DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 402

[Docket No. FWS–R9–ES–2011–0072]

RIN 1018–AX88

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 402

[Docket No. 120106026–3731–01: 92210–0–0009–B4]

RIN 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: Proposed 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'') propose to amend our regulations, which implements the Endangered Species Act of 1973, as amended (Act). Our regulation establishes the procedural regulations governing interagency cooperation under section 7 of the Act. 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. In 1986, the Services established a definition for ''destruction or adverse modification'' (§ 402.02) that was found to be invalid by the U.S. Court of Appeals for the Fifth (2001) and Ninth (2004) Circuits. We propose to amend our regulations to replace the invalidated definition with one that is consistent with the Act and the circuit court opinions. Finally, the proposed amendment is part of the Services' response 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: We will accept comments from all interested parties until July 11, 2014. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on this date.

ADDRESSES: You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. In the box that reads ''Enter Keyword or ID,'' enter the Docket number for this proposed rule, which is FWS–R9–ES–2011–0072. Then, in the Search panel, under the Document Type heading, check the box next to Proposed Rules. You may enter a comment by clicking on ''Submit a Comment.'' Please ensure that you have found the correct rulemaking before submitting your comment.
- *U.S. mail or hand delivery:* Public Comments Processing, Attn: [Docket No. FWS–R9–ES–2011–0072]; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Request for Information section below for more information).

FOR FURTHER INFORMATION CONTACT: Patrice Ashfield, U.S. Fish and Wildlife Service, Division of Environmental Review, 4401 N Fairfax Drive, Suite 420, Arlington, VA, 22203, telephone 703/358–2171; facsimile 703/358–1735; or Cathryn E. Tortorici, National Marine Fisheries Service, Office of Protected Resources, Interagency Cooperation Division, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301/427–8405; 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 now open for public comment. We invite the public to comment individually on these documents as instructed in their preambles. This document is one of the three, of which two are proposed rules and one is a draft policy:

- A proposed rule to amend the existing regulations governing section 7 consultation under the Endangered Species Act to revise the definition of ''destruction or adverse modification'' of critical habitat. The current regulatory definition has been invalidated by several courts for being inconsistent with the language of the Act. This proposed rule would revise title 50 of the Code of Federal Regulations (CFR) at part 402. The Regulatory Identifier Number (RIN) is 1018–AX88, and the proposed rule may be found on *http://www.regulations.gov* at Docket No. FWS–R9–ES–2011–0072.
- A proposed rule to amend existing 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, have highlighted the need to clarify or revise the current regulations. This proposed rule would revise 50 CFR part 424. It is published under RIN 1018–AX86 and may be found on *http://www.regulations.gov* at Docket No. FWS–HQ–ES–2012–0096.
- A draft 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 policy is meant to complement the proposed revisions to 50 CFR part 424 and to provide for a simplified exclusion process. The policy is published under RIN 1018–AX87 and may be found on *http://www.regulations.gov* at Docket No. FWS–R9–ES–2011–0104.

Background

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. In 1978, the Services promulgated regulations governing interagency cooperation under section 7 of the Act. (50 CFR part 402). These regulations provided a definition for ''destruction or adverse modification'' of critical habitat, which was later updated in 1986 to conform with amendments made to the Act. The 1986 regulations defined ''destruction or adverse modification'' as: ''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.'' (50 CFR 402.02). The

preamble to the 1986 regulation contained relatively little discussion on the concept of ''destruction or adverse modification of critical habitat.''

In 2001, the Fifth Circuit Court of Appeals reviewed the 1986 regulatory definition of destruction and adverse modification and found it exceeded the Service's discretion. *Sierra Club* v. *U.S. Fish and Wildlife Service,* 245 F.3d 434 (5th Cir. 2001). Specifically, the court found the regulatory definition to be invalid on its face and inconsistent with the Act. The court reasoned that the regulatory definition set too high a threshold for triggering adverse modification by its requirement that both recovery and survival be diminished before adverse modification would be the appropriate conclusion. The court determined that the regulatory definition actually established a standard that would only trigger an adverse modification determination if the ''survival'' of the species was diminished, while ignoring the role critical habitat plays in the recovery of species. Citing legislative history and the Act itself, the court was persuaded that Congress intended the Act to ''enable listed species not merely to survive, but to recover from their endangered or threatened status.'' *Sierra Club* at 436. Noting the Act defines critical habitat as areas that are ''essential to the conservation'' of listed species, the court determined that ''conservation'' is a much ''broader concept than mere survival.'' *Sierra Club* at 436. The court concluded that the Act's definition of conservation ''speaks to the recovery'' of listed species.

In 2004, the Ninth Circuit Court of Appeals also reviewed the 1986 regulatory definition of destruction or adverse modification. *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F.3d 1059 (9th Cir. 2004). That court agreed with the Fifth Circuit's determination that the regulation was facially invalid. 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.'' 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.'' *Gifford Pinchot Task Force* at 1070.

After the Ninth Circuit's decision, the Services each issued guidance to discontinue the use of the 1986 adverse modification regulation (FWS Acting Director Marshall Jones Memo to Regional Directors, ''Application of the 'Destruction or Adverse Modification' Standard under Section 7(a)(2) of the Endangered Species 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 Endangered Species Act, 2005''). Specifically, in evaluating an action's effects on critical habitat as part of interagency consultation, the Services began applying the definition of ''conservation'' as set out in the Act, which defines conservation (and conserve and conserving) to mean ''to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no long necessary.'' 16 U.S.C. § 1532(3). Further, after examining the baseline and the effects of the action, the Services began analyzing whether the implementation of the Federal action under consultation, together with any cumulative effects, would result in the critical habitat remaining ''functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species.''

Proposed Definition

After considering relevant case law and our collective experience in applying the ''destruction or adverse modification'' standard over the last three decades, the Services propose to amend the definition of ''destruction or adverse modification'' to (1) more explicitly tie the definition to the stated purpose of the Act; and, (2) more clearly contrast the definitions of ''destruction or adverse modification'' and ''jeopardize the continued existence of.'' To achieve these purposes, the Services propose the following definition:

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

Use of the term ''conservation value'' is intended to align the definition of ''destruction or adverse modification'' with the conservation purposes of the Act and the Act's definition of ''critical habitat.'' Specifically, the term ''conservation value'' is intended to capture the role that critical habitat should play for the recovery of listed species. We believe by focusing on the conservation value of critical habitat, which also necessarily includes attributes critical to a species' survival, this definition will be consistent with the Fifth and Ninth Circuit Court of Appeals decisions referenced above. The Services note that ''value'' within ''conservation value'' refers to its utility or importance. It does not refer to a quantified value.

The proposed definition also better clarifies and preserves the existing distinction between the definitions of ''destruction or adverse modification'' and ''jeopardize the continued existence of'' by focusing the analysis for ''destruction or adverse modification'' on how the effects of a proposed action affect the value of critical habitat for the recovery of threatened or endangered species. The focus of the ''jeopardize the continued existence of'' definition, on the other hand, is the status of the species, which concentrates on a species' reproduction, numbers, and distribution. The second sentence of the Services' proposed definition of ''destruction or adverse modification'' simply acknowledges that some important physical or biological features may not be present or are present in a sub-optimal quantity or quality. This could occur when, for example, the habitat has been degraded by human activity or is part of an ecosystem adapted to a particular natural disturbance (e.g., fire or flooding), which does not constantly occur but is likely to recur. The critical habitat area may either be unoccupied habitat, which is not required to have physical or biological features present, or may be an area within an occupied habitat that has only some but not all features. The area may have been designated because of its potential to support the physical or biological features that fulfill the species' life-history needs and its potential recovery. A species life-history needs may include, but are not limited to, food, water, light, shelter from predators, competitors, weather and physical space to carry out normal behaviors or provide dispersal or migratory corridors. Thus, an action that would preclude or significantly delay habitat regeneration or natural successional processes, to an extent that it appreciably diminishes the conservation value of critical habitat, would result in destruction or adverse modification.

The Act defines critical habitat to include those 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 species. Our use of the phrase ''physical or biological features'' is consistent with the recently proposed definition of ''physical or biological features'' in 50 CFR 424.02 but is intended to apply more broadly than in defining specific areas of critical habitat within the geographic area occupied by the species at the time of listing. All habitats are comprised of physical or biological features. Consistent with current practice, we anticipate that our analyses of the effects of the action to critical habitat will necessarily consider, in part, effects to features irrespective of whether the specific area was designated within or outside of the geographic area occupied by the species at the time it was listed.

In proposing a new definition for ''destruction or adverse modification,'' and setting out the accompanying clarifying discussion in this Preamble, the Services are establishing prospective standards only. Nothing in these proposed revised regulations is intended to require (now or at such time as these regulations may become final) that any previously completed biological opinions must be reevaluated on this basis.

Basis for Term ''Conservation Value''

Our proposed definition of ''destruction or adverse modification'' of critical habitat is based on an understanding of the role that habitat—which includes the physical or biological features required for a species' life-history needs—generally plays for species. The size of species' populations will fluctuate with, among other things, the availability of the physical or biological features the species finds in its habitat (for more detailed definitions of habitat and reviews of the relationship between a species and its habitat, see Gilpin and Soule 1986; Hall *et al.* 1997; MacArthur and Wilson 1967; Odum 1971).

Our proposed definition is further shaped by the purpose of designating critical habitat. Both for occupied and unoccupied habitat, Congress focused on what habitat was essential to the ''conservation'' of listed species when designating critical habitat. As discussed above, the courts have concluded that Congress intended that ''conservation and survival be two different (though complementary) goals of the (Act).'' *Gifford Pinchot* at 1070. In light of congressional intent that critical habitat be established for conservation purposes, the courts concluded, and we agree, 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.* From these cases, it is clear that any definition of ''destruction or adverse modification'' must reflect the purpose for which the critical habitat was designated—the recovery of the species.

After reviewing the court cases discussed above, the Act's definitions of ''conservation'' and ''critical habitat,'' and our understanding of the role habitat plays for species' conservation, we determined that ''conservation value'' embodies the intended recovery role of critical habitat and, therefore, is relevant in a determination as to whether an action is likely to destroy or adversely modify that habitat. ''Conservation value,'' as used in the definition, then, is the contribution the critical habitat provides, or has the ability to provide, to the recovery of the species.

Determination of ''Conservation Value'' of Critical Habitat

Our determination of the conservation value of critical habitat for a particular species will be based on our current understanding of the life-history needs of that particular species, and how the features of the critical habitat provide or have the ability to provide for those life-history needs to continue the survival and promote the recovery of that species. As a practical matter, to determine the conservation value of critical habitat, we will need to consider several variables for the entire critical habitat, including for the specific areas (or units, as appropriate) designated. The variables include:

- Life-history needs of the species being provided for by critical habitat.
- Current condition of the critical habitat, which requires consideration of:
  - The quantity of features and habitat necessary to support the life-history needs of the species for recovery.
  - The quality of features and habitat necessary to support the life-history needs of the species for recovery.
  - The ability (or likelihood) for the critical habitat to fulfill its role in the recovery of the species.

In conducting a section 7 analysis under the Act on the impacts of an action on critical habitat, the Services will first consider the information set out in the final rule designating the critical habitat. In some cases, the final rules designating critical habitat contain sufficient information to characterize the ''conservation value'' of the critical habitat overall, and of any discrete areas that are designated. In other cases, the available information may be quite limited. With time, new information may become available and enable us to refine our determination of the conservation value of the critical habitat. For each section 7 consultation, we will rely upon the best scientific and commercial data available to describe the life-history needs of the species, and how the features or areas of the critical habitat provide or have the ability to provide for those life-history needs and the recovery of that species. In the future, an emphasis will be placed on preparing final critical habitat rules that explicitly describe the conservation value of critical habitat, both overall and at the scale of individual specific areas designated, if applicable.

Our determination of conservation value 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 recovery support for conserving the species. While occupied critical habitat would always contain at least one or more of the physical or biological features that provide for some life-history needs 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 important to the species life-history needs 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 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 conservation value of critical habitat relative to that which would occur without the action undergoing

consultation, is likely to result in destruction or adverse modification.

We note that habitat suitability for any particular species will vary through time as a result of natural processes and, in a natural system, these habitats would not be considered ''degraded.'' For example, willow flycatchers generally nest in a specific age-class of willows. In a dynamic riverine system this age-class of willows is continually created and destroyed by periodic flooding, bank erosion, and deposition. An area of riverine habitat would not be considered ''degraded'' during periods when the appropriate age-class of willows is not present. However, as with ''degraded'' habitat, an action that would preclude or significantly delay the development of those features that support the life-history needs of the species—the appropriate age-class of willows—is likely to result in destruction or adverse modification of critical habitat if it occurs to an extent that it appreciably diminishes the conservation value of critical habitat relative to that which would occur without the action undergoing consultation.

We are cognizant that section 7(a)(2) only applies to discretionary agency actions. *See* 50 CFR 402.03. Further, while other parts of the Act create certain responsibilities for all Federal agencies (such as section 7(a)(1)), we recognize that section 7(a)(2) does not create an affirmative duty for action agencies to recover listed species. The consultation provision requires that agencies insure that any action they authorize, fund, or carry out is ''not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of [critical habitat].'' 16 U.S.C. 1536(a)(2). This is a standard of prohibition rather than a mandate to further recovery. Thus, the Ninth Circuit has made it clear that for an action ''to jeopardize'' listed species, it has to cause ''some deterioration in the species' pre-action condition.'' *National Wildlife Federation* v. *NMFS,* 543 F.3d 917 (9th Cir. 2008).

We think the same is true for a finding of adverse modification (or destruction) of critical habitat—that is, in order for an action to be found to adversely modify critical habitat, it must in some way cause the deterioration of the critical habitat's pre-action condition, which includes its ability to provide recovery support to the species based on ongoing ecological processes. For example, if one aspect of the conservation value of the critical habitat is the capacity to develop into a specific age-class of willows in a riverine system, an action agency is not required under section 7(a)(2) to affirmatively assist the transition of the habitat to that state. But, an adverse modification may occur if the action agency takes an action that would appreciably diminish the capacity of that habitat to complete that transition relative to the conditions which would occur without the action undergoing consultation. Conversely, if the proposed action does not preclude or significantly delay the ability for that habitat to develop through ecological processes into a specific age-class of willows, then the habitat has not been adversely modified.

Determination of ''Appreciably Diminish''

Once the conservation value of the habitat is determined, then the question becomes whether the effects of the action (as defined in § 402.02) ''appreciably diminish'' that value of the critical habitat. The preamble to the 1986 regulations provides no guidance regarding the meaning of the words ''appreciably diminish.'' The Joint Consultation Handbook (Services 1998), however, defines ''appreciably diminish the value'' as ''to considerably reduce the capability of designated or proposed critical habitat to satisfy the requirements essential to both the survival and recovery of a listed species.''

We find this definition to be no longer valid in light of the courts' rulings with regard to the regulatory definition of ''destruction or adverse modification.'' That is, that portion of the definition that requires a reduction in the likelihood of ''both the survival and recovery'' of listed species is no longer valid. Further, we think the use of the term ''considerable'' to modify ''appreciably'' does not add any real value to help interpret what ''appreciably diminish'' means with regard to the modification of critical habitat, and may lead to disparate outcomes in consultations. For example, the word ''considerable'' can mean ''large in amount or extent'' but it can also mean ''worthy of consideration'' or ''significant.'' To further complicate matters, ''significant'' can mean ''measurable.'' So, some could interpret a ''considerable'' reduction to mean a massive reduction in the value of critical habitat and others could interpret it to mean a measurable reduction in the value of critical habitat. In light of the range of results various interpretations of ''considerable'' could lead one to, we have set out below a more detailed interpretation of the phrase ''appreciably diminish the conservation value.''

A determination that an action's effects will ''appreciably diminish'' the conservation value of critical habitat requires an understanding of both the words ''diminish'' and ''appreciable'' and how they relate to each other in the context of the definition. A review of the definition of (and the synonyms for) ''diminish'' establishes that to diminish is to reduce, lessen, or weaken. As applied to the definition of ''destruction or adverse modification,'' then, the inquiry is whether the relevant effects have reduced, lessened, or weakened the conservation value of the critical habitat. If so, then, the inquiry is whether that reduction or diminishment is ''appreciable'' to the conservation value of the critical habitat.

Appreciable is generally defined as ''noticeable'' or ''measurable.'' In this context, however, that definition is too simplistic because, to determine a diminishment of the conservation value—or a reduction, lessening, or weakening of that value—one would have had to be able to notice or recognize the diminishment. Using this unhelpful meaning, the inclusion of the term ''appreciably'' would not add anything to the definition of ''destruction or adverse modification.'' To determine the appropriate meaning of the term ''appreciably,'' we ultimately found it helpful to look at the definition of ''appreciate,'' which means to ''recognize the quality, significance, or magnitude'' or ''grasp the nature, worth, quality or significance.'' This usage makes more sense to us in the actual application of the phrase ''appreciably diminish.'' The relevant question, then, becomes whether we can recognize the quality, significance, or magnitude of the diminishment. In other words, is there a diminishment to the value of the critical habitat that has some relevance because we can recognize or grasp the quality, significance, magnitude, or worth of the diminishment in a way that affects the conservation value of the critical habitat.

It is important to understand that the determination of ''appreciably diminish'' will be based upon the effect to the conservation value of the designated critical habitat. That is, the question is whether the ''effects of the action'' will appreciably diminish the conservation value of the critical habitat as a whole, not just in the area where the action takes place. For example, an action may have an adverse effect to a portion of critical habitat. The question would be, then, whether the adverse effect in that one part of the critical habitat will diminish the conservation value of the critical habitat overall in such a manner that we can appreciate

the difference it will have to the recovery of the listed species. Specifically, some factors to be considered will be: will recovery be delayed, will recovery be more difficult, and will recovery be less likely. At the appropriate time after rulemaking, the Services plan to update guidance or handbook material to reflect any identified changes to the ''appreciably diminish'' definition in the March 1998 Consultation Handbook. These considerations should be applied cautiously so the Services do not apply a standard that is either too sensitive in light of the particular circumstances, or not sensitive enough. In a biological opinion, the Services provide an accurate assessment of the status of critical habitat, (including threats and trends), the environmental baseline (describing all past and present impacts), and cumulative effects (i.e., future State or private activities). The effects of any particular action are evaluated in the context of the status, environmental baseline, and cumulative effects. 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.

Finally, we note that the term ''appreciably'' also appears in the regulatory definition of ''jeopardize the continued existence of,'' although in that definition it modifies ''to reduce.'' A similar interpretation of ''appreciably'' should be applied to the definition of ''jeopardize the continued existence of.'' In other words, is the reduction one we can recognize or grasp the quality, significance, magnitude, or worth of in a way that makes a difference to the likely survival and recovery of the listed species?

The Relationship Between the Standards of Section 7 of the Act

The relationship between the ''jeopardize the continued existence of'' standard and the ''destruction or adverse modification'' standard reflects the ecological relationship between a species' population dynamics and the physical or biological features a species needs to grow and recover. To fulfill their responsibilities during interagency consultation, the Services conduct separate analyses for the two standards that are founded on this relationship. The difference between the outcomes of the ''jeopardize the continued existence of'' and ''destruction or adverse modification'' analyses will depend on a variety of factors. The results from applying the ''jeopardize the continued existence of'' and ''destruction or adverse modification'' standards tend to converge and diverge depending on whether the area designated as critical habitat currently encompasses the physical or biological features that a species would need to be ''conserved,'' and whether the species' reproduction, numbers, or distribution will be affected. There is an inherent linkage, though, between a species and its habitat, and that linkage means those alterations to a species' habitat will in many cases cause alterations in the numbers, reproduction, or distribution of the species.

The ''destruction or adverse modification'' standard focuses on how Federal actions affect the quantity and quality of the physical or biological features in the area that is designated as critical habitat for a listed species and, especially in the case of unoccupied habitat, on any impacts to the area itself. Specifically, as discussed above, the Services should first evaluate Federal actions against the ''destruction or adverse modification'' definition standard by considering how the action affects the quantity and quality of the physical or biological features that determine the habitat's ability to support recovery of a listed species. If the effects of an action appreciably diminish the quantity and quality of those features to support the conservation value of critical habitat, then the Services generally conclude that the Federal action is likely to ''destroy or adversely modify'' the designated critical habitat.

In addition, the Services may consider other kinds of impacts to the designated areas. 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 habitat 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 will alter the ecology of the habitat in ways that prevent the habitat from improving over time relative to pre-action condition. For example, by artificially maintaining an area of critical habitat in a relatively late successional stage, to the detriment of a species dependent upon periodic flooding or fire to establish early successional stages.

Conversely, the ''jeopardize the continued existence of'' definition focuses on the effects of a Federal action on a listed species' likelihood of continuing to survive and recover in the wild. Specifically, the Services evaluate Federal actions against the ''jeopardize the continued existence of'' definition by considering how the action affects a species' reproduction, numbers, or distribution. If the effects of an action would likely reduce the species' reproduction, numbers, or distribution in a manner or to a degree that would appreciably reduce the species' likelihood of surviving and recovering in the wild, the Services would conclude that the Federal action is likely to ''jeopardize'' the species' continued existence.

The distribution and/or abundance of some species are not currently limited by the quantity or quality of their habitat (for example, population densities may be suppressed by other factors such as over-exploitation, disease, or predators, and often persist well below population sizes that could be supported by the available habitat). In such circumstances where habitat modifications associated with a Federal action are not expected to reduce the species' reproduction, numbers, or distribution, the Services might conclude that a Federal action ''adversely modified'' designated critical habitat, but they would not conclude that the action ''jeopardized the continued existence of'' the species (unless the modifications were dramatic). Application of the two section 7 standards should produce different outcomes whenever a proposed Federal action affects a portion of designated critical habitat that will not result in an appreciable reduction of the species' reproduction, numbers, or distribution (for example, because the species exists as very small populations that do not fully occupy the designated critical habitat).

Request for Information

We intend that a final regulation will consider information and recommendations from all interested parties. We therefore solicit comments, information, and recommendations from governmental agencies, Native American tribes, the scientific community, industry groups, environmental interest groups, and any other interested parties. All comments and materials received by the date listed in **DATES** above will be considered prior to the approval of a final document.

You may submit your information concerning this proposed rule by one of the methods listed in **ADDRESSES**. If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is

made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Information and supporting documentation that we receive in response to this proposed rule will be available for you to review at *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Conservation and Classification (see **FOR FURTHER INFORMATION CONTACT**).

We are particularly interested in comments concerning whether the phrases ''conservation value'' and ''appreciably diminish'' are clear and can be applied consistently across consultations and we invite the public to suggest alternative phrases that might improve clarity and consistency in implementing the ''destruction or adverse modification'' provisions of the section 7(a)(2) of the Act.

Required Determinations

Regulatory Planning and Review (E.O. 12866)

The Office of Management and Budget (OMB) has determined that this proposed rule is a significant regulatory action and has reviewed this proposed rule under Executive Order 12866 (E.O. 12866).

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 are certifying that this regulation would not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

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

This proposed rule, if made final, would 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 [see **ADDRESSES**]), this proposed rule is substantially unlikely to affect our determinations. The proposed rule would serve to provide clarity to the standard with which we will evaluate agency actions pursuant to section 7 of the Endangered Species 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) If adopted, this proposal 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 proposed rulemaking 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 proposed 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 proposed regulation would not impose any additional management or protection requirements on the States or other entities.

Takings (E.O. 12630)

In accordance with Executive Order 12630, we have determined the proposed 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. This rule would substantially advance a legitimate government interest (conservation and recovery of listed species) and would 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 this proposed rule would have significant Federalism effects and have determined that a Federalism assessment is not required. This proposed rule pertains only to determinations of Federal agency compliance with section 7 of the Act, and would 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 proposed rule will not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. This proposed rule would clarify how the Services will make determinations whether a Federal agency has ensured that any action it would authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We cannot reasonably predict the species or particular locations where we would designate critical habitat in the future. Thus, we cannot predict whether tribal lands would be affected by a proposal to designate critical habitat. However, the Act requires that we give notice of and seek comment on any proposal to designate critical habitat prior to a final decision. Our proposed rules to designate critical habitat would indicate the types of activities that may be affected by resulting regulatory requirements of the Act. Any potentially affected federally recognized Indian tribes would be notified of a proposed determination and given the

opportunity to review and comment on the proposed rules.

Paperwork Reduction Act

This proposed rule does not contain any new collections of information that require approval by the OMB under the Paperwork Reduction Act. This proposed rule would 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 are analyzing these proposed 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 Oceanographic and Atmospheric Administration (NOAA) Administrative Order 216–6. Our analysis includes evaluating whether the action is procedural, administrative, or legal in nature, and therefore a categorical exclusion applies. We invite the public to comment on whether, and if so, how this proposed regulation may have a significant effect upon the human environment, including any effects identified as extraordinary circumstances at 43 CFR 46.215. We will complete our analysis, in compliance with NEPA, before finalizing these proposed regulations.

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

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

Clarity of This Policy

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule or policy we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the regulation, your comments should be as specific as possible. For example, you should tell us the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

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 402

Endangered and threatened species.

Proposed Regulation Promulgation

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

PART 402—[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 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 physical or biological features that support the life-history needs of the species for recovery.

* * * * *

Dated: April 3, 2014.

Rachel Jacobson,

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

Dated: April 4, 2014.

Samuel D. Rauch III,

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

[FR Doc. 2014–10503 Filed 5–9–14; 8:45 am]

BILLING CODE 4310–55; 3510–22–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 424

[Docket No. FWS–HQ–ES–2012–0096; Docket No. 120106025–3256–01; 4500030114]

RIN 1018–AX86; RIN 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, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Proposed 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''), propose to amend portions of our regulations, which implements the Endangered Species Act of 1973, as amended (Act). Our regulation clarifies, interprets, and implements 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, we propose to amend portions of our regulations that clarify procedures for designating and revising critical habitat. The proposed amendments would make minor edits to the scope and purpose, add and remove some definitions, and clarify the criteria for designating critical habitat. These proposed amendments are based on the Services' review of the regulations and are intended to add clarity for the public,

clarify expectations regarding critical habitat and provide for a credible, predictable, and simplified critical-habitat-designation process. Finally, the proposed 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: We will accept comments from all interested parties until July 11, 2014. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on this date.

ADDRESSES: You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* In the Search box, enter the Docket Number for this proposed rule, which is FWS–HQ–ES–2012–0096. You may submit a comment by clicking on ''Comment Now!''. Please ensure that you have found the correct rulemaking before submitting your comment.
- *U.S. mail or hand delivery:* Public Comments Processing, Attn: [Docket No. FWS–HQ–ES–2012–0096]; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Request for Information section below for more information).

FOR FURTHER INFORMATION CONTACT: Douglas Krofta, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 4401 N Fairfax Drive, Suite 420, Arlington, VA, 22203, 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: Today, we publish in the **Federal Register** three related documents that are now open for public comment. We invite the public to comment individually on these documents as instructed in their preambles. This document is one of the three, of which two are proposed rules and one is a draft policy:

- A proposed rule to amend the existing regulations governing section 7 consultation under the Endangered Species Act to revise the definition of ''destruction or adverse modification'' of critical habitat. The current regulatory definition has been invalidated by several courts for being inconsistent with the language of the Act. This proposed rule would revise title 50 of the Code of Federal Regulations (CFR) at part 402. The Regulatory Identifier Number (RIN) is 1018–AX88, and the proposed rule may be found on *http://www.regulations.gov* at Docket No. FWS–R9–ES–2011–0072.
- A proposed rule to amend existing 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, have highlighted the need to clarify or revise the current regulations. This proposed rule would revise 50 CFR part 424. It is published under RIN 1018–AX86 and may be found on *http://www.regulations.gov* at Docket No. FWS–HQ–ES–2012–0096.
- A draft 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 policy is meant to complement the proposed revisions to 50 CFR part 424 and to provide for a simplified exclusion process. The policy is published under RIN 1018–AX87 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 in furtherance of 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 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. 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 or will be essential to the species' recovery. Once critical habitat is designated, it provides for 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 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, and special management considerations or protections) to bridge the gap until the Services can complete more thorough recovery planning.

In addition to serving as a notification tool, the designation of critical habitat also provides a significant regulatory protection—the requirement that Federal agencies consult with the Services under section 7(a)(2) of the Act to ensure 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 a myriad of 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 should be 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 species such as a plant's ''presence'' may be 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 NMFS.

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 maintained 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 proposed 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 directed by 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 proposed rule.

Discussion of Proposed Changes to Part 424

This proposal would amend 50 CFR 424.01, 424.02, and 424.12 (except for paragraph (c) as mentioned) 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 proposing 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. Nothing in these proposed revised regulations is intended to require (now or at such time as these regulations may become final) that any previously completed critical habitat designation must be reevaluated on this basis.

Section 424.01 Scope and Purpose

We propose minor revisions to this section to update language and terminology. The first sentence in section 424.01(a) would be 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. The Services believe that circumstances when critical habitat designation will be deemed 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.

Section 424.02 Definitions

This section of the regulations defines terms used in the context of section 4 of the Act. We propose revisions to section 424.02 to update it to current formatting guidelines, to revise several definitions related to critical habitat, to delete definitions that are redundant of 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 that, although revising the formatting of the section requires that the entirety of the section be restated in the proposed-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 proposing to amend 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 propose to revise the title of this entry to ''Conserve, conserving, and conservation,'' changing the order of the words to conform to the statute. Additionally, we propose to revise 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 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 section 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 propose to delete 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 propose to 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 postlisting determination of occupancy based on the currently known distribution of the species. Although the D.C. Circuit disagreed with the district court that the record contained sufficient data to support the FWS's determination of occupancy in that case, the D.C. Circuit did not disagree that the Act allows FWS to make a postlisting determination of occupancy if based on adequate data. The FWS acknowledges that to make a postlisting 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 proposed definition for ''geographical area occupied by the species'' would clarify that the meaning of the term ''occupied'' includes 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 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 inferred presence) of eggs or cysts of fairy shrimp or seed banks of plants constitute occupancy even when mature individuals are not present.

We also propose 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 propose to 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 proposed 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's 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'' would clarify that features can be dynamic or ephemeral habitat characteristics. However, 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 physical or biological features at the time of designation.

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

We are also proposing to revise the definition of ''special management considerations or protection'' which is found in section 424.02. Here we propose to 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 propose to 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 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 may be required. The consideration of whether features in an area may require special management 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 or protections 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 *require* 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 proposing to revise the regulations at this time, we are using this notice to inform the public of our longstanding interpretation of this phrase. We have always understood the phrase ''interbreeds when mature'' to mean that a distinct population segment (DPS) must consist of members of the same species or subspecies in the wild that 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 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.

Section 424.12 Criteria for Designating Critical Habitat

We propose to revise 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 existing language is ''shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing.'' We propose to add the words ''proposed and finalized'' to be consistent with the Act, which requires that critical habitat be finalized concurrent with listing. 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 requirements of the Act, which is to propose and finalize a designation of critical habitat. The last two sentences in proposed paragraph (a) contain minor language changes to use the active voice.

Paragraphs (a)(1) and (a)(1)(i) would not be changed.

The first sentence of paragraph (a)(1)(ii) would remain the same. However, we propose to add a second sentence to paragraph (a)(1)(ii) to provide examples of factors that we may consider in determining whether a designation would be beneficial to the species. A designation may not be beneficial and, therefore, not prudent, under certain circumstances, including but not limited to: The present or threatened destruction, modification or curtailment of a species' habitat or range is not a threat to the species, or 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 for 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) would remain unchanged from the current regulation, and proposed subparagraphs (i) and (ii) contain minor language changes to be consistent with the language in the Act.

The Services propose to completely revise section 424.12(b) of the current regulations. For the reason explained below, we also propose to remove the terms ''principal biological or physical constituent elements'' and ''primary constituent elements'' from this section. These concepts would be replaced by the statutory term ''physical or biological features,'' which we propose to 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 important to the species. In current section 424.12(b), the Services use the phrase ''primary constituent elements'' to focus identification of critical habitat on areas that contain these 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 during the designation process.

The proposed definition of ''physical or biological features,'' described above, would encompass similar habitat characteristics as currently described in section 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.

Proposed 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 proposed regulations would emphasize that the Secretary would 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, yard, acre, or even mile independently meets the definition of ''critical habitat.'' Nor would 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).

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 proposed section 424.12(b)(1)(i), the Secretary would identify the geographical area occupied by the species using the definition of this term as proposed above. Under proposed section 424.12(b)(1)(ii), the Secretary would then identify those physical and biological features essential for 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 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 proposed section 424.12(b)(1)(iii), the Secretary would 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.

Proposed 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, 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 would 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 the conservation needs of the species, the proposed section 424.12(b)(1)(i) through (iv) would 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), that draws, as appropriate, from the existing designation.

More broadly, when applying the proposed 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 Service may evaluate areas needed for the conservation of the species. The Service 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 Service 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 will maximize the effectiveness of the designation in promoting recovery of the species.

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.'' Proposed section 424.12(b)(2) further describes the factors the Services would 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 proposed section 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.''

Proposed section 424.12(b)(2) would subsume and supersede section 424.12(e) of the existing regulations. Section 424.12(e) currently 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 current provision represents one reasonable approach to giving meaning to the term ''essential'' as it relates to unoccupied areas, the Services believe 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. Therefore, we conclude that deleting this provision would restore the two parts of the statutory definition (for occupied and unoccupied areas) to the appropriate relative statuses envisioned by Congress.

However, even if we were to conclude that Congress intended the Services to rely primarily on occupied areas, we think 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.

As it is currently written, the provision in section 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 believe 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). In other words, the Services may identify 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 the features as areas essential to the conservation of the species. Areas may develop features over time, or, with special management, features may be restored to an area. Under proposed section 424.12(b)(2), the Services would identify unoccupied areas, either with the features or not, that are essential for the conservation of a species. This proposed section is intended to be 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. 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 infer 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 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 section 424.12(c) has been revised in a separate rulemaking (77 FR 25611).

The proposed section 424.12(d) would include minor language changes and would remove the example as it is not necessary for the text of the regulation.

We propose to remove current section 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—would be captured in proposed section 424.12(b)(2).

We propose to redesignate the current section 424.12(f) as section 424.12(e) and to add 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 proposed section 424.12(e) would provide 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 paragraph section 424.12(f) in the existing regulations, although the Services have changed the passive voice to the active voice.

The new second sentence would codify 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 must be designated concurrently with listing. See Public Law 97–304, 96 Stat. 1411, § 2(b)(4) (Oct. 13, 1982). To reduce potential confusion, it will be useful for the regulations to 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 to1982. 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 rules for finalizing proposals to designate critical habitat for species listed prior to1982 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 governed 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 propose to redesignate current section 424.12(g) as section 424.12(f) with minor language changes.

We propose to redesignate current section 424.12(h) as section 424.12(g) with minor language changes.

We propose to add a new section 424.12(h). Proposed section 424.12(h) would reflect 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). This proposed paragraph would codify 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 result 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 would result 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 would 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, also propose in section 424.12(h) to describe some factors that would 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.

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 approved INRMP shall reflect the mutual agreement of the involved agencies on the conservation, protection, and management of fish and wildlife resources. In other words, FWS must approve 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 approval 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 approved. 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.

Proposed new section 424.12(h) would specify that an INRMP must be approved 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 will evaluate it.

Existing section 424.19 has been finalized in a separate rulemaking (78 FR 53058).

Request for Information

We intend that a final regulation will consider information and recommendations from all interested parties. We, therefore, solicit comments, information, and recommendations from governmental agencies, Native American tribes, the scientific community, industry groups, environmental interest groups, and any other interested parties. All comments and materials received by the date listed in **DATES** above will be considered prior to the approval of a final document.

You may submit your information concerning this proposed rule by one of the methods listed in **ADDRESSES**. If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Information and supporting documentation that we receive in response to this proposed rule will be available for you to review at *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Conservation and Classification (see **FOR FURTHER INFORMATION CONTACT**).

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 are certifying that these proposed regulations would not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

This rulemaking revises and clarifies requirements for NMFS and FWS in designating critical habitat under the Endangered Species Act to reflect recent amendments to the Act and agency experience. This proposed rule, if made final, would revise the Services' regulations to be consistent with recent statutory amendments that make certain lands managed by the Department of Defense ineligible for designation of critical habitat; be consistent with Congressional intent; be consistent with recent case law; and would clarify our process for designating critical habitat. The other changes included in these proposed regulations serve to clarify, and do not expand the reach of potential designations of critical habitat.

NMFS and FWS are the only entities that are directly affected by this rule because we are the only entities that designate critical habitat. No external entities, including any small businesses, small organizations, or small governments, will experience any economic impacts from this rule.

Therefore, the only effect to any external entities large or small would likely be positive, that is, gaining a greater understanding of the process we use for designating critical habitat.

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 proposed regulations would 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 would 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 proposed regulations would not place additional requirements on any city, county, or other local municipalities.

(b) These proposed regulations would 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, it is not a ''significant regulatory action''' under the Unfunded Mandates Reform Act. These proposed regulations would impose no obligations on State, local, or tribal governments.

Takings (E.O. 12630)

In accordance with Executive Order 12630, these proposed regulations would not have significant takings implications. These proposed regulations would not pertain to ''taking'' of private property interests, nor would they directly affect private property. A takings implication assessment is not required because these proposed regulations (1) would not effectively compel a property owner to suffer a physical invasion of property and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. These proposed regulations would substantially advance a legitimate government interest (conservation and recovery of endangered and threatened species) and would 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 proposed regulations would have significant Federalism effects and have determined that a Federalism assessment is not required. These proposed regulations pertain only to determinations to designate critical habitat under section 4 of the Act, and would 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 proposed 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 proposed regulations would 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 the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In our proposed regulations, we explain that the Secretaries have discretion to exclude any particular area from the critical habitat upon a determination that the benefits of exclusion outweigh the benefits of specifying the particular area as part of the critical habitat. In identifying those benefits, the Secretaries may consider effects on tribal sovereignty.

Paperwork Reduction Act

This proposed rule does not contain any new collections of information that require approval by the OMB under the Paperwork Reduction Act. This proposed rule would 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 are analyzing these proposed 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. We invite the public to comment on whether, and if so, how this proposed regulation may have a significant effect upon the human environment, including any effects identified as extraordinary circumstances at 43 CFR 46.215. We will complete our analysis, in compliance with NEPA, before finalizing these proposed regulations.

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

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. These proposed regulations, if made final, 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.

Clarity of This Proposed Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule or policy we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the proposed rule, your comments should be as specific as possible. For example, you should tell us the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

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.

Proposed Regulation Promulgation

Accordingly, we propose to further amend part 424, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as proposed to be amended at 77 FR 51503, August 24, 2012, 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 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 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 section 402.02. 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 which 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. Any species or subspecies of fish, wildlife, or plant, and any distinct population segment of any vertebrate species that interbreeds when mature. 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. 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 economic impact, the impact on national security, and other relevant impacts of making such a designation in accordance with section 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 be beneficial, the factors the Services may consider include, but are not limited to: The present or threatened destruction, modification or curtailment of a species habitat or range is not a threat to the species, or no 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.

* * * * *

(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 an approved 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: April 3, 2014.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

Dated: April 4, 2014.

Samuel D. Rauch III,

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

[FR Doc. 2014–10504 Filed 5–9–14; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. FWS–R9–ES–2011–0104; Docket No. 120206102–336501; 4500030114]

RIN 1018–AX87; 0648–BB82

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

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

ACTION: Announcement of draft policy and solicitation of public comment.

SUMMARY: We, the U.S Fish and Wildlife Service and the National Marine Fisheries Service, announce a draft policy on exclusions from critical habitat under the Endangered Species Act. This draft 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 draft policy is meant to complement the amendments to our regulations regarding impact analyses of critical habitat designations and is intended to clarify expectations regarding critical habitat and provide for a credible, predictable, and simplified critical-habitat-exclusion process.

DATES: We will accept comments from all interested parties until July 11, 2014. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** section below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on this date.

ADDRESSES: You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. In the Search box enter the Docket number for this proposed policy, which is FWS–R9–ES–2011–0104. You may enter a comment by clicking on ''Comment Now!.'' Please ensure that you have found the correct document before submitting your comment.
- *U.S. mail or hand delivery:* Public Comments Processing, Attn: Docket No. FWS–R9–ES–2011–0104; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, PDM–2042; Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Request for Information section below for more information).

FOR FURTHER INFORMATION CONTACT: Douglas Krofta, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 4401 N Fairfax Drive, Suite 420, Arlington, VA, 22203, 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 301/713–1401; 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 now open for public comment. We invite the public to comment individually on these documents as instructed in their preambles. This document is one of the three, of which two are proposed rules and one is a draft policy:

- A proposed rule to amend the existing regulations governing section 7 consultation under the Endangered Species Act to revise the definition of ''destruction or adverse modification'' of critical habitat. The current regulatory definition has been invalidated by several courts for being inconsistent with the language of the Act. This proposed rule would revise title 50 of the Code of Federal Regulations (CFR) at part 402. The Regulatory Identifier Number (RIN) is 1018–AX88, and the proposed rule may be found on *http://www.regulations.gov* at Docket No. FWS–R9–ES–2011–0072.
- A proposed rule to amend existing 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, have highlighted the need to clarify or revise the current regulations. This proposed rule would revise 50 CFR part 424. It is published under RIN 1018–AX86 and may be found on *http://www.regulations.gov* at Docket No. FWS–HQ–ES–2012–0096.
- A draft 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 policy is meant to complement the proposed revisions to 50 CFR part 424 and to provide for a simplified exclusion process. The policy is published under RIN 1018–AX87 and may be found on *http://www.regulations.gov* at Docket No. FWS–R9–ES–2011–0104.

Background

The National Marine Fisheries Service (NMFS) and 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 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 utilize their authorities to further the purposes of the Act. In addition to serving as a notification tool, the designation of critical habitat also provides a significant regulatory protection—the requirement that Federal agencies consult with the Services under section 7(a)(2) to insure their actions are not likely to destroy or adversely modify critical habitat.

Section 4 of the Act requires the Services to designate critical habitat and sets out standards and processes for determining critical habitat. Congress authorized the Secretaries to ''exclude any area from critical habitat if [s]he determines that the benefits of exclusion outweigh the benefits of specifying such

area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned'' (section 4(b)(2)).

Over the years there have been legal challenges to the Services' process for considering exclusions. Several court decisions have addressed the Services' implementation of section 4(b)(2). In 2008, the Solicitor of the Department of the Interior issued a legal opinion on implementation of section 4(b)(2) (*http://www.doi.gov/solicitor/opinions.html*). That opinion is based on the text of the Act and principles of statutory interpretation and relevant case law. The opinion explained the legal considerations that guide the Secretary's exclusion authority and discussed and elaborated on the application of these considerations to the circumstances commonly faced by the Services (e.g., habitat conservation plans, Tribal lands).

To provide predictability and transparency regarding how the Services consider exclusions under section 4(b)(2), the Services are announcing a draft policy on several issues that frequently arise in the context of exclusions. The draft policy on implementation of specific aspects of section 4(b)(2) does not cover the entire range of factors that may be considered as the basis for an exclusion in any given designation, nor does it serve as a comprehensive interpretation of all the provisions of section 4(b)(2).

This draft policy, when finalized, will set forth the Services' position regarding 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. The Services intend to apply this policy when considering exclusions from critical habitat. That being said, under the terms of the policy as proposed, the Services retain a great deal of discretion in making decisions with respect to exclusions from critical habitat.

Implementation of Section 4(b)(2) of the Act

On August 24, 2012 (77 FR 51503) the Services published a proposed rule to revise 50 CFR 424.19. In that rule the Services proposed to elaborate on the process and standards for implementing section 4(b)(2) of the Act. The final rule was published on August 28, 2013 (78 FR 53058). This draft policy is meant to complement those revisions to 50 CFR 424.19 and provides further clarification as to how we will implement section 4(b)(2) when designating critical habitat.

Section 4(b)(2) of the Act provides that:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

In 1982, Congress added this provision to the Act, both to require the Services to consider the broader impacts of designation of critical habitat and to provide a means for the Services to ameliorate potentially negative impacts of designation by excluding, in appropriate circumstances, particular areas from a designation. The first sentence of section 4(b)(2) sets out a mandatory requirement that the Services consider the economic impact, impact on national security, and any other relevant impacts prior to designating an area as part of a critical habitat designation. The Services will always consider such impacts, as required under this sentence, for each and every designation of critical habitat. Although the term ''homeland security'' was not in common usage in 1982, the Services acknowledge that homeland security is fairly embodied within the mandatory requirement that the Services consider impacts on national security within the intent and meaning of section 4(b)(2).

The second sentence of section 4(b)(2) outlines a separate, discretionary process by which the Secretaries may elect to go further in order to determine whether to exclude such an area from the designation, by performing an exclusion analysis. The Services use their compliance with the first sentence of section 4(b)(2), their consideration of whether to engage in the discretionary exclusion analysis under the second sentence of section 4(b)(2), and any exclusion analysis that the Services undertake, as the primary basis for satisfying the provisions of Executive Orders 12866 and 13563. E.O. 12866 (and incorporated by E.O. 13563) requires agencies to assess the costs and benefits of a rule, and, to the extent permitted by law, to propose or adopt the rule only upon a reasoned determination that the benefits of the intended regulation justify the costs.

Conducting an exclusion analysis under section 4(b)(2) involves balancing or weighing the benefits of excluding a specific area from a designation of critical habitat against the benefits of including that area in the designation. If the benefits of exclusion outweigh the benefits of inclusion, the Secretaries may exclude the specific area so long as an explicit determination is made that an exclusion of the specific area would not result in the extinction of the species concerned. The discretionary 4(b)(2) exclusion analysis is fully consistent with the E.O. requirements in that it permits excluding an area where the benefits of exclusion outweigh the benefits of inclusion, and not excluding an area when the benefits of exclusion do not outweigh the benefits of inclusion. This draft policy sets forth specific categories of information that we often consider when we enter into the discretionary 4(b)(2) exclusion analysis and exercise the Secretaries' discretion to exclude areas from critical habitat. We do not intend to cover in these examples all the categories of information that may be relevant, or to limit the Secretaries' discretion under this section to weight the benefits as appropriate.

Moreover, revisions to 50 CFR 424.19 further explain how the Services clarify the exclusion process for critical habitat and address statutory changes and case law. The revisions to 50 CFR 424.19 state that the Secretaries have the discretion to exclude any particular area from the critical habitat upon a determination that the benefits of such exclusion outweigh the benefits of specifying the particular area as part of the critical habitat. Furthermore, the Secretaries may consider any relevant benefits, and the weight and consideration given to those benefits is within the discretion of the Secretaries. The revisions to 50 CFR 424.19 provide the framework for how the Services intend to implement section 4(b)(2) of the Act. This draft policy further details the discretion available to the Services (acting for the Secretaries) and provides detailed examples of 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 when we undertake a discretionary exclusion analysis.

a. The Services' Discretion

The Act affords a great degree of discretion to the Services in

implementing section 4(b)(2). This discretion is applicable to a number of aspects of section 4(b)(2). Most significant is that the decision to exclude is always completely discretionary, as the Act states that the Secretaries ''may'' exclude areas. In no circumstance is exclusion required under the second sentence of section 4(b)(2).

It is the general practice of the Services to exercise this discretion to exclude an area when the benefits of exclusion outweigh the benefits of inclusion, and not exclude an area when the benefits of exclusion do not outweigh the benefits of inclusion. In articulating this general practice, the Services do not intend to limit in any manner the discretion afforded to the Secretaries by the statute.

b. Private or Other Non-Federal Conservation Plans and Partnerships, in General

We sometimes exclude specific areas from critical habitat designations in part based on the existence of private or other non-Federal conservation plans or partnerships. A conservation plan describes actions that minimize and/or mitigate impacts to species and their habitats. Conservation plans can be developed by private entities with no Service involvement, or in partnership with the Services. In the case of a habitat conservation plan (HCP), safe harbor agreement (SHA), or a candidate conservation agreement with assurances (CCAA), a plan or agreement is developed in partnership with the Services for the purposes of attaining a permit under section 10 of the Act. See paragraph C, below, for a discussion of HCPs, SHAs, and CCAAs.

In determining how the benefits of exclusion and the benefits of inclusion are affected by the existence of private or other non-Federal conservation plans and partnerships, when we undertake a discretionary exclusion analysis, we evaluate a variety of factors. These factors include:

(i) The degree to which the record supports a conclusion that a critical habitat designation would impair the realization of benefits expected from the plan, agreement, or partnership;

(ii) The extent of public participation in the development of the conservation plan;

(iii) The degree to which there has been agency review and required determinations;

(iv) Whether National Environmental Policy Act (NEPA) compliance was required;

(v) The demonstrated implementation and success of the chosen mechanism;

(vi) The degree to which the plan or agreement provides for the conservation of the essential physical or biological features for the species;

(vii) Whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan or agreement will be implemented; and

(viii) Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.

Whether a plan or agreement has previously been subject to public comment, agency review, and NEPA compliance processes are factors that may indicate the degree of critical analysis the plan or agreement has already received. These factors influence the Services' determination of the appropriate weight that should be given in any particular case.

Achieving the conservation benefits of a particular existing plan is usually not a *benefit of exclusion,* because we expect such plans to be implemented and, therefore, those conservation benefits are expected to occur, regardless of inclusion or exclusion of the covered areas in critical habitat. Instead, the benefit of excluding from critical habitat a specific area covered by an existing plan is typically the maintenance of an existing partnership or the potential for creation of new conservation partnerships with the plan's signatories or other parties. On the other hand, the conservation benefits of a particular existing plan, agreement, or partnership may serve to reduce the *benefits of including* in critical habitat a specific area that is covered by an existing plan. The benefits of inclusion in critical habitat include that amount of conservation of the species habitat provided by the designation of critical habitat above the baseline (i.e., above the conservation benefits from listing of the species or other measures not dependent on this designation of critical habitat). Where there is an existing plan, that plan (and the conservation benefits it provides) may appropriately be included in the baseline. Therefore, to the extent the plan provides some protection for the species' habitat that would to some degree be duplicated by designating the area at issue as critical habitat, the benefits of inclusion of that area covered by the plan are reduced.

c. Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act

Habitat conservation plans (HCPs) for incidental take permits under section 10(a)(1)(B) of the Act provide for partnerships with non-Federal entities to minimize and mitigate impacts to listed species and their habitat. In most cases HCP permittees agree to do more for the conservation of the species and their habitats on private lands than designation of critical habitat would provide alone. We place great value on the partnerships that are developed during the preparation and implementation of HCPs.

Candidate conservation agreements with assurances (CCAAs) and safe harbor agreements (SHAs) are voluntary agreements designed to conserve candidate and listed species, respectively, on non-Federal lands. In exchange for actions that contribute to the conservation of species on non-Federal lands, participating property owners are covered by an enhancement of survival permit under section 10(a)(1)(A) of the Act, which authorizes incidental take of the covered species that may result from implementation of conservation actions, specific land uses, and return to baseline under the agreements. The Services also provide enrollees assurances that we will not impose further land-, water-, or resource-use restrictions or additional commitments of land, water, or finances beyond those agreed to in the agreements.

When we undertake a discretionary exclusion analysis, we will always consider areas covered by an approved CCAA/SHA/HCP, and generally exclude such areas from a designation of critical habitat if three conditions are met:

(1) The permittee is properly implementing the CCAA/SHA/HCP and is expected to continue to do so for the term of the agreement. A CCAA/SHA/HCP is properly implemented if the permittee is and has been fully implementing the commitments and provisions in the CCAA/SHA/HCP, Implementing Agreement, and permit.

(2) The species for which critical habitat is being designated is a covered species in the CCAA/SHA/HCP, or very similar in its habitat requirements to a covered species. The recognition that the Services extend to such an agreement depends on the degree to which the conservation measures undertaken in the CCAA/SHA/HCP would also protect the habitat features of the similar species.

(3) The CCAA/SHA/HCP specifically addresses that species' habitat (and does

not just provide guidelines) and meets the conservation needs of the species in the planning area.

We will undertake a case-by-case analysis to determine whether these conditions are met and, as with other conservation plans, whether the benefits of exclusion outweigh the benefits of inclusion.

The benefits of excluding lands with CCAAs, SHAs, or properly implemented HCPs that have been permitted under section 10 of the Act from critical habitat designation include relieving landowners, communities, and counties of any potential additional regulatory burden that might be imposed as a result of the critical habitat designation. A related benefit of exclusion is the unhindered, continued ability to maintain existing partnerships and seek new partnerships with potential plan participants, including States, counties, local jurisdictions, conservation organizations, and private landowners. Together, these entities can implement conservation actions that the Services would be unable to accomplish without private landowners. These partnerships can lead to additional CCAAs, SHAs, and HCPs. This is particularly important because HCPs often cover a wide range of species, including listed plant species (for which there is no general take prohibition under section 9 of the Act) and species that are not state or federally listed (which do not receive the Act's protections). Neither of these categories of species may receive much protection from development in the absence of HCPs.

As is the case with conservation plans generally, the protection that a CCAA, SHA, or HCP provides to habitat can reduce the benefits of including the area covered by a CCAA, SHA, or HCP in the designation. With specific regard to HCPs, because the Services generally approve HCPs on the basis of their efficacy to minimize and mitigate impacts to listed species and their habitat, these plans tend to be very effective at reducing those benefits of inclusion. Nonetheless, HCPs often are written with the understanding that some of the covered area will be developed, and the associated permit provides authorization of incidental take caused by that development (although a properly designed HCP will tend to steer development toward the least biologically important habitat). Thus, designation of the areas specified for development that meet the definition of ''critical habitat'' may still conceivably provide a conservation benefit to the species. In addition, if activities not covered by the HCP are affecting or may affect an area that is identified as critical habitat, then the benefits of inclusion of that specific area may be relatively high because additional conservation benefits may be realized by the designation of critical habitat in that area. In any case, the Services will weigh whatever benefits of inclusion there are against the benefits of exclusion (usually the fostering of partnerships that may result in future conservation actions).

For CCAAs, SHAs, and HCPs that are still under development, when we undertake a discretionary exclusion analysis, we generally will not exclude those areas from a designation of critical habitat. If a CCAA, SHA, or HCP is close to being approved, we will evaluate these draft plans under the framework of general plans and partnerships (subsection b, above). In other words, we will consider factors such as partnerships that have been developed during the preparation of draft CCAAs, SHAs, and HCPs and broad public benefits such as encouraging the continuation of current and development of future conservation efforts with non-Federal partners, and consider these factors as possible benefits of exclusion. However, promises of future conservation actions in draft CCAAs, SHAs, and HCPs will be given little weight in the discretionary exclusion analysis, even if they may directly benefit the species for which a critical habitat designation is proposed.

d. Tribal Lands

There are several Executive Orders, Secretarial Orders, and policies that relate to working with tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control Tribal lands, emphasize the importance of developing partnerships with Tribal governments, and direct the Services to consult with Tribes on a government-to-government basis.

A joint Secretarial Order that applies to both FWS and NMFS, Secretarial Order 3206, *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* (June 5, 1997) (S.O. 3206), is the most comprehensive of the various guidance documents related to Tribal relationships and ESA implementation, and it provides the most detail directly relevant to the designation of critical habitat. In addition to the general direction discussed above, S.O. 3206 explicitly recognizes the right of Tribes to participate fully in the listing process, including designation of critical habitat. The Order also states: ''Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.'' In light of this instruction, when we undertake a discretionary exclusion analysis we will always consider exclusions of Tribal lands under section 4(b)(2) of the Act prior to finalizing a designation of critical habitat and will give great weight to Tribal concerns in analyzing the benefits of exclusion.

However, S.O. 3206 does not preclude us from designating Tribal lands or waters as critical habitat nor does it state that Tribal lands or waters cannot meet the Act's definition of ''critical habitat.'' We are directed by the Act to identify areas that meet the definition of ''critical habitat,'' (i.e., occupied lands that contain the essential physical or biological features that may require special management or protection and identification of unoccupied areas that are essential to the conservation of a species) without regard to landownership. While S.O. 3206 provides important direction, it expressly states that it does not modify the Departments' statutory authority.

e. Impacts on National Security and Homeland Security

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)), as revised in 2003 provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense [DoD], or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.'' In other words, as articulated in the proposed rule revising 50 CFR 424.12(h) published elsewhere in today's edition of the **Federal Register**, if the Services conclude that an INRMP ''provides a benefit'' to the species, the area covered is ineligible for designation. Thus that area cannot be designated as critical habitat.

Section 4(a)(3)(B)(i) of the Act, however, may not cover all DoD lands or areas that pose potential national security concerns (e.g., a DoD installation that is in the process of revising its integrated natural resources management plan). If a particular area is

not covered under section 4(a)(3)(B)(i), national security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of ''critical habitat.'' Nevertheless, when designating critical habitat under section 4(b)(2), the Secretaries must consider impacts on national security, including homeland security, on DoD lands or areas ineligible for consideration under section 4(a)(3)(B)(i). Accordingly, we will always consider for exclusion from the designation areas for which DoD, DHS, or another Federal agency has requested exclusion based on an assertion of national security or homeland-security concerns.

We cannot, however, automatically exclude requested areas. When DoD, DHS, or another Federal agency requests exclusion from critical habitat on the basis of national-security or homeland-security impacts, it must provide a specific justification. Such justification could include demonstration of probable impacts, such as impacts to ongoing border security patrols and surveillance activities, or a delay in training or facility construction, as a result of compliance with section 7(a)(2) of the Act. If the agency requesting the exclusion does not provide us with a specific justification, we will contact the agency to recommend that it provide a specific justification. If the agency provides a specific justification, we will defer to the expert judgment of DoD, DHS, or another Federal agency as to: (1) Whether activities on its lands or waters, or its activities on other lands or waters, have national-security or homeland-security implications; and (2) the importance of those implications. In that circumstance, in conducting a discretionary exclusion analysis, we will give great weight to national-security and homeland security concerns in analyzing the benefits of exclusion.

f. Federal Lands

We recognize that we have obligations to consider the impacts of designation of critical habitat on Federal lands under the first sentence of section 4(b)(2) and under E.O. 12866. However, as mentioned above, the Services have broad discretion under the second sentence of 4(b)(2) on how to weigh those impacts. In particular, ''[t]he consideration and weight given to any particular impact is completely within the Secretary's discretion.'' H.R. Rep. No. 95–1625, at 17 (1978). In considering how to exercise this broad discretion, we are mindful that Federal land managers have unique obligations under the Act. First, Congress declared that it was its policy that ''all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.'' Section 2(c)(1). Second, all Federal agencies have responsibilities under section 7 of the Act to carry out programs for the conservation of listed species and to ensure their actions are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

We also note that, while the benefits of excluding non-Federal lands include development of new conservation partnerships and fostering existing partnerships, those benefits do not generally arise with respect to Federal lands, because of the independent obligations of Federal agencies under section 7 of the Act. Conversely, the benefits of including Federal lands in a designation are greater than non-Federal lands because there is a Federal nexus for any project on Federal lands that may affect critical habitat, so section 7 consultation would be triggered and an analysis under the destruction and adverse-modification standard would always be conducted.

Under the Act, the only direct consequence of critical habitat designation is to require Federal agencies to ensure, through section 7 consultation, that any action they fund, authorize, or carry out does not destroy or adversely modify designated critical habitat. The costs that this requirement may impose on Federal agencies can be divided into two types: The additional administrative or transactional costs associated with the consultation process, and the costs to Federal agencies and other affected parties, including applicants for Federal permits, of any project modifications necessary to avoid adverse impacts to critical habitat. Consistent with the unique obligations that Congress created for Federal agencies in conserving endangered and threatened species, we generally will not consider avoiding the administrative or transactional costs associated with the section 7 consultation process to be a ''benefit'' of excluding a particular area from a critical habitat designation in any discretionary exclusion analysis. We will, however, consider the extent to which such consultation would produce an outcome that has economic or other impacts, such as by requiring project modifications and additional conservation measures by the Federal agency or other affected parties.

Lands owned by the Federal government should be prioritized as sources of support in the recovery of listed species. To the extent possible, we will focus designation of critical habitat on Federal lands in an effort to avoid the real or perceived regulatory burdens on non-Federal lands. We do greatly value the partnership of other Federal agencies in the conservation of listed and non-listed species. However, for the reasons listed above, we will focus our exclusions on non-Federal lands. Circumstances where we determine that the benefits of excluding Federal lands outweigh the benefits of not doing so are most likely when national security or homeland-security concerns are present.

g. Economic Impacts

The first sentence of section 4(b)(2) of the ESA requires the Services to consider the economic impacts (as well as the impacts on national security and any other relevant impacts) of designating critical habitat. In addition, economic impacts may for some particular areas play an important role in the discretionary exclusion analysis under the second sentence of section 4(b)(2). In both contexts, the Services will consider the probable incremental economic impacts of the designation. When the Services undertake a discretionary exclusion analysis with respect to a particular area, they will weigh the economic benefits of exclusion (and any other benefits of exclusion) against any benefits of inclusion (primarily the conservation value of designating the area). 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. The Services will use their discretion in determining how to weigh probable incremental economic impacts against conservation value. It is the nature of the probable incremental economic impacts, not necessarily a particular threshold level, that triggers considerations of exclusions based on probable incremental economic impacts. For example, if an economic analysis indicates high probable incremental impacts in a proposed critical habitat unit of low conservation value (relative to the remainder of the designation), the Services may consider exclusion of that particular unit.

Draft Policy on Implementation of Section 4(b)(2) of the Act

1. The decision to exclude any specific area from a designation of critical habitat is always discretionary, as the Act states that the Secretaries

''may''' exclude any area. In no circumstances is an exclusion of any specific area required by the Act.

2. When we undertake a discretionary exclusion analysis, we will evaluate the effect of conservation plans and partnerships on the benefits of inclusion and the benefits of exclusion of any particular area from critical habitat by considering a number of factors including:

a. The degree to which the record supports a conclusion that a critical habitat designation would impair the realization of benefits expected from the plan, agreement, or partnership.

b. The extent of public participation in the development of the conservation plan.

c. The degree to which there has been agency review and required determinations.

d. Whether National Environmental Policy Act (NEPA) compliance was required.

e. The demonstrated implementation and success of the chosen mechanism.

f. The degree to which the plan or agreement provides for the conservation of the essential physical or biological features for the species.

g. Whether there is a reasonable expectation that the conservation management strategies and actions contained in the management plan or agreement will be implemented.

h. Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.

3. When we undertake a discretionary exclusion analysis, we will always consider areas covered by a permitted CCAA, SHA, or HCP, and generally exclude such areas from a designation of critical habitat if incidental take caused by the activities in those areas is covered by a permit under section 10 of the Act and the CCAA/SHA/HCP meets the following conditions:

a. The permittee is properly implementing the CCAA/SHA/HCP and is expected to continue to do so for the term of the agreement. A CCAA/SHA/HCP is properly implemented if the permittee is and has been fully implementing the commitments and provisions in the HCP, Implementing Agreement, and permit.

b. The species for which critical habitat is being designated is a covered species in the CCAA/SHA/HCP, or very similar in its habitat requirements to a covered species. The recognition that the Services extend to such an agreement depends on the degree to which the conservation measures undertaken in the CCAA/SHA/HCP would also protect the habitat features of the similar species.

c. The CCAA/SHA/HCP specifically addresses that species' habitat (not just providing guidelines) and meets the conservation needs of the species in the planning area.

We generally will not rely on CCAAs/SHAs/HCPs that are still under development as the basis of exclusion from a designation of critical habitat.

4. When we undertake a discretionary exclusion analysis, we will always consider exclusion of Tribal lands, and give great weight to Tribal concerns in analyzing the benefits of exclusion. However, Tribal concerns are not a factor in determining what areas, in the first instance, meet the definition of ''critical habitat.''

5. When we undertake a discretionary exclusion analysis, we will always consider exclusion of areas for which a Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns, and give great weight to national-security or homeland-security concerns in analyzing the benefits of exclusion. National-security and or homeland-security concerns are not a factor, however, in the process of determining what areas, in the first instance, meet the definition of ''critical habitat.''

6. Except in the circumstances described in 5 above, we will focus our exclusions on non-Federal lands. Because all actions on Federal lands are subject to the requirements of Section 7(a)(2) of the Act, the benefits of designating Federal lands as critical habitat are always present and are typically greater than the benefits of not designating Federal lands or of designating other lands.

7. When the Services are determining whether to undertake a discretionary exclusion analysis as a result of the probable incremental economic impacts of designating a particular area, it is the nature of those impacts, not necessarily a particular threshold level, that is relevant to the Services' determination.

8. For any area to be excluded, we must find that the benefits of excluding that area outweigh the benefits of including that area in the designation. We must not exclude an area if the failure to designate it will result in the extinction of the species.

Request for Information

We intend that a final policy will consider information and recommendations from all interested parties. We, therefore, solicit comments, information, and recommendations from governmental agencies, Indian Tribes, the scientific community, industry groups, environmental interest groups, and any other interested parties. All comments and materials received by the date listed above in **DATES** will be considered prior to the approval of a final document.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov*.

We seek comments and recommendations in particular on:

1. Whether this policy sets out clearly defined expectations regarding critical habitat and the exclusion process. If not, please provide detailed comments so we can clarify our draft policy.

2. Whether this draft policy provides enough or too little detail regarding how the Services will consider and conduct the discretionary 4(b)(2) exclusion analysis for each of the categories described in this draft policy.

3. Whether, in general, there may be other factors or considerations that we should evaluate when considering exclusions from critical habitat.

4. Regarding consideration of conservation plans and partnerships, whether our draft policy appropriately characterizes the importance of partnerships relative to the conservation benefits of a plan or partnership.

5. Regarding habitat conservation plans (HCPs), whether our draft policy works for large-scale regional plans as well as smaller project-specific plans

6. Relative to our consideration for Tribal lands, whether our draft policy provides clearly defined expectations and appropriate consideration of Tribal sovereignty. If not, please describe in detail how we could improve this consideration.

7. Whether our consideration of impacts to national security and homeland security accurately captures our responsibilities under the Act and the Sikes Act (16 U.S.C. 670a).

Required Determinations

As mentioned above, we intend to apply this policy, when finalized, in considering exclusions from critical habitat designations. The general policy reserves much discretion that will be applied by the agencies in particular designations, and in each we are required to comply with various

Executive Orders and statutes for those individual rulemakings. Below we discuss compliance with several Executive Orders and statutes as they pertain to this draft policy.

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. OIRA has determined that this is a significant rule.

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 our regulatory system 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 policy in a manner consistent with these requirements.

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) We find this draft policy would 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 this policy would not impose a cost of $100 million or more in any given year on local or State governments or private entities. Small governments would not be affected because the draft policy would not place additional requirements on any city, county, or other local municipalities.

(b) This draft policy would 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, it is not a ''significant regulatory action''' under the Unfunded Mandates Reform Act. This policy would impose no obligations on State, local, or tribal governments because this draft policy is meant to complement the amendments to 50 CFR 424.19, and is intended to clarify expectations regarding critical habitat and provide for a credible, predictable, and simplified critical-habitat-exclusion process. The only entities directly affected by this draft policy are the FWS and NMFS. As such, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with Executive Order 12630, this draft policy would not have significant takings implications. This draft policy would not pertain to ''taking'' of private property interests, nor would it directly affect private property. A takings implication assessment is not required because this draft policy (1) would not effectively compel a property owner to suffer a physical invasion of property and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This draft policy would substantially advance a legitimate government interest (clarify expectations regarding critical habitat and provide for a credible, predictable, and simplified critical-habitat-exclusion process) and would not present a barrier to all reasonable and expected beneficial use of private property.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this draft policy does not have significant Federalism effects and a Federalism assessment is not required. This draft policy pertains only to exclusions from designations of critical habitat under section 4 of the Act, and would 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—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), this draft policy would not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. The clarification of expectations regarding critical habitat and providing a credible, predictable, and simplified critical-habitat-exclusion process will make it easier for the public to understand our critical-habitat-designation process, and thus should not significantly affect or burden the judicial system.

Paperwork Reduction Act of 1995

This draft policy does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This draft policy 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 (NEPA)

We are analyzing this draft policy 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. We invite the public to comment on the extent to which any of these proposed regulations may have a significant impact on the human environment, or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. We will complete our analysis, in compliance with NEPA, before finalizing this draft policy.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175 ''Consultation and Coordination with Indian Tribal Governments,'' and the Department of the Interior Manual at 512 DM 2, and the Department of Commerce *American Indian and Alaska Native Policy* (March 30, 1995), we have considered possible effects on federally recognized Indian tribes and have preliminarily determined that there are no potential adverse effects of issuing this draft policy. Our intent with this draft policy is to provide a consistent approach to the consideration of exclusion of areas from critical habitat, including Tribal lands. This draft policy does not establish a new irection, but does establish a consistent approach and direction for the Services. We will continue to work with Tribes as we finalize this draft policy and promulgate individual critical habitat designations.

Energy Supply, Distribution, or Use

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies

to prepare Statements of Energy Effects when undertaking certain actions. *This draft policy, if made final, is not expected to significantly affect energy supplies, distribution, or use.* Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Clarity of This Draft Policy

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule or policy we publish must:

a. Be logically organized;

b. Use the active voice to address readers directly;

c. Use clear language rather than jargon;

d. Be divided into short sections and sentences; and

e. Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise this draft policy, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Authors

The primary authors of this draft policy are the staff members of the Endangered Species Program, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Arlington, VA 22203, and the National Marine Fisheries Service's Endangered Species Division, 1335 East-West Highway, Silver Spring, MD 20910.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: April 28, 2014.

Rachel Jacobson,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

Dated: April 28, 2014.

Samuel D. Rauch III,

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

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BILLING CODE 4310–55–P; 3510–22–P

threat (e.g., fishery interactions, ship strikes, acoustics, pollutants, climate change). In summary, the petition concludes that the recovering population in combination with the removal of previously identified threats qualifies the Central North Pacific humpback whale population for delisting under the ESA.

Petition Finding

We have reviewed the petition, the literature cited in the petition, and other literature and information available in our files. Although we identified some incomplete information and unsupported conclusions within the petition, we find that the information presented in the petition would lead a reasonable person to believe that the petitioned action may be warranted. Considering the requirements of 50 CFR 424.14(b) for addressing petitions at the 90-day finding stage, we have therefore determined that the petition, the literature cited in the petition, and other literature and information readily available in our files constitute substantial information indicating that the petitioned action may be warranted.

As a result of this finding, we will continue our status review of the humpback whale to determine whether the Central North Pacific humpback whale population constitutes a DPS under the ESA, and if so, the risk of extinction to this DPS. Based on the results of the status review, we will then determine whether delisting or downlisting (from endangered to threatened) the Central North Pacific population of the humpback whale is warranted.

Request for Information

To ensure that the status review is based on the best available scientific and commercial data, we are soliciting information on the humpback whale, with a focus on the Central North Pacific population, in the following areas: (1) Taxonomy, abundance, reproductive success, age structure, distribution, habitat selection, food habits, population density and trends, and habitat trends; (2) historical and current population status and trends; (3) historical and current distribution; (4) migratory movements and behavior; (5) genetic population structure, as compared to other populations; (6) the effects of vessel strikes, entanglements, acoustic impacts, and climate change, on the distribution and abundance of Central North Pacific humpback whales and their principal prey over the short- and long-term; (7) the effects of other threats, including whaling, disease and predation, contaminants, fishing, industrial activities, or other known or potential threats; (8) the effects of research on Central North Pacific humpback whales; (9) management or conservation programs for Central North Pacific humpback whales, including mitigation measures associated with private, tribal or governmental conservation programs which benefit this population; and (10) current or planned activities that may adversely impact humpback whales. We request that all information and data be accompanied by supporting documentation such as (1) maps, bibliographic references, or reprints of pertinent publications; and (2) the submitter's name, address, and any association, institution, or business that the person represents.

Authority: The authority for this action is the Endangered Species act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: June 20, 2014.

Samuel D. Rauch III,

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

[FR Doc. 2014–14961 Filed 6–25–14; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 402 and 424

[Docket Nos. FWS–HQ–ES–2012–0096; FWS–R9–ES–2011–0072; 120106026–4518–02; 120106025–4514–02; 4500030114]

RIN 1018–AX86; 1018–AX88; 0648–BB80; 0648–BB79

Endangered and Threatened Wildlife and Plants; Changes to the Definitions and Regulations for Designating Critical Habitat

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

ACTION: Proposed rules; extension of comment periods.

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''), announce the extension of the public comment periods on our May 12, 2014, proposals to revise definitions and regulations regarding critical habitat. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of each final rule.

DATES: We will consider comments received or postmarked on or before October 9, 2014. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES**, below) must be received by 11:59 p.m. Eastern Time on the closing date.

ADDRESSES: You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. In the Search box, enter the appropriate docket number; for the proposed revised definition of destruction or adverse modification of critical habitat, use FWS–R9–ES–2011–0072, and for the proposed rule to amend the regulations for designating critical habitat, use FWS–HQ–ES–2012–0096. You may submit a comment by clicking on ''Comment Now!'' Please ensure that you have found the correct rulemaking before submitting your comment.
- *U.S. mail:*
  - Submit comments on the proposed revised definition of destruction or adverse modification of critical habitat to: Public Comments Processing, Attn: Docket No. FWS–R9–ES–2011–0072; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.
  - Submit comments on the proposed rule to amend the regulations for designating critical habitat to: Public Comments Processing, Attn: Docket No. FWS–HQ–ES–2012–0096; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Public Comments section, below, for more information).

FOR FURTHER INFORMATION CONTACT:

For proposed revised definition of destruction or adverse modification of critical habitat: Patrice Ashfield, U.S. Fish and Wildlife Service, Division of Environmental Review, 4401 N. Fairfax Drive, Suite 420, Arlington, VA 22203; telephone 703/358–2171; facsimile 703/358–1735; or Cathryn E. Tortorici, National Marine Fisheries Service, Office of Protected Resources, Interagency Cooperation Division, 1315 East-West Highway, Silver Spring, MD 20910; telephone 301/427–8405;

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.

For the proposed rule to amend the regulations for designating critical habitat: Douglas Krofta, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 4401 N. Fairfax Drive, Suite 420, Arlington, VA 22203; 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:

Public Comments

We will accept written comments and information during this extended comment period on our proposed rule to revise the definition of destruction or adverse modification of critical habitat and our proposed rule to amend the regulations for designating critical habitat that were published in the **Federal Register** on May 12, 2014 (79 FR 27060 and 79 FR 27066, respectively). We will consider information we receive from all interested parties on or before the close of the comment period (see **DATES**).

If you submitted comments or information on either proposed rule during the public comment period that began May 12, 2014, please do not resubmit them. We have incorporated them into the public record, and we will fully consider them in the preparation of our final rules.

You may submit your comments and materials regarding either proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information—will be posted on the Web site. We will post all hardcopy comments on *http://www.regulations.gov* as well. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Background

On May 12, 2014, we published three related documents concerning designation and implementation of critical habitat under the Act: Two proposed regulation amendments and one draft policy. This notice extends the comment period for the two proposed regulation amendments, and a separate notice published elsewhere in today's issue of the **Federal Register** extends the comment period for the draft policy. The two proposed rules for which we are extending the comment period in this document propose to revise definitions and regulations regarding critical habitat.

Specifically, the proposed rule to revise the definition of destruction or adverse modification of critical habitat proposes to amend title 50, part 402, of the Code of Federal Regulations, which implements the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*). Part 402 establishes the procedural regulations governing interagency cooperation under section 7 of the Act. 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. In 1986, the Services established a definition for ''destruction or adverse modification'' (§ 402.02) that was found to be invalid by the U.S. Court of Appeals for the Fifth (2001) and Ninth (2004) Circuits. We propose to amend part 402 to replace the invalidated definition with one that is consistent with the Act and the circuit court opinions.

The proposed rule to revise the regulations for designating critical habitat proposes to amend portions of title 50, part 424, of the Code of Federal Regulations, which also implements the Act. Part 424 clarifies, interprets, and implements 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, we propose to amend portions of part 424 that clarify procedures for designating and revising critical habitat. The proposed amendments would make minor edits to the scope and purpose, add and remove some definitions, and clarify the criteria for designating critical habitat.

Authors

The primary authors of this notice are the staff members of the Endangered Species Program, Headquarters Office, U.S. Fish and Wildlife Service.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: June 17, 2014.

Michael J. Bean,

Acting Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

Dated: June 17, 2014.

Samuel D. Rauch III,

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

[FR Doc. 2014–14774 Filed 6–25–14; 8:45 am]

BILLING CODE 4310–55–P; 3510–22–P

early restoration planning and environmental review; defined the issues and alternatives that would be examined in detail; and saved time by ensuring that draft documents adequately addressed relevant issues. A scoping process reduces paperwork and delay by ensuring that important issues are considered early in the decision making process. To gather public input, the Trustees hosted six public meetings and accepted written comment electronically and via U.S. mail during the scoping period.

Notice of availability of the Draft Programmatic and Phase III Early Restoration Plan and Draft Early Restoration Programmatic Environmental Impact Statement (Draft Phase III ERP/PEIS) was published in the **Federal Register** on December 6, 2013 (78 FR 73555). The Draft Phase III ERP/PEIS considered programmatic alternatives for early restoration and proposed 44 early restoration projects in Phase III of early restoration consistent with the project types included in the proposed programmatic alternative. The Trustees provided the public with 75 days to review and comment on the Draft Phase III ERP/PEIS (including a 15-day extension of the original announced 60-day comment period). The Trustees also held public meetings in Mobile, Alabama; Long Beach, Mississippi; Belle Chasse, Thibodaux, and Lake Charles, Louisiana; Port Arthur, Galveston, and Corpus Christi, Texas; and Pensacola, Florida to facilitate public participation. The Participating Trustees considered the public comments received, which informed the Participating Trustees' analyses of programmatic alternatives and specific early restoration projects in the Final Phase III ERP/PEIS. A summary of the public comments received and the Participating Trustees' responses to those comments are addressed in Chapter 13 of the Final Phase III ERP/PEIS.

Overview of the Phase III ERP/PEIS

The Final Phase III ERP/PEIS is being released in accordance with the Oil Pollution Act (OPA), the Natural Resource Damage Assessment (NRDA) regulations found in the Code of Federal Regulations (CFR) at 15 CFR part 990, and the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*).

The Final Phase III ERP/PEIS proposes early restoration programmatic alternatives and evaluates the potential environmental effects and cumulative effects of those alternatives. The Final Phase III ERP/PEIS groups 12 project types into two categories: (1) Contribute to Restoring Habitats and Living Coastal and Marine Resources, and (2) Contribute to Providing and Enhancing Recreational Opportunities. These categories provide the basis for defining the list of four alternatives considered in the document:

- Alternative 1: No Action (No Additional Early Restoration);
- Alternative 2: Contribute to Restoring Habitats and Living Coastal and Marine Resources;
- Alternative 3: Contribute to Providing and Enhancing Recreational Opportunities; and
- Alternative 4 (Preferred Alternative): Contribute to Restoring Habitats, Living Coastal and Marine Resources, and Recreational Opportunities.

The Participating Trustees propose to select 44 projects as described in the Final Phase III ERP/PEIS, totaling an estimated cost of approximately $627 million.

The proposed restoration projects are intended to continue the process of using early restoration funding to restore natural resources, ecological services, and recreational use services injured or lost as a result of the *Deepwater Horizon* oil spill. The Participating Trustees considered both ecological and recreational use restoration projects to restore injuries caused by the *Deepwater Horizon* oil spill, addressing both the physical and biological environment, as well as the relationship people have with the environment.

The projects proposed in Phase III are not intended to, and do not, fully address all injuries caused by the spill or provide the extent of restoration needed to make the public and the environment whole. The Participating Trustees anticipate that additional early restoration projects will be proposed in the future as the early restoration process continues.

Next Steps

In accordance with NEPA, a Federal agency must prepare a concise public Record of Decision (ROD) at the time the agency makes a decision in cases involving an EIS (40 CFR 1505.2). The ROD for the Final Phase III ERP/PEIS would provide and explain the Trustees' decisions regarding the selection of a programmatic early restoration alternative and specific early restoration projects. The Trustees will issue the ROD no earlier than 30 days after the Environmental Protection Agency publishes a notice in the **Federal Register** announcing the availability of the Final Phase III ERP/PEIS (40 CFR § 1506.10).

Administrative Record

An Administrative Record has been established and can be viewed electronically at *http://www.doi.gov/deepwaterhorizon/adminrecord/index.cfm.*

Authorities

The authorities of this action are the Oil Pollution Act of 1990 (33 U.S.C. 2701 *et seq.*), the implementing Natural Resource Damage Assessment regulations found at 15 CFR 990, NEPA, and the Framework Agreement.

Cynthia K. Dohner,

DOI Authorized Official.

[FR Doc. 2014–14952 Filed 6–25–14; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. FWS–R9–ES–2011–0104; 120206102–4517–02; 4500030114]

RIN 1018–AX87; 0648–BB82

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

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

ACTION: Notice; extension of comment period.

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''), announce the extension of the public comment period on our May 12, 2014, draft policy regarding implementation of section 4(b)(2) of the Endangered Species Act. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final policy.

DATES: We will accept comments from all interested parties until October 9, 2014. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** section, below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Time on this date.

ADDRESSES: You may submit comments by one of the following methods:

• *Federal eRulemaking Portal: http://www.regulations.gov.* In the Search box, enter the docket number for the draft policy, which is FWS–R9–ES–2011–0104. You may submit a comment by clicking on ''Comment Now!'' Please ensure that you have found the correct rulemaking before submitting your comment.

• *U.S. mail:* Public Comments Processing, Attn: Docket No. FWS–R9–ES–2011–0104; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section, below, for more information).

FOR FURTHER INFORMATION CONTACT: Douglas Krofta, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 4401 N. Fairfax Drive, Suite 420, Arlington, VA 22203; 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 301/713–8469; 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:

Public Comments

We will accept written comments and information during this extended comment period on our draft policy regarding implementation of section 4(b)(2) of the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*), that was published in the **Federal Register** on May 12, 2014 (79 FR 27052). We will consider information we receive from all interested parties on or before the close of the comment period (see **DATES**).

If you submitted comments or information during the public comment period that began May 12, 2014, please do not resubmit them. We have incorporated them into the public record, and we will fully consider them in the preparation of our final policy.

You may submit your comments and materials by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

If you submit a comment via *http://www.regulations.gov,* your entire comment—including any personal identifying information—will be posted on the Web site. We will post all hardcopy comments on *http://www.regulations.gov* as well. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Background

On May 12, 2014, we published three related documents concerning designation and implementation of critical habitat under the Act: Two proposed regulation amendments and one draft policy. This notice extends the comment period for the draft policy, and a separate document published elsewhere in today's issue of the **Federal Register** extends the comment periods for the two proposed regulation amendments. The document for which we are extending the comment period in this notice announces a draft policy regarding implementation of section 4(b)(2) of the Act.

Specifically, the draft policy on exclusions from critical habitat under the Act 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. The draft policy is meant to complement the amendments to our regulations regarding impact analyses of critical habitat designations and is intended to clarify expectations regarding critical habitat and provide for a credible, predictable, and simplified critical-habitat-exclusion process.

Authors

The primary authors of this notice are the staff members of the Endangered Species Program, Headquarters Office, U.S. Fish and Wildlife Service.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: June 17, 2014.

Michael J. Bean,

Acting Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

Dated: June 17, 2014.

Samuel D. Rauch III,

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

[FR Doc. 2014–14773 Filed 6–25–14; 8:45 am]

BILLING CODE 4310–55–P; 3510–22–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

[DR.5B814.IA001213]

Renewal of Agency Information Collection for Application for Job Placement and Training Services

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of submission to OMB.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, the Assistant Secretary—Indian Affairs is submitting to the Office of Management and Budget (OMB) a request for renewal of the approval for the collection of information in the Application for Job Placement and Training Services. The information collection is currently authorized by OMB Control Number 1076–0062, which expires June 30, 2014.

DATES: Interested persons are invited to submit comments on or before July 28, 2014.

ADDRESSES: You may submit comments on the information collection to the Desk Officer for the Department of the Interior at the Office of Management and Budget, by facsimile to (202) 395–5806 or by email to: *OIRA_Submission@omb.eop.gov.* Please send a copy of your comments to Jack Stevens, Division Chief, Office of Indian Energy and Economic Development, Assistant Secretary—Indian Affairs, 1951 Constitution Avenue NW., MS–20 SIB, Washington, DC 20240; facsimile: (202) 208–4564; email: *Jack.Stevens@bia.gov.*

FOR FURTHER INFORMATION CONTACT: Jack Stevens, telephone: (202) 208–6764. You may review the information collection request online at *http://www.reginfo.gov.* Follow the instructions to review Department of the Interior information collections under review by OMB.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Office of Indian Energy and Economic Development (IEED) is seeking renewal of the approval for the information collection conducted under 25 CFR part 26 to administer the job placement and training program, which provides vocational/technical training, related counseling, guidance, job placement services, and limited financial assistance to Indian individuals who are not less than 18 years old and who reside within service areas approved by the Bureau of Indian Affairs (BIA). Information is collected through the form, BIA–8205,