



**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:** Proposed rule.

**SUMMARY:** The U.S. Fish and Wildlife Service (“the Service”) proposes to rescind the final rule titled “Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat” that published on December 18, 2020, and became effective January 19, 2021 (“the Final Rule”). The proposed rescission, if finalized, would remove the regulations established by that rule.

**DATES:** We will accept comments from all interested parties until [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on this date.

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

- (1) *Electronically:* Go to the Federal eRulemaking Portal:

<https://www.regulations.gov>. In the Search box, enter FWS–HQ–ES–2019–0115, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen,

under the Document Type heading, click on the Proposed Rules link to locate this document.

You may submit a comment by clicking on “Comment.”

(2) *By hard copy*: Submit by U.S. mail: Public Comments Processing, Attn: FWS–HQ–ES–2019–0115; U.S. Fish and Wildlife Service, MS:JAO (PRB/3W), 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on <https://www.regulations.gov>. This generally means that we will post any personal information you provide us (see **Public Comments** below for more information).

**FOR FURTHER INFORMATION CONTACT:** Bridget Fahey, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703/358–2171. If you use a telecommunications device for the deaf, call the Federal Relay Service at 800/877–8339.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

Title 50 of the Code of Federal Regulations (CFR) pertains to Wildlife and Fisheries. Chapter I, which consists of parts 1 through 199, includes regulations administered by the Service. The implementing regulations for the designation of critical habitat for listed species are located in 50 CFR part 424. 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 by the Service and the National Marine Fisheries Service (NMFS) (collectively, the Services). On February 11, 2016, the Services issued a joint policy describing how they 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; “the Policy”).

On December 18, 2020, the Service (“we” or “our”) amended portions of our regulations that implement section 4 of the Endangered Species Act of 1973, as amended (codified at 16 U.S.C. 1531 et seq.) (“the Act”). The final regulation (85 FR 82376 (“the Final Rule”)) was incorporated into 50 CFR part 17 (at § 17.90) because the rule applied solely to critical habitat designated by the U.S. Fish and Wildlife Service. The Final Rule set forth a process for implementing section 4(b)(2) of the Act, which requires us to consider the impacts of designating critical habitat and allows us to exclude particular areas following a discretionary exclusion analysis subject to certain limitations (16 U.S.C. 1533(b)(2)). The Final Rule also summarized and responded to numerous public comments that we received on the proposed rule, which was published on September 5, 2020, (85 FR 55398). That proposed rule provided the background for proposed revisions in terms of the statute, legislative history, and case law.

Section 4(b)(2) of the Act requires that the Service consider the economic impact, the impact on national security, and any other relevant impact of designating any particular areas as critical habitat. It provides that the Service then may engage in a further discretionary consideration and exclude particular areas from the designation if the benefits of exclusion outweigh the benefits of inclusion and exclusion would not result in extinction of the species. In the Final Rule, we discussed our desire to articulate clearly when and how we will undertake such an exclusion analysis under section 4(b)(2), including identifying a non-exhaustive list of categories of potential impacts for the Service to consider (85 FR at 82376; December 18, 2020).

The Final Rule revisited certain language in the preamble of the Policy, as well as certain statements in the preamble to a 2013 rule that had revised the regulations on the timing of our economic analyses at 50 CFR 424.19 (78 FR 53058, August 28, 2013) (“the 2013 Rule”). Our goal for the Final Rule was to clarify, based on agency experience, how the Service considers impacts caused by critical habitat designations and conducts our discretionary exclusion analyses, partially in light of the Supreme Court’s recent decision in *Weyerhaeuser Co. v. U.S.*

*FWS*, 139 S. Ct. 361 (2018) (*Weyerhaeuser*). The Final Rule also stated that the Service's implementation of the 2016 Policy would be superseded by implementation of the regulations at 50 CFR 17.90.

### **Rationale for Rescission**

On January 20, 2021, the President issued Executive Order 13990 (86 FR 7037; "the E.O."), which, among other things, required all agencies to review agency actions issued between January 20, 2017 and January 20, 2021 to determine consistency with the purposes articulated in section 1 of the E.O. A "Fact Sheet" supporting the E.O. set forth a non-exhaustive list of specific agency actions that agencies were required to review. One of the agency actions included on the Fact Sheet was the December 18, 2020 Final Rule. Pursuant to the direction in the E.O., we have reviewed the Final Rule to assess whether to keep the rule in place or to revise any aspects of it. Our review included evaluating the benefits or drawbacks of the rule, the necessity of the rule, its consistency with applicable case law, its inconsistency with NMFS's process for applying section 4(b)(2) of the Act, and other factors. Based on our evaluation, we propose to rescind the Final Rule. If we make a final decision to rescind the Final Rule, the 2016 Policy will no longer be superseded, and we will resume full implementation of the Policy and the regulations at 50 CFR 424.19. In proposing the specific changes to the regulations in this document and setting out the accompanying clarifying discussion in this preamble, FWS is proposing prospective standards only. Nothing in this proposed rescission is intended to require (if this rule becomes final) that any previously finalized critical habitat designations be reevaluated on the basis of the final decision.

In the preamble to the Final Rule, we explained that, in light of the Supreme Court's decision in *Weyerhaeuser*, we needed to revisit certain language in the preambles for the 2013 Rule and the Policy that asserted that exclusion decisions are committed to agency discretion and therefore judicially unreviewable. For example, in the preamble to the 2013 Rule, the Services

had cited case law that supported their conclusion that exclusions are wholly discretionary and that the discretion not to exclude an area is judicially unreviewable (78 FR 53072; August 28, 2013). The Services also stated in the preamble to the Policy that then-recent court decisions resoundingly upheld the discretionary nature of the Secretaries' consideration of whether to exclude areas from critical habitat (81 FR 7226, 7233; February 11, 2016), and that, although the Services will explain their rationale for not excluding a particular area, that decision is judicially unreviewable because it is committed to agency discretion (*id.* at 7234).

The Supreme Court's opinion in *Weyerhaeuser* rendered inaccurate prior statements regarding judicial reviewability. Although the word "may" in the second sentence of section 4(b)(2) indicates discretionary authority, such that the Secretary is not required to exclude areas in any particular circumstances (16 U.S.C. 1533(b)(2)), the Court in *Weyerhaeuser* held that decisions not to exclude areas 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)). 139 S. Ct. at 371. In response, we stated in our December 18, 2020, Final Rule that the ruling in *Weyerhaeuser* underscored the importance of being deliberate and transparent about how the Service goes about making exclusion decisions, such that we were proposing regulations to provide that "transparency, clarity, and certainty to the public and other stakeholders" (85 FR 82385).

During the comment period for the proposed rule, we received numerous public comments that provided both support and opposition for many of the provisions included in the proposed rule. At that time, we considered all of the comments and decided that finalization of the Final Rule was an appropriate policy decision. In issuing the Final Rule, we concluded that the criticisms brought forth by commenters were not sufficient to change our approach in that rulemaking.

We acknowledge that we are now adopting many of those criticisms as support for rescinding the Final Rule. Upon our reconsideration, we are now changing our view of the best way to provide a balance between transparency and predictability on the one hand, and flexibility

and discretion on the other. We explain below why we have concluded that this changed approach is preferable to the Final Rule. We now find that the Final Rule is problematic because it unduly constrained the Service's discretion in administering the Act, potentially limiting or undermining the Service's role as the expert agency and its ability to further the conservation of endangered and threatened species through designation of their critical habitats. Our specific rationale for why we now find that the Final Rule does not achieve its stated goals or further the conservation of species is set forth below.

First, the Final Rule potentially limits or undermines the Service's role as the expert agency responsible for administering the Act because it potentially gives undue weight to outside parties in guiding the Secretary's statutory authority to exclude areas from critical habitat designations. Through the Secretary, Congress delegated the authority to designate critical habitat for listed species to the Service. Performance of parts of these responsibilities is outlined in section 4(b)(2) of the Act and includes evaluating information about the impacts of designating particular areas as critical habitat on economic, national security, and other considerations; determining which among competing data on potential impacts is the "best available"; comparing the impacts of designation against the benefits of designating those areas and determining the weight that each should receive in the analysis; and making exclusion decisions based on the best scientific data available. The Final Rule potentially limits the Service from fulfilling aspects of this role by giving parties other than the Service, including proponents of particular exclusions, an outsized role in determining whether and how the Secretary will conduct exclusion analyses. This undue reliance on outside, directly affected parties in certain aspects of the process interferes with the Secretary's authority to evaluate and weigh the information provided by those parties, when determining what specific areas to designate as critical habitat for a species.

Second, the Final Rule employs a rigid ruleset in all situations regardless of the specific facts as to when and how the Secretary will exercise the discretion to exclude areas from critical

habitat designations. Although the preamble and response to comments in the Final Rule refers to using the best available information and based on the case-specific information to support exclusions analyses, the regulatory text mandates a rigid process for when the Secretary will enter into an exclusion analysis, how weights are assigned to impacts, and when an area is excluded. Therefore, implementing the Final Rule undermines the Service's ability to further the conservation of the species because the ruleset applies in all situations regardless of the specific facts at issue or the conservation outcomes. We now recognize that keeping the Final Rule would result in competing and potentially conflicting legal requirements when we undertake an exclusion analysis and could increase our legal vulnerability. Prior to the Final Rule, we implemented the Policy and 2013 Rule—neither of which set forth a rigid ruleset regarding the level of information needed for us to consider excluding areas, the weight we would assign to the information about impacts of designation, or any requirement to exclude areas under certain circumstances. In the Service's view, this approach achieved the balance that Congress sought when it enacted section 4(b)(2): it furthered the conservation of the species while still allowing for exclusions of particular areas when the benefits of exclusion outweighed the benefits of inclusion.

Finally, we find that the Final Rule does not accomplish the goal of providing clarity and transparency. Section 4(b)(2) requires the Service to consider relevant information provided by other Federal agencies, Tribes, States, and other potentially affected stakeholders and members of the public about the economic, national security, and other relevant impacts of critical habitat designations. This responsibility makes it particularly important that potentially affected entities and other relevant stakeholders have a clear understanding of what information is relevant to the Secretary's evaluation of impacts of critical habitat designations and of how that information fits into the exclusion process. Thus, in this context it is preferable for the Service's section 4(b)(2) processes and standards to be consistent with those of NMFS. Having different regulations from those NMFS applies (i.e., 50 CFR 424.19) could result in different outcomes in analogous

circumstances or for species where the Services share jurisdiction and therefore poses a significant risk of confusing other Federal agencies, Tribes, States, other potentially affected stakeholders and members of the public, and agency staff responsible for drafting critical habitat designations. We have not identified a science- or mission-based reason for separate regulations that would outweigh that risk. Thus, we find that the previous approach—in which both agencies follow the joint implementing regulations at 50 CFR 424.19 and the Policy—provides greater clarity for the public and Service staff. The *Weyerhaeuser* decision made clear that we now need to explain decisions not to exclude areas from critical habitat. Therefore, we will always explain our decisions not to exclude, with or without the Final Rule. Although we stated in the Final Rule that *Weyerhaeuser* was, in part, its impetus, even without the Final rule, and implementing the Final policy and 50 CFR 424.19, we will always explain our decisions not to exclude. We did not issue the final rule solely because of that decision. Rather, our intent was to provide greater clarity and transparency about the analyses we undertake and explain decisions not to exclude. However, the Policy and the regulations at 50 CFR 424.19 already provided that, and we have now concluded that the Final Rule was unnecessary and that it increased confusion and decreased clarity by articulating an approach that differed from both NMFS’s approach and the jointly promulgated Policy. For these reasons, the Service now concludes that rescinding the Final Rule and resuming implementation of the 2013 Rule and the Policy will better enable the Service to ensure conservation of endangered and threatened species and the ecosystems on which they depend, as mandated by the Act. In addition to this overarching rationale, we explain below our basis for rescinding each of the primary substantive provisions contained in the Final Rule: the mandate to undertake a discretionary exclusion analysis whenever a proponent of an exclusion provides credible information supporting the exclusion; the generic prescription for weighing impacts; the mandate to exclude areas from a critical habitat designation whenever the benefits of exclusion outweigh the benefits of inclusion; the treatment of Federal lands; and the enumeration of factors to consider under section 4(b)(2).



## *Credible Information*

The Final Rule commits the Secretary to conduct a discretionary exclusion analysis whenever a proponent of an exclusion presents “credible information” regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area (85 FR at 82388; December 18, 2020). The preamble describes “credible information” as information that constitutes a “reasonably reliable indication” regarding the impact, and stated that, in determining what constitutes “credible information,” we will look at whether the proponent presents factual information in support of the claimed impact (85 FR at 82380; December 18, 2020).

We find that the “credible information” standard is vague and does not accomplish the stated goal of improving transparency about what information will or will not trigger an exclusion analysis, potentially resulting in inefficiencies and wasting the Service’s limited resources. A requirement to always undertake an exclusion analysis when this standard is met does not accomplish its stated goal of providing transparency and clarity as to when the Service would conduct an exclusion analysis because the standard is not clear. In the Final Rule, we did not define “meaningful impact,” but we stated our intention for the phrase to mean only more than a de minimis impact. The Act requires us to take into consideration the best available data about the impacts of specifying particular areas as critical habitat, including information that any proponents of exclusions provide about the impacts of the designation (See 16 U.S.C. 1533(b)(2)). In addition, the Supreme Court’s opinion in *Weyerhaeuser* already made clear that decisions not to exclude areas from critical habitat designation are judicially reviewable for abuse of discretion. 139 S. Ct. at 371. In light of that opinion, and regardless of the Final Rule, we must provide an explanation and support for our decisions to exclude any particular area, as well as decisions not to exclude (where a request with specific and relevant information has been made), as part of our critical habitat designations. Regardless of the Final Rule, the statutory requirement to designate critical habitat on the basis of the best scientific data available requires

the Service to consider any information submitted by the public, including proponents of exclusions. Moreover, multiple court decisions have outlined standards and requirements to guide the Service's compliance with the best-scientific-data-available requirement; these court decisions provide the Service with sufficient guidance on this topic. For example, the courts have held that, to comply with the requirement to designate critical habitat on the basis of the best scientific data available, the Service cannot ignore evidence just because it falls short of scientific certainty. Additionally, courts have held that, to comply with the requirement to designate critical habitat on the basis of the best scientific data available, the Service (1) must provide substantial evidence to support its designations of critical habitat, *Otay Mesa Property v. U.S. DOI*, 646 F.3d 914, 916-17 (D.C. Cir. 2011) (conclusion that San Diego fairy shrimp occupied an area at the time of listing was held to be invalid because it was not supported by substantial evidence); (2) may use flawed studies or data if the agency acknowledges and explains the limitations, *In re Polar Bear ESA Listing and Section 4(d) Rule Litigation*, 709 F.3d 1, 13 (D.C. Cir. 2013) (listing of the polar bear was valid even though it relied on flawed climate models because the Service explained the methodology of the models, acknowledged their limitations, and only used the models for the limited purpose of confirming the "general direction and magnitude" of the population trends; but (3) may reject studies if they are not reliable, *Home Builders Ass'n of Cal. v. U.S. FWS*, 529 F. Supp. 2d 1110, 1121 (N.D. Cal. 2007) (listing of the California tiger salamander, after rejecting a population estimate study as not being the best scientific data available, was valid because FWS had evaluated the study and found its methodology to be flawed to the point of not being reliable), *aff'd*, 321 Fed. Appx. 704 (9<sup>th</sup> Cir. 2009); and (4) cannot ignore information if it is in some way better than the evidence on which it relies, *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1080-81 (9<sup>th</sup> Cir. 2006) (listing of the Buena Vista lake shrew was valid because the agency did not ignore three studies that were inconsistent with the final rule and instead evaluated and incorporated the studies into its analysis); (5) even if the information falls short of scientific certainty, *Alabama-Tombigbee*

*Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1260 (11<sup>th</sup> Cir. 2007) (listing of Alabama sturgeon as an endangered species was valid despite taxonomic uncertainty as to whether it is a separate species from the shovelnose sturgeon; “[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts”). The “credible information” provision is not necessary for improving clarity, and, to the contrary, it creates confusion by deviating from both the statutory standard and the Service’s longstanding approach and practice.

Prior to the Final Rule, under the Policy, the Service always considered requests for exclusion; in fact, in a response to a comment on the Policy, the Services stated that if a commenter provided a reasoned rationale for an exclusion, including measures undertaken to conserve species and habitat on the land at issue (such that the benefit of inclusion is reduced), the Services would consider exclusion of those lands. However, that provision retained the Secretaries’ discretion to decide not to conduct exclusion analyses in appropriate circumstances. The Final Rule, on the other hand, makes a commitment to undertake exclusion analyses whenever proponents of an exclusion submit “credible information” of a meaningful impact. This commitment reduces the Secretary’s discretion not to conduct exclusion analyses in individual circumstances, even in situations in which it is clear to the Service, in its expert judgment and experience, that the benefits of exclusions are not going to outweigh the benefits of inclusion, thereby likely leading to unnecessary and time-consuming analyses. Because Congress appropriates a finite amount of funding for completing listing and critical habitat actions to protect endangered and threatened species, any resources that the Service expends on undertaking, and then potentially defending, unnecessary exclusion analyses for one species will reduce the Service’s capacity to make listing and critical habitat decisions to protect other species.

Furthermore, NMFS applies the Policy to guide the exercise of the Secretary’s discretion in implementation of section 4(b)(2) of the Act. This significant difference in implementation of

the same provision of the Act is likely to be confusing to other Federal agencies, Tribes, States, and other potentially affected stakeholders and members of the public, particularly in situations where fact patterns are largely similar. Implementing the Policy instead of the Final Rule would provide for a consistent approach between the Service and NMFS as to when we undertake an exclusion analysis at the request of a landowner, land manager, or other entity without compromising transparency or clarity in our implementation of section 4(b)(2) of the Act.

*Assigning Weights According to Who Has the Expertise*

The Final Rule (85 FR 82380) states that, for impacts outside the scope of the Service's expertise, which was narrowly defined to extend only to biological issues, the Secretary will assign weights to the benefits of inclusion or exclusion consistent with the available information from experts and parties with firsthand knowledge, unless the Secretary has knowledge or material evidence that rebuts that information. "Impacts that are outside the scope of the Service's expertise," according to the Final Rule, expressly include nonbiological impacts identified by States or local governments.

After reconsidering the Final Rule, we find the provision to automatically assign weights based on the nonbiological impacts identified by entities outside the agency does not advance the conservation goals of the Act. Not only does it unduly constrain our authority and responsibility as the agency with the expert judgment in implementation of the Act, but it could also be at odds with the Act's mandate to base designations on the best scientific data available. Although the preamble and response to comments in the Final Rule addressed this concern by pointing out that we would make exclusion decisions on a case-by-case basis using the best available information, the regulatory text mandates a rigid process for how weights are assigned to impacts. We now recognize that keeping the Final Rule would result in competing and potentially conflicting legal requirements when we undertake an exclusion analysis and could increase our legal vulnerability. In section 4(b)(2) of the Act, Congress vested in the Secretary the authority and responsibility to assign weights to the impacts of designating particular areas as critical habitat.

Automatically assigning weights based on information from parties other than the Secretary or their chain of command, including to parties that may have direct economic or other interests in the outcome of the exclusion analysis, regardless of whether those parties have expert or firsthand information, is in tension with Congress's decision to place that authority with the Secretary. Furthermore, the requirement that, unless we have rebutting information, the Secretary must assign weights to non-biological impacts based strictly on information from those entities constrains the Secretary's discretion to use their expert judgment and mandate to base designations on the best scientific data available.

In addition, the requirement to assign weights consistent with expert or firsthand information submitted by proponents of exclusions was unnecessary. Even without that provision, the Service was already required to, and did, take into consideration expert and firsthand information submitted by proponents when it assigned weights to the impacts of designation. The Service applied the Policy, which states that the Secretary will assign weights to the benefits of inclusion and exclusion when conducting an exclusion analysis. Without the Final Rule, our consideration of impacts, including the weights we assigned to the impacts and identification of the best available data, would still be subject to judicial review under the APA's "abuse of discretion" standard. See *Weyerhaeuser* 139 S. Ct. at 371. The Policy would again guide the Service to consider relevant information provided by commenters without creating presumptions in tension with the statute's requirement that we designate critical habitat. Therefore, in applying the Policy (if this proposed rule were finalized), we would continue to consider information submitted by proponents of exclusions, as we did before the Final Rule was promulgated

We now find that the significant constraints that the Final Rule places on the Secretary's discretion undermine our role in undertaking an impartial evaluation of the relevant data, including information that proponents of exclusions provide, and hinders our ability to designate

critical habitat based on the scientific data available as required by the statute and to provide for conservation of species.

### *Federal Lands*

The Policy states we would generally not exclude Federal lands from a designation of critical habitat because of the unique obligations of Federal land managers under the Act to conserve listed species and their habitats. The Final Rule states that the standards for evaluating Federal and non-Federal lands are the same and provided that our consideration of nonbiological impacts to permittees, lessees, or others with a permit, lease, or contract would be the same regardless of land ownership. It also states that the Secretary will assign weights to nonbiological impacts consistent with information provided by permittees, lessees, or contractor applicants for permits, leases, or contracts on Federal lands.

Some commenters in the rulemaking process for the Final Rule asserted that the change in policy with respect to considering exclusion of Federal lands was arbitrary and capricious because we did not adequately explain the basis for the change or elaborate on any changed circumstances. The reasoning that the preamble described for making this change in the Final Rule was that we did not wish to foreclose the potential to exclude areas under Federal ownership in cases where the benefits of exclusion outweigh the benefits of inclusion. We find that the reasoning that the preamble describes for this change was incomplete because it overlooked some key context underscoring the benefits of focusing critical habitat designations on Federal lands.

First, Congress declared its policy that “all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” (U.S.C 1531(c)(1)).

Second, all Federal agencies have responsibilities under section 7 of the Act to carry out programs for the conservation of listed species and to ensure their actions are not likely to

jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Federal agencies should use their authorities to further the purposes of the Act, and Federal lands are often important to the recovery of listed species. To the extent possible, we intend to focus designation of critical habitat on Federal lands in an effort to avoid the real or perceived regulatory burdens on non-Federal lands.

Finally, while the Final Rule acknowledges a change in the consideration of Federal lands from the Policy, it fails to recognize that the Policy does not prohibit exclusions of Federal lands, nor does it prohibit consideration of information provided by permittees, lessees, or contractors on Federal lands when the Secretary assigns weights to impacts under section 4(b)(2) of the Act. Thus, if this proposed rule were finalized, consistent with the Policy, the Secretary would retain their discretion to exclude Federal lands when the factual circumstances merit it. We find that the approach in the Policy better equips the Service with the flexibility necessary to account for the wide variability of circumstances in which the Secretary makes exclusion decisions—variability in the needs of the species, in the geography and quality of critical habitat areas, and of land ownership arrangements. For example, while the transactional costs of consultation with Federal agencies tend to be a relatively minor cost in most situations, and while activities on Federal lands automatically have a Federal nexus (which usually would require consultation and thus increase the potential for conservation benefits if those lands are designated), we have found that in some instances the benefits of exclusion nevertheless outweigh the benefits of designating those areas. In those situations when the benefits of excluding Federal lands outweigh the benefits of designating them as critical habitat, the Policy provides sufficient discretion for the Secretary to exclude Federal lands. Therefore, we find that it is unwise to constrain the Secretary's discretion in the regulations. Further, resuming the implementation of the Policy would realign our implementation of section 4(b)(2) of the Act with that of NMFS.

*“Shall exclude”*

The Final Rule states that the Secretary “shall” exclude an area where the benefits of exclusion outweigh those of inclusion, so long as the exclusion will not result in the extinction of the species concerned. Using the phrase “shall exclude” requires exclusion of the area when a balancing analysis finds the benefits of exclusion outweighs those of inclusion. Although, as we stated in the preamble to the Final Rule, adding this requirement to the regulations was an exercise of the Secretary’s discretion, we now find that exercising the Secretary’s discretion in this way interferes with the statute’s conservation goals by making a binding rule that ties the hands of current and future Secretaries in a particular way in all situations, regardless of the case-specific facts or the conservation outcomes. We recognize this change may result in a decrease in the exclusion proponent’s sense of predictability in the ultimate outcome of an exclusion analysis. However, we find that advancing the conservation goals of the statute and providing a rational basis for our decision are more important than providing increased predictability, and the statute’s conservation goals will be better achieved if we rescind the Final Rule and resume the implementation of the provisions of the Policy, under which the Secretary would retain discretion not to exclude an area when the benefits of exclusion outweigh those of inclusion. Although the Policy does not require exclusion when the benefits of exclusion outweigh the benefits of inclusion, it states that we would generally exclude an area in those circumstances. One difference is that the Policy acknowledges that we cannot anticipate all possible fact patterns; thus, it preserves the Secretary’s discretion on exclusions regardless of the outcome of the balancing. Regardless of implementation of the Final Rule, or the Policy, when the Secretary undertakes an exclusion analysis, *Weyerhaeuser* requires us to be transparent and provide a rational basis to support the decision. Therefore, our explanation will make the basis of our decision clear to proponents of an exclusion and to the general public. We find that the “shall exclude” language in the Final Rule is an unnecessarily broad constraint on the Secretary’s discretion. Moreover, in light of the numerous possible fact patterns regarding the relationship between critical habitat and conservation of a particular species, we find that preserving the



Secretary's discretion regarding whether or not to exclude areas when the benefits of exclusion outweigh the benefits of inclusion is most consistent with the Supreme Court's characterization of the Act as representing "a policy [of] 'institutionalized caution.'" *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978).

#### *Other Regulatory Provisions of the Final Regulations*

The Final Rule contains other provisions identifying factors for the Secretary to consider when conducting exclusion analyses that involve particular categories of impacts. For example, 50 CFR 17.90(a) includes non-exhaustive lists of the types of impacts that the terms "economic impacts" and "other relevant impacts" may include. Because these lists are examples of possible factors to be considered, and are neither mandatory nor exhaustive, with or without the Final Rule the Secretary can consider whatever factors on or off of those lists that they determine appropriate given the specific facts of a designation and its impacts. As a result, removing them, if this proposed rule is made final, will not affect the Service's implementation. Similarly, 50 CFR 17.90(d) identifies factors for the Secretary to consider in evaluating impacts related to economics, national and homeland security, and conservation plans that are or are not permitted under section 10 of the Act. These factors are mostly the same as the factors identified in the Policy. Therefore, we find that it is unnecessary to include these provisions in the regulations and that, if the Final Rule is rescinded, resuming the implementation of the Policy would not alter our implementation of section 4(b)(2) of the Act with respect to these factors.

The one change in the Final Rule as compared to the Policy is the fourth factor for evaluating non-permitted plans and partnerships. The fourth factor in the Policy is whether compliance with the National Environmental Policy Act (NEPA) (codified at 42 U.S.C. 4321 et seq.) is required, but the Final Rule adds language to make clear that we may consider plans that have had reviews similar to NEPA review even if the reviews were not technically completed under NEPA. However, that language was unnecessary because the Policy specifies that the factors it identifies for evaluating nonpermitted plans are not exclusive. As a result, even

without that added language under the fourth factor in the Final Rule, we may consider plans that have had reviews similar to NEPA review, but no NEPA reviews. In short, we find that it is unnecessary to include in the regulations the additional language regarding reviews of nonpermitted plans that are similar to NEPA reviews, and that, if the Final Rule is rescinded, resuming the implementation of the Policy would not substantially change our implementation of section 4(b)(2) of the Act with respect to evaluating nonpermitted plans.

## **Public Comments**

We are soliciting public comment on this proposal and supporting material. All relevant information will be considered prior to making a final determination regarding the regulations for exclusions from critical habitat. You may submit your comments and materials concerning the proposed rule by one of the methods listed in **ADDRESSES**. Comments must be submitted to <https://www.regulations.gov> (Docket FWS–HQ–ES–2019–0115) before 11:59 p.m. (Eastern Time) on the date specified in **DATES**. We will not consider mailed comments that are not postmarked by the date specified in **DATES**.

We will post all comments on <https://www.regulations.gov>. This generally means that we will post any personal information you provide us. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

## **Required Determinations**

### *Regulatory Planning and Review (E.O.s 12866 and 13563)*

Executive Order 12866 (“E.O. 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 (“E.O. 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. E.O. 13563 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 and further emphasizes 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 proposed rule in a manner consistent with these requirements. This proposed rule is consistent with E.O. 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.”

#### *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 that person’s designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We certify that, if adopted as proposed, this proposed rule would not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

This rulemaking proposes to rescind a rule that outlines Service procedures regarding exclusion of areas from designations of critical habitat under the Act. If finalized, the Service would resume the implementation of the 2013 Rule and the Policy jointly with NMFS.

As discussed above, resuming the implementation of the 2013 Rule and the Policy will not substantially alter our implementation of section 4(b)(2) of the Act. To the extent that the Final Rule differs from the Policy, it is limited to identifying specific factors for consideration that the Policy already authorizes the Service to consider in weighing the benefits of excluding areas against the benefits of including them, but in a more general sense. Moreover, the Service is the only entity that would be directly affected by this rule because the Service is the only entity that was implementing the final regulations under this portion of the CFR. No external entities, including any small businesses, small organizations, or small governments, will experience any economic impacts directly from this rule because the Service would continue to take into consideration the relevant impacts of designating specific areas as critical habitat and retain the ability to apply the factors identified in the Final Rule. In addition, our decisions to exclude or not exclude areas (where a specific request has been made) based on this consideration of impacts will continue to be judicially reviewable in accordance with the Supreme Court's opinion in *Weyerhaeuser*.

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

(b) This proposed 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 proposed rule is not a “significant regulatory action” under the Unfunded Mandates Reform Act. This

proposed rule would impose no obligations on State, local, or Tribal governments.

*Takings (E.O. 12630)*

In accordance with E.O. 12630, this proposed rule would not have significant takings implications. This proposed 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 proposed rule would not result in a regulatory taking because it would not deny all economically beneficial or productive use of the land or aquatic resources and it would substantially advance a legitimate government interest (conservation and recovery of endangered species and threatened species) and would not present a barrier to all reasonable and expected beneficial use of private property.

*Federalism (E.O. 13132)*

In accordance with E.O. 13132, we have considered whether this proposed rule would have significant federalism effects and have determined that a federalism summary impact statement is not required. This proposed rule pertains only to factors for designation of critical habitat under the Act and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

*Civil Justice Reform (E.O. 12988)*

This proposed rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of E.O. 12988. This proposed rule would rescind a rule that was solely focused on exclusions from critical habitat under the Act.

*Government-to-Government Relationship with Tribes*

In accordance with E.O. 13175, “Consultation and Coordination with Indian Tribal Governments,” and the Department of the Interior’s manual at 512 DM 2, we are considering possible effects of this proposed rule on federally recognized Indian Tribes. The Service has

reached a preliminary conclusion that the changes to these implementing regulations are general in nature and do not directly affect specific species or Tribal lands. This proposed rule would rescind the December 18, 2020 Final Rule that modified certain aspects of the critical habitat designation processes that we have been implementing in accordance with previous guidance and policies. If finalized, we would resume the implementation of the 2013 Rule and the Policy jointly with NMFS. Further, the 2013 Rule and the Policy are almost identical to the treatment of Tribal lands under the Final Rule and will not have Tribal implications. These proposed regulatory revisions directly affect only the Service, and with or without these revisions the Service would be obligated to continue to designate critical habitat based on the best available data. Therefore, we conclude that these proposed regulations do not have “tribal implications” under section 1(a) of E.O. 13175, and therefore formal government-to-government consultation is not required by E.O. 13175 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 work with them as we implement the provisions of the Act. *See* Secretarial Order 3206, “American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act” (June 5, 1997).

#### *Paperwork Reduction Act*

This proposed rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (45 U.S.C. 3501 et seq.). We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

#### *National Environmental Policy Act*

We are analyzing this proposed regulation in accordance with the criteria of the 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). The effect of this proposed rulemaking would be to rescind the Service-only procedures for

considering exclusion of areas from a designation of critical habitat under the Act and return to implementing the 2013 Rule and the Policy jointly with NMFS. As we discussed earlier, resuming the implementation of the Policy will not substantially alter our implementation of section 4(b)(2) of the Act, and to the extent the Final Rule differs from the Policy, it is limited to identifying specific factors for consideration that the Policy already authorizes the Service to consider in weighing the benefits of excluding areas against the benefits of including them, but in a more general sense.

As a result, we anticipate, similar to our conclusion stated in the Final Rule, that the categorical exclusion found at 43 CFR 46.210(i) likely applies to the proposed regulation changes. In 43 CFR 46.210(i), the Department of the Interior has found that the following categories of actions would not individually or cumulatively have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: “Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature.” However, as a result of public comments received, the final rule may differ from this proposed rule and our analysis under NEPA may also differ from the proposed rule. We will complete our analysis, in compliance with NEPA, before finalizing this regulation.

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

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

#### *Clarity of the Rule*

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

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) Use lists and tables wherever possible.

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

### **Authority**

We issue this proposed 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.

### **Proposed Regulation Promulgation**

For the reasons discussed in the preamble, the U.S. Fish and Wildlife Service proposes to amend 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 I [Removed]**

2. Remove subpart I, consisting of § 17.90.

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

3. Redesignate subpart J, consisting of §§ 17.94 through 17.99, as subpart I.

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

4. Redesignate subpart K, consisting of §§ 17.100 through 17.199, as subpart J.

**Shannon A. Estenoz,**

Assistant Secretary for Fish and Wildlife and Parks.

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