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October 9, 2014

Patrice Ashfield, Division of Environmental Review  
Cathryn E. Tortorici, National Marine Fisheries Service  
U.S. Fish and Wildlife Service  
c/o Public Comments Processing  
Division of Policy and Directives Management  
4401 N. Fairfax Drive, Suite 222  
Arlington, VA 22203

Re: Michigan Farm Bureau's Comments on Docket No. FWS-R9-ES-2011-0072, FWS/NMFS  
Proposed Rule on Definition of Destruction or Adverse Modification of Critical Habitat

Dear Ms. Ashfield and Ms. Tortorici,

Thank you for the opportunity to comment on the United States Fish and Wildlife Service (FWS) and National Marine Fisheries Service's (NMFS) proposed rule amending the definition of "Destruction or Adverse Modification of Critical Habitat," Docket #FWS-R9-ES-2011-0072. Michigan Farm Bureau is our state's largest general farm organization, representing nearly 50,000 farming families across Michigan. Our members have a strong commitment to responsible environmental stewardship while maintaining thriving agricultural operations, taking part in the vital task of feeding 7 billion people around the world. We have a number of concerns with the proposed rule, and strongly suggest the FWS and NMFS amend their proposed definition to better align with statutory and regulatory requirements.

The FWS and NMFS propose to revise the definition of "adverse modification" as follows:

*Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for ~~both the survival and recovery of a~~ listed species. Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of physical or biological features that support the life-history needs of the species for recovery alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.*

They incorporate into the proposed rule definitions of "conservation value" and "appreciably diminish." These definitions will significantly impact the application of the revised definition above and must be addressed as well. They are key components of the adverse modification definition, and have a significant effect on the how the adverse modification inquiry is

conducted. The FWS and NMFS should therefore include the definitions of “appreciably diminish” and “conservation value” in the Code of Federal Regulations. These definitions supplement the Endangered Species Act (ESA), change existing law and policy, and impose significant effects on the public, they should be proposed as rules under the Administrative Procedures Act.

In considering the definitions themselves, the term “appreciably diminish” is applied to the value of critical habitat. The FWS and NMFS explain that “diminish” means to “reduce, lessen, or weaken.” They then conclude that “appreciably” should mean to “recognize the quality, significance, or magnitude” or “grasp the nature, worth, quality or significance.” However, this makes “appreciably” the same as “noticeable” or “measurable,” which the FWS and NMFS rejected as too simplistic. This interpretation would take the word “appreciably” out of the regulatory provision.

“Appreciably” must contain a threshold of significance in order to have independent meaning. Presently, the Consultation Handbook definition states that “appreciably diminish” means “to considerably reduce the capability of designated or proposed critical habitat to satisfy the requirements essential to both the survival and recovery of a listed species.” “Appreciably” must have a quantitative measure of significance, not one of mere recognition. The context of the term requires the determination of “appreciably diminish” to analyze the effect of an action upon critical habitat with respect to its quantitative significance and magnitude.

Turning to the term “conservation value,” this is intended to consider the “contribution the critical habitat provides, or has the ability to provide, to the recovery of the species.” The FWS and NMFS state that determining “conservation value” will be based both on the current status of the critical habitat but also, when degraded or subject to ongoing ecological processes, on the “potential” for the habitat to provide further recovery support for conserving the species. Such a broad term is inconsistent with the ESA. In section 7(a)(2), the consultation process focuses on preventing the destruction or adverse modification of critical habitat which requires an examination of the effects of an action. In contrast, section 4(f) focuses on the recovery of species by requiring the development and implementation of recovery plans. Section 7(a)(1) imposes an obligation that federal agencies utilize their authorities to implement programs for the conservation of listed species. Given the differences between these statutory provisions, the FWS and NMFS cannot combine the adverse modification inquiry with a recovery obligation.

Further, the term “conservation value” would establish the implementation of a recovery standard. Based upon the FWS and NMFS’ interpretation, adverse modification could be found with any recognizable diminishment in the contribution that critical habitat provides, or could provide, to the recovery of the species. This approach would establish such a low threshold that any alteration of critical habitat would constitute adverse modification affecting listed species. This would represent a drastic expansion of the Section 7 consultation process beyond what was intended by Congress. A determination that an activity will cause the destruction or

adverse modification of critical habitat cannot be made only on the “potential” for particular areas to support recovery.

Instead, we recommend the FWS and NMFS retain the present focus of the adverse modification inquiry, specifically, on whether the direct or indirect alteration appreciably diminishes the *value* of the critical habitat for the listed species. This ensures that adverse modification continues to involve the actual, present and identifiable impacts to critical habitat that are attributable to the federal action subject to consultation.

Now turning back to the original phrase “adverse modification,” while past court decisions have recognized separate meanings applied to conservation and survival under the ESA, in crafting a definition of “destruction or adverse modification,” the FWS and NMFS must still take into account Congressional intent for the role of critical habitat under the ESA. In 1978, Congress enacted a definition of critical habitat in the ESA that narrowed the scope of the term from what was defined in existing regulations. In defining critical habitat, they placed the role of “conservation” in the narrower concept of what is “essential to the conservation” of the species for purposes of designating critical habitat. The primary concern was protecting specific core areas that held critical characteristics, not to empower the FWS and NMFS to take authority over every habitat across the countryside.

In defining “destruction or adverse modification,” the FWS and NMFS must maintain this focus on what is “essential to the conservation” of the species, which informs the designation of a specific area as critical habitat. The FWS and NMFS’ proposed definition fails to maintain this consistent focus on what is essential to the species. Rather, the FWS and NMFS’ revised interpretation of adverse modification eschews a consideration of what is “essential” to the conservation of a species and instead lowers the bar to merely “contribution” of habitat features to the recovery of the species.

The FWS and NMFS propose to expand the definition of destruction or adverse modification to include activities that would preclude or significantly delay the development or restoration of the physical or biological features needed to achieve the recovery of the species. However, the FWS and NMFS’ proposal is inconsistent with Congressional intent, overbroad, and capable of so many interpretations that it is unduly vague and unenforceable.

In the ESA, the initial formulation Section 7(a) provided that federal agencies take measures necessary that their actions do not result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical.” In explaining the purpose of this formulation, both the House and Senate Reports state that the focus of this provision was to prevent physical acts of “destruction of critical habitat of [listed] species,” such as clearcutting of timber. There is no support for a finding that Congressional intent went beyond such direct, physical actions and into the realm of actions that preclude or delay physical and biological features of habitat. Precluding or delaying the restoration of degraded habitat does not constitute the change in condition that the statutory language requires.

The FWS and NMFS fail to provide a consistent explanation of what actions would constitute destruction or adverse modification. For example, the FWS and NMFS state that “in order for an action to be found to adversely modify critical habitat, it must in some way *cause the deterioration* of the critical habitat’s *pre-action condition*, which includes its ability to provide recovery support to the species based on ongoing ecological processes.” They are correct that “deterioration” of the pre-action condition of critical habitat may be determined to be adverse modification—because deterioration of a pre-action condition connotes an adverse change in condition of the habitat features under protection. However, this example does not support the idea that preclusion or delay constitutes a change in condition, since neither preclusion nor delay would be a change in the pre-action conditions within the critical habitat. In fact, what the FWS and NMFS appear to be attempting to claim as adverse modification is essentially the continuation of a static environment as represented by the baseline conditions. By defining “adverse modification” to include the delay or preclusion of physical and biological features, the FWS and NMFS are proposing a process that is vague and unenforceable.

The FWS and NMFS propose to define “destruction or adverse modification” to include alterations that affect the development of the physical or biological features that support the “life-history needs” of the species. As part of their introduction of the concept of “life history,” however, they only explain that a species’ life-history needs “may include, but are not limited to, food, water, light, shelter from predators, competitors, weather and physical space to carry out normal behaviors or provide dispersal or migratory corridors.” This does not provide the clarity needed for adverse modification inquiries. Given the role proposed for these life-history needs in determining conservation value, the FWS and NMFS must provide a specific description both of the needs and how they are being provided for by the critical habitat. Generic descriptions of geographic features or environmental conditions, for example, are not sufficient. The FWS and NMFS should include clear statements about life-history needs that may be incorporated into an adverse modification inquiry as well as a process and standard by which they may be evaluated.

The ESA was never intended to be the mechanism for managing the process of recovery for a species. Rather, the ESA addresses the means for recovery efforts under sections 4(f), 5, 6 and 7(a)(1). The regulatory provisions of section 7(a)(2) (consultation process), section 9 (take prohibitions), and section 10 (incidental take permits) have separate and more specific purposes. This distinction—between consultations intended to protect against jeopardy to a listed species or destruction/adverse modification of its critical habitat, and the separately authorized ESA actions focused on the recovery of listed species, must be retained in any continued implementation of all elements of the adverse modification inquiry.

The proposed definition of “destruction or adverse modification” of critical habitat, and the process by which it is assessed, represents a significant revision to how the FWS and NMFS previously considered critical habitat in the consultation process. We request that, within any final rule, the following steps be incorporated into that process:

1. Undertake an Appropriate Review under the Regulatory Flexibility Act. In the proposed rule, the FWS and NMFS assert that an analysis under the Regulatory Flexibility Act is not required because the proposed rule “would not have a significant economic effect on a substantial number of small entities.” They explain that the proposed rule only directly affects federal agencies. This conclusion is overly narrow and inaccurate. The proposed rule broadly changes the definition of adverse modification of critical habitat which is applied in section 7 consultation on federal actions. Many “small entities” (*e.g.*, small businesses or small government jurisdictions) are the parties triggering the federal action that necessitates the consultation. Because small entities will be subject to costly measures, these entities will be directly affected by the rulemaking. Accordingly, the FWS and NMFS must assess such potential impacts on small entities

2. Conduct Further Coordination with State and Local Governments. As the FWS and NMFS consider revisions to the proposed rule, they should coordinate with state and local governments. Areas designated as critical habitat will often have specific state or local programs in place to protect and enhance habitat functions. Because state and local governments are often better situated to develop measures to protect and manage listed species and their habitat, they have unique perspectives that could help craft a workable definition of adverse modification. We request that the FWS and NMFS better utilize these experiences and perspectives by increasing the amount of coordination with state and local governments.

Thank you again for the opportunity to comment on this proposed rule and express our concerns. Please take these comments into full consideration and adopt the proposed revisions when finalizing the applicable regulatory language.

Sincerely,



Laura A. Campbell, Manager  
Agricultural Ecology Department