

# THE WILDLIFE SOCIETY

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## Public Comments Processing

Attn: Docket Numbers:

[FWS-R9-ES-2011-0072]

[FWS-R9-ES-2011-0104]

[FWS-HQ-ES-2012-0096]

Division of Policy and Directive Management

U.S. Fish and Wildlife Service

4401 N. Fairfax Drive,

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Dear U.S. Fish & Wildlife Service and National Marine Fisheries Service,

The Wildlife Society thanks you for the opportunity to provide comments on the U.S. Fish & Wildlife and National Marine Fisheries Services' two proposed rules and one proposed policy related to the designation, adverse modification, and exclusion of critical habitats under the Endangered Species Act (ESA).

The Wildlife Society (TWS) was founded in 1937 and is a non-profit professional society representing nearly 10,000 wildlife biologists and managers, dedicated to excellence in wildlife stewardship through science and education. Our mission is to inspire, empower, and enable wildlife professionals to sustain wildlife populations and habitats through science-based management and conservation.

TWS recognizes the ESA as a vital tool in the U.S. effort to conserve biological diversity. We hold that conservation of threatened and endangered species presents one of the most formidable challenges to society, and addressing this challenge requires biological expertise and its application through effective regulations and policies. We support the Services' designation of critical habitats and measures to restore, enhance, manage, and protect occupied and unoccupied habitats that are essential to the recovery of species. We applaud the Services' efforts to provide clarity to these regulations to ensure the consistent interpretation and application in support of threatened and endangered species conservation.

Overall, we believe these proposals bring regulatory clarity to the critical habitat component of the ESA. We offer the following comments specific to each proposal:

### **[Docket No. FWS-HQ-ES-2012-0096] Implementing Changes to the Regulations for Designating Critical Habitat**

Habitat loss and degradation constitute a large threat to our nation's biodiversity. Designation and subsequent protection of critical habitat is an essential part of recovery for listed species.

TWS is generally supportive of the proposed changes that clarify the procedures and criteria for designating critical habitat.

TWS supports the revised definition of “Conserve, conserving, and conservation” in the context of the ESA, recognizing the goal of the ESA is species recovery, not just the prevention of extinction. We also approve of the proposed definitions for “geographical area occupied by the species” and “physical and biological features”. These definitions are science-based and consider a species’ full life history and related habitat requirements.

We offer these specific recommendations to improve or further clarify the proposed rule:

- §424.12(a)(2): Critical habitat can be deemed not determinable due to a lack of data for habitat analyses or lack of knowledge on biological needs of the species. When critical habitat cannot be determined due to a lack of data or knowledge, we believe the Services should regularly check for new data and/or make efforts to collect necessary data and move forward with critical habitat designations. A requirement to do so should be included in this section.
- §424.12(b)(1) and §424.12(b)(2): These sections give authority to the Secretary to identify specific areas for consideration as critical habitat. We believe the phrase “*The Secretary will identify, at a scale determined by the Secretary to be appropriate, specific...*” should be modified to include a reference to the scientific basis on which the Secretary will determine this scale. The spatial scale at which these determinations will be made is a critical factor in ensuring the appropriate designation and effectiveness of critical habitat, and should be specific to each species. We propose the statement should read “*The Secretary will identify, at a scale determined by the Secretary to be appropriate based on the best available science, specific....*”
- §424.12 (b)(2): When designating critical habitat outside the geographical area occupied by the species that is essential for the species’ conservation, the provided explanation states that currently unoccupied areas may become occupied in the future due to global climate change, habitat management practices, or restoration efforts. We support this flexibility and suggest it be explicitly reflected in the rule. Furthermore, the use of the phrase “conservation needs” is undefined, adding ambiguity to the rule. We feel “conservation needs of the species” should be replaced with “physical and biological features”, using a phrase explicitly defined in this section which incorporates those concepts. We suggest §424.12(b)(2) read:  
*“The Secretary will identify, at a scale determined by the Secretary to be appropriate based on the best available science, specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the species’ life history, status, essential physical and biological features, and anticipated changes from climate change, habitat management regime changes, restoration efforts, or other forecasted changes to the landscape.”*

## **[Docket No: FWS-R9-ES-2011-0072] Definition of Destruction or Adverse Modification of Critical Habitat**

TWS believes the revised definition of “destruction or adverse modification” improves on the Services’ previous definition and supports a scientific understanding of critical habitat and the values it provides to wildlife species. This definition, as explained in the proposed rule, supports the recovery of species rather than mere survival, adds focus to the life history needs of species, and displays a sound understanding of the role habitat has in sustaining wildlife populations.

We especially support the notion that specific habitat features may not be present at all times in a given area, and some natural processes are required (i.e. fire, flooding, etc.) to bring about certain habitat components; therefore, we support the phrase in the definition “that preclude or significantly delay the development of physical or biological features”.

Some areas where we note more clarity or improvements could be made to the definition:

- We suggest a definition for “appreciably diminish” and “conservation value” be codified in the rule based on the explanations provided in the background information of the proposal. This will provide some legal certainty and clarification to the “destruction or adverse modification” definition moving forward.
- The phrase “significantly delay” was not explained or defined in the Services’ proposal. A lack of proper clarity on the meaning of this phrase could cause ambiguity in the definition and leaves it open to widely varying interpretations.
- In the definitions for those three phrases, we encourage the expression of quantitative and spatial measures and concepts. Quantitative and spatial measures are important aspects of evaluating habitat components and features and should be relied upon whenever possible in order to support science-based decisions that best conserve species and their habitats.

## **[Docket No. FWS-R9-ES-2011-0104] Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act - Exclusions from Critical Habitat**

We thank the Services’ efforts in creating this draft policy to clarify expectations regarding critical habitat designations and exclusions through a simplified policy. In response to your specific questions, we offer the following insights:

Question 1: Policy clarity and well defined expectations

- Part(3)(c): We suggest that that phrase “...and meets the conservation needs of the species...” be changed to “.....and maintains the physical and biological features essential for the conservation of the species....” to maintain consistency in the use of terms related to critical habitat designations and exclusions (see proposed definition in §424.02). This will provide further clarity and certainty to critical habitat evaluations.

Question 2: Adequacy of detail on discretionary 4(b)(2) exclusion analysis

- Part(8): It will be very difficult for the Services to determine if excluding one piece of habitat “will result in the extinction of a species.” As such, we recommend the language be changed to express a likelihood the action will result in the extinction of the species. We also believe this determination should be made according to the best available science. Consider using this statement to conclude Part(8): “We must not exclude an area if the best available science indicates that failure to designate it will likely result in the extinction of the species.”

Question 3: Other factors and considerations to evaluate

- Economic considerations are often used to support the exclusion of habitats. We suggest that the Services also consider potential economic benefits of inclusion. Economic benefits of designating habitat include a potentially faster rate of recovery for the species, which could result in less long-term costs for the agency and partners.

Question 4: Importance of partnerships

- TWS encourages the Services to continue expanding and supporting the use of private and public partnerships to conserve listed and candidate species.

Question 6: Tribal sovereignty considerations

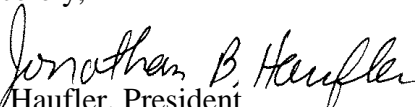
- Part(4): TWS agrees Tribal concerns are a priority and values the role tribes have in natural resource management. However, the phrase “great weight” is a subjective term and could use additional clarity. The use of the phrase implies Tribal concerns will always outweigh the benefits of inclusion. We recommend expanding or altering this phrase to better clarify how Tribal concerns will be considered.

Question 7: National security considerations

- Part(5) – The phrase “great weight” is a subjective term and could use additional clarity. The use of the phrase implies national security concerns will always outweigh the benefits of inclusion. We recommend expanding or altering this phrase to better clarify how national security concerns will be considered.

Thank you for considering the scientific perspectives of wildlife professionals. If you have any questions regarding our comments, please contact Keith Norris, Assistant Director of Government Affairs, at [keith.norris@wildlife.org](mailto:keith.norris@wildlife.org) or (301)897-9770 ext. 309.

Sincerely,

  
Jon Haufler, President  
The Wildlife Society