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FOR THE SOUTHERN DISTRICT OF ALABAMA

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Plaintiffs,

vs.

NATIONAL MARINE FISHERIES SERVICE
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UNITED STATES FISH AND WILDLIFE SERVICE
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Defendants.

COMPLAINT

SUMMARY OF ACTION

1. The States of Alabama, Arkansas, Alaska, Arizona, Colorado, Kansas, Louisiana, Michigan, Montana, Nebraska, New Mexico, Nevada, North Dakota, South Carolina, Texas, West Virginia, Wisconsin, and Wyoming hereby challenge two newly issued regulations (the "Final Rules") promulgated under the purported authority of the Endangered Species Act ("ESA") by the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the "Services"). These Final Rules are the "Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat" rule, revising portions of 50 C.F.R. § 424 and available at 81 Fed. Reg. 7413–40 (Feb. 11, 2016) (Ex. A), and the

"Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat" rule, revising 50 C.F.R. § 402.02 and available at 81 Fed. Reg. 7214–26 (Feb. 11, 2016) (Ex. B).

2. The Final Rules are an unlawful attempt to expand regulatory authority and control over State lands and waters and should be vacated and enjoined because they violate the ESA and the Administrative Procedure Act ("APA").

3. The ESA carefully delineates how and when the Services may designate areas as critical habitat. The ESA provides that when a species is listed as endangered or threatened, the Services shall "designate any habitat of such species which is then considered to be critical habitat" and "may, from time-to-time thereafter as appropriate, revise such designation." 16 U.S.C. § 1533(a)(3)(A).

4. The ESA defines critical habitat as "specific areas within the geographical area occupied by the species at the time it is listed . . . on which are found 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 areas trigger an additional requirement—the Services must determine that "such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

5. By employing two different definitions, "[t]he statute thus differentiates between 'occupied' and 'unoccupied' areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the [Services] to make a showing that unoccupied areas are essential for . . . conservation." *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010); *accord Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 918 (D.C. Cir. 2011). The Services have long recognized that they may designate unoccupied areas "only when a designation

limited to its present range would be inadequate to ensure the conservation of the species." 49 Fed. Reg. 38900, 38909 (Oct. 1, 1984) (previously codified at 50 C.F.R. § 424.12(e)).

6. After designation, federal agencies are required to consult with the Services to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2).

7. Decisions on how to designate habitat and how to define destruction or adverse modification of critical habitat directly affect the States as States are expressly covered by the ESA, along with individuals, corporations, municipalities, and political subdivisions of each State and the uses and activities upon lands owned or controlled by such persons within States. 16 U.S.C. § 1532(13).

8. Ensuring compliance with the ESA is a part of many state agencies' operations. This is especially true in the context of state construction projects. State transportation projects, pipeline construction and maintenance, forest and storm water management, and other key infrastructure operations must comply with the ESA and critical habitat designations. States also comply with the ESA when issuing permits to use certain pesticides and herbicides, including monitoring the use of these chemicals to ensure they do not destroy critical habitat.

9. The ESA respects the sovereign right of States to manage and control lands and waters within their borders. As the Services reiterated in a policy revision entitled, "Revised Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities," it is undisputed that "in the exercise of their general governmental powers, States possess broad trustee and police powers over fish, wildlife, and plants and their habitats within their borders. Unless preempted by Federal authority, States possess primary authority and

responsibility for protection and management of fish, wildlife, and plants and their habitats." 81 Fed. Reg. 8663 (Feb. 22, 2016). For this reason, the ESA itself directs the Services to "cooperate to the maximum extent practicable with the States." 16 U.S.C. § 1535(a). In administering the ESA, the States and the federal government are inextricably intertwined.

10. The Final Rules issued by the Services trample upon the sovereign rights of the States as landowners and stewards of their natural resources. They directly implicate state management decisions related to wildlife regulation, forest management, water management, state-owned or supported projects, and other areas of traditional State control. As promulgated, the Final Rules are without foundation in the ESA, violate the APA, and illegally expand the authority of the Services.

11. If allowed to stand, the Final Rules would allow the Services to exercise virtually unlimited power to declare land and water critical habitat for endangered and threatened species, regardless of whether that land or water is occupied or unoccupied by the species, regardless of the presence or absence of the physical or biological features necessary to sustain the species, and regardless of whether the land or water is actually essential to the conservation of the species.

12. The Final Rules essentially nullify statutory provisions requiring that the Services only designate as occupied critical habitat "specific areas…occupied by the species, at the time it was listed…on which are found those physical or biological features" necessary to support the species. 16 U.S.C. § 1532(5)(A)(i). Moreover, the Final Rules would allow the Services to designate areas as unoccupied critical habitat almost without limitation, even though the statutory scheme intended designation of these areas to require a higher threshold than the designation of occupied areas.

13. Moreover, the Final Rules would allow the Service to declare that almost any activity destroys or adversely modifies critical habitat under the theory that such activity might prevent the eventual development of the physical or biological characteristics necessary to support an endangered or threatened species. This novel theory of destruction or adverse habitat modification has no support in the ESA and indeed contravenes the statute. The ESA is present-focused; it prohibits only those activities that "result in the destruction or adverse modification of habitat of such species," not those that might prevent currently non-habitable areas from developing into habitat. 16 U.S.C. § 1536(a)(2).

14. Accordingly, the States ask this Court to vacate the Final Rules, to enjoin the Services from enforcing them, and for any other relief this Court deems proper.

THE PARTIES

15. Plaintiffs, the States appearing by and through Luther Strange, Attorney General of Alabama; Leslie Rutledge, Attorney General of Arkansas; Jahna Lindemuth, Attorney General of Alaska; Mark Brnovich, Attorney General of Arizona; Cynthia H. Coffman, Attorney General of Colorado; Derek Schmidt, Attorney General of Kansas; Jeff Landry, Attorney General of Louisiana; Bill Schuette, Attorney General of Michigan; Tim Fox, Attorney General of Montana; Doug Peterson, Attorney General of Nebraska; Adam Paul Laxalt, Attorney General of Nevada; Alexandra Sandoval, Director of the New Mexico Department of Game and Fish; Wayne Stenehjem, Attorney General of North Dakota; Alan Wilson, Attorney General of South Carolina; Ken Paxton, Attorney General of Texas; Patrick Morrisey, Attorney General of West Virginia; Brad D. Schimel, Attorney General of Wisconsin; and Peter K. Michael, Attorney General of Wyoming, are sovereign States that regulate the natural resources within their borders through

duly enacted state laws administered by state officials and constituent agencies[1]. They are also landowners that are directly regulated by the ESA.

16. The National Marine Fisheries Service ("NMFS") is an agency of the National Oceanic and Atmospheric Administration of the United States Department of Commerce. NMFS has been delegated responsibility for administering the provisions of the ESA. The authority delegated to NMFS to administer and implement the ESA is subject to, and must be in compliance with, the applicable requirements of the ESA and the APA.

17. Penny Pritzker, in her official capacity as Secretary of Commerce, directs all business of the Department of Commerce, including NMFS. In her official capacity as Secretary of Commerce, Pritzker is responsible for the Final Rules and for the associated violations of the ESA and the APA as alleged in this Complaint.

18. The United States Fish and Wildlife Service (FWS) is an agency of the United States Department of the Interior. FWS has been delegated responsibility for administering the provisions of the ESA. The authority delegated to FWS to administer and implement the ESA is subject to, and must be in compliance with, the applicable requirements of the ESA and the APA.

19. Sally Jewell, in her official capacity as Secretary of the Interior, directs all business of the Department of the Interior, including FWS. In her official capacity as Secretary of the Interior, Jewell is responsible for the Final Rules and for the associated violations of the ESA and the APA as alleged in this Complaint.

[1] All plaintiffs are represented by the Attorneys General of Alabama and Arkansas.

JURISDICTION, VENUE & STATUTORY FRAMEWORK

20. This Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 701–706 (APA), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory judgments), and 28 U.S.C. § 2202 (injunctive relief).

21. Venue is proper under 28 U.S.C. § 1391(e)(1)(C) because plaintiff State of Alabama is located in this judicial district.

22. The APA provides for judicial review of final agency action. 5 U.S.C. § 702. The APA also authorizes courts reviewing agency action to hold unlawful and set aside final agency actions, findings, and conclusions that are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). The Final Rules are subject to judicial review under this provision of the APA.

FACTUAL ALLEGATIONS

23. The Final Rules update implementing regulations for two provisions of the ESA, one establishing how the Services designate critical habitat and the other prohibiting destruction or adverse modification of critical habitat.

A. Designating Critical Habitat

23. In 1973, Congress enacted the ESA to establish procedures to protect the growing number of plant and animal species faced with extinction. Central to this plan was the protection of critical habitat.

24. But in 1978, the Supreme Court's decision interpreting the ESA in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978)—a case which resulted in the suspension of a dam-building project that was 80 percent complete and for which Congress had spent more than $100 million of taxpayer money—led to amendments intended to reform the statute and provide limits

to its reach. These reforms included statutorily defining critical habitat and adverse modification of critical habitat for the first time.

25. In introducing these definitions, the House Merchant Marine and Fisheries Committee explained in its report Congress's concern that the existing regulatory regime "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* 1978 U.S.C.C.A.N. 9453, 9475. The Committee warned that in applying the new statutory definition, "the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." *Id.* at 18, *reprinted in* 1978 U.S.C.C.A.N. 9468.

26. The Senate Committee on Environment and Public Works explained that the amendments created an "extremely narrow definition" of critical habitat. S. Comm. On Env't & Pub. Works, 97th Cong., A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, and 1980, at 1220–21 (Comm. Print 1982).

27. With these concerns in mind, Congress created a statutory definition narrowing the scope of critical habitat that has not since changed:

> (5)(A) The term "critical habitat" for a threatened or endangered species means—
>
> (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 1533 of this title, on which are found those physical or 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 section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i–ii).

28. Congress further limited the possible reach of critical habitat by specifying that it "shall not include the entire geographical area which can be occupied by the threatened or endangered species." 16 U.S.C. § 1532(5)(C).

29. Prior to the adoption of the Final Rules, the Services last promulgated a comprehensive amendment of the regulations implementing these provisions in 1984. For the last thirty-two years, these regulations have defined the power of the Services to make critical habitat designations.

30. Consistent with the plain language of the ESA, the 1984 regulations require a two-step process in designating critical habitat. First, the Services must look to whether designating specific occupied areas meets the conservation needs of the species. If occupied areas would not meet the species' conservation needs, only then may the Services designate unoccupied areas, and only then when those areas are essential to the conservation of the species. In sum, the 1984 regulations permit the Services to designate unoccupied areas "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 49 Fed. Reg. 38900, 38909 (Oct. 1, 1984) (previously codified at 50 C.F.R. § 424.12(e)).

31. In considering the designation of critical habitat, the 1984 regulations directed that the Services "shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species," including everything from sites for roosting, nesting, spawning, and feeding, to geological formations, vegetation, soil, and water quality. 49 Fed. Reg. 38900, 38909 (Oct. 1, 1984) (previously codified at 50 C.F.R. § 424.12(b)(1-5)).

32. The Services acknowledged in the 1984 regulations 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." 49 Fed. Reg. at 38903 (addressing comments about designating unoccupied areas).

33. In revising the 1984 regulations, the Final Rules make a number of expansive changes to the habitat designation standard, at least four of which go far beyond what the ESA will bear.

34. The Final Rules collapse the ESA's long-established two-step process of designating habitat, allowing the Services to designate unoccupied areas as essential to conservation, even if designating only occupied areas would result in the recovery of the species. The Final Rules also allow the Services to designate areas as occupied critical habitat, containing the physical and biological features essential to conservation, even when those areas are neither occupied nor contain those features. The Final Rules allow the Services to designate uninhabited areas as critical habitat, whether or not they are capable of supporting the species. And finally, the Final Rules allow the Services to declare broad, generalized swaths of land and water critical habitat even though the ESA requires the Services to specifically identify those areas that qualify as critical habitat.

35. First, the Final Rules eliminate the two-step process for designating occupied and unoccupied habitat required by the ESA. In reversing that long standing practice, the Services contend that "there is no specific language in the Act that requires the Services to first prove that the inclusion of all occupied areas in a designation are insufficient to conserve the species before considering unoccupied areas." 81 Fed. Reg. 7414, 7426–27 (Feb. 11, 2016). The Services do not explain how unoccupied areas can be "essential" to the conservation of a species as required by

the specific language in the Act if designating the occupied area alone would meet conservation goals.

36. Second, the Final Rules "completely revis[e] § 424.12(b) of the current regulations." 81 Fed. Reg. at 7432. The 1984 regulations track the statutory framework of the ESA by requiring the Services to only designate areas as occupied critical habitat "*on which are found* those physical or biological features" essential to the conservation of the species. 16 U.S.C. § 1532(5)(A)(i) (emphasis added). But the Final Rules allow the Services to designate areas as occupied critical habitat on which are found neither the species itself nor the physical or biological features essential to the conservation of the species.

37. Under this new definition, the Services may declare an area occupied based on "indirect or circumstantial evidence" of occupation "during some portion of the listed species' life history." 81 Fed. Reg. at 7430. In addition to radically redefining the meaning of the statutory phrase "occupied, at the time it is listed," the Final Rules also declare that essential features include not only the physical or biological aspects that actually support the species, but also items that might lead to the development of those species-supporting features sometime in the future. 50 C.F.R. § 424.02; 81 Fed. Reg. at 7419 (essential "physical or biological features" exist where "once certain conditions are met, the habitat will recur"); 81 Fed. Reg. at 7422 ("[T]he physical or biological features referred to in the definition of 'critical habitat' can include features that allow for the periodic development of habitat characteristics."); 81 Fed. Reg. at 7423 (definition includes areas where features "may exist only 5 to 15 years after" certain events occur); *see also* 81 Fed. Reg. at 7431 (features exist where there is a "reasonable expectation of that habitat occurring again.").

38. Moreover, the rules do not provide any measurable standard for determining whether such features exist or might develop; instead, those determinations will be made on an *ad hoc* basis. *See* 50 C.F.R. § 424.12(b)(1)(ii) (explaining that features "will vary between species and may include consideration of the appropriate quality, quantity, and spatial and temporal arrangements of such features in the context of the life history, status, and conservation needs of the species").

39. Thus, the Final Rules allow the Services to declare areas occupied critical habitat that are not occupied by the species and that could not support the species were it moved there, on the supposition that one day the essential physical and biological features might develop and the species might return. The ESA cannot support this interpretation.

40. Third, the Final Rules assert that the Services can designate unoccupied areas as critical habitat even if those areas are incapable of acting as habitat for the species. The Services claim, "The presence of physical or biological features is not required by the statute for the inclusion of unoccupied areas in a designation of critical habitat." 81 Fed. Reg. at 7420. Thus, the Services assert they can declare an area that is not habitable by the relevant species as essential, critical habitat.

41. Under this interpretation and in contravention of the ESA, it is easier for the Services to designate unoccupied areas critical habitat than it is to designate occupied areas. Courts reviewing the same statutory language have reached the exact opposite conclusion, finding that the ESA imposes "a more onerous procedure on the designation of unoccupied areas." *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163. Rather than the Services' tortured reading of the statutory text, the plain meaning of the ESA is that "both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to

conservation, the area itself must be essential." *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004).

42. Fourth, the Final Rules allow the Services to declare critical habitat "at a scale determined by the Secretary to be appropriate." 81 Fed. Reg. at 7432. In other words, "the Secretary need not determine that each square inch, square yard, acre, or even square mile independently meets the definition of 'critical habitat.'" *Id*. And as discussed above, the Services may include within these broad swaths of habitat any areas with "indirect or circumstantial evidence" of occupation "during some portion of the listed species' life history." 81 Fed. Reg. at 7430.

43. This expansion of the Services' power directly conflicts with the ESA. Nowhere does the statute provide that the Services may designate additional, larger areas that do not qualify as critical habitat. In fact, the ESA expressly requires the Services to designate "specific" occupied and unoccupied areas that meet the statutory definition of critical habitat. 16 U.S.C. § 1532(5)(A).

44. Moreover, by including areas within the "range" of the species and ill-defined "migratory corridors," 81 Fed. Reg. at 7439, the Services have essentially written the requirement that they only designate "specific areas" as critical habitat out of the statute. Under this interpretation, the Services could designate entire States or even multiple States as critical habitat for certain species.

45. By allowing the Services to issue critical habitat designations that do not meet the statutory definitions, the Final Rules conflict with the ESA and run afoul of the very concerns Congress expressed in passing the 1978 critical habitat amendments. *See, e.g.*, S. Rep. No. 95-874, 9–10 (1978); H.R. Rep. No. 95-1625, 25 (1978). Furthermore, Congress specifically provided that the Services "shall not include the entire geographical area which can be occupied by the

threatened or endangered species" when declaring habitat. 16 U.S.C. § 1532(5)(C). But the Final Rules allow the Services to do much more than that; they can now declare as "essential" habitat for the conservation of a listed species vast geographical areas which are not occupied or cannot be occupied.

B. Adverse Modification

46. In addition to redefining how the Services designate critical habitat, the Final Rules also redefine and expand the definition of adverse modification of critical habitat.

47. The ESA empowers the Services to declare as critical habitat areas "on which are found 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)

48. As part of that special management and protection, federal agencies must consult with the Services to ensure that their actions do not "result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2). In other words, federal agencies must not act in a way that makes "essential" habitable land or water uninhabitable for a listed species.

49. But in expanding the Services power to declare critical habitat beyond what is permissible under the ESA, the Final Rules also expand the definition of adverse modification beyond what the ESA can bear.

50. The new definition reads,

> Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.
>
> 50 C.F.R. § 402.02

51. By including alterations that "preclude or significantly delay development" of physical or biological features, the Final Rules give the Services power that the ESA never contemplated—to consider whether an alteration would adversely modify or destroy features that do not exist at present.

52. This overreach goes hand in glove with the Services' new critical habitat definitions. If allowed to stand, the Services may first declare as critical habitat areas that do not have and may never have the physical and biological features necessary to support a species and then prohibit an activity that might prevent the development of those features. For example, under the Final Rules, the Services could declare desert land as critical habitat for a fish and then prevent the construction of a highway through those desert lands, under the theory that it would prevent the future formation of a stream that might one day support the species. Or the Services could prevent a landowner from planting loblolly pine trees in a barren field if planting longleaf pine trees might one day be more beneficial to an endangered or threatened species.

C. Procedural violations of the APA.

53. The Services not only ignored the limits of the ESA in releasing the Final Rules, they also violated the procedural safeguards in the APA against arbitrary and capricious rulemaking.

54. The Services failed to provide a basis for repealing the requirement that they determine that occupied areas are not sufficient for conservation before designating unoccupied areas. The Services have long acknowledged that they must determine that occupied areas are insufficient for conservation before designating unoccupied areas. Even if the statute permits the Services to adopt a contrary approach and designate both simultaneously, the Services fail to offer a legitimate explanation for changing their approach.

55. Instead, in an attempt to justify their about-face, the Services assert that the previous regulations "may result in a designation that is geographically larger, but less effective" and "that the inclusion of all occupied habitat in a designation does not support the best conservation strategy." 81 Fed. Reg. at 7415. But the Services do not point to any evidence that the previous process compelled larger designations, let alone required them to simply designate all occupied areas. Indeed, that approach would have violated Section 1532(5)(A)(i)'s requirement that the Services designate only certain "specific areas within the geographical area occupied by the species" and Section 1532(5)(C)'s limitation on including "the entire geographical area which can be occupied." Moreover, contrary to the Services' unexplained assertion, numerous comments explained how excising the sufficiency requirement would result in larger—not smaller—designations. By failing to consider those comments and relying on irrelevant information, the Services acted arbitrarily and capriciously.

56. In adopting the Final Rules, the Services failed to respond to numerous comments requesting that they define, explain, or otherwise illuminate critical terms. *See* 81 Fed. Reg. at 7419 (asking what constituted a "reasonable expectation of that habitat occurring again"); 81 Fed. Reg. at 7422 (requesting essential features be defined and inquiring how the Services would distinguish those features from others); 81 Fed. Reg. at 7217 (querying what constitutes appreciable diminishment as opposed to lesser changes). For example, comments asked the Services to explain what it meant for a species to be temporarily or periodically present. *See* 81 Fed. Reg. at 7421. The Services declined to define that phrase or provide guidance on the grounds that any response might not cover every conceivable situation, species, or data set. *See* 81 Fed. Reg. at 7421 ("We will use the best scientific data available to determine occupied areas including those that are used only periodically or temporarily by a listed species . . . This will be determined

on a species-by-species basis."). Similar responses were given to requests for guidance on what constitutes a "reasonable expectation" of recurrence (81 Fed. Reg. at 7419), "appreciabl[e] diminish[ment]" (81 Fed. Reg. at 7218), and "essential features." *See* 81 Fed. Reg. at 7422 (vaguely indicating essential features include "those found in the appropriate quality, quantity, and spatial and temporal arrangements in the context of the life history, status, and conservation needs of the species" and even then emphasizing that what is essential "varies"). At most, the Services suggested that each term's meaning would become clear "in [the] proposed and final rules designating critical habitat for a particular species." 81 Fed. Reg. at 7418; *accord* 81 Fed. Reg. at 7421; 81 Fed. Reg. at 7422. And even then, any information would depend on what "is appropriate in light of what is known about the species' habitat needs, while recognizing that the available science may still be evolving." 81 Fed. Reg. at 7422.

57. The Services' refusal to provide guidance, define, or otherwise illuminate critical terms on the grounds that the information provided might not cover every conceivable situation or development amounts to little more than an attempt to avoid grappling with serious issues because so doing would be too difficult. But under the APA, the Services may not simply avoid facing significant issues highlighted by commentators merely because they are challenging.

58. The Services also failed to consider administrative, litigation, and other costs associated with Final Rules, or to respond to comments discussing how the revised designation process and their use of vague and ill-defined terms is likely to result in increased litigation and impose considerable costs. *See* 81 Fed. Reg. at 7416 (noting comments). Rather than respond to those concerns, the Services simply assumed that costs will not increase because "[t]he amended regulations do not substantially change the manner in which critical habitat is designated." 81 Fed. Reg. at 7416. But the transition from a well-established system to an entirely novel designation

process will result in disputes and litigation. Similarly, the Services simply assume that their new definitions are not vague—or will not be when applied—and, therefore, will not result in increased litigation. *See* 81 Fed. Reg. at 7416; *accord* 81 Fed. Reg. at 7417. The Services' failure to acknowledge or consider those issues demonstrates that they failed to appropriately weigh the costs of the Final Rules.

59. Moreover, the Final Rules do not address how the Services will distinguish between changes in occupancy and changes in information. The ESA requires that occupancy be determined at listing, but the Services read the statutory scheme as permitting them to designate an area decades after listing when they conclude their initial data was incomplete. But as the authorizing release acknowledges, the Services have not addressed how they will "distinguish between actual changes to species occupancy" after listing "and changes in available information." 81 Fed. Reg. at 7430. Thus, the Services have failed to consider and address an important aspect of the problem that the Final Rules purport to address.

60. The Services' failure to conduct a regulatory flexibility analysis was arbitrary, capricious, and contrary to law. The Services assert that a regulatory flexibility analysis was not required because the rules only apply to federal agencies and do not directly impact others. However, a critical habitat designation "can impose significant costs on landowners," states, and small business "because federal agencies may not authorize, fund, or carry out actions that are likely to result in the destruction or adverse modification of critical habitat." *Otay Mesa*, 646 F.3d at 915 (internal quotation marks omitted). Thus, the Services' failure to consider those direct impacts was contrary to the law.

61. Similarly, the Services' failure to comply with Executive Order 13,132 and conduct a federalism assessment was arbitrary, capricious, and contrary to law. The Services assert that a

federalism assessment was not required as the regulations pertain only to determinations to designate critical habitat and "will not have substantial direct effects on the States." 81 Fed. Reg. at 7437 and 81 Fed Reg. at 7225. But as discussed in more depth above, the Final Rules will directly implicate any State operations that fall under the ESA. Also, E.O. 13,132 requires the Services to consult with state and local officials before any action that would limit the policymaking discretion of the States to determine whether federal objectives can be attained by any other means. The Services' failure to meaningful consult with the States is contrary to the intent of E.O. 13,132. And, in striking contrast, the Services did exchange information with Federally recognized Indian Tribes' representatives and intend to continue to collaborate and coordinate with them. 81 Fed. Reg. at 7437 and 81 Fed. Reg. at 7225.

62. The Services' final definition of "destruction or adverse modification" is not a logical outgrowth of the rulemaking process. The Services also modified several other terms in the final release without explaining how those changes reflected the rulemaking process. *See* 81 Fed. Reg. at 7216. For example, while maintaining the earlier term was "clear and can be applied consistently," the Services replaced "conservation value" with the phrase "the value of critical habitat for the conservation of a listed species." 81 Fed. Reg. at 7218. But the Services do not explain how the newly adopted phrase is clearer than their original proposal or what comments they considered in adopting it. Nor do the Services ever analyze, consider, or explain how using "the value of critical habitat" in combination with "conservation" instead of "survival and recovery" might change the applicable standard or be applied. *See* 81 Fed. Reg. at 7218; *cf*. 81 Fed. Reg. at 7217 (discussing decision to replace recovery with conservation). Thus, the modification cannot be termed a logical outgrowth and the Services failure to address those issues invalidates the Final Rules.

63. The Final Rules contain no standards for determining what constitutes the best available data. The ESA requires the Services to rely on the best available data in designating critical habitat. To justify their failure to create clear and measurable standards or metrics or even to define basic terms, the Services repeatedly rely on this language and assert that they cannot provide more guidance because what a term means will depend on the best available data. But neither the Final Rules—nor the release—contain any standards for determining what constitutes the best available data. Their failure to develop or provide any guidance demonstrates that the Services failed to consider an important aspect of the problem that the rules purport to address, and thus violates the APA.

CLAIMS FOR RELIEF

COUNT ONE:

Violation of the Endangered Species Act and Administrative Procedures Act

64. The States incorporate by reference the allegations of the preceding paragraphs.

65. All regulations must be consistent with their authorizing statutes. 5 U.S.C. § 706(2)(A).

66. The ESA sets forth a carefully delineated and limited procedure by which the Services can declare areas critical habitat and prevent adverse modification or destruction of those habitats. *See* 16 U.S.C. § 1533(a)(3)(A), (A)(i), (A)(ii); 16 U.S.C. § 1536(a)(2).

67. Because the Final Rules exceed the Services' statutory authority under the ESA and are indeed contrary to the provisions of the ESA, they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

COUNT TWO:

The Final Rules are Arbitrary and Capricious Under the Administrative Procedure Act

68. The States incorporate by reference the allegations of the preceding paragraphs.

69. Rules cannot be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Services must provide an internally consistent and satisfactory explanation for their actions. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Ala. Power Co. v. F.C.C.*, 311 F.3d 1357, 1371 (11th Cir. 2002); *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987). They must treat similar cases similarly or "provide a legitimate reason for failing to do so." *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996).

70. The Final Rules repeatedly fail to provide explanations for the changes contained therein, or to provide guidance for their consistent application. The Final Rules are thus "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

COUNT THREE:

Claim for Injunctive Relief

71. The States incorporate by reference the allegations of the preceding paragraphs.

72. A plaintiff must satisfy a four-factor test before a court will grant injunctive relief. A plaintiff must show: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

73. An injunction is warranted and would serve the public interest because the Final Rules expand federal regulatory authority over property and land and water resources, impairing

the States' ability to protect and manage their resources in accordance with local needs. By expanding the scope of federal regulatory authority, the Final Rules impose significant costs on States, businesses and citizens, and introduce grievous uncertainty into land use and water management.

74. The States and their citizens will be irreparably injured by the Final Rules.

75. The Final Rules require the States to expend resources as land owners subject to the requirements set out by the ESA. The States expend resources in order to comply with the ESA in their own operations and in assisting private citizens' compliance efforts.

76. The Final Rules also harm States and their citizens by transferring regulatory authority over state-owned resources to the federal government. The Final Rules harm the States in their capacity as sovereigns with both the right and the obligation to ensure appropriate usage of State resources. In addition, the statutory and constitutional limitations on the authority of federal agencies protect citizens from the intrusion of the federal government into areas where local knowledge is critical to designing effective rules and policies. The preservation of habitat critical to threatened and endangered species is one of those areas.

77. By displacing local regulatory authority, the Final Rules impede, rather than advance, efforts to protect endangered and threatened species around the country.

78. The Final Rules impose numerous harms specifically on citizens. The Final Rules impose costs upon citizens because individuals and businesses must obtain federal permits that are directly affected by the Final Rules' expansion of potential critical habitat designations and the definition of adverse modification and destruction of critical habitat.

79. The States are therefore entitled to injunctive relief under 5 U.S.C. § 702.

PRAYER FOR RELIEF

80. Wherefore, the States ask this court to enter an order and judgment:

a. Declaring that the Final Rules are unlawful because they: (1) were issued in violation of the ESA and the APA; and (2) are arbitrary and capricious in violation of the APA;

b. Vacating and setting aside the Final Rules in their entirety;

c. Issuing injunctive relief prohibiting the Services from using, applying, enforcing, or otherwise proceeding on the basis of the Final Rules;

d. Remanding this case to the Services, to permit the Services to issue rules that comply with the ESA and the APA;

e. Awarding the States costs and attorneys' fees pursuant to any applicable statute or authority; and

f. Awarding the States such additional relief, including equitable injunctive relief, as the Court deems appropriate.

Respectfully submitted,

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Exhibit A

FEDERAL REGISTER

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Part II

Department of the Interior

Fish and Wildlife Service

Department of Commerce

National Marine Fisheries Service

50 CFR Part 424

Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat; Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Marine Fisheries Service

50 CFR Part 424

[Docket No. FWS–HQ–ES–2012–0096; Docket No. 120106025–5640–03; 4500030114]

RIN 1018–AX86; 0648–BB79

Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat

AGENCY: U.S. Fish and Wildlife Service, Interior; National Marine Fisheries Service, Commerce.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the ''Services'' or ''we''), amend portions of our regulations that implement the Endangered Species Act of 1973, as amended (Act). The revised regulations clarify, interpret, and implement portions of the Act concerning the procedures and criteria used for adding species to the Lists of Endangered and Threatened Wildlife and Plants and designating and revising critical habitat. Specifically, the amendments make minor edits to the scope and purpose, add and remove some definitions, and clarify the criteria and procedures for designating critical habitat. These amendments are based on the Services' review of the regulations and are intended to clarify expectations regarding critical habitat and provide for a more predictable and transparent critical habitat designation process. Finally, the amendments are also part of the Services' response to Executive Order 13563 (January 18, 2011), which directs agencies to review their existing regulations and, among other things, modify or streamline them in accordance with what has been learned.

DATES: *Effective date:* This rule is effective March 14, 2016. *Applicability date:* This rule applies to rules for which a proposed rule was published after March 14, 2016.

ADDRESSES: Public input and a list of references cited for this final rule are available on the Internet at *http://www.regulations.gov*. Supporting documentation used in the preparation of this rule will be available for public inspection, by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Division of Conservation and Classification, 5275 Leesburg Pike; Falls Church, VA 22041–0041, telephone 703/358–2171; facsimile 703/358–1735 and National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301–713–1401; facsimile 301–713–0376.

FOR FURTHER INFORMATION CONTACT: Douglas Krofta, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 5275 Leesburg Pike, Falls Church, VA 22041, telephone 703/358–2527; facsimile 703/358–1735; or Marta Nammack, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301/427–8469; facsimile 301/713–0376. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION: This document is one of three listed below, of which two are final rules and one is a final policy:

- A final rule that amends the regulations governing section 7 consultation under the Endangered Species Act to revise the definition of ''destruction or adverse modification'' of critical habitat. The previous regulatory definition had been invalidated by several courts for being inconsistent with the language of the Act. That final rule amends title 50 of the Code of Federal Regulations (CFR) at part 402. The Regulation Identifier Numbers (RINs) are 1018–AX88 and 0648–BB80, and the final rule may be found on *http://www.regulations.gov* at Docket No. FWS–R9–ES–2011–0072.
- A final rule that amends the regulations governing the designation of critical habitat under section 4 of the Act. A number of factors, including litigation and the Services' experiences over the years in interpreting and applying the statutory definition of ''critical habitat,'' highlighted the need to clarify or revise the regulations. This final rule (this document) amends 50 CFR part 424. It is published under RINs 1018–AX86 and 0648–BB79 and may be found on *http://www.regulations.gov* at Docket No. FWS–HQ–ES–2012–0096 or at Docket No. NOAA–NMFS–2014–0093.
- A final policy pertaining to exclusions from critical habitat and how we consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process. This final policy complements the revised regulations at 50 CFR part 424 and clarifies expectations regarding critical habitat, and provides for a more predictable and transparent exclusion process. The policy is published under RIN 1018–AX87 and 0648–BB82 and may be found on *http://www.regulations.gov* at Docket No. FWS–R9–ES–2011–0104.

Background

The Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), states that the purposes of the Act are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions. Moreover, the Act states that it is the policy of Congress that the Federal Government will seek to conserve threatened and endangered species, and use its authorities to further the purposes of the Act.

In passing the Act, Congress viewed habitat loss as a significant factor contributing to species endangerment. Habitat destruction and degradation have been a contributing factor causing the decline of a majority of species listed as threatened or endangered species under the Act (Wilcove *et. al.* 1998). The present or threatened destruction, modification, or curtailment of a species' habitat or range is included in the Act as one of the factors on which to base a determination of threatened or endangered species status. One of the tools provided by the Act to conserve species is the designation of critical habitat.

The purpose of critical habitat is to identify the areas that are essential to the species' recovery. Once critical habitat is designated, it can contribute to the conservation of listed species in several ways. Specifying the geographic location of critical habitat facilitates implementation of section 7(a)(1) of the Act by identifying areas where Federal agencies can focus their conservation programs and use their authorities to further the purposes of the Act. Designating critical habitat also helps focus the conservation efforts of other conservation partners, such as State and local governments, nongovernmental organizations, and individuals. Furthermore, when designation of critical habitat occurs near the time of listing, it provides a form of early conservation planning guidance (*e.g.,* identifying some of the areas that are needed for recovery, the physical and

biological features needed for the species' life history, and special management considerations or protections) to bridge the gap until the Services can complete recovery planning.

In addition to serving as an educational tool, the designation of critical habitat also provides a significant regulatory protection—the requirement that Federal agencies ensure, in consultation with the Services under section 7(a)(2) of the Act, that their actions are not likely to destroy or adversely modify critical habitat. The Federal Government, through its role in water management, flood control, regulation of resources extraction and other industries, Federal land management, and the funding, authorization, and implementation of myriad other activities, may propose actions that are likely to affect critical habitat. The designation of critical habitat ensures that the Federal Government considers the effects of its actions on habitat important to species' conservation and avoids or modifies those actions that are likely to destroy or adversely modify critical habitat. This benefit is especially valuable when, for example, species presence or habitats are ephemeral in nature, species presence is difficult to establish through surveys (*e.g.,* when a plant's ''presence'' is sometimes limited to a seed bank), or protection of unoccupied habitat is essential for the conservation of the species.

The Secretaries of the Interior and Commerce (the ''Secretaries'') share responsibilities for implementing most of the provisions of the Act. Generally, marine and anadromous species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior. Authority to administer the Act has been delegated by the Secretary of the Interior to the Director of FWS and by the Secretary of Commerce to the Assistant Administrator for Fisheries.

There have been no comprehensive amendments to the Act since 1988, and no comprehensive revisions to part 424 of the implementing regulations since 1984. In the years since those changes took place, the Services have gained considerable experience in implementing the critical habitat requirements of the Act, and there have been numerous court decisions regarding the designation of critical habitat.

On May 1, 2012, the Services finalized the revised implementing regulations related to publishing textual descriptions of proposed and final critical habitat boundaries in the **Federal Register** for codification in the Code of Federal Regulations (77 FR 25611). That final rule revised 50 CFR 424.12(c) to make the process of designating critical habitat more user-friendly for affected parties, the public as a whole, and the Services, as well as more efficient and cost effective. Since the final rule became effective on May 31, 2012, the Services have continued the publication of maps of proposed and final critical habitat designations in the **Federal Register**, but the inclusion of any textual description of the designation boundaries in the **Federal Register** for codification in the Code of Federal Regulations is optional. Because we revised 50 CFR 424.12(c) separately, we do not discuss that paragraph further in this final rule.

On August 28, 2013, the Services finalized revisions to the regulations for impact analyses of critical habitat (78 FR 53058). These changes were made as a result of the President's February 28, 2012, Memorandum, which directed us to take prompt steps to revise our regulations to provide that the economic analysis be completed and made available for public comment at the time of publication of a proposed rule to designate critical habitat. These revisions also state that the impact analysis should focus on the incremental effects resulting from the designation of critical habitat. Because we have revised 50 CFR 424.19 separately, we do not discuss that section further in this final rule.

Summary of Comments and Recommendations

In the proposed rule published on May 12, 2014 (79 FR 27066), we requested that all interested parties submit written comments on the proposal by July 11, 2014. We also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties, and invited them to comment on the proposal. We did not receive any requests for a public hearing. We did receive several requests for an extension of the public comment period, and on June 26, 2014 (79 FR 36284), we extended the public comment period to October 9, 2014. All substantive information provided during the comment periods has either been incorporated directly into this final determination or addressed in the more specific response to comments below.

General Issues

(1) Comment: Several commenters, including several States, provided edits to the proposed regulation.

Our Response: We have reviewed the edits provided and, where appropriate, we have incorporated them into this final regulation. The more specific comments and edits are addressed below.

(2) Comment: Several comments stated that the proposed changes to the regulation would vastly expand the area of critical habitat designation, in direct conflict with using the critical habitat designation as a conservation tool.

Our Response: The proposed changes to the regulation are not likely to vastly expand the areas included in any particular critical habitat designation. Many commenters focused on the inclusion of unoccupied areas or perception that the proposed changes expand the Services' authority to include such areas in a critical habitat designation. Section 3(5)(A) of the Act expressly allows for the consideration and inclusion of unoccupied habitat in a critical habitat designation if such habitat is determined to be essential for the conservation of the species. However, the existing implementing regulations state that such unoccupied habitat can be considered only if a determination is made that the Service(s) cannot recover the species with the inclusion of only the ''geographical area presently occupied'' by the species, which is generally understood to refer to habitat occupied at the time of listing (50 CFR 424.12(e)). As discussed in the proposed rule, we have determined that the provision is an unnecessary and redundant limitation on the use of an important conservation tool. Further, we have learned from years of implementing the critical habitat provisions of the Act that a rigid step-wise approach, *i.e.,* first designating all occupied areas that meet the definition of ''critical habitat'' (assuming that no unoccupied habitat is designated) and then, only if that is not enough, designating essential unoccupied habitat may not be the best conservation strategy for the species and in some circumstances may result in a designation that is geographically larger, but less effective as a conservation tool. Our proposed change will allow us to consider the inclusion of occupied and unoccupied areas in a critical habitat designation following any general conservation strategy that has been developed for the species. In some cases (*e.g.,* wide ranging species like the spotted owl or lynx), we have found and expect that we will continue to find that the inclusion of all occupied habitat in a designation does not support the best conservation strategy for a species. We expect that the concurrent evaluation of occupied and unoccupied areas for a

critical habitat designation will allow us to develop more precise and deliberate designations that can serve as more effective conservation tools, focusing conservation resources where needed and minimizing unnecessary regulatory burdens.

(3) Comment: Several commenters including one State noted that recovery planning and critical habitat designation are two different processes. A commenter also asked how the Services will ''infer'' that unoccupied areas will eventually become necessary for recovery given that recovery plans do not exist at the time of listing and when it is not appropriate to designate unoccupied areas that are essential for recovery.

Our Response: While we agree that the designation of critical habitat and the recovery planning processes are different and guided by two separate provisions of the Act and implementing regulations, the ultimate goal of developing effective conservation tools and measures to recover a listed species is the same. A general draft conservation strategy or criterion that informs the construction of a critical habitat designation is often developed in consultation with staff working in recovery planning and implementation to ensure collaboration, consistency, and efficiency as the Services work with the public and partners to recover a listed species.

We have replaced the word ''infer'' with the word ''determine'' in our preambular discussion to be clearer. We will determine from the record and based on any existing conservation strategy for the species if any unoccupied areas are likely to become necessary to support the species' recovery. In order to designate unoccupied areas, we are required by section 3(5)(A) of the Act to determine that such areas are essential for the conservation of the species.

(4) Comment: Several commenters stated that this attempt by the Services to expand their own discretion and authority without congressional authorization is neither justified nor lawful.

Our Response: The amended regulations do not expand the Services' discretion. Rather, they clarify the existing process by which we designate critical habitat based on lessons learned over many years of implementing critical habitat and relevant case law. The amendments synchronize the language in the implementing regulations with that in the Act to minimize confusion, and clarify the discretion and authority that Congress provided to the Secretaries under the Act. The Services are exercising their discretion to resolve ambiguities and fill gaps in the statutory language, and the amended regulations are a permissible interpretation of the statute.

(5) Comment: Several commenters were concerned that the changes would lead to extensive litigation because the Services failed to establish clear, measurable, and enforceable criteria for what should or should not be considered ''habitat'' for a given species, let alone whether an area should or should not be considered critical habitat under the Act.

Our Response: The amended regulations do not substantially change the manner in which critical habitat is designated. Rather, the amendments primarily clarify how the Services already have been developing critical habitat designations. We have set forth criteria in the final rule below. We will also refine, to the extent practicable, and articulate the specific criteria used for identifying which features and areas are essential to the conservation of a species and the subsequent development of a critical habitat designation for each species (using the best scientific data available) in the proposed and final critical habitat rules. Our intent is to be more transparent about how we define the criteria and any generalized conservation strategy that may have been used in the development of a critical habitat designation to provide for a more predictable and transparent critical habitat designation process.

(6) Comment: Several commenters stated that the Services have misled stakeholders and effectively failed to provide adequate notice and opportunity for public comment. The comments assert that we should withdraw our proposal, republish it with a more accurate and clear summary of the changes to the regulations and their implications, and provide further opportunity for public comment.

Our Response: The Services have not misled stakeholders. We initially provided a 60-day public comment period on the proposed rule.In response to public comments requesting an extension, we extended the comment period for an additional 90 days. This followed extensive coordination and discussion with potentially affected Federal agencies, States, and stakeholders and partners, as well as formal interagency review under Executive Order 12866. We also held subsequent calls and extensive webinars with many stakeholders to further inform them about the proposed rule and address any questions or concerns they may have had at the time. This satisfies the Services obligation to provide notice and comment under the Act and the Administrative Procedure Act (APA).

(7) Comment: Several tribes commented that traditional ecological knowledge should constitute the best scientific data available and be used by the Services.

Our Response: Traditional ecological knowledge (TEK) is important and useful information that can inform us as to the status of a species, historical and current trends, and threats that may be acting on it or its habitat. The Services have often used TEK to inform decisions under the Act regarding listings, critical habitat, and recovery. The Act requires that we use the best scientific and commercial data available to inform decisions to list a species and the best scientific data available to inform designation of critical habitat, and in some cases TEK may be the best data available. The Services cannot determine, as a general rule, that TEK will be the best available data in every rulemaking. However, we will consider TEK along with other available data, weighing all data appropriately in the decision process. We will explain the sources of data, the weight given to various types of data, and how data are used to inform our decision. Further, any data, including TEK, used by the Services to support a listing determination or in the development of a critical habitat designation may be subject to disclosure under the Freedom of Information Act (FOIA).

(8) Comment: One State strongly advised the Services to withdraw the **Federal Register** notice and form a Policy Advisory group on the issue. The Western Governors' Association requested that the rule be reworked in cooperation with Western States and utilize State data to reach a more legally defensible result and to foster partnerships.

Our Response: We appreciate the interest by the State and Western Governors' Association to form a policy advisory group and work collaboratively with the Services. However, the Services have already coordinated with States, Federal agencies, and partners to develop the amended regulations, and do not agree that a Policy Advisory group is necessary. The Services have relied on input from States and other entities, as well as lessons we have learned from implementing the provisions for critical habitat under the Act, to make the regulations consistent with the statute, codify our existing practices, and provide greater clarity and flexibility to designate critical habitat so that it can be a more effective conservation tool. We will continue

working collaboratively with Federal, State, and private partners to ensure that our critical habitat designations are based on the best available scientific information and balance the conservation needs of the species with the considerations permitted under section 4(b)(2).

Scope and Purpose (Section 424.01)

(9) Comment: Several commenters including several States suggested that we retain the words ''where appropriate'' to qualify the reference to designation or revision of critical habitat as it is a phrase of limiting potential. Some commenters suggested that we replace the words with ''unless deemed imprudent'' to better clarify the intention of this proposed change.

Our Response: As discussed in our proposal, the phrase ''where appropriate'' was misleading and implied a greater flexibility than the Services have regarding whether to designate critical habitat. The Services have the discretion not to designate critical habitat only for species listed prior to 1978 for which critical habitat has not previously been designated or where an explicit determination is made that designation is not prudent. Based on our experiences with designating critical habitat, a determination that critical habitat is not prudent is rare. Removing the phrase ''where appropriate'' still allows the Services to determine that critical habitat is not prudent for a species if such determination is supported by the best available scientific information. Replacing it with the phrase ''unless deemed imprudent'' implies that not prudent determinations are common, which is not our intent. Deleting ''where appropriate'' provides the necessary clarification concerning the discretion the Services have in determining when to designate critical habitat.

(10) *Comment:* Several commenters suggested that we add the words ''at the appropriate time'' in place of the words ''where appropriate'' to qualify the reference to designation or revision of critical habitat in § 424.01(a).

Our Response: The Services are required under section 4(a)(3)(A) of the Act to designate critical habitat, to the maximum extent prudent and determinable, at the time a species is listed. The inclusion of the phrase ''at the appropriate time'' and the implication that the Services have flexibility regarding the timing of the designation process runs counter to the statutory text.

Definitions

(11) Comment: Several commenters including one State asked us to keep the definitions for ''critical habitat,'' ''endangered species,'' ''plant,'' ''Secretary,'' ''State Agency,'' and ''threatened species'' in the regulation for the purpose of transparency and clarity because they are core definitions in the authorizing statute and are important terms in the regulations.

Our Response: These terms are defined in the Act itself, thus repeating them verbatim in the implementing regulations is redundant and does not resolve any ambiguity.

(12) Comment: Several commenters were concerned that the addition of the phrase ''*i.e.,* the species is recovered'' to the definition of ''conserve, conserving, and conservation'' to explain the point at which the measures provided under the Act are no longer necessary resulted in a higher standard for conservation than is warranted. Others commented that the Services are implying that conservation of critical habitat is equated to meeting recovery goals.

Our Response: The use of ''recovered'' in the definition of ''conserve, conserving, and conservation'' does not introduce a new standard for conservation. Rather, it clarifies the existing link between conservation and recovery. Conservation is the use of all methods and procedures that are necessary to bring any species to the point at which measures provided by the Act are no longer necessary. Recovery is improvement in the status of listed species to the point at which listing is no longer appropriate. Also see our response to comment 2.

(13) Comment: One commenter stated that if the ''*i.e.,* the species is recovered'' is added to the definition of ''conserve, conserving, and conservation,'' then the Services should also add the phrase ''or extinct'' since these examples describe when the action of conservation (a set of methods and procedures) are not necessary anymore.

Our Response: ''Conserve, conserving, and conservation'' is defined in the Act as 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 pursuant to this Act are no longer necessary. Extinction does not meet this definition because extinct species have not been brought to the point at which listing is no longer necessary. Our regulations at § 424.11(d) state that a species may be delisted for one or more of the following reasons: (1) Extinction; (2) Recovery; (3) Original data for classification in error. Each of these is a separate category, and only recovered species have reached the recovered state contemplated by the definition of ''conserve, conserving, and conservation.'' (See our response to comment 12).

(14) Comment: Several commenters stated that proposing to define ''geographical area occupied by the species'' is an amendment to the definition in the Act and is illegal.

Our Response: The Act does not define the phrase ''geographical area occupied by the species.'' The Services may develop, clarify, and revise regulations implementing the provisions of a statute, provided that our interpretations do not conflict with or exceed the authority provided by the statute. Since there has been considerable confusion as to the specific area and scale the phrase refers to, we find that it is important to provide a reasonable and practicable definition for this phrase based on what we have learned over the many years of implementing critical habitat under the Act. Providing this definition will clarify how we designate critical habitat and which areas are considered occupied at the time of listing.

(15) Comment: Several States commented that the definition of ''geographical area occupied by the species'' provides no objective criteria, which will only lead to further confusion and more litigation. One State requested that we abandon the definition. Several States offered revised language.

Our Response: The Services are defining the term ''geographical area occupied by the species'' because the phrase is found in the Act but is not defined in the Act's regulations, and because there has been considerable confusion over the proper interpretation of the phrase. We have clearly stated and explained the definition in our proposal. Further, we will specify the criteria used for identifying which features and areas are essential to the conservation of a species and the subsequent development of a critical habitat designation for each species (using the best scientific data available) in the proposed and final rules for a particular critical habitat designation. Our intent is to be more clear and transparent about how we define the criteria and any generalized conservation strategy that may have been used in the development of a critical habitat designation to enhance its use as a conservation tool.

(16) Comment: One State commented that ''regular or consistent use'' is a hallmark of a finding of occupied habitat, and should be required by the

''geographical area occupied by the species'' definition, not excluded. The State pointed to the decision in *Arizona Cattle Growers' Ass'n* v. *Salazar,* 606 F.3d 1160 (9th Cir. 2010), in which the court upheld the application of the Service's definition of occupied habitat for the Mexican spotted owl as ''areas that the owl uses with sufficient regularity that it is likely to be present during any reasonable span of time.'' Another State similarly commented that the use of the term ''even if not used on a regular basis'' in the definition of geographical area occupied by the species will now enable the Services to designate critical habitat within areas infrequently used by a species.

Our Response: We respectfully disagree with the commenter that the definition of ''geographical area occupied by the species'' should be limited to only those areas in which the use by the species is ''regular or consistent.'' As discussed at length in our proposal, we find that the phrase ''geographical area occupied by the species'' should also include areas that the species uses on an infrequent basis such as ephemeral or migratory habitat or habitat for a specific life-history phase. We find that this more inclusive interpretation is consistent with legislative history and *Arizona Cattle Growers' Ass'n* v. *Salazar,* 606 F.3d 1160 (9th Cir. 2010), and congressional intent. Additionally, based on our experience of implementing the provisions of critical habitat for many years, we have found that there has been considerable confusion and differing interpretations of this phrase. Our intent through the definition provided in our proposal was to provide greater clarity regarding how we interpret the phrase and the general scale at which we define occupancy. We give examples in the rule of areas such as migratory corridors, seasonal habitats, and habitats used periodically (but not solely by vagrant individuals). We will use the best scientific data available to determine if such areas occur for a species. Each species' life cycle is different and the details of such areas, if they exist, would be explained in the proposed and final rules designating critical habitat for a particular species. These areas would also have to meet the criteria for occupied areas in the definition of critical habitat found in the Act.

(17) Comment: One commenter stated that the definition of ''geographical area occupied by the species'' fails to include paragraph 3(5)(C) from the Act: ''Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.''

Our Response: The regulatory definition is intended to clarify how we interpret the phrase, not to repeat the language of the statute. Further, paragraph 3(5)(C) in the Act, applies to the geographic area that *can* be occupied by a species, as opposed to the geographic area actually occupied by the species.

(18) Comment: Several commenters including several States stated that the definition of ''geographical area occupied by the species'' provides unlimited discretion and authority to the Secretary to determine the boundaries and size of the critical habitat area.

Our Response: While we agree that the Secretaries are afforded significant discretion and authority to define and designate critical habitat, we respectfully disagree with the commenter that the discretion and authority is unlimited. First, critical habitat is to be defined and designated based on the best scientific data available. Second, we have learned from years of implementing the critical habitat provisions of the Act that often a rigid step-wise approach, *i.e.,* first designating all occupied areas that meet the definition of ''critical habitat'' (assuming that no unoccupied habitat is designated) and then, only if that is not enough, designating essential unoccupied habitat, may not be the best conservation strategy for the species and in some circumstances may result in a designation that is geographically larger, but less effective as a conservation tool. By providing a definition of ''geographical areas occupied by the species'' along with the other revisions and clarifications in our proposal, we can be more precise and deliberate in the development of our critical habitat designations following any general conservation strategy that has been developed for the species. Lastly, we are still bound by paragraph 3(5)(C) (see response to Comment 17 above).

(19) Comment: Several commenters asked, ''What standards will be in place to substantiate that such areas are used as part of a species' life cycle and not just an individual vagrant's life cycle'' in the definition of ''geographical area occupied by the species.'' Several States also commented that the vagrant animal exception in the rule is vague and subject to varying interpretations because no definition of ''vagrant'' is provided.

Our Response: As stated in our proposed rule, vagrant individuals are species who wander far from the known range of the species. We will use the best scientific data available to determine whether an area is used by a species for part of its life cycle versus an individual vagrant's life cycle. The basis for our determination on this point will be articulated in our proposed and final rules designating critical habitat for a particular species and subject to public review and comments, as well as peer review.

(20) Comment: Several commenters suggested that we add the word ''regularly'' to the sentence ''Such areas may include those areas used *regularly* throughout all or part of the species' life cycle'' in the definition of ''geographical area occupied by the species.''

Our Response: The suggested addition would conflict with the second part of the sentence, in which we state ''even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).'' If the best scientific data available indicates that these areas are used periodically during some portion of the listed species' life history, then these areas should be considered in the development of a critical habitat designation.

(21) Comment: Several commenters questioned what would happen to the size, shape, and location of critical habitat areas that were designated in areas that were not regularly used as conditions change and travel corridors shift or breeding areas move.

Our Response: As discussed in our proposal and throughout this final rule, critical habitat is to be based on the best scientific data available, and to the maximum extent prudent and determinable promulgated concurrent with the listing of a species. Often at the time of listing when we are developing a designation of critical habitat for a species, we may have only limited data concerning the distribution of the species, its life-history requirements, and other factors that can inform the identification of features or specific areas essential to the conservation of the species. Such limited data may still be the best scientific data available. The Services are required in a proposed and final designation of critical habitat to clearly articulate what data are being used and the criteria for defining the specific essential features and areas. The Services must also allow for public review and comments on the proposal to ensure public involvement in the process and provide as much clarity and transparency as possible. The designation of critical habitat results in a regulation in which the boundaries of critical habitat for a species are defined. These boundaries can be changed only

through rulemaking. Thus, if habitat changes following a designation, such that those specific areas no longer meet the definition of ''critical habitat,'' the areas within the boundaries of critical habitat are still critical habitat until such time as a revision to the designation is promulgated. Any interested party may file a petition with the Services to request revision of a critical habitat designation.

(22) Comment: A number of commenters, including several States, asserted that the proposed definition of ''geographical area occupied by the species'' is so vague it could lead to huge areas of unoccupied and potentially unsuitable habitat being designated as critical habitat that would result in the public or the regulated community having no consistency.

Our Response: The proposed definition would not lead to more expansive critical habitat designations. We do not designate areas that are occupied at the time of listing unless those areas have one or more of the physical or biological features present that are essential to the conservation of the species and may require special management considerations or protection. Any unoccupied habitat at the time of listing could only be designated critical habitat under section 3(5)(A)(ii) of the Act, which requires a determination by the Secretary that such areas are essential for the conservation of the species. Further, we will articulate the specific criteria used for identifying which features and areas are essential to the conservation of a species during the subsequent development of a critical habitat designation for each species (using the best scientific data available) in the proposed and final rules designating critical habitat for that species. Our intent is to be more clear and transparent about how we define the criteria for designation and how in the development of a critical habitat designation we use any generalized conservation strategy that may have been developed for the species. The proposed rule would inform the public, including landowners and businesses, of our critical habitat designation and allow them time to review and provide comments.

(23) Comment: Two States commented that the Services have justified the new definition of ''geographical area occupied by the species'' by misrepresenting the court's decision in *Otay Mesa Property L.P.* v. *DOI,* 646 F.3d 914 (D.C. Cir. 2011), *reversing* 714 F. Supp. 2d 73 (D.D.C. 2010). The States contend that we asserted that the D.C. Circuit's decision supported our interpretation, even though a thorough review of the decision reveals the court did not hold or find that the Act allows the Services to make a post-listing determination of occupancy if based on adequate data, simply because the court did not decide that particular issue.

Our Response: We agree that the D.C. Circuit did not hold or find that the ESA allows the Services to make a post-listing determination of occupancy. Our proposed rule, however, did not assert that the *circuit court* opinion supported our interpretation. Instead, the proposed rule correctly noted that the *district court* opinion supported our interpretation. *See* 714 F. Supp. 2d at 83 (''The question, therefore, is not whether FWS knew in 1997, when it listed the San Diego fairy shrimp as endangered, that there were San Diego fairy shrimp on Plaintiffs' property but, rather, whether FWS reasonably concluded, based on data from 2001, that the shrimp had been on the property in 1997.''). Because that decision was reversed by the D.C. Circuit, however, we needed to explain what effect that D.C. Circuit's decision had on the district court opinion with respect to this issue. Because the D.C. Circuit reversed the district court's opinion on other grounds (*i.e.,* that the evidence in the record was inadequate), the D.C. Circuit did not address the interpretive issue of whether later data can support a determination of occupancy at the time of listing. Thus, we stated, accurately, that the D.C. Circuit ''did not disagree'' with this aspect of the district court's opinion. We did not mean to suggest that the D.C. Circuit had considered and affirmed this aspect of the district court's opinion.

(24) Comment: One State commented that the Service's reliance on the decision in *Arizona Cattle Growers' Assoc.* v. *Salazar,* 606 F.3d 1160 (9th Cir. 2010), to expand the definition of ''occupied'' is misplaced because the Services oversimplify and misstate the court's ruling. The State provided additional detail regarding the court's analysis, noting a variety of factors that the court suggested were relevant to a case-by-case determination of occupancy, and the court's emphasis on reasonableness.

Our Response: None of the detail provided by the State is inconsistent with our summary of the holding: ''a determination that a species was likely to be temporarily present in the areas designated as critical habitat was a sufficient basis for determining those areas to be occupied, even if the species was not continuously present.''

(25) Comment: One commenter asserted that the ''physical or biological features'' definition has too many if and if/then scenarios that appear too scientifically attenuated to serve as an appropriate basis for critical habitat designations.

Our Response: In defining physical and biological features, we provided examples of types of features and conditions that we have found to be essential to certain species based on experience over many years of designating critical habitat for a wide variety of species. The determination of specific features essential to the conservation of a particular species will be based on the best scientific data available and explained in the proposal to designate critical habitat for that species, which will be available for public comment and peer review.

(26) Comment: Several States commented that the new definition of ''physical or biological features'' is excessively broad and completely unnecessary. They stated that the new definition goes too far and allows the Services to include areas that do not currently have any essential physical or biological features necessary for a species; they asserted that the original language of the Act provides enough latitude to allow for ephemeral, essential habitat requirements. Two States also asked the Services to more clearly define the phrase ''reasonable expectation'' found in the preamble discussion (''the Services could conclude that essential physical or biological features exist in a specific area . . . if there were documented occurrences of the particular habitat type in the area and a reasonable expectation of that habitat occurring again'').

Our Response: Because the term ''physical or biological features'' is not defined in the Act, the Services clarify how they have been using this term. A ''reasonable expectation'' would be based on the best scientific data available showing that the habitat has a temporal or cyclical nature in that in some years particular habitat elements may not be present, but the record indicates that, once certain conditions are met, the habitat will recur and be used by the species.

(27) Comment: One State contended that the Services support the new definition of ''physical or biological features'' with a flawed interpretation of the opinion in *Cape Hatteras Access Preservation Alliance* v. *DOI,* 344 F. Supp. 2d 108 (D.D.C. 2004). According to the State: That opinion does not justify expanding the meaning and breadth of the phrase; the Services should withdraw the definition because the Services cite no authority for making

such a change and thus lack any justification for doing so; the Court explicitly rejected the Service's attempt to broaden the scope of critical habitat designation; and the Services should not attempt to expand their authority by circumventing the Federal courts.

Our Response: The district court rejected the U.S. Fish and Wildlife Service's critical habitat designation for the piping plover as including lands that did not currently contain the features defined in the rule, but noted that it was not addressing whether dynamic land capable of supporting plover habitat can itself be one of the physical or biological features essential to the conservation of the plover. The court noted that the Service had not made that assertion in the context of the piping plover designation. To address this unintentional gap, we are setting out our interpretation as part of the framework regulations. This new definition clarifies that features can be dynamic or ephemeral habitat characteristics. We clearly state in the rule that an area within the geographical area occupied by the species, with habitat that is not ephemeral by nature but that has been degraded in some way, must have one or more of the features at the time of designation to be critical habitat.

(28) Comment: Several commenters recommended that the Services separately define ''physical features'' and ''biological features'' to provide greater clarity.

Our Response: The Act refers to ''physical or biological features,'' so it is not necessary to define them separately. We find that the definition provided in the draft proposal along with the examples and accompanying explanation provides sufficient clarity and that separately defining these terms in the final regulation would not be helpful. However, the Services must clearly articulate, in proposed and final rules designating critical habitat for a particular species, which physical or biological features are essential to the conservation of the species and the basis for that critical habitat.

(29) Comment: Several commenters suggested that we remove ''at a scale determined by the Secretary to be appropriate'' and add ''for a specific unoccupied area to be designated as critical habitat, it must be reasonably foreseeable that (1) such area will develop the physical and biological features necessary for the species and (2) such features will be developed in an amount and quality that the specific area will serve an essential role in the conservation of the species.''

Our Response: We determine whether unoccupied areas are essential for the conservation of the species by considering the best available scientific data regarding the life-history, status, and conservation needs of the species, which include considerations similar to those raised by the commenter. However, we do not agree that the specific findings suggested by the commenter either are required under the statute or are useful limitations for the Services to impose on themselves. Further, our rationale for why unoccupied areas are essential for the conservation of the species will be articulated in the proposed rule designating critical habitat for a particular species and available for public review and comment. Finally, we decline to remove the language ''at a scale determined by the Secretary to be appropriate because we have concluded that it is useful to clarify that different circumstances will require different scales of analysis, and the Secretary retains the discretion to choose an appropriate scale.

(30) Comment: A commenter suggested that we add the phrase ''based on the best scientific data available'' after the word ''appropriate'' in ''the Secretary will identify, at a scale determined by the Secretary to be appropriate'' in § 424.12(b)(2). The commenter further stated that this provides a reference to the scientific basis on which the Secretary will determine this scale.

Our Response: The phrase ''based on the best scientific data available'' is captured in § 424.12(b)(1)(ii). Under section 4(b)(2) of the statute, it also states that the Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available. It would be redundant to add the phrase to the section the commenter has suggested. Nevertheless, as stated above, the Secretary's choice of scale will be based on the best available scientific data.

(31) Comment: A commenter suggested that we replace the phrase ''conservation needs of the species'' with ''physical or biological features'' in § 424.12(b)(2). The commenter stated that the phrase ''conservation needs of the species'' is undefined and adds ambiguity to the regulation.

Our Response: Section 424.12(b)(2) refers to the designation of critical habitat in unoccupied areas. Under section 3(5)(A)(ii) of the statute, unoccupied areas are subject only to the requirement that the Secretary determine that such areas are essential for the conservation of the species. The presence of physical or biological features is not required by the statute for the inclusion of unoccupied areas in a designation of critical habitat. Incorporating the edit suggested by the commenter would limit Secretarial discretion in a way inconsistent with the statute by mandating the presence of essential features as a prerequisite to inclusion of unoccupied areas in a critical habitat designation. Therefore, it would be inappropriate to use the term ''physical or biological features'' in this section.

(32) Comment: Several commenters stated that the Services' claim that they may designate acres or even square miles without evidence that those areas contain features essential to the conservation of the species is contrary to the Act. Two States commented that the scale of critical habitat should not be left to the Secretary's absolute discretion and must be chosen and justified at a scale that both makes sense in terms of the habitat needs of the species and is fine enough to demonstrate that the physical or biological features are found in each specific area of occupied habitat. One State also provided revised language for § 424.12(b)(1) by replacing ''at a scale determined by the Secretary to be appropriate'' with ''at a scale consistent with the geographical extent of the physical or biological features essential to the species' conservation.''

Our Response: We state in the proposed regulation that the Secretary need not determine that each square inch, yard, acre, or even mile independently meets the definition of critical habitat. However, setting out defined guidelines for the scale of an analysis in regulations would not be practicable for the consideration of highly diverse biological systems and greatly differing available data. Each critical habitat designation is different in terms of area proposed, the conservation needs of the species, the scope of the applicable Federal actions, economic activity, and the scales for which data are available. Additionally, the scale of the analysis is very fact specific. Therefore, the Services must have flexibility to evaluate these different areas in whatever way is most biologically and scientifically meaningful. For example, for a narrow-endemic species, a critical habitat proposal may cover a small area; in contrast, for a wide-ranging species, a critical habitat proposal may cover an area that is orders of magnitude greater. The appropriate scale for these two species may not be the same. For the narrow-endemic species, we may look at a very fine scale with a great level of detail. In contrast, for the wide-ranging

species, which may cover wide expanses of land or water, we may use a coarser scale, due to the sheer size of the proposed designation. Each critical habitat proposal includes a description of the scope of the area being proposed, and uses a scale appropriate to that situation based on the best scientific data available. The suggested language would not allow for the Secretarial discretion that is needed to be flexible to meet the conservation needs of the species. The proposed rule designating critical habitat for a particular species is made available for public review and comment, and interested parties may comment on the scale for a specific designation.

(33) Comment: Several commenters stated that, in reaching this determination, the Services appear to conflate disparate terminology (specific areas versus occurrences) and rely upon a vague term (range) that does not adequately delineate what geographic areas are actually occupied by a species. Several commenters also requested additional explanation of the term ''range.''

Our Response: Under section 3(5)(A)(i) of the Act, specific areas designated as critical habitat include those specific areas within the geographical area occupied by the species at the time the species is listed. As discussed in our proposal and this final rule, the geographical area that may generally be delineated around the species' occurrences is synonymous with the species' range. The term ''range'' used in our proposal refers to the general area currently occupied by the species at the time the listing determination is made. These areas are occupied by the species throughout all or part of the species' life cycle, even if not used on a regular basis. Some examples we give are migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals. This scale of occupancy is different from a very narrow or limited delineation of areas of occupancy identified through presence and absence surveys for localized occurrences of the species. We, therefore, disagree that we are using a vague term in referring to range.

(34) Comment: Several commenters including one State stated that by defining the geographical area occupied by the species as coextensive with the ''range'' and including multiple areas of occurrence, the Services are expanding the geographic extent of occupied habitat beyond the limits of judicial interpretation. They suggested we should define the area occupied by the species as limited to the specific location where the species occurs on a regular or consistent basis.

Our Response: We have indicated that the geographical area occupied by the species is likely to be larger than the specific areas that would then be analyzed for potential designation under section 3(5)(A)(i). We are not suggesting that the specific areas included in critical habitat should fill this area. To limit the definition to specific locations where the species occurs on a regular or consistent basis would not allow the Secretaries to designate areas that may be important for the conservation of a listed species that may only be periodically used by a species, such as breeding areas, foraging areas, and migratory corridors, thereby limiting Secretarial discretion.

(35) Comment: One State asked if the range in the geographical area occupied by the species definition refers to the historical range or the currently occupied range.

Our Response: The term ''range'' as indicated in our proposal refers to the generalized area currently occupied by the species at the time the listing determination is made, not the historical range.

(36) Comment: One State also wanted to know if land-use restrictions within the geographical area occupied by the species would be put into place in addition to the designated critical habitat.

Our Response: The revised regulations would not result in any change to land-use restrictions beyond the existing regulatory requirements under section 7 of the Act that Federal agencies consult with the Services to ensure that the actions they carry out, fund, or authorize are not likely to destroy or adversely modify critical habitat (see the final rule published elsewhere in today's **Federal Register**). The Act provides no special regulatory protections for those areas within the geographic area occupied by the species that are not designated as critical habitat, although the section 7 prohibition on jeopardy and the section 9 prohibitions may still be applicable.

(37) Comment: Several States disagree with the Services' interpretation of the definition of ''occupied.'' This interpretation and inclusion of ''periodic or temporary'' areas will lead to a much larger consideration of critical habitat that is largely unnecessary for species recovery.

Our Response: Identifying the geographic area occupied at the time of listing is only the first step in designating critical habitat. In occupied areas, we can only designate critical habitat if one or more of the physical or biological features are present and are found to be essential to the conservation of the species and may require special management considerations or protection. The inclusion of periodic or temporary areas would be based on the best scientific data available for the species and these areas would have to meet the criteria above.

(38) Comment: Several commenters asked what constitutes being ''temporarily present?'' The Services should explain that occupied areas require a demonstration of regular or consistent use within a reasonable period of time. One State commented that the Services should clarify the meaning of the terms ''periodically'' and ''temporarily'' to provide adequate guidance and set reasonable limits for potential critical habitat designations.

Our Response: We will use the best scientific data available to determine occupied areas including those that are used only periodically or temporarily by a listed species during some portion of its life history. This will be determined on a species-by-species basis, and our rationale would be explained in the proposed and final rules for these species, which would be available for public review and comment.

(39) Comment: Several commenters, including two States, were concerned about using ''indirect or circumstantial'' evidence to determine occupancy and questioned whether this qualified as the best scientific data available. One of the commenters asserted that the Services should only designate areas as occupied based on scientific evidence (including traditional and local knowledge) that breeding, foraging, or migratory behaviors actually occur in that location on a regular or consistent basis.

Our Response: The Services will rely on the best scientific data available in determining which specific areas were occupied at the time of listing and which of these contain the features essential to the conservation of the species. The best available scientific data in some cases may only be indirect or circumstantial evidence. We will explain in the proposed rule designating critical habitat for a particular species if and how such evidence was used to determine occupancy and will provide the public with an opportunity to review and comment.

(40) Comment: Several commenters, including two States, asked us to define and explain ''life-history needs.''

Our Response: We give a sample list of life-history needs in the rule. This list includes but is not limited to water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. The

life-history needs are what the species needs throughout its different life stages to survive and thrive.

(41) Comment: One State commented that the term ''sites'' in the definition of ''physical or biological features'' is wholly ambiguous and must be defined, explained, or deleted.

Our Response: We included the term ''sites'' in the definition of physical or biological features to keep the same level of specificity as currently is called for in the regulations, and our current regulations list ''sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal'' among the examples of primary constituent elements that might be specified (50 CFR 424.12(b)(4)). The term ''sites'' does not need to be defined or further explained because we rely on a plain dictionary meaning of ''site'': The place, scene, or point of an occurrence or event (Merriam-Webster, 2015).

(42) Comment: One State suggested that we simplify the ''physical or biological features'' definition as follows: ''Geographic or ecological elements within a species' range that are essential to its survival and reproduction, whether single or in combination, or necessary to support ephemeral habitats. Features may be described in conservation biology terms, including patch size and connectivity.''

Our Response: We appreciate the State providing edits to simplify the phrase; however, based on our years of experience designating critical habitat and implementing it, we find that the text in our proposal and this final rule will provide greater clarity.

(43) Comment: Several commenters, including one State, indicated that we needed a more specific delineation of what features may be considered and how they relate to the needs of the species.

Our Response: We respectfully disagree with the commenters that further clarification should be added in this revised regulation. However, we do agree that we need to clearly articulate in our proposed and final rules designating critical habitat for each species how the essential features relate to the life-history and conservation needs of the species. This type of specificity will be in the individual proposed and final rules designating critical habitat for each species. As is our general practice, we will clearly lay out the features and how they relate to the needs of the species in each rule.

(44) Comment: Several commenters asked us to clarify the distinction, if any, between features that support the life-history needs of the species and features that are essential to the conservation of the species.

Our Response: Our definition of physical or biological features is the first step, and we do not assume that all features are essential. In many circumstances the features that support life-history needs of the species are the features that are essential to the conservation of the species. The features that are essential to the conservation of the species are those found in the appropriate quality, quantity, and spatial and temporal arrangements in the context of the life history, status, and conservation needs of the species. This varies according to the species. For example, for a small, endemic species the features that support the life-history needs may be essential themselves, but for a wide-ranging species what rises to the level of essential features may rely more on the quality, quantity, and arrangement of those features.

(45) Comment: Several commenters sought an explanation for how the requisite physical and biological features would be identified, documented, and verified during the critical-habitat-designation process.

Our Response: We use the best scientific data available to determine the life-history needs of the species. The essential physical or biological features support the life-history and conservation needs of the species. A description of the essential features for each species and how they relate to its life-history and conservation needs will be articulated in the proposed and final rules designating critical habitat for a particular species. This description of the essential features, as well as the designation that is based on them, will be available for public review and comment during the rulemaking process.

(46) Comment: Several commenters stated that the description of the relevant features cannot be in broad terms, but must be specific enough to limit critical habitat to the most ''essential areas'' and help provide an understanding of what the species actually requires to return from the brink of extinction.

Our Response: When evaluating occupied habitat, we agree that the statute requires us to determine which areas contain physical or biological features essential to the conservation of the species (that may require special management considerations or protection). In every proposed and final rule designating critical habitat for a particular species, we describe those features that we have determined to be essential and explain the basis for our determination. However, we respectfully disagree that broadly described features are necessarily inappropriate. The level of specificity in our description of the features is primarily determined by the state of the best scientific information available for that species. We will provide as much specificity as is appropriate in light of what is known about the species' habitat needs, while recognizing that the available science may still be evolving for that species. Where the available information is still evolving, it may not be possible or necessary to provide a high level of specificity, and it may frustrate the conservation purposes of the Act to attempt to do so. *See Arizona Cattle Growers' Ass'n* v. *Kempthorne,* 534 F. Supp. 2d 1013, 1025 n.2 (D. Ariz. 2008), *aff'd sub nom. Arizona Cattle Growers' Ass'n* v. *Salazar,* 606 F.3d 1160 (9th Cir. 2010).

Finally, we must disagree with the commenter's suggestion that in identifying essential features the Services must identify what the species' actually requires to return from ''the brink of extinction.'' Critical habitat is generally required for threatened species as well as endangered species. Moreover, the Services are not required to have developed a recovery plan prior to designating critical habitat for any species. *Home Builders Ass'n of Northern Cal.* v. *U.S. Fish and Wildlife Service*, 616 F.3d 983, 989–90 (9th Cir. 2010). Our determinations of which features are ''essential'' thus depend on an understanding of the species' habitat needs rather than on a specific projection of how the species could be recovered.

(47) Comment: Several commenters stated that the plain language of the Act limits the scope of any designated area to those features essential to the species, and does not authorize the designation of areas that may include those subsidiary characteristics that are essential for the development of the features themselves.

Our Response: We respectfully disagree and interpret the statutory language not to limit ''features'' to those habitat characteristics that make habitat immediately usable by the species. In other words, the physical or biological features referred to in the definition of ''critical habitat'' can include features that allow for the periodic development of habitat characteristics immediately usable by the species. An interpretation of ''features'' that referred only to immediately usable habitat would render many essential areas ineligible for designation as critical habitat, thwarting Congress's intent that designation of critical habitat should contribute to species' conservation.

We will use the best scientific data available to identify features essential to the conservation of the species and clearly identify how they relate to the life-history and conservation needs of the species. When considering what features are essential, it is sometimes necessary to allow for the dynamic nature of the habitat, such as successional stages of habitat, which could consist of old-growth habitat or habitat newly formed through disturbance events such as fire or flood events. Thus, the physical or biological features essential to the conservation of the species may include features that support the occurrence of ephemeral or dynamic habitat conditions. The example we gave in the proposed rule was a species that may require early-successional riparian vegetation in the Southwest to breed or feed. Such vegetation may exist only 5 to 15 years after a local flooding event. The necessary features, then, may include not only the suitable vegetation itself, but also the flooding events, topography, soil type, and flow regime, or a combination of these characteristics and the necessary amount of the characteristics that can result in the periodic occurrence of the suitable vegetation. The flooding event would not be a subsidiary characteristic as suggested by the commenter, but would itself be a feature necessary for the vegetation to return. So in this case, it would be a combination of features, flooding, and vegetation that would be necessary to the conservation of the species.

(48) Comment: Several commenters, including two States, were concerned that designating critical habitat based on the presence of certain characteristics that may be necessary to eventually support the periodic occurrence of riparian vegetation, without evidence that the vegetation would actually develop, constitutes an impermissible reliance upon hope and speculation. They further stated that the Services must go through a separate inquiry determining why it is reasonably foreseeable to conclude that the potential critical habitat will develop the physical or biological features at some point in the future.

Our Response: We will use the best scientific data available to support the identification of features essential to the conservation of the species and clearly identify how they relate to the life-history and conservation needs of the species. When considering what features are essential, it is sometimes necessary to allow for the dynamic nature of the habitat, such as successional stages of habitat, which could consist of old-growth habitat or habitat newly formed through disturbance events such as fire or flood events. This does not constitute reliance on mere hope or speculation but is based on an understanding of the relevant ecological processes. We also disagree with the characterization of this situation as involving ''potential critical habitat'' that ''will develop the physical or biological features at some point in the future.'' Properly understood, the essential features would currently exist in these areas, even though they may not be currently manifesting the shorter-term habitat conditions immediately usable by the species. Such areas may currently meet the definition of ''critical habitat'' and not be merely ''potential critical habitat.''

(49) Comment: Several commenters stated that the Services' position that ''most circumstances'' require ''special management'' is inconsistent with congressional intent to narrow the definition of ''critical habitat'' to require a very careful analysis of what is actually needed for survival of the species. Several commenters, including two States, also indicated that the Services must continue to make the factual determination that special management is needed as required by the Act.

Our Response: We make the determination and describe the special management considerations or protections that may be needed in the proposed and final rules designating critical habitat for each critical habitat area. However, it has been our experience that, in most circumstances, the physical or biological features essential to the conservation of endangered species may require special management considerations or protection in all areas in which they occur. This is particularly true for species that have significant habitat-based threats, which is the case for most of our listed species. The statute directs us to identify the essential physical or biological features which ''may require'' special management considerations or protection, a standard that suggests we should be cautious and protective. We do acknowledge that if in some areas the essential features clearly do not require special management considerations or protection, then that area does not meet this part (section 3(5)(A)(i)) of the definition of ''critical habitat.'' However, we expect based on our experience with designating critical habitat that these circumstances will be rare. In our proposed and final critical habitat rules, we will continue to make factual determinations as to whether special management considerations or protection may be required.

(50) Comment: Several States commented that the new interpretation of ''special management considerations or protection'' set out in the preamble appears to presume that areas covered by existing protection plans will actually be more likely to be designated as critical habitat, and could act as a disincentive to implementing voluntary pre-designation conservation initiatives, in direct contravention to recent Services' policies attempting to incentivize voluntary conservation.

Our Response: We respectfully disagree. We are directed by the Act to identify areas that meet the definition of ''critical habitat'' (*i.e.,* occupied areas that contain the essential physical or biological features that may require special management considerations or protection and unoccupied areas that are essential for the conservation of a species) without regard to land ownership. We also make the determination and describe the special management considerations or protections that may be needed in the proposed and final rules for each critical habitat area. The consideration of whether features in an area may require special management considerations or protection occurs independent of whether any form of management or protection occurs in the area. This does not preclude the Services from considering the exclusion of these areas under section 4(b)(2) of the Act based on conservation programs, plans, and partnerships prior to issuing the final critical habitat rule.

(51) Comment: Several commenters stated that the Services cannot designate critical habitat based on the general assertions that the area contains the essential physical or biological features. Instead, the Services must demonstrate that the relevant features are found within a specific area.

Our Response: In the first part of the definition of ''critical habitat'' in the Act, we are required to identify specific areas within the geographical area occupied by the species at the time it is listed on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection. In our proposed and final critical habitat rules, we identify which features occur in the area, the basis on which we are identifying them as essential features, including how they provide for the life-history and conservation needs of the species, and whether they may require special management considerations or

protection. These rules will be available for public review and comment.

(52) Comment: Several commenters suggested that we remove ''principles of conservation biology'' from the definition of ''physical and biological features.''

Our Response: We respectfully disagree. The sentence ''Features may also be expressed in terms of relating to principles of conservation biology, such as patch size, distribution distances, and connectivity'' explains more clearly how we may identify the features. The principles of conservation biology are generally accepted among the scientific community and consistently used in species-at-risk status assessments and development of conservation measures and programs.

(53) Comment: Several commenters requested that we add language delineating the area ''around'' the species occurrences, either by using a distance or a reference to the species' natural functions in the geographic area definition.

Our Response: We are unable to determine a universal distance or a reference to the species' natural functions that would be applicable to all species. This analysis and determination is best left to the specific critical habitat rulemaking for a given species. In those proposed and final rules, we can be specific for each species based on its life-history needs and more precisely define the geographical area occupied by the species. The rules will be available for public review and comment.

(54) Comment: Several commenters, including one State, indicated that the proposed § 424.12(b)(2) and deletion of current § 424.12(e) would relieve the Services of any requirements that they justify the designation of unoccupied habitat by demonstrating the inadequacies of occupied habitat for the conservation of the species. They further stated that this was a major departure in the law regarding designation of critical habitat.

Our Response: We respectfully disagree. The proposed rule clearly explains that the Act does not require the Services to first prove that the occupied areas are insufficient before considering unoccupied areas. The regulatory provision at 424.12(e) merely restated the requirement from the statutory definition in a different way. We will still explain based on the best scientific data available, why the unoccupied areas are essential for the conservation of the species.

(55) Comment: Several commenters pointed out that we use ''no longer necessary'' in the new definition of ''conserve, conserving, and conservation'' and the words ''no longer appropriate'' in the definition of ''recovery'' in 50 CFR 402.02. The commenters asserted that these are two different standards and that we should pick one of them.

Our Response: The words ''no longer necessary'' are used in the statutory definition of ''conserve, conserving, and conservation'' in the Act. The rule simply points out that the concept described in the statutory language is equivalent to ''recovery.'' That term is defined in § 402.02, which we are not revising at this time.

(56) Comment: Several commenters stated that the National Marine Fisheries Service's interpretation of the phrase ''which interbreeds when mature'' was upheld by the Ninth Circuit in *Modesto Irr. Dist.* v. *Gutierrez,* 619 F.3d 1024 (9th Cir. 2010), and that the Act also requires that a group of organisms must interbreed when mature to qualify as a distinct population segment (DPS), which is in contrast to the Services' interpretation of the phrase in the proposed rule.

Our Response: We respectfully disagree that our interpretation of ''interbreeds when mature'' is at odds with the ruling in *Modesto Irrigation District.* In that case, the Ninth Circuit did not hold that actual interbreeding among different populations is required in order to include such populations in a single DPS. To the contrary, the court made it clear that Congress did not intend to create a ''rigid limitation'' on the Services' discretion to define DPSs. On the ''narrow issue'' of whether the ESA or the DPS Policy *required* that NMFS place interbreeding steelhead and rainbow trout in the same DPS, the court deferred to NMFS's judgment that there was no such requirement. *Id.* at 1037. While NMFS did state in the challenged rule that ''[t]he ESA requirement that a group of organisms must interbreed when mature to qualify as a DPS is a necessary but not exclusive condition'' (71 FR 834, 838 (Jan. 5, 2006)), nothing in the rule suggested that NMFS's position was that *actual* interbreeding among disparate populations was required, and that biological capacity to interbreed would not be sufficient.

(57) Comment: Several commenters stated that the Services did in fact revise the regulations in our discussion of ''interbreeds when mature'' by inserting the phrase ''A distinct population segment ''interbreeds when mature'' when it consists of members of the same species or subspecies in the wild that are capable of interbreeding when mature'' to the definition of a ''species.'' They further stated that this was an Administrative Procedure Act violation and that the phrase should be removed in the final rule.

Our Response: The commenters are correct that we proposed to amend the definition of ''species.'' In the preamble we wrote, ''Finally, we explain our interpretation of the meaning of the phrase 'interbreeds when mature,' which is found in the definition of 'species.' . . . Although we are not proposing to revise the regulations at this time, we are using this notice to inform the public of our longstanding interpretation of this phrase.'' Our intent was to explain how we have interpreted the phrase, but by inadvertently including this interpretation in the regulatory language of the proposed rule, we in fact were proposing to change the definition of ''species'' to insert, ''A distinct population segment 'interbreeds when mature' when it consists of members of the same species or subspecies in the wild that are capable of interbreeding when mature.'' We have removed the proposed language from the definition of ''species'' in this final rule and left only the language in the preamble. The Services are not amending the definition.

(58) Comment: A commenter suggested that the Services clarify the meaning of ''being considered by the Secretary'' in the definition of the term ''candidate.'' The commenter suggested that the final rule substitute the more narrow definition found in the FWS candidate species fact sheet, which states: ''Candidate species are plants and animals for which the U.S. Fish and Wildlife Service has sufficient information on their biological status and threats to propose them as endangered or threatened under the Endangered Species Act, but for which development of a proposed listing regulation is precluded by other higher priority listing activities.''

Our Response: We agree with the commenter that the statement in the FWS candidate fact sheet is an appropriate meaning of the phrase ''being considered by the Secretary'' found in the definition of candidate. We emphasize that we did not change the definition of ''candidate'' in this regulation.

Criteria for Designating Critical Habitat

(59) Comment: The Western Governors' Association requested that the Services provide a thorough, data-based explanation of the basis for the determination that areas outside the range occupied at the time of listing are or will be essential habitat.

Our Response: Under section 3(5)(A)(ii) of the Act, to designate as critical habitat specific areas that are outside the geographical area occupied by the species at the time the species is listed, the Services must determine that the areas are essential for the conservation of the species. This determination must be based on the best scientific data available concerning the particular species and its conservation needs. When the Services propose to designate specific areas pursuant to section 3(5)(A)(ii), they have under the existing regulations and will under the revised regulations explain the basis for the determination, including the supporting data. Thus, the Services' explanation will be available for public comment.

(60) Comment: Several commenters, including one State, were concerned that the essential areas in unoccupied areas may not even be suitable for the species and that this is an erroneous and unreasonable interpretation of an otherwise clear statutory statement and should be withdrawn.

Our Response: Section 3(5)(A)(ii) of the Act expressly allows for the consideration and inclusion of unoccupied habitat in a critical habitat designation if such habitat is determined to be essential for the conservation of the subject species. These areas do not have to contain the physical or biological features and are not subject to a finding that they may require special management considerations or protection. This is in contrast to what is required under the first part of the definition of ''critical habitat'' (section 3(5)(A)(i) of the Act) for areas occupied at the time of listing.

(61) Comment: Several commenters stated that the Services may only properly make a ''not prudent'' finding if there is specific information that increased poaching would result from designating critical habitat.

Our Response: We respectfully disagree with the commenters' assertion. The current regulations (49 FR 38900; October 1, 1984, and at 50 CFR 424.12(a)(1)) allow for a determination that critical habitat is not prudent for a species if such designation would: (1) Increase the degree of threat to the species through the identification of critical habitat, or (2) not be beneficial to the species. The determination that critical habitat is not prudent for a listed species is uncommon, especially given that most species are listed, in part, because of impacts to their habitat or curtailment of their range. Most ''not prudent'' findings have resulted from a determination that there would be increased harm or threats to a species through the identification of critical habitat. For example, if a species was highly prized for collection or trade, then identifying specific localities of the species could render it more vulnerable to collection and, therefore, further threaten it. However, in some circumstances, a species may be listed because of factors other than threats to its habitat or range, such as disease, and the species may be a habitat generalist. In such a case, on the basis of the existing and revised regulations, it is permissible to determine that critical habitat is not beneficial and, therefore, not prudent. It is also permissible to determine that a designation would not be beneficial if no areas meet the definition of ''critical habitat.''

(62) Comment: Several commenters inquired about whether the Services would revise the regulations to provide greater flexibility in defining a greater breadth of circumstances where a determination can be made that the designation of critical habitat for a species is not beneficial to its conservation and, therefore, not prudent.

Our Response: As noted above, it is permissible under the current and revised regulations to determine that designating critical habitat for a species is not beneficial and, therefore, not prudent. The text of these revised regulations further clarifies the non-exclusive list of factors the Services may consider in evaluating whether designating critical habitat is not beneficial. The inclusion of ''but not limited to'' to modify the statement ''the factors the Services may consider include'' allows for the consideration of alternative fact patterns where a determination that critical habitat is not beneficial would be appropriate. We think it is important to expressly reflect this regulatory flexibility in the revised regulations. Nonetheless, based on the Services' history of implementing critical habitat, we anticipate that making a not-prudent determination on any fact pattern will be rare.

(63) Comment: One State commented that the Services dropped the word ''probable'' from the revised § 424.12(a) when talking about economic impacts and that the word should be retained in the final rule.

Our Response: We agree and have retained the word ''probable'' in this final rule. It is consistent with the revised final regulation in 50 CFR 424.19 (78 FR 53058) and our draft policy on exclusions under section 4(b)(2) of the Act. We note that in this context the term ''probable'' means reasonably likely to occur.

(64) Comment: Several commenters recommended adding after the word ''threat'' in the second sentence to § 424.12(a)(1)(ii), the words ''sufficient to warrant listing the species as threatened or endangered.''

Our Response: While we agree with the commenters' intent, we find that adding the phrase would be redundant because we would only be making a determination as to whether critical habitat is prudent if the species was either being proposed for listing simultaneously or is already listed.

(65) Comment: Several commenters thought the Services should simply delete § 424.12(a)(1)(ii) instead of expanding it. They further stated that the Act does not require that a species currently be threatened by habitat loss before critical habitat is designated and protected, and the spirit of the Act would not be served by the imposition of such a requirement by regulation.

Our Response: Critical habitat is a conservation tool under the Act that can provide for the regulatory protection of a species' habitat. The current regulations and the proposed revisions do not establish a requirement that a species be threatened by the modification, fragmentation, or curtailment of its range for critical habitat to be beneficial and, therefore, prudent to designate. However, the regulation and revisions establish a framework whereby if a species is listed under the Act and it is determined through that process that its habitat is not limited or threatened by destruction, modification, or fragmentation, then it may not be beneficial or prudent to designate critical habitat. While this provision is intended to reduce the burden of regulation in rare circumstances in which designating critical habitat does not contribute to conserving the species, the Services recognize the value of critical habitat as a conservation tool and expect to designate it in most cases.

(66) Comment: Several commenters stated that § 424.12(a)(2) is not consistent with the plain meaning of the Act and should be deleted from the final rule. They stated the proposed minor word changes did not improve the situation.

Our Response: The minor word changes to § 424.12(a)(2) are meant to make the language more consistent with the language in the Act. This section is necessary to inform the public as to the circumstances in which the Services will make a not-determinable finding on critical habitat and thereby invoking the 1-year extension of section 4(b)(6)(C)(ii) of the Act. 16 U.S.C. 1533(b)(6)(C)(ii).

(67) Comment: A commenter stated that when the Services deem critical habitat as not determinable due to a lack of data for habitat analyses or lack of knowledge on biological needs of the species, the Services should regularly check for new data and/or make efforts to collect necessary data and move forward with critical habitat designations. One State also commented that critical habitat designations should only be made based on the best available scientific data and information, and in instances where data or information is lacking, the Services have an obligation to delay a designation until such time that sufficient information is acquired.

Our Response: Finding that critical habitat is not determinable only invokes a 1-year extension of the deadline for finalizing a critical habitat designation under section 4(b)(6)(C)(ii) of the Act. 16 U.S.C. 1533(b)(6)(C)(ii). At the conclusion of the year, the Services must move forward with the designation and have no authority under the Act to further delay designation (unless we determine that designation is not prudent). We agree that critical habitat designations must only be made based on the best scientific data available as required by the Act. If we initially do not have enough data to make a critical habitat determination, then we can invoke the 1-year extension allowed under the Act. The Services use that time to gather additional data. At the end of the 1-year extension, the Services must use the best scientific data available to make the critical habitat determination.

(68) Comment: One State suggested that climate change is more appropriately addressed during a 5-year status review and the critical habitat revision process than trying to attempt to accommodate future critical habitat by predicting areas necessary to support the species' recovery. It further asserted that the Services' proposed authority to designate areas that are currently unoccupied and which are not now necessary to support the species' recovery, but may eventually become necessary, is a vast expansion of the critical habitat program and contrary to the focus in the Act on current habitat conditions.

Our Response: We agree that 5-year status reviews and the critical habitat revision process can play important roles regarding the conservation needs of a species in response to habitat changes resulting from climate change. However, the statute as written allows for sufficient flexibility to address the effects of climate change in a critical habitat designation, and, therefore, the clarifications provided in our proposal and this final rule do not expand the Services' authority. There have been specific circumstances, as discussed in our proposal, where data have been available showing the shift in habitat use by a species in response to the effects of climate change. In those cases where the best scientific data available indicate that a species may be shifting habitats or habitat use, then it is permissible to include specific areas accommodating these changes in a designation, provided that the Services can explain why the areas meet the definition of ''critical habitat.'' Although some such instances are based on reasonable predictions of how habitat will be used by the species in the future, they are based on determinations that the areas are currently essential to the species. In other words, we may find that an unoccupied area is currently ''essential for the conservation'' even though the functions the habitat is expected to provide may not be used by the species until a point in the foreseeable future. The data and rationale on which such a designation is based will be clearly articulated in our proposed rule designating critical habitat. The Services will consider whether habitat is occupied or unoccupied when determining whether to designate it as critical habitat and use the best available scientific data on a case-by-case basis regarding the current and future suitability of such habitat for recovery of the species, and when developing conservation measures.

(69) Comment: Several commenters requested clarification of new § 424.12(e) with regard to the differences in the way the Services handle designation of critical habitat for species listed prior to the 1982 amendments to the Act versus species listed after the 1982 amendments.

Our Response: If the Services designate critical habitat for species listed prior to the 1982 amendments, the designation is procedurally treated like a revision of existing critical habitat even if critical habitat was never designated. Thus, the Services have additional options at the final rule stage with regard to a proposal to designate critical habitat for those species listed prior to 1982 that they do not have when proposing to designate habitat for other species. These include an option to make a finding that the revision ''should not be made'' and to extend the 12-month deadline by an additional period of up to 6 months if there is substantial disagreement regarding the sufficiency or accuracy of available data (see 16 U.S.C. 1533(b)(6)(B)(i)).

(70) Comment: Several commenters, including two States, indicated that removing references to ''primary constituent elements'' dramatically and unnecessarily expands the scope of critical habitat and confuses instead of clarifies critical habitat designation, leading to more litigation.

Our Response: Removing references to ''primary constituent elements'' from the regulation will not result in expansion of the scope of critical habitat. Removing this phrase is not intended to substantively alter anything about the designation of critical habitat, but to eliminate redundancy in how we describe the physical or biological features. The phrase ''primary constituent element'' is not found in the Act and the regulations have never been clear as to how primary constituent elements relate to or are distinct from physical or biological features essential to the conservation of the species, which is the phrase used in the Act. In fact, the removal of the phrase ''primary constituent elements'' will alleviate the tension caused by trying to understand the relationship between the phrases. The specificity of the primary constituent elements that has been discussed in previous designations will now be discussed in the descriptions of the physical or biological features essential to the conservation of the species.

(71) Comment: Several commenters including several States were opposed to elimination of § 424.12(e) as this section is necessary and intentionally limiting and is an accurate implementation of the statutory definition and Congressional intent. Several commenters also questioned that when the Services promulgated § 424.12(e) in 1980, that we explained in the preamble to that rule that the limitation in § 424.12(e) was intended to ''implement the statutory requirement'' that unoccupied areas may be designated ''only if necessary to ensure the conservation of the species.'' The Services do not address this prior interpretation at all, or explain why a rule that it once enacted as necessary to implement a statutory requirement is now unnecessary.

Our Response: We respectfully disagree. Section 424.12(e) did not allow us to designate unoccupied areas unless a designation limited to its present range (occupied) would be inadequate to ensure the conservation of the species. As we stated in the proposed rule, there is no suggestion in the legislative history that the Services were expected to exhaust occupied habitat before considering whether any unoccupied areas may be essential.

Further, section 3(5)(A) of the Act expressly allows for the consideration and inclusion of unoccupied habitat in a critical habitat designation if such habitat is determined to be essential for the conservation of the subject species. There is no specific language in the Act that requires the Services to first prove that the inclusion of all occupied areas in a designation are insufficient to conserve the species before considering unoccupied areas. However, the existing implementing regulations state that such unoccupied habitat could only be considered if a determination was made that the Service(s) could not recover the species with the inclusion of only the occupied habitat.

We have learned from years of implementing the critical habitat provisions of the Act that often a rigid step-wise approach, *i.e.,* first designating all occupied areas that meet the definition of ''critical habitat'' (assuming that no unoccupied habitat is designated) and then, only if that is not enough, designating essential unoccupied habitat, does not necessarily serve the best conservation strategy for the species and in some circumstances may result in a designation that is geographically larger, but less effective as a conservation tool. Our proposed change will allow us to consider the inclusion of occupied and unoccupied areas in a critical habitat designation following at minimum a general conservation strategy for the species. In some cases, we have and may continue to find, that the inclusion of all occupied habitat in a designation does not support the best conservation strategy for a species. We expect that the concurrent evaluation of occupied and unoccupied areas for a critical habitat designation will allow us to develop more precise and deliberate designations that can serve as more effective conservation tools. Additionally, there is no specific language in the Act that requires the Services to first prove that the inclusion of all occupied areas in a designation are insufficient to conserve the species before considering unoccupied areas. The statutory language is sufficiently clear that it does not need explanation in the revised regulation, and, moreover, to the extent that the 1980 regulation language differs from the statutory language, it does not add any clarity.

(72) Comment: Several commenters, including one State, disagreed that unoccupied areas need not have the features essential to the conservation of the species and that the Services propose to unlawfully write this statutory requirement out of the Act. The State also pointed out that the Services' current position on this issue is distinctly contrary to the position the Services took in 1984 when the existing regulations were adopted.

Our Response: Under the second part of the definition of ''critical habitat'' in the Act (section 3(5)(A)(ii)), the Services are to identify specific areas outside the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species. In contrast to section 3(5)(A)(i), this provision does not mention physical or biological features, much less require that the specific areas contain the physical or biological features essential to the conservation of the species. These are two clearly distinct provisions. The unoccupied areas do not have to presently contain any of the physical or biological features, which is not a change from the way we have been designating unoccupied critical habitat *(see, e.g., Markle Interests* v. *USFWS,* 40 F. Supp. 3d 744 (E.D. La. 2014)*).*

(73) Comment: One State recommended that the Services develop a policy or metric to determine whether a particular area should be designated as critical habitat in unoccupied areas.

Our Response: This final rule explains the Services' general parameters for designating critical habitat. The details of why a specific area is determined to be essential to the conservation of the species will in part be directed by any generalized conservation strategy developed for the species, and clearly articulated in our proposed and final rules designating critical habitat. That determination is a fact-specific analysis and is based on the best available scientific data for the species and its conservation needs. The proposed rule for each critical habitat designation will be subject to public review and comment.

(74) Comment: A commenter suggested that the Services designate enough critical habitat at the time of listing to ensure that a species can recover.

Our Response: In evaluating which areas qualify as critical habitat and specific areas finalized (subject to section 4(b)(2) exclusions, see final policy published elsewhere in today's **Federal Register**), we follow the statutory requirements to identify those occupied areas that contain the physical or biological features essential to the species' conservation that may require special management considerations or protection and any unoccupied areas that we determine to be essential for the species' conservation. Designation of critical habitat is one important tool that contributes to recovery, but a critical habitat designation alone may not be sufficient to achieve recovery. Indeed, given the limited regulatory role of a critical habitat designation (*i.e.,* through section 7's mandate that Federal agencies avoid destruction or adverse modification of critical habitat, see final rule published elsewhere in today's **Federal Register**), it is generally not possible to look to a critical habitat designation alone to ensure recovery. Also, we must designate critical habitat according to mandatory timeframes, very often prior to development of a formal recovery plan. *See Home Builders Ass'n of Northern Cal.* v. *U.S. Fish and Wildlife Servic*e, 616 F.3d 983, 989–90 (9th Cir. 2010). However, although a critical habitat designation will not necessarily ensure recovery, it will further recovery because the Services base the designation on the best available scientific information about the species' habitat needs at the time of designation. The best available information will include any generalized conservation strategy or criteria that may have been developed for the species in consultation with staff working in recovery planning and implementation to ensure collaboration, consistency, and efficiency as the Services work with the public and partners to recover a listed species.

(75) Comment: A commenter stated that the proposed rule clarifies that the Services have the discretion to designate critical habitat for species listed before 1978, but does not specify when that discretion would be used. The commenter requested that the Services identify guidelines or standards for judging when to designate critical habitat for pre-1978 species.

Our Response: Whether to exercise discretion to designate critical habitat for species listed prior to 1978 is a case-specific determination dependent on the conservation needs of the species, scientific data available, and the resources available for additional rulemaking. Guidelines on this point could limit Secretarial discretion and may not allow for sufficient flexibility in furthering the conservation of a species.

(76) Comment: Several commenters were concerned that the Services must commit to using the best scientific data available when designating unoccupied areas as critical habitat.

Our Response: We are mandated by the Act to use (and are committed to using) the best scientific data available in determining any specific areas as critical habitat, regardless of occupancy.

(77) Comment: Several Tribes stated that while the Services readily acknowledge in the proposal their responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis, the proposed revision does nothing to clarify how the Services will carry out this responsibility.

Our Response: These revised regulations set forth our general practice for designating critical habitat, clarify definitions and phrases, and in general align the regulations with the statute. The revised regulations are not intended to be prescriptive in how the Services will implement the provisions or coordinate with federally recognized Tribes that are potentially affected. However, the Services are committed to communicate and coordinate meaningfully and effectively with federally recognized Tribes concerning actions under the ESA, including the development and implementation of critical habitat for species that may occur on their lands. We rely on the requirements of S.O. 3206 to provide the guidance on how the Services will carry out this responsibility. We have often found that the best and most meaningful coordination and collaboration, including fulfilling our responsibilities under S.O. 3206, occurs between our Regional and field offices and a specific Tribe on a particular species.

(78) Comment: Several commenters were opposed to the inclusion of the proposed § 424.12(g), saying the Act makes no distinction between foreign and domestic species and requires that all listed species receive critical habitat unless doing so is not prudent or determinable.

Our Response: We respectfully disagree. Subsection (g) is a continuation of existing subsection (h), which has long codified the Services' understanding that critical habitat should not be designated outside of areas under United States jurisdiction. This interpretation is well supported. The Act makes a distinction between coordination with and implementation of the provisions of the ESA between States and local jurisdictions within the United States versus with foreign countries. Section 4(b)(1)(A), which deals with listing species, provides that the Secretary shall consult, as appropriate, not only with affected States, but also, in cooperation with the Secretary of State, with the country or countries in which the species is normally found. In contrast, section 7 of the ESA does not include a requirement to consult with foreign governments. Further, section 8(b)(1) states that ''the Secretary, through the Secretary of State, shall encourage—(1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 4.'' It is clear that Congress understood the distinction between implementing the ESA within the jurisdiction of the United States and implementing the ESA within the jurisdiction of foreign countries. It then follows that since Congress did not explicitly state that critical habitat shall be designated in foreign countries or that the Secretary consult, as appropriate, with foreign countries on a designation of critical habitat, then the designation of critical habitat is limited to lands within the jurisdiction of the United States.

Justice Stevens approved of the Services' conclusion in his concurrence in *Lujan* v. *Defenders of Wildlife,* 504 U.S. 555 (1992). There, he favorably noted the Service's longstanding interpretation of the limitation of critical habitat designations to areas within the jurisdiction of the United States:

> The Secretary of the Interior and the Secretary of Commerce have consistently taken the position that they need not designate critical habitat in foreign countries. See 42 FR 4869 (1977) (initial regulations of the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of the Interior and the Secretary of Commerce). Consequently, neither Secretary interprets § 7(a)(2) to require federal agencies to engage in consultations to ensure that their actions in foreign countries will not adversely affect the critical habitat of endangered or threatened species.
>
> That interpretation is sound. . . .

Id. at 587 (Stevens, J., concurring).

(79) Comment: One State requested that the Services include a new § 424.12(e) that requires that designation will be made after consultation with the affected States. It would read, ''In designating any area as critical habitat, the Secretary shall consult with affected States (those in which the proposed critical habitat is located or those that may be affected by the designation of the habitat) prior to completing the designation, and the fact of and finding of such consultation shall be addressed in the final rulemaking for the designation.''

Our Response: The suggested new § 424.12(e) is not necessary because section 4(b)(5)(A)(ii) of the Act requires the Secretary to give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction. Further, section 4(i) of the Act requires the Secretary to provide a written justification for adopting regulations in conflict with the agency's comments or for failing to adopt a regulation as requested in a State petition. In addition to these requirements, the Services are committed to continuing to work with the States early in the process to ensure that we are using the best scientific data available.

(80) Comment: One State requested clarification on the application of this regulation to critical habitat designations that are currently under way, but not yet finalized.

Our Response: As indicated in **DATES** above, although effective 30 days from the date of publication, the revised version of § 424.12 will apply only to rulemakings for which the proposed rule is published after that date. Thus, the prior version of § 424.12 will continue to apply to any rulemakings for which a proposed rule was published before that date. However, because many of the revisions merely codify or explain our existing practices and interpretations, we may immediately refer to and act consistent with the amended language of § 424.12 in final rules to which the prior version applies.

(81) Comment: Several commenters objected to the Services' determination that a regulatory flexibility analysis is not required for this regulation, stating the regulated community is affected by this regulation.

Our Response: We respectfully disagree. We interpret the Regulatory Flexibility Act, as amended, to require that Federal agencies evaluate the potential incremental impacts of rulemaking only on those entities directly regulated by the rulemaking itself and, therefore, not on indirectly regulated entities. Recent case law supports this interpretation (*https://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf*, pages 22–23). NMFS and FWS are the only entities that are directly affected by this rule because we are the only entities that designate critical habitat, and this rule pertains to the procedures for carrying out those designations. No external entities, including any small businesses, small organizations, or small governments, will experience any direct economic impacts from this rule.

We understand that there is considerable confusion as to how these revisions to the regulation will change the process for designating critical

habitat, with many thinking it will greatly expand our designations and provide less clarity to the process. We went to great effort in our proposal and further in this final rule to explain that revised regulations will not result in any significant deviation from how the two agencies have been designating critical habitat. Our intent is to codify what we have been doing for many years and provide common-sense revisions based on lessons learned and relevant case law. It is our expectation that these revisions will allow us to develop more precise and deliberate designations that can serve as more effective conservation tools, focusing conservation resources where needed and minimizing regulatory burdens where not necessary. As a consequence, we find, as iterated above, that NMFS and FWS are the only entities directly regulated by these revisions and that an RFA analysis is not required.

(82) Comment: We received several comments that the proposed revised regulations constituted a major Federal action because they will result in significant socioeconomic consequences and these impacts must be analyzed under the National Environmental Policy Act of 1969 (NEPA).

Our Response: As detailed in the REQUIRED DETERMINATIONS section below, we have determined that this action qualifies for a categorical exclusion under both DOI and NOAA governing procedures.

Final Amendments to Regulations
Discussion of Changes to Part 424

This final rule revises 50 CFR 424.01, 424.02, and 424.12 (except for paragraph (c)) to clarify the procedures and criteria used for designating critical habitat, addressing in particular several key issues that have been subject to frequent litigation.

In finalizing the specific changes to the regulations that follow, and setting out the accompanying clarifying discussion in this preamble, the Services are establishing prospective standards only. As indicated in **DATES** above, although effective 30 days from the date of publication, the revised version of § 424.12 will apply only to rulemakings for which the proposed rule is published after that date. Thus, the prior version of § 424.12 will continue to apply to any rulemakings for which a proposed rule was published before that date. However, because many of the revisions merely codify or explain our existing practices and interpretations, we may immediately refer to and act consistent with the amended language of § 424.12 in final rules to which the prior version applies. Nothing in these final revised regulations is intended to require that any previously completed critical habitat designation must be reevaluated on this basis.

Section 424.01 Scope and Purpose

We are making minor revisions to this section to update language and terminology. The first sentence in § 424.01(a) is being revised to remove reference to critical habitat being designated or revised only ''where appropriate.'' This wording implied a greater flexibility regarding whether to designate critical habitat than is correct. Circumstances in which we determine critical habitat designation is not prudent are rare. Therefore, the new language removes the phrase ''where appropriate.'' Other revisions to this section are minor word changes to use more plain language or track the statutory language.

Section 424.02 Definitions

This section of the regulations defines terms used in the context of section 4 of the Act. We are making revisions to § 424.02 to update it to current formatting guidelines, to revise several definitions related to critical habitat, to delete definitions that are redundant with statutory definitions, and to add two newly defined terms. Section 424.02 is currently organized with letters as paragraph designation for each term (*e.g.,* § 424.02(b) *Candidate*). The Office of the Federal Register now recommends setting out definitions in the CFR without paragraph designations. We propose to revise the formatting of the entire section accordingly. Discussion of the revised definitions and newly defined terms follows. We note where these final revisions differ from those set out in the proposed rule.

We note that, although revising the formatting of the section requires that the entirety of the section be restated in the final-amended-regulation section, we are not at this time revisiting the text of those existing definitions that we are not specifically revising, including those that do not directly relate to designating critical habitat. In particular, we are not in this rulemaking amending the definitions of ''plant,'' ''wildlife,'' or ''fish and wildlife'' to reflect changes in taxonomy since the ESA was enacted in 1973. In 1973, only the Animal and Plant Kingdoms of life were universally recognized by science, and all living things were considered to be members of one of these kingdoms. Thus, at enactment, the ESA applied to all living things. Advances in taxonomy have subsequently split additional kingdoms from these two. Any species that was considered to be a member of the Animal or Plant Kingdoms in 1973 will continue to be treated as such for purposes of the administration of the Act regardless of any subsequent changes in taxonomy. We may address this issue in a future rulemaking relating to making listing determinations (as opposed to designating critical habitat). In the meantime, the republication of these definitions here should not be viewed as an agency determination that these definitions reflect the scope of the Act in light of our current understanding of taxonomy.

The current regulations include a definition for ''Conservation, conserve, and conserving.'' We are revising the title of this entry to ''Conserve, conserving, and conservation,'' changing the order of the words to conform to the statute. Additionally, we are revising the first sentence of the definition to include the phrase ''*i.e.,* the species is recovered'' to clarify the link between conservation and recovery of the species. The statutory definition of ''conserve, conserving, and conservation'' is ''to use and the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which measures provided pursuant to the Act are no longer necessary.'' This is the same concept as the definition of ''recovery'' found in § 402.02: ''improvement in the status of listed species to the point at which listing is no longer appropriate.'' The Services, therefore, view ''conserve, conserving, and conservation'' as a process culminating at the point at which a species is recovered.

We are deleting definitions for ''critical habitat,'' ''endangered species,'' ''plant,'' ''Secretary,'' ''State Agency,'' and ''threatened species'' because these terms are defined in the Act and the existing regulatory definitions do not add meaning to the terms.

We also define the previously undefined term ''geographical area occupied by the species'' as: ''the geographical area which may generally be delineated around the species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).'' This term appears in the definition of ''critical habitat'' found in section 3(5)(A)(i) and (ii) of the Act, but is not defined in the Act or in our current regulations. The inclusion of this new

regulatory definition reflects the Services' efforts to clarify the critical-habitat-designation process.

The definition of ''critical habitat'' in the Act has two parts, section 3(5)(A)(i) and (ii), which establish two distinct categories of critical habitat, based on species occupancy in an area at the time of listing. Therefore, to identify specific areas to designate as critical habitat, we must first determine what area constitutes the ''geographical area occupied by the species at the time of listing,'' which is the language used in the Act. The scale of this area is likely to be larger than the specific areas that would then be analyzed for potential designation under section 3(5)(A)(i). This is because the first part of the critical habitat definition in the Act directs the Services to identify ''specific areas within'' the geographical area occupied by the species at time of listing. This intentional choice to use more narrow terminology alongside broader terminology suggests that the ''geographical area'' was expected most often to be a larger area that could encompass multiple ''specific areas.'' Thus, we find the statutory language supports the interpretation of equating the geographical area occupied by the species to the wider area around the species' occurrences at the time of listing. A species' occurrence is a particular location in which members of the species are found throughout all or part of their life cycle. The geographic area occupied by the species is thus the broader, coarser-scale area that encompasses the occurrences, and is what is often referred to as the ''range'' of the species.

In the Act, the term ''geographical area occupied by the species'' is further modified by the clause ''at the time it is listed.'' However, if critical habitat is being designated or revised several years after the species was listed, it can be difficult to discern what was occupied at the time of listing. The known distribution of a species can change after listing for many reasons, such as discovery of additional localities, extirpation of populations, or emigration of individuals to new areas. In many cases, information concerning a species' distribution, particularly on private lands, is limited as surveys are not routinely carried out on private lands unless performed as part of an environmental analysis for a particular development proposal. Even then, such surveys typically focus on listed rather than unlisted species, so our knowledge of a species' distribution at the time of listing in these areas is often limited and the information in our listing rule may not detail all areas occupied by the species at that time.

Thus, while some of these changes in a species' known distribution reflect changes in the actual distribution of the species, some reflect only changes in the quality of our information concerning distribution. In these circumstances, the determination of which geographic areas were occupied at the time of listing may include data developed since the species was listed. This interpretation was supported by a recent court decision, *Otay Mesa Property L.P.* v. *DOI,* 714 F. Supp. 2d 73 (D.D.C. 2010), *rev'd on other grounds,* 646 F.3d 914 (D.C. Cir. 2011) (San Diego fairy shrimp). In that decision, the judge noted that the clause ''occupied at the time of listing'' allows FWS to make a post-listing determination of occupancy based on the currently known distribution of the species in some circumstances. Although the D.C. Circuit disagreed with the district court that the record contained sufficient data to support the FWS' determination of occupancy in that case, the D.C. Circuit did not express disagreement with (or otherwise address) the district court's underlying conclusion that the Act allows FWS to make a post-listing determination of occupancy if based on adequate data. The FWS acknowledges that to make a post-listing determination of occupancy we must distinguish between actual changes to species occupancy and changes in available information. For succinctness, herein and elsewhere we refer to areas as ''occupied'' when we mean ''occupied at the time of listing.''

The second sentence of the definition for ''geographical area occupied by the species'' clarifies that the meaning of the term ''occupied'' includes specific areas that are used only periodically or temporarily by a listed species during some portion of its life history, and is not limited to those areas where the listed species may be found more or less continuously. Areas of periodic use may include, for example, breeding areas, foraging areas, and migratory corridors. The Ninth Circuit recently supported this interpretation by FWS, holding that a determination that a species was likely to be temporarily present in the areas designated as critical habitat was a sufficient basis for determining those areas to be occupied, even if the species was not continuously present. *Arizona Cattle Growers' Assoc.* v. *Salazar,* 606 F.3d 1160 (9th Cir. 2010) (Mexican spotted owl).

Nonetheless, periodic use of an area does not include use of habitat in that area by vagrant individuals of the species who wander far from the known range of the species. Occupancy by the listed species must be based on evidence of regular periodic use by the listed species during some portion of the listed species' life history. However, because some species are difficult to survey or we may otherwise have incomplete survey information, the Services will rely on the best available scientific data, which may in some cases include indirect or circumstantial evidence, to determine occupancy. We further note that occupancy does not depend on identifiable presence of adult organisms. For example, periodical cicadas occupy their range even though adults are only present for 1 month every 13 or 17 years. Similarly, the presence (or reasonably determined presence) of eggs or cysts of fairy shrimp or seed banks of plants constitute occupancy even when mature individuals are not present.

We also finalize a definition for the term ''physical or biological features.'' This phrase is used in the statutory definition of ''critical habitat'' to assist in identifying the specific areas within the entire geographical area occupied by the species that can be considered for designation as critical habitat. We define ''physical or biological features'' as ''the features that support the life-history needs of the species, including but not limited to water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.''

The definition clarifies that physical and biological features can be the features that support the occurrence of ephemeral or dynamic habitat conditions. For example, a species may require early-successional riparian vegetation in the Southwest to breed or feed. Such vegetation may exist only 5 to 15 years after a local flooding event. The necessary features, then, may include not only the suitable vegetation itself, but also the flooding events, topography, soil type, and flow regime, or a combination of these characteristics and the necessary amount of the characteristics that can result in the periodic occurrence of the suitable vegetation. Thus, the Services could conclude that essential physical or biological features exist in a specific area even in the temporary absence of

suitable vegetation, and could designate such an area as critical habitat if all of the other applicable requirements were met and if there were documented occurrences of the particular habitat type in the area and a reasonable expectation of that habitat occurring again.

In *Cape Hatteras Access Preservation Alliance* v. *DOI,* 344 F. Supp. 2d 108, 123 n.4 (D.D.C. 2004), the court rejected FWS' designation for the piping plover as including lands that did not currently contain the features defined by FWS, but noted that it was not addressing ''whether dynamic land capable of supporting plover habitat can itself be one of the 'physical or biological features' essential to conservation.'' The new definition for ''physical or biological features'' clarifies that features can be dynamic or ephemeral habitat characteristics. However, an area within the geographical area occupied by the species, containing habitat that is not ephemeral by nature but that has been degraded in some way, must have one or more of the physical or biological features at the time of designation.

Having defined ''physical or biological features,'' we are also removing the term ''primary constituent element'' and all references to it from the regulations in § 424.12. As with all other aspects of these revisions, this will apply only to future critical habitat designations and is further explained below in the discussion of the changes to § 424.12, where the term is currently used.

We are also revising the definition of ''special management considerations or protection'' which is found in § 424.02. Here we remove the phrase ''of the environment'' from the current regulation. This phrase is not used in this context elsewhere in the regulations or the Act and, therefore, may create ambiguity. We also insert the words ''essential to'' to conform to the language of the Act.

In determining whether an area has essential features that may require special management considerations or protection, the Services do not base their decision on whether management is currently in place or whether that management is adequate. FWS formerly took the position that special management considerations or protection was required only if whatever management was in place was inadequate and that *additional* special management was needed. This position was rejected by the court in *Center for Biological Diversity* v. *Norton,* 240 F. Supp. 2d 1090 (D. Ariz. 2003) (Mexican spotted owl), the only court to address this issue. The Services agree with the conclusion of the court on this point—it is incorrect to read the statute as asking whether *additional* special management considerations or protection may be required. The evaluation of whether features in an area may require special management considerations or protection occurs independent of whether any form of management or protection occurs in the area.

We expect that, in most circumstances, the physical or biological features essential to the conservation of endangered species may require special management in all areas in which they occur, particularly for species that have significant habitat-based threats. However, if in some areas the essential features do not require special management consideration or protection because there are no applicable threats to the features that have to be managed or protected for the conservation of the species, then that area does not meet this part (section 3(5)(A)(i)) of the definition of ''critical habitat.'' Nevertheless, we expect such circumstances to be rare.

Furthermore, it is not necessary that a feature currently *requires* special management considerations or protection, only that it *may require* special management to meet the definition of ''critical habitat.'' 16 U.S.C. 1532(5)(A)(i) (emphasis added). Two district court decisions have emphasized this point. *CBD* v. *Norton* (Mexican spotted owl); *Cape Hatteras Access Preservation Alliance* v. *DOI,* 344 F. Supp. 2d 108 (D.D.C. 2004) (piping plover). The legislative history supports the view that Congress purposely set the standard as ''may require.'' Earlier versions of the bills that led to the statutory definition of ''critical habitat'' used the word ''requires,'' but ''may require'' was substituted prior to final passage. In any case, an interpretation of a statute should give meaning to each word Congress chose to use, and our interpretation gives the word ''may'' meaning.

Finally, we explain our interpretation of the meaning of the phrase 'interbreeds when mature,' which is found in the definition of 'species.' The ''interbreeds when mature'' language is ambiguous (*Modesto Irrigation Dist.* v. *Gutierrez,* 619 F.3d 1024, 1032 (9th Cir. 2010)). Although we are not revising the regulatory definition of ''species'' at this time, we are using this notice to inform the public of our interpretation of this phrase.'' We have always understood the phrase ''interbreeds when mature'' to mean that a DPS consists of members of the same species or subspecies that when in the wild would be biologically capable of interbreeding if given the opportunity, but all members need not actually interbreed with each other. A DPS is a subset of a species or subspecies, and cannot consist of members of different species or subspecies. The ''biological species'' concept, which defines species according to a group of organisms' actual or potential ability to interbreed, and their relative reproductive isolation from other organisms, is one widely accepted approach to defining species. We interpret the phrase ''interbreeds when mature'' to reflect this understanding and to signify only that a DPS must be composed solely of members of the same species or subspecies. As long as this requirement is met, a DPS may include multiple groups of vertebrate organisms that do not actually interbreed with each other. For example, a DPS may consist of multiple groups of a fish species separated into different drainages. While it is possible that the members of these groups do not actually interbreed with each other, their members are biologically capable of interbreeding.

Our intent was to explain how we have interpreted the phrase, but by inadvertently including this interpretation in the regulatory language of the proposed rule, we in fact were proposing to change the definition of ''species'' to insert, ''A distinct population segment 'interbreeds when mature' when it consists of members of the same species or subspecies in the wild that are capable of interbreeding when mature.'' We have removed the proposed language from the definition of ''species'' in this final rule and left only the language in this preamble. We also noticed that we inadvertently left out the word ''Includes'' from the definition of ''species'' in our proposed regulation. We have restored the word ''Includes'' in this final regulation to match the definition of ''species'' found in our 1984 regulation. The Services are not substantively amending the definition at this time.

Section 424.12 Criteria for Designating Critical Habitat

We are revising the first sentence of paragraph (a) to clarify that critical habitat shall be proposed and finalized ''to the maximum extent prudent and determinable . . . concurrent with issuing proposed and final listing rules, respectively.'' The language of the existing regulation is ''shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing.'' We added the words ''proposed and finalized'' to be

consistent with the Act, which requires that critical habitat be finalized concurrent with listing to the maximum extent prudent and determinable. The existing language could be interpreted to mean *proposing* critical habitat concurrent with listing was the only requirement. Additionally, the existing phrase ''shall be specified'' is vague and not consistent with the requirement of the Act, which is to propose and finalize a designation of critical habitat. The last two sentences in paragraph (a) contain minor language changes to use the active voice.

Paragraphs (a)(1) and (a)(1)(i) are not changed.

The first sentence of paragraph (a)(1)(ii) remains the same. However, we add a second sentence to paragraph (a)(1)(ii) to provide examples of factors that we may consider in determining whether a designation would not be beneficial to the species. A designation may not be beneficial and, therefore, not prudent, under certain circumstances, including but not limited to: Whether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or whether no areas meet the definition of ''critical habitat.'' For example, this provision may apply to a species that is threatened primarily by disease but the habitat that it relies upon continues to exist unaltered throughout an appropriate distribution that, absent the impact of the disease, would support conservation of the species. Another example is a species that occurs in portions of the United States and a foreign nation. In the foreign nation, there are multiple areas that have the features essential to the conservation of the species; however, in the United States there are no such areas. Consequently, there are no areas within the United States that meet the definition of ''critical habitat'' for the species. Therefore, there is no benefit to designation of critical habitat, and designation is not prudent.

While this provision is intended to reduce the burden of regulation in rare circumstances in which designation of critical habitat does not contribute to the conservation of the species, the Services recognize the value of critical habitat as a conservation tool and expect to designate it in most cases.

Section 424.12(a)(2) remains unchanged from the current regulation, and subparagraphs (i) and (ii) contain minor language changes to be consistent with the language in the Act.

The Services are completely revising § 424.12(b) of the current regulations. For the reason explained below, we also remove the terms ''principal biological or physical constituent elements'' and ''primary constituent elements'' from this section. These concepts are replaced by the statutory term ''physical or biological features,'' which we define as described above.

The first part of the statutory definition of ''critical habitat'' (section 3(5)(A)(i)) contains terms necessary for (1) identifying specific areas within the geographical area occupied by the species that may be considered for designation as critical habitat and (2) describing which features on those areas are essential to the conservation of species. In addition, current § 424.12(b) introduced the phrase ''primary constituent elements.'' However, the regulations are not clear as to how primary constituent elements relate to or are distinct from physical or biological features, which is the term used in the statute. Adding a term not found in the statute that is at least in part redundant with the term ''physical or biological features'' has proven confusing. Trying to parse features into elements and give them meaning distinct from one another has added an unnecessary layer of complication and confusion during the designation process.

The definition of ''physical or biological features,'' described above, encompasses similar habitat characteristics as currently described in § 424.12(b), such as roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types. Our proposal is intended to simplify and clarify the process, and to remove redundancy, without substantially changing the manner in which critical habitat is designated. The Services still expect to provide a comparable level of detail and specificity in defining and describing physical or biological features essential to the conservation of a species.

Section 424.12(b) describes the process to be used to identify the specific areas to be considered for designation as critical habitat, based on the statutory definition of ''critical habitat.'' With respect to both parts of the definition, the revised regulations emphasize that the Secretary will identify areas that meet the definition ''at a scale determined by the Secretary to be appropriate.'' The purpose of this language is to clarify that the Secretary cannot and need not make determinations at an infinitely fine scale. Thus, the Secretary need not determine that each square inch, square yard, acre, or even square mile independently meets the definition of ''critical habitat.'' Nor will the Secretary necessarily consider legal property lines in making a scientific judgment about what areas meet the definition of ''critical habitat.'' Instead, the Secretary has discretion to determine at what scale to do the analysis. In making this determination, the Secretary may consider, among other things, the life history of the species, the scales at which data are available, and biological or geophysical boundaries (such as watersheds), and any draft conservation strategy that may have been developed for the species.

Under the first part of the statutory definition, in identifying specific areas for consideration, the Secretary must first identify the geographical area occupied by the species at the time of listing. Within the geographical area occupied by the species, the Secretary must identify the specific areas on which are found those physical or biological features (1) essential to the conservation of the species, and (2) which may require special management considerations or protection.

Under § 424.12(b)(1)(i), the Secretary will identify the geographical area occupied by the species using the new regulatory definition of this term. Under § 424.12(b)(1)(ii), the Secretary will then identify those physical and biological features essential to the conservation of the species. These physical or biological features are to be described at an appropriate level of specificity, based on the best scientific data available at the time of designation. For example, physical features might include gravel of a particular size required for spawning, alkali soil for germination, protective cover for migration, or susceptibility to flooding or fire that maintains early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a maximum level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic needed to support the life history of the species. For example, a feature may be a specific type of forage grass that is in close proximity to a certain type of shrub for cover. Because the species would not consume the grass if there were not the nearby shrubs in which to hide from predators, one of these characteristics in isolation would not be an essential feature; the feature that supports the life-history needs of the

species would consist of the combination of these two characteristics in close proximity to each other.

In considering whether features are essential to the conservation of the species, the Services may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. For example, a small patch of meadow may have the native flowers, full sun, and a biologically insignificant level of invasive ants that have been determined to be important habitat characteristics that support the life-history needs of an endangered butterfly. However, that small patch may be too far away from other patches to allow for mixing of the populations, or the meadow may be too small for the population to persist over time. So the area could have important characteristics, but those characteristics may not contribute to the conservation of the species because they lack the appropriate size and proximity to other meadows with similar characteristics. Conversely, the exact same characteristics (native flowers, full sun, and a biologically insignificant level of invasive ants), when combined with the additional characteristics of larger size and short dispersal distance to other meadows, may in total constitute a physical or biological feature essential to the conservation of the species.

Under § 424.12(b)(1)(iii), the Secretary will then determine the specific areas within the geographical area occupied by the species on which are found those physical or biological features essential to the conservation of the species.

Section 424.12(b)(1)(iv) provides for the consideration of whether those physical or biological features may require special management considerations or protection. In this portion of the analysis, the Secretary must determine whether there are any ''methods or procedures useful in protecting physical and biological features for the conservation of listed species.'' Only those physical or biological features that may be in need of special management considerations or protection are considered further. The Services may conduct this analysis for the need of special management considerations or protection at the scale of all specific areas, but they may also do so within each specific area.

The ''steps'' outlined in subparagraphs (i) through (iv) above are not necessarily intended to be applied strictly in a stepwise fashion. The instructions in each subparagraph must be considered, as each relates to the statutory definition of ''critical habitat.'' However, there may be multiple pathways in the consideration of the elements of the first part of the definition of ''critical habitat.'' For instance, one may first identify specific areas occupied by the species, then identify all features needed by a species to carry out life-history functions in those areas through consideration of the conservation needs of the species, and then determine which of those specific areas contain the features essential to the conservation of the species. The determination of which features are essential to the conservation of the species may consider the spatial arrangement and quantity of such features in the context of the life history, status, and conservation needs of the species. In some circumstances, not every location that contains one or more of the habitat characteristics that a species needs will be designated as critical habitat. Some locations may have important habitat characteristics, but are too small to support a population of the species, or are located too far away from other locations to allow for genetic exchange. Considered in context of any generalized conservation strategy that might be developed for the species, § 424.12(b)(1)(i) through (iv) will allow for sufficient flexibility to determine what areas within the geographical area occupied by the species are needed to provide for the conservation of the species.

Occasionally, new taxonomic information may result in a determination that a previously listed species or subspecies is actually two or more separate entities. In such an instance, the Services must have flexibility, when warranted, to continue to apply the protections of the Act to preserve the conservation value of critical habitat that has been designated for a species listed as one listable entity (*i.e.,* species, subspecies, or distinct population segment (DPS)), and which is being reproposed for listing as one or more different listable entities (*e.g.,* when the Services propose to list two or more species, subspecies, or DPSs that had previously been listed as a single entity). Where appropriate (such as where the range of an entity proposed for listing and a previously designated area of critical habitat align), the Services have the option to find, simultaneously with the proposed listing of the proposed entity or entities, that the relevant geographic area(s) of the existing designation continues to apply as critical habitat for the new entity or entities. Such a finding essentially carries forward the existing critical habitat (in whole or in part). Alternatively, the Services have the option to pursue a succinct and streamlined notice of proposed rulemaking to carry forward the existing critical habitat (in whole or in part), which draws, as appropriate, from the existing designation.

More broadly, when applying § 424.12(b)(1) to the facts relating to a particular species, the Services will usually have more than one option available for determining what specific areas constitute the critical habitat for that species. In keeping with the conservation-based purpose of critical habitat, the relevant Service may find it best to first consider broadly what it knows about the biology and life history of the species, the threats it faces, the species' status and condition, and, therefore, the likely conservation needs of the species with respect to habitat. If there already is a recovery plan for that species (which is not always the case and not a prerequisite for designating critical habitat), then that plan would be useful for this analysis.

Using principles of conservation biology such as the need for appropriate patch size, connectivity of habitat, dispersal ability of the species, or representation of populations across the range of the species, the Services may evaluate areas needed for the conservation of the species. The Services must identify the physical and biological features essential to the conservation of the species and unoccupied areas that are essential for the conservation of the species. When using this methodology to identify areas within the geographical area occupied by the species at the time of listing, the Services will expressly translate the application of the relevant principles of conservation biology into the articulation of the features. Aligning the physical and biological features identified as essential with the conservation needs of the species and any conservation strategy that may have been developed for the species allows us to develop more precise designations that can serve as more effective conservation tools, focusing conservation resources where needed and minimizing regulatory burdens where not necessary.

We note that designation of critical habitat relies on the best available scientific data at the time of designation. The Services may not know of, or be able to identify, all of the areas on which are found the features essential to the conservation of a species. After designation of final critical habitat for a particular species, the Services may become aware of or identify other

features or areas essential to the conservation of the species, such as through 5-year reviews and recovery planning. Newly identified features that are useful for characterizing the conservation value of designated critical habitat can be considered in consultations conducted under section 7(a)(2) of the Act as part of the best available scientific and commercial data. We also note that if there is uncertainty as to whether an area was ''within the geographical area occupied by the species, at the time it is listed,'' the Services may in the alternative designate the area under the second part of the definition if the relevant Service determines that the area is essential for the conservation of the species.

The second part of the statutory definition of ''critical habitat'' (section 3(5)(A)(ii)) provides that areas outside the geographical area occupied by the species at the time of listing should be designated as critical habitat if they are determined to be ''essential for the conservation of the species.'' Section 424.12(b)(2) further describes the factors the Services will consider in identifying any areas outside the geographical area occupied by the species at the time of listing that may meet this aspect of the definition of ''critical habitat.'' Under § 424.12(b)(2), the Services will determine whether unoccupied areas are essential for the conservation of the species by considering ''the life-history, status, and conservation needs of the species.'' This will be further informed by any generalized conservation strategy, criteria, or outline that may have been developed for the species to provide a substantive foundation for identifying which features and specific areas are essential to the conservation of the species and, as a result, the development of the critical habitat designation.

Section 424.12(b)(2) subsumes and supersedes § 424.12(e) of the existing regulations. Existing section 424.12(e) provides that the Secretary shall designate areas outside the ''geographical area presently occupied by a species'' only when ''a designation limited to its present range would be inadequate to ensure the conservation of the species.'' Although the existing provision represents one reasonable approach to giving meaning to the term ''essential'' as it relates to unoccupied areas, the Services find, based on years of applying the existing regulations, that this provision is both unnecessary and unintentionally limiting. While Congress supplied two different standards to govern the Secretary's designation of these two types of habitat, there is no suggestion in the legislative history that the Services were expected to exhaust occupied habitat before considering whether any unoccupied area may be essential. In addition, although section 3(5)(C) of the Act reflects Congressional intent that a designation generally should not include every area that the species *can* occupy, this does not necessarily translate into a mandate to avoid designation of any unoccupied areas unless relying on occupied areas alone would be insufficient. Indeed, there may be instances in which particular unoccupied habitat is more important to the conservation of the species than some occupied habitat.

For example, a species may occupy at low densities a large amount of habitat that is marginal habitat for the species. That marginal habitat may nonetheless meet the definition of ''critical habitat'' because the species has been extirpated from what historically was superior habitat, and it is possible to recover the species if all of the marginal habitat is thoroughly protected. However, a more certain and efficient path to recovery may involve the protection of a relatively small subset of the marginal habitat combined with protection of some of the superior habitat (allowing for natural expansion or artificial reintroduction). A variation of this scenario would involve habitat that may currently be of high quality, but is unlikely to remain that way due to the effects of climate change. Given these scenarios, it will be useful for the Services to retain the flexibility to consider various paths to recovery in considering what areas to designate as critical habitat.

We conclude that a rigid step-wise approach, *i.e.,* first designating all occupied areas that meet the definition of ''critical habitat'' (assuming that no unoccupied habitat is designated) and then, only if that is not enough, designating essential unoccupied habitat, does not necessarily serve the best conservation strategy for the species and, in some circumstances, may result in a designation that is geographically larger but less effective as a conservation tool. Deleting current § 424.12(e) will allow us to consider including occupied and unoccupied areas in a critical habitat designation and to follow any general conservation strategy, criteria, or outline for the species that may be developed. We expect that the concurrent evaluation of occupied and unoccupied areas for a critical habitat designation will allow us to develop more precise designations that can serve as more effective conservation tools, focusing conservation resources where needed and minimizing regulatory burdens where not necessary.

In addition, the existing regulatory provision is unnecessary because the Secretary in any case must find that the unoccupied area is ''essential.'' In many cases the Secretary may conclude that an integral part of analyzing whether unoccupied areas are essential is to begin with the occupied areas, but the Act does not require the Services to first prove that the occupied areas are insufficient before considering unoccupied areas. Therefore, we conclude that deleting existing § 424.12(e) restores the two parts of the statutory definition (for occupied and unoccupied areas) to the relationship envisioned by Congress.

As it is currently written, the provision in § 424.12(e) also confusingly references *present* range, while the two parts of the statutory definition refer to the area occupied *at the time of listing.* In practice, these concepts may be largely the same, given that critical habitat ideally should be designated at or near the time of listing. Nevertheless, the Services find that it will reduce confusion to change the regulations to track the statutory distinction. In addition, because critical habitat may be revised at any time, the statutory distinction may be important during a revision, which could occur several years after the listing of the species.

However, we note that unoccupied areas must be essential for the conservation of the species, but need not have the features essential to the conservation of the species: This follows directly from the inclusion of the ''features essential'' language in section 3(5)(A)(i) but not in section 3(5)(A)(ii). Thus, even keeping in mind that ''features'' may include features that support the occurrence of ephemeral or dynamic habitat conditions, the Services may identify as areas essential to the conservation of the species areas that do not yet have the features, or degraded or successional areas that once had the features, or areas that contain sources of or provide the processes that maintain essential features in other areas. Areas may develop features over time, or, through special management considerations or protection. The conservation value may be influenced by the level of effort needed to manage degraded habitat to the point where it could support the listed species. Under § 424.12(b)(2), the Services will identify unoccupied areas, either with the features or not, that are essential for the conservation of a species. This section is intended to provide a flexible, rather than prescriptive, standard to allow the Services to tailor the inquiry about what

is essential to the specific characteristics and circumstances of the particular species.

The Services anticipate that critical habitat designations in the future will likely increasingly use the authority to designate specific areas outside the geographical area occupied by the species at the time of listing following any generalized conservation strategy that might be developed for the species. As the effects of global climate change continue to influence distribution and migration patterns of species, the ability to designate areas that a species has not historically occupied is expected to become increasingly important. For example, such areas may provide important connectivity between habitats, serve as movement corridors, or constitute emerging habitat for a species experiencing range shifts in latitude or altitude (such as to follow available prey or host plants). Where the best available scientific data suggest that specific unoccupied areas are, or it is reasonable to determine from the record that they will eventually become, necessary to support the species' recovery, it may be appropriate to find that such areas are essential for the conservation of the species and thus meet the definition of ''critical habitat.''

An example may clarify this situation: A butterfly depends on a particular host plant. The host plant is currently found in a particular area. The data show the host plant's range has been moving up slope in response to warming temperatures (following the cooler temperatures) resulting from the effects of climate change. Other butterfly species have been documented to have shifted from their historical ranges in response to changes in the range of host plants. Therefore, we rationally conclude that the butterfly's range will likely move up slope, and we would designate specific areas outside the geographical area occupied by the butterfly at the time it was listed if we concluded this area was essential based on this information.

Adherence to the process described above will ensure compliance with the requirement in section 3(5)(C) of the Act, which states that, except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

Existing § 424.12(c) resulted from a recent separate rulemaking (77 FR 25611; May 1, 2012); it is not addressed in this rulemaking.

Section 424.12(d) includes minor language changes and removes the example as it is not necessary for the text of the regulation.

We are removing current § 424.12(e), as this concept—designating specific areas outside the geographical area occupied by the species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species—is captured in revised § 424.12(b)(2).

We are redesignating the current § 424.12(f) as § 424.12(e) and adding a second sentence to emphasize that designation of critical habitat for species that were listed prior to 1978 is at the discretion of the Secretaries. The first sentence of § 424.12(e) provides that the Secretary ''may designate critical habitat for those species listed as threatened or endangered species but for which no critical habitat has been previously designated.'' This is substantially the same as current § 424.12(f) in the existing regulations, although the Services have changed the passive voice to the active voice.

The new second sentence codifies in the regulations the principle that the decision whether to designate critical habitat for species listed prior to the effective date of the 1978 Amendments to the Act (November 10, 1978) is at the discretion of the Secretary. This principle is clearly reflected in the text of the statute and firmly grounded in the legislative history. The definition of ''critical habitat'' added to the Act in 1978 provided that the Secretary ''may,'' but was not required to, establish critical habitat for species already listed by the effective date of the 1978 amendments. *See* Public Law 95–632, 92 Stat. 3751 (Nov. 10, 1978) (codified at 16 U.S.C. 1532(5)(B)); *see also Conservancy of Southwest Florida* v. *United States Fish & Wildlife Service,* No. 2:10–cv–106–FtM–SPC, 2011 WL 1326805, *9 (M.D. Fla. April 6, 2011) (Florida panther) (plain language of statute renders designation of habitat for species listed prior to the 1978 Amendments discretionary), *aff'd,* 677 F.3d 1073 (11th Cir. 2012); *Fund for Animals* v. *Babbitt,* 903 F. Supp. 96, 115 n.8 (D.D.C. 1995) (grizzly bear) (same). Similarly, the 1982 amendments expressly exempted species listed prior to the 1978 amendments from the requirement that critical habitat be designated concurrently with listing. See Public Law 97–304, 96 Stat. 1411, sec, 2(b)(4) (Oct. 13, 1982). To reduce potential confusion, the revised regulations reflect the discretionary nature of designations for such species.

As recent litigation has highlighted, the statutory history regarding the procedures for undertaking proposals to designate critical habitat for certain species is nuanced and has proven confusing in other respects as well. For species listed before passage of the 1982 amendments to the Act (October 13, 1982), any proposed regulations issued by the Secretary to designate critical habitat are governed by the provisions in section 4 of the Act applicable to proposals to revise critical habitat designations. This is specified in an uncodified provision of the 1982 amendments. *See* Public Law 97–304, 96 Stat. 1411, 1416, 2(b)(2), 16 U.S.C. 1533 (note) (''Any regulation proposed after, or pending on, the date of the enactment of this Act to designate critical habitat for a species that was determined before such date of enactment to be endangered or threatened shall be subject to the procedures set forth in section 4 of such Act of 1973 . . . for regulations proposing revisions to critical habitat instead of those for regulations proposing the designation of critical habitat.''); *see also Center for Biological Diversity* v. *FWS,* 450 F.3d 930, 934–35 (9th Cir. 2006) (unarmored three-spine stickleback). While the Services do not propose to add regulatory text to address this narrow issue, we explain below how these provisions must be understood within the general scheme for designating critical habitat.

As a result of the above-referenced provision of the 1982 amendments, final regulations to designate critical habitat for species that were listed prior to October 13, 1982, are governed by section 4(b)(6)(A)(i) of the Act. By contrast, for species listed after October 13, 1982, final regulations are governed by section 4(b)(6)(A)(ii). Proposed rules for species listed both pre- and post-1982 are governed by section 4(b)(5). Thus, the Services have additional options at the final rule stage with regard to a proposal to designate critical habitat for those species listed prior to 1982 that they do not have when proposing to designate habitat for other species. These include an option to make a finding that the revision ''should not be made'' and to extend the 12-month deadline by an additional period of up to 6 months if there is substantial disagreement regarding the sufficiency or accuracy of available data. *See* 16 U.S.C. 1533(b)(6)(B)(i); *see also Center for Biological Diversity,* 450 F.3d at 936–37.

These provisions, however, do not affect the handling or consideration of *petitions* seeking designation of critical habitat for species listed prior to 1982. The term ''petition'' is not used in section 2(b)(2) of the 1982 amendments to the Act (compare to section 2(b)(1) of the same amendments, which mentions

''[a]ny petition'' and ''any regulation''). Thus, the special procedures for finalizing proposals to designate critical habitat for species listed prior to 1982 come into play only upon a decision by the Secretary to actually propose to designate critical habitat for such species. Petitions seeking such designations are managed just like any other petition seeking designation, which are governed by the provisions of the Administrative Procedure Act rather than section 4 of the Endangered Species Act. *See* 50 CFR 424.14(d); *Conservancy of Southwest Florida,* 2011 WL 1326805, at *9 (''It is the Secretary's proposal to designate critical habitat that triggers the statutory and regulatory obligations, not plaintiffs' requests that the Secretary do so.''); *Fund for Animals* v. *Babbitt,* 903 F. Supp. at 115 (petitions to designate critical habitat are governed by the APA, not the ESA).

We are redesignating current § 424.12(g) as § 424.12(f) with minor language changes.

We are redesignating current § 424.12(h) as § 424.12(g) with minor language changes.

We are adding new § 424.12(h). This paragraph reflects the amendment to section 4(a)(3)(B)(i) of the Act in the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136). Section 424.12(h) codifies the amendments to the Act that prohibit the Services from designating as critical habitat lands or other geographic areas owned or controlled by the Department of Defense, or designated for its use, if those lands are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act (16 U.S.C. 670a), and if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is being designated. In other words, if the Services conclude that an INRMP ''benefits'' the species, the area covered is ineligible for designation. Unlike the Secretary's decision on exclusions under section 4(b)(2) of the Act, this resulting exemption is not subject to the discretion of the Secretary (once a benefit has been found).

Neither the Act nor the National Defense Authorization Act for Fiscal Year 2004 defines the term ''benefit.'' However, the conference report on the 2004 National Defense Authorization Act (Report 108–354) instructed the Secretary to ''assess an INRMP's potential contribution to species conservation, giving due regard to those habitat protection, maintenance, and improvement projects . . . that address the particular conservation and protection needs of the species for which critical habitat would otherwise be proposed.'' We, therefore, conclude that Congress intended ''benefit'' to mean ''conservation benefit.'' In addition, because a finding of benefit results in an exemption from critical habitat designation, and given the specific mention of ''habitat protection, maintenance, and improvement'' in the conference report, we infer that Congress intended that an INRMP provide a conservation benefit to the habitat (*e.g.,* essential features) of the species, in addition to the species. Examples of actions that provide habitat-based conservation benefit to the species include: Reducing fragmentation of habitat; maintaining or increasing populations in the wild; planning for catastrophic events; protecting, enhancing, or restoring habitats; buffering protected areas; and testing and implementing new habitat-based conservation strategies.

In the conference report, Congress further instructed the Secretary to ''establish criteria that would be used to determine if an INRMP benefits the listed species.'' The Services, therefore, describe in § 424.12(h) some factors that will help us determine whether an INRMP provides a conservation benefit: (1) The extent of area and features present; (2) the type and frequency of use of the area by the species; (3) the relevant elements of the INRMP in terms of management objectives, activities covered, and best management practices, and the certainty that the relevant elements will be implemented; and (4) the degree to which the relevant elements of the INRMP will protect the habitat from the types of effects that would be addressed through a destruction-or-adverse-modification analysis. FWS will defer to our Guidelines for Coordination on Integrated Natural Resource Management Plans in evaluating these plans.

Under the Sikes Act, the Department of Defense is also instructed to prepare INRMPs in cooperation with FWS and each appropriate State fish and wildlife agency. The compliant or operational INRMP must reflect the mutual agreement of the involved agencies on the conservation, protection, and management of fish and wildlife resources. In other words, FWS must agree with an INRMP (reflected by signature of the plan or letter of concurrence pursuant to the Sikes Act (not to be confused with a letter of concurrence issued in relation to consultation under section 7(a)(2) of the Act)) before an INRMP can be relied upon for making an area ineligible for designation under section 4(a)(3)(B)(i). As part of this process, FWS will also conduct consultation under section 7(a)(2) of the Act, if listed species or designated critical habitat may be affected by the actions included in the INRMP. Section 7(a)(2) of the Act will continue to apply to any Federal actions affecting the species once an INRMP is compliant or operation. However, if the area is ineligible for critical habitat designation under section 4(a)(3)(B)(i), then those consultations would address only effects to the species and the likelihood of the Federal action to jeopardize the continued existence of the species.

New § 424.12(h) specifies that an INRMP must be compliant or operational to make an area ineligible for designation under section 4(a)(3)(B)(i). When the Department of Defense provides a draft INRMP for the Services' consideration during development of a critical habitat designation, the Services may evaluate it following the guidelines set forth in our Policy on Exclusions from Critical Habitat under Section 4(b)(2) of the Act.

Existing § 424.19 results from a recent, separate rulemaking (78 FR 53058), and is not addressed in this rulemaking.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or his designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We certified that the proposed rule to implement these changes to the 50 CFR part 424 regulations would not have a significant economic impact on a substantial number of small entities (79 FR 27066, at 27075). Several commenters objected to the Services' determination that a regulatory flexibility analysis is not required for this regulation, stating the regulated community is affected by this regulation. We explained that NMFS and FWS are the only entities that are directly affected by this rule because we are the only entities that designate critical habitat, and this rule pertains to the procedures for carrying out those designations (See our response to Comment 81). No external entities, including any small businesses, small organizations, or small governments, will experience any direct economic impacts from this rule. No information received during the public comment period leads us to change our analysis.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) On the basis of information contained in the ''Regulatory Flexibility Act'' section above, these regulations will not ''significantly or uniquely'' affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that these regulations will not impose a cost of $100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments will not be affected because the regulations will not place additional requirements on any city, county, or other local municipalities.

(b) These regulations will not produce a Federal mandate on State, local, or tribal governments or the private sector of $100 million or greater in any year; that is, this rule is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. These regulations will impose no obligations on State, local, or tribal governments.

Takings (E.O. 12630)

In accordance with Executive Order 12630, these regulations will not have significant takings implications. These regulations will not pertain to ''taking'' of private property interests, nor will they directly affect private property. A takings implication assessment is not required because these regulations (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. These regulations will substantially advance a legitimate government interest (conservation and recovery of endangered and threatened species) and will not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether these regulations will have significant Federalism effects and have determined that a Federalism assessment is not required. These regulations pertain only to determinations to designate critical habitat under section 4 of the Act, and will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

These regulations do not unduly burden the judicial system and meet the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. These regulations will clarify how the Services will make designations of critical habitat under section 4 of the Act.

Government-to-Government Relationship With Tribes

In accordance with Executive Order 13175 ''Consultation and Coordination with Indian Tribal Governments,'' the Department of the Interior's manual at 512 DM 2, and the Department of Commerce (DOC) Tribal Consultation and Coordination Policy''/(May 21, 2013), DOC Departmental Administrative Order (DAO) 218–8, and NOAA Administrative Order (NAO) 218–8 (April 2012), we have considered possible effects of this final rule on federally recognized Indian Tribes. Following an exchange of information with tribal representatives, we have determined that this rule, which modifies the general framework for designating critical habitat under the ESA, does not have tribal implications as defined in Executive Order 13175. We will continue to collaborate/coordinate with tribes on issues related to federally listed species and their habitats and work with them as appropriate as we develop particular critical habitat designations, including consideration of potential exclusion on the basis of tribal interests. *See* Joint Secretarial Order 3206 (''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'', June 5, 1997).

Paperwork Reduction Act

This rule does not contain any new collections of information that require approval by the OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We have analyzed these regulations in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10–46.450), the Department of the Interior Manual (516 DM 1–6 and 8)), and National Oceanic and Atmospheric Administration (NOAA) Administrative Order 216–6. Our analysis includes evaluating whether this action is procedural, administrative, or legal in nature and, therefore, a categorical exclusion applies.

Following a review of the changes to the regulations at 50 CFR 424.01, 424.02, and 424.12 and our requirements under NEPA, we find that the categorical exclusion found at 43 CFR 46.210(i) applies to these regulation changes. At 43 CFR 46.210(i), the Department of the Interior has found that the following category of actions

would not individually or cumulatively have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement:

''Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature.''

NOAA Administrative Order 216–6 contains a substantively identical exclusion for ''policy directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature.'' § 6.03c.3(i).

At the time DOI's categorical exclusion was promulgated, there was no preamble language that would assist in interpreting what kinds of actions fall within the categorical exclusion. However, in 2008, the preamble for a language correction to this categorical exclusion gave as an example of an action that would fall within the exclusion the issuance of guidance to applicants for transferring funds electronically to the Federal Government. In addition, examples of recent **Federal Register** notices invoking this categorical exclusion include a final rule that established the timing requirements for the submission of a Site Assessment Plan or General Activities Plan for a renewable energy project on the Outer Continental Shelf (78 FR 12676; February 26, 2013), a final rule that established limited liability for Noncoal Reclamation by Certified States and Indian Tribes (78 FR 8822; February 6, 2013), and a final rule changing the tenure of eagle permits (77 FR 22267; April 13, 2012). These regulations fell within the categorical exclusion because they did not result in any substantive change. In no way did they alter the standards for, or outcome of, any physical or regulatory Federal actions.

The changes to the critical habitat designation criteria are similar to these examples of actions that are fundamentally administrative, technical, and procedural in nature. The changes to the regulations at 50 CFR 424.01, 424.02, and 424.12 (except for paragraph (c)) clarify the procedures and criteria used for designating critical habitat, addressing in particular several key issues that have been subject to frequent litigation. In addition, the regulation revisions to 50 CFR 424.01, 424.02, and 424.12 better track the statutory language of the Act and make transparent practices the Services follow as a result of case law. The Services also make minor wording and formatting revisions throughout the three sections to reflect plain language standards. The regulation revision as a whole carries out the requirements of Executive Order 13563 because, in this rule, the Services have analyzed existing rules retrospectively ''to make the agencies' regulatory program more effective or less burdensome in achieving the regulatory objectives.'' None of the changes to the text of the regulation will result in changes to the opportunity for public involvement in any critical habitat designations.

We also considered whether any ''extraordinary circumstances'' apply to this situation, such that the DOI categorical exclusion would not apply. See 43 CFR 46.215 (''Categorical Exclusions: Extraordinary Circumstances''). We determined that no extraordinary circumstances apply. Although the final regulations would revise the implementing regulations for section 4 of the Act, the effects of these proposed changes would not ''have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species,'' as nothing in the revised regulations is intended to require that any previously listed species or completed critical habitat designation be reevaluated on this basis. Furthermore, the revised regulations do not ''[e]stablish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects'' (43 CFR 46.215(e)). None of the extraordinary circumstances in 43 CFR 46.215(a) through (l) apply to the revised regulations in 50 CFR 424.01, 424.02, or 424.12.

Nor would the final regulations trigger any of the extraordinary circumstances of NAO 216–6. This rule does not involve a geographic area with unique characteristics, is not the subject of public controversy based on potential environmental consequences, will not result in uncertain environmental impacts or unique or unknown risks, does not establish a precedent or decision in principle about future proposals, will not have significant cumulative impacts, and will not have any adverse effects upon endangered or threatened species or their habitats. § 5.05c.

We completed an Environmental Action Statement for the Categorical Exclusion for the revised regulations in 50 CFR 424.01, 424.02, and 424.12.

Energy Supply, Distribution or Use (E.O. 13211)

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. These regulations are not expected to affect energy supplies, distribution, and use. Therefore, this action is a not a significant energy action, and no Statement of Energy Effects is required.

References Cited

A complete list of all references cited in this document is available on the Internet at *http://www.regulations.gov* or upon request from the U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Authority

We are taking this action under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

List of Subjects in 50 CFR Part 424

Administrative practice and procedure, Endangered and threatened species.

Regulation Promulgation

Accordingly, we are amending part 424, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as set forth below:

PART 424—[AMENDED]

■ 1. The authority citation for part 424 continues to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*

■ 2. Revise § 424.01 to read as follows:

§ 424.01 Scope and purpose.

(a) Part 424 provides regulations for revising the Lists of Endangered and Threatened Wildlife and Plants and designating or revising the critical habitats of listed species. Part 424 provides criteria for determining whether species are endangered or threatened species and for designating critical habitats. Part 424 also establishes procedures for receiving and considering petitions to revise the lists and for conducting periodic reviews of listed species.

(b) The purpose of the regulations in part 424 is to interpret and implement those portions of the Act that pertain to the listing of species as threatened or endangered species and the designation of critical habitat.

■ 3. Revise § 424.02 to read as follows:

§ 424.02 Definitions.

The definitions contained in the Act and parts 17, 222, and 402 of this title

apply to this part, unless specifically modified by one of the following definitions. Definitions contained in part 17 of this title apply only to species under the jurisdiction of the U.S. Fish and Wildlife Service. Definitions contained in part 222 of this title apply only to species under the jurisdiction of the National Marine Fisheries Service.

Candidate. Any species being considered by the Secretary for listing as an endangered or threatened species, but not yet the subject of a proposed rule.

Conserve, conserving, and *conservation.* To use and the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary, *i.e.,* the species is recovered in accordance with § 402.02 of this chapter. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Geographical area occupied by the species. An area that may generally be delineated around species' occurrences, as determined by the Secretary (*i.e.,* range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (*e.g.,* migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

List or *lists.* The Lists of Endangered and Threatened Wildlife and Plants found at 50 CFR 17.11(h) or 17.12(h).

Physical or biological features. The features that support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

Public hearing. An informal hearing to provide the public with the opportunity to give comments and to permit an exchange of information and opinion on a proposed rule.

Special management considerations or protection. Methods or procedures useful in protecting the physical or biological features essential to the conservation of listed species.

Species. Includes any species or subspecies of fish, wildlife, or plant, and any distinct population segment of any vertebrate species that interbreeds when mature. Excluded is any species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of the Act would present an overwhelming and overriding risk to man.

Wildlife or *fish and wildlife.* Any member of the animal kingdom, including without limitation, any vertebrate, mollusk, crustacean, arthropod, or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

■ 4. In § 424.12, revise paragraphs (a), (b), and (d) through (h) to read as follows:

§ 424.12 Criteria for designating critical habitat.

(a) To the maximum extent prudent and determinable, we will propose and finalize critical habitat designations concurrent with issuing proposed and final listing rules, respectively. If designation of critical habitat is not prudent or if critical habitat is not determinable, the Secretary will state the reasons for not designating critical habitat in the publication of proposed and final rules listing a species. The Secretary will make a final designation of critical habitat on the basis of the best scientific data available, after taking into consideration the probable economic, national security, and other relevant impacts of making such a designation in accordance with § 424.19.

(1) A designation of critical habitat is 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. In determining whether a designation would not be beneficial, the factors the Services may consider include but are not limited to: Whether the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or whether any areas meet the definition of ''critical habitat.''

(2) Designation of 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 that meets the definition of ''critical habitat.''

(b) Where designation of critical habitat is prudent and determinable, the Secretary will identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the geographical area occupied by the species to be considered for designation as critical habitat.

(1) The Secretary will identify, at a scale determined by the Secretary to be appropriate, specific areas within the geographical area occupied by the species for consideration as critical habitat. The Secretary will:

(i) Identify the geographical area occupied by the species at the time of listing.

(ii) Identify physical and biological features essential to the conservation of the species at an appropriate level of specificity using the best available scientific data. This analysis will vary between species and may include consideration of the appropriate quality, quantity, and spatial and temporal arrangements of such features in the context of the life history, status, and conservation needs of the species.

(iii) Determine the specific areas within the geographical area occupied by the species that contain the physical or biological features essential to the conservation of the species.

(iv) Determine which of these features may require special management considerations or protection.

(2) The Secretary will identify, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species based on the best available scientific data.

* * * * *

(d) When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, the Secretary may designate an inclusive area as critical habitat.

(e) The Secretary may designate critical habitat for those species listed as threatened or endangered but for which no critical habitat has been previously designated. For species listed prior to November 10, 1978, the designation of

critical habitat is at the discretion of the Secretary.

(f) The Secretary may revise existing designations of critical habitat according to procedures in this section as new data become available.

(g) The Secretary will not designate critical habitat within foreign countries or in other areas outside of the jurisdiction of the United States.

(h) The Secretary will not designate as critical habitat land or other geographic areas owned or controlled by the Department of Defense, or designated for its use, that are subject to a compliant or operational integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act (16 U.S.C. 670a) if the Secretary determines in writing that such plan provides a conservation benefit to the species for which critical habitat is being designated. In determining whether such a benefit is provided, the Secretary will consider:

(1) The extent of the area and features present;

(2) The type and frequency of use of the area by the species;

(3) The relevant elements of the INRMP in terms of management objectives, activities covered, and best management practices, and the certainty that the relevant elements will be implemented; and

(4) The degree to which the relevant elements of the INRMP will protect the habitat from the types of effects that would be addressed through a destruction-or-adverse-modification analysis.

Dated: January 29, 2016.

Michael J. Bean,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

Dated: January 29, 2016.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2016–02680 Filed 2–10–16; 8:45 am]

BILLING CODE 4310–55–P; 3510–22–P

Exhibit B

Dated: January 25, 2016.

Jared Blumenfeld,

Regional Administrator, Region IX.

Part 52, Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

■ 1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart D—Arizona

§ 52.111 [Removed]

■ 2. Remove § 52.111.

■ 3. Section 52.120 is amended by:
■ a. Adding paragraphs (b)(1)(i), (c)(3)(ii) introductory text and (c)(3)(ii)(A), and (c)(6)(i) introductory text and (c)(6)(i)(A);
■ b. Revising paragraph (c)(19);
■ c. Adding paragraphs (c)(20)(i) introductory text and (c)(20)(i)(A), (c)(27)(i)(D), and (c)(29)(i)(B);
■ d. Removing and reserving paragraph (c)(30);
■ e. Adding paragraphs (c)(43)(i)(D) and (c)(45)(i)(E);
■ f. Revising paragraph (c)(50)(ii)(B);
■ g. Adding paragraphs (c)(50)(ii)(D) and (c)(54)(i)(I); and
■ h. Removing and reserving paragraph (c)(120).

The additions and revisions read as follows:

§ 52.120 Identification of plan.

* * * * *

(b) * * *

(1) Arizona State Department of Health.

(i) Previously approved on May 31, 1972 in paragraph (b) of this section and now deleted without replacement: Arizona Revised Statutes section 36–1700 (''Declaration of Policy'')

(c) * * *

(3) * * *

(ii) Arizona State Department of Health.

(A) Previously approved on July 27, 1972 in paragraph (c)(3) of this section and now deleted without replacement: Chapter 2 (''Legal Authority''), Section 2.9 (''Jurisdiction over Indian lands''); Arizona Revised Statutes sections 36–1700 (''Declaration of Policy'') and 36–1801 (''Jurisdiction over Indian Lands''); and Arizona State Department of Health, Rules and Regulations for Air Pollution Control 7–1–4.3 (''Sulfite Pulp Mills'') and 7–1–9.1 (''Policy and Legal Authority'').

* * * * *

(6) * * *

(i) Arizona State Department of Health.

(A) Previously approved on July 31, 1978 in paragraph (c)(6) of this section and now deleted without replacement: Arizona Air Pollution Control Regulation 7–1–4.3 (R9–3–403) (''Sulfur Emissions: Sulfite Pulp Mills'').

* * * * *

(19) Arizona Air Pollution Control Regulations, submitted on September 16, 1975: R9–3–102 (Definitions), R9–3–108 (Test Methods and Procedures), R9–3–302 (Particulate Emissions: Fugitive Dust), R9–3–303 (Particulate Emissions: Incineration), R9–3–304 (Particulate Emissions: Wood Waste Burners), R9–3–305 (Particulate Emissions: Fuel Burning Equipment), R9–3–307 (Particulate Emissions: Portland Cement Plants); and R9–3–308 (Particulate Emissions: Heater-Planers), submitted on September 16, 1975.

(20) * * *

(i) Arizona State Department of Health.

(A) Previously approved on August 4, 1978 in paragraph (c)(20) of this section and now deleted without replacement: Arizona Air Pollution Control Regulation R9–3–1001 (''Policy and Legal Authority'').

* * * * *

(27) * * *

(i) * * *

(D) Previously approved on April 23, 1982, in paragraph (c)(27)(i)(B) of this section and now deleted without replacement: R9–3–511 (Paragraph B), R9–3–512 (Paragraph B), R9–3–513 (Paragraphs B and C), and R9–3–517 (Paragraphs B and C).

* * * * *

(29) * * *

(i) * * *

(B) Previously approved on April 23, 1982, in paragraph (c)(29)(i)(A) of this section and now deleted without replacement: Arizona Testing Manual for Air Pollutant Emissions, Sections 3.0 and 4.0.

* * * * *

(43) * * *

(i) * * *

(D) Previously approved on April 23, 1982, in paragraph (c)(43)(i)(B) of this section and now deleted without replacement: R9–3–511 (Paragraph A.1 to A.5), R9–3–512 (Paragraph A.1 to A.5), R9–3–513 (Paragraph A.1 to A.5), and R9–3–517 (Paragraph A.1 to A.5).

* * * * *

(45) * * *

(i) * * *

(E) Previously approved on April 23, 1982, in paragraph (c)(45)(i)(B) of this section and now deleted without replacement: R9–3–511 (Paragraph A); R9–3–512 (Paragraph A); R9–3–513 (Paragraph A); R9–3–517 (Paragraph A); Section 3, Method 11; Section 3.16, Method 16; Section 3.19, Method 19; and Section 3.20, Method 20.

* * * * *

(50) * * *

(ii) * * *

(B) Arizona State: Chapter 14, Air Pollution, Article 1. State Air Pollution Control, Sections 36–1700 to 36–1702, 36–1704 to 36–1706, 36–1707 to 36–1707.06, 36–1708, 36–1720.01, and 36–1751 to 36–1753.

* * * * *

(D) Previously approved on June 18, 1982, in paragraph (c)(50)(ii)(B) of this section and now deleted without replacement: Arizona Revised Statutes section 36–1700.

* * * * *

(54) * * *

(i) * * *

(I) Previously approved on September 28, 1982, in paragraph (c)(54)(i)(C) of this section and now deleted without replacement: R9–3–511 (Paragraph A to A.1 and A.2), R9–3–513 (Paragraph A to A.1 and A.2), and R9–3–517 (Paragraph A to A.1).

* * * * *

[FR Doc. 2016–02714 Filed 2–10–16; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 402

[Docket No. FWS–R9–ES–2011–0072; Docket No. 120106026–4999–03]

RIN 1018–AX88; 0648–BB80

Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat

AGENCIES: U.S. Fish and Wildlife Service, Interior; National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), collectively referred to as the ''Services'' or ''we,'' revise a regulatory definition that is

integral to our implementation of the Endangered Species Act of 1973, as amended (Act or ESA). The Act requires Federal agencies, in consultation with and with the assistance of the Services, to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. On May 12, 2014, we proposed to revise the definition for ''destruction or adverse modification'' in our regulations as this definition had been found to be invalid by two circuit courts. In response to public comments received on our proposed rule, we have made minor revisions to the definition. This rule responds to section 6 of Executive Order 13563 (January 18, 2011), which directs agencies to analyze their existing regulations and, among other things, modify or streamline them in accordance with what has been learned.

DATES: Effective March 14, 2016.

ADDRESSES: Supplementary information used in the development of this rule, including the public comments received and the environmental assessment may be viewed online at *http://www.regulations.gov* at Docket No. FWS–R9–ES–2011–0072 or at Docket No. NOAA–NMFS–2014–0093.

FOR FURTHER INFORMATION CONTACT: Jennifer Schultz, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910; telephone 301/427–8443; facsimile 301/713–0376; or Craig Aubrey, U.S. Fish and Wildlife Service, Division of Environmental Review, 5275 Leesburg Pike, Falls Church, VA 22041; telephone 703/358–2171; facsimile 703/358–1735. Persons who use a Telecommunications Device for the Deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, and 7 days a week.

SUPPLEMENTARY INFORMATION:

Background

Section 7(a)(2) of the Act requires Federal agencies, in consultation with and with the assistance of the Secretaries of the Interior and Commerce, to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species (16 U.S.C. 1536(a)(2)). The Act defines critical habitat as 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 or biological features (1) essential to the conservation of the species and (2) which may require special management considerations or protection, as well as specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species (16 U.S.C. 1532(5)(A)). Conservation means to use and the use of all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary (16 U.S.C. 1532(3)). The Act does not define ''destruction or adverse modification.'' The Services carry out the Act via regulations in title 50 of the Code of Federal Regulations (CFR).

In 1978, the Services promulgated regulations governing interagency cooperation under section 7(a)(2) of the Act that defined ''destruction or adverse modification'' in part as a ''direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for survival and recovery of a listed species. Such alterations include but are not limited to those diminishing the requirements for survival and recovery . . . '' (43 FR 870, January 4, 1978). In 1986, the Services amended the definition to read ''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'' (51 FR 19926, June 3, 1986; codified at 50 CFR 402.02). In 1998, the Services provided a clarification of usage of the term ''appreciably diminish the value'' in the Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Act (*i.e.,* the Handbook; *http://http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf*) as follows: ''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.''

In 2001, the Fifth Circuit Court of Appeals reviewed the 1986 definition and found it exceeded the Service's discretion by requiring an action to appreciably diminish a species' survival and recovery to trigger a finding of ''destruction or adverse modification.'' *Sierra Club* v. *U.S. Fish and Wildlife Service,* 245 F.3d 434 (5th Cir. 2001). As stated in the decision (*Sierra Club,* at 441–42 (citations omitted) (emphasis in original)):

> The ESA defines 'critical habitat' as areas which are 'essential to the conservation' of listed species. 'Conservation' is a much broader concept than mere survival. The ESA's definition of 'conservation' speaks to the recovery of a threatened or endangered species. Indeed, in a different section of the ESA, the statute distinguishes between 'conservation' and 'survival.' Requiring consultation only where an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits.

In 2004, the Ninth Circuit Court of Appeals also reviewed the 1986 definition and found portions of the definition to be facially invalid. *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F.3d 1059 (9th Cir. 2004). The Ninth Circuit, following similar reasoning set out in the *Sierra Club* decision, determined that Congress viewed conservation and survival as ''distinct, though complementary, goals, and the requirement to preserve critical habitat is designed to promote both conservation and survival.'' *Gifford Pinchot Task Force,* at 1070. Specifically, the court 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.'' *Id.* ''Congress said that 'destruction or adverse modification' could occur when sufficient critical habitat is lost so as to threaten a species' recovery even if there remains sufficient critical habitat for the species' survival.'' *Id.*

After the Ninth Circuit's decision, the Services each issued guidance to discontinue the use of the 1986 definition (FWS Acting Director Marshall Jones Memo to Regional Directors, ''Application of the 'Destruction or Adverse Modification' Standard under Section 7(a)(2) of the Act, 2004;'' NMFS Assistant Administrator William T. Hogarth Memo to Regional Administrators, ''Application of the 'Destruction or Adverse Modification' Standard under Section 7(a)(2) of the Act, 2005''). Specifically, in evaluating an action's effects on critical habitat as part of interagency consultation, the Services began directly applying the definition of ''conservation'' as set out in the Act. The guidance instructs the Services' biologists, after examining the baseline and the effects of the action, to determine whether critical habitat

would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species, upon implementation of the Federal action under consultation. ''Primary constituent elements'' was a term introduced in the critical habitat designation regulations (50 CFR 424.12) to describe aspects of ''physical or biological features,'' which are referenced in the statutory definition of ''critical habitat''; the Services have proposed to remove the term ''primary constituent elements'' and return to the statutory term ''physical or biological features.'' See 79 FR 27066, May 12, 2014.

On May 12, 2014, the Services proposed the following regulatory definition to address the relevant case law and to formalize the Services' guidance: ''*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.'' See 79 FR 27060, May 12, 2014. In the preamble to the proposed rule, we explained that the proposed definition was intended to align with the conservation purposes of the Act. The first sentence captured the role that critical habitat should play for the recovery of listed species. The second sentence acknowledged that some physical or biological features may not be present or may be present in suboptimal quantity or quality at the time of designation.

We solicited comments on the proposed rule for a total of 150 days. We received 176 comments.

Summary of Changes From the Proposed Definition

This final rule aligns the regulatory definition of ''destruction or adverse modification'' with the conservation purposes of the Act and the Act's definition of ''critical habitat.'' It continues to focus on the role that critical habitat plays for the conservation of listed species and acknowledges that the development of physical and biological features may be necessary to enable the critical habitat to support the species' recovery. Though we made minor changes to clarify our intent, these changes do not alter the overall meaning of the proposed definition. We do not expect this final rule to alter the section 7(a)(2) consultation process from our current practice, and previously completed biological opinions do not need to be reevaluated in light of this rule.

In our final definition, to avoid unnecessary confusion and more closely track the statutory definition of critical habitat, we replaced two ''terms of art'' introduced in the proposed definition with language that explained the intended meanings. In addition, we modified the second sentence of the definition to avoid unintentionally giving the impression that the proposed definition had a narrower focus than the 1986 definition.

First, as described in detail under the Summary of Comments section below, many commenters suggested that we replace two terms, ''conservation value'' and ''life-history needs,'' in the proposed definition with simpler language more clearly conveying their intended meanings. After reviewing the comments, we agreed that use of these terms was unnecessary and led to unintended confusion. We modified the proposed definition accordingly. Specifically, we replaced ''conservation value of critical habitat for listed species'' with ''the value of critical habitat for the conservation of a listed species.'' We also replaced ''physical or biological features that support life-history needs of the species for recovery'' in the second sentence with ''physical or biological features essential to the conservation of a listed species.'' These revisions avoid introducing previously undefined terms without changing the meaning of the proposed definition. Furthermore, these revisions better align with the conservation purposes of the Act, by using language from the statutory definition of ''critical habitat'' (*i.e.,* ''physical or biological features essential to the conservation of the species'').

Second, commenters also expressed concern that, in their perception, the Services proposed a significant change in practice by appearing to focus the definition on the preclusion or delay of the development of physical or biological features, to the exclusion of the alteration of existing features. We did not intend the proposed definition to signal such a shift in focus. Rather, we believed the first sentence of the proposed definition captured both types of alteration: those of existing features as well as those that would preclude or delay future development of such features. We intended the second sentence of the proposed definition to merely emphasize this latter type of alteration because of its less obvious nature. Because the second sentence of the 1986 definition expressly refers to alterations adversely modifying physical or biological features and to avoid any perceived shift in focus, we revised the proposed definition to explicitly reference alterations affecting the physical or biological features essential to the conservation of a species, as well as those that preclude or significantly delay development of such features.

Final Definition

After considering public comments, Congressional intent, relevant case law, and the Services' collective experience in applying the ''destruction or adverse modification'' standard over the last three decades, we finalize the following regulatory definition: *Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

As described in the preamble to the proposed rule, the ''destruction or adverse modification'' definition focuses on how Federal actions affect the quantity and quality of the physical or biological features in the designated critical habitat for a listed species and, especially in the case of unoccupied habitat, on any impacts to the critical habitat itself. Specifically, the Services will generally conclude that a Federal action is likely to ''destroy or adversely modify'' designated critical habitat if the action results in an alteration of the quantity or quality of the essential physical or biological features of designated critical habitat, or that precludes or significantly delays the capacity of that habitat to develop those features over time, and if the effect of the alteration is to appreciably diminish the value of critical habitat for the conservation of the species. If the Services make a destruction or adverse modification determination, they will develop reasonable and prudent alternatives on a case by case basis and based on the best scientific and commercial data available.

As also described in the preamble to the proposed rule, the Services may consider other kinds of impacts to designated critical habitat. For example, some areas that are currently in a degraded condition may have been designated as critical habitat for their potential to develop or improve and eventually provide the needed ecological functions to support species' recovery. Under these circumstances, the Services generally conclude that an

action is likely to ''destroy or adversely modify'' the designated critical habitat if the action alters it to prevent it from improving over time relative to its pre-action condition. It is important to note that the ''destruction or adverse modification'' definition applies to all physical or biological features; as described in the proposed revision to the current definition of ''physical or biological features'' (50 CFR 424.12), ''[f]eatures may include habitat characteristics that support ephemeral or dynamic habitat conditions'' (79 FR 27066, May 12, 2014).

Summary of Comments

In our proposed rule (79 FR 27060, May 12, 2014), we requested written comments from the public for 60 days, ending July 11, 2014. We received several requests to extend the public comment period, and we subsequently published a notice (79 FR 36284, June 26, 2014) extending the comment period by an additional 90 days, through October 9, 2014.

During the public comment period, we received approximately 176 comments. We received comments from Tribes, State and local governments, industry, conservation organizations, private citizens, and others.

We considered all substantive information provided during the comment period and, as appropriate, incorporated suggested revisions into this final rule. Here, we summarize the comments, grouped by issue, and provide our responses.

Comment on ''conservation'' versus ''recovery'': A few commenters suggested that conservation is not recovery. One commenter suggested that Congress intended critical habitat to mean areas that are essential to the continued existence of the species, *i.e.,* its survival.

Our Response: We disagree with the commenter that ''conservation'' means ''survival.'' Instead, we agree with the courts that Congress intended critical habitat to focus on conservation, which addresses more than mere survival. While we recognize the distinction between ''conservation'' and ''recovery,'' we also acknowledge that the courts and the Services often use the terms synonymously.

The statutory definition of critical habitat includes the phrase ''essential to [or for] the conservation of the species'' twice; it does not include the word ''survival'' or the phrase, ''the continued existence of the species'' (16 U.S.C. 1532(5)(A)). Conservation means to use and the use of all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary (16 U.S.C. 1532(3)). The statutory definition does not include the word ''survival'' or the phrase, ''the continued existence of the species.'' This does not appear to be an oversight. Congress used the word ''survival'' in other places in the Act; they also used the phrase ''continued existence of a species'' elsewhere and specifically in reference to the jeopardy standard under section 7(a)(2) of the Act.

In 2001, the Fifth Circuit concluded that '' 'conservation' is a much broader concept than mere survival'' and ''speaks to the recovery'' of species: ''Indeed, in a different section of the ESA, the statute distinguishes between 'conservation' and 'survival.' '' *Sierra Club,* at 441–42. In 2004, the Ninth Circuit added, ''Congress said that 'destruction or adverse modification' could occur when sufficient critical habitat is lost so as to threaten a species' recovery even if there remains sufficient critical habitat for the species' survival.'' Further, the Ninth Circuit indicated that the 1986 definition ''fails to provide protection of habitat when necessary only for species' recovery.'' *Gifford Pinchot Task Force,* at 1070. Throughout these decisions, the courts used the words ''recovery'' and ''conservation'' interchangeably.

The Services view ''conservation'' as the process used to achieve ''recovery,'' that is, the improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act (50 CFR 402.02). In the proposed regulatory definition of ''conserve, conserving, and conservation,'' the Services included the phrase ''*i.e.,* the species is recovered'' to clarify the link between conservation and recovery of the species. *See* 79 FR 27066, May 12, 2014 (proposing revisions to 50 CFR 424.02). Despite the distinction between the two terms, we often use the terms interchangeably in practice. We believe that this is consistent with Congress's intent for ''conservation'' to encompass the procedures necessary to achieve ''recovery.''

Comments on ''appreciably diminish'': We received 63 comments regarding our use and explanation of the term ''appreciably diminish.'' Many commenters considered the explanation of the term vague, confusing, and giving too much discretion to the Services. Some suggested that ''appreciably diminish'' should apply only to the reduction in quality, significance, magnitude, or worth of the physical or biological features that were the basis for determining the habitat to be critical. Others suggested alternatives to ''appreciably,'' including significantly, measurably, and considerably. Several commenters suggested simply removing the words ''both the survival and'' from the clarification of usage in the Services' Handbook. Some commenters believed the Services were ''lowering the bar,'' while others felt that the Services were ''raising the bar'' with the definition. Commenters disagreed on whether the Services should consider every perceptible diminishment to critical habitat to be destruction or adverse modification.

Our Response: In the proposed rule, the Services requested comments on whether the phrase ''appreciably diminish'' is clear and can be applied consistently across consultations. Though this phrase has been part of the definition of ''destruction or adverse modification'' since 1978, we invited the public to suggest any alternative phrases that might improve clarity and consistency. Though several commenters responded that phrase is unclear or unable to be consistently applied, they did not present clearer alternatives or examples of inconsistent application.

The courts have not identified problems with the clarity or consistent application of the ''appreciably diminish'' standard. Though the Fifth (2001) and Ninth Circuits (2004) invalidated the existing regulatory definition because it included the phrase ''both the survival and recovery,'' they did not comment unfavorably on the word ''appreciably'' or the term ''appreciably diminish.'' In 2010, the Ninth Circuit expressly noted that its decision in *Gifford Pinchot* ''did not alter the rule that an 'adverse modification' occurs only when there is 'a direct or indirect alteration that *appreciably diminishes* the value of critical habitat.' '' *Butte Environmental Council* v. *U.S. Army Corps of Engineers,* 620 F.3d 936, 948 (9th Cir. 2010) (emphasis in original).

Commenters generally agreed that ''diminish'' means to reduce; however, several commenters disagreed with our use of the word ''appreciably'' and suggested we use alternative qualifiers (*i.e.,* significantly, measurably, or considerably). In the preamble of the proposed rule, we discussed the word ''appreciably,'' as well as the suggested alternatives, which are similar in meaning to the word ''appreciably'' but also have multiple possible meanings. In light of all the comments received, our review of case law, and our previous experience with the term, we have

concluded that no alternative has a sufficiently clear meaning to warrant changing this longstanding term in the regulation. Without a clearly superior alternative, the Services retain the phrase ''appreciably diminish'' in the definition of ''destruction or adverse modification.''

In the preamble to the proposed rule, we further clarified the meaning of ''appreciably diminish'' by explaining that the relevant question is whether the reduction has some relevance because we can recognize or grasp its quality, significance, magnitude, or worth in a way that negatively affects the value of the critical habitat as a whole for the conservation of a listed species. Some commenters objected to this clarification and advocated for the retention of the Handbook language, with edits to remove the phrase ''both the survival and.''

Courts have looked to the Handbook as guidance for interpreting the ''appreciably diminish'' standard. In 2008, the U.S. District Court for the Eastern District of California held that the Handbook's definition of ''appreciably diminish'' is reasonable and therefore would be applied by the court as guidance. See *Pacific Coast Federation of Fishermen's Associations* v. *Gutierrez,* 606 F. Supp. 2d 1195, 1208–09 (E.D. Cal. 2008) (according deference to the agencies' interpretation under the principles of *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 139–40 (1944)). The court thus applied ''appreciably diminish'' as meaning ''considerably reduce.'' Other district courts have similarly applied the ''considerably reduce'' language contained in the Handbook's definition of ''appreciably diminish the value.'' See *Wild Equity Institute* v. *City and County of San Francisco,* No. C 11–00958 SI, 2011 WL 5975029, *7 (N.D. Cal. Nov. 29, 2011) (unreported) (noting that, in *Gutierrez,* ''The court accepted the FWS' definition of 'appreciably diminish' to mean 'considerably reduce'''); *Forest Guardians* v. *Veneman,* 392 F.Supp.2d 1082, 1092 (D. Ariz. 2005) (applying the handbook's definition of ''appreciably diminish'' as guidance for interpreting ''reduce appreciably'' as used in section 7(a)(2)'s jeopardy standard).

In the preamble to the proposed rule, we acknowledged that the Handbook's language referring to ''both the survival and recovery'' as part of its definition of ''appreciably diminish the value'' is no longer valid. We also indicated that the term ''considerably,'' taken alone, may lead to disparate outcomes because it can mean ''large in amount or extent,'' ''worthy of consideration,'' or ''significant.'' In light of the comments urging the Services to retain the Handbook clarification, the Services take this opportunity to clarify that the term ''considerably,'' in this context, means ''worthy of consideration'' and is another way of stating that we can recognize or grasp the quality, significance, magnitude, or worth of the reduction in the value of critical habitat. We believe that this clarification will allow the Services to reach consistent outcomes, and we reiterate that the Handbook reference to ''both the survival and'' is no longer in effect.

We disagree with commenters who suggest that every diminishment, however small, should constitute destruction or adverse modification. We find it necessary to qualify the word ''diminish'' to exclude those adverse effects on critical habitat that are so minor in nature that they do not impact the conservation of a listed species. It is appropriate for the Services to consider the biological significance of a reduction when conducting a section 7(a)(2) consultation. The U.S. District Court for the Eastern District of California rejected as ''overly expansive'' the plaintiff's suggestion that ''appreciably'' means ''perceptible''. *Gutierrez,* 606 F.Supp.2d at 1208–09. The guidance issued by the Services in 2004 and 2005 directed the Services to discuss the ''significance of anticipated effects to critical habitat,'' which the U.S. District Court for the Northern District of California found appropriate and ''sufficient to implement an 'appreciably diminish' standard.'' *In re Consolidated Salmonid Cases,* 791 F. Supp.2d 802, 872 (E.D. Cal. 2011) (applying NMFS' 2005 guidance), *affirmed in part, reversed in part on other grounds, San Luis & Delta-Mendota Water Authority* v. *Locke,* 776 F.3d 971 (9th Cir. 2014). Similarly, in the context of applying the jeopardy standard from section 7(a)(2) of the Act, which also includes the term ''appreciably'' (in the phrase ''appreciably reduce''), the U.S. District Court for the District of Columbia rejected the argument that the Services are required to recognize every reduction in the likelihood of survival or recovery that is capable of being perceived or measured; the court instead held that the Services have discretion to evaluate a reduction to determine if it is ''meaningful from a biological perspective.'' *Oceana, Inc.* v. *Pritzker,* F.Supp.3d, No. 08–1881, 2014 WL 7174875, *8–9 (D.D.C. December 17, 2014).

Thus, our explanation in this final rule of the meaning of ''appreciably diminish'' is consistent with previous usage; ''the bar'' for determining whether a proposed action is likely to result in destruction or adverse modification of critical habitat is neither raised nor lowered by this rule. A Federal action may adversely affect critical habitat in an action area without appreciably diminishing the value of the critical habitat for the conservation of the species. In such cases, a conclusion of destruction or adverse modification would not be appropriate. Conversely, we would conclude that a Federal action would result in destruction or adverse modification if it appreciably diminishes the value of critical habitat for the conservation of the species, even if the size of the area affected by the Federal action is small.

In summary, the Services have applied the term ''appreciably diminish'' from the definition of ''destruction or adverse modification'' for decades (43 FR 870, January 4, 1978). With the clarifications of usage in this rule, we find no basis in either the comments received or in court decisions to abandon this well-established language.

Comments on ''conservation value'': We received 68 comments on the term ''conservation value,'' suggesting that the term was vague, unnecessary, and confusing.

Our Response: In the proposed rule, the Services requested comments on whether the phrase ''conservation value'' is clear and can be applied consistently across consultations. We invited the public to suggest alternatives that might improve clarity and consistency in implementing the ''destruction or adverse modification'' standard.

Upon reviewing the comments, we agreed that inclusion of a new, undefined term, ''conservation value,'' was unnecessary. We wish to clarify that by introducing the term ''conservation value'' in the proposed definition, we did not intend to introduce a new concept but rather to reiterate that critical habitat is designated because it has been found to contribute to the conservation of the species, in keeping with the statutory definition of critical habitat. However, to avoid any confusion, we revised the first sentence of the final definition to replace the term ''conservation value'' with a phrase that conveys its intended meaning, *i.e.,* ''the value of critical habitat for the conservation of a listed species.'' This minor revision retains the meaning of ''conservation value'' without introducing a new term. Like the statutory definition of critical habitat, it emphasizes the role of critical habitat in the conservation of a species.

Comments on ''survival or recovery'': Several commenters suggested that the Services should simply substitute ''or'' for ''and'' in the phrase ''survival and recovery'' from the 1986 definition.

Our Response: The Services find that simply changing ''and'' to ''or'' in the existing regulatory definition would not go far enough to incorporate the refined understanding we now have regarding the role of critical habitat. The Services' regulations introduced the term ''survival'' into the 1978 definition; the statutory definition of critical habitat focuses on conservation, which the courts have explained emphasizes recovery. (See *Sierra Club,* at 441: ''The ESA's definition of 'conservation' speaks to the recovery of a threatened or endangered species.'') The Ninth Circuit further indicates that ''Congress said that 'destruction or adverse modification' could occur when sufficient critical habitat is lost so as to threaten a species' recovery even if there remains sufficient critical habitat for the species' survival'' (*Gifford Pinchot Task Force,* at 1070).

In *Gifford Pinchot,* the Ninth Circuit supported the use of ''or'' in place of ''and''; however, this in no way limits our discretion to revise the definition to more clearly implement Congressional intent. In its definition of critical habitat, Congress uses the word ''conservation'' and not ''survival''; therefore, it is appropriate for the Services to revise the definition to unambiguously emphasize the value of critical habitat for conservation. By doing so, we have produced a regulatory definition that is less confusing, less susceptible to misinterpretation, and more consistent with the intent of Congress than by merely substituting ''or'' for ''and.''

Comments on linking the definition to existing physical and biological features: We received a few comments requesting that the definition explicitly include alterations of existing physical and biological features.

Our Response: In the proposed definition, we did not intend to disregard the alteration of existing physical or biological features; rather, our goal was to highlight certain types of alterations that may not be as evident as direct alterations, specifically those that preclude or significantly delay development of features. We reiterate and reaffirm that the first sentence of our final definition (*Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species.) is meant to encompass all potential types of alterations if they reduce the value of the habitat for conservation, including alterations of existing features.

In response to comments and to avoid further confusion, we revise the second sentence to specifically reference alterations of existing physical and biological features (as does the 1986 definition), in addition to those that preclude or significantly delay development of essential physical or biological features, as examples of effects that may constitute destruction or adverse modification of critical habitat. We believe that the revised sentence provides clarity and transparency to the definition and its implementation while retaining the core idea of the proposed definition.

Comments on ''may include, but are not limited to'': We received three comments on the use of the phrase ''may include, but are not limited to.'' Commenters found this language ''overbroad'' and thought the definition should be less vague or narrowed or both. One commenter thought it allowed a ''catch-all provision'' too favorable to the Federal Government, against prospective good-faith challengers.

Our Response: The phrase, ''may include, but are not limited to'' emphasizes that the types of direct or indirect alterations that appreciably diminish the value of critical habitat for listed species include not only those that affect physical or biological features, but also those that may affect the value of critical habitat itself. The concept of non-exhaustive inclusion is not new to the regulatory definition of ''destruction or adverse modification.'' Both 1978 and 1986 definitions included the phrase. This language has not proven problematic in application. Indeed, this phrase is commonly used by the Services to account for the variation that occurs in biological entities and ecological systems, and to preserve the role of the inherent discretion and professional judgment the Services must use to evaluate all relevant factors when making determinations regarding such entities and systems.

We retain the phrase in our final definition, as we believe its meaning is clear and that it serves an important function in the definition. It allows that there may be impacts to an area of critical habitat itself that are not impacts to features. This is particularly important for unoccupied habitat, for which no physical or biological features may have been identified (because physical or biological features are not required to be present in order to designate such an area as critical habitat under the second part of the statutory definition of ''critical habitat''). For occupied habitat, the Services must retain the flexibility to address impacts to the area itself, such as those that would impede access to or use of the habitat. As noted in the proposed rule, a destruction or adverse modification analysis begins with impacts to the features but does not end there (79 FR 27060, May 12, 2014). For these reasons, we retain this phase in the final definition.

Comments on ''life-history needs'': We received 12 comments regarding the phrase ''physical or biological features that support the life-history needs.'' The commenters considered the phrase to be vague and poorly defined. Some commenters felt that the phrase misinterpreted or ''lowered the bar'' from that intended by the statutory language ''physical or biological features essential to the conservation of a species.'' Commenters recommended describing the physical and biological features as ''essential'' or ''necessary.''

Our Response: We did not intend the phrase, ''physical or biological features that support the life-history needs'' to ''lower the bar'' for identifying physical and biological features, as established in the statutory definition of critical habitat. Rather, our intent was to explain that physical or biological features provide for the life-history needs, which are essential to the conservation of the species.

However, based on review of the public comments on this issue, we recognized the confusion caused by introducing a new ''term of art'' in the proposed definition. To avoid confusion, we revised the second sentence of the definition to replace the phrase, ''support the life-history needs,'' with its intended meaning, ''essential to the conservation of a species.'' In accordance with the statutory definition of critical habitat, the revision emphasizes our focus on those physical or biological features that are essential to the conservation of the species. We believe that the revised sentence, which aligns more closely to the statutory language, provides clarity and transparency to the definition and its implementation.

Comments on ''preclude or significantly delay:'' We received many comments regarding the terms ''preclude or significantly delay'' in the proposed definition. Commenters believed these concepts are vague, undefined, and allow for arbitrary determinations. One commenter asserted that focusing on effects that preclude or significantly delay development of features was an expansion of authority that conflicted

with E.O. 13604 (Improving Performance of Federal Permitting and Review of Infrastructure Projects).

Our Response: Our proposed definition of ''destruction or adverse modification'' expressly included effects that preclude or significantly delay the development of physical or biological features that support the life-history needs of the species for recovery. Although we have revised the definition in minor respects from the proposed rule (see Summary of Changes from the Proposed Definition, above), we retain its forward-looking aspect.

Our determination of ''destruction or adverse modification'' is based not only on the current status of the critical habitat but also, in cases where it is degraded or depends on ongoing ecological processes, on the potential for the habitat to provide further support for the conservation of the species. While occupied critical habitat would always contain at least one or more of the physical or biological features essential to the conservation of the listed species, an area of critical habitat may be in a degraded condition or less than optimal successional stage and not contain all physical or biological features at the time it is designated or those features may be present but in a degraded or less than optimal condition. The area may have been designated as critical habitat, however, because of the potential for some of the features not already present or not yet fully functional to be developed, restored, or improved and contribute to the species' recovery. The condition of the critical habitat would be enhanced as the physical or biological features essential to the conservation of the species are developed, restored, or improved, and the area is able to provide the recovery support for the species on which the designation is based. The value of critical habitat also includes consideration of the likely capability of the critical habitat to support the species' recovery given the backdrop of past and present actions that may impede formation of the optimal successional stage or otherwise degrade the critical habitat. Therefore, a proposed action that alters habitat conditions to preclude or significantly delay the development or restoration of the physical or biological features needed to achieve that capability (relative to that which would occur without the proposed action undergoing consultation), where the change appreciably diminishes the value of critical habitat for the conservation of the species, would likely result in destruction or adverse modification.

This is not a new concept or expansion of authority. The Services have previously recognized and articulated the need for this forward-looking aspect in the analysis of destruction or adverse modification of critical habitat. As discussed in the Background section, each Service issued substantially identical guidance following the decisions of the Fifth and Ninth Circuits invalidating the current regulatory definition (FWS 2004; NMFS 2005). For the past 10 years, the Services have evaluated whether, with implementation of the proposed Federal action, critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species. As noted above, ''primary constituent elements'' was a term introduced in the critical habitat designation regulations (50 CFR 424.12) to describe aspects of ''physical or biological features.'' On May 12, 2014, the Services proposed to revise these regulations to remove the use of the term ''primary constituent elements'' and replace it with the statutory term ''physical or biological features'' (79 FR 27066). However, the shift in terminology does not change the approach used in conducting a ''destruction or adverse modification'' analysis, which is the same regardless of whether the original designation identified primary constituent elements, physical or biological features, or both.

Several commenters asserted that assessing the projected condition of the habitat and projected development of physical and biological features would be inconsistent with the Act. The Services disagree. The Act defines critical habitat to include both areas occupied at the time of listing that contain features ''essential to the conservation'' of the species, as well as unoccupied areas that are ''essential for the conservation'' of listed species. Unoccupied habitat by definition is not required to contain essential physical or biological features to qualify for designation, and even occupied habitat is not required to contain all features throughout the area designated. Yet, the obligation to preserve the value of critical habitat for the conservation of listed species applies to all designated critical habitat. At some point in the recovery process, habitat must supply features that are essential to the conservation of the species. It is thus important to recognize not only the features that are already present in the habitat, but the potential of the habitat to naturally develop the features over time. Therefore, the Services believe it is necessary (and consistent with the Act) to examine a project's effects on the natural development of physical and biological features essential to the conservation of a species.

''Preclusion'' prevents the features from becoming established. The phrase ''significantly delay'' requires more explanation. We intend this phrase to encompass a delay that interrupts the likely natural trajectory of the development of physical and biological features in the designated critical habitat to support the species' recovery. That trajectory is viewed in the context of the current status of the designated critical habitat and with respect to the conservation needs of the listed species.

If the Services make a destruction or adverse modification determination, they will develop reasonable and prudent alternatives on a case by case basis and based on the best scientific and commercial data available.

Comments on ''foreseeable future:'' We received many comments regarding the term ''foreseeable future,'' as used in the preamble to the proposed rule. Commenters believed this concept is vague and undefined, and requires speculation on the part of the Services.

Our Response: In the preamble to the proposed rule (79 FR 27060, May 12, 2014), we used the term ''foreseeable future'' to explain and provide context for the forward-looking aspect of the destruction or adverse modification analysis; we explained that the conservation value of critical habitat also includes consideration of the likely capability, in the foreseeable future, of the critical habitat to support the species' recovery given the backdrop of past and present actions that may impede formation of the optimal successional stage or otherwise degrade the critical habitat. Therefore, an action that would preclude or significantly delay the development or restoration of the physical or biological features needed to achieve that capability, to an extent that it appreciably diminishes the value of critical habitat for the conservation of the species relative to that which would occur without the action undergoing consultation, is likely to result in destruction or adverse modification.

In the proposed rule, we used the language ''foreseeable future'' not as specifically used in the definition of the term ''threatened species'' but as a generally understood concept; that is, in regards to critical habitat, we consider its future capabilities only so far as we are able to make reliable projections with reasonable confidence. The Services do not speculate when

evaluating whether a Federal action would preclude or significantly delay the development of features. As required by the Act, we rely on the best scientific and commercial data available to determine whether the action is likely to destroy or adversely modify critical habitat (16 U.S.C. 1536(a)(2)). This rule formalizes in regulation the forward-looking aspect of the destruction or adverse modification analysis adopted in the 2004 and 2005 guidance.

Additional comments relating to forward-looking aspect of definition: Several commenters felt that considerations regarding ''precluding'' or ''significant delay'' and ''foreseeable future'' would result in more consultations and longer review times.

Our Response: As noted above and in the proposed rule, the Services have applied these concepts since the 2004 and 2005 guidance documents, and no significant increase in the number of consultations or review times has occurred as a result. The Services do not believe that adopting this approach in our regulations will result in more or lengthier consultations.

Comments on defining ''destruction or adverse modification'' instead of defining ''destruction'' and ''adverse modification'' separately: We received three comments requesting that we define ''destruction'' and ''adverse modification'' independently.

Our Response: ''Destruction or adverse modification of critical habitat'' was not defined in the statute. The Services defined the term in the 1978 regulations and amended the definition in 1986. The Services have thus applied the term as a singular concept for many years without difficulty.

Independently defining ''destruction'' and ''adverse modification'' is unnecessary and would not alter the outcome of section 7(a)(2) consultations. If, through consultation, the Services determine that a proposed Federal action likely would result in the destruction or adverse modification of critical habitat, we would, if possible, provide a reasonable and prudent alternative to the action. Such alternative must not violate section 7(a)(2) of the Act, must be economically and technologically feasible, must be capable of being implemented in a manner consistent with the intended purpose of the action, and must be capable of being implemented consistent with the scope of the Federal agency's legal authority and jurisdiction (16 U.S.C. 1536(b)(3)(A); 50 CFR 402.14(h); 50 CFR 402.02 (defining ''reasonable and prudent alternatives'')).

Independently defining ''destruction'' and ''adverse modification'' would unnecessarily complicate the process without improving it or changing the outcome. The key distinction is whether the action appreciably diminishes the value of critical habitat for the conservation of the species, not whether the action destroys critical habitat or adversely modifies it. The time and effort applied to determine whether the action destroyed or adversely modified critical habitat would be better spent on the identification of reasonable and prudent alternatives to the proposed action. Therefore, we do not independently define ''destruction'' and ''adverse modification.''

Comments on the need for a quantitative definition: Eight commenters suggested the need for a quantitative definition that minimizes the Services' discretion.

Our Response: We did not receive any examples of a quantitative definition. We are not able to provide such a definition because Federal actions, species, and critical habitat designations are complex and differ considerably. Our analyses of the actions and their effects on critical habitat require case-by-case consideration that does not fit neatly into a mathematical formula. Congress anticipated the need for the Services to use their professional judgment by requiring us to provide our opinion, detailing how the action affects species and critical habitat. This opinion must be based on the best available scientific and commercial information available for a particular action and species. The level of specificity and precision in available data will vary across actions and across species, and therefore a one-size-fits-all standard would not be workable.

Further, the U.S. Court of Appeals for the Ninth Circuit has specifically held that nothing in the Act or current regulations requires that the analysis of destruction or adverse modification be quantitative in nature. *Butte Environmental Council,* 620 F.3d at 948 (agency not required to calculate rate of loss of habitat). *See also San Luis & Delta-Mendota Water Authority* v. *Salazar,* 760 F.Supp.2d 855, 945 (E.D. Cal. 2010) (Services not required to set threshold for determining destruction or adverse modification), *affirmed in part, reversed in part on other grounds sub nom. San Luis & Delta-Mendota Water Auth.* v. *Jewell,* 747 F.3d 581 (9th Cir. 2014).

Therefore, we find that attempting to specify a quantitative threshold is neither feasible nor required.

Comments on the scale of analysis: Many commenters expressed confusion or concern regarding the scale at which the determination of destruction or adverse modification of critical habitat is made. Some commenters agreed with the Services' interpretation of the statute and the existing implementing regulations at 50 CFR 402.14, as described in the preamble to the proposed rule, that determinations on destruction or adverse modification are based on critical habitat as a whole, not just on the areas where the action takes place or has direct impacts. These commenters requested clarification of the process used to make such determinations or thought that the language, ''critical habitat, as a whole,'' should be included in the rule and not just the preamble. Other commenters disagreed with the Services' interpretation that the destruction or adverse modification determination should be based on critical habitat as a whole and recommended that the Services evaluate destruction or adverse modification at the smallest scale relevant to determining whether the species has met its recovery criteria.

Our Response: As explained in the preambles to this rule and the proposed rule, the determination of ''destruction or adverse modification'' will be based on the effect to the value of critical habitat for the conservation of a listed species. In other words, the question is whether the action will appreciably diminish the value of the critical habitat as a whole, not just in the action area (*i.e.,* all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action; 50 CFR 402.02).

The section 7 process involves multiple determinations, made by the action agency or the Services or both, regarding critical habitat. Where critical habitat has already been designated, section 7(a)(2) of the Act applies. Under the implementing regulations, the Federal agency first determines if its proposed action may affect critical habitat. If such a determination is made, formal consultation is required unless the Federal agency determines, with the written concurrence of the Services, that the action is not likely to adversely affect critical habitat. In accordance with the Act, our implementing regulations at 50 CFR 402.14(g)(1) through (g)(4), and the 2004 and 2005 guidance documents issued by FWS and NMFS (see the Background section), the formal consultation process generally involves four components: (1) The status of critical habitat, which evaluates the condition of critical habitat that has been designated for the species in terms of physical or biological features, the factors responsible for that condition, and the intended conservation role of the

critical habitat overall; (2) the environmental baseline, which evaluates the current condition of the critical habitat in the action area, the factors responsible for that condition, and the relationship of the affected critical habitat in the action area to the entire critical habitat with respect to the conservation of the listed species; (3) the effects of the action, which includes the direct and indirect effects of the action (and the effects of any interrelated or interdependent activities) and describes how those effects alter the value of critical habitat within the action area; and (4) cumulative effects (as defined at 50 CFR 402.02), which evaluates the effects of future, non-Federal activities in the action area and describes how those effects are expected to alter the value of critical habitat within the action area. After synthesizing and integrating these four components, the Services make their final determination regarding the impact of the action on the overall value of the critical habitat designation. The Services conclude whether critical habitat would remain functional (or retain the current ability for the features to be functionally established in areas of currently unoccupied but capable habitat) to fulfill its value for the conservation of the species, or whether the action appreciably reduces the value of critical habitat for the conservation of the species.

Where critical habitat has only been proposed for designation, a distinct but related process applies under section 7(a)(4) of the Act. The action agency must initiate a conference with the Services on the effects of its proposed action when the action is likely to result in destruction or adverse modification of the proposed critical habitat (50 CFR 402.10(b)). Although a conference generally will consist of informal discussions leading to advisory recommendations, action agencies have the option of conducting the conference under the same procedures that apply to formal consultations so that a conference opinion is produced (and later adopted as a biological opinion upon finalization of the critical habitat designation, provided certain conditions are met; 50 CFR 402.10(c) and (d)). While there are important differences between the consultation and conference processes, the same analytical steps as described in the paragraph above apply in the Services' evaluation of impacts to critical habitat.

Adverse effects to critical habitat within the action area may not necessarily rise to the level of destruction or adverse modification to the designated critical habitat. The Handbook expressly provides that adverse effects to single elements or segments of critical habitat generally do not result in destruction or adverse modification unless that loss, when added to the environmental baseline, is likely to appreciably diminish the capability of the critical habitat to satisfy essential requirements of the species. Courts have concurred that a proposed action may result in destruction of some areas of critical habitat and still not necessarily result in a finding of ''destruction or adverse modification.'' *See Conservation Congress* v. *U.S. Forest Service,* 720 F.3d 1048, 1057 (9th Cir. 2013) (''Even completely destroying 22 acres of critical habitat does not necessarily appreciably diminish the value of the larger critical habitat area.''); *Butte Environmental Council,* 620 F.3d at 948 (applying the Handbook provision to support the conclusion that ''[a]n area of a species' critical habitat can be destroyed without appreciably diminishing the value of critical habitat for the species' survival or recovery.'').

The analysis thus places an emphasis on the value of the designated critical habitat as a whole for the conservation of a species, in light of the role the action area serves with regard to the function of the overall designation. Just as the determination of jeopardy under section 7(a)(2) of the Act is made at the scale of the entire listed entity, a determination of destruction or adverse modification is made at the scale of the entire critical habitat designation. Even if a particular project would cause adverse effects to a portion of critical habitat, the Services must place those impacts in context of the designation to determine if the overall value of the critical habitat is likely to be reduced. This could occur where, for example, a small affected area of habitat is particularly important in its ability to support the conservation of a species (*e.g.,* a primary breeding site). Thus, the size or proportion of the affected area is not determinative; impacts to a small area may in some cases result in a determination of destruction or adverse modification, while impacts to a large geographic area will not always result in such a finding.

Because the existing consultation process already ensures that destruction or adverse modification of critical habitat is analyzed at the appropriate scale, the Services decline to include language referring to determinations based on critical habitat ''as a whole'' in the definition of ''destruction or adverse modification.''

Comments on aggregate effects: Several commenters expressed concern that aggregate adverse impacts to critical habitat are not adequately addressed in the Services' analyses and that the proposed rule should be revised to expressly require the evaluation of aggregate effects to critical habitat that multiple actions will have on a species' recovery. One commenter urged the Services to develop a system to track the aggregate effects that destroy or degrade critical habitat.

Our Response: The Services' biological opinion provides an assessment of the status of the critical habitat (including threats and trends), the environmental baseline of the action area (describing all past and present impacts), and cumulative effects. Under the implementing regulations of the Act, cumulative effects are defined as those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation (50 CFR 402.02). Following the definition, we only consider cumulative effects within the action area. The effects of any particular action are evaluated in the context of this assessment, which incorporates the effects of all current and previous actions. This avoids situations where each individual action is viewed as causing only insignificant adverse effects but, over time, the aggregate effects of these actions would erode the conservation value of the critical habitat.

Comments on the role of mitigation in ''destruction or adverse modification'' findings: Four commenters thought the ''net effects'' of an action, including consideration of ''mitigation and offsetting beneficial'' measures, should be considered in the revised regulatory definition. One commenter suggested that the Services should develop an explicit framework for allowing project proponents to avoid a destruction or adverse modification finding by restoring the same biological or physical feature of critical habitat that they degrade, provided there is evidence the restoration is likely to succeed.

Our Response: As stated in the Services' 2004 and 2005 guidance, conservation activities (*e.g.,* management, mitigation, etc.) outside of designated critical habitat should not be considered when evaluating effects to critical habitat. However, conservation activities within critical habitat, included as part of a proposed action to mitigate the adverse effects of the action on critical habitat, are considered by the Services' in formulating our biological opinion as to whether an action is likely to result in the destruction or adverse

modification of critical habitat. This consideration of beneficial actions is consistent with the implementing regulations at 50 CFR 402.14(g)(8), which set forth that in formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation. The Services welcome the inclusion of beneficial conservation activities as part of proposed actions. However, because the question of whether beneficial actions can compensate for impacts to critical habitat is complicated and must be evaluated on a case-by-case basis, it would be advisable for Federal agencies and applicants to coordinate closely with the Services on such activities.

Comments on continuation of current uses: Two commenters discussed current land practices and other uses on areas that may be designated as critical habitat. One commenter specifically requested that the final rule indicate that continuation of current uses does not constitute destruction or adverse modification.

Our Response: There is nothing in the Act to suggest that previously ongoing activities are or may be exempted from analysis during section 7(a)(2) consultations. Accordingly, our longstanding regulatory framework does not distinguish between ongoing and other actions. ''Action'' is defined broadly at 50 CFR 402.02 to include all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. The applicability provision of the regulations further explains that section 7(a)(2) obligations arise so long as there is discretionary Federal involvement or control (50 CFR 402.03). It would be unsupported and beyond the scope of the definition of ''destruction or adverse modification'' to change these well-established principles.

Comments regarding the use of recovery documents as a basis for a destruction or adverse modification determination: We received three comments requesting that the Services clarify that criteria, goals, or programs established in recovery plans are not enforceable and may not be used as a basis for a destruction or adverse modification decision.

Our Response: The Services agree that recovery plans convey guidance and are not regulatory documents that compel any action to occur. In addition, section 7(a)(2) of the Act describes a standard of prohibition rather than a mandate to further recovery. However, criteria, goals, and programs for recovery that are established in these plans may be used in our evaluation of whether, with implementation of the proposed action, critical habitat would retain its value for the conservation of the species. Recovery plans, in addition to critical habitat rules, may provide the best scientific and commercial information available on the value of critical habitat to the conservation of the species, thus assisting the Services with evaluating the effects of a proposed action on critical habitat.

Comments on undue burden: We received 14 comments regarding the perceived potential for undue burden on Tribes, State and local governments, and various industries. The commenters suggested that the proposed definition would prevent the issuance of permits or impose unwarranted restrictions and requirements on permit applicants, resulting in additional costs for project redesign, reductions in productivity, and increases in the time and effort required to submit permit applications. Some commenters predicted an increase in the number of section 7(a)(2) consultations, especially formal consultations. Others predicted that the Services would conclude destruction or adverse modification of critical habitat more frequently.

Our Response: Because the final regulatory definition largely formalizes existing guidance that FWS and NMFS have implemented since 2004 and 2005, respectively, we conclude that the section 7(a)(2) consultation process will not significantly change. The final definition does not ''raise the bar'' in any way. We will not reinitiate consultations as a result of this rule. We will consult on ongoing actions in a similar manner as we have since the issuance of the guidance. Therefore, we do not anticipate changes in the costs related to section 7(a)(2) consultations or the frequency at which the Services conclude destruction or adverse modification of critical habitat. The decision to consult is made prior to and independent of our analysis of destruction or adverse modification of critical habitat (*i.e.*, by a Federal agency applying the ''may affect'' standard of 50 CFR 402.14(a) to determine whether their action may affect designated critical habitat). If a Federal agency determines, with the written concurrence of the Services, that the proposed action is not likely to adversely affect critical habitat, formal consultation is not required (50 CFR 402.14(b)), and the Services would not perform an analysis of destruction or adverse modification of critical habitat. Therefore, the number of section 7(a)(2) consultations, and formal consultations in particular, is not likely to be affected by this rule.

Comments on Tribe, State, and local coordination: We received five comments from Tribes, State and local governments, and industry groups indicating that we should consult or coordinate with Tribes, States, and local governments to finalize the proposed rule.

Our Response: The Services have undertaken numerous efforts to ensure that our State, Tribal, and other partners had full notice and opportunity to provide input into the development of this rule. We reached out to industry groups, environmental organizations, intergovernmental organizations, and Federal agencies. We worked with the Association of Fish and Wildlife Agencies and the Native American Fish and Wildlife Society to distribute information to Tribes, States, and local governments about the proposed rule. The Services notified their respective Tribal liaisons, who sent letters to Tribes regarding this rule. We also hosted a webinar for the States on May 23, 2014. We considered all submitted comments, which included comments from Tribes, States, and local governments, and, as warranted, applied suggestions to the final rule.

Comments on NEPA: We received 11 comments suggesting that a categorical exclusion from the NEPA was not appropriate for the proposed rule and that the Services should analyze the environmental impacts of this action.

Our Response: The Services believe this rule likely would qualify for one or more categorical exclusions adopted by the Department of the Interior and the National Oceanic and Atmospheric Administration, respectively. Nevertheless, in an abundance of caution, the Services have completed an environmental assessment, which is available at the Federal e-rulemaking portal: *http://www.regulations.gov* (see **ADDRESSES**).

Comments on Energy Supply, Distribution, and Use (E.O. 13211), Takings (E.O. 12630), and Economic Analyses (E.O. 12866, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act): We received comments that the Services should prepare a Statement of Energy Effects (E.O. 13211, 1 comment), a regulatory flexibility analysis (2 comments), and an economic analysis (2 comments).

Our Response: This rule clarifies existing requirements for Federal agencies under the Act. Based on

procedures applied through existing agency guidance, the rule is substantially unlikely to lead to different conclusions in section 7(a)(2) consultations. The rule clarifies the standard by which we will evaluate the effect of agency actions on critical habitat pursuant to section 7(a)(2) of the Act. For further information, please see the relevant sections under Required Determinations, below.

Comments on extension of the comment period: Many commenters requested an extension of the public comment period announced in the draft policy. Additionally, we received requests to reopen the comment period that ended on October 9, 2014.

Our Response: On June 26, 2014 (79 FR 36284), we extended the public comment period on the draft policy for an additional 90 days to accommodate this request and to allow for additional review and public comment. The comment period for the draft policy was therefore open for 150 days, which provided adequate time for all interested parties to submit comments and information.

Comments on the proposed rule being ''beyond the scope of the Act'': We received 25 comments stating that the proposed definition exceeded the authority of the Act. Some commenters wrote that it was beyond the scope of the Act. Some expressed concern that the proposed definition implied an affirmative conservation requirement or mandate for recovery.

Our Response: As the agencies charged with administering the Act, it is within our authority to promulgate and amend regulations to ensure transparent and consistent implementation. Under general principles of administrative law, an agency may resolve ambiguities and define or clarify statutory language as long as the agency's interpretation is a permissible interpretation of the statute. The term ''destruction or adverse modification'' was not defined by Congress. Consequently, the Services first promulgated a regulatory definition in 1978, and then later in 1986. As previously mentioned, the ''survival and recovery'' standard of our earlier definitions was invalidated by courts. We believe that this revised definition comports with the language and purposes of the Act.

As explained in the preamble to the proposed rule, section 7(a)(2) only applies to discretionary agency actions and does not create an affirmative duty for action agencies to recover listed species (79 FR 27060, May 12, 2014). Similarly, the definition of ''destruction or adverse modification'' is a prohibitory standard only. The definition does not, and is not intended to, create an affirmative conservation requirement or a mandate for recovery. Consistent with the Ninth Circuit's opinion, in the context of describing an action that ''jeopardizes'' a species, in *National Wildlife Federation* v. *NMFS*, 524 F.3d 917 (9th Cir. 2008), the Services believe that an action that ''destroys'' or ''adversely modifies'' critical habitat must cause a deterioration in the value of critical habitat, which includes its ability to provide recovery support to the species based on ongoing ecological processes. Section 7(a)(2) of the Act requires Federal agencies to insure that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. Under this section of the Act, Federal agencies are not required to recover species; however, they must insure that their actions are not likely to prevent or impede the recovery of the species through the destruction or adverse modification of critical habitat. To be clear, Federal actions are not required to improve critical habitat, but they must not reduce its existing capacity to conserve the species over time. Section 7(a)(2) and the definition of ''destruction or adverse modification'' are implemented independent of section 7(a)(1), which directs Federal agencies to utilize their authorities to carry out affirmative conservation programs for listed species.

Comments suggesting revision or withdrawal of the rule: We received 15 comments requesting that we revise or withdraw the proposed rule.

Our Response: In order to administer the Act, the Services need a regulatory definition of ''destruction or adverse modification.'' The Fifth and Ninth Circuits found the current regulatory definition to be invalid over a decade ago because it required that both the survival and the recovery of listed species be impacted. As discussed previously, in 2004 and 2005, the Services issued internal guidance instructing their biologists to discontinue use of the regulatory definition and to instead consider whether critical habitat would continue to contribute (or have the potential to contribute) to the conservation of the species. After several years of implementation, the Services herein formalize this guidance by modifying the regulatory definition. In response to public comments, we have made minor revisions to the proposed definition; however, the meaning and implementation of the standard remains unchanged. The final definition is clear, implementable, and consistent with the Act.

Required Determinations

Regulatory Planning and Review (E.O. 12866)

The Office of Management and Budget (OMB) has determined that this final rule is a significant regulatory action and has reviewed this rule under E.O. 12866 because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA requires Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We certify that this rule will not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

This rule clarifies existing requirements for Federal agencies under the Act. Federal agencies are the only entities that are directly affected by this rule, and they are not considered to be small entities under SBREFA's size standards. No other entities are directly affected by this rule.

This rule will be applied in determining whether a Federal agency has ensured, in consultation with the Services, that any action it would authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. Based on procedures applied through existing agency guidance, this rule is unlikely to affect our determinations. The rule provides clarity to the standard with which we will evaluate agency actions pursuant to section 7(a)(2) of the Act.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) This rule will not ''significantly or uniquely'' affect small governments. We have determined and certify under the Unfunded Mandates Reform Act (2 U.S.C. 1502 *et seq.*) that this rule will not impose a cost of $100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the regulation will not place additional requirements on any city, county, or other local municipalities.

(b) This rule will not produce a Federal mandate of $100 million or greater in any year (*i.e.*, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act). This regulation would not impose any additional management or protection requirements on the States or other entities.

Takings (E.O. 12630)

In accordance with E.O. 12630, we have determined the rule does not have significant takings implications.

A takings implication assessment is not required because this rule (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. Indeed, this regulation provides broad program direction for the Services' application of section 7(a)(2) in consultations on future proposed Federal actions and does not itself result in any particular action concerning a specific property. Further, this rule substantially advances a legitimate government interest (conservation and recovery of listed species) and does not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with E.O. 13132, we have considered whether this rule will have significant Federalism effects and have determined that a federalism summary impact statement is not required. This rule pertains only to determinations of Federal agency compliance with section 7(a)(2) of the Act, and will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

This rule will not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of E.O. 12988. This rule clarifies how the Services will make determinations on whether a Federal agency has ensured that any action it authorizes, funds, or carries out is not likely to result in the destruction or adverse modification of critical habitat.

Government-to-Government Relationship With Tribes

In accordance with Executive Order 13175 (''Consultation and Coordination with Indian Tribal Governments'', November 6, 2000), the Department of the Interior Manual at 512 DM 2, the Department of Commerce (DOC) Tribal Consultation and Coordination Policy (May 21, 2013), DOC Departmental Administrative Order (DAO) 218–8, and NOAA Administrative Order (NAO) 218–8 (April 2012), we have considered possible effects of this final rule on Federally recognized Indian Tribes. Following an exchange of information with tribal representatives, we have determined that this rule, which modifies the general framework for conducting consultations on Federal agency actions under section 7(a)(2) of the Act, does not have tribal implications as defined in Executive Order 13175. We will continue to collaborate and coordinate with Tribes on issues related to Federally listed species and their habitats and work with them as appropriate as we engage in individual section 7(a)(2) consultations. See Joint Secretarial Order 3206 (''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act'', June 5, 1997).

Paperwork Reduction Act of 1994

This rule does not contain any collections of information that require approval by the OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This rule does not impose recordkeeping or reporting requirements on Tribes, State or local governments, individuals, businesses, or organizations. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA)

In the proposed rule, we invited the public to comment on whether and how the regulation may have a significant effect upon the human environment, including any effects identified as extraordinary circumstances at 43 CFR 46.215. After considering the comments received and further evaluating whether there is any arguable basis to require preparation of an environmental assessment, we analyzed this rule in accordance with the criteria of the National Environmental Policy Act, the Department of the Interior regulations on Implementation of the NEPA (43 CFR 46.10–46.450), the Department of the Interior Manual (516 DM 1–6 and 8), and National Oceanographic and Atmospheric Administration Administrative Order 216–6. This analysis was undertaken in an abundance of caution only, as we believe the rule would qualify for one or more categorical exclusions. Based on a review and evaluation of the information contained in the Environmental Assessment, we made a determination that the Final Definition for the phrase ''destruction or adverse modification'' of critical habitat will not have a significant effect on the quality of the human environment under the meaning of section 102(2)(c) of the National Environmental Policy Act of 1969 (as amended).

Energy Supply, Distribution or Use (E.O. 13211)

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to affect energy supplies, distribution, or use. Therefore, this action is a not a significant energy action, and no Statement of Energy Effects is required.

References Cited

A complete list of all references cited in this document is available upon request from the U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 402

Endangered and threatened species.

Regulation Promulgation

Accordingly, we amend part 402, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as set forth below:

PART 402—INTERAGENCY COOPERATION—ENDANGERED SPECIES ACT OF 1973, AS AMENDED

■ 1. The authority citation for part 402 continues to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*

■ 2. In § 402.02, revise the definition for ''*Destruction or adverse modification*'' to read as follows:

§ 402.02 Definitions.

* * * * *

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

* * * * *

Dated: January 29, 2016.

Michael J. Bean,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior.

Dated: January 29, 2016.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2016–02675 Filed 2–10–16; 8:45 am]

BILLING CODE 4333–15–P; 3510–22–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 424

[Dockets FWS–R9–ES–2011–0104 and 120206102–5603–03; 4500030114]

RIN 1018–AX87; 0648–BB82

Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act

AGENCY: U.S. Fish and Wildlife Service (FWS), Interior; National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice of final policy.

SUMMARY: We, the U.S Fish and Wildlife Service and the National Marine Fisheries Service, (jointly, the ''Services'') announce our final policy on exclusions from critical habitat under the Endangered Species Act. This non-binding policy provides the Services' position on how we consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process. This policy complements our implementing regulations regarding impact analyses of critical habitat designations and is intended to clarify expectations regarding critical habitat and provide for a more predictable and transparent critical-habitat-exclusion process.

DATES: This policy is effective March 14, 2016.

ADDRESSES: You may review the reference materials and public input used in the creation of this policy at *http://www.regulations.gov* at Docket No. FWS–R9–ES–2011–0104. Some of these materials are also available for public inspection at U.S. Fish and Wildlife Service, Division of Conservation and Classification, MS: ES, 5275 Leesburg Pike, Falls Church, VA 22041–3803 during normal business hours.

FOR FURTHER INFORMATION CONTACT: Douglas Krofta, U.S. Fish and Wildlife Service, Division of Conservation and Classification, MS: ES, 5275 Leesburg Pike, Falls Church, VA 22041–3803; telephone 703/358–2171; facsimile 703/358–1735; or Marta Nammack, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910; telephone 301/427–8469; facsimile 301/713–0376. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION: Today, we publish in the **Federal Register** three related documents that are final agency actions. This document is one of the three, of which two are final rules and one is a final policy:

- A final rule that amends the regulations governing section 7 consultation under the Endangered Species Act to revise the definition of ''destruction or adverse modification'' of critical habitat. That regulatory definition had been invalidated by several courts for being inconsistent with the Act. This final rule amends title 50 of the Code of Federal Regulations (CFR) at part 402. The Regulation Identifier Numbers (RIN) are 1018–AX88 and 0648–BB82, and the final rule may be found on *http://www.regulations.gov* at Docket No. FWS–R9–ES–2011–0072.
- A final rule that amends the regulations governing the designation of critical habitat under section 4 of the Act. A number of factors, including litigation and the Services' experience over the years in interpreting and applying the statutory definition of ''critical habitat,'' highlighted the need to clarify or revise the regulations. This final rule amends 50 CFR part 424. It is published under RINs 1018–AX86 and 0648–BB79 and may be found on *http://www.regulations.gov* at Docket No. FWS–HQ–ES–2012–0096.
- A final policy pertaining to exclusions from critical habitat and how we may consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process. This final policy complements the final rule amending 50 CFR 424.19 and provides for a predictable and transparent exclusion process. The policy is published under RINs 1018–AX87 and 0648–BB82 and is set forth below in this document. The policy may be found on *http://www.regulations.gov* at Docket No. FWS–R9–ES–2011–0104.

Background

The National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (FWS) are charged with implementing the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), the goal of which is to provide a means to conserve the ecosystems upon which listed species depend and to provide a program for listed species conservation. Critical habitat is one tool in the Act that Congress established to achieve species conservation. In section 3(5)(A) of the Act Congress defined ''critical habitat'' 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 this Act, on which are found those physical or 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 section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

Specifying the geographic location of critical habitat helps facilitate implementation of section 7(a)(1) by identifying areas where Federal agencies can focus their conservation programs and use their authorities to further the purposes of the Act. In addition to serving as an educational tool, the designation of critical habitat also provides a significant regulatory protection—the requirement that Federal agencies consult with the

JS 44 (Rev. 08/16)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

STATE OF ALABAMA EX REL. LUTHER STRANGE, in his official capacity as Attorney General of Alabama, STATE OF ARKANSAS, EX REL. LESLIE RUTLEDGE, in her official capacity as Attorney General of Arkansas, et al. (see attached)

(b) County of Residence of First Listed Plaintiff Mobile
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
See attached

DEFENDANTS

NATIONAL MARINE FISHERIES SERVICE, PENNY PRITZKER, in her official capacity of Secretary of Commerce, UNITED STATES FISH AND WILDLIFE SERVICE, SALLY JEWELL, in her official capacity as Secretary of the Interior

County of Residence of First Listed Defendant Mobile
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☐ 3 Federal Question *(U.S. Government Not a Party)*
- ☒ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
- ☐ 110 Insurance
- ☐ 120 Marine
- ☐ 130 Miller Act
- ☐ 140 Negotiable Instrument
- ☐ 150 Recovery of Overpayment & Enforcement of Judgment
- ☐ 151 Medicare Act
- ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
- ☐ 153 Recovery of Overpayment of Veteran's Benefits
- ☐ 160 Stockholders' Suits
- ☐ 190 Other Contract
- ☐ 195 Contract Product Liability
- ☐ 196 Franchise

REAL PROPERTY
- ☐ 210 Land Condemnation
- ☐ 220 Foreclosure
- ☐ 230 Rent Lease & Ejectment
- ☐ 240 Torts to Land
- ☐ 245 Tort Product Liability
- ☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
- ☐ 310 Airplane
- ☐ 315 Airplane Product Liability
- ☐ 320 Assault, Libel & Slander
- ☐ 330 Federal Employers' Liability
- ☐ 340 Marine
- ☐ 345 Marine Product Liability
- ☐ 350 Motor Vehicle
- ☐ 355 Motor Vehicle Product Liability
- ☐ 360 Other Personal Injury
- ☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
- ☐ 365 Personal Injury - Product Liability
- ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
- ☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
- ☐ 370 Other Fraud
- ☐ 371 Truth in Lending
- ☐ 380 Other Personal Property Damage
- ☐ 385 Property Damage Product Liability

CIVIL RIGHTS
- ☐ 440 Other Civil Rights
- ☐ 441 Voting
- ☐ 442 Employment
- ☐ 443 Housing/ Accommodations
- ☐ 445 Amer. w/Disabilities - Employment
- ☐ 446 Amer. w/Disabilities - Other
- ☐ 448 Education

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- ☐ 463 Alien Detainee
- ☐ 510 Motions to Vacate Sentence
- ☐ 530 General
- ☐ 535 Death Penalty

Other:
- ☐ 540 Mandamus & Other
- ☐ 550 Civil Rights
- ☐ 555 Prison Condition
- ☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
- ☐ 625 Drug Related Seizure of Property 21 USC 881
- ☐ 690 Other

LABOR
- ☐ 710 Fair Labor Standards Act
- ☐ 720 Labor/Management Relations
- ☐ 740 Railway Labor Act
- ☐ 751 Family and Medical Leave Act
- ☐ 790 Other Labor Litigation
- ☐ 791 Employee Retirement Income Security Act

IMMIGRATION
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- ☐ 465 Other Immigration Actions

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- ☐ 423 Withdrawal 28 USC 157

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- ☐ 820 Copyrights
- ☐ 830 Patent
- ☐ 840 Trademark

SOCIAL SECURITY
- ☐ 861 HIA (1395ff)
- ☐ 862 Black Lung (923)
- ☐ 863 DIWC/DIWW (405(g))
- ☐ 864 SSID Title XVI
- ☐ 865 RSI (405(g))

FEDERAL TAX SUITS
- ☐ 870 Taxes (U.S. Plaintiff or Defendant)
- ☐ 871 IRS—Third Party 26 USC 7609

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- ☐ 375 False Claims Act
- ☐ 376 Qui Tam (31 USC 3729(a))
- ☐ 400 State Reapportionment
- ☐ 410 Antitrust
- ☐ 430 Banks and Banking
- ☐ 450 Commerce
- ☐ 460 Deportation
- ☐ 470 Racketeer Influenced and Corrupt Organizations
- ☐ 480 Consumer Credit
- ☐ 490 Cable/Sat TV
- ☐ 850 Securities/Commodities/ Exchange
- ☐ 890 Other Statutory Actions
- ☐ 891 Agricultural Acts
- ☐ 893 Environmental Matters
- ☐ 895 Freedom of Information Act
- ☐ 896 Arbitration
- ☒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
- ☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
5 U.S.C. § 701-706, 28 U.S.C. § 2201-2202

Brief description of cause:
Action challenging illegal regulations improperly promulgated under the Endangered Species Act

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See instructions):
JUDGE _____ DOCKET NUMBER _____

DATE 11/29/2016

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: Nature of Suit Code Descriptions.

V. Origin. Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statue.

VI. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. Related Cases. This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

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