites addressed in our regulations at 50 CFR § 424.12 and listed above. For example, what are the specific features or areas that the subject species requires to provide for food, shelter, breeding, foraging, population expansion, migratory habitat-wintering and breeding grounds, seed bank, dispersal corridors, and other life history functions. As defined in *Webster's Dictionary*, essential is absolutely necessary or indispensable. Therefore, PCEs must be features that are essential or absolutely necessary or indispensable.

When determining and describing the PCEs, define the specific parameters of the feature, where possible, that make it essential to the conservation of the species. For example, if the species is aquatic, does the species require specific parameters of water temperature, pH, depth, quality, flow, etc., or if terrestrial, does the species require a certain soil type, structure and function of a particular habitat type, host plant, food source, fire-return frequency or disturbance regime, dispersal or pollinating vector, host species, etc. If the specific parameters are not readily known, provide data concerning a range of the parameter where the species is present. PCEs should be specific enough yet flexible enough to accommodate and account for normal variation/fluctuation of the specific parameter of interest (e.g., water temperature).

PCEs should be tangible, recognizable, or measurable features in the landscape, where possible, and not the processes that result in the feature. This should allow for biologist and non-biologist to more clearly determine the PCEs while in the field. PCEs should not prescribe management conditions for habitat or for reducing threats. So, for example, reduction of predation would not be a PCE. But, the specific features of the habitat that would reduce the risk of predation could be a PCE (e.g., vegetative cover).

Similarly, a physical process such as a hydrological regime or bedrock degradation to form a particular soil type should not be the PCE, but the resulting habitat condition, such as flow speed or soil type (the end result of the process) should be the PCE. The feature that is essential to the species is the end point of the process – the particular soil type – so the soil type is the PCE. Since the process is important and helps to define the PCE, the process should be discussed in the beginning of the PCE section and/or elsewhere in the rule.

Some species may have essential features that fall outside the topics covered in the regulation, e.g., essential symbiotic relationships. In these cases, clearly and logically define the feature through discussion in the beginning of the PCE section or in the background section of covering the species biology so that a reader not familiar with the species can easily understand what and why you have determined that feature to be a PCE.

Discussion of PCEs and their Supporting Rationale

The proposed and final critical habitat designation must discuss the rationale behind defining particular features as PCEs and their relationship to the species. This should be done in the Primary Constituent Elements section. Do not rely on statements made in the Background section to support PCEs. The PCE section must stand by itself, containing all the information necessary to understand why the PCEs have been determined to be as designated.

The PCE section must discuss the physical and biological needs of the species, the relative importance of these needs to the species, and set the stage for the definition of the feature as a PCE. Refer to the listing rule for the species, recovery plan for the species, or peer reviewed literature that addresses the species and discusses the relative importance of the particular feature to the species. The discussion of the PCEs in this section should lead the reader to a natural conclusion that the specific features discussed are the features essential to the survival and conservation of the species. An appropriate method to focus this discussion is to couch it in terms of each of the five topics, or those applicable, from the regulations. More specifically, use subheadings to define paragraphs speaking to the topics in the regulation at 50 CFR § 424.12 and listed above. This then will provide the lead-in to the list defining the specific PCEs for the subject species.

Next, the PCE section should discuss each of the specific PCEs and the rationale behind determining that these features are essential to the conservation of the species. The discussion in this section should be brief, but each PCE should be matched back to the regulation and provide a summary statement as to why that feature is essential to the conservation of the species.

Most importantly, the language used to identify PCEs in the rule must be specific: i.e., “the PCEs are:” and NOT “the PCEs can be found in” or the “PCEs include, but are not limited to:”

CRITERIA USED TO IDENTIFY CRITICAL HABITAT

Follow the steps below to determine what to designate.

1. Define a species-specific “rule set” for determining what areas were occupied at the time of listing and apply this “rule-set” consistently in the analysis of habitat to include in the designation.
 - a. Describe the “rule set” in the proposed and final rules.
 - b. Use point locational data in conjunction with the species’ dispersal distance or home range size and maps of suitable habitat. If using dispersal distances or home range sizes in determining the area occupied by a species, use averages, not maximums.
2. Use the following to determine the minimum amount and optimum distribution of

PCEs such that the numbers and distribution of the species necessary for conservation will be supported (i.e., "How much habitat is needed and where should it be located?"). Do not assume that it is necessary to designate all occupied habitat. In most cases critical habitat will not encompass the entire area identified in a recovery plan for the species, as recovery plans often contain habitat that may be desirable but not essential. When the species has a recovery plan, use the science behind the plan, rather than citing the plan, to do the following:

a. Describe how relevant principles of conservation biology (e.g., landscape analysis, small population dynamics, conservation genetics, extinction risk assessment, adaptive management) and species life history characteristics (e.g., body size, species vagility and dispersal distances, breeding biology, home range and territoriality, population density, etc.) are applied for the determination of critical habitat for this particular species.

i. Identify the most important habitat concepts to meet the objectives (such as connectivity, corridor, size and shape, core, isolation, mosaics, matrix, edge, and fragmentation, habitat resiliency). Quantitatively, where possible, determine important current or recent habitat distributions and identify numbers (e.g., acres, distances between habitat patches, patch size and shape, length of stream reaches) that have meaning to the sustained survival of the species.

ii. Identify the most important life history/population concepts to meet the objectives (such as small population dynamics, conservation genetics, metapopulation dynamics, redundancy). Quantitatively, where possible, determine important current or recent past population sizes, and identify numbers (e.g., of individuals, breeding pairs, family groups, population numbers, population densities) that have meaning to the sustained survival of the species.

b. Combine the qualitative and quantitative habitat and life history/population information into an explicit, deductive analysis to answer the questions "How much habitat is needed and where should it be located?" Information such as estimates of viable population sizes, population densities, home range sizes, and dispersal distances will assist the biologist in determining the location and amount of area necessary for conservation. Whether or not quantitative information exists, rule sets, decision trees, and other decision analysis tools can be used to develop an objective, science-based, transparent rationale of how size and location of the designation was determined. This does not have to be exhaustive; it just needs to clearly explain the basis for the designation.

c. Occupied areas must contain the features essential to the conservation of the species (i.e., PCEs).

d. Do not designate any areas that are merely "important to recovery" or "may be needed" or "are suitable habitat" or are "appropriate for recovery."

3. Only if the habitat identified in steps 1 & 2 is not believed sufficient to conserve the species, would we consider designating habitat that is "unoccupied."

a. Areas unoccupied at the time of listing must be found to be essential for the conservation of the species. Thus, to be designated as critical habitat, it is not sufficient for habitat to be suitable, or even important; rather, the habitat must be indispensable to the species long-term persistence.

b. In the preamble of the rule, there must be a clear and compelling statement why any included areas outside those occupied are considered essential. These areas should also be distinguished in the preamble from areas occupied at the time of listing such that it is clear which areas are which.

c. Typically, unoccupied areas should have significant potential for re-occupation by the species, either by natural means through dispersal from currently occupied sites, or by future reintroduction efforts. In addition, unoccupied areas might satisfy one or more of the following criteria in order to be deemed essential:

i. Areas that were known to be occupied by the species within the recent past, and where the habitat has not changed appreciably during that time (thus allowing for the assumption that previous occupancy still provides good indication of the known suitability of the site for the species' biological needs);

ii. Areas that have potential for current occupancy by the species (*i.e.*, no conclusive evidence is available that the species is currently completely absent from the site due to few, incomplete, or no surveys having been conducted there recently and the PCEs for the species are present);

iii. Areas that are geographically separated from other critical habitat units (e.g., in a separate watershed for stream units), to provide redundancy in the event of natural catastrophe.

BEST AVAILABLE SCIENTIFIC AND COMMERCIAL DATA

Best available data must support the decision. Among the most reliable sources of data are papers published in the peer-reviewed scientific literature. Data provided by individuals with demonstrated specific expertise in the relevant subject area can also generally be considered reliable. Published documents of state and federal agencies are also generally considered reliable. Anecdotal information or information from sources without established records of subject-matter experience and expertise must be independently corroborated to be considered reliable.

EXEMPTIONS UNDER SECTION 4(A)(3) OF THE ACT

Consideration of DOD Lands

Section 318 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law No: 108-136) amended the Endangered Species Act by adding a new section 4(a)(3), that states, "The secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary of the Interior determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation."

The legislative history provides some additional insight into the intent of the provision:

The conferees would expect the Secretary of the Interior to assess an INRMP's potential contribution to species conservation, giving due regard to those habitat protection, maintenance, and improvement projects and other related activities specified in the plan that address the particular conservation and protection needs of the species for which critical habitat would otherwise be proposed. Consistent with current practice, the Secretary would establish criteria that would be used to determine if an INRMP benefits the listed species for which critical habitat would be proposed.

An exemption from critical habitat under Section 4(a)(3) requires that a completed and approved INRMP be in place that provides a benefit to the species. The written determination that an INRMP has met this standard may be contained in the administrative record, such as a letter to the installation. We may also include this determination in the preamble to the CH rule for installations excluded under 4(a)(3).

DOD lands may also be excluded under 4(b)(2), which was also amended with the DOD authorization by inserting "the impact on national security," after "the economic impact." These 4(b)(2) exclusions would follow existing procedures for evaluating exclusions of DOD lands due to national security or military readiness. See "Exclusions" section below for more information.

EXCLUSIONS UNDER 3(5)(a)

For lands known to be occupied at the time of listing: In order to meet the definition of critical habitat, these lands must contain the PCEs (features) essential to the conservation of the species and those PCEs must require special management or protection. Therefore,

- (1) If the area does not contain PCEs essential to the conservation of the species, then it does not meet the first part of the definition and is not included; and

- (2) If the area contains the PCEs, but the PCEs have sufficient management or protection through a management plan or other conservation strategy that meets the criteria below, then it does not meet the second part of the definition and is not included.

For lands not known to be occupied at the time of listing: The Act does not require that these areas “may need special management or protection.” Therefore, areas not known to be occupied at the time of listing that are not essential to the conservation of the species do not meet the definition and are not included.

Evaluation Of Management Plans Under 3(5)(a)

If an area is covered under a management plan or other conservation strategy, we should evaluate that plan under the criteria the Service uses to determine if an area is adequately managed:

- a. The plan/agreement provides a conservation benefit to the species;
- b. The plan/agreement provides reasonable assurances that the management plan will be implemented; and
- c. The plan/agreement provides reasonable assurances that the conservation effort will be effective.

Note that these criteria are similar to the criteria in PECE, but we are not specifically using PECE here, and the level of certainty required is not the same. Any NPS and Refuge lands that have a management plan or CCP that adequately conserve the species or its primary constituent elements are not included in the designation on the basis of 3(5)(A). Other areas that typically should not be included in the designation because they have adequate management plans are tribal lands and private lands with appropriate management plans. However, lands covered by HCPs should be excluded using provisions under 4(b)(2) (see below), rather than not including them using provisions under 3(5)(A).

If an area is covered by a management plan that does not meet all three criteria, then it may be considered for exclusion under 4(b)(2) (e.g., on the basis of national security, furthering private conservation efforts, partnerships, or Tribal relationships, as may be appropriate).

EXCLUSIONS UNDER SECTION 4(b)(2) OF THE ACT

There is considerable discretion under section 4(b)(2) for evaluating exclusions from critical habitat providing that (1) there is a thorough and substantive balancing justification in which we indicate that the benefits of excluding the lands outweighs the benefits of including them; and (2) the exclusion will not result in the extinction of the species. The regulations at 50 CFR 424.19 indicate that “...after proposing designation of such an area, consider the probably economic and other impacts of the designation...”

Thus a final exclusion under 4(b)(2) should only be done in a final rule.

Proposed exclusion: In this option we include lands in the proposal, but state that we propose to exclude them from the final designation. These areas would be included in the proposal, fully described, and mapped. Discussion under 4(b)(2) speaking to their proposed exclusion would vary depending on the available information and how likely it is that the lands would be excluded from the final designation. The exclusion language for HCPs, for example, should be complete in the proposed rule. Depending on how strongly we speak to the exclusion, we would set forth our justification/analysis for the 4(b)(2) exclusion in the proposed rule with some level of certainty that we would exclude the lands from the final designation. Some examples of language would be: “we intend to exclude”, “we propose to exclude”, “we are likely to exclude”, etc. In this option, because the lands are included in the proposal, section 7 conferencing would be required.

* When we state that we are excluding these areas from the proposal, specifically request comment on whether the areas are essential, whether they warrant exclusion, and on what basis they should be excluded. Make clear that the final rule could find the areas either appropriate for exclusion under 4(b)(2), or not appropriate for exclusion, in which case they would be made part of the designation.

Exclusion in the final rule: In this option, we include lands in the proposal and defer all discussion of the 4(b)(2) justification/analysis for the final rule. This is most applicable to situations where we have no information to indicate an area is appropriate for exclusion at the time of the proposed rule.

Types of Exclusions

Exclusions Based on Management

Exclusions under 4(b)(2) can be proposed for management plans and activities not meeting the standard in 3(5)(a), where the benefits of exclusion outweigh the benefits of inclusion. For exclusions based on management plans, programs, or partnerships, include:

- 1) A description of the plan, program, partnership, etc., including its history, partners, funding;
- 2) A description of the specific area, habitats, and species covered by the plan, etc., including the features essential to the conservation of the subject species and the species' occupancy within the area covered by the plan, etc.;
- 3) A description of relevant permits, implementing documents such as MOUs or MOAs, etc., that may provide some assurances that the plan, program, etc. will be implemented; and

4) A description of the goals, standards, and implementing actions such that there may be some assurances that the plan, program, etc. will provide effective management and protection for the subject species and habitat.

DOD Lands Under 4(B)(2)

Assuming good ongoing cooperation with the military, areas should be excluded from a designation pursuant to section 4(b)(2) of the Act if there is an INRMP that is nearly complete, or we have sufficient assurances that the plan will be amended to adequately address the species.

If we have comments in the record that indicate a national security or military readiness impact, including comments that we have received in the comment periods of past rules, we will forward a recommended exclusion to the Assistant Secretary's office for their analysis. Although the comments need to be reasonably specific about what the impact is, we cannot second-guess the military about issues on which they are the experts (i.e., national security and military readiness). However, we must have enough justification for these impacts in our files to consider excluding on that basis; we cannot rely on generalized statements unless we have information from the military that releasing additional details would endanger national security or military preparedness.

Economic Exclusions

The field office should review the economic analysis to determine if there are areas that suffer disproportionate economic impacts (i.e., areas that have higher costs than the rest of the designation). If areas with disproportionate economic impacts are identified, then the field office should evaluate the biological benefits of these areas and put forth a recommendation based on the balancing test - weighing the potential economic costs with the biological benefits.

Other Exclusion Considerations

Section 10(j)(2)(C)(i) states, "critical habitat shall not be designated...for any experimental population determined ...to be not essential..." If there are areas where non-essential experimental populations are expected to be established, those areas should be excluded.

Developing The Justification/Analysis Under 4(B)(2)

Section 4(b)(2) is a balancing test; the benefits of exclusion of an area must outweigh the benefits of inclusion. The evaluation of the balancing must be thorough and well-reasoned. The following is general guidance of how to construct and present a reasonable 4(b)(2) exclusion argument.

The analysis should generally follow these sections:

A) Description of the reason for the exclusion. A thorough discussion of the specific plan, program, partnership, etc., that is the basis for the exclusion.

B) Benefits of inclusion. This section should include a thorough discussion of the benefits of including the specific area defined by the plan, program, partnership, etc., in the designation of critical habitat for the subject species. The discussion should include the benefits to the species of the habitat potentially being designated. To assist in writing this discussion, a benefits table is required to be developed prior to the final critical habitat designation (see attached schedule). Use the information from the table in creating this section of the rule. In general, benefits may be described as:

1) Additional regulatory benefits - especially in light of the *Gifford Pinchot* decision - a consideration of the possible adverse modification protections provided from critical habitat.

2) Additional educational benefits derived from the designation of critical habitat; additional clarification or certainty provided to stakeholders, landowners, etc., as to the importance of specific lands; identification of areas important for recovery/restoration such as the inclusion of areas in the designation for re-establishment efforts.

3) Benefits due to the triggering of additional protections, such as protections under state laws or other federal laws.

C) Benefits of exclusion. A thorough discussion must be provided of the benefits of excluding the specific area defined by the plan, program, partnership, or economic impact. The benefits of excluding the specific area from the designation can be:

1) Preservation of partnerships, programs, etc. Discussion should touch on any stigma effect or overburdening economic or regulatory impact by being included in a designation thus resulting in a disincentive to enter into these programs or partnerships. We can also discuss exclusions as incentives to encourage future voluntary conservation.

2) The inclusion of the specific areas in the critical habitat designation will result in significant economic or regulatory burdens. It is best if this assertion is supported by information in the economic analysis and/or NEPA documentation; and

3.) Greater conservation benefit through the exclusion from critical habitat. In some cases, a greater conservation benefit for the species and features essential to the conservation of the species may be derived from the exclusion from critical habitat. For example, if a Federal nexus does not exist and the partner/landowner is willing to work with us to develop a

conservation plan/program if they are not included in the designation, then this is something that should be explored. For the exclusion to occur there should be some documentation in the supporting record such as a signed plan or agreement, or existing, ongoing management. Do not base exclusions on a mere promise.

D) Balancing. A thorough discussion that sets forth our “balancing” or “weighing” of the benefits of including the specific area in the critical habitat designation versus the benefits of excluding the specific area from the critical habitat designation. We then need to have a thorough balancing discussion where we are explicitly weighing the two sides, point by point, and coming to our determination. The section should end with our conclusion that iterates the language from the statute.

E) Determination as to Whether the Exclusion will Result in Extinction: The Secretary may exclude areas from critical habitat pursuant to section 4(b)(2) of the Act, providing that the exclusion of the specific area does not result in the extinction of the subject species. Therefore, as part of our exclusion discussion, there must be a determination as to whether the exclusion of the specific area will result in the extinction of the species. This discussion should be well reasoned and supported, preferably with documentation in the administrative record. In most cases, there should be ample support in the sections preceding that speak to the benefits of excluding the specific areas from the designation.

UNIT DESCRIPTIONS

In each unit description, briefly state whether the unit was occupied at the time of listing and whether it is occupied currently. If unoccupied at the time of listing, briefly provide justification as to why it is essential. In addition, either in the individual unit description or in the preface of the unit descriptions, state if the unit(s) has one or more of the PCEs. Briefly describe why the unit, if occupied, requires special management.

PUBLIC AND OTHER COMMENTS

All public and other comments must be taken into consideration when finalizing the critical habitat rule. Responses to comments must be included in the final rule. Please include copies of public comments, if feasible, on a CD accompanying the package.

State Comments

Section 4(i) of the Endangered Species Act states, “the Secretary shall submit to the State agency a written justification for [her] failure to adopt regulations consistent with the agency’s comments or petition.” This requirement is restated in regulation 50 CFR 424.18(c), without additional clarification. The requirement is also noted in the Listing Handbook under “V. Notification and Public Hearings”.

Each rule should include a separate section specifically addressing comments received from any State agency and the Service's response to these comments (titled something like Section 4(i) Comments from State(s)). By incorporating State(s) comments within the rule, we will ensure appropriate consideration and awareness of these comments and responses at all appropriate levels.

Separately, direct communication will be sent from the Director to each State agency that submitted comments. As a courtesy, we will send responses to all State comments even if their comments are not considered to be in conflict with the final rule. If more than one agency from a State submitted comments, the same communication will be sent to each State agency.

A template for this communication is available (see <https://xxx>), and the section of the rule responding to the State agency comments will be an enclosure to the Service's response letter, to ensure consistency. These letters should be prepared and submitted at the same time as the listing or critical habitat rule, so they can travel with the rule during the surname process and be signed at the same time as the rule.

State comment letters should be provided in the rule package in a separate tab.

Peer Reviewer Comment Letters

Respond to peer review comments in a separate section of the responses to comments section of the rule. Discuss negative or non-supportive peer review comments with the Washington office before responses are drafted.

Make a separate tab labeled "Peer Review" in the rule package. Behind the tab, put each peer reviewer's name and title, with a description of their biography or CV and expertise underneath. Include the letters sent to all the peer reviewers from whom we requested review (even if they did not respond). Be sure to include a copy of each peer reviewer response in this section as well.

TABLES, CHARTS, AND MAPS

Charts and Tables

- Provide a chart listing HCPs (and NCCP areas when applicable) within the general area containing the proposed CH, by name, showing total area for each.
- In the table that lists the area considered essential, the area not included under 3(5)(A), the area excluded under 4(b)(2), and the net area of the proposal, provide a listing by name of the specific areas excluded (i.e., list the HCPs and military lands that make up the non-inclusions or exclusions).

- In final designations, include a section explaining the area changed from the proposed rule broken out by unit and also noting the ownership types that were affected (i.e., how much private land increased/decreased, state, Federal, etc.).
- Give the English standard measures first (particularly listing acres first when describing a critical habitat designation). If the actual measurement was reported in Metric then it is okay to provide that first followed by the English conversion.

Maps

- All CH maps both proposed and final must either have the species name(s) on the map or for maps that cover many species some kind of a descriptive heading-- something to help a user know that they are finding the right map. Do not include the mapping disclaimer on the maps, which can be part of the methods section.
- For multi-species designations we can only cross reference maps (have maps that cover more than one animal species) within a given Class. For example, "Crustaceans," several different crustacean species could share one map by printing it once for the first crustacean species and then cross-referencing it for other crustacean species. Then the map would have to be reprinted for the first species in another Class such as "Insects" and could then be cross-referenced for other insect species that share the same designation. Likewise for plants cross-referencing maps must be within the same family.
- Lines need to be clearly distinguishable in black and white and labeled. Maps should only have relevant information as to minimize the maps from being too busy or having too many extraneous pieces of information. No grayscale or shading, use cross hatching or other method for water or other features.
- All maps should provide geographical reference points for the public, so they can better understand the location of the designation. It may be appropriate to include as such references to city names, county lines, major highways, or other such features. Try to keep to major reference data to minimize extraneous information on maps.

ECONOMIC ANALYSIS AND REQUIRED DETERMINATIONS

Economic Analyses

An analysis of economic issues is required under Section 4(b)(2). The Service normally complies with this requirement, as well as requirements under E. O. 12866, and the Regulatory Flexibility Act, by conducting an economic analysis. Policy on conducting economic analyses will be provided in a separate document.

Required Determinations

For required determinations requiring economic information (e.g., E.O. 12866, Regulatory Flexibility Act/SBREFA, Unfunded Mandates, Takings, E.O. 13211), where the economic analysis follows the proposed rule, certification is deferred until the Notice of Availability of the draft economic and NEPA (if applicable) analyses.

OTHER ISSUES

Citations/References

Please refer to the Guidance for References for *Endangered Species Federal Register Documents*. In addition, the following guidance is provided:

- Do not include references to recovery plans in critical habitat rules. All citations must be to the primary sources underlying the recovery plan.
- All rules must have all references included in the package, preferably on a CD that accompanies the package. All citations should follow current policies and guidance.
- If hard copies of references are included, they should always be separate from the rest of the rule package (i.e., in their own binder).
- If a copy of a reference has been provided in support of a proposed rule, a new copy does not need to be resubmitted for the final rule. However, the list of references needs to indicate if and where a reference was provided previously (i.e., in what other package was it provided).

Look to Save on Printing Costs

Elements of Guidance: Federal Register publishing is a significant cost element for the program. We accordingly need to do all we can to ensure that Federal Register notices contain only material essential to justify the proposed or final rule, or to comply with administrative requirements. Some things that can be done editorially to meet this goal include:

Do not unnecessarily repeat information provided elsewhere. If there is a species description, history of past Federal actions or other body of information that would normally be included in a notice but which has been previously published in the Register, incorporate it by reference to the prior publication rather than repeat it.

Write concisely. Avoid unnecessary adjectives or other words. Example: "species description," not "description of a species".

Additional Information for Drafting a Rule or Other Documents

The following are some of the on-line references you can use when drafting a critical habitat designation:

NARA Drafting handbook:

http://www.archives.gov/federal_register/document_drafting_handbook/document_drafting_handbook.html

United States Government Printing Office Style Manual 2000:

<http://www.gpoaccess.gov/stylemanual/browse.html>

PDM's Rulemaking Reference Guide (202 FW 1):

<http://policy.fws.gov/library/RGuide.html>

<http://pdm.fws.gov/regs.html>

Department Manual

Chapter on Federal Register Documents:

<http://elips.doi.gov/elips/release/3208.htm>

Chapter on Record of Compliance:

<http://elips.doi.gov/elips/release/3207.htm>

Federal Register Document Drafting Handbook:

http://www.archives.gov/federal_register/document_drafting_handbook/document_drafting_handbook.html

Writing User-Friendly Documents:

<http://www.plainlanguage.gov/handbook/index.htm>

Attachments

cc: 3242-MIB-FWS/AES

420-ARLSQ-FWS/TE (CNolin)

420-ARLSQ-FWS/TE RF

FWS/AES/DCC:CNolin/cgl:9-6-06:703-358-2171

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**APPENDIX 1 – TIMELINE FOR CRITICAL HABITAT DESIGNATIONS AND
ASSOCIATED ANALYSES**

TIMELINE FOR CRITICAL HABITAT DESIGNATIONS AND ASSOCIATED ANALYSES

The following provides the timeline for completing proposed and final critical habitat rules and their associated draft and final economic and NEPA analyses, if applicable. Embedded within the schedule are the specific deliverables that are expected through this process. The schedule is portioned by month/months; however, the specific milestone day in each month corresponds to the specific due date of the proposed and final rule. For example if the due date is the 17th of the month, then each monthly milestone is the 17th of that month. These timeframes should be closely followed; however, in those cases where there may be questions regarding the process timeframe, contact your Regional or Washington office representative to discuss. As a reminder, it is our current policy that NEPA documentation for critical habitat designations is only done in the jurisdiction of the 10th Circuit Court (New Mexico, Colorado, Utah, Wyoming, Kansas, Oklahoma) or where specifically required under a court order or court approved settlement agreement.

PROPOSED RULE:

Month 1:

FO begins proposed rule process.

Kickoff call (initiated by the RO) between FO/RO/DCC, Division of Economics, economic contractors and NEPA contractors, if applicable, to determine schedule.

RO/DCC/FO communicate about issues and questions, and progress of writing proposed rule.

FO begins to compile documents (HCPs, consultations, recovery plans, listing documents, etc.), agency and stakeholder contact information, and GIS layers and information to provide to Division of Economics.

Month 3:

FO briefs RO on rule. RO and FO discuss any issues raised in briefing with DCC. If necessary, RD is briefed on issues.

Month 5:

Draft proposed rule due to RO for formal review. Read copy of rule is provided to WO and conference call is held to discuss issues.

Briefing statement is due to DCC. DCC provides comments to RO and FO.

Month 6:

Briefing statement due to Director and FWP. Briefing for the Director, if requested, (i.e., litigation, controversial issues) is provided.

FO revises proposed rule based on input from region.

Month 7:

Draft proposed rule is submitted to the Regional SOL for their “preliminary review” according to the April 20, 2004 procedure memorandum from the Assistant Solicitor.

Month 8:

Kickoff call for DEA – FO provides maps and supporting information to Division of Economics and their contractors. Decision is made by DCC and Division of Economics on schedule for economic analysis. The timeline will be dependent on the complexity and scope of the rule and whether the FO can provide to contractors all necessary information during Month 8.

Kickoff for NEPA documentation, if applicable.

Status call on proposed rule and NEPA (if applicable) to address any issues.

Month 9:

1st draft of methodology memo due from Division of Economics to DCC. DCC will forward to RO/FO and coordinate comments back to Division of Economics – 2 weeks to review and provide comment.

Month 10:

Draft proposed rule due to DCC for review. DCC will return comments on significant issues within one week.

2nd draft of methodology memo, if necessary, is due to AES and Director.

RO/FO incorporates comments from DCC.

RO/FO/WO incorporate Regional SOL comments and documents how SOL comments were incorporated or addressed

FO/RO/DCC has two weeks from receipt of draft DEA and NEPA (if applicable) documents to review and provide comment back to Division of Economics and contractors.

Month 11:

Draft proposed rule is also submitted to the Regional SOL for their “final review” according to the April 20, 2004 memorandum from the Assistant Solicitor.

Ongoing Review And Revision.

1st drafts of DEA and NEPA (if applicable) to DCC, according to schedule agreed upon at month 8. DCC will forward to RO/FO and coordinate comments back to Division of Economics.

Month 12:

4 WEEKS PRIOR TO DUE DATE: Final draft proposed rule to Director

WO SOL is provided read copy with response to Regional SOL comments.

DEA and NEPA (if applicable) contractors are provided two weeks (exceptions as warranted and approved) to revise first draft of documents and provide a 2nd draft to FO/RO/DCC. If first draft of DEA and NEPA (if applicable) are delivered during Month 11, then 2nd draft of DEA and NEPA (if applicable) are provided to FO/RO/DCC during Month 12.

2nd draft of the DEA and NEPA documentation to AES and Director.

Upon their surname, draft documents provided to FWP and OMB (DEA only unless NEPA is specifically requested).

Respond to comments on the second draft of the DEA and NEPA documentation.

Third draft of the DEA and NEPA documentation made available for public review and comment. **If DEA and NEPA (if applicable) are ready and approved, then released concurrently to the public with the proposed rule – language added into the proposed rule to announce their availability.**

ABSOLUTELY NO LATER THAN 2 WEEKS PRIOR TO DUE DATE

PROPOSED RULE DUE TO FWP AND OMB.

DEADLINE FOR PROPOSED RULE

COMPILE ADMINISTRATIVE RECORD FOR PROPOSED RULE. RO AND WO TO SUBMIT INFORMATION TO FO BY ONE MONTH AFTER SIGNATURE.

FINAL RULE:

Month 1-5:

Public comments to DEA and NEPA contractors: FO compiles and summarizes public comments and provides copies of comments to DEA and NEPA (if applicable) contractors within one week of close of public comment period, preferably as they arrive during the comment period.

Response to economic comments provided by Division of Economics to DCC due one month following receipt of public comments. DCC will forward to RO/FO and coordinate any comments. A second draft is generated if necessary.

If DEA and NEPA were not released concurrently with proposal, FO/RO/DCC coordinates with DEA and NEPA contractors concerning draft analyses, reviews, and preparation for release

2nd draft of the DEA and NEPA documentation with accompanying draft NOA to AES and Director. Upon their surname, draft documents provided to FWP and OMB (DEA only unless NEPA is specifically requested).

Respond to comments on the second draft of the DEA and NEPA documentation.

Third draft of the DEA and NEPA documentation made available for public review and comment.

NOA for the release of the DEA and NEPA (if applicable) documents on surname and published no later than Month 5, if not released concurrently with proposal.

FO briefs RO on rule (Month 5)

Month 6:

FO continues work on rule.

Month 7:

Comment period on DEA and NEPA (if applicable) documentation ends, if not earlier.

FO sends copies of all public comments to DEA and NEPA contractors no later than one week of close of comment period, preferably as they arrive during the comment period.

Status call on final rule, DEA, and NEPA (if applicable) to address any issues and confirm schedule.

Responses to Economic Comments due from contractor 3 weeks after receipt of complete comments.

Month 8:

Draft final rule due to RO for formal review.

1st drafts of final economic and NEPA (if applicable) documents to DCC – DCC will forward to RO/FO and coordinate comments back to Division of Economics.

Month 9:

FO revises final rule based on input.

Draft final rule is submitted to the Regional SOL for their “preliminary review” according to the April 20, 2004 procedure memorandum from the Assistant Solicitor.

Month 10:

Draft final rule due to DCC for review.

RO/FO incorporates comments from WO and Regional SOL and documents how comments were incorporated or addressed.

Final EA and NEPA documents to DCC who will forward them to RO/SOL.

Final EA with accompanying public comments on economics provided to AES/Director/FWP for review and evaluation of potential economic exclusions pursuant to section 4(b)(2).

Draft final rule is submitted to the Regional SOL for their "final review" according to the April 20, 2004 memorandum from the Assistant Solicitor.

Month 11:

Final Solicitor review, FO/RO/WO incorporate solicitor comments, respond to questions.

Ongoing review and revision.

Month 12:

4 WEEKS PRIOR TO DUE DATE: Final draft final rule to Director

WO SOL is provided read copy with response to Regional SOL comments.

**ABSOLUTELY NO LATER THAN 2 WEEKS PRIOR TO DUE DATE
FINAL RULE DUE TO FWP AND OMB.**

DEADLINE FOR FINAL RULE:

Addendum to final economic analysis is prepared for OMB to document final decisions and determine final economic impact of rule.

WO AND RO should provide any administrative record documents to FO within one month of rule signature.

Definitions:

AES = Assistant Director, Endangered Species
CH = critical habitat
DCC = Division of Conservation and Classification -- Branch of Listing
DEA = Draft economic analysis
Director = Director of the Fish and Wildlife Service
FO = Field Office
FWP = Office of the Assistant Secretary for Fish and Wildlife and Parks
NEPA = National Environmental Policy Act
NOA = Notice of Availability
OMB = Office of Management and Budget
RO = Regional Office
SOL = Office of Solicitors
WO = Washington Office
FWP -- Assistant Secretary for Fish, Wildlife and Parks

**APPENDIX 2
BOILERPLATE FOR CRITICAL HABITAT RULES**

Red italics are directions, yellow are inserts, 10pt font are examples.

Billing Code 4310-55-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018-XXXX

Endangered and Threatened Wildlife and Plants; Proposed Designation of Critical Habitat for the [insert species name]

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: *[As per the Federal Register, we need to have relatively short summaries]* We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the [species common name (Scientific name)] under the Endangered Species Act of 1973, as amended (Act). In total, approximately [X] acres (ac) ([X] hectares (ha)) fall within the boundaries of the proposed critical habitat designation. The proposed critical habitat is located in [Counties, States].

DATES: We will accept comments from all interested parties until [insert date 60 days after date of Federal Register publication]. We must receive requests for public hearings, in writing, at the address shown in the ADDRESSES section by [insert date 45 days after Federal Register publication].

ADDRESSES: If you wish to comment, you may submit your comments and materials concerning this proposal by any one of several methods:

1. You may submit written comments and information to the [insert name of field supervisor] Field Supervisor, U.S. Fish and Wildlife Service, [X] Fish and Wildlife Office, [address].
2. You may hand-deliver written comments to our office, at the above address.
3. You may send comments by electronic mail (e-mail) to [email address]. Please see the Public Comments Solicited section below for file format and other information

CERTIFICATE OF SERVICE

The undersigned certifies that on this 10th day of December, 2014, a copy of the foregoing Brief of *Amici Curiae* in Support of Plaintiffs-Appellants was electronically transmitted to the United States Court of Appeals for the Fifth Circuit using the Court's ECF filing system and was served on all counsel of record via electronic notice pursuant to the Court's ECF filing system.

s/ Paul Korman
Paul Korman
Attorney for Amici Curiae

Dated: December 10, 2014