



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 424

[Docket No. FWS-HQ-ES-2021-0107, FXES1111090FEDR-245-FF09E23000;

Docket No. 240325-0088]

RIN 1018-BF95; 0648-BK47

Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat

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

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS; collectively, the “Services”), finalize revisions to portions of our regulations that implement section 4 of the Endangered Species Act of 1973, as amended. The revisions to the regulations clarify, interpret, and implement portions of the Act concerning the procedures and criteria used for listing, reclassifying, and delisting species on the Lists of Endangered and Threatened Wildlife and Plants (Lists) and designating critical habitat.

DATES: This final rule is effective [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 rule, are available online at <https://www.regulations.gov> in docket number FWS-HQ-ES-2021-0107.

FOR FURTHER INFORMATION CONTACT: Carey Galst, U.S. Fish and Wildlife Service, Division of Ecological Services, Branch of Listing Policy and Support Chief, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703–358–1954; or Angela Somma, National Marine Fisheries Service, Office of Protected Resources, Endangered Species Division Chief, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301–427–8403. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

The Secretaries of the Interior and Commerce (“Secretaries” or “Secretary”) share responsibilities for implementing most of the provisions of the Endangered Species Act of 1973, as amended (“ESA” or “the Act,” 16 U.S.C. 1531 *et seq.*), and authority to administer the Act has been delegated by the respective Secretaries to the Director of FWS and the Assistant Administrator for NMFS. Together, the Services have promulgated regulations that interpret aspects of the listing and critical habitat designation provisions of section 4 of the Act. These joint regulations, which are codified in the Code of Federal Regulations (CFR) at 50 CFR part 424, were most recently revised in 2019 (84 FR 45020, August 27, 2019; “the 2019 rule” or “the 2019 regulations”). Those revised regulations became effective on September 26, 2019.

Executive Order 13990 (E.O. 13990), entitled “Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis,” was issued on January 20, 2021. E.O. 13990 directed all departments and agencies to immediately review agency actions taken between January 20, 2017, and January 20, 2021, and, as

appropriate and consistent with applicable law, consider suspending, revising, or rescinding agency actions that conflict with important national objectives, including promoting and protecting our public health and the environment, and to immediately commence work to confront the climate crisis. A Fact Sheet that accompanied E.O. 13990 provided a non-exhaustive list of particular regulations requiring such a review and included the 2019 rule (see <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/>). In response to E.O. 13990 and litigation that ended with a court remand of the 2019 rule, the Services reviewed the 2019 rule and, on June 22, 2023, published a proposed rule to revise portions of the implementing regulations at 50 CFR part 424 (88 FR 40764) that had previously been revised by the 2019 rule. We solicited public comments on the June 22, 2023, proposed rule for 60 days, ending August 21, 2023.

Section 2 of the Act states that the purposes of the Act include providing a means to conserve the ecosystems upon which endangered and threatened species depend, developing a program for the conservation of listed species, and achieving the purposes of certain treaties and conventions (16 U.S.C. 1531(b)). Section 2 of the Act also makes explicit that it is the policy of Congress that all Federal agencies and departments seek to conserve threatened and endangered species and use their authorities to further the purposes of the Act (16 U.S.C. 1531(c)).

To determine whether listing a species is warranted, the Act requires that the Services conduct a review of the status of the species and consider any efforts being made by any State or foreign nation (or subdivision thereof) to protect the species. The Act also requires that determinations of whether a species meets the definition of an endangered or threatened species be based solely on the best scientific and commercial data available (16 U.S.C. 1533(b)(1)(A)). Once species are listed, section 4(c)(2) of the Act requires us to conduct a review at least once every 5 years to determine whether the

listed species should be removed from the Lists or changed in status, and section 4(f) of the Act requires that we develop and implement recovery plans for the conservation and survival of the listed species (unless a finding is made that such a plan would not promote the conservation of the species) (16 U.S.C. 1533(c)(2) and (f)). To the maximum extent practicable, recovery plans are required to provide certain elements, including objective, measurable criteria, which when met, would result in a determination that the species should be removed from the list.

Section 4(a)(3)(A) of the Act requires the Services to designate critical habitat concurrent with the listing rule to the maximum extent prudent and determinable, or issue a final critical habitat rule within 1 year following a final listing rule if critical habitat was not initially determinable. Critical habitat is defined in section 3 of the Act as: (1) the specific areas within the geographical area occupied by the species at the time it is listed on which are found those physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection; and (2) specific areas outside the geographic area occupied by the species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species (16 U.S.C. 1532(5)). The two parts of this definition for critical habitat depend on whether the species occupies an area or does not occupy an area at the time of listing. For simplicity, throughout this document we will refer to the former type of area as “occupied” critical habitat and the latter type as “unoccupied” critical habitat.

In passing the Act, Congress viewed habitat loss as a significant factor contributing to species endangerment, and the “present or threatened destruction, modification, or curtailment” of a species’ habitat or range is specifically enumerated in section 4(a)(1) of the Act as the first of the factors that may underlie a determination that a species meets the definition of an endangered or threatened species. The designation of

critical habitat is a regulatory tool designed to further the conservation of a listed species, i.e., to help bring the endangered or threatened species to the point at which protections under the Act are no longer necessary. More broadly, designation of critical habitat also serves as a tool for meeting one of the Act's stated purposes: Providing a means for conserving the ecosystems upon which endangered and threatened species depend. Once critical habitat is designated, Federal agencies must ensure that any actions they authorize, fund, or carry out are not likely to result in destruction or adverse modification of the critical habitat (16 U.S.C. 1536(a)(2)).

In this final rule, we summarize and discuss the comments received in response to the proposed rule (88 FR 40764, June 22, 2023), and outline changes from the proposed rule based on our consideration of those comments and in light of the objectives of this rulemaking process to address concerns we had identified in the 2019 rule, the policies expressed in E.O. 13990, and our experience with implementing the Act. In the event any provision is invalidated or held to be impermissible as a result of a legal challenge, "the remainder of the regulation could function sensibly without the stricken provision."

Belmont Mun. Light Dep't v. FERC, 38 F.4th 173, 187 (D.C. Cir. 2022) (quoting *MD/DC/DE Broad. Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001)). Because each of the provisions stand on their own, the Services view each of the provisions as operating independently from the other provisions. Thus, should a reviewing court invalidate any particular provision(s) of this rulemaking, the remaining provisions would still allow the Services to classify species and designate their critical habitat. Specifically, these distinct provisions include: (1) economic and other impacts; (2) foreseeable future; (3) factors considered in delisting species; (4) not prudent determinations; and (5) designation of unoccupied critical habitat. To illustrate this with one example, in the event that a reviewing Court would find that the revisions to the foreseeable future regulatory language is invalid, that finding would not affect the revisions to the factors considered in

the designation of unoccupied critical habitat. Therefore, in the event that any portion of this final rule is held to be invalid or impermissible, the Services intend that the remaining aspects of the regulatory provisions be severable.

In finalizing the specific changes to the ESA implementing regulations in this document, the Services are establishing prospective standards only. These regulations will apply to classification and critical habitat rules finalized after the effective date of this rule and will not apply retroactively to classification and critical habitat rules finalized prior to the effective date of this rule. (For the effective date of this rule, see **DATES**, above.) Nothing in these revisions to the regulations is intended to require that any prior final listing, delisting, or reclassification determinations or previously completed critical habitat designations be reevaluated on the basis of these final regulations.

This final rule is one of three final rules publishing in today's *Federal Register* that make changes to the regulations that implement the ESA. Two of these final rules, including this one, are joint between the Services, and one final rule is specific to FWS.

Changes from the Proposed Rule

In this section, we discuss changes between the proposed regulatory text and the regulatory text that we are finalizing in this document. We have modified the text we proposed for two sections of the regulations—the foreseeable future regulation in 50 CFR 424.11(d) and the delisting regulations in 50 CFR 424.11(e). We are not making modifications to any other sections of the regulations in 50 CFR part 424 that were addressed in the 2023 proposed rule (88 FR 40764, June 22, 2023); we are finalizing those sections as proposed.

Foreseeable Future

The ESA defines “threatened species” as “any species that is likely to become an endangered species in the foreseeable future” (16 U.S.C. 1532(2)). As part of the 2019

rule, the Services issued a regulation explaining how to apply the “foreseeable future” language (50 CFR 424.11(d)). In the proposed rule, we proposed to revise the second sentence of the foreseeable future regulation in 50 CFR 424.11(d) to state, “The term foreseeable future extends as far into the future as the Services can reasonably rely on information about the threats to the species and the species’ responses to those threats.” As explained below, we have modified that sentence so that it now states, “The foreseeable future extends as far into the future as the Services can make reasonably reliable predictions about the threats to the species and the species’ responses to those threats.”

The Services received numerous comments that the proposed revisions were vague and unclear, would result in foreseeable-future timeframes that were limitless, or lowered the standard needed to list species. Some commenters requested that we rescind the regulation or rely on the 2009 Memorandum Opinion on the foreseeable future from the Department of the Interior, Office of the Solicitor (M-37021, January 16, 2009; “M-Opinion”, available online at <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37021.pdf>). Other commenters stated that the Services should retain this regulation in some form, as the M-Opinion does not have the force of law. In response to these comments and upon further consideration, we decided not to rescind the regulation but to, instead, modify it for clarity.

We are not rescinding the 2019 regulation because including a foreseeable future framework in our regulations establishes binding standards for the Services to apply and promotes transparency to the public by setting out our understanding of the foreseeable future in the CFR, where it can be read in context with other regulatory provisions implementing section 4. We are, however, revising the regulation because the language from the 2019 regulation (i.e., “reasonably determine that both the future threats and the

species' responses to those threats are likely") created confusion. The 2019 regulation seemed to suggest that the Services had adopted a novel requirement to determine the foreseeable future by first determining the likely effects of threats on the species. With this rule, the Services clarify that the foreseeable future regulation does not function as an independent substantive standard in the context of a listing decision. Rather, the foreseeable future articulates how the Services determine the appropriate timeframe over which to evaluate the best scientific and commercial data available when determining whether the species meets the substantive standard set out in the Act's definition of a threatened species.

In response to public comments on the proposed rule, we have further revised the second sentence of the regulation to state that the foreseeable future extends as far into the future as the Services can make reasonably reliable predictions about the threats to the species and the species' responses to those threats. Specifically, we made two changes to the second sentence. First, we removed the word "term" from the second sentence because it is unnecessary, and the sentence is clearer without this word. Second, we removed the phrase "reasonably rely on information" and replaced it with "make reasonably reliable predictions." In light of the public comments received, we determined that the phrase "reasonably rely on information" in the proposed rule did not provide the clarity that we intended with respect to explaining how far into the future the Services can use information to assess future threats and species' responses to those threats.

Many of the commenters referred to the M-Opinion as being preferable because it better explains the role of the "foreseeable future" phrase in the Act and is more understandable than the regulatory text we proposed. The M-Opinion explains, based on contemporaneous dictionary definitions of "foreseeable" and the statutory context in which the term appears, that what constitutes the foreseeable future for a particular listing determination must be rooted in the best available data that allow predictions into the

future, and that the foreseeable future extends only so far as those predictions are reliable. Because the M-Opinion provided a well-reasoned interpretation of this statutory term, following a thorough analysis of the text and structure of the ESA and its legislative history, it has guided the Services' longstanding practice. The comments we received confirmed that the interpretation we had been applying, as guided by the M-Opinion, is well understood and accepted. Therefore, we have now rephrased the regulatory text to better reflect that legal analysis and our longstanding practice by stating that the foreseeable future extends as far into the future as the Services can "make reasonably reliable predictions."

As noted above, the term "foreseeable future" is a term contained in the statutory definition of "threatened species" (16 U.S.C. 1532(20)), yet Congress did not define "foreseeable future" in the Act. Since 2009, the Services have relied on the M-Opinion for internal guidance in interpreting and applying this term. As part of our assessment of a species' status, we evaluate how threats may already have affected the species by considering available data regarding abundance and population trends, and we evaluate how threats may affect the species in the future. When conducting this analysis, we must review the degree of certainty and foreseeability concerning each of the threats to the species and the species' responses to those threats. We must assess the nature of the best scientific and commercial data available concerning each threat and the degree to which the data allow us to make reliable predictions. Predictions about the occurrence of an event or a response in the future are inherently uncertain. The M-Opinion explores ordinary definitions of the word "foreseeable" and refers to the event as "being such as may reasonably be anticipated" or "lying within the range for which forecasts are possible" (M-Opinion, at 8 (emphasis removed)). It goes on to explain further that a "forecast" is defined as a prophecy, estimate, or prediction of a future happening or condition, and the verb "forecast" is defined as to anticipate, calculate, or predict some

future event or condition as a result of rational study and analysis of pertinent data (*id.*).

The M-Opinion states that we look not only at the foreseeability of threats, but also at the foreseeability of the impact of the threats on the species. In some cases, a species' responses to a foreseeable threat will manifest immediately; in other cases, it may be multiple generations before a foreseeable threat's effect on the species can be observed. But in each case, we must be able to make reliable predictions about the future impact to the species from the foreseeable threat. The further into the future that we assess threats to a species or a species' responses to threats, the greater the burden on the Services to explain how we can conclude that those future threats or responses remain foreseeable—that is, that our assessments of them are based on reasonably reliable predictions out to that point in the future. In making these predictions, we must avoid speculation and presumption. Thus, for a particular species, we may conclude, based on the extent or nature of the best data available, that a trend has only a certain degree or period of reliability, and that to extrapolate the trend beyond that point would constitute speculation. Therefore, following our consideration of the public comments, we have revised the second sentence of the framework to state that the “foreseeable future” extends as far into the future as the Services can make reasonably reliable predictions about the threats to the species and the species' responses to those threats. The remainder of the framework is unchanged.

The M-Opinion, which we have relied on since 2009, includes a detailed analysis of the Act, legislative history, and case law and, based on that analysis, develops a set of considerations for determining the extent of the foreseeable future. We provide here a summary of those considerations to address comments that our discussion of the M-Opinion in the proposed rule was insufficient and should have been more detailed. We carefully considered both the M-Opinion analysis that we referenced in the proposed rule and the public comments we received on the proposed rule when making the additional

revisions to the foreseeable future framework we finalize here. We will continue to consider the following as we determine the extent of the foreseeable future when making classification decisions:

1. Congress intended the Secretary (of the Interior or Commerce) to apply the concept of the foreseeable future based on the facts applicable to the species being considered for listing. Congress purposefully did not set a uniform timeframe for the Secretary's consideration of whether a species was likely to become an endangered species, nor did Congress intend that the Secretary set a uniform timeframe. (*Endangered Species Act of 1973: Hearings on S. 1592 and S. 1983 Before the Senate Subcomm. On the Environment of the Committee on Commerce, 93d Cong. 51, 58-59, 61, 63, 66 (1973)*).
2. In any particular analysis under section 4(a)(1) of the Act, the Secretary has broad discretion with respect to what constitutes the foreseeable future in the context of that analysis, as long as the rationale is articulated.
3. The Secretary's discretion must be exercised consistent with the ordinary meaning of the statutory language and context in which the phrase is used. (*BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006); *Food & Drug Admin. v. Brown & Williams Tobacco Co.*, 529 U.S. 120, 132-33 (2000)).
4. The Secretary's analysis of what constitutes the foreseeable future for a particular listing determination must be rooted in the best available data that allow predictions into the future, and the foreseeable future extends only so far as those predictions are reliable. "Reliable" does not mean "certain"; it means sufficient to provide a reasonable degree of confidence in the prediction, in light of the conservation purposes of the Act. (*See generally Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671, 681 (9th Cir. 2016)).

5. Because the predictions relate to the status of the species, the data relevant to an analysis of foreseeable future are those that concern the future population trends and threats to the species, and the likely consequences of those threats and trends.
6. Since the foreseeable future is uniquely related to population, status, trends, and threats for each species and since species often face multiple threats, the Secretary is likely to find varying degrees of foreseeability with respect to the various threats. Although the Secretary's conclusion as to the future status of a species may be based on reliable predictions with respect to multiple trends and threats over different periods of time or even threats without specific time periods associated with them, the final conclusion is a synthesis of that information.
7. The Secretary must make the determination of "threatened status" based on the best scientific and commercial data available (16 U.S.C. 1533(b)(1)). This may include reliance on the exercise of professional judgment by experts when such judgments are consistent with the concepts laid out in the M-Opinion, including the need to document the basis for the conclusion.
8. The Secretary need not identify the foreseeable future in terms of a specific period of time. Rather, it is important that the information and data used by the Secretary are reliable for the purpose of making predictions with respect to a particular threat. Nevertheless, if the information or data are susceptible to such precision, it may be helpful to identify the time scale being used.
9. With respect to any relevant prediction, when the point is reached that the conclusions concerning the trends or the impacts of a particular threat are based on speculation, rather than reliable prediction, those impacts are not within the foreseeable future. (*E.g.*, *Bennett v. Spear*, 520 U.S. 154, 176 (1997); *Bldg. Indus. Ass'n. v. Norton*, 247F.3d 1241, 1246-47 (D.C. Cir. 2001)).

10. The administrative record for a decision under section 4(a)(1) of the Act should include more than just a conclusion as to what is foreseeable given the data available; it should also explain how the Secretary reached that conclusion.

Factors Considered in Delisting Species

The June 22, 2023, proposed rule (88 FR 40764) contained a series of revisions to the regulation at 50 CFR 424.11(e), which addresses delisting decisions under the ESA. As we explained in the proposed rule, these changes were intended to clarify multiple aspects of this regulation, which had been revised in 2019. The proposed text for this regulation was as follows:

It is appropriate to delist a species if the Secretary finds, after conducting a status review based on the best scientific and commercial data available, that:

- (1) The species is extinct;
- (2) The species is recovered or otherwise does not meet the definition of a threatened or endangered species. In making such a determination, the Secretary shall consider the factors and apply the standards set forth in paragraph (c) of this section regarding listing and reclassification; or
- (3) The listed entity does not meet the statutory definition of a species.

While many commenters indicated they support the proposed revisions to 50 CFR 424.11(e), many others requested that additional changes be made to further clarify the intent of the proposed revisions and to better indicate or ensure that delisting decisions would be based on sufficient data and a thorough review of the best scientific data available. Following our review and consideration of the public comments, we have modified the text of this regulation to read as follows:

Species will be delisted if the Secretary determines, based on consideration of the factors and standards set forth in paragraph (c) of this section, that the best scientific and commercial data available substantiate that:

- (1) The species is extinct;
- (2) The species has recovered to the point at which it no longer meets the definition of an endangered species or a threatened species;
- (3) New information that has become available since the original listing decision shows the listed entity does not meet the definition of an endangered species or a threatened species; or
- (4) New information that has become available since the original listing decision shows the listed entity does not meet the definition of a species.

As indicated in this revised version of 50 CFR 424.11(e), the opening sentence now includes a cross reference to the “factors and standards” for making listing determinations, which are set forth in an earlier paragraph (i.e., paragraph (c)) of the implementing regulations. In the proposed rule, this cross reference had appeared only in 50 CFR 424.11(e)(2). This modified opening sentence also includes the more-straightforward wording, “species will be delisted if,” in place of the proposed wording, “it is appropriate to delist a species if”; it also includes slightly different phrasing that indicates the best available data must “substantiate that” one of the listed circumstances for delisting has been met. These additional modifications to 50 CFR 424.11 are intended to address various and diverse concerns and comments asserting that the Services could, when making delisting determinations, apply novel factors and standards, base their decision on insufficient scientific evidence, delist species automatically if any of the identified circumstances are met, or purposely delay delisting species even if any of the identified circumstances are met. As revised, the text more clearly indicates that the factors and standards that the Services must consider and apply when listing a species also apply when a species is being evaluated for delisting (e.g., consideration of threats per section 4(a)(1) of the ESA), regardless of the particular circumstances for that species (e.g., extinction, recovery). The revised text also removes potentially confusing language

regarding the Services' intentions (i.e., "it is appropriate to delist") and better emphasizes that the Services would not promulgate a delisting rule unless the best available data provide sufficient scientific evidence that the species no longer warrants protection under the ESA.

The text in 50 CFR 424.11(e)(2) is also modified from the proposed text to simultaneously address disparate comments and concerns regarding the proposed reinsertion of "recovery" into the regulation. Some comments expressed concerns that by reinserting "recovery" into the regulation, the Services intend to link delisting to recovery plans or would require recovery plan criteria to be met to delist species. Other comments expressed concerns that by simply inserting a reference to "recovery" into an existing provision, the Services are not sufficiently emphasizing recovery of species as a principal goal of the ESA and a principal responsibility of the Services. The modified text for 50 CFR 424.11(e)(2) now sets out recovery as one of the distinct circumstances in which species will be delisted. The modified text also explicitly links "recovery" to the definitions of an endangered species and a threatened species to make it clear that the standard for assessing whether a species is recovered is not exclusively or inextricably linked to any recovery plan criteria; instead, "recovery" must be assessed against the definitions of an endangered species and a threatened species in the Act.

We also modified the text to separately list two other potential circumstances for delisting a species, which are now set forth at 50 CFR 424.11(e)(3) and (e)(4). These additional modifications were made in response to comments that the Services were creating vague or novel bases for delisting. We acknowledge that in our effort to simplify and streamline this text in 2019, we removed some of the explanatory context for these circumstances and, as a result, created the false impression that these were novel circumstances for delisting. As this was not our intent, we have modified the text to provide the necessary context for understanding that these other two circumstances for

delisting are limited to situations in which new data become available after a species is listed that change the scientific understanding of that species—with respect to either its taxonomy or its status. Scientific understanding of species is often not perfectly or fully resolved at the time of listing; nevertheless, the Services are required to make listing determinations based on the best data available while adhering to statutory time limits. The ESA does not permit the Services to delay or extend these statutory deadlines indefinitely to conduct additional studies or resolve all uncertainties. In cases where we have listed species that are later shown, on the basis of new information, to not be taxonomically valid “species” or not be facing risk of extinction, the Services will undertake a rulemaking to propose to delist those species. The revised text at 50 CFR 424.11(e)(3) and (e)(4) is intended to better reflect those circumstances, which both Services have experienced in their years of implementing the ESA (See, e.g., 75 FR 52272, August 25, 2010 (new survey data showed additional populations and greater geographical range of the Utah valvata snail, *Valvata utahensis*, than were known at the time of listing); 86 FR 74378, December 30, 2021 (new genetic and morphological data demonstrated that the listed coral, *Siderastrea glynni*, is synonymous with another coral species)).

In the section below, we provide further discussion and explanations of the changes to 50 CFR 424.11.

Summary of Comments and Responses

Comments on the proposed rule, which published on June 22, 2023 (88 FR 40764), were solicited from all interested parties through August 21, 2023. In addition to requesting comments on the proposed revisions to 50 CFR part 424, we solicited comments on the analyses and conclusions in the Required Determinations section of the proposed rule. We also indicated that we would accept public comments on all aspects of

the 2019 rule, including whether any of those provisions should be rescinded in their entirety (restoring the prior regulatory provisions) or revised in a different way.

During the public comment period, we held a series of six informational sessions to provide interested Federal agencies, Tribes, States, nongovernmental organizations, and industry groups an overview of the proposed rule. More than 500 attendees participated in these informational sessions, and we addressed questions from the participants during the sessions. We received and considered several requests for an extension of the 60-day public comment period; however, we decided not to grant these requests because we concluded that 60 days was sufficient to afford the public a meaningful opportunity to comment. The majority of the proposed revisions are to portions of the regulations that were previously revised and thus subjected to public review and comment in 2019, and we had also publicly announced in a press release our intention to revise these regulations in June of 2021.

More than 95,000 comment submissions representing more than 163,000 individual commenters were received by the close of the comment period on August 21, 2023. Comments were received from a range of interested parties, including individual members of the public, States, Tribes, industry organizations, legal foundations and firms, and environmental organizations. The majority of commenters requested that the 2019 rule be rescinded in full. Among the submissions we received were multiple letters from organizations signed by thousands of individuals expressing general opposition to the proposed rule because we had not proposed to rescind or revise some provisions of the 2019 rule. Many of the individual comments we received were non-substantive in nature, expressing either general support for, or opposition to, the proposed rule with no supporting information or analysis, but we also received many detailed substantive comments expressing support for, or opposition to, specific portions of the proposed rule. We reviewed and considered all public comments prior to developing this final rule.

Below, we summarize and provide responses to the substantive public comments, and we indicate where we made revisions to the proposed regulations in response to those comments. Similar comments are combined where appropriate. We did not consider, and did not include below, comments that are not relevant to, or that are beyond the scope of, this particular rulemaking or the 2019 rule.

Comments on the Presentation of Economic or Other Impacts

Comment 1: Many commenters expressed support for reinserting “without reference to possible economic or other impacts” into the regulatory text, stating that it was most consistent with the plain language of the ESA and would further the science-based conservation purposes of the ESA. Several commenters stated that the 2019 regulations violated congressional intent with respect to the ESA and inappropriately injected economic considerations into listing decisions.

Response: The Services appreciate the support for reinstating “without reference to possible economic or other impacts” into the regulatory text related to listing determinations and agree that it is consistent with the Act and congressional intent regarding section 4(b)(1)(A) of the Act. The Act states that determinations under section 4(a)(1) are to be made solely on the basis of the best scientific and commercial data available. Congress added this requirement through amendments to the Act in 1982 (Pub. L. 97–304, October 13, 1982). The legislative history for the 1982 amendments describes the purposes of the amendments using the following language (emphases added): “to ensure that [listing and delisting] decisions ... are based *solely* upon biological criteria,” Conf. Rep. (H.R.) No. 97–835 (1982) (“Conf. Rep.”), at 19; “to prevent non-biological considerations from affecting [listing and delisting] decisions,” *id.*; and “economic considerations *have no relevance to* [listing and delisting] determinations,” *id.* at 20. See also Rep. 97–657 (H.R. Rep. No. 567, 97th Cong., 2nd Sess. 1982, 1982 United States

Code Congressional and Administrative News (U.S.C.C.A.N.). 2807, 2819, 1982 WL 25083, *20).

We find the removal of this language from the regulatory text created the impression, and possibly even expectation, that the Services would compile information regarding the economic impacts of classification determinations, and it created concerns that the Services would inappropriately consider such information when making classification determinations (e.g., “Science Loses Ground to Economics with New Endangered Species Act Rules,” (McGlashen 2019); “Biodiversity on the Brink: The Consequences of a Weakened Endangered Species Act,” (Bleau 2020)). For example, during the comment period for the California spotted owl proposed listing rule (88 FR 11600; February 23, 2023), we received a comment (FWS-R8-ES-2022-0166-0052) asking the FWS to “do their due diligence” and conduct “a comprehensive economic analysis that includes evaluation of impacts” on various stakeholders and activities and stating: “FWS must refrain from issuing a final decision on whether or not to approve the proposed listing for Spotted Owls until after a comprehensive economic analysis has been completed, and the public has had an opportunity to review said analysis and submit comments on it.” As it was never our intention to take such information into account when making classification decisions, and doing so would clearly run afoul of the Act, we find that reinstating this regulatory text should help dispel these misperceptions and concerns.

Comment 2: A commenter noted that economic impact analyses are already addressed through other means such as through project planning and National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) compliance for specific projects and should not be included in the listing process.

Response: The Services agree that economic impact analyses for specific projects can be addressed through other means and should not be conducted for listing, delisting, and reclassification decisions, consistent with the clear intent of the Act.

Comment 3: Several commenters stated that the Services are not precluded from compiling data and referring to the economic impact of a listing determination as long as that information is not used in the listing determination. A number of commenters stated that compiling this information and making it available to the public, local and State governments, and stakeholders at the time of listing a species would improve transparency, would allow decision-makers to make better informed choices concerning activities that may affect the species, and may spur voluntary conservation actions. One commenter stated that if the Services restored this language to the regulation, it would prevent them from making decisions that are least cost to small entities.

Response: As we explained in the proposed rule and discuss above in response to *Comment 1*, the removal of this phrase from the regulations in 2019, as well as certain statements made by the Services in the preamble accompanying its proposed removal (see 83 FR 35193 at 35194–95, July 25, 2018), caused confusion regarding the Services’ intentions with respect to the collection, presentation, and consideration of economic impact information stemming from the classification of species. In some instances, and as implied by these comments, removal of this language even created the expectation that the Services should consider economic impacts of a listing decision in an effort to minimize the economic impacts of species’ listings. However, the Services never intended, as a matter of general or routine practice, to compile, analyze, or present information pertaining to the economic impacts of species classification, and doing so could lead to needless and time-consuming litigation to determine whether any economic impact considerations were improperly taken into account. Restoring the language “without reference to possible economic or other impacts” will help eliminate these

public expectations and better reflects both the statutory requirements of section 4(b)(1) of the Act and the Services' actual practice.

Comment 4: Some commenters stated that the Services should be compelled to compile data on the economic impact of listing species because all ESA regulatory programs, including listing decisions, must consider economic impacts. One commenter stated the Services should also consider impacts to the human environment in addition to economic impacts. One commenter stated that the Services lack clear authority to omit disclosure of economic impacts from listings.

Response: Congress amended the ESA in 1982 to ensure that listing determinations are based solely on the best scientific and commercial data available. The Act is clear that the Services cannot consider economic impacts when making listing decisions. Likewise, the Act does not permit the Services to consider impacts to the human environment when making listing decisions. The regulation we are finalizing, which is explicitly linked to making listing, reclassification, and delisting determinations under the Act, simply reiterates these existing legal requirements. With respect to the comment that the Services must disclose economic impacts of listing decisions, the Act is clear that listing decisions must be based solely on the best scientific and commercial data available and any impacts that may stem from the classification decision are not to be considered in making the determination. When proposing and finalizing rules to list, reclassify, or delist species, the Services are only required to disclose the data upon which the species classification decision is based (see 16 U.S.C. 1533(b)(8)). The 2019 rule premised the removal of the phrase, in part, on our inherent authority to administer our programs in the interest of public transparency (84 FR 45020 at 45025, August 27, 2019), rather than a specific grant of statutory authority. This goal of transparency was poorly served, however, because we created the problematic impression that the Services would begin to compile information regarding the economic impacts of classification

determinations and, further, that the Services might take such information into account directly or indirectly when making classification determinations, which would run afoul of the Act's mandate.

Comment 5: Several commenters suggested the Services could consider economic impacts when making listing determinations. One commenter stated the Services could refrain from listing a species if they determine that because of the economic impact of listing the species, they could leverage more conservation resources from other parties by not listing the species.

Response: The Act requires the Services to make listing determinations solely on the basis of the best scientific and commercial data available. We are not permitted to consider the economic impact of listing a species when making a species classification determination. If, following an assessment of a species' status, a species meets the Act's definition of an endangered species or a threatened species based on the best scientific and commercial data available, the Services are required to list that species regardless of economic impact.

Comment 6: Some commenters stated that the Services had not adequately explained why we reversed our view that the ESA permits us to compile and share economic data about listing decisions. They disagreed that the legislative history cited in our proposed rule supports the Services' rationale. Some commenters stated that we had misinterpreted congressional intent, while others cautioned the Services not to rely too much on legislative history, arguing that if Congress sought to exclude consideration of economic data or other impacts from listing decisions, it could have done so through statutory language.

Response: When we removed this phrase from the regulations in 2019, we stated that it was not necessary because neither the Act nor the legislative history indicates that Congress intended to completely prohibit the Services from compiling economic

information about potential listings, and because there may be circumstances in which referencing economic or other impacts would be informative to the public. We also made clear that we could not consider economic or other impacts in making listing determinations because the Act prohibits it. Based on our subsequent review of the 2019 rule and our experiences implementing it, the language of the Act, and the legislative history, we find that this change created the problematic impression that the Services would begin to compile information regarding the economic impacts of classification determinations and that the Services might take such information into account directly or indirectly when making classification determinations, which would clearly run afoul of the Act's mandate. When evaluating a species' classification status, the Services cannot take into account potential economic impacts that could stem from the classification decision.

As we describe above in response to *Comment 1*, the Act states that determinations under section 4(a)(1) are to be made solely on the basis of the best scientific and commercial data available. Congress added this requirement through amendments to the Act in 1982 (Pub. L. 97-304, October 13, 1982). The legislative history for the 1982 amendments describes the purposes of the amendments using the following language (emphases added): “to ensure that [listing and delisting] decisions ... are based *solely* upon biological criteria,” Conf. Rep., at 19; “to prevent non-biological considerations from affecting [listing and delisting] decisions,” *id.*; and “economic considerations *have no relevance to* [listing and delisting] determinations,” *id.* at 20. The legislative history for the 1982 amendments is equally clear that use of the term “commercial data” was to “allow the use of trade data” for purposes of evaluating threats to species and that “retention of the word ‘commercial’ is not intended, in any way, to authorize the use of economic considerations in the process of listing a species” (See

H.R. Rep. No. 567 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2820, 1982 WL 25083, *20).

As we explained in the June 22, 2023, proposed rule, the removal of this phrase from the regulations, as well as certain statements made by the Services in the preamble accompanying its removal (see 83 FR 35193 at 35194–95, July 25, 2018), caused confusion regarding the Services’ intentions with respect to the collection, presentation, and consideration of economic impact information stemming from the classification of species. The Services never intended, as a matter of general or routine practice, to compile, analyze, or present information pertaining to the economic impacts of species classification. However, as a result of removing this phrase, some stakeholders expected us to do just that and provided comments to that end. Restoring this phrase to the regulations addresses this confusion and removes this expectation.

Comment 7: Some commenters stated the proposed regulatory text was contrary to law because “commercial data” in the requirement to list species based solely on the best scientific and commercial data available includes economic impacts and the reference to it in the ESA allows flexibility for the Services to account for data that could be considered “economic” in nature.

Response: As indicated above, the legislative history of the Act is clear that the phrase “commercial data” is “not intended, in any way, to authorize the use of economic considerations in the process of listing a species” (H.R. Rep. No. 97–567 (1982), reprinted in 1982 U.S.C.C.A.N. 2807, 2820, 1982 WL 25083, *20. The determination of whether a species should be listed as endangered or threatened must be based on several factors that relate to the species and the threats to its continued existence, but do not include a consideration of the economic effects stemming from the listing, reclassification, or delisting of the species. While the origins of threats to a species may be caused by development or other economic activities, classification determinations are

expressly to be made “solely on the basis of the best scientific and commercial data available” regarding the threats and the species’ response to the threats. The word “solely” was added in the 1982 amendments to the Act to clarify that the determination of endangered or threatened status was intended to be made without reference to economic impacts of listing the species. The House committee report (*Id.* at 19–20) elaborated on this point and also stated that “commercial data” refers to trade data:

The principal purpose of the amendments to [s]ection 4 is to ensure that decisions pertaining to the listing and delisting of species are based solely upon biological criteria and to prevent non-biological considerations from affecting such decisions. To accomplish this and other purposes, [s]ection 4(a) is amended in several instances

Section 4(b) of the Act is amended in several instances by [s]ection 1(a)(2) of H.R. 6133. First, the legislation requires that the Secretary base [her] determinations regarding the listing or delisting of species “solely” on the basis of the best scientific and commercial data available to [her]. The addition of the word “solely” is intended to remove from the process of the listing or delisting of species any factor not related to the biological status of the species. The Committee strongly believes that economic considerations have no relevance to determinations regarding the status of species

The Committee did not change this information standard because of its interpretation of the word “commercial” to allow the use of trade data. Retention of the word “commercial” is not intended, in any way, to authorize the use of economic considerations in the process of listing a species.

The 1982 Conference Report (Conference Report, for Endangered Species Act Amendments of 1982, H.R. No. 97–835, at 19–20 (September 17, 1982)) also underscored the point that the Services must not consider economic information when making classification decisions:

The principal purpose of these amendments is to ensure that decisions in every phase of the process pertaining to the listing and delisting of species are based solely upon biological criteria and to prevent non-biological considerations from affecting such decisions

[E]conomic considerations have no relevance to determinations regarding the status of species

Comment 8: One commenter stated Congress’s intent that economic information be compiled at the time of listing is reflected in the ESA’s directives that the Services

consider “economic impact[s]” in establishing critical habitat designations and because the Services are required to designate critical habitat concurrently with listing decisions, we could disclose to the public and potential conservation partners the economic information that is already in the Services’ possession or readily available to them.

Response: Section 4(b)(2) of the Act requires that, in the course of designating critical habitat, the Services must consider the economic and other relevant impacts of designating any particular area as critical habitat. Section 4(b)(1) does not permit the Services to consider economic or other impacts when making a listing determination. The fact that the Services are required to designate critical habitat concurrently with listing a species as endangered or threatened does not mean that Congress intended the Services to compile economic information regarding the impacts of listing a species. In fact, and as discussed above, Congress amended the Act in 1982 to make clear that the Services are to make listing decisions solely on the basis of the best scientific and commercial data available. The Services limit the analysis of the potential economic impact of a critical habitat designation to estimating the economic impacts that could stem from the designation alone, even when the designation is proposed and finalized at the same time as listing. Reinstating the phrase “without reference to possible economic or other impacts of such determination” in § 424.11(b) clarifies the Services’ longstanding practice and does not preclude the Services from continuing to analyze and present the economic impacts associated with the designation of critical habitat even when the designation is completed concurrently with a species’ listing. The reinstated language at § 424.11(b) applies specifically to listing, delisting, and reclassification decisions, as indicated in the regulation, and thus does not prohibit the Services from conducting and presenting economic analyses for other types of rulemakings or actions under the Act, where appropriate.

Comment 9: Several commenters stated that the ESA already prohibits consideration of economic or other impacts when making a listing determination and suggested that adding this language back into the regulations could prevent the disclosure of information needed for the designation of critical habitat.

Response: The Services consider the economic impact of designating an area as critical habitat before an area is designated pursuant to section 4(b)(2) of the Act. The economic impact analysis is made available to the public for review and comment with the proposed rule to designate critical habitat. The reinstatement of the regulatory text preventing the Services from considering economic or other impacts when making listing determinations will have no effect on the compilation or disclosure of information needed for the designation of critical habitat.

Comment 10: One commenter suggested the regulatory text be revised to state: “The Services are not required to compile economic data, and listing determinations will be made without regard to economic impacts.”

Response: The Services decline to make this suggested change. The Act is clear that the Services are not required to compile economic data when making listing determinations, and the addition of such text is unnecessary. In addition, the suggested text could be potentially confusing to the public because it differs from the text that was in the regulations from 1984 until 2019 and could create the impression that we would compile economic information when making listing determinations.

Comment 11: A commenter suggested the Services should define “other” in the proposed regulatory text.

Response: The Services decline to define “other” in the phrase “economic or other impacts.” “Other” in this phrase refers to any impact stemming from the listing determination other than economic impacts. As described in this rulemaking, the Services must make listing, delisting, and reclassification determinations based solely on the best

scientific and commercial data available and cannot take into consideration economic or any other impacts stemming from the listing, reclassification, or delisting of a species when making species classification decisions.

Comments on the Foreseeable Future

Comment 12: Commenters expressed general support for the proposed revisions, stating that maintaining a regulatory framework to determine the “foreseeable future” is important to ensure consistency and transparency. Additionally, commenters stated that the “reliable” standard is appropriate for determining the extent of the foreseeable future, but that more guidance would be needed because the term is subjective and has been applied in different ways since the 2009 M-Opinion was released. Other commenters stated that the Services should rescind the 2019 foreseeable future regulation rather than revise it, and they asserted that the proposed revisions to the regulatory language are confusing and inconsistent with the M-Opinion and the Act.

Response: After review of the foreseeable future regulation and consideration of public comments received, the Services have determined that including it in the regulations is preferred because it codifies some of the key elements of our longstanding interpretation of this term as guided by the M-Opinion and creates binding standards that both Services will apply. The changes we finalize in this rule will help to ensure a consistent interpretation and application of the term “foreseeable future” within the context of status reviews and listing decisions. Our use of the phrase in the second sentence, “make reasonably reliable predictions,” tracks closely with the text on page 13 of the M-Opinion, which the Services have relied on since 2009. As both the M-Opinion and the foreseeable future regulation indicate, we will describe the foreseeable future on a case-by-case basis. We recognize that there will continue to be some subjectivity assessing what is foreseeable, but each listing determination or rule will have to support that the “reasonably reliable” standard has been met. At this time, we do not find that, in

addition to the regulation and the M-Opinion, additional guidance on how to interpret the foreseeable future is necessary.

Comment 13: Commenters stated that the Services should ensure that the regulation for determining foreseeable-future timeframes and the subsequent application of that framework are not artificially shortened, particularly when considering listing of long-lived species.

Response: The Services evaluate the extent of the foreseeable future on a case-by-case basis for each species when we assess its classification status and must rely on the best scientific and commercial data available when completing these assessments. As described in the preamble to this final rule, the foreseeable-future timeframe is limited by our ability to make reasonably reliable predictions about threats and the species' responses to the threats. We note that the framework we codify in these regulations reflects and tracks with guidance provided in the M-Opinion. The M-Opinion states that the analysis of what constitutes the foreseeable future for a particular listing determination must be rooted in the best available data that allow predictions into the future, and the foreseeable future extends only so far as those predictions are reliable. For example, to be reliable, predictions and the data on which they rely need not be certain; rather, they must be "sufficient to provide a reasonable degree of confidence in the prediction" (M-Opinion, at 13). In addition, as stated in the M-Opinion, "when the point is reached that the conclusions concerning the trends or the impacts of a particular threat are based on speculation, rather than reliable prediction, those impacts are not within the foreseeable future" (M-Opinion, at 14). Therefore, just as the Services cannot speculate beyond when we can make reliable predictions, we cannot arbitrarily limit the extent of the foreseeable future. The regulatory framework we finalize today addresses these inherent limitations by reference to our ability to make reasonably reliable predictions.

Comment 14: Commenters stated that there was not an adequate justification for

proposing to revise the foreseeable future framework and noted that the proposed rule did not present examples of confusion or inconsistencies between the M-Opinion and the current regulation.

Response: Our proposed rule provided a clear and sufficient justification for proposing changes to the foreseeable future regulation (88 FR 40764 at 40766–40767, June 22, 2023). As we explained in the proposed rule, the language in the 2019 regulation created confusion regarding the way in which the Services interpret and implement the term “foreseeable future.” We discussed how the second sentence in the “foreseeable future” paragraph that we had added to the regulations in 2019 (i.e., “reasonably determine that both the future threats and the species’ responses to those threats are likely”) created confusion because it seemed to suggest the Services were adopting a novel requirement to conduct an independent analysis of the status of the species rather than simply articulating how we determine the appropriate timeframe over which to conduct that analysis. The statutory reference to the “foreseeable future” sets the time period within which to make the substantive determination about the status of the species (i.e., whether the species is likely to become an endangered species, within the foreseeable future, 16 U.S.C. 1532(20)). The Services must then determine whether a species is “likely to become an endangered species” within this timeframe. Confusion with respect to this regulation was evident, as some comments on the 2019 rule expressed concern that the Services would be using a more-stringent standard to determine whether a species was threatened or would be demanding a level of scientific certainty that we had not previously required (see 84 FR 45020 at 45028, August 27, 2019). Other comments on the June 22, 2023, proposed rule stated that we were doing something different from the M-Opinion. We never intended for the regulations to create a different standard from the one explained in the M-Opinion. We reconsidered those points, including our responses to those comments in 2019, in accordance with E.O. 13990. We

determined it would be better to eliminate this confusion proactively now and revise the regulatory provision so that it aligns more closely with the M-Opinion rather than taking a “wait-and-see” approach to determine whether these identified issues with the 2019 rule would manifest in specific listing determinations.

Comment 15: Commenters that expressed support for a regulation interpreting the “foreseeable future” suggested that the Services revise the proposed rule language and offered general concepts and/or specific language. Some commenters stated that the Services should use a specific time period of no longer than 12 to 18 years; others recommended that we use “commonly accepted timeframes,” and still others recommended the inclusion of a clear endpoint of the foreseeable future. Some commenters suggested that the Services provide more rigid bounds to the extent of the foreseeable future so that greater consistency could be achieved. Other commenters suggested that we apply timeframes only as far as the five factors in the Act, along with the species’ responses to those factors, can be reliably predicted.

Response: As stated above, after reviewing the 2019 regulations setting out the foreseeable future framework and considering the public comments on our proposed revisions to those regulations, we have elected to retain the regulation with the revisions described above. We are declining to use a predetermined number of years or period of time (e.g., seven generations as suggested by a commenter) as a universally applied “foreseeable future” for all listings because picking a predetermined number of years would be arbitrary and could preclude the Services from relying on the best scientific and commercial data available. Although some threats might manifest according to certain consistent timeframes, the species’ likely responses to those stressors are uniquely related to the particular plant or animal’s characteristics, status, trends, habitats, and other operative threats. Furthermore, when multiple threats affect a particular species, these threats may have synergistic effects that are also unique to that particular species.

Therefore, we decline to adopt any one particular timeframe to be applied universally to all species in lieu of a regulation that describes how we will identify the foreseeable future timeframe for each species. In addition, consistent implementation of the regulation does not mean that the extent of the foreseeable future will automatically be the same number of years into the future or that it will necessarily be the same for each threat to a particular species. To the extent possible, we will continue to provide information in all listing decisions regarding the particular timeframes used when evaluating threats and a species' risk of extinction in the foreseeable future. Providing such information facilitates the public's ability to evaluate the reasonableness of the Services' listing decisions.

Comment 16: Some commenters recommended rescinding the foreseeable future regulation and using the M-Opinion alone. Those who supported this position stated that the M-Opinion is sufficient for interpreting and applying the foreseeable future. Other commenters disagreed that relying on the M-Opinion alone is sufficient without additional guidance. They further stated that they opposed the use of the M-Opinion alone because it did not go through public notice and comment and as a result it is non-binding.

Response: As stated above, after our review of the 2019 regulations setting out the foreseeable future framework, as well as the public comments on the June 22, 2023, proposed rule, we have elected to retain the "foreseeable future" regulation with the further revisions described above. The approach we codify in regulation largely reflects the reasoning in the M-Opinion, which does not have the force of law. Therefore, we conclude that it is preferable to codify language in the regulations that more closely reflects the interpretation of the ESA provided in the M-Opinion, which has guided the Services since 2009. Regulations are also subject to a rigorous review process, and the public provided numerous substantial comments on the proposed revisions that helped to

inform our conclusion that retaining a regulation regarding the foreseeable future was ultimately a better solution to our concerns about the existing text than rescission. The M-Opinion will continue to be a helpful resource to both Services' staff and the public and can be read without the risk of conflicting with our regulatory text.

Comment 17: Some commenters were unsupportive of the proposed revision to the second sentence of the foreseeable future regulation; in particular, they disagreed with the phrase in the second sentence (i.e., “reasonably rely”), stating that the phrase is vague, confusing, and should be revised to be clearer.

Response: As stated above, after our review of the 2019 regulations setting out the foreseeable future framework, as well as the public comments on the June 22, 2023, proposed revisions to those regulations, we have revised the second sentence of the framework to specifically align the text to the M-Opinion as described above. The bulk of the comments received stated that the M-Opinion was understandable, clear, and conveyed a logical description of the limit of the foreseeable future. The changes we codify track the language in the M-Opinion and will provide a transparent and logical framework that the Services will use when making classification decisions. Responses to additional comments below provide further discussion on this aspect of the revisions to the foreseeable future regulation.

Comment 18: Some commenters favored keeping the current regulatory text for 50 CFR 424.11(d) and specifically stated that they opposed removing the word “likely” (in the phrase “...both the future threats and the species' responses to those threats are likely”) because, they asserted, foreseeability is limited to what is likely or must be tied to what is likely. Other commenters supported removal of “likely” because it would interfere with the Services' use of the best scientific data available.

Response: As explained in the proposed rule, we found that the use of “likely” in the 2019 regulations created confusion and seemed to suggest the Services were adopting

a novel requirement to conduct an independent analysis of the status of the species, rather than simply articulating how we determine the appropriate timeframe over which to conduct that analysis. (See also our responses to *Comments 12* and *15*). We agree that, to determine that a species meets the definition of a “threatened species,” we must provide a rational explanation of why the particular species is “*likely* to become an endangered species in the foreseeable future.” In addition, when determining how far into the future is foreseeable for purposes of determining whether a species is threatened, we are required to rely on the best available scientific information and to provide a rational basis for looking out to that point in the future. The comments on the proposed rule have confirmed the importance of removing the word “likely” because commenters clearly inferred that use of that word was intended to create a separate or higher bar for listing decisions. Under the revisions we are now finalizing, the Services will follow longstanding practice and continue to apply the guidance set out in the M-Opinion, and thereby avoid speculation and ensure that the data, information, analysis, and conclusions we rely upon are rationally articulated and fully supported. We find that removing the term “likely” revises the regulations in a way that better aligns with the interpretation of the ESA provided in the M-Opinion, continues our longstanding practice, and will result in consistent application of the process we apply to determine what constitutes the foreseeable future. The ultimate conclusion of whether a species meets the Act’s definition of a threatened species will still depend on whether it is likely to become an endangered species within that timeframe.

Comment 19: Some commenters expressed concern that the proposed changes would allow the use of inaccurate and biased models and treatment of them as factual and would result in overall inconsistency in determining the foreseeable future. They stated that we should not base decisions on speculation or use computer models based on

“suspicions” of what the future might look like in hundreds of years, and they further stated that endpoints of models should not define the extent of the foreseeable future.

Response: We agree that we are not permitted to speculate or rely on inaccurate models or limitless timeframes, as suggested by some commenters. Regardless of the regulatory text, the Services are required to base classification decisions solely on the best scientific and commercial data available. Because evaluating a species’ status is fact-specific, a case-by-case analysis is required, and we must base our decisions on predictions about the threats and the species’ responses to those threats that are reasonable and supported by the best scientific and commercial data available. As described in the M-Opinion, we look not only at the foreseeability of threats, but also at the foreseeability of the impact of the threats on the species. In some cases, foreseeable threats will manifest themselves immediately; in other cases, it may be multiple generations before the manifestation of the threats occurs. In each case, the Secretary must be able to make reasonably reliable predictions about the future. The further into the future that an assessment of threats or species’ responses progresses, the greater the burden with respect to explaining how the future remains foreseeable for the period being assessed.

We agree with what the M-Opinion states on this point:

[T]he analysis of what constitutes the foreseeable future for a particular listing determination must be rooted in the best available data that allow predictions into the future, and the foreseeable future extends only so far as those predictions are reliable. “Reliable” does not mean “certain”; it means sufficient to provide a reasonable degree of confidence in the prediction, in light of the conservation purposes of the Act. (M-37021 at 13).

Comment 20: Some commenters opposed removing the phrase “reasonably determine” (in the phrase “The term foreseeable future extends only so far into the future

as the Services can reasonably determine that ...”) because, they argued, the phrase ensures the foreseeable future is not based on vague or speculative information and does not lead to a limitless foreseeable future. Some commenters stated that this proposed revision seems to fully adopt the precautionary principle when deciding to list, which the ESA does not allow.

Response: We have concluded that replacing the proposed phrase “reasonably rely on information” with the phrase “make reasonably reliable predictions” better aligns the second sentence of the regulation with the language of the statute as explained by the M-Opinion and reflected in the Services’ longstanding practice. As explained above and in more detail in the M-Opinion, the statutory language does not permit the Services to base our determinations of the foreseeable future on vague or speculative information and does not lead to a limitless foreseeable future. In implementing this regulation, we will review the degree of certainty and foreseeability concerning each of the threats to the species and the species’ responses to those threats. The foreseeable future must be based on the best scientific and commercial data available, and none of the changes finalized here adopt a precautionary approach to listing determinations.

Comment 21: Commenters expressed concern that the proposed regulatory text, if made final, would provide no regulatory certainty, result in limitless foreseeable future timeframes, and lower the “bar” on listing species, leading to an increase in species listings.

Response: The Services do not agree that the revised regulatory language will lower the “bar” on, or standards for, listing decisions or result in limitless foreseeable futures. As discussed above, the revisions we are finalizing today are consistent with the reasoning in the M-Opinion. Therefore, we are revising the regulation to better align with the interpretation of the statute provided in the M-Opinion that the foreseeable future be based on our ability to make reasonably reliable predictions about the threats and species’

responses to those threats.

Comment 22: Commenters questioned the use of the phrase “reasonably rely” in the proposed rule language and asked whether the standard for the foreseeable future should instead be how far into the future the “best scientific and commercial data available” goes, based on section 4(b)(1)(A) of the Act.

Response: The commenters are correct that the Services are required to make decisions about species’ classification status on the basis of the best scientific and commercial data available. Our implementing regulations at 50 CFR 424.11(c) also restate this requirement and apply it to determinations of the foreseeable future. However, even for analyses or predictions that are based on the best scientific and commercial data, determining the status of any species at some point in the future is inherently challenging because we cannot predict the future with precise certainty. Therefore, we have revised the second sentence of the regulation to include the phrase “make reasonably reliable predictions” to indicate how far into the future predictions based on the best scientific and commercial data available can extend. The phrase “reasonably reliable predictions” is also consistent with generally applicable administrative law principles that we provide a rational basis for our decision.

Comments on Delisting

Comment 23: Some commenters stated that they support the proposed delisting regulation because it addresses the concern that, under the 2019 regulation, the Services would delist species prematurely. Numerous other commenters, however, requested that we instead rescind the 2019 delisting regulation and reinstate the regulation that had been in place prior to 2019, which the commenters asserted was clearer, better emphasized the goal of recovery, and better ensured a science-based delisting process. Some commenters specifically requested that we provide additional direction for assessing extinction or restore the waiting-period requirement for declaring species extinct, because extinction is

not otherwise explained or defined, nor can it be assessed by the Act's section 4(a)(1) factors. Some commenters specifically requested we reinstate the previous regulatory language indicating delisting may be warranted when the original data were in error to ensure such decisions are based on scientific data and not intervening statutory or regulatory changes.

Response: In response to these and other related comments, we have made several changes to the proposed regulation at 50 CFR 424.11(e) to include certain aspects of the regulations that had been in place prior to 2019. For instance, we rephrase two of the listed circumstances to provide more context, which indicate those circumstances are limited to cases in which new data demonstrate the original listing is not accurate. We also rephrase the text to explicitly indicate that delisting is contingent upon whether the best scientific and commercial data substantiate that the species meets one of the identified circumstances. We make these changes because we recognize that in our efforts to simplify and streamline the delisting regulation in 2019, we removed the explanatory context necessary to understand the intent and meaning of specific provisions, and the 2023 proposed rule included too few changes to adequately address that concern and clarify the regulation. We find that this final rule strikes the appropriate balance of being simple and straightforward while also clearly describing the various circumstances for delisting species and more firmly establishing that delisting decisions are science-based decisions.

We do not, however, find it necessary or helpful to include additional regulatory direction or guidance on how to assess extinction. Determinations and assessments to establish whether a species is extinct are inherently fact- and case-specific, and we do not agree that the regulations should establish universally applicable guidance beyond the existing requirement to base our conclusions on the best scientific and commercial data available. We, therefore, find that some of the streamlining of this regulation achieved

through the 2019 rule, such as the removal of ambiguous phrasing (e.g., “a sufficient period of time must be allowed”), is still appropriate. The wording of the regulation finalized in this rule does not undermine the requirement to substantiate the extinction of a species prior to delisting it. Each rulemaking to remove a species from the official Lists must provide the scientific basis for the delisting and must be subject to public review and comment, whether the delisting is due to extinction, recovery, or a change in our understanding of the species due to the availability of new information.

Comment 24: A commenter recommended we delete § 424.11(e) of the regulations because it is unnecessary and the Services should instead rely on section 4(c) of the ESA, which provides the criteria for delisting.

Response: We decline to remove § 424.11(e) of the implementing regulations, because it provides a useful and transparent interpretation of the statutory basis for delisting and identifies the possible circumstances in which a species may be delisted. While section 4(c) of the Act does indicate the basis for review and revision of the Lists of Endangered and Threatened Wildlife and Plants, it does not identify or describe the various circumstances in which delisting may be appropriate. For example, it does not acknowledge extinction as a basis for delisting, nor does it account for the fact that there are instances when new information may become available that alters the original basis for listing, whether it be new information about the species’ status or its taxonomy.

Comment 25: Multiple commenters were opposed to the proposed changes to the delisting regulations, and some of these commenters requested that we withdraw the proposed rule. Other commenters noted that if the proposed changes are finalized, the Services should provide a detailed explanation of the factors that will be considered in delisting decisions and include a straightforward process by which recovered species may be expeditiously delisted.

Response: As noted previously and as discussed further in responses to related comments below, we have made several revisions to the proposed delisting regulation. Some of these revisions were made in response to comments stating that aspects of the regulation were confusing, vague, or ambiguous. We find the final delisting regulation is clear with respect to the basis, standards, and circumstances for delisting species. There are no other factors outside of those indicated in this regulation that can or could provide a basis for delisting pursuant to the Act. Straightforward requirements and procedures for proposed and final rules are also already provided at 50 CFR 424.16 and 424.18, and we find no purpose or basis for adding separate or different requirements for delisting rules.

Comment 26: Some commenters asserted that the proposed changes to the delisting regulation were not adequately justified in the proposed rule. The commenters stated that the Services' rationale that these changes are intended as clarifications and to eliminate potential confusion is not credible because the proposed changes are not limited to clarifications, and because the Services did not provide evidence of any confusion stemming from the 2019 rule.

Response: We disagree and find that the proposed rule provided adequate justification for the several changes proposed to the delisting regulations at 50 CFR 424.11(e). For example, in the proposed rule, we stated that some changes were intended to remove the potential for confusion or concerns that the Services can or will take immediate action to delist a species upon completion of a status review without following notice-and-comment rulemaking procedures or that the outcome of such a rulemaking is predetermined in any way (see 88 FR 40764 at 40767, June 22, 2023). Indications of such confusion and concerns can be found in comments we received and discussed in the 2019 rule (e.g., "the revised 424.11(e) creates an expedited delisting process," 84 FR 45020 at 45038, August 27, 2019), as well as in comments on the recent 2023 proposed rule and discussed herein (see comment summaries below). Thus, there is adequate indication of

confusion regarding the text and implications of this regulation, and our decision to finalize additional revisions to this regulation to further reduce or eliminate any confusion with respect to the when and how of delisting actions is well-justified. We determined it would be better to address this confusion proactively and in an effort to be consistent with E.O. 13990's policy of improving protections to the environment rather than taking a "wait-and-see" approach to determine whether these identified issues with the 2019 rule would manifest in specific delisting determinations.

In the proposed rule, we also explained that removal of the reference to recovery in the delisting regulations was the focus of many public comments and that commenters expressed concerns that the Services would delist species before they were recovered (see 88 FR 40764 at 40767, June 22, 2023). In the proposed rule, we also indicated that, upon review and reconsideration of the 2019 rule, we now find that it is appropriate and preferable to include "recovered" in the delisting regulations as an express, important example of when a species should be delisted. This revision made in this final rule is intended to more clearly indicate that the Services have no intention of delisting species prematurely and that recovering listed species is no less of a priority. As the agencies charged with implementing the Act, we view this change as an important and appropriate clarification to the delisting regulation.

Comment 27: Multiple commenters objected to the proposed removal and replacement of the phrase "the Secretary shall delist if" with the phrase "it is appropriate to delist if" in the opening sentence of the regulation concerning the delisting process. Many of the commenters opposing this change stated it would remove the directive for the Services to take immediate action to delist species when the specified criteria are met. Some commenters expressed concerns that this proposed rewording would be interpreted as making delisting discretionary or optional, or that it could delay, or allow for purposeful delay of, delisting actions. Commenters stated that delisting is mandatory,

because the ESA requires that we delist species when they no longer meet the criteria for listing or when they become extinct; therefore, implying that delisting is discretionary is contrary to the ESA. Other commenters asserted that this change was vague or would create more confusion regarding the process for delisting. Commenters noted that delisting must be treated as a priority and that delisting species in a timely fashion reduces the regulatory burden on the public and helps to better demonstrate the success of the ESA.

Response: As we discussed in the proposed rule, the intention of this particular proposed change was to remove the potential for confusion or concerns that, by inserting the phrase “the Secretary shall delist if” into this regulation in 2019, the Services would or could take immediate action to delist a species without following notice-and-comment rulemaking procedures, or that the outcome of such a rulemaking was predetermined. However, based on these and other comments, the text finalized in this rule replaces the phrase “it is appropriate to delist a species if” with the more direct phrase, “species will be delisted if.” The final text of this regulation better reflects both that the Services have no intention of either purposely delaying delisting actions or circumventing any ESA or Administrative Procedure Act (APA; 5 U.S.C. 551 *et seq.*) requirements. We also note that the Act does not establish strict timelines for removing species from the Lists once a status review is completed. While the Services make every effort to complete delisting rules when supported by the data and evidence, we acknowledge that doing so is contingent upon our available resources. We also note that regardless of how quickly the Services are able to take action to formally remove a species from the list, the Act allows any interested party to petition the Services to do so and thereby compel the Services to take action to consider delisting that species.

Comment 28: Some commenters indicated they oppose removal of the “shall delist” phrase from this regulation because it would make the delisting regulation

inconsistent with the listing and reclassification regulation at paragraph (c) of § 424.11, which states that “a species shall be listed or reclassified if” Other commenters noted that the “shall” phrasing aligns with the language Congress used in section 4 of the ESA. Other commenters supported retaining the “shall” clause or other text that would acknowledge the obligation to delist and also recommended additional revisions to indicate that delisting is not automatic and would still involve a rulemaking process. Several commenters recommended regulatory text that would explicitly instruct the Services to initiate the process to delist, and some commenters also suggested that similar language be included in § 424.11(c) with respect to listing and uplisting (i.e., reclassification from a threatened species to an endangered species).

Response: We have considered these comments and the structure of the listing and reclassification regulations at 50 CFR 424.11(c), and we have modified the text of the delisting regulation in this final rule. Specifically, and as already discussed, we have changed the proposed phrasing to instead state that “species will be delisted if ...,” which matches the structure of the listing and reclassification regulation at 50 CFR 424.11(c). We also note that we have elected to use the verb “will” instead of “shall” to be consistent with the 2011 Federal Plain Language Guidelines at III.a.1.iv. (available online at <https://www.plainlanguage.gov/media/FederalPLGuidelines.pdf>), which recommend against using “shall” due to the term being outdated and imprecise, and the Office of the Federal Register’s Principles of Clear Writing (available online at <https://www.archives.gov/federal-register/write/legal-docs/clear-writing.html>), which suggest the use of “will” to predict future action. These verbs in no way represent or reflect a difference in terms of the required actions that must be undertaken by the Services when listing, reclassifying, or delisting species.

We do not find it necessary or consistent with the Act or 50 CFR 424.11(c) to include additional text to indicate any specific requirements for initiating rulemaking.

Those requirements are already provided in section 4 of the ESA, the APA, and 50 CFR 424.16 and 424.18. For these same reasons, we also decline to revise the implementing regulation at 50 CFR 424.11(c) to include instructions for initiating rulemakings to list and reclassify species.

Comment 29: Multiple commenters expressed support for removing the phrase stating the “Secretary shall delist if” and replacing it with the phrase “it is appropriate to delist if” to avoid implying that delisting is a foregone conclusion without agency discretion or public comment. Some commenters stated that this proposed change appropriately reflects that the delisting process must be based not only on a status review using the best scientific and commercial data available but also on a subsequent notice-and-comment rulemaking, rather than imposing or implying a requirement to delist a species immediately following a status review. Some commenters, however, stated this proposed change did not go far enough and that the regulations should also state that species can only be delisted through the process indicated at 50 CFR 424.16(c). Another commenter requested we rephrase the proposed regulation to state “it is appropriate to consider delisting a species if” to further alleviate concerns that the Services would take immediate action to delist species when one of the listed circumstances is met.

Response: We appreciate the comments in support of the proposed regulation. However, as noted above and in response to other comments we received, we have made several modifications to the regulatory text to more closely align this section of the regulations with the listing and reclassification regulation at 50 CFR 424.11(c), and to more clearly indicate that we will delist species when the best available data substantiate that decision. We find that the wording of the final regulation best reflects the Services’ intention that delistings be neither premature nor purposely delayed. As finalized in this rule, the regulations are clear that removal of a species from the Lists requires a status

review, consideration of the factors listed in section 4(a)(1) of the Act, application of the best available data, and notice-and-comment rulemaking.

Comment 30: Multiple commenters indicated they support the proposed reference to recovery in the delisting regulation because it acknowledges that recovery is a fundamental objective of the ESA and represents an important pathway to delisting. Some commenters indicated they support this proposed change because it encourages the Services to delist species when they have recovered. Some commenters stated that removal of this term from the regulation in 2019 had appeared to circumvent recovery plans or make section 4(f) of the ESA meaningless.

Response: We appreciate these comments in support of inclusion of recovery as a circumstance in which a species should be delisted. We also reiterate that although the delisting regulation does not specifically refer to section 4(f) of Act, the statutory requirement to develop recovery plans pursuant to section 4(f) of the Act remains a priority for the Services; recovery plans will continue to be an important tool for guiding, tracking, and implementing conservation actions. This final regulation explicitly refers to recovery but also makes it clear that the delisting of a species requires a status review of that species, consideration of threats as outlined in section 4(a)(1) of the Act, and scientific and commercial data that substantiate that the species is no longer endangered or threatened.

Comment 31: Some commenters noted they support acknowledging recovery in the delisting regulation but stated the proposed regulation does not sufficiently emphasize recovery as the ultimate goal of the ESA. Some commenters requested that the regulation specifically state that recovery is a primary reason for delisting. Several commenters asserted the Services' goal of acknowledging the importance of recovery is undermined or diminished by the proposed insertion of the term "recovered" into the phrase "or otherwise does not meet the definition of a threatened or endangered species."

Response: We have addressed some of these comments in the final delisting regulation, which includes the modified phrase, “The species has recovered to the point at which it no longer meets the definition of an endangered species or a threatened species.” In contrast to the phrasing in the proposed rule (i.e., “The species is recovered or otherwise does not meet the definition of a threatened or endangered species”), the phrasing of the final regulation appropriately identifies species’ recovery as one of the separate, distinct circumstances in which species should be delisted. We decline to make other revisions requested by these commenters, however, because we do not agree that the implementing regulations are the appropriate place to provide a discussion or characterizations of the goals or purposes of the Act, nor do we find it necessary to do so.

Comment 32: Several commenters described the proposed insertion of “is recovered” in this regulation as vague, ambiguous, or confusing. Commenters requested that we reword the text to be clearer, include a definition of “recovered,” or adopt more-specific regulatory text indicating delisting is warranted after a species has recovered or has met recovery plan objectives. Some commenters stated that linking the regulation to recovery plan criteria would also trigger a delisting action when a recovery plan’s objectives are met and would, therefore, likely lead to significantly more buy-in for advancing recovery plan goals. In contrast, other commenters stated that, although they support acknowledging recovery as a basis for delisting, the Services should add language to explicitly indicate that species do not have to meet the specific criteria set forth in a recovery plan in order to be delisted, as such a requirement is not supported by the ESA, the implementing regulations, or existing case law.

Response: In response to the comments describing the proposed revision as confusing and vague, as well as other comments received on the proposed text, we have modified the text in the final regulation. Specifically, we have rephrased the text to read: “The species has recovered to the point at which it no longer meets the definition of an

endangered species or a threatened species.” We find this statement is clear on its face and further instruction or guidance is not necessary: the terms “endangered species” and “threatened species” are defined in section 3 of the Act, and the standards and requirements the Services must apply when making listing, reclassification, and delisting decisions are set forth in section 4(a) and (b) of the Act.

As we have acknowledged previously and as supported by existing case law, recovery plan criteria are not binding and cannot in all cases serve as a measure by which the Services can judge the status of a listed species (See *Ctr. for Biological Diversity v. Haaland*, 58 F.4th 412, 418 (9th Cir. 2023); *Friends of the Blackwater v. Salazar*, 691 F.3d 428, 432-34 (D.C. Cir. 2012); see also *Ctr. for Biological Diversity v. Bernhardt*, 509 F. Supp. 3d 1256, 1267 (D. Mont. 2020); *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996) (“Section 1533(f) makes it plain that recovery plans are for guidance purposes only.”)). Thus, we do not find it necessary to make any of the other requested changes to indicate that recovery plan criteria must be met, or do not have to be met, to delist a species as a result of its recovery. We also do not find it necessary to insert a definition of “recovered” into this section of the regulations because the term “recovery” is already defined in our joint implementing regulations in 50 CFR 402.02 as “improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.”).

Comment 33: Some commenters indicated their support for the proposed reference to “recovery” but asserted that the Services are missing the opportunity to provide additional requirements that recovery goals be clear, consistent, measurable, and based on the best available science, to ensure that the long-term health and viability of recovered species will be maintained after they are returned to State management. Another commenter stated that recovery plans should be updated periodically to address current conditions and new threats.

Response: We appreciate the commenters' feedback on recovery plans; however, regulatory requirements for recovery plans are outside the scope of this current rulemaking. Therefore, we have not added additional text to this final rule to address the content of recovery plans or the process or frequency with which the Services will update recovery plans. The Services do not have joint implementing regulations addressing section 4(f) of the Act; however, both agencies have developed detailed guidance on recovery planning and implementation. Those documents are available online (see <https://www.fisheries.noaa.gov/resource/document/nmfs-recovery-planning-handbook-version-10>; and <https://www.fws.gov/media/interim-endangered-and-threatened-species-recovery-planning-guidance>). We also note that both Services release draft recovery plans for public review and comment prior to issuing final plans; this provides the public with the opportunity to provide specific input to help ensure plans contain clear, measurable, scientifically sound management actions and criteria.

Comment 34: Multiple commenters stated they opposed the proposed reference to recovery in the delisting regulations. Some of these commenters stated this change was unnecessary because the regulations already sufficiently cover the circumstance of species recovery. A commenter asserted this proposed change is confusing because a species may no longer meet the definition of an endangered or a threatened species yet not be fully recovered, i.e., the species may still require conservation actions to be self-sustaining.

Response: We agree that the delisting regulation, as finalized in 2019, did inherently cover the circumstance of recovery as a basis for delisting; however, and as explained in the proposed rule, removal of the reference to recovery from this regulation in 2019 created concerns that the Services would delist species before they were truly recovered or would no longer prioritize recovery planning or recovery efforts in general. We have no intention to diminish or undermine the critical role that recovery plans play

in guiding, tracking, and facilitating conservation actions. Because recovery (i.e., conservation) of listed species is a principal goal of the Act and a clearly legitimate basis for delisting species, we conclude it is better and clearer to explicitly refer to recovery in our delisting regulation (see also response to *Comment 36*, below).

The Services have defined “recovery” to mean “improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act” (50 CFR 402.02). Under this regulatory definition, which informs how we construe this term under the section 424 regulations, for a species to be considered recovered, it must no longer be an endangered or a threatened species. Thus, we disagree with the comment that the text of the regulation is confusing.

Comment 35: Multiple commenters objected to reinserting “recovery” into the delisting regulations and stated that it adds a factor that is not indicated in section 4(a)(1) of the ESA and adds a new or heightened standard that is inconsistent with the ESA. The commenters noted that the existing regulation is clear and that adding the term “recovery” to the regulations would create confusion regarding the delisting process, which can only be based on the factors and standards outlined in section 4 of the ESA and is not contingent on meeting a separate recovery standard. Commenters stated that because recovery is not a statutorily permissible basis for delisting, “recovery” has no independent meaning in the regulation and is thus purposeless. Some commenters expressed the concern that insertion of this term would result in making recovery plans a requirement for delisting or would lead to the need for the Services to demonstrate that a recovery plan’s criteria have been met to delist a species.

Response: We agree with the commenters that the criteria set forth in a recovery plan do not establish the standards for delisting species; those standards are instead set forth in section 4(a) and (b) of the Act. However, recovering endangered and threatened species is one of the primary goals of the ESA, and a recovered status (i.e., when a

species no longer meets the definition of an endangered or a threatened species) is a valid circumstance in which a species should be delisted. (See H.R. Rep. No. 95–1625, at 5 (1978) (“The primary purpose of the Endangered Species Act of 1973 is to prevent animal and plant species endangerment and extinction caused by man’s influence on ecosystems, and to return the species to the point where they are viable components of their ecosystems.”); *Alaska v. Lubchenco*, 723 F.3d 1043, 1054 (9th Cir. 2013) (“The goal of the ESA is not just to ensure survival, but to ensure that the species recovers to the point it can be delisted.” (citations omitted))). Thus, we find that including recovery as an express example of when delisting is warranted is not only appropriate but entirely consistent with the Act. We, therefore, also find that including the reference to recovery has both purpose and meaning.

This final rule, which has been modified from the proposed rule, is consistent with the Act and existing case law, and in no way requires that recovery plan criteria are satisfied before the species may be delisted (see generally *Friends of the Blackwater v. Salazar*, 691 F.3d 428 (D.C. Cir. 2012); *Ctr. for Biological Diversity v. Bernhardt*, 509 F. Supp. 3d 1256, 1267 (D. Mont. 2020) (“...recovery plans do not bind an agency into any single course of action”); *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996) (“Section 1533(f) makes it plain that recovery plans are for guidance purposes only.”)). The final delisting regulation also very clearly links the concept of recovery to the Act’s definitions of endangered species and threatened species, the section 4(a)(1) factors in the Act, and the requirement to base the status review on the best scientific and commercial data. Thus, this regulation does not create the need for the Services to demonstrate that a recovery plan’s criteria have been met to delist a species.

Comment 36: Some commenters stated that the justification for inserting the term “recovery”—to acknowledge one of the principal goals of the ESA—was erroneous, because Congress did not use the term “recovery” when outlining the purposes of the Act

in section 2 or when defining the terms “conserve, conserving, and conservation” in section 3. Some commenters asserted that the Services were overstating the role of recovery plans in decisions regarding downlisting and delisting and stated they are guidance documents only.

Response: We acknowledge that Congress did not use the term “recovery” in section 2 of the Act when it outlined the goals of this Act, or in section 3 of the Act, where it defined the terms “conserve, conserving, and conservation.” For nearly 40 years, the Services have, however, used a regulatory definition of “recovery” that clearly establishes that this term refers to a condition in which a species has improved, or has been conserved, such that it no longer warrants protection under the Act (see 50 CFR 402.02; 51 FR 19926 at 19958, June 3, 1986). Therefore, we do not find it erroneous to use this term in a manner consistent with its regulatory definition in 50 CFR 402.02 of our joint implementing regulations.

As the delisting regulation in 50 CFR 424.11(e) makes no reference to recovery plans or section 4(f) of the Act, we do not agree that the regulation overstates the role of recovery plans; rather it makes no statement about them at all.

Comment 37: Some commenters requested additional revisions to the regulation to ensure the Services can apply a precautionary approach when making delisting decisions. These commenters asserted that it should be easier to list species than to delist them and that additional changes to the regulations should be made to correct the false equivalency between listing and delisting. Some commenters requested that the regulations include a statement that, when there is reasonable uncertainty, the Services should err against delisting. Commenters also requested that the regulations be modified to indicate that a higher level of certainty and standards is required for delisting compared to those specified in 50 CFR 424.11(c) for listing and reclassifying species.

Response: We decline to make the additional requested revisions, because such revisions would not, in our view, be consistent with the Act and existing case law. As we have stated previously in response to similar comments in 2019 (84 FR 45020 at 45035, August 27, 2019), the Act directs the Services to make determinations regarding whether a species is endangered or threatened based on the best scientific and commercial data available and by applying the factors and standards in section 4(a) and (b) of the Act. The same set of standards applies and the same level of certainty is required regardless of whether we are making a listing determination or delisting determination. In either a listing or delisting context, the Services must substantiate their determination based solely on the best available data. Similarly, if there is sufficient uncertainty regarding the status of a species, the Services could not support a listing determination, nor a delisting determination (*Humane Soc’y of the U.S. v. Zinke*, 865 F.3d 585, 597 (D.C. Cir. 2017) (“In addition, the statute requires the Service to attend to both parts of the listing process—the initial listing, and the revision or delisting—with equal care.... Nothing in the statutory text compels the Service to put a thumb on the scale in favor of listing, nor does the text require the Service to temporize when the best evidence indicates that a revision is warranted.”)).

As with listing determinations, when considering whether to delist a species, the Services are required to take into account the best available data and information relevant to assessing the species’ status and risk of extinction, including prior findings and the discussion of facts supporting those findings, and discuss how the available information supports the conclusions in a well-reasoned, transparent manner. We acknowledge that the factual analyses in the two contexts may differ: in determining whether to list a species, we can generally rely on past and current data and trends regarding the species and the threats to the species to determine whether the species meets the definition of an endangered or a threatened species; but, in cases where a species may have recovered,

determining whether to delist a species also requires that we assess the status of the species in the hypothetical absence of protections it currently receives under the Act. Nevertheless, the underlying standards and obligation of the Services to articulate a rational connection between their conclusions and facts in the record are still the same regardless of the context of the determination being made (listing or delisting).

Comment 38: Some commenters stated that the proposed removal of the word “same” from the phrase “the Secretary shall consider the same factors and apply the same standards” was not substantiated and is unnecessary. The commenters stated there is no evidence that this regulation has caused the “possible” confusion discussed in the proposed rule. The commenters stated that rather than eliminate possible confusion, this proposed change would create new confusion about whether the Services intend to consider different factors and apply different standards depending on whether we are considering a species’ listing, delisting, or reclassification. Commenters stated that it is important that the Services remain clear that the five factors in section 4(a)(1) of the Act are the same when listing a species and when delisting a species, and that this proposed change would not expand or otherwise revise the criteria that may be considered when determining whether to delist a species.

Response: As we outlined in the proposed rule, this revision eliminates the possible, though unintended, confusion that the delisting analysis is limited to those same, specific factors or threats that initially led us to list that particular species. We find that elimination of possible misinterpretation of our regulations is an appropriate and adequate justification for making this minor wording change. As we have stated in response to other comments, we are not obligated to wait to take action to address confusion until it manifests itself in specific circumstances. The possible confusion here could present a serious issue, as an overly literal reading of the 2019 rule could lead to a premature delisting of a species for whom protections under the Act are still warranted.

Resolving this issue now, with a simple word change, is appropriate and consistent with E.O. 13990. The regulation also clearly and plainly states that delisting decisions will be based on consideration of the factors and standards set forth in paragraph (c) of § 424.11. The cross-referenced paragraph (c) identifies the factors and standards that must be applied when listing and reclassifying species, which correspond to the factors and standards set forth in section 4 of the Act. Therefore, removal of the word “same” does not allow the Services to apply different requirements, standards, or factors depending on whether we are making listing, reclassification, or delisting decisions.

Comment 39: Multiple commenters agreed with the proposed removal of the word “same” from the delisting regulation because it would help eliminate any possible confusion that the delisting analysis is limited to the specific factors or threats that led to the need to list the species. Commenters stated this change makes it clear that the analysis must be conducted on all the threats facing the species at the time of the analysis, not only on the threats that were present at the time of listing. One commenter pointed to specific examples of listed species for which the types of threats affecting the species has changed or increased since the time of their listing. A commenter noted that this proposed change is consistent with the best available science standard and appropriately allows the Services to consider additional information that may arise after a Services’ listing determination that supports their decision—whether that be keeping the species on the Lists or delisting it.

Response: We appreciate and agree with these comments.

Comment 40: Some commenters stated that the circumstances for delisting identified in the regulation should be limited to extinction and recovery, and that the other vague factors should not be considered. Some commenters disagreed with including the species “does not meet the statutory definition of a species” as a circumstance in which the Services may delist a species, because such inquiries are no longer limited to

the data that were available to the Services at the time of listing. Instead, the commenters asserted, this provision would allow for delisting based on other considerations, such as changes in policies or regulations governing the ESA.

Response: In response to these comments, we have modified the text of the regulation to clarify that the particular circumstance referenced by the commenters is limited to instances in which new data indicate the original listing can no longer be considered accurate or valid. Specifically, the regulation now states: “New information that has become available since the original listing decision shows the listed entity does not meet the definition of a species.” Under the Act, the Services can only list “species,” a term which is defined in the Act to include subspecies of fish, wildlife, and plants, and distinct population segments of vertebrates (16 U.S.C. 1532(16)). Although infrequent, there have been instances in which the Services have removed “species” from the Lists because scientific information that subsequently became available showed that the listed entity had been misclassified or incorrectly identified as a unique species. For instance, after the foreign coral, *Siderastrea glynni*, was listed as an endangered species in 2015, new genetic and morphological information became available that demonstrated that *S. glynni* was not a unique species or subspecies and was instead synonymous with another coral species. Based on this information, *S. glynni* did not meet the statutory definition of a species, and it was on this basis that NMFS delisted it in 2021 (see 86 FR 74378, December 30, 2021).

Comment 41: Some commenters noted that the factors listed in section 4(a)(1) of the ESA address threats only, and that although threats must be addressed before a species is delisted, the section 4(a)(1) factors do not provide science-based factors for delisting. Other commenters stated that a review of the listing factors alone could fail to adequately consider a population’s long-term stability and thus potentially result in premature delisting.

Response: We agree that the section 4(a)(1) factors address threats only; however, in addition to considering the threats listed in section 4(a)(1) of the Act, delisting determinations must also be made in accordance with section 4(b) of the Act, which requires a review of the species' status based on the best scientific and commercial data available (16 U.S.C. 1533(b)(1)(A)). We also note that under factor (E) of section 4(a)(1) of the Act, which includes "other natural or manmade factors," the Services routinely consider potential demographic threats (e.g., low abundance, declining population trends, limited genetic diversity, limited or disconnected distribution) and factor those types of threats into their assessment of the species' risk of extinction.

Comments on Not-Prudent Determinations

Comment 42: Multiple commenters supported our proposed removal of the second part of § 424.12(a)(1)(ii), which established in 2019 the circumstance that a designation of critical habitat may be not prudent when the threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act. Commenters supported removal of this provision because they felt it would increase the protections provided to species through designation of critical habitat and allow for the full benefit of critical habitat designations to be realized. Commenters supported our proposal because of their concern that this provision allowed the Services to decline to designate critical habitat for species when climate change is a primary threat. They also stated that declining to designate critical habitat when climate change is a primary threat could thwart the conservation purposes of the Act and undermine the efficacy of critical habitat designations. Commenters also expressed the opinion that allowing the Services not to designate critical habitat when climate change is a primary threat was not supported by court decisions.

Response: We appreciate the support of these commenters. They raised many of the same concerns that we detailed in our proposed rule, and we agree that removing this

provision is a better way to advance the conservation of endangered species and threatened species, particularly in the face of the ongoing climate crisis.

In our 2019 rule, we stated that we did not intend for the revisions either to suggest that as a standard practice we would find that designating critical habitat is not prudent for species that are primarily threatened by impacts related to climate change, or to preclude us from designating critical habitat whenever the effects from climate change are a primary threat to the species (84 FR 45020 at 45042, August 27, 2019). Further, we explained that we will not prejudge outcomes associated with future potential section 7 consultations because the analysis will be based on whether the threats *can be*—not whether they *will be*—addressed by management actions resulting from consultation (e.g., *id.* at 45043). However, upon further review and as discussed in the 2023 proposed rule (88 FR 40764, June 22, 2023), we find that this clause did, in fact, require that the Services presuppose the scope and outcomes of future section 7 consultations under the Act, and did suggest that the only conservation benefits of a critical habitat designation are through the section 7 process, a presumption not supported by the language of the Act or court decisions. The public has also interpreted this language as allowing the Services to regularly decline to designate critical habitat for species threatened by climate change, which was not our intent (e.g., see Delach 2019, https://www.realclearpolitics.com/articles/2019/08/28/new_trump_rules_will_abet_loss_of_climate-threatened_species_141107.html). Therefore, we conclude that removing this provision is appropriate. As we stated in the preambles to our 2019 rule and 2023 proposed rule, we anticipate not-prudent determinations will continue to be rare, consistent with congressional intent (e.g., S. Rep. 106–126, at 4 (1999), 1999 WL 33592886).

Comment 43: Multiple commenters expressed opposition to our proposed removal of the second part of § 424.12(a)(1)(ii), which established in 2019 the circumstance that a

designation of critical habitat may be not prudent when the threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act. Some commenters suggested the removal of the provision will result in changes to how we designate critical habitat. For example, commenters stated the Services will consider effects of climate change even when the true effects are unknown. Other commenters suggested the removal would create a potential for the Services to designate vast areas, undermining the effectiveness of critical habitat by making it less likely that a section 7 consultation on any particular project would result in a determination of destruction or adverse modification.

Other commenters opposed the proposed removal of the provision based on concerns about increased regulatory burden. They stated that considering effects of climate change or other, non-anthropogenic, threats when designating critical habitat may result in unnecessary impacts to regulated entities without any benefits to species. Other commenters stated that removing the provision could create an unintended regulatory burden for project proponents during section 7 consultation because the proponents could be held responsible to address impacts, like those stemming solely from climate change, that are entirely outside of their control.

Response: As discussed in our previous response, both the Act and case law indicate that “not prudent” determinations are rare outcomes; the Act requires that the Services designate critical habitat to the maximum extent prudent and determinable when we list species and that we base critical habitat determinations on the best scientific data available. In most instances, the Services have designated critical habitat for listed species that occur within U.S. jurisdiction. The removal of this provision affects whether there is a designation of critical habitat; it does not affect how critical habitat could or would be designated. Therefore, we do not agree that removal of this particular provision in 50 CFR 424.12(a)(1)(ii) will change the size or scope of critical habitat designations.

Climate change affects different species in different ways, and in some cases we may have clear evidence that climate change has altered habitats within the species' occupied range and is causing extirpations and range shifts (e.g., Quino checkerspot butterfly; 74 FR 28776, June 17, 2009). Where the scientific data available support that areas contain essential features (i.e., the “physical or biological features essential to the conservation of the species”) or that the areas themselves are essential for the conservation of the species, it is important and appropriate that the Services be able to designate those areas. To ignore the impacts from climate change or to establish a general principle of not designating critical habitat if we cannot address habitat-related threats to the species through section 7 of the Act (e.g., climate change) would undermine the conservation purposes of the Act and would not have a rational basis.

Section 7(a)(2) requires that Federal agencies ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of their critical habitat. Specific provisions in the section 7 implementing regulations (e.g., 50 CFR 402.14(i)(2)) safeguard against scenarios where a project proponent would be held responsible for finding a solution to an issue like climate change, which operates on a global scale and is caused by many contributing factors. However, reasonably foreseeable climate-change effects themselves may well be relevant to analyzing effects of an action on listed species and critical habitat and could potentially necessitate changes in project design and operation. Nothing in the implementing regulations for section 4 of the ESA changes the operation of the section 7 consultation process.

Comment 44: Commenters stated that the current not-prudent circumstance at § 424.12(a)(1)(ii) (the present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species) confuses the threats to the species—which form the basis for listing the species—with the protections that are

needed to conserve the species—which form the basis for designating the species’ critical habitat. Some of these commenters recommended that we remove § 424.12(a)(1)(ii) entirely, while others suggested that we modify this provision to include that designation of critical habitat would not be prudent if habitat loss or impacts are not a “significant” or “primary” threat. Still other commenters stated the current § 424.12(a)(1)(ii) should be modified to address the court’s decision invalidating the FWS’s not-prudent determination for the rusty patched bumble bee (*Natural Res. Def. Council v. U.S. FWS*, No. 21-0770(ABJ), 2023 WL 5174337 (D.D.C. August 11, 2023)). Commenters also pointed out that in the absence of habitat-based threats, critical habitat can still be an important tool to help a species overcome non-habitat-based threats.

Response: We are finalizing § 424.12(a)(1)(ii) as proposed, which will continue to provide that the Services may find it is not prudent to designate critical habitat in situations when the present or threatened destruction, modification, or curtailment of a species’ habitat or range is not a threat to the species. While the provision in § 424.12(a)(1)(ii), which has been in the regulations since 2016 (81 FR 7414, February 11, 2016), is intended to reduce the burden of regulation in rare circumstances in which designating critical habitat does not contribute to conserving the species, the Services recognize the value of critical habitat as a conservation tool and expect to designate it in most cases. In addition, as the introductory text of this section of the regulations indicates, the Services are not required to make a not-prudent determination merely because one of the listed circumstances occurs; all of the enumerated not-prudent circumstances are discretionary, and the Services would have to articulate a well-reasoned explanation for exercising that discretion to determine that a specific designation is not prudent.

The court’s decision in the rusty patched bumble bee case does not preclude the Services from retaining § 424.12(a)(1)(ii)—the not-prudent circumstance for when the

present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species. In vacating and remanding the not-prudent determination in that case, the court did not invalidate the regulatory not-prudent circumstance that FWS had applied, but rather concluded that the record had failed to set forth a reasoned basis for the determination (2023 WL 5174337, at 14).

Comment 45: Commenters stated that critical habitat is an important component of recovery planning and implementation success, and that the only circumstance in which critical habitat should not be designated is when a critical habitat designation would increase the risk of take or otherwise harm a species because of the designation.

Response: The Services agree that critical habitat is an important regulatory tool that contributes to the conservation and recovery of species, and that instances when designating critical habitat is not prudent should be, and are, rare (H.R. Rep. No. 97–1625, at 16–18 (1978); *Natural Res. Def. Council v. U.S. Dep't of the Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997); *N. Spotted Owl v. Lujan*, 758 F. Supp. 621, 625–26 (W.D. Wash. 1991)).

Most not-prudent determinations have resulted from the Services finding that there would be increased harm or threats to a species as a consequence of identifying where the species occurs or identifying areas that are essential to the species. For example, when a species is highly prized for collection or trade, then identifying specific localities where the species occurs could render it more vulnerable to collection and, therefore, further increase threats to it. Nonetheless, Congress did not limit “not prudent” findings to those situations, and other circumstances may arise where a designation is not prudent for the particular listed species. However, and as the Services' record indicates, in most cases we will find that a designation of critical habitat will further the conservation of the species and will be designated.

Comment 46: Commenters expressed concern that the Services intend to designate critical habitat in situations where there would be no conservation benefit to the species.

Response: The Services disagree that we would designate critical habitat when there would be no conservation benefit to the species. Critical habitat is an important tool that we use to conserve endangered species and threatened species. The Act establishes a requirement for us to designate critical habitat to the maximum extent prudent and determinable at the time a species is listed or finalize a designation of critical habitat within 1 year of the final listing rule. This statutory requirement is not limited to situations when there is a specific conservation benefit from designating critical habitat. Moreover, in most cases, and aside from protections afforded under section 7 of the Act, designation of critical habitat does provide other conservation benefits, for instance through informing management partners of important habitats, stimulating scientific surveys or research, promoting voluntary conservation actions, and raising public awareness of habitats that are essential for the conservation of a species.

Comment 47: Some commenters indicated they support the removal of § 424.12(a)(1)(v), which allowed for not-prudent determinations when the Secretary “otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available,” but oppose the proposed change at § 424.12(a)(1) to make the list of not-prudent circumstances not exhaustive. Specifically, commenters stated that making the list of circumstances non-exhaustive is no change from the current regulations and allows the Secretary unlimited discretion to determine critical habitat is not prudent. Commenters stated that the non-exhaustive nature of the list of circumstances would not provide clarity or certainty to the public and that it would be contrary to the legislative history that makes clear Congress intended for not-prudent determinations to be rare and used only for circumstances when designation would harm a listed species. Other commenters stated they support the catch-all nature of the

proposed rule text, stating that the Act provides flexibility to the Services to make not-prudent determinations.

Response: As discussed in the 2023 proposed rule, setting this text out separately within the list of circumstances in which the Secretary could potentially make a not-prudent determination inadvertently gave the appearance that the Services might overstep their authority under the Act by issuing “not prudent” determinations for any number of unspecified reasons that may be inconsistent with the purposes of the Act. As this was not our intention, we are removing the circumstance set out in § 424.12(a)(1)(v). However, we cannot foresee all possible circumstances in which critical habitat may not be prudent, and making the list of circumstances non-exhaustive provides for the ability to address those circumstances should they arise.

The question regarding whether designating critical habitat is not prudent must be addressed on a case-by-case basis. Any future proposed rule that includes a not-prudent determination will clearly lay out the Services’ rationale as to why a not-prudent determination is appropriate in that particular circumstance. In some situations, the Services may conclude, after a review of the best available scientific data, that a designation would nevertheless be prudent even in the enumerated circumstances. Congress recognized that for some species it may not be prudent to designate critical habitat, but the Act does not define or provide specificity with respect to when designation of critical habitat might not be prudent. Section 424.12(a)(1)(i), (ii), (iii), and (iv) partially fill in that gap by identifying general circumstances for when designation of critical habitat may not be prudent. Making the list of circumstances non-exhaustive does not allow the Services to circumvent the clear direction of the Act (i.e., to designate critical habitat) without adequate and rational justification. Any determination that critical habitat is not prudent must be based on the best scientific data available and an evaluation of the fact-specific information for the individual species. As stated elsewhere,

we expect it to continue to be rare that we would find a designation of critical habitat to be not prudent.

Comment 48: Commenters expressed opposition to the current not-prudent circumstance at § 424.12(a)(1)(iii) for areas within the jurisdiction of the United States that are of negligible conservation value for species occurring primarily outside the United States. Commenters stated that there are no provisions in the Act to decline designation of critical habitat in instances where species found primarily outside the United States would have a small conservation impact.

Response: We are retaining this particular provision without revision. The commenters are correct that the Act does not contain a provision for determining that it is not prudent to designate critical habitat for species that occur primarily outside of the United States if a designation would have a negligible conservation impact. Congress did not place a statutory restriction on when the Services could determine that designating critical habitat is not prudent. Instead, Congress left discretion to the Secretaries of Commerce and the Interior to determine the circumstances when designating critical habitat may not be prudent. In our 2016 regulations (81 FR 7414, February 11, 2016), we noted in the preamble that the consideration of whether areas within U.S. jurisdiction provide conservation value to a species that occurs in areas primarily outside U.S. jurisdiction could be a basis for determining that critical habitat designation would not be prudent (81 FR 7414 at 7432, February 11, 2016). As stated in our 2019 regulation (84 FR 45020 at 45041, August 27, 2019), the dictionary defines “negligible” to mean “so small or unimportant as to be not worth considering; insignificant.” In the context of “negligible conservation value” we mean that the conservation value of habitats under U.S. jurisdiction would be insignificant to the conservation of the listed entity, and designation of critical habitat would not be prudent.

For the purposes of clarity and transparency, we added this consideration directly to the regulatory text in our 2019 rule (84 FR 45020 at 45053, August 27, 2019), and for the same reasons we continue to conclude that this provision adds clarity without precluding the authority to designate critical habitat where appropriate. We will make case-specific determinations, based on the best scientific data available, regarding whether critical habitat designations would provide negligible conservation value for particular species that primarily occur outside of U.S. jurisdiction.

Comment 49: Commenters suggested that the current not-prudent circumstance at § 424.12(a)(1)(iv) (where no areas meet the definition of critical habitat) is superfluous because if no areas meet the definition of critical habitat, none would be proposed as critical habitat anyway.

Response: We are not revising this provision with this rulemaking. These situations will be rare; however, the Services find value in retaining the current § 424.12(a)(1)(iv) for instances when they do arise, and thus decline to remove it from the regulation.

Comment 50: Some commenters who favor complete rescission of the 2019 rule supported their position by expressing support for the “not beneficial” provision from the pre-2019 regulations, under which a not-prudent determination would be appropriate when “designation of critical habitat would not be beneficial to the species.” Other commenters cited to critical habitat designations promulgated by the FWS during the late 1990s and early 2000s that suggest critical habitat has little benefit. Commenters used these examples to support their contention that critical habitat should only be designated where there would be a demonstrated conservation benefit to the species.

Response: After considering public comments and our reconsideration under E.O. 13990, we decline to rescind the 2019 rule. By including the “to the maximum extent prudent” language, Congress recognized that not all listed species would be conserved

by, or benefit from, the designation of critical habitat. However, Congress wrote into the Act the fundamental requirement to designate critical habitat “to the maximum extent” while still allowing the “not prudent” and “not determinable” exceptions.

Congress did not provide specific direction or guidance on when designation of critical habitat would be not prudent. We have come to the conclusion that basing not-prudent determinations on whether particular circumstances are present, rather than on whether a designation would not be “beneficial,” provides an interpretation of the Act that is clearer, more transparent, and more straightforward. It also eliminates some confusion reflected in the courts’ decisions in *Natural Resources Defense Council v. Department of the Interior*, 113 F.3d 1121 (9th Cir. 1997) (“*NRDC*”), and *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Haw. 1998) (“*CCH*”). In those decisions, the courts remanded the not-prudent determinations at issue because they found that the FWS had not articulated a rational connection between the facts and the agency’s conclusion that designating critical habitat would not be beneficial for the species (*NRDC*, 113 F.3d at 1125–26; *CCH*, 2 F. Supp. 2d at 1288). Although the courts held that FWS had failed to weigh the benefits and risks of designating critical habitat or had failed to consider potential benefits beyond consultation benefits, the courts’ reasoning indicates that they found the decisions were based on the insufficiency or absence of any factual analyses of the specific data available. The court in *NRDC* also found that, in implementing the regulations that were in place at the time, FWS had erroneously applied a “beneficial to most of the species” standard instead of a “beneficial to the species” standard. *NRDC*, 113 F.3d at 1126. Moreover, the decisions’ reliance on the legislative-history statements equating “not prudent” with “not beneficial to the species” is undermined by the fact that ultimately Congress did not choose to include the “not beneficial to the species” language as a standard or limitation in the Act. Further, we note that in both decisions the courts seem to have considered principles related to the

discretionary process for weighing the impacts of critical habitat designation under section 4(b)(2) of the Act, which do not govern “not prudent” determinations. In part, this appears to be due to the courts’ interpretations of statements the Services had made regarding their intentions in applying the regulatory provisions (see *NRDC*, 113 F.3d at 1125 (“[T]he Service itself has said that it will forgo habitat designation as a matter of prudence only ‘in those cases in which the possible adverse consequences would outweigh the benefits of designation.’ 49 FR 38900, 38903.” (emphasis omitted))). We now take the opportunity to clarify the separate nature of “not prudent” determinations and the discretionary analyses that we may elect to take under section 4(b)(2) of the Act. We intend these evaluations to address separate factors. We emphasize that determining that a species falls within one or more of the circumstances identified in the revised regulations does not bring the prudency analysis to an end. As the court holdings in both *NRDC* and *CCH* demonstrate, in determining whether designation of critical habitat is prudent, the Services must take into account the specific factual circumstances at issue for each species (*NRDC*, 113 F.3d at 1125; *CCH*, 2 F. Supp. 2d at 1287–88). However, this does not require the Services to engage in the type of area-by-area weighing process that applies under section 4(b)(2) of the Act.

While the statutory language allows us to forgo designating critical habitat in rare circumstances when designating critical habitat would not contribute to the conservation of the species, the Services recognize the value of critical habitat as an important conservation tool, and we expect to designate it in most cases.

Comment 51: A commenter asserted that critical habitat does not apply to Tribal lands and that, therefore, the Services lack the authority to designate on Tribal lands.

Response: While the Services recognize their responsibilities and commitments under Secretaries’ Order 3206 and principles of Tribal sovereignty, the Act does not allow for categorical presumptive exclusion or omission of any areas within the

jurisdiction of the United States that meet the definition of critical habitat and otherwise qualify for designation. If we determine that Tribal lands meet the definition of “critical habitat,” the Act requires that we identify those lands as meeting the definition. However, it is the longstanding policy of the Services to consider and give great weight to Tribal concerns and always consider excluding Tribal lands under section 4(b)(2) of the Act (81 FR 7226, at 7230–7231, February 11, 2016).

Comments on Designation of Unoccupied Critical Habitat

Comment 52: Multiple commenters stated they opposed the proposed revisions to the regulation addressing the designation of unoccupied critical habitat at 50 CFR 424.12(b)(2) because they exceed the Services’ legal authorities. Commenters asserted that the 2019 regulatory revisions conformed to the ESA, its legislative history, and case law interpreting the Act, while the proposed revisions do not. Some commenters stated that with these proposed regulatory changes, the Services are claiming the regulatory authority to designate large areas presently unoccupied by an ESA-listed species, even if those areas are not necessary for, do not contribute to, or may never contribute to the conservation of the species; do not contain an essential conservation feature for the species; or are not based on the best scientific data available. One commenter stated that this kind of broad and unfettered discretion triggers heightened scrutiny under the “major questions doctrine.”

Response: The revisions that we proposed to 50 CFR 424.12(b)(2) and are now finalizing in this rule are consistent with the ESA, its legislative history, and the applicable case law. While the revisions do remove certain criteria for designating unoccupied areas as critical habitat, they do not expand the Services’ authorities for designating unoccupied habitat as critical habitat. The revisions remove the requirement that the unoccupied areas have a “reasonable certainty” both to contribute to the species conservation and to contain one or more features essential to the species’ conservation.

These changes also remove the requirement to designate all possible occupied areas as critical habitat before allowing the Services to even consider designating any unoccupied areas. As we discussed in the proposed rule and further in other responses to comments below in this document, these added criteria, most of which were newly added to the regulations in 2019, imposed requirements that go beyond the statutory standards requiring a science-based finding that an unoccupied area is “essential for the conservation” of the listed species. We recognize that some commenters consider these now-removed criteria to have provided the Services with reasonable guidance for determining whether certain areas qualify as being “essential for conservation”; however, we no longer agree. We now find that the criteria could undermine our duty to designate areas that otherwise meet the definition of critical habitat and are essential to support the conservation of the species. In addition, instead of providing a useful interpretation of the Act, those criteria created the perception that, rather than abide by the statutory requirement to base critical habitat designations on the best scientific data available, the Services would need to provide some heightened level of certainty with respect to those data and the areas being designated. Furthermore, as we stated in the proposed rule, imposing a “reasonable certainty” standard is also unnecessary in light of the best-available-data standard of the Act, because this standard already prohibits the Services from basing their decisions on speculation.

By removing requirements established under the 2019 regulations, these revisions may allow for designations of unoccupied areas that would have been ineligible for designation under the 2019 regulations. However, because revisions to 50 CFR 424.12(b)(2) do not weaken or undermine the requirements set forth in the ESA for defining critical habitat, they do not allow for expanded or larger designations of unoccupied areas than is permitted under the ESA. As discussed in the proposed rule and further in responses to comments below, we find these revisions appropriate and

necessary. The Services must still apply the best available scientific data, and for any critical habitat rulemaking that includes a designation of unoccupied areas, they must explain why the unoccupied areas are “essential” for that species’ conservation based on a supporting record. These standards prevent the Services from designating large areas of unoccupied habitat that do not meet the statutory requirements for critical habitat.

In short, the revisions to 50 CFR 424.12(b)(2) do not expand our authorities under the ESA, because they do not remove, undermine, or in any way weaken the existing statutory requirements to base critical habitat designations on the best scientific data available, consider potential impacts of designating areas, and make a finding that the unoccupied areas are essential for that species’ conservation. The Services have no intention to exceed our authority under the Act by designating “large” areas of unoccupied habitat that are not essential for the conservation of the species. Since this regulation directly corresponds to specific authorities granted to the Services under the ESA, the major questions doctrine is not implicated. As further explained below under our response to *Comment 86*, nothing in this rule, including the revisions to 50 CFR 424.12(b)(2), is inconsistent with, or extends beyond, the statutory authority expressly granted to the Services by the Act.

We provide further discussion of the unoccupied critical habitat regulation below in our responses to other related comments (e.g., see also responses to *Comment 61* and *Comment 62*, below).

Comment 53: Several commenters stated we should retain the existing regulation at 50 CFR 424.12(b)(2) because it provides an analytical process by which unoccupied critical habitat will be designated and thus regulatory certainty for stakeholders. Commenters stated the proposed regulation for designating unoccupied critical habitat should provide guidance regarding when an unoccupied area may be considered for designation as critical habitat, rather than simply repeating the statutory language.

Response: Although the 2019 regulation did provide more requirements with respect to designating unoccupied critical habitat, it did not provide greater regulatory certainty to stakeholders or private landowners. The requirement to designate critical habitat under the ESA is directly tied to a species' listing and to any petitions requesting that the Services revise critical habitat. Whether and where critical habitat is ultimately designated depends on what petitions are considered, what species are listed, the particular life history of the species, and the best available data about the species' habitat. As the Services cannot control or readily predict these series of facts and information, there is little in the way of regulatory certainty that can be achieved through general implementing regulations. Determinations of whether a particular unoccupied area of habitat qualifies as critical habitat for a species are fact-specific and depend upon the scientific understanding of the particular species' habitat and conservation needs, which vary tremendously across species and must be addressed within each individual critical habitat rulemaking. The revisions we are finalizing in this rule do not change this practical reality.

Comment 54: Several commenters asserted that the proposed changes to 50 CFR 424.12(b)(2) would put unnecessary and unreasonable economic burdens and costs on local development and industries. The commenters stated the proposed revisions would result in increased land-use restrictions, reduced land values, or other economic impacts, with little conservation benefit.

Response: We recognize and understand the concerns of these commenters; however, as we discuss in our response to *Comment 52*, the revised critical habitat regulation at 50 CFR 424.12(b)(2) does not authorize or direct the Services to designate more or larger areas of unoccupied critical habitat. Therefore, there is no basis to conclude that this regulation will increase economic or other impacts of critical habitat designations. The Services must still adhere to the requirements of the ESA when

designating areas as critical habitat. These requirements include the mandatory consideration of economic, national security, and other relevant impacts of designating any particular area as critical habitat under section 4(b)(2) of the ESA, which also permits the Services to exclude particular areas from a designation if the benefits of that exclusion outweigh the benefits of designation. Section 4(b)(2) of the ESA is the appropriate mechanism for considering the type of impacts described by these commenters; purposely constraining what and how areas may even be considered for designation as critical habitat through implementing regulations is not. We also note that because the direct regulatory effect of critical habitat is on Federal agencies and Federal actions, costs associated with conducting additional analyses under section 7 of the ESA are typically born by the Federal action agencies, not by private landowners, small businesses, or industry. Only in instances where a Federal action would result in destruction or adverse modification of the critical habitat would economic impacts stemming from project modifications actually arise. As the record for both Services indicates, such instances are rare (Macolm and Li 2015;

<https://www.regulations.gov/document/FWS-HQ-ES-2018-0009-64309>). Evidence to support assertions that property values invariably decrease as a consequence of the area being designated as critical habitat is equivocal at best (Mamun et al. 2022 IEC 2023; Auffhammer et al. in prep). And while research specifically assessing the economic impacts of critical habitat on land values has to date been limited, there is an extensive body of economic literature indicating that there are often economic benefits (e.g., increased land value, increased home sale price) associated with land conservation (e.g., Bolitzer and Netusil 2000; Curran 2001; MacConnell and Walls 2005; Black 2018).

Comment 55: Some commenters expressed concerns that the proposed revisions to the 2019 regulations for designating unoccupied critical habitat could allow for over-designation of critical habitat, which could in turn undermine land-management activities

(e.g., tree thinning to reduce wildfire risk) or negatively affect cooperative conservation and recovery efforts with private landowners. A commenter noted that those impacts could also undercut the goals of E.O. 13990, “Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis,” which is a key justification of this current rulemaking. Another commenter urged the Services to consider whether the proposed revisions to the critical habitat regulations, and their potential impacts on private landowners, would help or hamper conservation and recovery efforts.

Response: Although we appreciate the concerns of these commenters, the revised regulation at 50 CFR 424.12(b)(2) that we are finalizing in this rule will not change the extent to which critical habitat designations may impact ongoing management and conservation activities. As discussed in our prior response, while the revised regulations may potentially result in designation of different specific areas as critical habitat, there is no basis to conclude that this regulation will increase the size of areas designated as critical habitat. Under section 4(b)(2) of the ESA, we are required to take into consideration economic, national security, and other relevant impacts of designating any particular area as critical habitat. As part of that analysis, and as reflected in the Services’ joint policy on implementing section 4(b)(2) of the ESA (“section 4(b)(2) policy” 81 FR 7226, February 11, 2016), we evaluate the impact of designation on conservation plans and agreements, as well as on their attendant partnerships. As expressed in our section 4(b)(2) policy, it is our intention to encourage and foster conservation partnerships. In the Services’ experience, excluding from a critical habitat designation areas that are covered by existing plans and programs can encourage other land managers to partner with the Services in the future by removing any real or perceived disincentives for engaging in conservation activities. We will continue to apply the section 4(b)(2) policy in the same manner under the revised critical habitat regulation.

With respect to ongoing land-management activities, if those activities involve a Federal agency action, such as permitting or funding, and if they may affect designated critical habitat, then those activities would be subject to the consultation requirements of section 7(a)(2) of the ESA. That statutory requirement is unaffected by the critical habitat implementing regulation we are finalizing in this rule. The outcome of any specific consultation is driven by the particular Federal action and effects of that action on the critical habitat. Thus, there is no basis to conclude that any land management activities would be affected any differently as a result of this rule. Furthermore, as stated previously, while the revised regulation may potentially alter which specific areas are ultimately designated as critical habitat, there is no basis to conclude that critical habitat designations will be larger or include more areas. Consequently, there is no basis to conclude that these revised regulations will result in an increased impact on land management activities or hamper conservation and recovery efforts.

Comment 56: One commenter stated the proposed text for 50 CFR 424.12(b)(2) was too long and the steps for designating unoccupied critical habitat were not in logical order. Another commenter asserted the proposed revisions also removed the “essential” criterion from 50 CFR 424.12(b)(2), which is clearly required by the Act. Another stated the proposed changes were overly complicated and that the implications of the proposed changes were hard to understand.

Response: We considered these comments and concluded that no further changes are necessary to improve the logical ordering or length of the proposed text for 50 CFR 424.12(b)(2); thus, we are finalizing the text as proposed. As revised, the regulation is shorter and contains fewer elements than the 2019 regulation and still indicates that unoccupied areas must be “essential for the conservation of the species,” which is clearly required by the Act. In this rule, we have included explanations, both generally in the preamble as well as in responses to specific comments, of the intent, meaning, and

implications of this particular revision. As we discuss in response to other specific comments on this particular provision, the revised regulation at 50 CFR 424.12(b)(2) does not expand the Services' authorities beyond the limits established by the Act, nor will it necessarily lead to larger or more expansive designation of unoccupied critical habitat.

Comment 57: Several commenters stated that, as written, the proposed text of 50 CFR 424.12(b)(2) would require the Secretary to identify critical habitat outside the area occupied by the species at the time of listing or appears to mandate the designation of unoccupied critical habitat. Commenters stated the proposed revision fails to acknowledge that the Services have the option not to designate unoccupied areas. One commenter requested we reword this provision to indicate that there may not be unoccupied areas that are essential to conservation.

Response: We considered these comments and concluded that rewording of the proposed 50 CFR 424.12(b)(2) is not necessary because the regulation does not indicate or imply that designation of unoccupied areas of critical habitat is required. The text of the regulation uses the same phrasing as the other provisions set forth at 50 CFR 424.12(b)—i.e., “the Secretary will identify”—and lays out only the process and requirements for identifying areas “to be considered for designation as critical habitat” (see 50 CFR 424.12(b)). The regulation does not state that such areas will or must be designated as critical habitat. This section of the regulations purposely does not refer to designation because, as indicated in subsequent sections of the regulations, there are additional requirements that must be met prior to proposing or finalizing a critical habitat designation. The Services could also still consider excluding particular areas from a designation after considering the economic, national security, and other relevant impacts of designating those areas as critical habitat (see 16 U.S.C. 1533(b)(2), 50 CFR 424.19). Furthermore, unoccupied areas may only be designated if they meet the statutory

requirement that they are essential for the species' conservation, and the text of 50 CFR 424.12(b)(2) in no way mandates such a finding.

Comment 58: A commenter indicated they support the proposed changes to the unoccupied critical habitat regulation, but also requested that the Services use a Solicitor's M-Opinion for determining and describing the process for designating unoccupied critical habitat. This commenter stated such an opinion could provide an extensive evaluation of the legislative and judicial history, a description of the complex framework or process that the Services would implement, and examples of how it may be applied. The commenter asserted this opinion would serve as a publicly available standard reference document that could reduce the likelihood of successful challenges in court.

Response: We appreciate this commenter's suggestion regarding development of additional, publicly available guidance regarding the designation of critical habitat, but we do not think such a document is necessary at this time. The Services strive to provide clear, transparent, and accessible information to the public whenever possible so that interested and affected parties can more readily understand the legal framework, legal and technical terms and standards, and procedural requirements associated with mandated duties and obligations under the ESA. In addition to the joint implementing regulations at 40 CFR part 424 and the Services' section 4(b)(2) policy, each agency provides additional information and resources regarding critical habitat on their respective websites (see <https://www.fisheries.noaa.gov/national/endangered-species-conservation/critical-habitat> and <https://www.fws.gov/project/critical-habitat>), and every critical habitat rule provides a detailed explanation of the processes, analyses, and legal support that underlie that rule.

Comment 59: Numerous commenters stated they support the proposed changes to 50 CFR 424.12(b)(2), which they stated better reflect both the Act and the legislative

history. Several commenters stated that unoccupied habitat is sometimes essential to successfully recovering a species, and when the best available science includes information regarding the future habitat needs of a species, those areas should be considered for critical habitat designation. Some commenters stated the proposed changes would ensure that habitat protections will be determined using the best available scientific data, and other commenters noted the revisions are especially important for endangered and threatened species with habitats that are being impacted by climate change. Some commenters stated that the unnecessarily high standards for designating unoccupied critical habitat established by the 2019 regulation were in conflict with the ESA and could negatively impact future recovery efforts. Several commenters stated that the proposed changes are consistent with and would better support the ESA's goal of conserving ecosystems upon which endangered and threatened species depend.

Response: We appreciate and agree with the comments in support of the proposed rule.

Comment 60: Multiple commenters stated they support the proposed removal of the strict sequencing requirement at 50 CFR 424.12(b)(2), and some noted the proposed softening of this requirement follows good conservation practice. Other commenters noted they agreed that the Services should not be required to exhaust all possible occupied areas before being able to consider designating unoccupied areas as critical habitat. Several commenters, however, recommended this text be further revised to indicate that the Services can consider occupied and unoccupied areas simultaneously for possible designation as critical habitat, or return to the 2016 version of this regulation, which did not include a two-step process for determining critical habitat. One of these commenters stated that the two-step process included in the proposed rule creates unnecessary barriers to designation, leads to less-effective conservation, and incorrectly implies that unoccupied areas are less important to a species' survival and recovery.

Response: We appreciate and agree that unoccupied areas of critical habitat may be just as important for a species' conservation as the areas where the species was known to occur at the time of listing under the ESA. We also recognize that, especially in light of climate change and associated shifts from historical habitats into new areas, unoccupied habitats may become increasingly important for species conservation efforts in the future. We do not agree, however, that the continued focus on occupied areas, and the approach of identifying occupied areas first, will impede the Services' ability to designate critical habitat in a way that effectively supports species' survival and recovery. As mentioned previously, it has been our longstanding practice to begin our assessments of potential critical habitat by evaluating the areas that the species currently occupies. Understanding how the species is currently distributed and using available habitat helps support our analysis of whether additional, unoccupied areas are needed to support the species' conservation. We do not view the unoccupied areas as necessarily less important, but those areas should be considered carefully and in light of what we know about the species' habitat needs and its occupied habitats. Therefore, we are finalizing this regulation as proposed.

Comment 61: Many commenters requested we retain the requirement at 50 CFR 424.12(b)(2) that the Services must first determine that occupied critical habitat is inadequate to conserve the species before we can consider whether any unoccupied areas are essential for the species conservation—either by retaining the 2019 regulation or by making additional revisions. Multiple commenters stated the “sequencing” or prioritization approach in the 2019 regulations is a reasonable, or even a necessary, analytical framework for assessing whether unoccupied areas are essential for the species because as a matter of logic, an unoccupied area cannot be considered “essential for the conservation” of a species if the occupied areas are adequate to ensure its conservation. Some commenters asserted that the courts, the Services' decades-old regulations, and

fundamental logic all indicate that it is not possible to conclude that an unoccupied area is essential for the conservation of a species without knowing how the species would fare if the unoccupied area were not designated.

Response: We do not agree that the inflexible approach established in the 2019 regulations regarding unoccupied critical habitat was the best or a necessary one. The revisions we are making to 50 CFR 424.12(b)(2) do not necessarily conflict with the logic expressed by the commenters, as we are simply removing the rigid requirement to exhaustively designate all occupied areas of critical habitat before we can even consider whether any unoccupied areas are essential for the species' conservation. As we have stated previously, a rigid step-wise approach (i.e., "exhausting" the occupied critical habitat, and then designating essential unoccupied habitat only if the occupied critical habitat is not enough to support the species' conservation) does not necessarily support the best conservation strategy for all species and could even result in a designation that is both geographically larger and potentially less effective as a conservation tool. By removing this rigid "sequencing" or "exhaustion" requirement, the Services can instead consider the inclusion of occupied and unoccupied areas in a critical habitat designation in a manner that best supports the conservation needs of the species, while also allowing for exclusions of particular areas where appropriate under section 4(b)(2) of the ESA. Thus, removal of the "exhaustion" requirement ensures that the Services have the flexibility that is already authorized under the ESA to evaluate unoccupied areas that are "essential for conservation" based on the best scientific data available without first being required to designate all occupied areas of critical habitat.

As discussed by some commenters, the 2019 regulation was not the first time the Services' implementing regulations contained a two-step or exhaustion approach for designating occupied and unoccupied critical habitat; the implementing regulations took this approach from 1980 to and 2016 ("pre-2016 regulation"), and from 2019 to the

present (see 45 FR 13010, February 27, 1980; 49 FR 38900, October 1, 1984; 81 FR 7414, February 11, 2016; 84 FR 45020, August 27, 2019). As with the 2019 regulation, the pre-2016 regulation prioritized the designation of occupied areas over unoccupied areas by allowing the Services to designate unoccupied areas as critical habitat only if a critical habitat designation limited to occupied areas would be inadequate to ensure the conservation of the species (49 FR 38900 at 38909, October 1, 1984; 84 FR 45020 at 45053, August 27, 2019). This version of the regulations suffered from the same issue as the 2019 regulations—the possibility of being interpreted as saying that, to designate unoccupied critical habitat, we must designate all of the occupied areas that we could possibly designate because they meet the definition of occupied critical habitat and then determine that the designation would be inadequate to provide for the conservation of the species.

In 2016, we removed the two-step requirement entirely from the implementing regulations, stating that it was an unnecessary and unintentionally limiting requirement (81 FR 7414 at 7434, February 11, 2016), and we revised the regulation to instead allow for simultaneous consideration of occupied and unoccupied areas. When we then reinstated the two-step “sequencing” or “exhaustion” prioritization process in 2019, we explained that we were responding to concerns that the Services would inappropriately designate overly expansive areas of unoccupied critical habitat (see 83 FR 35193 at 35197–98, July 25, 2018), and that a two-step approach would help further Congress’s intent to place increased importance on habitat within the geographical area occupied by the species (84 FR 45020 at 45043, August 27, 2019).

We now recognize that we can retain a two-step approach and maintain an emphasis on occupied areas without imposing a rigid limitation upon the Services’ ability to designate unoccupied critical habitat that is nowhere set forth in the statute itself. Thus, the version of the regulation we are finalizing in this rule indicates that the Services will

first identify “areas occupied by the species”; however, as already noted, the regulation also allows the Services the flexibility to identify unoccupied areas that are essential for the species’ conservation based on the best scientific data available—the statutory standard—without requiring that the Services first exhaust all occupied habitat—a limitation without a clear statutory basis. This flexibility was lacking in both the pre-2016 and the 2019 regulations. The revised regulation provides a different and reasonable approach for emphasizing occupied areas in a way that does not suggest an “exhaustion” requirement or unnecessarily constrain the Services’ ability to designate unoccupied areas that are essential for the species.

The approach we are finalizing in this rule is also not inconsistent with case law cited by the commenters that interpreted the pre-2016 regulations. While various court rulings provided some insight with respect to the issue of “sequencing” and emphasizing occupied critical habitat, none indicated there is a statutory obligation to exhaustively designate all occupied areas before designating any unoccupied areas. Likewise, no court has ruled that under the Act, before designating unoccupied critical habitat, the Services must first determine that designating all of the occupied critical habitat would be “inadequate” and, therefore, that the Services *must exhaust designating all* potential areas of occupied habitat before the Services can determine that unoccupied areas are essential for a species’ conservation. Instead, these courts held that the Services’ regulatory interpretation at the time merely elaborated the statutory standard requiring that, for unoccupied areas to meet the definition of “critical habitat,” they must be essential for the conservation of the species (*Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015); *accord N.M. Farm & Livestock Bureau v. U.S. Dep’t of Interior*, 952 F.3d 1216, 1231 (10th Cir. 2020)). Neither the Act nor applicable case law contains a requirement to exhaust designating all occupied critical habitat before designating unoccupied critical habitat.

Comment 62: A number of commenters viewed the proposed regulatory requirements for designating unoccupied critical habitat as being unlawful and inconsistent with the ESA, existing case law, and the legislative history related to the 1978 and 1982 amendments to the ESA. Commenters stated that the two-part statutory definition in the ESA effectively creates a two-part regulatory hierarchy that prioritizes occupied areas over unoccupied areas, noting that the legislative history indicates that the Services must be “exceedingly circumspect” when designating unoccupied critical habitat (H.R. 96–1625 at 25 (1978)), and designation of unoccupied areas should be more onerous. Some commenters also pointed to various court rulings, including the Supreme Court ruling in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368–69 (2018) (hereafter, *Weyerhaeuser*), in support of their view that unoccupied critical habitat must be absolutely necessary or indispensable for the species’ conservation, and, therefore, the Services must first determine that occupied areas are inadequate to conserve the species. Another commenter stated that, while the ESA does not require a finding of inadequacy of the occupied critical habitat to consider unoccupied areas, Congress emphasized the need to focus on occupied areas first.

Response: We agree that both the legislative history surrounding the amendments to the ESA establishing the definition and requirements for critical habitat and the existing case law support a conclusion that the standard for determining whether unoccupied areas qualify as critical habitat is more onerous than the standard for determining whether occupied areas qualify as critical habitat (e.g., *Home Builders Ass’n v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 990 (9th Cir. 2010) (“Essential for conservation is the standard for unoccupied habitat ... and is a more demanding standard than that of occupied critical habitat.”); *Cape Hatteras Access Pres. All. v. U.S. Dep’t of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) (“[W]ith unoccupied areas, it is not enough that the area’s features be essential to conservation, the area itself must be

essential”); S. Rep. No. 95–874, at 9–10 (1978)). We also are aware of and considered the legislative history that many commenters cited in support of their view that designation of unoccupied critical habitat is supposed to meet a higher or more onerous test (e.g., H.R. Rep. No. 95–1625, at 742 (1978) (“[T]he Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species”)), and we do not take issue with the statement or idea that the Services should be exceedingly circumspect when designating unoccupied areas as critical habitat.

However, none of these sources establishes a legal basis for requiring that the standard for determining whether any unoccupied area meets the definition of “critical habitat” must go beyond the standard provided by the ESA. In defining “critical habitat” in section 3 of the ESA, Congress established the two different standards for determining whether an area is critical habitat, depending on whether that area is occupied by the species at the time of its listing or not occupied by the species at the time of its listing. Those differing standards are how Congress chose to express its view that the two types of areas should be assessed and treated differently. The statutory definition provides the only test that the Services must meet to designate an area as critical habitat. By revising the regulations at 50 CFR 424.12(b)(2) to correspond more closely to the statutory definition of “critical habitat,” and eliminating requirements in the 2019 regulations that go beyond those of the Act, we are adhering to intent and direction of Congress.

Comment 63: Some commenters stated that the proposed removal of the sequencing requirement at 50 CFR 424.12(b)(2) was not adequately justified, and that because this was such a long-held interpretation, the rationale that the proposed revisions provide a better interpretation of the congressional intent is not plausible. Another commenter stated that the proposed removal of the sequencing requirement was poorly supported in part because the Services did not provide any examples of how this requirement has constrained our ability to designate unoccupied critical habitat.

Response: As we discussed in the proposed rule (88 FR 40764, June 22, 2023), we are revising the regulations regarding the designation of unoccupied critical habitat to remove requirements that are not mandated by the language or structure of the ESA and, in the view of the Services, to better fulfill the Secretaries' authority to further the conservation purposes of the ESA. By removing the rigid "sequencing" requirement, the Services can continue to prioritize our consideration of occupied areas but still consider the inclusion of occupied and unoccupied areas in a critical habitat designation without having to exhaust all areas of occupied critical habitat first. We find that this approach is more faithful to the statutory definition of "critical habitat" and will allow the Services necessary flexibility to apply the best scientific data available to designate critical habitat in a manner that best supports the conservation needs of the species. We also find this revision is consistent with E.O. 13990's policy of improving protections to the environment. Rather than taking a "wait-and-see" approach to determine whether these identified issues with the 2019 rule would manifest in specific critical habitat designations, we are making this revision proactively.

Comment 64: Some commenters objected to the proposed removal of the requirement to first determine that occupied areas are "inadequate" because they are concerned it would allow for arbitrary or overly expansive or vast critical habitat designations. Commenters stated that there is no indication that Congress intended critical habitat to include large tracts of unoccupied lands for population expansion. Some commenters asserted that by linking critical habitat to the listing process and not delaying it until a recovery strategy was developed, Congress clearly intended that designation of unoccupied critical habitat should be limited to areas needed for the species' survival and should not include areas for population expansion or recovery.

Response: We do not agree that the regulation regarding unoccupied critical habitat that we proposed on June 22, 2023, and are finalizing in this rule will lead to

arbitrary or overly large designations. While the changes we are finalizing do remove certain constraints for designating unoccupied areas as critical habitat, these changes do not expand the Services' authorities under the ESA. The Services must still base critical habitat designations on the best scientific data available and can only designate unoccupied areas if the data support a conclusion that those areas are essential for that species' recovery. Nothing in this rule undermines or weakens those foundational, statutory requirements.

Despite some concerns expressed in the legislative history (e.g., S. Rep. No. 95–874, p. 10 (May 15, 1978)), we do not agree with the comments stating or implying that Congress intended critical habitat designations to be limited to only the areas needed for a species' survival. The plain language of the ESA indicates this is not a correct interpretation, as the definition of “critical habitat” refers specifically to “conservation” and not “survival.” In defining the terms “conserve, conserving, and conservation” in section 3 of the ESA, Congress made it clear that the term “conservation” refers to all actions needed to bring the species to the point at which protections provided under the ESA are no longer necessary. We cannot substitute the term “survival” and its meaning in place of the term “conservation” and its meaning when reading and interpreting the statutory definition of critical habitat. Applicable case law has also consistently supported the view that critical habitat is habitat necessary for both survival and recovery of the listed species (see *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004) (“Clearly, then, the purpose of establishing ‘critical habitat’ is for the government to carve out territory that is not only necessary for the species’ survival but also essential for the species’ recovery.”); *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 442 (5th Cir. 2001) (noting that the ESA’s definition of critical habitat “is grounded in the concept of ‘conservation’”); *Center for Biological Diversity, Defenders of Wildlife v. Kelly*, 93 F. Supp. 3d 1193, 1201 (D. Idaho 2015)

(noting that critical habitat is “defined and designated ‘in relation to areas necessary for the conservation of the species, not merely to ensure its survival.’” (quoting *Ariz. Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1166 (9th Cir. 2010); *Alaska Oil & Gas Ass’n v. Jewell*, 815 F.3d 544, 555–56 (9th Cir. 2016))).

Comment 65: Some commenters stated that the proposed elimination of the sequencing requirement could lead to increased conflict, controversy, and litigation, because the Services would have to rely on their expertise and their ability to adequately explain the scientific basis for when unoccupied habitat is deemed nonessential. As evidence of such controversy, some commenters pointed to the recent Supreme Court decision in *Weyerhaeuser*, in which unoccupied critical habitat for the dusky gopher frog was contested by the private property owner. The commenters also suggested that designation of unoccupied critical habitat could undermine conservation and lead to perverse incentives for landowners to destroy habitat before it becomes occupied by the listed species. The commenter suggested the Services focus on areas where a critical habitat designation will encourage conservation.

Response: We do not agree that the changes we are now making to the implementing regulations regarding the designation of unoccupied areas of critical habitat will lead to increased conflict, litigation, or controversy over critical habitat designations. Even with the changes we are making in this rule, the Act will still require that we designate critical habitat on the basis of the best scientific data available. Despite their limited regulatory effect (i.e., through the ESA section 7(a)(2) requirement that Federal agencies ensure their actions are not likely to destroy or adversely modify critical habitats), critical habitat designations are consistently one of the most controversial protections afforded listed species under the ESA. It has been the experience of both Services that controversy related to critical habitat designations depends more on factors

such as the size and location of the designation rather than whether the areas being designated are occupied or unoccupied.

The revisions we are making to 50 CFR 424.12(b)(2) do not alter the Services' longstanding practice of first considering areas within the geographical area occupied by the species when developing a critical habitat designation. As reflected in the first sentence of this revised regulation, the Services will still consider and identify occupied areas first before assessing whether any unoccupied areas are essential for the species' conservation. We find that this approach is the most logical way to begin a critical habitat analysis and has consistently been the practice of the Services regardless of which regulations have been in place. The revisions we are making thus do not completely remove the prioritization of occupied areas over unoccupied areas; they instead remove the requirement that the Services exhaust all occupied areas before considering whether any unoccupied areas may be essential for conservation of the particular species.

As the critical habitat at issue in *Weyerhaeuser* was designated under the pre-2016 regulations (see 77 FR 35118, June 12, 2012), which included a two-step or "sequencing" requirement, this example does not support the assertion that elimination of a "sequencing" requirement will increase litigation or controversy. Instead, the *Weyerhaeuser* example aligns with our expectation that removal of the strict sequencing step will have no effect on the level of controversy associated with designations of unoccupied critical habitat, which in our experience is largely driven by where the critical habitat is located (e.g., on private lands) and its size.

The ESA allows for consideration of the potential impacts on conservation efforts when designating critical habitat, and as described in the Services' section 4(b)(2) policy (81 FR 7226, February 11, 2016), we will consider areas covered by conservation agreements or plans when assessing the benefits of including and excluding particular areas from a designation. In particular, the Services consider whether such conservation

plans are already providing on-the-ground conservation that would reduce the benefit of designating the same area as critical habitat. We expect that our approach of examining whether to exclude from designation areas that are subject to voluntary conservation agreements and plans will continue to provide a substantial incentive to private landowners and help further the conservation of listed species while also minimizing regulatory impacts. This approach is also consistent with our authorities and the intent of section 4(b)(2) of the ESA.

With respect to the perverse incentives described by the commenter, we do not agree that the revisions we are making to 50 CFR 424.12(b)(2) in this rule will alter those behaviors or attitudes. To the extent that any perverse incentives exist with regard to modifying habitat conditions on private lands, it has been the Services' experience that these attitudes persist regardless of any specific regulation. We are also aware that deliberate modification of areas to make private property less hospitable to listed species may have occurred previously in response to species' listings under the ESA rather than in response to, or in potential avoidance of, a critical habitat designation.

Comment 66: A commenter recommended that, if we finalize the proposed removal of the sequencing requirement at 50 CFR 424.12(b)(2), the final rule should indicate that the Services will identify unoccupied privately owned areas in recovery plans versus critical habitat rules due to the controversy associated with designating such areas. The commenter stated that recovery plans, which have overlapping but broader goals than critical habitat designation, are the appropriate place to consider such lands, especially given that the areas do not provide immediate habitat for the listed species, and this approach would reduce controversy and maintain the focus on collaboration.

Response: We appreciate the suggestion to use recovery plans as a means to identify unoccupied areas of critical habitat. However, the ESA requires the Services to designate critical habitat concurrently with listing or, if not yet determinable, within 1

year from the date of listing. Recovery plans are developed after a species is listed, typically involve coordination with multiple partners and stakeholders, and require a period of public review before being finalized. As a result, recovery plans are often finalized well after the species is listed under the ESA. The ESA does not allow us to delay designating critical habitat until such time as a recovery plan is completed, nor does it allow the Services to exempt private lands from a critical habitat designation and instead identify those lands as essential for a species' conservation in a recovery plan. Moreover, courts have noted that the recovery plan's requirements are separate and distinct from critical habitat designation. (See generally *N.M. Farm & Livestock Bureau v. U.S. FWS*, 952 F.3d 1216, 1232–33 (10th Cir. 2020) (recovery plan provision “is entirely separate from the requirements for the designation of critical habitat”); *Home Builders Ass’n of N. Cal. v. U.S. FWS*, 616 F.3d 983, 989-990 (9th Cir. 2010) (distinguishing recovery plan and critical habitat designation requirements)). We decline to adopt regulatory provisions that would blur the distinct statutory requirements established by Congress for critical habitat designation and recovery planning.

Comment 67: Several commenters stated they support the proposed removal of the requirement for unoccupied areas to contain essential features, because there is no legal basis for such a requirement or such a requirement is in direct conflict with the ESA.

Response: We appreciate the commenters' support of our proposed changes.

Comment 68: A number of commenters opposed the proposed removal of the requirement for unoccupied areas to contain one or more essential features and stated that this requirement is a logical way to establish that an area is habitat for the species. Some commenters stated that an area cannot be habitat for a species if it does not contain at least one feature necessary for the existence and survival of a species, and to comply with the Supreme Court's ruling in *Weyerhaeuser*, an area must be habitat for a species to be

considered critical habitat. Other commenters stated the proposed revisions ignore, downplay, or are inconsistent with the *Weyerhaeuser* ruling, and that to ensure consistency with the *Weyerhaeuser* ruling, the regulation should be rephrased to indicate that the unoccupied areas under consideration are habitat or rephrased to specifically require that the area is presently capable of supporting one or more life processes of the species. Some commenters asserted that removal of the essential-feature requirement indicates the Services will not apply a sufficient scientific rationale when determining which unoccupied areas are essential for a species' conservation, or that the Services will designate areas that are not habitat for the species.

Response: We understand the commenters' concerns and desire for assurances that critical habitat will be designated in a manner consistent with the Supreme Court's ruling in *Weyerhaeuser*. As we have stated previously, we recognize the importance of the Supreme Court's ruling in *Weyerhaeuser*, and we intend to designate critical habitat in a manner consistent with that ruling (87 FR 37757, June 24, 2022; 88 FR 40764, June 22, 2023). However, we also now recognize that importing language from the statutory definition of "occupied" critical habitat (regarding essential features) into the regulatory requirements for defining "unoccupied" critical habitat is not the best way to ensure that unoccupied critical habitat is habitat for the listed species. Congress defined occupied critical habitat and unoccupied critical habitat separately, purposely setting different standards for defining each type of critical habitat and referred to essential features only in connection with occupied critical habitat (see 16 U.S.C. 1532(5)(A)(i)). We now find that when we revised this regulation in 2019, we confounded the criteria for defining occupied and unoccupied critical habitat, and thereby eroded the clear statutory distinction between those two types of areas. In other words, by adding the requirement for unoccupied areas to contain one or more essential features in 2019, we made the standards for designating those areas more similar than what the ESA plainly indicates.

The revisions we are finalizing today will realign the implementing regulation at 50 CFR 424.12(b)(2) with the statutory standards for defining and designating unoccupied critical habitat. These revisions avoid the potential for rendering any part of the statutory language surplusage.

In *Weyerhaeuser*, the Court held that an area is eligible for designation as critical habitat under the ESA only if it is habitat for that species. The *Weyerhaeuser* ruling is sufficiently clear on this matter and stands on its own; thus, we find there is no need to build this ruling explicitly into the ESA implementing regulations. The *Weyerhaeuser* decision did not address what should or should not qualify as “habitat”; thus, it in no way established any requirements regarding presence of essential features or habitability of the area. We find that, rather than creating additional regulatory requirements that confound or go beyond the statutory standards, it is more appropriate to make determinations regarding whether areas qualify as habitat for a given species by applying the best available scientific data, as required by the ESA, and providing clear explanations of those data in each individual critical habitat rule.

Comment 69: Some commenters requested that we clarify the process for determining critical habitat by providing a regulatory definition of the term “habitat.” Several commenters stated that the absence of a clear definition of “habitat” would lead to regulatory and legal uncertainty, would decrease transparency and predictability, would increase litigation over the definition of “habitat,” and could even potentially delay important clean-energy infrastructure projects or result in fewer projects pursued. One commenter stated that the proposed revision of 50 CFR 424.12(b)(2) eliminated the word “habitat” and was therefore an attempt to circumvent the Supreme Court’s ruling in *Weyerhaeuser*. This commenter stated that in the absence of a regulatory definition of “habitat,” the proposed rule used vague and subjective language, such as “specific areas outside the geographical area occupied by the species at the time of listing.”

Response: The proposed revisions to 50 CFR 424.12(b)(2), which we are finalizing in this rule, are in no way an attempt by the Services to circumvent or disregard the Supreme Court’s ruling that to qualify as critical habitat an area must first be habitat for the particular species. The court’s ruling did not require that the Services develop a definition of the term “habitat,” and we do not agree that a definition is necessary to designate critical habitat in a manner consistent with this ruling (see also our response to *Comment 68*). We also do not agree that the language in 50 CFR 424.12(b)(2) is vague or overly subjective. This language is consistent with the statutory language in 16 U.S.C. 1532(5)(A)(ii), and the particular phrase cited by the commenter (i.e., “specific areas outside the geographical area occupied by the species at the time of listing”) comes directly from the statutory definition of “critical habitat.” Furthermore, the phrase “geographical area occupied by the species” has already been defined in the ESA implementing regulations at 50 CFR 424.02.

Through our prior efforts to codify a regulatory definition of “habitat” (85 FR 81411, December 16, 2020), we ultimately found that, to encompass the diverse array of species’ habitat requirements and simultaneously encompass both occupied and unoccupied critical habitat as defined under the ESA, the resulting regulatory definition of “habitat” had to be generic and broad. The resulting definition we developed was neither clear nor sufficiently informative to allow for any conclusions to be reached about whether a particular area would be considered habitat for a particular species (87 FR 37757, June 24, 2022). We also concluded that, given the complexity and variety of factual information pertaining to each individual species that the Services must consider, it is not possible to develop any “habitat” definition that would allow for perfect predictability in determining what areas constitute habitat. The public had ample opportunity to comment on both the 2020 habitat definition rule and the 2022 rescission rule. We did not reopen our prior decision to rescind the 2020 definition of “habitat” with

this rulemaking, as we did not propose a new definition of this term or express a willingness to accept comments on this issue. We find no basis to conclude that a regulatory definition of “habitat” would reduce regulatory or legal uncertainty associated with the designation of unoccupied critical habitat, increase transparency and predictability of designations, or affect the timing or number of infrastructure projects. Any necessarily generic definition of this term would also not increase the consistency and transparency in the Services’ approach for designating critical habitat designations beyond that already achieved through the existing, governing requirements of the ESA, the implementing regulations, and applicable court decisions.

Comment 70: Several commenters opposed the proposed removal of the requirement that unoccupied areas contain one or more physical or biological features essential to the conservation of the species, stating the current regulation is consistent with the ESA. Commenters asserted that the structure of the ESA’s section 3 definition of “critical habitat” compels the conclusion that the prerequisite that areas contain “physical or biological features” applies to both occupied and unoccupied areas. The commenters stated that if the ESA’s less demanding standard for designating “occupied areas” requires the presence of “physical or biological features,” then the more demanding standard for designating “unoccupied areas” must also require the presence of “physical or biological features.”

Response: As discussed previously, the statutory definition of “critical habitat” contains two distinct prongs: one provides the criteria for determining whether “occupied” areas qualify as critical habitat (16 U.S.C. 1532(5)(A)(i)), and the second provides the criterion for determining whether “unoccupied” areas qualify as critical habitat (16 U.S.C. 1532(5)(A)(ii)). The second prong of the definition in section 3(5)(A)(ii) of the ESA (16 U.S.C. 1532(5)(A)(ii)) states that critical habitat includes specific areas outside the geographical area occupied by the species at the time it is listed

under the ESA that the Secretary determines are essential for the conservation of the species. In contrast to section 3(5)(A)(i) (16 U.S.C. 1532(5)(A)(i)), this second prong of the critical habitat definition does not mention physical or biological features, much less require that the specific areas contain the physical or biological features essential to the conservation of the species. This two-prong structure of the definition indicates that Congress intended the two types of critical habitat to have distinct as opposed to the same standards. A regulation requiring unoccupied areas to contain essential features has the effect of making the standards for defining unoccupied critical habitat more similar to those of occupied critical habitat, not “more demanding.” As a number of courts have indicated, the higher or more demanding standard for designating unoccupied areas does not stem from whether essential physical or biological features are present, but from whether the area itself is essential for the species’ conservation (*Home Builders Ass’n v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 990 (9th Cir. 2010) (“Essential conservation is the standard for unoccupied habitat ... and is a more demanding standard than that of occupied critical habitat.”); *Cape Hatteras Access Pres. All. v. U.S. Dep’t of the Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) (“[W]ith unoccupied areas, it is not enough that the area’s features be essential to conservation, the area itself must be essential”)).

Comment 71: Several commenters stated they opposed removal of the “essential features” requirement in 50 CFR 424.12(b)(2) because an area cannot be reasonably construed as “essential for the conservation of the species” if the area is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species or that it would have to be substantially altered from its current condition to meet the habitat needs of the species. One commenter stated that, in *Weyerhaeuser*, the Supreme Court explicitly rejected the lower court’s conclusion that “there is no habitability requirement in the text of the ESA or the implementing regulations.” Commenters also asserted that the legislative history of the 1978 ESA amendments

plainly displays Congress's expectation that unoccupied critical habitat encompasses only those areas currently sustaining or currently capable of sustaining species. Several commenters expressed concerns that the proposed revision could or would allow the Services to designate areas that do not have any essential features and then require restoration of the area through section 7 of the ESA and conditioning of Federal permits. One commenter stated that the fact that an area may become habitat at some point in the future does not render it habitat at the time of the critical habitat designation. Several other commenters urged the Services to revise the regulation to at least require a finding that the area will support the essential features in the foreseeable future.

Response: We do not agree that importing a portion of the statutory definition for "occupied" critical habitat (i.e., requiring presence of physical or biological features essential to the conservation of the species) into the requirements for determining what areas qualify as "unoccupied" critical habitat is the appropriate way to resolve the question of whether an area is habitat for a species. Nor is conflating the definitions of occupied and unoccupied habitat appropriate to resolve whether an area is essential for that species' conservation. We agree that Congress through the statutory text and the Supreme Court in *Weyerhaeuser* provide consistent direction that an area must be habitat for the species in order for it to be designated as critical habitat under the ESA. (See 16 U.S.C. 1533(a)(3)(A)(i), which states that "[t]he Secretary shall "... designate *any habitat of such species* which is then considered to be critical habitat ..." (emphasis added); and *Weyerhaeuser Co. v. U.S. FWS*, 139 S. Ct. 361, 372 (2018) ("Only the 'habitat' of the endangered species is eligible for designation as critical habitat.")). In *Weyerhaeuser*, the Supreme Court also stated that the statutory definition of "critical habitat" is "no baseline definition of habitat" and that it "leaves the larger category of habitat undefined" (see *Weyerhaeuser Co. v. U.S. FWS*, 139 S. Ct. 361, 372 (2018)). When this case reached the Supreme Court, whether the unoccupied area at issue in that case could support the listed

species was still in dispute. Neither the Supreme Court nor the lower court ruled on that aspect of the case. The Supreme Court, stating that the lower court had “no occasion to interpret the term “habitat” in section 4(a)(3)[(A)](i) [of the ESA] or to assess the Service’s administrative findings” regarding whether the area in dispute was habitat, remanded the lower court’s ruling with instruction to “consider these questions.”

Weyerhaeuser Co., 139 S. Ct. at 369. As this case was ultimately resolved as a result of revisions by the FWS to the critical habitat designation, the lower court had no further cause to address these questions. In other words, even upon remand, the lower court did not opine on or provide an interpretation of the term “habitat.” Therefore, neither this particular case history nor the statutory definition of “critical habitat” establishes requirements or guidance with respect to the meaning of the term “habitat.”

Removal of the “essential feature requirement” in 50 CFR 424.12(b)(2) will not alter the need for the Services to abide by both Congress’ statutory direction and the Supreme Court’s ruling in *Weyerhaeuser* to designate areas that are habitat for the listed species. This revision will also not alter the need for the Services to make the statutorily required finding that an unoccupied area is essential for the conservation of the listed species to designate it as critical habitat. Whether an unoccupied area constitutes habitat and is essential for the conservation of a species will be case- and fact-specific and must be based on the best scientific data available for the listed species. Furthermore, we find it most appropriate and consistent with the conservation purposes of the ESA to consider areas as habitat if they fit within any reasonable biological understanding of “habitat” as established by the best available scientific data for a particular species. We also note that neither Congress nor the *Weyerhaeuser* ruling established any prohibition on designating areas as critical habitat if those areas may require some reasonable restoration to become accessible, habitable, or capable of supporting the species. The Services will not designate areas that are wholly unsuitable for the given listed species or that require

extreme intervention or modification to support the species, but it is not necessary or consistent with the conservation purposes of the ESA to disqualify an area as “habitat” simply because it requires some reasonable alteration or restoration—whether through natural processes or some reasonable degree of human intervention.

It is implicit but clear, based on the statutory definition of “critical habitat,” that the appropriate timeframe for assessing whether physical or biological features “are found” in a specific area and whether specific areas “are essential” for a species’ conservation is the time of designation (16 U.S.C. 1532(5)(A)(i)). Therefore, we do not find it necessary or appropriate to add any additional regulatory requirements regarding the timing of when certain essential features would be present in the area, or when a species may occupy or use the area. A specific unoccupied area may remain inaccessible to the listed species (e.g., blocked historical spawning habitat), or may require some form of natural recovery or reasonable restoration to support the listed species over the long term (e.g., upgrading old culverts), but may still be considered habitat for that species and may still be considered essential for that species’ conservation if the record supports such conclusions at the time of designation. The ESA does not require the Services to know when the species is likely to benefit from a critical habitat designation to exercise our authority to designate an area as critical habitat.

The Services cannot designate as critical habitat areas that lack essential physical and biological features and then use the consultation requirements under section 7(a)(2) of the ESA to require restoration of the area. Section 7 of the ESA does not grant the Services that authority. Section 7(a)(2) of the ESA prohibits Federal actions from reducing critical habitats’ capacity to conserve listed species over time; it does not impose an affirmative requirement to restore or improve any areas of critical habitat (see 81 FR 7214 at 7224, February 11, 2016 (extending to the adverse-modification analysis the conclusion in *National Wildlife Federation v. National Marine Fisheries Service*, 524

F.3d 917, 930 (9th Cir. 2007), that agency action can only violate section 7(a)(2) of the Act “if that agency action causes some deterioration in the species’ pre-action condition”). In other words, the requirement for Federal agencies to ensure their actions are not likely to destroy or adversely modify critical habitat is a prohibitory standard only.

Comment 72: A commenter stated that removal of the requirement that unoccupied areas contain essential features will increase the burden on the Services to demonstrate to stakeholders that an area is habitat and is essential for the species. Several commenters note that the Services failed to identify a situation where they have designated an unoccupied area as critical habitat without an essential conservation feature or explain how an area can be essential when it lacks features the species needs.

Response: We do not agree that removal of this regulatory requirement will increase the burden on the Services to demonstrate that unoccupied areas are essential for the conservation of the listed species. With or without this requirement, the Act requires the Services to explain how the habitat is essential for the species’ recovery. Mere presence of certain habitat features is not sufficient to demonstrate the features are, or the area itself is, “essential,” which is the required test under the ESA. Although several court rulings on this issue predate the 2019 regulation, they nonetheless speak to this statutory standard and indicate that, in designating unoccupied critical habitat, the Services must still explain how the *area* is essential for the conservation of the species. Where efforts have been made to use the presence of “essential features” to reach a conclusion that the area itself is essential to the conservation of the species, those efforts have failed (see *Cape Hatteras Access Pres. All.*, 344 F. Supp. 2d at 119 (“[W]ith unoccupied areas, it is not enough that the area’s features be essential to conservation, the area itself must be essential.”); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 67 F.4th 1027, 1044–45 (9th Cir. 2023) (holding that “the mere presence of pertinent

biological features” is insufficient for unoccupied areas to qualify as critical habitat); *Otay Mesa Prop., L.P. v. U.S. Dep’t of the Interior*, 344 F. Supp. 3d 355, 376 (D.D.C. 2018) (explaining that “the mere presence of pertinent biological features” is insufficient for designating unoccupied critical habitat and that to do so instead requires a finding that “the area itself is ‘essential’ to the conservation of the species”).

As discussed in previous responses, we find that the 2019 regulation’s requirement that unoccupied areas contain one or more essential features blurred the clear distinction between the two types of critical habitat defined in section 3 of the ESA (16 U.S.C. 1532(5)(A)) (e.g., see responses to *Comment 68*, *Comment 70*, and *Comment 71*, above). We do not need to point to specific instances of unoccupied critical habitat that lack essential physical or biological features to rectify this issue.

Comment 73: Several commenters stated that they support the proposed removal of the “reasonable certainty” standard from § 424.12(b)(2) because it is potentially unlawful. Some commenters stated that this requirement is unnecessary in light of the ESA’s requirement to determine critical habitat on the basis of the best scientific data available or otherwise noted that the ESA does not require a finding of “reasonable certainty.”

Response: We appreciate the commenters’ support for our proposed changes.

Comment 74: Multiple commenters opposed the proposed removal of the “reasonable certainty” requirement from 50 CFR 424.12(b)(2) because, in their view, removing that requirement is contrary to the “more demanding” standard Congress established for designating unoccupied critical habitat, and the Services should be required to make a strong case for making a determination that the areas are “essential for conservation.” These commenters asserted that, under the proposed regulation, the Services could base their designation on science that is not sufficiently certain. Other commenters stated that if the best available data do not contain the requisite amount of

certainty, those data cannot be relied upon in making regulatory decisions. Several commenters stated that basing designation of unoccupied areas on the “best scientific data available” is not an adequate standard, as the “best data” could be poor and speculative. One commenter asserted that the proposed removal of the “reasonable certainty” standard indicates that the Services could rely on “quite inconclusive” information when designating critical habitat.

Response: Removal of the “reasonable certainty” standard from the regulations does not allow the Services to begin to, nor does it indicate we will, designate areas of unoccupied habitat based on unreliable or speculative data. The best-available-data standard is also not an inadequate standard; it is the statutory standard upon which we are required to base all critical habitat designations (16 U.S.C. 1533(b)(2)). As we discussed in the proposed rule, courts have held that the ESA’s “best scientific data available” standard does not require that the information relied upon by the Services be perfect or free from uncertainty. (See, e.g., *Oceana, Inc. v. Ross*, 321 F. Supp. 3d 128, 142 (D.D.C. 2018) (“[T]he plain language of the provision requires NMFS only to use the best data available, not the best data possible.”) (emphases in original); *Alaska Oil & Gas Ass’n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016) (noting that the Act’s best-data-available requirement does not require perfection in the data but only precludes basing decisions on speculation or surmise) (citing cases). In applying this standard, the Services cannot, and do not, simply rely on whatever data are available at the time of designation without independent evaluation; the Services must carefully review and interpret those data along with any associated assumptions and uncertainties, and then draw supportable, reasonable conclusions. The scientific information and basis for a proposed designation are also subjected to both peer and public review, which affords additional vetting and opportunity for input before a designation is finalized.

The statutory definition of “critical habitat” provides separate, distinct standards for defining the two types (occupied and unoccupied) of critical habitat (16 U.S.C. 1532(5)(A)). The ESA does not establish or imply there must be a greater degree of certainty in the underlying data supporting the designation of unoccupied areas relative to occupied areas. In fact, section 4(b)(2) of the ESA makes no distinction on this matter, and simply states that critical habitat must be designated “on the basis of the best scientific data available” (16 U.S.C. 1533(b)(2)).

Comment 75: Several commenters opposed the proposed removal from 50 CFR 424.12(b)(2) of the requirement to determine that unoccupied areas will have a reasonable certainty to contribute to the conservation of the species. One commenter stated that this provision informs the determination of whether an area is essential for the species’ conservation, and that this requirement helps ensure that unoccupied areas deemed “essential” will benefit the species. Furthermore, the commenter stated that the regulation should be revised to provide relevant factors for determining when an unoccupied area is considered essential, and that the Services should be required to make a finding that the species will occupy the area. The commenter stated that if the species is unlikely to occupy the area, then it cannot contribute to the species’ conservation.

Response: To designate an unoccupied area as critical habitat, the Services must make a determination that the specific area is “essential for conservation.” Whether and how an area is demonstrated to meet this statutory test will depend on the best available data for the listed species and what those data indicate in terms of the habitat and conservation needs of the species. It is possible that, in some cases, the Services will have data to show or project when the listed species may move into or reoccupy an unoccupied area of critical habitat; however, such data are not required to find that the area is “essential” for the conservation of that species. Rather, the Services can consider a variety of relevant factors (e.g., whether the area was part of the historical range, current

condition of the unoccupied habitat, planned restoration activities) when determining whether the area is essential for the species' conservation and assessing the impacts (positive and negative) of designation under section 4(b)(2) of the ESA.

Regardless of the relevant available data that are used to inform a critical habitat designation, the ESA does not require the Services to conduct a forward-looking analysis to forecast or predict when a species may occur in an area that it did not occupy at the time of listing. The ESA also does not require the Services to know when the species is likely to benefit from a critical habitat designation in order to exercise our authority to designate an area as critical habitat. As we discussed in response to *Comment 71*, the statutory definition of "critical habitat" indicates that the appropriate timeframe for assessing whether a specific area is "essential" for a species' conservation is the time of designation (16 U.S.C. 1532(5)(A)(i)). Therefore, for an unoccupied area to be considered "essential," we need not determine or project when the listed species may occur in the area or benefit from the critical habitat designation. A specific unoccupied area may contain excellent habitat for a listed species but remain inaccessible to the listed species (e.g., blocked historical spawning habitat) or may require some form of natural recovery or reasonable restoration to support the listed species over the long term (e.g., upgrading old culverts); but in both cases, the areas may still be considered habitat for that species and may still be considered essential for that species' conservation if the evidence supports such conclusions at the time of designation.

Comment 76: A commenter stated they support the removal of the phrase "there is a reasonable certainty ... that the area will contribute to the conservation of the species" from 50 CFR 424.12(b)(2) because this is an inappropriately low standard. The commenter stated that merely contributing to conservation is not equivalent or indicative of being essential or indispensable to conservation.

Response: We appreciate this commenter’s point, and we agree that “contributing to conservation” is not an equivalent standard to the statutory standard of whether an area is “essential” or necessary for a species’ conservation.

Comment 77: Some commenters asserted that the proposal to remove the “reasonable certainty” requirement from 50 CFR 424.12(b)(2) lacked a sufficient explanation. A commenter stated that the justification that this requirement could potentially conflict with the best available data requirement was not reasonable. The commenter stated that because the best-available-data standard has not previously been interpreted to require a specific level of certainty, there is no indication that any potential conflict exists. Several commenters stated they did not agree with the Services’ statements in the proposed rule that imposing a “reasonable certainty” standard could result in some of the best available data being excluded from consideration.

Response: We respectfully disagree with these comments and continue to find that the “reasonable certainty” requirement in the 2019 regulation is not mandated by the language or structure of the Act, and in the view of the Services, its removal would better fulfill the Secretaries’ obligation to further the conservation purposes of the Act. The best-available-data standard of the ESA already inherently contains an obligation for the Services not to base their decisions on information that is merely potential or speculative. The “reasonable certainty” standard appeared to set a more stringent standard relative to the statutory standard and thus could potentially result in the Services excluding data from consideration because they were deemed not to meet some ambiguously heightened level of certainty. As we also discussed in response to *Comment 74*, the ESA does not require that the supporting data be free from uncertainty (see, e.g., *Alaska Oil & Gas Ass’n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016) (noting that the Act’s best data available requirement does not require perfection in the data but only precludes basing decisions on speculation or surmise) (citations omitted)). The “reasonable certainty”

standard could also potentially lead to increased legal challenges to the Services' designations asserting either that we ignored some of the relevant available data, or that the underlying data were not sufficiently free from uncertainty. We find that the rationale and explanation for this revision is clear and reasonable, and we are finalizing the revision as proposed.

Comment 78: Several commenters noted they support the addition of the last sentence of 50 CFR 424.12(b)(2) indicating that determinations regarding whether an area is essential for a species' conservation will be based on the best scientific data available. Several commenters, however, objected to the inclusion of this phrase, stating that, while accurate, it is redundant with regulatory text at 50 CFR 424.12(a) and is also incomplete or misleading because it leaves out the requirement to consider economic, national security, and other relevant impacts.

Response: We appreciate the comments in support of this revision, and we do agree with other comments that the added sentence in 50 CFR 424.12(b)(2) is redundant with existing text in the earlier section of the regulations (50 CFR 424.12(a)). However, we have elected to repeat this statutory requirement in 50 CFR 424.12(b)(2) because it is helpful to reiterate and emphasize this important standard, particularly given the sometimes contested nature of unoccupied critical habitat designations. Also, comments we received on the proposed rule expressing concerns that the Services intend to have unfettered discretion in designating these areas reaffirm that it is helpful to reiterate in the context of unoccupied critical habitat that decisions must be made on the basis of the best scientific data available.

We do not find the text of 50 CFR 424.12(b)(2) to be incomplete or misleading because this section of the regulations is focused on the identification of areas that meet the definition of "critical habitat" under the ESA. Other sections of the regulations, 50

CFR 424.19 in particular, discuss other requirements of the designation and rulemaking process, and these regulations addressing critical habitat continue to apply.

Other General Comments

Comment 79: Several commenters stated that the Services did not adequately explain the proposed changes and, for that reason, the proposed regulation is arbitrary and capricious. Some commenters claimed that the Services' reliance primarily on E.O. 13990, litigation, and points that were adequately addressed in the 2019 rulemaking for its rationale for the proposed changes is insufficient.

Response: As discussed above in response to comments on specific proposed revisions, in our June 22, 2023, proposed rule (88 FR 40764), the Services thoroughly explained the proposed revisions based on our review of the 2019 regulations in light of the Act, its conservation purposes, and congressional intent. Following our review of the 2019 regulations, and as discussed more thoroughly in the responses above to comments on specific provisions, the Services have concluded that certain provisions of the 2019 regulations were not the best interpretation of the statutory standards or the best way to further the conservation purposes of the Act. Our preamble to the 2023 proposed rule identified where we were changing our positions from the prior rulemaking, and we have expanded our reasoning for those changes here in response to comments received. The 2019 rule was prompted by E.O. 13777 (82 FR 12285, March 1, 2017), which has been rescinded, as well as a settlement agreement related to litigation over the 2016 regulatory changes. We also note that, prior to 2016 there had been no comprehensive revisions to 50 CFR part 424 since 1984.

Comment 80: One commenter questioned whether the Services have adequately disclosed what they were not proposing to change in the 2019 regulations and requested the Services provide a publicly available written analysis of the sections of the regulations that would not be changed.

Response: Our June 22, 2023, proposed rule (88 FR 40764) thoroughly explained the revisions and changes that we proposed to the 2019 regulations. There is no requirement for agencies to identify portions of a rule that they do not propose to change and justify why certain provisions are being retained. We prepared a supporting document that displayed the specific, proposed line edits to the existing text in 50 CFR part 424 and made that document publicly available as part of the rulemaking docket during the public comment period. The Services have generally made revisions to all of the sections of the regulations that were revised in 2019: listing, delisting, and criteria for designating critical habitat. Those few provisions of the 2019 regulations that are not revised with this final rule remain in place. We refer commenters to the explanations provided in that rulemaking (83 FR 35193, July 25, 2018; 84 FR 45020, August 27, 2019) for the not-prudent determinations codified at 50 CFR 424.12(a)(1)(i), (iii), and (iv) (see also our responses to *Comment 48* and *Comment 49* in this document), for the changes to the definition of “physical or biological features” at § 424.02, and for the editorial changes to § 424.11(c).

Comment 81: A commenter requested the Services review all of the listing decisions and critical habitat determinations made under the 2019 rule. The commenter noted the original Federal court decision to vacate the entire rule indicates there are substantial issues with the rule. Consequently, some or all of the species affected by the 2019 rule may not have received the full conservation benefits of the Act when listing determinations and critical habitat designations were finalized.

Response: The specific changes to the regulations being finalized in this rule create prospective standards only. These regulations apply to classification and critical habitat rules finalized after the effective date of this rule (see **DATES**, above) and will not apply retroactively to classification and critical habitat rules finalized prior to the effective date of this rule. The Services do not intend to reevaluate any prior final listing,

delisting, or reclassification determinations or previously completed critical habitat designations on the basis of this final regulation.

As noted by the commenter, the 2019 regulations have been the subject of litigation. We described the litigation in our proposed rule (88 FR 40764–40765, June 22, 2023), and we note that the court’s decision to vacate the 2019 rule was not based on the merits, and that the 2019 rule was subsequently put back into effect. Due to the litigation, where there may have been some questions regarding which version of the regulations was in effect and therefore applicable, each listing, delisting, reclassification, and critical habitat designation made since the initial Federal court decision has been assessed to determine whether those listing determinations and critical habitat designations would be the same under the 50 CFR part 424 regulations as they existed before 2019, and under the regulations as revised by the 2019 rule. Those assessments concluded that, while the analysis may have differed, the outcomes would not. Therefore, we conclude that it is not necessary to reevaluate any prior final listing, delisting, or reclassification determinations or completed critical habitat designations.

Comment 82: Some commenters stated the Services should fully rescind the 2019 regulations, while others said the 2019 regulations should not be revised at all.

Response: In response to E.O. 13990 and in light of recent litigation over the 2019 rule, the Services reviewed the 2019 rule, evaluated the specific regulatory revisions promulgated through that process, and, for reasons set forth above in response to comments on the specific provisions, decided to make revisions to some of the 2019 regulations rather than fully rescinding them.

Comment 83: A commenter stated the Services should substantially revise or withdraw the June 22, 2023, proposed rule (88 FR 40764) because it will impede our ability to implement this Administration’s goals for the Infrastructure Investment and

Jobs Act (Pub. L. 117–58, 135 Stat. 429) and the Inflation Reduction Act (Pub. L. 117–169, 136 Stat. 1818).

Response: This rule revises and clarifies the standards for listing, delisting, reclassification determinations and critical habitat designations under the ESA. It will not directly affect this Administration’s goals for the Infrastructure Investment and Jobs Act or the Inflation Reduction Act. The extent to which future species listings or designations of their critical habitat are affected by or have an effect on specific projects that stem directly from the Infrastructure Investment and Jobs Act of 2021 or the Inflation Reduction Act of 2022 will be assessed on a case-by-case basis through section 7 consultation as specific projects are planned and implemented.

Comment 84: Some commenters noted the regulations governing listing and critical habitat designation have changed frequently in recent years, creating uncertainty for the regulated public.

Response: The Services acknowledge that there have been several recent revisions to the listing and critical habitat regulations and that revisions adopted in 2016 and 2019 were both challenged in subsequent litigation. However, following a review of the 2019 regulations prompted by E.O. 13990, and in response to the litigation on the 2019 rule and other ESA regulation revisions finalized in 2019, the Services determined that it is appropriate and necessary to revise these regulations so that the Services could best fulfill their duties under the Act with clear guidance. Moreover, changes to general implementing regulations related to listing and critical habitat cannot give any certainty as to a particular outcome of a listing determination or critical habitat designation due to the fact-specific nature of such rules. The process for revising regulations is governed by the APA as interpreted by relevant case law, with which the Services have complied fully. The explanation for the changes finalized today, as well as extensive responses to comments, are intended to reduce any confusion or uncertainty created by these changes.

Comment 85: A commenter stated the proposed rule is overly technical and that the final rule should contain additional information making it more understandable for the general public.

Response: We are required by E.O.s 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. We have explained the regulatory changes finalized in this rule as plainly and simply as possible. The Services received more than 160,000 comments on the proposed rule, indicating the general public was able to understand its provisions. We do not believe additional information needs to be provided in this document to make the final rule more understandable to the general public, but we did try to make some of the explanations in this final rule clearer.

Comment 86: Some commenters stated the regulation violates the “major questions doctrine” because the rule would give the Services the ability to make decisions based on tenuous scientific information with indefinite timeframes, unfettered ability to regulate lands through designations of unoccupied critical habitat, and discretionary delisting procedures. They stated that these actions may exceed the scope of the ESA as envisioned by Congress and may violate the major questions doctrine.

Response: The Services disagree with the commenters’ characterization of the rule and their statement that these regulations violate the major questions doctrine. The doctrine is a legal principle articulated by the Supreme Court in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), and relied upon in *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), the latter of which is referenced by the commenter. While clear parameters to this doctrine are difficult to discern, it generally involves an inquiry into whether Congress intended to confer on an agency the authority to address a matter of economic and political significance. (See generally *West Virginia*, 142 S. Ct. at 2608; *Biden*, 143 S. Ct. at 2372–73.) Here, Congress provided the requisite authority. We recognize that implementation of the ESA is often contested, as reflected in the numerous public comments on the

proposed rule. Nonetheless, Congress entrusted the Services with the authority to implement the ESA and develop regulations that interpret the Act in furtherance of its purposes in a consistent and transparent manner. This final rule fills in some details to implement express authority provided to the Services by the Act and does not exceed the scope of this authority. Moreover, these regulations do not give the Services the ability to make decisions based on tenuous scientific information with indefinite timeframes, give the Services the unfettered ability to regulate land, or make delisting discretionary. This rule revises and clarifies requirements for NMFS and FWS in classifying species and designating critical habitat in a manner most consistent with the language and conservation purposes of the Act.

Comments on Required Determinations

Comment 87: A commenter stated that the Services should pause this rulemaking to evaluate impacts under E.O.12866, as our proposal was identified as a significant rule. They stated the review process for the proposed rule must comply with the requirements for regulatory planning, coordination, and review specified in E.O. 12866 and related directives, including an economic analysis of the proposed rule.

Response: Executive Order 12866, as amended by E.O. 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OMB designated the June 22, 2023, proposed rule (88 FR 40764) as “significant” pursuant to E.O. 12866 but did not characterize the rulemaking as significant under section 3(f)(1) of E.O. 12866. Therefore, we are not required to conduct an economic analysis of the rule.

Executive Order 14094 amends E.O. 12866, reaffirms the principles of E.O. 12866 and E.O. 13563, and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and be consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January

20, 2021 (Modernizing Regulatory Review). E.O. 14094 states that regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity to the extent permitted by law. 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 final rule in a manner consistent with these requirements.

The revisions we are finalizing to the listing, delisting, and reclassification regulations as described in this rule are intended to align more closely with the Act and to provide transparency and clarity—not only to the public and stakeholders, but also to the Services’ staff in the implementation of the Act. Similarly, the revisions to the provisions related to the Secretaries’ duty to designate critical habitat are intended to align the regulations with the Act. These changes provide transparency and clarity, and there are no identifiable, quantifiable effects from the final rule. Further, we do not anticipate any material effects such that the rule would have an annual effect that would reach or exceed \$200 million or would adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or Tribal governments or communities.

Comment 88: Some commenters stated that we need to conduct an evaluation of economic impacts under E.O. 12866 and the Regulatory Flexibility Act. Others stated that because OMB deemed the rule significant under E.O. 12866, the Services’ determination that the rule would not have a significant effect on small entities was in error. Several commenters stated that the rule would directly and significantly affect small entities; as such, the Services should conduct a regulatory flexibility analysis.

Response: This final rule does not violate E.O. 12866 or the Regulatory Flexibility Act. We do not anticipate any material effects such that the rule would have an annual effect that would reach or exceed \$200 million or would adversely affect in a

material way the economy; a sector of the economy; productivity, competition, jobs, the environment, public health or safety; or State, local, territorial, or Tribal governments or communities.

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. We have certified that these regulations will not have a significant economic impact on a substantial number of small entities because this rule revises and clarifies requirements for NMFS and FWS in classifying species and designating critical habitat under the Act and does not directly affect small entities (see 88 FR 40764 at 40772, June 22, 2023). Further, regarding the comment that because OMB deemed the rule significant under E.O. 12866, the rule is also significant under RFA, we disagree. The criteria for identifying a significant regulatory action under E.O. 12866 are not the same as the criteria for identifying a rule that will have a significant economic impact on a substantial number of small entities pursuant to the RFA. See **Required Determinations**, below, for further discussion of E.O. 12866 and the RFA.

Comment 89: Some commenters stated the Services should prepare an environmental impact statement or an environmental assessment under NEPA and stated that a categorical exclusion is not appropriate for this rule. One commenter requested that, if an environmental assessment is prepared, it be made available for public comment and that any categorical exclusion be made available for public inspection.

Response: We have analyzed this regulation in accordance with the criteria of NEPA, the Department of the Interior regulations on implementation of NEPA (43 CFR 46.10–46.450), the Department of the Interior Manual (516 DM 8), the National Oceanic and Atmospheric Administration (NOAA) Administrative Order 216–6A, and the companion manual, “Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities,” which became effective January 13, 2017. We have concluded a categorical exclusion is appropriate for this rulemaking. For more-specific information regarding our conclusions regarding categorical exclusion under NEPA, see **Required Determinations**, below. The categorical exclusion memoranda developed by the Services are available online (see **ADDRESSES**, above).

Comment 90: One commenter stated the Services should have provided a statement of energy effects under E.O. 13211 and, because of the adverse energy effects of the rule, should prepare reasonable alternatives to the action.

Response: Because this final rule is promulgating interpretive rules that govern the Services’ implementation of the ESA, this action is not expected to affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action, and no statement of energy effects is required. Furthermore, to the extent that there may be any energy effects from future critical habitat determinations, the Services will be required to consider those effects pursuant to E.O. 13211 in the context of those species-specific rulemakings.

Comment 91: A few commenters stated that the proposed regulatory change violates E.O. 13777.

Response: Executive Order 13777 was revoked by President Biden on January 20, 2021, and is longer in effect. Moreover, by its terms, E.O. 13777 did not create any enforceable rights or benefits against the United States.

Comment 92: A commenter stated the proposed rule would affect States and, therefore, disagrees with the Services' conclusion that a federalism summary impact statement under E.O. 13132 is not required.

Response: As stated below under **Required Determinations** in *Federalism (E.O. 13132)*, the Services have determined, in accordance with E.O. 13132, that this final rule will not have significant federalism effects and have determined that a federalism summary impact statement is not required. This final rule pertains only to factors for listing, delisting, or reclassifying species and designation of critical habitat under the Act and does 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. Furthermore, to the extent that there may be any federalism effects from future critical habitat determinations, the Services will be required to consider those effects pursuant to E.O. 13132 in the context of those species-specific rulemakings.

Comment 93: A commenter stated the rule could result in takings and the Services should reconsider our findings under E.O. 12630.

Response: The Services have concluded, in accordance with E.O. 12630, that this final rule will not have significant takings implications. As discussed in the June 22, 2023, proposed rule and below under **Required Determinations**, this rule does not pertain to taking of private property interests, nor does it directly affect private property. A takings implication assessment is not required because this rule will not effectively compel a property owner to suffer a physical invasion of property and will not deny all economically beneficial or productive use of the land or aquatic resources. This rule substantially advances a legitimate government interest (conservation and recovery of endangered species and threatened species) and does not present a barrier to all reasonable and expected beneficial use of private property. To the extent that there may

be any takings implications as a result of future critical habitat determinations, the Services will be required to consider those implications pursuant to E.O. 12630 in the context of those species-specific rulemakings.

Comment 94: A commenter stated the Services will violate section 7(a)(2) of the ESA if they do not consult on this final rule. They stated that if the Services finalize the rule without completing consultation under section 7(a)(2), they will violate section 7(d) of the ESA, which prohibits Federal agencies from making any irreversible or irretrievable commitment of resources with respect to the agency action once consultation has been initiated.

Response: In finalizing this rule, the Services are acting in their statutory roles as administrators of the ESA and are engaged in a legal exercise of interpreting the standards of the ESA. The Services' promulgation of interpretive rules that govern the implementation of the ESA is not an action that is in itself subject to the ESA's provisions, including section 7(a)(2). The Services have a historical practice of issuing their general implementing regulations under the ESA without undertaking section 7 consultation. Given the plain language, structure, and purposes of the ESA, we find that Congress never intended to place a consultation obligation on the Services' promulgation of implementing regulations under the ESA. In contrast to actions in which we have acted principally as an "action agency" in implementing the ESA to propose or take a specific action (e.g., issuance of section 10 permits and actions under statutory authorities other than the ESA), here, the Services are carrying out an action that is at the very core of their unique statutory role as administrators—promulgating general implementing regulations or revisions to those regulations that interpret the terms and standards of the Act.

Comment 95: A commenter stated that the Services have not adequately consulted with Alaska Native Corporations and that they have an obligation under E.O. 13175 to consult with Alaska Native Corporations on the same basis as Tribes. Consistent with this

obligation, the Services should commit to consulting with Alaska Native Corporations on the designation of critical habitat in Alaska.

Response: In accordance with E.O. 13175 “Consultation and Coordination with Indian Tribal Governments,” the Department of the Interior’s manual at 512 DM 2, the Department of Commerce (DOC) “Tribal Consultation and Coordination Policy” (May 21, 2013), DOC Departmental Administrative Order (DAO) 218–8, and NOAA Administrative Order (NAO) 218–8 (April 2012), we considered possible effects of this rule on federally recognized Indian Tribes. This rule is general in nature and does not directly affect any specific Tribal lands, treaty rights, or Tribal trust resources. Therefore, we concluded that this rule does not have “Tribal implications” under section 1(a) of E.O. 13175. However, the Services did conduct several webinars on the proposed rule specifically targeted to Tribes and Alaska Natives.

A number of recent memoranda and Executive orders describe the commitment of the U.S. Government to strengthening the relationship between the Federal Government and Tribal Nations and to advance equity for Indigenous people, including Native Americans, Alaska Natives, Native Hawaiians, and Indigenous peoples of the U.S. Territories. These include the Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships (86 FR 7491, January 29, 2021); Executive Order 13985: Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (86 FR 7009, January 25, 2021); Executive Order 14031: Advancing Equity, Justice, and Opportunity for Asian Americans, Native Hawaiians, and Pacific Islanders (86 FR 29675, June 3, 2021); and the Memorandum on Indigenous Traditional Ecological Knowledge and Federal Decision Making (November 15, 2021). The commitments described in these recent Executive orders and memoranda include ensuring that Federal agencies conduct regular, meaningful, and robust consultation with Tribal officials in the development of Federal research, policies, and decisions, especially

decisions that may affect Tribal Nations and the people they represent. Our obligation to have a government-to-government relationship with federally recognized Tribes is paramount and, in addition to Executive orders and policies on the government-to-government relationship, is covered by Secretaries' Orders (S.O.) 3206 and 3225. While S.O. 3225 discusses "Alaska Natives" and "other Native organizations," its purpose is to protect subsistence rights and ways of life, and states that Departments of Commerce and the Interior will seek to enter into cooperative agreements for the conservation of specific species, such as marine mammals and migratory birds, and the co-management of subsistence uses with these organizations.

In the Consolidated Appropriations Act of 2004 (Pub. L. 108–199, Div. H, sec. 161), Congress required that the Director of the Office of Management and Budget (and, subsequently, all Federal agencies) consult with Alaska Native Corporations on the same basis as Indian Tribes under Executive Order 13175. Consistent with this obligation, the Services will consult on Federal decisions that have a substantial, direct effect on an Alaska Native Corporation. This obligation to consult does not extend beyond the E.O. 13175 context.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866, 13563, and 14094

Executive Order 12866, as amended by Executive Order 14094, provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA determined that this final rule is significant as defined by Executive Order 12866.

Executive Order 14094 amends E.O. 12866 and reaffirms the principles of E.O. 12866 and E.O. 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and be consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January

20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity to the extent permitted by law. 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 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.”

This rule revises the Services’ implementing regulations at 50 CFR 424.11 and 424.12. Specifically, the Services are finalizing changes to implementing regulations at: (1) § 424.11(b), the factors for listing, delisting, or reclassifying species; (2) § 424.11(d), the foreseeable future framework; (3) § 424.11(e), the standards for delisting; (4) § 424.12(a), the criteria for not-prudent determinations for critical habitat; and (5) § 424.12(b)(2), the criteria for designation of unoccupied critical habitat. The preamble to this rule and responses to public comments explain in detail why we anticipate that the regulatory changes we are finalizing will improve the implementation of the Act.

When we made changes to these same sections in 2019, we compiled historical data on the occurrence of specific metrics of listing and critical habitat determinations by the Services in an effort to describe for OMB and the public the potential scale of any effects of those regulations (on <https://www.regulations.gov>, see Supporting Document No. FWS-HQ-ES-2018-0006-0002 of Docket No. FWS-HQ-ES-2018-0006). We presented various metrics related to the regulation revisions, as well as historical data supporting the metrics.

For the 2019 regulations, we concluded—with respect to the provisions related to listing, reclassification, and delisting of species—that, because those revisions served to

clarify rather than alter the standards for classifying species, the 2019 regulation revisions would not change the average number of species classification (i.e., listing, reclassification, delisting) outcomes per year. With respect to the critical habitat provisions, we concluded that, because the outcomes of critical habitat determinations are highly fact-based, it was not possible to forecast reliably whether more or fewer not-prudent determinations or designations of unoccupied critical habitat would be made each year if the 2019 regulation revisions were finalized.

The revisions we are now finalizing to the listing, delisting, and reclassification provisions as described above are intended to align more closely with the Act and to provide transparency and clarity—not only to the public and stakeholders, but also to the Services’ staff—in the implementation of the Act. As a result, we do not anticipate any change in the rate or frequency or particular classification outcomes due to the revised regulation. Similarly, the revisions to the provisions related to the Secretaries’ duty to designate critical habitat are intended to align the regulations with the Act, and—because the outcomes of critical habitat analyses are so highly fact-specific and it is not possible to forecast how many related circumstances will arise—any future benefit or cost stemming from these revisions is currently unknowable.

These changes provide transparency and clarity, and there are no identifiable, quantifiable effects from this rule. Further, we do not anticipate any material effects such that the rule would have an annual effect that would reach or exceed \$200 million or would adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or Tribal governments or communities.

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 certified at the proposed rule stage that the proposed rule would not have a significant economic impact on a substantial number of small entities (88 FR 40764 at 40772, June 22, 2023). Nothing in this final rule changes the basis for that conclusion, and we received no information that changes the factual basis of this certification.

This rule revises and clarifies requirements for NMFS and FWS in classifying species and designating critical habitat under the Act and does not directly affect small entities. NMFS and FWS are the only entities that will be directly affected by this rule because we are the only entities that list species and designate critical habitat under the ESA. External entities, including any small businesses, small organizations, or small governments, are not directly regulated by this rule and thus will not experience any direct economic impacts from this rule.

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 presented under *Regulatory Flexibility Act* above, this rule will not “significantly or uniquely” affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act that this final rule will not impose a cost of \$100 million or more in any given year on local or State

governments or private entities. A small government agency plan is not required. As explained above, small governments will not be affected because the final rule will not place additional requirements on any city, county, or other local municipalities.

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

Takings (E.O. 12630)

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

Federalism (E.O. 13132)

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

Civil Justice Reform (E.O. 12988)

This rule 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 clarifies factors for listing, delisting, or reclassifying species and designation of critical habitat under the ESA.

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 (DOI) manual at 512 DM 2, the Department of Commerce’s (DOC) “Tribal Consultation and Coordination Policy” (May 21, 2013), DOC Departmental Administrative Order (DAO) 218–8, and NOAA Administrative Order (NAO) 218–8 (April 2012), we considered possible effects of this rule on federally recognized Indian Tribes and Alaska Native Corporations. We held three informational webinars for federally recognized Tribes in January 2023, before the June 22, 2023, proposed rule published, to provide a general overview of, and information on how to provide input on, a series of rulemakings related to implementation of the Act that the Services were developing, including the June 22, 2023, proposed rule to revise our regulations at 50 CFR part 424 (88 FR 40764). In July 2023, we also held six informational webinars after the proposed rule published, to provide additional information to interested parties, including Tribes, regarding the proposed regulations. More than 500 attendees, including representatives from federally recognized Tribes and Alaska Native Corporations, participated in these sessions, and we addressed questions from the participants as part of the sessions. We received written comments from Tribal organizations; however, we did not receive any requests for coordination or government-to-government consultation from any federally recognized Tribes.

This rule is general in nature and does not directly affect any specific Tribal lands, treaty rights, or Tribal trust resources. Therefore, we conclude that this rule does not have

Tribal implications under section 1(a) of E.O. 13175. Thus, formal government-to-government consultation is not required by E.O. 13175 and related policies of the DOI and DOC. This rule revises regulations for protecting endangered and threatened species pursuant to the Act. These regulations will 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.

Although this rule does not have “tribal implications” under section 1(a) of E.O. 13175, we will continue to collaborate with Tribes and Alaska Native Corporations on issues related to federally listed species and their habitats and will work with them as we implement the provisions of the Act. See Joint Secretaries’ Order 3206 (“American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act”, June 5, 1997) and Secretaries’ Order 3225 (“Endangered Species Act and Subsistence Uses in Alaska (Supplement to Secretarial Order 3206),” January 19, 2001).

Paperwork Reduction Act

This final rule does not contain any new collection of information that requires approval by the OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We have analyzed this final regulation in accordance with the criteria of NEPA, the Department of the Interior regulations on implementation of NEPA (43 CFR 46.10–46.450), the Department of the Interior Manual (516 DM 8), the NOAA Administrative Order 216–6A, and the companion manual, “Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities,” which became effective January 13, 2017.

On June 3, 2023, NEPA was amended by the Fiscal Responsibility Act (Pub. L. 118–5). These amendments codified a procedure for determining the appropriate level of NEPA review. Under these statutory standards, which generally reflect the same standards previously applicable by regulation, an environmental impact statement is only required for an action that has a reasonably foreseeable significant effect on the quality of the human environment. An environmental assessment is not required for actions that do not have a reasonably foreseeable significant effect on the quality of the human environment, or have effects of unknown significance, if the agency finds, *inter alia*, that the action is excluded pursuant to one of the agency’s categorical exclusions.

We have determined that a detailed statement under NEPA is not required because the rule is covered by a categorical exclusion. We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 or listed in NOAA’s NEPA companion manual (CM) that would require further analysis under NEPA.

Under DOI’s NEPA procedures, DOI 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 (43 CFR 46.210(i)). NOAA’s NEPA procedures include a similar categorical exclusion for “preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature” (categorical exclusion G7, at CM appendix E). This rule does not involve any of the extraordinary circumstances provided in NOAA’s NEPA procedures, and therefore does not require further analysis to determine whether the action may have significant effects (CM at 4.A).

As a result, we find that the categorical exclusion found at 43 CFR 46.210(i) and in the NOAA CM applies to this regulation, and neither Service has identified any extraordinary circumstances that would preclude this categorical exclusion.

Endangered Species Act

In developing this rule, the Services are acting in their unique statutory role as administrators of the Act and are engaged in a legal exercise of interpreting the standards of the Act. The Services' promulgation of interpretive rules that govern their implementation of the Act is not an action that is in itself subject to the Act's provisions, including section 7(a)(2). The Services have a historical practice of issuing their general implementing regulations under the ESA without undertaking section 7 consultation. Given the plain language, structure, and purposes of the ESA, we find that Congress never intended to place a consultation obligation on the Services' promulgation of implementing regulations under the Act. In contrast to actions in which we have acted principally as an "action agency" in implementing the Act to propose or take a specific action (e.g., issuance of section 10 permits and actions under statutory authorities other than the ESA), here the Services are carrying out an action that is at the very core of their unique statutory role as administrators—promulgating general implementing regulations or revisions to those regulations that interpret the terms and standards of the Act.

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

Executive Order 13211 requires agencies to prepare statements of energy effects when undertaking certain actions. These revised regulations are not expected to affect energy supplies, distribution, or use. 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 424

Administrative practice and procedure, Endangered and threatened species.

Regulation Promulgation

For the reasons set out in the preamble, we hereby amend part 424, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as set forth below:

PART 424—LISTING ENDANGERED AND THREATENED SPECIES AND DESIGNATING CRITICAL HABITAT

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

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

2. Amend § 424.11 by:

- a. In paragraph (a), removing the text “§ 424.02(k)” and adding in its place the text “§ 424.02”; and

- b. Revising paragraphs (b), (d), and (e) to read as follows:

§ 424.11 Factors for listing, delisting, or reclassifying species.

* * * * *

(b) The Secretary shall make any determination required by paragraphs (c), (d), and (e) of this section solely on the basis of the best available scientific and commercial information regarding a species’ status without reference to possible economic or other impacts of such determination.

* * * * *

(d) In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The foreseeable future extends as far into the future as the Services can make reasonably reliable predictions about the threats to the species and the species’ responses to those threats. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as

the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time.

(e) Species will be delisted if the Secretary determines, based on consideration of the factors and standards set forth in paragraph (c) of this section, that the best scientific and commercial data available substantiate that:

(1) The species is extinct;

(2) The species has recovered to the point at which it no longer meets the definition of an endangered species or a threatened species;

(3) New information that has become available since the original listing decision shows the listed entity does not meet the definition of an endangered species or a threatened species; or

(4) New information that has become available since the original listing decision shows the listed entity does not meet the definition of a species.

* * * * *

3. Amend § 424.12 by:

a. Revising the introductory text of paragraph (a)(1) and paragraphs (a)(1)(ii) through (iv);

b. Removing paragraph (a)(1)(v); and

c. Revising paragraph (b)(2).

The revisions read as follows:

§ 424.12 Criteria for designating critical habitat.

(a) * * *

(1) Designation of critical habitat may not be prudent in circumstances such as, but not limited to, the following:

* * * * *

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species;

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States; or

(iv) No areas meet the definition of critical habitat.

* * * * *

(b) * * *

(2) After identifying areas occupied by the species at the time of listing, the Secretary will identify, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species at the time of listing that the Secretary determines are essential for the conservation of the species. Such a determination must be based on the best scientific data available.

* * * * *

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks,

Department of the Interior.

Richard W. Spinrad,

Under Secretary of Commerce for Oceans and Atmosphere,

NOAA Administrator,

National Oceanic and Atmospheric Administration.

