October 9, 2014

Ms. Patrice Ashfield
U.S. Fish and Wildlife Service
Division of Environmental Review
4401 N Fairfax Drive, Suite 420
Arlington, VA 22203

Dear Ms. Ashfield:

Western Governors respectfully submit to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the “Services”) the following comments on the Notice of Proposed Rulemaking for Definition of Destruction or Adverse Modification of Critical Habitat [79 FR 36284, June 26, 2014 and 79 FR 27060, May 12, 2014]. Thank you for extending the public comment period to provide states a reasonable period of time in which to respond to the proposed draft.

Western Governors request that this proposed rule be reworked in cooperation with Western states and utilizing our state data to reach a more legally-defensible result and foster partnership.

**Stated Purpose of the Proposed Rule:**

The Services are undertaking this rulemaking to clarify several definitional terms under Section 7 of the Endangered Species Act (ESA).

**Definition of “Destruction or Adverse Modification” / “Conservation Value”**

In the past, the Services operated under regulations governing interagency cooperation under ESA Section 7 (50 CFR 402) which provided the following definition for “destruction or adverse modification” of critical habitat:

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.
In the proposed rule, the Services note that in *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001), the court found that this

“regulatory definition [of destruction or adverse modification] set too high a threshold for triggering adverse modification by its requirement that both recovery and survival be diminished before adverse modification would be the appropriate conclusion.” A 2004 case before the Ninth Circuit Court of Appeals, *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 found that “the purpose of establishing ‘critical habitat’ is for the government to designate habitat that is not only necessary for the species’ survival but also essential for the species’ recovery.”

In response to these court decisions, the Services are proposing the following new definition:

“Destruction or adverse modification” means a direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for listed species. Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery [italics added].

In addition, this proposed definition introduces the new term “conservation value,” defined as:

The contribution the critical habitat provides, or has the ability to provide, to the recovery of the species.

The proposed definition for this new term does not speak to species survival as directed by the courts in 2004.

**Definition of “Appreciably Diminish”**

The Services suggest that the current definition of “appreciably diminish” was invalidated by the courts because it hinged on “both” survival and recovery of a listed species. That definition read:

Appreciably diminish the value - to considerably reduce the capability of designated or proposed critical habitat to satisfy requirements essential to both the survival and recovery of a listed species.

The Services note that the use of the term “considerable” in this definition may lead to disparate outcomes in consultations due to varying interpretations of what is “considerable.” The Services have suggested a new means of determining “appreciably diminish” which would apply if “there is a diminishment to the value of the critical habitat that has some relevance
because we can recognize or grasp the quality, significance, magnitude, or worth of the diminishment in a way that affects the conservation value of the critical habitat.”

**Western Governors’ Analysis and Recommendations:**

- **Changes to Definition of “Destruction or Adverse Modification”**

  The proposed definition of “destruction or adverse modification” cites effects that “significantly delay” the development of physical or biological features but does not benchmark what constitutes a “significant delay.” If this term is utilized, it must be better defined.

  Western Governors recommend that rather than introduce the new term “conservation value” and include the ambiguity of what constitutes “significantly delay” that the first sentence of the proposed definition of “destruction or adverse modification” be changed to:

  “Destruction or adverse modification” means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the survival and/or recovery of a listed species.

  This language is in keeping with the current definition, but addresses the courts’ concerns that critical habitat be designated for both species survival and recovery. It removes the word “both” and uses “and/or” to indicate that the diminishment of value that could result in a “destruction or adverse modification” determination could relate to habitat for survival or recovery or both (but need not be both as the court indicated in 2001).

  The second sentence of the new proposed definition of “destruction or adverse modification” goes far beyond the scope of the definition as it currently stands. The proposed definition suggests that “destruction or adverse modification” extends to actions that “preclude or significantly delay the development” of physical or biological features needed for species recovery. Such a definition requires the Services to forecast or model that an area is capable of 1) developing those physical or biological features in the first place and 2) that the proposed measure would further “preclude or significantly delay the development” of those features. That would seem a complex process to resolve for many actions that would necessitate Section 7 consultation.

  Moreover, this proposed language appears to emphasize “development” of physical or biological features in designated critical habitat, implying that the designated critical habitat does not currently contain those features, but may include them at some point in
the future. Such an application runs counter to the plain language of the ESA, which defines critical habitat as: “the specific areas within the geographical area occupied by the species [at the time of listing] . . . on which are found those [essential] physical or biological features . . . .” Section 3(5)A(i); italics added. The statutory language is worded in the present tense, indicating that those features must already be “found” in an area in order for it to be designated as critical habitat. If an area being considered for designation as critical habitat does not currently contain those physical and biological features, by definition, those features cannot be “essential” to the survival or recovery of a listed species.

Instead of the language proposed by the Services, Western Governors recommend that the second sentence in the “destruction or adverse modification” definition retain the same language currently in place (with small changes for clarity). That language allows for consideration of the physical and biological features that were the basis for determining habitat to be critical in the first place. Given that the Services indicated in the NOPR for Implementing Changes to the Regulations for Designating Critical Habitat 79 FR 36284, June 26, 2014 and 79 FR 27066, May 12, 2014] that “the purpose of critical habitat is to identify the areas that are or will be [italics added] essential to the species’ recovery,” then this definition captures those physical and biological features that “will be” essential to species recovery but have not yet developed. However, as noted in Western Governors comments on that NOPR, we feel that designation of critical habitat should be focused on areas that have already been identified as essential to species recovery, not areas that may perhaps be essential at some unknown future date.

In summary, Western Governors would propose this alternate definition of “destruction or adverse modification”:

“Destruction or adverse modification” means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the survival and/or recovery of a listed species. Such alterations may include, but are not limited to, actions adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

- **Change to Definition of “Appreciably Diminish”**

Western Governors find that this newly proposed method of determining “appreciably diminish” has merit but unnecessarily introduces the “conservation value” concept. We recommend using the language that replaces “considerably” but retains the emphasis on the requirements, i.e., the physical and biological features determined by the Service to be essential for species survival and recovery, from the current definition. We propose the following definition:
Appreciably diminish the value - to reduce the value of the critical habitat such that the Service can recognize and document the quality, significance, magnitude, or worth of the diminishment of the physical or biological features that were the basis for determining the habitat to be critical.

**Conclusion:**

Western Governors believe that the Services’ proposed changes to the definition of “destruction or adverse modification” of critical habitat requires excessive conjecture about “conservation value,” as well as when and where essential physical or biological features may develop in the future. For that reason, we have put forward an alternate definition we find more in keeping with the findings of the courts and the elements essential for species conservation. Western Governors would like to collaborate with the Services to incorporate this definition into a revised rule.

Sincerely,

Brian Sandoval  
Governor, State of Nevada  
Chairman, WGA

John Kitzhaber  
Governor, State of Oregon  
Vice Chairman, WGA

cc: Honorable Sally Jewell, Secretary, U.S. Department of the Interior  
Honorable Penny Pritzker, Secretary, U.S. Department of Commerce  
Dan Ashe, Director, U.S. Fish and Wildlife Service  
Eileen Sobeck, Assistant Administrator for Fisheries, National Marine Fisheries Service