



## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### 50 CFR Part 17

[Docket No. FWS–HQ–ES–2019–0115; FF09E23000 FXES1111090FEDR 212]

RIN 1018–BD84

### Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat

**AGENCY:** U.S. Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (FWS or Service), amend portions of our regulations that implement section 4 of the Endangered Species Act of 1973, as amended (Act). The revisions set forth a process for excluding areas of critical habitat under section 4(b)(2) of the Act, which mandates our consideration of the impacts of designating critical habitat and permits exclusions of particular areas following a discretionary exclusion analysis. These regulations outline when and how the Service will undertake an exclusion analysis, including identifying a non-exhaustive list of categories of potential impacts that we will consider. This rule, reflects agency experience, codifies some current agency practices, makes some modifications to current agency practice, and responds to applicable Supreme Court case law. The intended effect of this rule is to provide greater transparency and certainty for the public and stakeholders.

**DATES:** *Effective date:* This final regulation is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

*Applicability date:* This revised regulation applies to critical habitat rules for which a proposed rule is published after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** Public comments and materials received, as well as supporting documentation used in the preparation of this final regulation, are available on the Internet at <http://www.regulations.gov> in Docket No. FWS–HQ–ES–2019–0115.

**FOR FURTHER INFORMATION CONTACT:** Gary Frazer, U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240, telephone 202/208–4646. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS) at 800/877–8339.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

On September 8, 2020, we proposed to amend portions of our regulations that implement section 4 of the Endangered Species Act of 1973, as amended (hereafter “Act”; 16 U.S.C. 1531 et seq.). In that proposed rule (85 FR 55398), we provided the background for our proposed revisions in terms of the statute, legislative history, and case law; a brief description of the proposed rule follows:

The implementing regulations for the designation of critical habitat for listed species are located in part 424 of title 50 of the Code of Federal Regulations. Relevant definitions are at 50 CFR 424.02, and the standards and procedures for identifying critical habitat are at 50 CFR 424.12. These regulations are jointly administered between the Service and the National Marine Fisheries Service (NMFS) (referred to hereafter as the “Services”). On February 11, 2016, the Services issued a joint policy describing how we implement the authority to exclude areas from

critical habitat designations (“Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act,” 81 FR 7226; hereafter the “2016 Policy”).

The proposed revisions in our September 8, 2020, proposed rule (85 FR 55398) set forth a process for excluding areas of critical habitat under section 4(b)(2) of the Act, which mandates our consideration of the impacts of designating critical habitat. Section 4(b)(2) of the Act requires us first to consider the relevant impacts of designating critical habitat and authorizes us then to exclude particular areas from the designation based on our discretionary exclusion analysis. We wanted to articulate clearly when and how we will undertake an exclusion analysis, including identifying a non-exhaustive list of categories of potential impacts for us to consider.

In the proposed rule, we revisited certain language in the preamble of the 2016 Policy, as well as certain statements in the preamble to a 2013 rule that revised the regulations on the timing of our economic analyses at 50 CFR 424.19 (August 28, 2013, 78 FR 53058). This 2013 rule is discussed below in this document and is referred to hereafter as the “Final 424.19 Rule.” Our goal in the proposed rule was to provide clarity to the Service and the public in light of agency experience and current practices, and to respond to the Supreme Court’s recent decision in *Weyerhaeuser Co. v. U.S. FWS*, 139 S. Ct. 361 (2018).

In this final rule, we focus our discussion on the comments we received during the comment period and our consideration of the issues raised. For background on the statutory and legislative history and case law relevant to this regulation, we refer the reader to the proposed rule (85 FR 55398, September 8, 2020).

### **Effects of the Final Rule**

After consideration of the information provided through the public comment process, we are finalizing this rule as proposed, but have provided clarification to questions and concerns below in the responses to public comments.

In finalizing the specific changes to the current regulations in the rule portion of this document and setting out the accompanying clarifying discussion in this preamble, we are establishing prospective standards only. Although this regulation is effective 30 days from the date of publication as indicated in **DATES** above, it will apply only to relevant rulemakings for which the proposed rule is published after that date. Thus, the Service will continue to apply the 2016 Policy and the regulations at 50 CFR part 424 to any rulemakings for which a proposed rule was published before the effective date of this rule. Nothing in this final revised regulation is intended to require that any previously completed critical habitat designation be reevaluated on the basis of this final regulation.

For critical habitat designations or revisions that FWS proposes after the effective date of this rulemaking action, we will not apply the 2016 Policy or the Final 424.19 Rule. These regulations primarily adopt and deepen the provisions in the 2016 Policy and Final 424.19 Rule, and, therefore, supersede the 2016 Policy and Final 424.19 Rule with respect to FWS. However, NMFS will continue to implement the 2016 Policy and Final 424.19 Rule for purposes of their critical habitat rulemaking actions. For critical habitat designations or revisions that FWS proposed prior to the effective date of these regulations, FWS will apply the 2016 Policy and the Final 424.19 Rule.

### **Summary of Comments and Responses**

In our proposed rule published on September 8, 2020 (85 FR 55398), we requested public comments on the provisions of the proposed rule. During the public comment period, we received several requests for public hearings. Public hearings are not required for regulation revisions of this type, and we elected not to hold public hearings. After considering several requests for extensions of the public comment period beyond the original 30-day public comment period, we also decided not to extend the public comment period.

The APA does not specify a minimum number of days for a comment period, but the comment period must be long enough to afford the public a meaningful opportunity to comment, which usually leads agencies to allow a comment period of at least 60 days. Consistent with this principle, courts give broad discretion to agencies in determining the reasonableness of a comment period. Courts have frequently upheld comment periods that were shorter than 60 days. *See, e.g., Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 534 (D.C. Cir. 1982) (upholding a 30-day comment period and stating that “neither statute nor regulation mandates that the agency do more”). In addition to the length of a comment period, courts consider the number of comments received and whether comments had an effect on an agency's final rule, in assessing whether the public had a meaningful opportunity to comment. Although the comment period here was shorter than 60 days, the public had a meaningful opportunity to comment on the proposed rule. The Services received more than 28,600 public submissions representing more than 107,600 individual commenters. Among the submissions were multiple letters from organizations signed by thousands of individuals expressing general opposition to the rule. Although many of the other individual comments were non-substantive in nature, expressing either general support for, or opposition to, the proposed rule with no supporting information or analysis, we also received many detailed substantive comments with specific rationale for support of, or opposition to, specific portions of the proposed rule. Below, we summarize the substantive public comments sent by the October 8, 2020, deadline.

*Comment 1:* Some commenters supported adding a requirement that the Service always exclude areas from critical habitat when the costs of designation outweigh the benefits of critical habitat, while others said that the proposed process would prioritize economic gains over species protection. Some were concerned the proposed process for analyzing potential exclusions would base critical habitat exclusions on analyses of incomparable ecological and economic costs and benefits. Additionally, others requested that we determine the monetary value of species and

habitats according to the ecosystem services they provide as a way to directly compare the economic costs of designation with biological benefits.

*Response:* When identifying the areas that meet the definition of “critical habitat,” Congress expressly prohibited the Secretaries from using anything other than the best scientific data available. However, Congress also expressly required the Secretaries to consider economic impacts, national-security impacts, and other relevant impacts before finalizing the critical habitat designation. Thus, Congress intended us to consider both the biological needs of a species and economic considerations when designating critical habitat.

As described in the proposed rule, once the Secretary has identified and considered economic and other relevant impacts, he has discretion in how to determine whether the benefits of excluding a particular area from the designation outweigh the benefits of including that area in the designation (see also M-37016, “The Secretary’s Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act”, October 3, 2008). The regulation states that the Secretary shall exclude any area where the benefits of exclusion outweigh those of inclusion; benefits of exclusion may include avoidance of economic, national security, and other relevant impacts while benefits of inclusion may include ecological or conservation benefits.

When the Service undertakes the mandatory consideration of economic costs and benefits of each critical habitat designation, we are guided by the Final 424.19 Rule. That rule codified the approach of evaluating the incremental impacts when conducting impact analyses, including economic analyses, for critical habitat designations. The preamble to the Final 424.19 Rule provided the numerous legal authorities that support the use of an incremental-impacts analysis, including the Office of Management and Budget’s (OMB’s) Circular A–4, which provides guidance and best practices for consideration of impacts of regulatory actions. Additionally, this final rule incorporates the incremental-impacts language from the Final 424.19 Rule without

change, including the first two sentences of paragraph (a) and all of paragraph (b). As part of this process, we consider the best available information regarding the anticipated impacts of exclusion, either positive or negative, and may include valuation or monetization of ecosystem services provided by species and ecosystems if the information is available.

*Comment 2:* Several commenters requested that we include all economic impacts of a listing in our economic assessment following the coextensive approach, rather than limiting it to the incremental effects of critical habitat designation. Commenters also requested that the regulation include a definition of “meaningful” economic impacts and a description of their scope, along with a requirement to use a quantitative economic assessment whenever possible. Additionally, some commenters requested that only economic impacts in a defined area and only those tied to Federal actions should be considered.

*Response:* Our Final 424.19 Rule codified the use of the incremental method for conducting impact analyses, including economic analyses, for critical habitat designations. That final rule contains responses to public comments that clearly lay out the Services’ rationale for using the incremental method. Evaluating incremental impacts that result from a regulation being promulgated, rather than considering coextensive impacts that may be ascribed to various previous regulations, is further supported by Executive Order 12866, as applied by OMB Circular A-4. In addition, a recent court decision addressing this question confirmed the validity of evaluating incremental impacts of critical habitat designations even in the Tenth Circuit, which used to require coextensive analysis. *Northern N.M. Stockman’s Ass’n v. U.S.F.W.S.*, No. 18-1138 JB/JFR, slip op. 136-37, 140-78 (D.N.M. Oct. 13, 2020) (concluding that the Service’s incremental impacts approach was permissible in light of regulatory changes that post-dated Tenth Circuit decision that had required coextensive approach).

We do not define “meaningful,” as we intend it to have its plain-language meaning. We included the word to indicate that evidence of de minimis economic impacts of a proposed designation will not trigger an exclusion analysis. Our consideration of economic impacts

includes an assessment of the probable economic impacts of a designation. We evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. In conducting economic analyses, we follow the guidance and best practices set out in Executive Orders (E.O.s) 12866 and 13563, as well as OMB's Circular A-4. Those guidelines direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible, including monetization) and qualitative terms. As part of our analysis, we consider the types of economic activities that are likely to occur within the areas likely affected by the critical habitat designation.

*Comment 3:* Many commenters support inclusion of a non-exhaustive list of categories of potential impacts described in the proposed rule. Commenters stated that lists would provide clarity and would allow focused public comments while being adaptable to the needs of affected areas. Additionally, many commenters suggested that we add to or elaborate on the potential impacts listed in the proposed regulations, including that we add both direct and indirect impacts to the list.

*Response:* The text of the regulation is clear that the examples or categories provided in the regulation are not exhaustive. Based on the specific facts in particular critical habitat designations, there may be other impacts identified, and we would consider those impacts. We develop and share a draft economic analysis that considers categories of potential economic impacts at the time we propose critical habitat for a species. When available, we also describe exclusions we are considering and solicit public comments on specific information that may inform those potential exclusions and other potential impacts not known to us at the time of the proposed designation. We are required to evaluate the direct and indirect costs of the designation of critical habitat under the provisions of Executive Order 12866, and we do so through the draft economic analyses of the designation.

*Comment 4:* Some commenters stated that the Service should engage with appropriate State and other authorities while developing a non-exhaustive list of categories of potential



impacts prior to publishing a draft critical habitat designation. Regulations should include a process for consulting with and considering input of State fish and wildlife agencies, local governments, and Tribal governments to identify economic and other relevant impacts.

*Response:* We routinely coordinate with State and Federal partners during the development of a species status assessment for evaluation of whether to list a species, and with Federal agencies during the development of the draft economic analysis of a proposed critical habitat rule. Through these coordination efforts, we typically receive information from State and Federal agencies regarding potentially relevant impacts of a designation of critical habitat early in our development of a critical habitat designation. Additionally, during the public comment period for a proposed critical habitat designation, we receive information regarding other potentially relevant economic or other impacts from State agencies, local governments, and Tribal governments that we consider when finalizing the designation. We conclude that our current process provides for coordination with States and other authorities, and it is unnecessary to codify our process in regulation.

*Comment 5:* Some commenters indicated that the list of economic impacts and “other relevant impacts” is unlawfully broad, such as including “community impacts.” They believed such items were far-reaching and speculative, and definitions could conceivably apply to all but the least substantiated information submissions and to nearly every proposed critical habitat designation, rendering what was a discretionary analysis mandatory under the proposed rule. Such broad lists would place a heavy burden on the Service to evaluate claims of impacts even if evidence is weak. Some commenters suggested we clarify terms such as “community impacts.”

*Response:* The phrase “other relevant impacts” in the statute gives the Secretary broad discretion to determine what those other relevant impacts might be. This discretion is thoroughly described in Solicitor’s Memorandum Opinion M–37016, “The Secretary’s Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act,”

(October 3, 2008, p. 12), and the list provided in the proposed rule and in this final rule illustrates the types of information we may consider. We do not agree with comments that state that the elaboration of the types of other relevant impacts is overly broad and therefore would lead us to conduct exclusion analyses for every designation, thereby rendering those analyses “mandatory.” The credible-information threshold states that an economic or other relevant impact must be meaningful to support a benefit of exclusion. Therefore, with the application of the credible-information threshold, we anticipate that we will not be in a position where every submission by a proponent of an exclusion would meet the standard of having a meaningful impact and thereby trigger an exclusion analysis. Regarding the phrase “community impacts,” the proposed rule provides a few examples of this phrase; however, we will evaluate on a case-by-case basis any information that is submitted by a proponent of an exclusion to determine whether credible information regarding whether there is an impact to a community is presented.

*Comment 6:* Commenters stated that the proposed rule does not address the impacts of excluding an area necessary to the recovery of a species, nor does it address the mechanisms through which benefits will accrue for the species if critical habitat were to be designated. Impacts on recovery should be addressed, because the goal of the Act is ultimately to recover and delist the species. Additionally, we should consider all relevant factors—including how designating critical habitat is likely to affect the species’ risk of extinction and how potential exclusion of areas would affect the recovery of the species—before granting exclusions.

*Response:* We consider the potential effects to species’ recovery when we enter into an exclusion analysis under section 4(b)(2) of the Act. In giving weights to the benefits of including and excluding particular areas, we evaluate the conservation value of the area, including the current function of the area for the species and the future recovery value of the area to the species. Benefits of including or excluding an area from critical habitat are considered for each designation and are fact-specific to each species. We note that critical habitat is one of many tools available to recover species, and the exclusion of an area from a critical habitat

designation does not mean that it no longer contributes to recovery. In fact, FWS has excluded many areas because they are already being managed for the conservation of the species thereby reducing the benefits of including those areas within a critical habitat designation. Further, many areas that are excluded from critical habitat designation but are not being managed for conservation of the species still contribute to the recovery of the species.

*Comment 7:* Some commenters stated that we should allow comment on the draft economic analysis and on our evaluation of any relevant impact of including or excluding areas from the critical habitat. The public may have significant non-economic concerns. Therefore, commenters recommended we expand this rule to allow the public to comment on any relevant factor regarding a designation, not just the economic analysis. The commenters opined that doing so is consistent with congressional intent and would minimize judicial challenge.

*Response:* We routinely seek comment on proposed designations of critical habitat regarding a wide range of issues, including biological factors that support the proposed designation and non-biological considerations that may inform potential exclusions from the final designation. We do not limit the scope of public comment to non-economic considerations; all relevant substantive comments are considered when developing a final designation of critical habitat. We make the draft economic analysis of the proposed designation of critical habitat available concurrent with publication of the proposed rule to designate critical habitat. During the public comment period for a proposed designation, the public has ample opportunity to review and comment on the economic analysis, as well as on any other relevant impacts from the designation of critical habitat. Because we already request public comment on all areas of the rulemaking whenever we propose to designate critical habitat, modifying this regulation to require the Service to request comments on non-economic impacts is duplicative and unnecessary.

*Comment 8:* Commenters stated that the proposed rule’s non-exhaustive list of “other relevant impacts” and economic impacts is heavily weighted toward negative impacts of designating critical habitat on the community and other stakeholders. It does not consider the potential economic and community benefits (e.g., socio-economic benefits), or cultural or other ecological benefits or co-benefits (such as protection of other species), that may be distinct from the “conservation value of the area.” Historically, the Service considered a broad array of direct and indirect economic benefits from critical habitat designations. The list of categories of potential impacts largely focuses on costs and fails to provide transparency about benefits that the Service should consider.

*Response:* We are not limited to considering the relevant impact examples included in this rule. If the specific facts indicate that there are economic benefits from including a particular area in the designation, we would consider those benefits, where appropriate. In situations where economic benefits are relevant, we generally describe two broad categories of benefits of inclusion of particular areas of critical habitat: (1) those associated with the primary goal of species conservation and recovery, and (2) those that derive from the habitat conservation measures to achieve this primary goal. In the rare cases where there are incremental impacts beyond administrative impacts from designating critical habitat, we may lack specific information to quantify the use or non-use benefits associated with critical habitat designations such as recreation, wildlife viewing, or ecosystem services that may result from critical habitat designations, but discuss them qualitatively, as permitted by OMB Circular A-4. As a result, we focus our analysis of benefits of inclusion qualitatively to describe the conservation value of the particular area of critical habitat as weighed against the benefits of exclusion.

*Comment 9:* Commenters stated that it is not clear how the text in proposed § 17.90(a) differs from the “consider[ation of] probable economic, national security, and other relevant impacts” referred to in § 17.90(b).

*Response:* The difference in these two paragraphs is procedural; in § 17.90, paragraph (a) describes the information we will provide in the proposed rule, while paragraph (b) describes our considerations in finalizing the rule. Paragraph (a) explains that the proposed critical habitat designation will identify known national security and other relevant impacts of the proposed designation and identify areas that the Secretary has reason to consider for exclusion and explain why. Additionally, we explain that at the proposed rule stage the Secretary will identify, to the extent known, the categories of potential impacts. We noted in the proposed rule that these impacts are the same as those that the Secretary will consider, as appropriate, when conducting the mandatory consideration of any other relevant impacts as expressed in the first sentence of section 4(b)(2) of the Act and in § 17.90(b). Including this list of categories as described in § 17.90(a) for consideration provides greater transparency and clarity to the public and stakeholders by providing information at the proposed rule stage to better inform public comment.

*Comment 10:* Commenters cite the statutory requirement that the appropriate scale of analysis is of the “particular area” of a proposed critical habitat designation and note that this is in conflict with the proposed rule allowing the Secretary to determine the appropriate scale for the consideration of impacts from a critical habitat designation. The commenters ask the Service to establish a consistent scale of analysis for all designations, or specify in the regulation that the scale of analysis applies to the “particular area” or otherwise clarify that the exclusion analysis will only evaluate impacts at a scale that considers the “particular areas” of a designation. Commenters state that the proposed rule, as written, would allow the Secretary to select the scale used in the exclusion analysis and assess impacts without regard to the “particular areas” of a proposed designation. Other commenters suggest that the Secretary should retain the discretion to determine exclusions at whatever scale he deems to be appropriate, to specifically state what that scale is in the proposed rule when making a critical habitat designation, and to take into full

consideration the economic impacts at that scale. Another commenter suggested that the scale of the analysis should be tied to the probability of a Federal nexus.

*Response:* Each critical habitat designation is different in terms of determining the area that meets the definition of critical habitat, the scope of the applicable Federal actions, economic activity, and the scales for which data are available, and each is very fact-specific. Therefore, the Service must have flexibility to evaluate these “particular areas” of critical habitat in whatever way is most meaningful and at whatever scale is appropriate in each situation. For example, for a narrowly distributed endemic species, a critical habitat proposal may cover a small area; in contrast, for a wide-ranging species, a critical habitat proposal may cover an area that is orders of magnitude greater. The appropriate scale of the impact analysis for these two species may not be the same. For the endemic species, it may be possible to conduct an impact analysis at a very fine scale with a great level of detail. In contrast, an impact analysis for the wide-ranging species, which may cover wide expanses of land or water, may use a coarser scale of analysis, due to the sheer size of the proposed designation. Each critical habitat proposal includes a description of the scope of the area being proposed and the “particular areas” that are being considered for exclusion, and uses the scale of analysis appropriate to that situation. Furthermore, while we will evaluate the likely effects of designating critical habitat upon the need to engage in, or outcomes of, consultations under section 7 of the Act, the scale of the analysis will be at the appropriate scale as determined by the Secretary. Because the scale is dependent on the data available and is very fact-specific, it will not be necessarily determined by the potential for section 7 consultations.

*Comment 11:* Commenters requested that the rule clarify or provide a definition for “credible information” and outline a clear process for soliciting this information. They suggested clarifying what information should be submitted, when to submit, and how the Service will evaluate the information to determine whether it constitutes credible information.

*Response:* As stated in the proposed rule, “credible information” refers to information that constitutes a reasonably reliable indication regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for a particular area. In each proposed designation of critical habitat, we solicit information regarding the biological basis for the designation, as well as any probable impact resulting from it. In addition to soliciting public comments on the proposed designation, we also share a draft economic analysis of the designation and solicit comments on that analysis. In determining what constitutes “credible information,” we will look at whether the proponent has provided factual information in support of the claimed impacts. We will typically use our economic analysis of the proposed critical habitat designation to help identify any information that does not meet the credible information standard or to confirm or rebut information that is provided by a proponent of an exclusion. Whether the claimed impacts support a benefit of exclusion that could potentially outweigh the benefits of inclusion may therefore be meaningful for the purposes of an exclusion analysis.

*Comment 12:* Some commenters asserted that their information, such as from the States or other regulated entities, should always be considered credible, whereas other commenters stated that assuming information is credible unless the Service has rebutting information allows non-FWS entities to drive exclusions of critical habitat.

*Response:* We will evaluate any information provided from outside entities on a case-by-case basis and will decide whether to conduct an exclusion analysis based on whether the proponent of an exclusion has presented credible information regarding a meaningful impact supporting a benefit of exclusion. We decline to institute a list of entities whose information automatically qualifies as credible information. All information submitted to us in support of exclusion will be subject to the credible-information standard.

*Comment 13:* One commenter asserts that the credible-information standard would prioritize non-biological impacts when considering whether to conduct an exclusion analysis

because the commenter anticipates that the most common credible information the Service is likely to receive will be information about non-biological impacts of designations of critical habitat.

*Response:* As stated in the proposed rule, the credible-information standard applies equally to biological and non-biological information, and the number of either category of comments that we receive that meet the “credible-information standard” is likely to differ from one designation to another. It is unknown if the Service will receive more comments about non-biological impacts or whether comments about non-biological impacts are more likely to meet the credible-information standard; we stress that each analysis will be done on a case-by-case basis. However, because the Act mandates our consideration of the impact to three broad categories of non-biological impacts prior to designating critical habitat, we conclude the inclusion of the broad array of non-biological considerations detailed in this rule is consistent with the Act.

*Comment 14:* Commenters provided both support for and opposition to the provision to assign weights of benefits of inclusion or exclusion based on who has the expertise. Commenters stated that it is unclear how the Service will determine if someone is an expert or what constitutes firsthand knowledge. They suggested that the Service should provide more clarity on how the expertise will be determined and how the weights will be assigned. They further stated that, without this information, the rule would establish a process that is less transparent and vague, would lead to inconsistent application, and is contrary to the conservation goals of the Act. Commenters expressed concern that this provision would inappropriately presume the validity of such information, which could include speculative economic analyses because the rule incentivizes inclusion of impacts provided by self-interested parties, and thereby allow non-FWS entities to drive critical habitat designations. Commenters expressed concern that deferring to information from outside experts would inappropriately delegate expert judgment and authority to third parties who are not statutorily authorized to perform these duties.



Alternatively, other commenters provided support for this provision because it allows for engagement from the public and stakeholders that will allow them to be part of the process and provide their firsthand knowledge. Commenters anticipated that allowing this stakeholder involvement will increase trust and would ensure we receive the best information. Some commenters supported the provision to weigh non-biological impacts in accordance with information provided by State or local governments because these entities have special expertise that should be included in an exclusion analysis. Further, some commenters suggested that the rule include a mandatory consultation process for States to ensure that the correct weights of benefits of exclusion are incorporated in the exclusion analysis, because States have had the responsibility of managing these species before FWS. Other commenters expressed support for allowing outside entities to provide information on economic impacts of the designation of critical habitat because the information from outside entities would improve FWS's economic analyses, which do not provide enough granularity to allow the public to understand the impacts.

*Response:* As stated in the proposed rule, we will give weight to benefits of inclusion or exclusion based on who has the relevant expertise. We will base critical habitat designations on the best available information, evaluate the information provided from outside entities on a case-by-case basis, and give weights of the benefits of inclusion or exclusion consistent with the available information from experts, firsthand knowledge, and the best available information that the Secretary may have to rebut that information. We do not consider speculative or unsupported information to be the best available information and will use our best professional judgment to evaluate all information critically before incorporating it into any exclusion analysis. Further, the list of categories included in paragraph (d)(1) is non-exhaustive, and if we receive information that is credible and outside the scope of our expertise, we will consider that information on a case-by-case basis as appropriate. We routinely coordinate with outside entities, such as State fish and wildlife agencies, during the development of a species status assessment for evaluation of whether to list a species and when necessary, we continue this

coordination during the development of a designation of critical habitat. We conclude that our current process is sufficient to coordinate with States and other authorities, and it is unnecessary to codify any additional consultation process in regulation.

*Comment 15:* Some commenters stated that the Service should expand § 17.90(d)(1)(i) to include assigning weights consistent with expert or firsthand information from Tribes regarding economic impacts.

*Response:* We consider any economic impact information submitted by a Tribe when we undertake exclusion analyses. The weights we give to economic impacts identified by Tribes will be consistent with the information the Tribes provide unless we have knowledge or material evidence information that rebuts that information. Thus, no changes were needed to address the intent of these comments.

*Comment 16:* A number of commenters stated that the regulation should include provisions requiring the Service to invite Tribal participation in the process for designating critical habitat or in establishing standards for designating Tribal lands as critical habitat. For example, some commenters stated that the regulations should require the Service to consult with affected Indian Tribes when designating critical habitat, while others stated that the regulations should establish a rebuttable presumption that Tribal lands either would be excluded from designations of critical habitat, or would not be considered for designations.

*Response:* We are committed to honoring and strengthening our unique legal relationship with Indian Tribal governments. When we designate critical habitat, we follow the applicable laws and policies setting out principles and requirements for ensuring meaningful and timely input by Tribal entities. This includes consulting with affected Tribes in accordance with both Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” 65 FR 67249 (Nov. 9, 2000), and Secretarial Order 3206, “American Indian Tribal Rights, Federal-

Tribal Trust Responsibilities, and the Endangered Species Act” (June 5, 1997) (S.O. 3206), among other authorities. Because we are already required to consult with affected Tribes under these authorities when we designate critical habitat, we did not make any changes to the regulation in response to these comments.

We do not have the authority to establish a standard making all Tribal lands ineligible for designation as critical habitat, or to establish a rebuttable presumption that Tribal lands would be excluded. The Act requires that critical habitat be designated on the basis of the best scientific data available; therefore, if Tribal lands meet the definition of critical habitat, those areas will be proposed as critical habitat. Our authority to exclude areas from critical habitat is limited to situations in which the benefits of excluding an area outweigh the benefits of including the area in the critical habitat designation where exclusion will not result in extinction of the species. We will give weight to the benefits of excluding Tribal areas consistent with Tribes’ firsthand or expert knowledge, in accordance with economic and other information provided by affected Tribes. However, there may be times when we determine the benefits of including Tribal lands outweigh the benefits of excluding those areas. Therefore, we cannot establish a rebuttable presumption that Tribal lands will be excluded from critical habitat designations. In this regulation, we do not make a determination about whether Tribal lands meet the definition of “critical habitat” in the first instance because that would fall within the first step in designating critical habitat and is therefore outside the scope of this rulemaking.

*Comment 17:* Some commenters stated that § 17.90(d)(1)(i) specifying that the Service will assign weights consistent with non-biological impacts of inclusion or exclusion identified by federally recognized Indian Tribes is too narrow. For example, the provision should include assigning weights consistent with expert or firsthand information from Tribes regarding biological impacts or impacts on natural resources, including traditional ecological knowledge.

*Response:* As stated in the proposed rule, whenever we undertake a discretionary exclusion analysis, we comply with Secretarial Order 3206, “American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act” (June 5, 1997) (S.O. 3206), prior to finalizing the designation of critical habitat. The exclusion analysis therefore includes consideration of the impacts to any Tribal lands included in, or resources affected by, a potential designation, and we would consider all relevant available information (whether non-biological or biological), including Tribal expertise, firsthand information, and traditional ecological knowledge.

*Comment 18:* We received comments stating that the regulation should include impacts on Alaska Native-owned lands in the list of “other relevant impacts” that the Service must consider. Some commenters also stated that the Service should assign weights consistent with impacts identified by Alaska Native Corporations and other Alaska Native organizations, because those entities also have expert and firsthand knowledge about impacts of critical habitat designations to Tribes, their natural resources, and their economies.

*Response:* Impacts on Alaska Native-owned lands qualify as “other relevant impacts” under section 4(b)(2), and we intend to address those impacts when we designate critical habitat. Similarly, non-biological impacts identified by any Tribal organizations, including Alaska Native Corporations and Alaska Native organizations, are outside the scope of the Service’s expertise; therefore, we would give weights to those impacts in accordance with the firsthand information or expert knowledge those organizations provide. We conclude that it is not necessary to change the text of the final rule because both of the lists that the comment references are expressly non-exhaustive. Section 17.90(a) states that “[o]ther relevant impacts’ may include, *but are not limited to*, impacts to” a variety of entities and values. Similarly, § 17.90(d)(1) states, “Impacts that are outside the scope of the Service’s expertise include, *but are not limited to*” several categories of impacts (emphasis added).

*Comment 19:* Some commenters pointed to Tribal treaties that give Tribes property or other rights with regard to their fisheries; these commenters stated that the proposed rule would put these Tribal rights further at risk by broadening the scope of critical habitat exclusions.

*Response:* We do not anticipate that the proposed rule would increase risks to any land or resources. To the extent an Indian Tribe is concerned that designating an area as critical habitat or excluding an area from a critical habitat designation could affect their treaty or other rights, under § 17.90(d)(1)(i) of these final regulations, those concerns would be an important part of the discretionary exclusion analysis. Impacts to Tribal rights concerning their land and fisheries fall within the category of impacts that are outside the scope of the Service's expertise. As a result, if any Tribe provides information indicating that its rights would be adversely affected by either including or excluding a particular area from a critical habitat designation, the Service would give a weight to those impacts in accordance with the Tribe's information.

*Comment 20:* Several commenters requested a clear definition for "national security" and "homeland security" with predetermined activities to avoid the use of open-ended terms. Other commenters made the case that water projects and related infrastructure and domestic petroleum production should be considered for exclusion due to homeland-security and national-security implications.

*Response:* As we stated in the proposed rule, we will rely on the expertise of the Department of Defense, Department of Homeland Security, or affiliated agencies to make a determination as to what constitutes an impact to national or homeland security. The Service is not an expert agency in determining all the activities or projects that may have national-security implications; therefore, we decline to produce a list or further define "national security" or "homeland security" in these regulations. We will continue to rely on the expert judgment of the agencies responsible for national security and homeland security and any reasonably detailed

justification of the potential impacts that they provide regarding a designation of critical habitat to inform our discretionary exclusion analysis.

*Comment 21:* One commenter suggested project developers and private contractors who work for the Federal Government should be contributors toward the analysis of non-biological impacts to critical habitat.

*Response:* As captured in the proposed rule and explained in the preamble, § 17.90(d)(1) provides a list of entities that may have specific knowledge that is outside the scope of the Service's expertise and would therefore be considered in an exclusion analysis if deemed to meet the credible information standard. That list is expressly non-exhaustive. Regarding submissions from project developers or private contractors working for another Federal agency, we would anticipate submissions of information to be made "on behalf of" or in their "official capacity representing" a Federal agency. Therefore, it is unnecessary to add categories of experts or sources to that list.

*Comment 22:* Commenters both supported and opposed the provision clarifying when the Service will consider excluding Federal lands. Those that expressed opposition to the proposed provision cited the statutory provision of sections 2(c) and 7 of the Act, which both generally state that Federal agencies shall seek to conserve listed species and use their authorities to further the purposes of the Act. Furthermore, commenters stated that, because section 7 of the Act requires consultation by Federal agencies to ensure their actions do not jeopardize listed species or destroy or adversely modify their critical habitat, Federal lands are important locations for species recovery, especially in light of ongoing habitat fragmentation and climate-change effects. Other commenters noted that the potential increase in exclusions of Federal lands could be a negative signal to private landowners regarding the commitment of Federal land managers to species recovery and section 7 consultation. Commenters stated that the change in position from the 2016 Policy to this proposed rule was not adequately explained, there were no changes

in circumstances that apparently prompted this change, and they therefore believe this provision is arbitrary and capricious. Commenters also noted that, combined with national-security exclusions and exemptions, additional exclusion of Federal lands could skew critical habitat designations to State and private lands and in turn could potentially pose an economic disadvantage to State and private lands, especially in Western States. Commenters further stated that administrative or transactional costs tend to be minor and should not be a basis for exclusion.

Other commenters expressed support for the approach to Federal lands in the proposed rule and asked that additional provisions be added to the final rule, such as specifically including consideration of more than section 7 transactional costs (for example, considering impacts on the private property of a lessee or permittee). Commenters asked for additional specificity in the types of Federal lands, minerals, and oil and gas activities to be considered for exclusion; whether federally withdrawn lands on which non-Federal entities are conducting activities could be considered; and whether exclusion could apply only with the project footprint or would extend to adjacent areas on Federal land where there may be an effect from the project.

*Response:* The Act is clear in section 2(c)(1) and section 7(a)(1) that Federal agencies shall use their authorities to further the purposes of the Act and carry out programs for the conservation of endangered and threatened species, and in section 7(a)(2) that Federal agencies must ensure their actions do not jeopardize the continued existence of listed species or result in destruction or adverse modification of their critical habitat. However, section 4(b)(2) of the Act does not provide for a different standard for exclusions on Federal lands relative to other lands. This final regulation does not change the obligations of Federal agencies or our implementation of those provisions of the Act.

Our change in consideration of exclusions of Federal lands from the 2016 Policy recognizes that Federal agencies are required to avoid jeopardy of listed species and destruction

or adverse modification of critical habitat through section 7 consultation. While the standards for evaluating Federal and non-Federal lands are the same, we will consider the extent to which 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, on a case-by-case basis. Additionally, we expect to evaluate the types of activities that are being permitted or the types of leases and activities being conducted on Federal land, any economic benefits associated with those leases and activities, any potential impacts that designating the lands as critical habitat could have on those economic benefits, and the conservation value of the areas that qualify as critical habitat, including whether the areas are occupied or unoccupied. Regardless of inclusion or exclusion of Federal lands from a designation of critical habitat, we consider Federal lands an important piece of species recovery efforts.

In any exclusion analysis for Federal lands, we will consider not only the transactional costs associated with consultation with a Federal agency, but also any potential costs to affected parties, including applicants for Federal authorizations (e.g., permits, licenses, leases, contracts), that would stem from any project modifications that may be required to avoid destruction or adverse modification of critical habitat. While we agree that the transactional costs of consultation with Federal agencies tend to be a relatively minor cost, we do not wish to foreclose the potential to exclude areas under Federal ownership in cases where the benefits of exclusion outweigh the benefits of inclusion. Consideration of other Federal agency transactional costs and other costs, including those to a permittee or lessee, will be considered on a case-by-case basis.

*Comment 23:* Several commenters shared concerns over the exclusion of lands under an agreement through section 10 of the Act. Comments included concern over the non-binding nature of habitat conservation plans (HCPs), changing conservation measures over time, the finite nature of the agreements, the question of whether the lands are in a currently acceptable



state for the listed entity, the lack of protective measures compared to a designation, and an overall concern regarding the durability of agreements compared to a critical habitat designation.

*Response:* As stated in the proposed rule in paragraph (d)(3) and associated preamble text, we place great value on the partnerships that are developed during the preparation and implementation of plans, agreements, or partnerships that have been permitted under section 10 of the Act. We anticipate consistently excluding areas covered by plans, agreements, or partnerships as long as the conditions in paragraphs (d)(3)(i)–(iii) are met. Because section 10 permits authorize take of covered species that would otherwise be unlawful, permittees are incentivized to continue the implementation of the measures contained in the conservation plan and required by the associated permit following the exclusion of the covered area. Therefore, the benefits of inclusion are generally less than the benefits of exclusion. We further noted in the proposed rule that this is not the same fact pattern for draft plans or agreements, and we thus would generally give little weight to these draft agreements or unrealized promises of future conservation actions in a discretionary section 4(b)(2) exclusion analysis. The Service will always consider the plans, agreements, or partnerships that have been permitted under section 10 of the Act on a case-by-case basis to determine whether the benefits of exclusion outweigh the benefits of inclusion. We have been applying these concepts formally following the finalization of the 2016 Policy, and our experience is that they work well and provide the clarity needed for landowners and partners to meet the exclusion requirements.

*Comment 24:* Commenters requested that the Service provide a clear and simple set of metrics for section 10 permitted plans to meet the requirements for areas covered by the plans to be excluded from critical habitat. Commenters stated that setting out these metrics would bolster the confidence of landowners, as well as incentivize participation in permitted plans. Some commenters suggested that the language in the final rule should include a presumption that areas covered by such plans would be excluded, and others suggested that the Service automatically exclude lands under section 10 agreements, or undertake a single comprehensive analysis to

cover all section 10 agreements, similar to State wildlife plans, and thereby reduce workload of private landowners and Service employees.

*Response:* When we undertake a discretionary section 4(b)(2) exclusion analysis, we will always consider whether to exclude areas covered by a permitted HCP or candidate conservation agreement with assurances (CCAA) or safe harbor agreement (SHA), and we anticipate consistently excluding such areas from a designation of critical habitat if incidental take caused by the activities in those areas is covered by the permit under section 10 of the Act and the CCAA, SHA, or HCP meets all of the conditions set forth in the final regulation. We have been applying these concepts formally following the finalization of the 2016 Policy, and our experience is that they work well and provide the clarity needed for landowners and partners to meet the exclusion requirements. Additionally, since finalization of the 2016 Policy, we are aware of at least one instance where a landowner holding a section 10 permit requested not to be excluded from a designation of critical habitat; this experience underscores that exclusion should not be an automatic conclusion for permitted plans such as CCAAs, SHAs, or HCPs so as not to negatively impact our relationship with permittees conducting voluntary conservation. Because every plan is unique, as are the specific needs of every species, it is difficult to offer an automatic exclusion and/or a single comprehensive analysis to cover all conservation agreements. For this reason, the Service has set out general conditions in the final regulation and conducts case-by-case analyses to determine whether to exclude areas covered by permitted plans.

*Comment 25:* Commenters stated concerns that the Service would provide little weight to draft voluntary agreements and emphasized that analysis of each agreement should be based on the past successes, on the strength of existing relationships, and on the stage of the process (e.g., whether the draft is an early version or a late version). Commenters agreed that a party must demonstrate that the voluntary conservation plan is being implemented consistent with its terms. However, the requirement to demonstrate “success” of the chosen mechanism is overbroad and would place an unreasonable threshold for appropriate recognition of voluntary

conservation measures. Instead of attempting to measure “success,” the Service should instead consider whether the party is meeting or exceeding the metrics or goals identified within the applicable plan.

Commenters stated that non-permitted plans should receive a heavier weight than the regulation implies. In the view of some commenters, the regulations make it too difficult to exclude areas covered by non-permitted plans because the proposed regulation requires the Service’s involvement in developing the plans and the factors set out in paragraphs (d)(4)(i)–(viii) that the Service considers in evaluating whether to exclude areas covered by non-permitted plans are too onerous. Commenters stated that the regulation should also provide clear and simple procedures to meet the exclusion threshold. The Service should take the necessary steps to promote conservation plans and bring more attention to them, not disincentivize their use. Additionally, some commenters stated that the presumption of exclusion should extend to agreements not permitted under section 10 of the Act. They stated that the language is only found in the preamble and should be restated in the regulation.

*Response:* Adding this provision (which was also in our section 4(b)(2) policy) to our regulations is intended to incentivize and recognize voluntary conservation efforts that provide conservation benefits to listed species and other species at risk. When we consider plans, agreements, or partnerships that have not been authorized by a permit under section 10 of the Act, we evaluate a variety of factors. Paragraphs (d)(4)(i)–(viii) of the rule provide a non-exhaustive list of these factors. We use these factors to determine how the benefits of exclusion and the benefits of inclusion of a particular area are affected by the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships when we undertake a discretionary section 4(b)(2) exclusion analysis. The considerations that commenters suggested are already included within the factors that the Service will consider when evaluating plans that have not been authorized by a permit under section 10 of the Act; therefore, no changes are necessary.

We have been applying these concepts formally following the finalization of the 2016 Policy, and our experience is that they work well. Further, as described in the preamble to the proposed rule, the Service is not required to be part of a non-permitted plan or agreement in order to consider the area for exclusion based on that plan. Evaluation of the success of a non-permitted plan or agreement directly relates to the benefits of exclusion of specific areas. We value the collaboration and conservation value provided by voluntary private or non-Federal conservation plans or agreements. It is in that context that we included in paragraphs (d)(4)(i)–(viii) descriptions of how we will consider these plans in a discretionary section 4(b)(2) exclusion analysis. Exclusions are not automatic and are determined on a case-by-case basis in light of the particular facts of each situation.

*Comment 26:* Commenters stated that the requirement of public participation, agency review, and review under the National Environmental Policy Act (NEPA) for plans, agreements, or partnerships that have not been authorized by a permit under section 10 of the Act will unnecessarily hinder meaningful and qualified private voluntary conservation measures or programs. While public review and comment are appropriate procedures for governmental programs, it is inappropriate to obligate private entities to meet these standards as a prerequisite for exclusion. They stated that to the extent that the Service believes public review and comment is necessary for the application of an exclusion, such process of review and comment can be addressed through the notice-and-comment process on the critical habitat designation. Specifically, as part of its development of a draft critical-habitat proposal, it is within our discretion to solicit public comments on areas that should be excluded from the critical habitat. Further, concurrent with the issuance of the proposed critical-habitat designation, we can likewise identify any areas that we already anticipate excluding and request public comment on whether we should exclude those or any other areas. Such a process allows for public participation in the exclusion process, as well as providing for an open and transparent process.

*Response:* As stated in the preamble to the proposed rule, a non-permitted plan or agreement is not required to go through agency review, NEPA review, or similar processes for lands covered by the plan or agreement to qualify for exclusion. However, completion of those processes in development of a plan or agreement does indicate that the plan or agreement has already received a high degree of critical analysis and further bolster the case for exclusion. Additionally, as stated in paragraph (a) of the proposed rule, we will identify areas in the proposed critical-habitat designation that the Secretary has reason to consider for exclusion. As part of the normal critical-habitat designation, the Service requests public input and comment on specific areas considered for exclusion and any other areas that should be considered for exclusion.

*Comment 27:* Some commenters interpreted the proposed rule as creating a provision that requires the Secretary to waive his discretion on whether to conduct the exclusion analysis given the presence of the “credible information” trigger to enter into an exclusion analysis.

*Response:* Under this rule, the Secretary will conduct an exclusion analysis when credible information triggers that analysis. The rule does not waive the Secretary’s discretion; instead, the regulation constitutes the Secretary’s decision on how to exercise his discretion under the statute on a consistent comprehensive basis instead of a case-by-case basis.

*Comment 28:* Some commenters expressed concern that the proposed rule would reduce the Secretary’s discretion as to whether to conduct an exclusion analysis because it would collapse the second step (the discretionary exclusion analysis) of the critical habitat designation process into the first step (the requirement to take into consideration economic and other relevant impacts). Other commenters took the contrary view, stating for example that the rule should narrow the Secretary’s discretion to undertake an exclusion analysis by specifying when and how he will exercise that discretion. Some of the commenters went so far as to request that the rule should eliminate the Secretary’s discretion on this issue by requiring the Secretary to always

conduct an exclusion analysis to determine if the benefits of exclusion outweigh the benefits of inclusion. The commenters disagreed that the Secretary has discretion as to whether to undertake an exclusion analysis, because section 4(b)(2) requires the Secretary to take economic and other relevant impacts into consideration and the balancing of impacts in the exclusion analysis is part of that consideration. Therefore, in the view of these commenters, the Secretary's discretion is much narrower—the only part of section 4(b)(2) that is left to the Secretary's discretion is the ultimate decision whether or not to exclude areas.

*Response:* The structure of section 4(b)(2) makes clear that the exclusion analysis is discretionary. The authorities in section 4(b)(2) are split between two sentences: The first sentence is framed in mandatory terms (“*shall* designate critical habitat...after taking into consideration...relevant impacts”), and the second sentence is framed in discretionary terms (“*may* exclude any area...if the benefits of such exclusion outweigh”) (emphasis added). Consideration of relevant impacts appears in the first sentence, which is the sentence framed in mandatory terms. The decision to enter into the exclusion analysis and the weighing of benefits of exclusion and inclusion appear in the second sentence, which is the sentence framed in discretionary terms. The proposed rule neither alters this structure of section 4(b)(2) nor collapses the two sentences together—it just describes how and when the Secretary will exercise the discretion to undertake an exclusion analysis and to exclude a particular area from the critical habitat designation. This framework facilitates the transparent and consistent implementation of the statute.

*Comment 29:* Some commenters stated that the proposed rule would give too much discretion to the Secretary in assigning weights and deciding on exclusions in certain outcomes, which would contradict congressional intent to afford imperiled species “the highest of priorities.” Some commenters were concerned that the broad discretion that the proposed rule gives to the Secretary in assigning weights to experts in non-biological fields of knowledge runs the risk of placing disproportionate weight on the expertise of entities with private interests

whose ultimate goal may not be conservation. Other commenters took the opposite view, stating that the proposed rule would cede the Secretary's discretion as to whether to undertake an exclusion analysis by deferring to regulated entities, lessees, and private landowners on the weighing of costs. Some commenters found it reasonable for experts to provide information about what costs and benefits are, but wanted to make sure that the Service ultimately retained the discretion to reject questionable claims by critical habitat opponents, as well as to "assign the weights" that result in the balance achieved by a particular decision meeting legal requirements. Some commenters went further and stated that only the Service has the expertise to determine the weights of costs and benefits.

*Response:* Rather than ceding the Secretary's discretion, the proposed rule enhances implementation by establishing a transparent and balanced approach in exercising it. Congress gave the authority to undertake exclusion analyses to the Secretary, and the Secretary delegated that authority to the Director of the Service, because the Service has the expertise to evaluate the impact that excluding particular areas from a critical habitat designation would have on an endangered or threatened species. Other relevant impacts of excluding or including particular areas in a critical habitat designation may not be within the Service's expertise. As some of the commenters pointed out, it is reasonable for the Secretary to seek input from experts regarding those other relevant impacts that are outside the scope of the Service's expertise. The proposed rule strikes that balance by providing for the Service to seek that input from experts and give weights to particular impacts in accordance with that input, while also making clear that the Service ultimately retains the discretion to reject or adjust that input to the extent it is rebutted by the best information available to the Service. By retaining that discretion for the Service, the rule avoids putting disproportionate weight on the expertise of entities whose ultimate goal may not be conservation.

*Comment 30:* Some commenters requested that the rule clarify whether the Secretary intends to delegate his authority to undertake an exclusion analysis to the Director of the Service.

*Response:* The Departmental Manual provides that the Secretary has delegated his authority to undertake leadership and coordination responsibilities under the Act to the Assistant Secretary for Fish and Wildlife and Parks and has further delegated those responsibilities, in part, to the Director of the Fish and Wildlife Service (632 DM 1). This includes responsibilities for all aspects of designating critical habitat for endangered species and threatened species.

*Comment 31:* We received comments that both supported and opposed the inclusion of the phrase “shall exclude” in § 17.90(e). Specifically, commenters supported the conclusion that the Service will always exclude the areas where the benefits of exclusion outweigh the benefits of inclusion, as long as exclusion will not result in the extinction of the listed species. Commenters stated that the proposed provision would create a clear standard and encourage consistent and transparent application of section 4(b)(2) of the Act. In addition, in the view of some commenters, once the exclusion analysis is completed, there are no further considerations because if the benefits of exclusion outweighed the benefits of inclusion, including that area in the designation of critical habitat would be arbitrary and capricious, lack a rational basis, and run counter to the evidence evaluated by the Service.

Alternatively, other commenters opposed using the words “shall exclude” in § 17.90(e) because those words would be more restrictive and would require us to automatically exclude an area from critical habitat if we determine that the benefits of exclusion outweigh the benefits of inclusion, regardless of the circumstances. Some commenters expressed concern that use of the word “shall” constituted an arbitrary and capricious change in agency practice without justification, citing the language in the 2016 Policy (i.e., that “the decision to exclude is always discretionary,” and, “[u]nder no circumstances is exclusion required under the second sentence of section 4(b)(2)”) (81 FR 7226, 7229; Feb. 11, 2016). Commenters expressed concern that this approach would result in more exclusions and contradict the purpose of the Act and Congress’s intent that the Secretary retain discretion in determining whether to exclude particular areas from critical habitat. Commenters also expressed concern that requiring that the Secretary exclude



areas whenever the benefits of exclusion outweigh the benefits of inclusion would allow for detrimental impacts to a listed species' habitat as long as the species does not go completely extinct.

*Response:* As described in the proposed rule, this rulemaking directly adopts some aspects of the 2016 Policy and alters other aspects. Using the phrase "shall exclude" in this rulemaking is not inconsistent with the statements that the commenters cite from the 2016 Policy. The commenters' excerpts from the 2016 Policy make clear that decisions to exclude areas from critical habitat are discretionary under the structure and language of the statute. The regulation does not change or contravene that fact. Rather, this rulemaking is an exercise of the discretion referenced in those excerpts. As we discussed in the proposed rule, the Secretary is choosing to exercise his discretion in this way to provide for transparency and certainty. Under the statute, the Secretary could have elected to undertake exclusion analyses on a case-by-case basis and exclude areas every time the benefits of exclusion outweigh the benefits of inclusion. However, the approach finalized here would provide greater transparency and certainty because it creates an advance understanding of how the Secretary will proceed when the benefits of exclusion outweigh the benefits of inclusion.

As we explained in the proposed rule, section 4(b)(2) of the Act gives the Secretary the discretion to exclude areas from critical habitat designations when certain criteria have been met. Using the phrase "shall exclude" in the regulation indicates how the Secretary is choosing to exercise his discretion, and making this choice is neither unlawful nor contrary to the purposes of the Act. Even with the words "shall exclude" in the regulation, under the statute the Secretary could exclude areas only if the Secretary determines that the benefits of exclusion outweigh the benefits of inclusion after considering the conservation value or benefit of inclusion of the area weighed against the impacts of the designation or benefits of exclusion, and the Secretary determines that exclusion will not lead to extinction of the species.

*Comment 32:* Some commenters identified circumstances in which the Secretary should retain the discretion to include a particular area in a designation even though the benefits of exclusion outweigh the benefits of inclusion. These included where the benefits of exclusion are equal or very near to the benefits of inclusion; or where permittees in areas covered by conservation plans, agreements, or partnerships may prefer to have the area included in the critical habitat designation.

*Response:* These circumstances are already addressed within the process that the regulation describes for analyzing potential exclusions. In determining whether the benefits of excluding an area outweigh the benefits of including it in the critical habitat designation, we take into consideration numerous factors, perspectives, and impacts, including, for example, the views of permittees. As part of the exclusion analysis, we thoroughly evaluate the impacts based on credible information and Service knowledge and give weight to the various impacts based on the relevant expertise and best available information. Further, the regulation requires exclusion of particular areas only if the benefits of exclusion outweigh those of inclusion; if they are equal, it would not require (and the statute would not allow) exclusion.

*Comment 33:* Many commenters stated that the proposed regulation violates the Administrative Procedure Act because we failed to provide a reasoned explanation or rational basis for the proposed changes in process for conducting a discretionary section 4(b)(2) exclusion analysis. Commenters stated that referring to the need to address the Supreme Court's decision in *Weyerhaeuser* is not a reasoned explanation because nothing in that decision required that the Service promulgate a regulation on the procedure for exclusion analyses under section 4(b)(2) of the Act. Further, they state that the U.S. Supreme Court did not, and, indeed, could not, authorize the Service to abdicate its statutory authority and discretion regarding whether and how to conduct a critical habitat exclusion analysis under section 4(b)(2) of the Act in the first instance. Additionally, they stated that we failed to explain departure from our 2016 Policy.

*Response:* To provide transparency, clarity, and certainty to the public and other stakeholders about how the Secretary intends to exercise his discretion regarding exclusions under section 4(b)(2), we are finalizing this regulation, which would supersede the regulations at 50 CFR 424.19 and the 2016 Policy with respect to the Service's implementation of the Act. In the proposed rule, we explained our rationale for the amendments and changes from the 2016 Policy. The proposed rule also sought comments from the public on the provisions of the regulation, and our comment responses above provide a detailed and reasoned explanation of why the specific terminology in the definition accomplishes the purposes of the definition and the conservation goals of the Act. Therefore, we have provided a reasoned explanation and rational basis for our action as required by the APA.

In addition, regarding *Weyerhaeuser*, although the Supreme Court's opinion did not require promulgation of regulations on the procedure for exclusion analyses under section 4(b)(2) of the Act, it did establish that decisions not to exclude a particular area of critical habitat are judicially reviewable. *Weyerhaeuser*, 139 S. Ct. at 371 (noting that the challenge to the Service's decision not to exclude a particular area was a "familiar one in administrative law that the agency did not appropriately consider all of the relevant factors that the statute sets forth to guide the agency in the exercise of its discretion"). In light of the Court's holding that decisions not to exclude may be reviewed by courts for abuse of discretion under section 706(2) of the Administrative Procedure Act (APA, 5 U.S.C 706(2)), the Service is of the view that the Court's decision underscores the importance of being deliberate and transparent about how the Service goes about making decisions about whether to exclude areas from designations of critical habitat.

*Comment 34:* The Service received comments stating that invoking the NEPA categorical exclusion at 43 CFR 46.210(i) is contrary to the requirements of NEPA and its implementing regulations, further asserting that the regulation would have significant, adverse environmental impacts on endangered and threatened species. That categorical exclusions applies to "[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or

procedural nature” under the Service’s NEPA implementing regulations. Commenters stated that we violate NEPA by failing to consider the impacts of this proposed rule in combination with the August 5, 2020, proposal that would add a new definition of “habitat” to our regulations for making critical habitat designations under section 4 of the Act (see 85 FR 47333, Aug. 5, 2020) (Endangered and Threatened Wildlife and Plants; Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat; Proposed Rule). They state that if we proceed with this rulemaking, an environmental impact statement should be prepared and circulated for public review and comment that considers the cumulative environmental impacts of both the proposed rule and the proposed definition of “habitat.”

*Response:* We conclude that the categorical exclusion for “[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature” (43 CFR 46.210(i)) applies to this rulemaking. As we made clear in the proposed rule, the objective of this rulemaking is to “provide greater transparency and certainty for the public and stakeholders” because the *Weyerhaeuser* decision may raise questions about the process the Service will use when conducting an exclusion analysis for particular areas of critical habitat. The result of promulgating this regulation is to inform the public and the Service’s employees of the mechanics of how the process for excluding areas from critical habitat will work, so that the process of designating critical habitat is more straightforward, more efficient, and more transparent. Accordingly, this rulemaking is of a technical nature.

*Comment 35:* Commenters requested that we coordinate with NMFS to assist in the development of corresponding regulations implementing section 4(b)(2) of the Act for species under NMFS’s jurisdiction.

*Response:* NMFS will continue to implement the 2016 Policy for exclusions from critical habitat for species in their jurisdiction. The Service and NMFS will continue to comply with requirements of the Act and applicable regulations and policies when designating critical habitat for species in their respective jurisdictions.

## **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. OIRA 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. This rule is consistent with Executive Order 13563, and in particular with the requirement of retrospective analysis of existing rules, designed “to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.”

### *Executive Order 13771*

This final rule is an Executive Order 13771 “other” action.

### *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 (RFA) 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. The following discussion explains our rationale.

This rulemaking responds to applicable Supreme Court case law regarding designating critical habitat under the Endangered Species Act and provides transparency, clarity, and consistency for stakeholders. The changes to these regulations do not alter the reach of designations of critical habitat.

The Service is the only entity that is directly affected by this rule because we are the only entity that will designate critical habitat under this regulation. Small entities are not directly regulated by this rulemaking, as it only imposes requirements on the Service. No external entities, including any small businesses, small organizations, or small governments, will experience any direct economic impacts from this rule. There is no requirement under the RFA to evaluate the potential impacts to entities that are not directly regulated. At the proposed rule stage, we certified that this rule would not have a significant economic effect on a substantial number of small entities. Nothing in this final rule changes that conclusion. Therefore the Service once again certifies that this rule will not have a significant economic impact on a substantial number of small entities.

*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, this final rule 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

rule would not impose a cost of \$100 million or more in any given year on local or State governments or private entities (IEc 2020). A Small Government Agency Plan is not required. As explained above, small governments would not be affected because this final rule would not place additional requirements on any city, county, or other local municipality.

(b) This rule 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, this final rule is not a “significant regulatory action” under the Unfunded Mandates Reform Act. This rule would impose no obligations on State, local, or Tribal governments.

#### *Takings (E.O. 12630)*

In accordance with Executive Order 12630, this rule would not have significant takings implications. This rule would not directly affect private property, nor would it cause a physical or regulatory taking. It would not result in a physical taking because it would not effectively compel a property owner to suffer a physical invasion of property. Further, the rule would not result in a regulatory taking because it would not deny all economically beneficial or productive use of any land or aquatic resources and it 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 rule would have significant federalism effects and have determined that a federalism summary impact statement is not required. This rule pertains only to designations of critical habitat under the Endangered Species 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 rule does 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 rule pertains only to designations of critical habitat under the Endangered Species Act.

*Government-to-Government Relationship with Tribes*

In accordance with Executive Order 13175 “Consultation and Coordination with Indian Tribal Governments,” the Department of the Interior’s manual at 512 DM 2 (December 1, 1995), we have considered possible effects of this final rule on federally recognized Indian Tribes. The following Tribes and Tribal entities stated that Government-to-Government consultation is required or requested Government-to-Government consultation: Southern Ute Indian Tribe; Swinomish Indian Tribe; National Congress of American Indians; and Northwest Indian Fisheries Commission member Tribes including the Lummi, Nooksack, Swinomish, Upper Skagit, Sauk-Suiattle, Stillaguamish, Tulalip, Muckleshoot, Puyallup, Nisqually, Squaxin Island, Skokomish, Suquamish, Port Gamble S’Klallam, Jamestown S’Klallam, Lower Elwha Klallam, Makah, Quileute, Quinault, and Hoh.

The Service has reviewed the comments from these Tribes and concludes that the changes to these implementing regulations make general changes to the Act’s implementing regulations and do not directly affect specific species or Tribal lands or interest. This regulation describes how we undertake our mandatory consideration of the impacts of designating critical habitat and our discretionary authority to exclude particular areas following a discretionary exclusion analysis as it is applied to designating critical habitat. Therefore, this rule directly affects only the Service. With or without these regulatory revisions, the Service must continue to list species and to designate critical habitat based on the best available data. Therefore, we conclude that this regulation does not have “tribal implications” under section 1(a) of E.O. 13175, and formal government-to-government consultation is not required by the Executive order and related policies of the Department of the Interior. We will continue to collaborate with Tribes on issues related to federally listed species and their habitats and will work with Tribes as



we implement the provisions of the Act. *See* Joint Secretarial Order 3206 (“American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,” June 5, 1997).

We recognize that some commenters stated that government-to-government consultation is necessary because in their view the changes that the proposed rule would make would have “substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.” However, these regulations primarily adopt and deepen the provisions in the 2016 Policy, so they do not have any substantial direct effects of that nature. The 2016 Policy stated that the Service would always consider excluding Tribal lands and would give great weight to Tribal concerns in analyzing the benefits of exclusion. Because the final regulation provides for consideration of any exclusions for which proponents provide credible information, Tribes have the ability to ensure that the Service always considers excluding their lands if that is what they want. In addition, the 2016 Policy already stated that the Service would give great weight to Tribes’ concerns when it undertakes exclusion analyses. This regulation essentially does the same thing by stating that the weights the Service gives to the benefits of excluding or including areas that affect Tribal lands or resources will be consistent with the information provided by the affected Tribes. Therefore, this rule does not trigger the requirement to undertake government-to-government consultation because the provisions of the rule merely codify and strengthen the provisions of the 2016 Policy, and this regulation therefore does not “have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.”

#### *Paperwork Reduction Act*

This rule does not contain any new collections of information that require approval by the OMB under the Paperwork Reduction Act and does not alter the existing collections of

information approved under OMB Control Numbers 1018-0093 and 1018-0094. 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 analyzed this final rule 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), and the Department of the Interior Manual (516 DM 8). This rulemaking responds to recent Supreme Court case law.

As a result, we conclude that the categorical exclusion found at 43 CFR 46.210(i) applies to this regulation. At 43 CFR 46.210(i), the Department of the Interior has found that the following category of actions would not have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: “Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature.”

We have considered the extent to which this regulation has a significant impact on the human environment and determined it falls within one of the categorical exclusions for actions that have no effect on the quality of the human environment.

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

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This regulation is not expected to have a significant adverse effect on the supply, distribution, or use of energy, and it has not been otherwise designated by the Administrator of OIRA as a significant energy action. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

### **Authority**

We issue this final rule under the authority of the Endangered Species Act, as amended (16 U.S.C. 1531 et seq.).

### **List of Subjects in 50 CFR Part 17**

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

### **Regulation Promulgation**

For the reasons discussed in the preamble, the U.S. Fish and Wildlife Service amends part 17 of chapter I, title 50 of the Code of Federal Regulations as set forth below:

### **PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS**

1. The authority citation for part 17 continues to read as follows:

AUTHORITY: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

#### **Subpart J—[Redesignated as Subpart K]**

2. Subpart J, consisting of §§ 17.100 through 17.199, is redesignated as subpart K.

#### **Subpart I—[Redesignated as Subpart J]**

3. Subpart I, consisting of §§ 17.94 through 17.99, is redesignated as subpart J.

4. New subpart I, consisting of § 17.90, is added to read as follows:

### **Subpart I—CONSIDERATIONS OF IMPACTS AND EXCLUSIONS FROM CRITICAL HABITAT**

#### **§ 17.90 Impact analysis and exclusions from critical habitat.**

(a) At the time of publication of a proposed rule to designate critical habitat, the Secretary will make available for public comment the draft economic analysis of the designation. The draft economic analysis will be summarized in the *Federal Register* notice of the proposed

designation of critical habitat. The Secretary will also identify any national security or other relevant impacts that the Secretary determines are contained in a particular area of proposed designation. Based on the best information available regarding economic, national security, and other relevant impacts, the proposed designation of critical habitat will identify the areas that the Secretary has reason to consider for exclusion and explain why. The identification of areas in the proposed rule that the Secretary has reason to consider for exclusion is neither binding nor exhaustive. “Economic impacts” may include, but are not limited to, the economy of a particular area, productivity, jobs, and any opportunity costs arising from the critical habitat designation (such as those anticipated from reasonable and prudent alternatives that may be identified through a section 7 consultation) as well as possible benefits and transfers (such as outdoor recreation and ecosystem services). “Other relevant impacts” may include, but are not limited to, impacts to Tribes, States, local governments, public health and safety, community interests, the environment (such as increased risk of wildfire or pest and invasive species management), Federal lands, and conservation plans, agreements, or partnerships. The Secretary will consider impacts at a scale that the Secretary determines to be appropriate and will compare the impacts with and without the designation. Impacts may be qualitatively or quantitatively described.

(b) Prior to finalizing the designation of critical habitat, the Secretary will consider the probable economic, national security, and other relevant impacts of the designation upon proposed or ongoing activities.

(c)(1) Subject to paragraph (c)(2) of this section, the Secretary has discretion as to whether to conduct an exclusion analysis under 16 U.S.C. 1533(b)(2).

(2) The Secretary will conduct an exclusion analysis when:

(i) The proponent of excluding a particular area (including but not limited to permittees, lessees or others with a permit, lease, or contract on federally managed lands) has presented

credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area; or

(ii) The Secretary otherwise decides to exercise discretion to evaluate any particular area for possible exclusion.

(d) When the Secretary conducts a discretionary exclusion analysis pursuant to paragraph (c) of this section, the Secretary shall weigh the benefits of including or excluding particular areas in the designation of critical habitat, according to the following principles:

(1) When analyzing the benefits of including or excluding any particular area based on impacts identified by experts in, or by sources with firsthand knowledge of, areas that are outside the scope of the Service's expertise, the Secretary will give weight to those benefits consistent with the expert or firsthand information, unless the Secretary has knowledge or material evidence that rebuts that information. Impacts that are outside the scope of the Service's expertise include, but are not limited to:

(i) Nonbiological impacts identified by federally recognized Indian Tribes, consistent with all applicable Executive and Secretarial orders;

(ii) Nonbiological impacts identified by State or local governments;

(iii) Impacts based on national security or homeland security implications identified by the Department of Defense, Department of Homeland Security, or any other Federal agency responsible for national security or homeland security; and

(iv) Nonbiological impacts identified by a permittee, lessee, or contractor applicant for a permit, lease, or contract on Federal lands.

(2) When analyzing the benefit of including or excluding any particular area based on economic impacts or other relevant impacts described in paragraph (b) of this section, the Secretary will weigh such impacts relative to the conservation value of that particular area. For

benefits of inclusion or exclusion based on impacts that fall within the scope of the Service's expertise, the Secretary will give weight to those benefits in light of the Service's expertise.

(3) When analyzing the benefits of including or excluding particular areas covered by conservation plans, agreements, or partnerships that have been authorized by a permit under section 10 of the Act, the Secretary will consider the following factors:

(i) Whether the permittee is properly implementing the conservation plan or agreement;

(ii) Whether the species for which critical habitat is being designated is a covered species in the conservation plan or agreement; and

(iii) Whether the conservation plan or agreement specifically addresses the habitat of the species for which critical habitat is being designated and meets the conservation needs of the species in the planning area.

(4) When analyzing the benefits of including or excluding particular areas covered by conservation plans, agreements, or partnerships that have not been authorized by a permit under section 10 of the Act, factors that the Secretary may consider include, but are not limited to:

(i) The degree to which the record of the plan, or information provided by proponents of an exclusion, supports a conclusion that a critical habitat designation would impair the realization of the 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 agency review and required determinations (e.g., State regulatory requirements) have been completed, as necessary and appropriate.

(iv) Whether National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) reviews or similar reviews occurred, and the nature of any such reviews.

(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 physical or biological features that are essential to the conservation of 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.

(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.

(e) If the Secretary conducts an exclusion analysis under paragraph (c) of this section, and if the Secretary determines that the benefits of excluding a particular area from critical habitat outweigh the benefits of specifying that area as part of the critical habitat, then the Secretary shall exclude that area, unless the Secretary determines, based on the best scientific and commercial data available, that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

**George Wallace,**

*Assistant Secretary for Fish and Wildlife and Parks,*

*Department of the Interior.*

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