Billing Code

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–HQ–ES–2025–0048; FXES11110900000–267–FF09E23000]

RIN 1018–BI76

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

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

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS or the Service), amend portions of our regulations for section 4 of the Endangered Species Act of 1973, as amended (Act or ESA). Specifically, we revise regulations related to section 4(b)(2) of the Act. Section 4(b)(2) requires consideration of the economic impact, the impact on national security, and any other relevant impact of designating any particular area as critical habitat and authorizes the exclusion of areas from critical habitat if the benefits of excluding the area outweigh the benefits of designating it as critical habitat. These revisions articulate when and how we determine whether the benefits of excluding an area outweigh the benefits of designating the area as critical habitat (exclusion analysis). This rule reflects the Service's experience and existing case law. The intended effect of this rule is to provide greater transparency and certainty for the public and stakeholders regarding the 4(b)(2) exclusion process.

DATES: This 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 regulation, are available at https://www.regulations.gov at Docket No. FWS–HQ–ES–2025–0048.

FOR FURTHER INFORMATION CONTACT: John Tirpak, U.S. Fish and Wildlife Service, Division of Conservation and Classification; 703-358–2163; john_tirpak@fws.gov. 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 Endangered Species Act of 1973, as amended (hereafter referred to as the Act or ESA; 16 U.S.C. 1531 et seq.), states that the purposes of the Act are to provide a means to conserve the ecosystems upon which endangered species and threatened species (listed species) depend, to provide a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions (16 U.S.C. 1531(b)). Moreover, the Act states that it is the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall use their authorities to further the purposes of the Act (16 U.S.C. 1531(c)(1)).

The Secretaries of the Interior and Commerce (Secretaries) share responsibilities for implementing most of the provisions of the Act. Generally, marine and anadromous species are under the jurisdiction of the Secretary of Commerce, and all other species are under the jurisdiction of the Secretary of the Interior. Authority to administer the Act has been delegated by the Secretary of the Interior to the Director of the FWS and by the Secretary of Commerce to the Assistant Administrator for the National Marine Fisheries Service (NMFS) (collectively, the Services). Together, the Services administer the Act via joint regulations in chapter IV of title 50 of the Code of Federal Regulations (CFR). In addition, each of the Services also has regulations specific to its own administration of the Act (located at 50 CFR part 17 for FWS and at 50 CFR parts 222 through 226 for NMFS). Because this rulemaking applies only to the FWS, the regulations in this rulemaking do not require NMFS to change its processes for consideration of exclusions under section 4(b)(2) of the Act. Since this rulemaking is solely applicable to the FWS, when we refer to the Secretary, we mean the Secretary of the Interior.

The regulations in this rule provide criteria or otherwise clarify the processes by which the FWS will implement various statutory requirements set forth in section 4 of the Act. This rule is intended to provide the public with a clear, transparent explanation of how we are revising the ESA regulations in 50 CFR part 17. These regulatory guidelines are based on our expertise in evaluating and protecting species, as well as in employing traditional tools of statutory interpretation that the courts have outlined.

One of the tools that the Act provides to conserve species is the designation of critical habitat. The purpose of critical habitat is to identify the areas that are essential to the listed species' conservation. When the Services determine that a species warrants listing, the Act requires the Services to designate critical habitat concurrently with the listing rule to the maximum extent prudent and determinable, or up to 1 year following listing 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 and biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; 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)).

Unless the FWS concludes that a critical habitat designation is not prudent and determinable for species listed under the Act, we must follow the statutory and regulatory provisions to designate critical habitat. The Act's language makes clear that biological considerations drive the initial step of identifying critical habitat. Section 4(b)(2) expressly requires designations to be made based on the best scientific data available. Therefore, the designation process begins by relying on the best scientific data available to identify the species' habitat. Next, the Act's definition of "critical habitat" requires the Secretary to identify those areas of habitat occupied by the species at the time of listing that contain physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection, and the specific areas of unoccupied habitat that are essential to the conservation of the species.

Section 4(b)(2) also requires that, in designating critical habitat, the Secretary must take into consideration the impacts of specifying any particular area as critical habitat (16 U.S.C. 1533(b)(2)). The second part of section 4(b)(2) then provides the Secretary the authority to exclude any particular area from a critical habitat designation if the benefits of exclusion outweigh the benefits of inclusion for that area, so long as excluding it will not result in the extinction of the species. Our regulations in 50 CFR part 424 set forth relevant definitions (50 CFR 424.02), describe the standards and procedures for identifying critical habitat (50 CFR 424.12), and describe the standards and procedures for impact analysis and exclusions of particular areas of critical habitat (50 CFR 424.19). In addition to our joint regulations, the Services developed the joint Policy Regarding Implementation of Section 4(b)(2) of the ESA that provided direction regarding how the Services would exercise discretion to exclude areas from critical habitat designations (81 FR 7226, February 11, 2016; hereafter "2016 policy"). The 2016 policy describes how we consider "other relevant impacts," including conservation plans, agreements, and partnerships, when designating critical habitat. On December 18, 2020, we finalized FWS-only regulations that set forth a process for excluding areas of critical habitat under section 4(b)(2) of the Act (85 FR 82376; hereafter "the 2020 rule"), superseding the 2016 policy and 50 CFR 424.19. Then on July 21, 2022, we rescinded those regulations (87 FR 43433; hereafter "the 2022 rescission"). We again are revising the regulations pertaining to exclusions of particular areas of critical habitat under section 4(b)(2) of the ESA.

In our 2025 proposed rule (90 FR 52592, November 21, 2025) we referred to an Executive Order (E.O.) as the impetus for reviewing and revising the regulations that pertain to excluding areas from critical habitat under section 4(b)(2). E.O. 14154, "Unleashing American Energy," issued January 20, 2025, directed all departments and agencies to immediately review agency actions that potentially impose an undue burden on the identification, development, or use of domestic energy resources, and, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding agency actions that conflict with this national objective. To implement provisions of E.O. 14154, the Department of the Interior subsequently issued Secretary's Order (S.O.) 3418, which directed Assistant Secretaries to take steps, as appropriate, to suspend, revise, or rescind multiple actions that had been finalized under the prior Administration. While E.O. 14154 and S.O. 3418 initiated our review, our goal in revising these regulations was to determine how best to designate critical habitat for endangered species and threatened species in compliance with section 4(b)(2) of the Act while also considering our experience administering the Act and the Administration's priorities. Based on our evaluation, and for reasons discussed in more detail below, we revise 50 CFR part 17.

This rule is one of two rules publishing in today's *Federal Register* that revise the regulations that implement the Act.

Changes from Proposed Rule

We made two minor changes in the regulatory text. The first is at 50 CFR 17.90(d)(1) in which we have changed the phrase "the FWS's expertise" to "the Service's expertise." We made this change for consistent use of "Service" throughout the regulatory text. The second change is at 50 CFR 17.90(d)(2), in which we have changed the word "assign" to "give." This ensures consistency with 17.90(d)(1). We did not intend for the regulatory text to be inconsistent between paragraphs (d)(1) and (d)(2) and have changed paragraph (d)(2) to be consistent with the regulatory text finalized in 2020. Further we want to avoid any potential misconception that we would quantify the weight of a particular impact when designating a specific area as critical habitat.

Regulatory Revisions

This rule provides the framework for the FWS's consideration of the economic impact, impact on national security, and any other relevant impacts of specifying any particular area as critical habitat under section 4(b)(2) of the Act and for the FWS's process for identifying any exclusions of particular areas from designations of critical habitat.

Once the Secretary has assessed the relevant impacts of designating particular areas as critical habitat, section 4(b)(2) authorizes the exclusion of any area from the designation if the Secretary determines that the benefits of excluding the area outweigh the benefits of including the area in the critical habitat designation (unless failure to designate the area will result in the extinction of the species) (16 U.S.C. 1533(b)(2)). The FWS refers to this comparative weighing of the impacts of excluding and including particular areas under 4(b)(2) as an "exclusion analysis."

To undertake an exclusion analysis, we first evaluate whether there are any meaningful impacts from designating any area such that avoiding those impacts may outweigh the benefits of including the area in the designation. If there are no such impacts that we are aware of or have been identified through public comments, there is no need to proceed further with weighing the impacts of designation. If there are any such impacts, we undertake a comparative weighing of those impacts. The ESA does not prescribe any elements of or methods for the analysis, such as the weight to give each factor or impact in determining the benefits of inclusion and the benefits of exclusion. Therefore, in completing the exclusion analysis, as long as the FWS has considered all the relevant impacts, in a manner that is not arbitrary or capricious under the Administrative Procedure Act (APA; 5 U.S.C. 551 et seq.), the ESA affords the Secretary broad discretion in deciding whether or not to exclude any area for which the benefits of exclusion outweigh the benefits of inclusion.

As stated above, these regulations apply to the considerations under section 4(b)(2) of the

ESA and determinations whether to exclude particular areas of critical habitat from a final critical habitat designation. However, given existing case law, we seek to clarify that these regulations do not apply to section 4(a)(3) of the ESA, which requires the designation of critical habitat "to the maximum extent prudent...". Previous statements made with respect to how we anticipated interpreting section 4(a)(3) likely contributed to confusion regarding the relationship between 4(b)(2) and 4(a)(3), leading a few courts to determine that we had not conducted the proper analysis under 4(b)(2) when finding critical habitat was not prudent for a given species. See *Natural Resources Defense Council* v. *U.S. Dep't of the Interior*, 113 F.3d 1121, 125 (9th Cir. 1997) (hereafter "*NRDC*") (citing 49 FR 38900 at 38903, October 1, 1984) (noting that the Services would balance the risks to the species of designating versus the benefits that might derive from designation and would forgo designations of critical habitat where the possible adverse consequences would outweigh the benefits). See also *Conservation Council of Hawaii* v. *Babbitt,* 2 F. Supp. 2d 1280 (D. Hawaii 1998) (hereafter "*Conservation Council of Hawaii*"); and *Center for Biological Diversity and Healthy Gulf* v. *U.S. Fish and Wildlife Service,* 792 F. Supp. 3d 50 (D.D.C. 2025) (hereafter "*CBD and Healthy Gulf*"). The legislative history discussing prudency under what is now section 4(a)(3) refers to circumstances where a designation would not be in the best interest of the species (*Center for Biological Diversity, et al.* v. *U.S. Department of the Interior, et al*, 2026 WL 898264, at *22 (N.D. Cal. Mar. 30, 2026)) and does not include any reference to consideration of economic impacts and other factors. The legislative history that discusses section 4(b), however, notes that while prior to the 1978 amendments, the determination of critical habitat had been a purely biological question. Under the amended text of section 4(b)(2), economics and other relevant impacts, including impacts to the public, must be considered in setting the limits of critical habitat (H.R. Rep. No. 95-1625, at 16–17 (1978), as reprinted in 1978 U.S.C.C.A.N. 9453, 9466–67).

The reference in the legislative history to what is now 4(b)(2) makes clear that critical habitat is only designated after impacts to human activity are considered, which includes considerations of the impacts to the public from a designation. Additionally, the language of 4(a)(3)(A) states that the FWS shall "designate" critical habitat to the maximum extent prudent, which implies that a determination that critical habitat is not prudent is not a "designation." The language in 4(b)(2) then is directed to "designations" and considerations for excluding specific areas from a designation. Given the plain language of the Act and the context of the legislative history, a decision that critical habitat is not prudent must rest on considering whether designation is in the best interest of the species and its conservation; whereas, during the course of actually designating critical habitat, the Services must consider economic and other relevant impacts pursuant to section 4(b)(2). Though sections 4(a)(3) and 4(b)(2) cross-reference each other, their functions are distinct: section 4(a)(3) provides that (unless the Secretary determines that designating critical habitat is not prudent) critical habitat must be designated in accordance with 4(b) and reinforces the timeline (i.e., concurrently with listing) of designating critical habitat.

As the court holdings in *NRDC* 113 F.3d at 1125, *Conservation Council of Hawaii* 2 F. Supp. 2d at 1287–88, and *CBD and Healthy Gulf* at 792 F. Supp. 3d at 66 demonstrate, when considering whether a designation of critical habitat is not prudent, the Services must take into account the specific factual circumstances at issue for each species including consideration of the risks and benefits of the critical habitat designation as a whole rather than individual areas. 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.

Summary

As mentioned earlier, the Services' joint regulations at 50 CFR 424.19 describe the standards and procedures for impact analysis and exclusions of particular areas of critical habitat, and the non-binding 2016 policy provides direction regarding how the Services would consider partnerships and conservation plans, conservation plans under section 10 of the ESA, Tribal lands, Federal lands, economic impacts, and national and homeland security impacts in the exclusion process under section 4(b)(2) of the ESA. We have concluded that reinstating our FWS-only regulations at 50 CFR 17.90 will be more effective in guiding agency activities and will provide greater transparency and certainty to the public and stakeholders and is our preferred approach. The regulations include some differences relative to what was outlined in the 2016 policy. These differences from the 2016 policy include an information standard applicable to when FWS undertakes a discretionary weighing analysis, a clarification of how considerations for exclusions will be conducted for Federal lands, and an approach for giving weight to the benefits of inclusion or exclusion of any particular areas designated as critical habitat. Additionally, as discussed in our 2020 proposed rule (85 FR 55398, September 8, 2020) we decided to revisit certain language in the preamble of the 2016 policy, as well as certain statements in the preamble to the 2013 rule that revised the regulations on the timing of our economic analyses at 50 CFR 424.19 (78 FR 53058, August 28, 2013) (hereafter "the 2013 rule"), to provide clarity to the FWS and the public in light of the Supreme Court's decision in *Weyerhaeuser Co.* v. *U.S. FWS,* 586 U.S. 9 (2018) (hereafter "*Weyerhaeuser*") that decisions not to exclude particular areas of critical habitat are judicially reviewable. At the time we developed the 2013 rule and 2016 policy, the Services were guided by a line of cases in which courts had held that a decision by the Services not to exclude a particular area under section 4(b)(2) of the Act was committed to agency discretion by law and therefore not subject to judicial review. The FWS is of the view that the Supreme Court's decision underscores the importance of being deliberate and transparent about how we go about making decisions to exclude areas from designations of critical habitat. For more details, please see our 2020 proposed rule and 2025 proposed rule.

Effects of the Final Rule

These regulations largely adopt provisions of the 2016 policy and regulations at 50 CFR 424.19 with further clarifications in the process that FWS will use when undertaking exclusion analyses. After consideration of the information provided through the public comment process, we are finalizing this rule as proposed with the two minor changes mentioned above (see **Changes from Proposed Rule**). We have provided clarification to questions and concerns below in the responses to public comments.

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 FWS views 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 FWS to exclude particular areas from critical habitat designations. Specifically, these distinct provisions include: (1) impact analysis procedures, (2) consideration of economic impacts, national security, and other relevant impacts, (3) when the Secretary will conduct an exclusion analysis, (4) weighing of the benefits of inclusion and exclusion, and (5) when the Secretary shall exclude an area. In the event that any portion of this final rule is held to be invalid or impermissible, the FWS intends that the remaining aspects of the regulatory provisions be severable.

In finalizing the specific changes to the current regulations in the rule portion of this document and setting out the accompanying clarifying discussion in this preamble, we are establishing prospective standards only. These regulations will supersede the 2016 policy and regulations at 50 CFR 424.19 for FWS; and they will apply to FWS critical habitat rules finalized after the effective date of this rule and will not apply retroactively to 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 critical habitat designations be reevaluated on the basis of these final regulations.

Summary of Comments and Responses

In our November 21, 2025, proposed rule (90 FR 52592), we requested public comments by December 22, 2025. We received a total of 12,532 submissions, representing approximately 306,628 individuals, by the close of the comment period. Commenters included individual members of the public, representatives from States, Tribes, industry organizations, and environmental organizations, among others.

During the public comment period, we received several requests for public hearings. Public hearings are not required for regulation revisions of this type, and we elected not to hold public hearings. We also received several requests for extensions of the public comment period. However, we elected not to extend the public comment period beyond the original 30-day public comment period because we found the 30-day comment period provided sufficient time for a thorough review of the proposed revisions. The APA does not specify a minimum number of days for a comment period, but the comment period must be long enough to afford the public a meaningful opportunity to comment. In this case, with a 30-day public comment period, the public had a meaningful opportunity to comment on the proposed rule, as demonstrated by the thousands of comments received.

The revisions are to portions of the regulations that were previously revised in 2020 and 2022. The number of comments received indicate that members of the public were aware of the proposed rule and had adequate time to review it. In addition, we provided five informational sessions for a wide variety of audiences. Over 2,100 attendees participated in these sessions, and we addressed questions from the participants as part of the sessions. Finally, on our website, we provided additional information about the regulations, such as frequently asked questions and a prerecorded presentation on the proposed revisions.

Most of the submissions were nonsubstantive in nature, expressing either general opposition to or support for the proposed rule with no supporting information or analysis. Other comments expressed opinions regarding topics not covered within the proposed regulation. We also received several hundred letters with detailed substantive comments with specific rationales for support of or opposition to specific portions of the proposed rule. We also received comments that were outside the scope of the rulemaking such as comments regarding litigation on other ESA regulations (*Center For Biological Diversity* v. *Dep't of the Interior*, 2026 WL 898264, at *22 (N. D. Cal. Mar. 30, 2026)) that are pending and that we are not responding to here. Below, we summarize and respond to the significant, substantive comments we received.

Framework for Considering an Exclusion and for Conducting a Discretionary 4(b)(2) Exclusion Analysis (§ 17.90(a))

Comment 1: Some commenters stated that the Service should engage with appropriate State and other authorities to the maximum extent practicable in exclusion analysis and prior to publishing a proposed critical habitat designation. Commenters suggested that we include additional regulatory text to include a process for consulting with and considering input from State fish and wildlife agencies, local governments, small businesses, and Tribal governments to identify economic, biological, and other relevant impacts.

Response: We routinely coordinate with partners and stakeholders (e.g., State natural resource agencies, Federal agencies, Tribes) before and after a species is listed and critical habitat is designated. For example, we coordinate during the development of a species status assessment which informs our evaluation of whether to list a species as well as possible areas for designation as critical habitat if listing is warranted. We also coordinate with Federal agencies during the development of the draft economic analysis prior to the publication of the proposed critical habitat rule. Through these coordination efforts, we typically receive information from State and Federal agencies regarding potentially relevant impacts early in our development of a critical habitat designation. Additionally, during the public comment period for a proposed critical habitat designation, we receive information regarding other potentially relevant economic or other impacts from a variety of sources (for example, State agencies, local governments, small businesses, private individuals and Tribal governments) that we consider when finalizing the designation. In addition, language in the ESA or other authorities already require the Services to coordinate and seek input from States, Tribes, and local governmental agencies. For instance, the requirements regarding coordination with States and counties in section 4(b)(5)(A)(ii) of the Act are already included in our regulations at 50 CFR 424.16(c). The Services also have a joint policy, “Interagency Policy Regarding the Role of State Agencies in ESA Activities,” which was developed in coordination with the State fish and wildlife agencies, that outlines our commitment to engagement and collaboration among the Services and State fish and wildlife agencies on many aspects of ESA implementation, including listing species (81 FR 8663, February 22, 2016). We conclude that our current process provides for coordination with potentially affected parties, and it is unnecessary to codify it in regulation.

Comment 2: We received multiple comments regarding public involvement and transparency of exclusion analyses for future critical habitat rulemakings. For example, some commenters stated that we should allow comments on the draft economic analysis and on our evaluation of any relevant impact of including or excluding areas from critical habitat. Other commenters appreciated the requirement for the Service to publish for public comment the draft economic analysis suggesting it would add transparency to the process. Finally, other commenters suggested that rather than merely considering the economic impacts of designating critical habitat, the Service now has to conduct an exhaustive economic analysis of the overall proposed designation and conduct a full public comment process on the economic analysis before the critical habitat can be designated which would pose a significant burden on the agency. Commenters suggested additional regulatory text to require documentation of specific evidence when we rebut information provided by the public or to allow the public to comment on any relevant factor regarding a designation and not just the economic analysis.

Response: With respect to public comment, we always seek comment on any proposed critical habitat designation regarding a wide range of issues, including biological factors that may inform the proposed designation and non-biological considerations that may inform potential exclusions from the final designation. We do not limit the scope of public comment to economic considerations; all relevant substantive comments are considered when developing a final critical habitat designation. We also already make the draft economic analysis of the proposed critical habitat designation available as supplemental information on Regulations.gov concurrently with publication of the proposed rule to designate critical habitat. The regulations we are finalizing at 50 CFR 17.90 will not change this existing practice. During the public comment period for a proposed critical habitat designation, the public has the opportunity to review and comment on the draft economic analysis, as well as on any other relevant impacts from the designation. Because we already request public comment on all areas of the rulemaking whenever we propose to designate critical habitat, modifying the regulation to require the Service to request comments on any relevant impacts, including non-economic impacts, is duplicative and unnecessary. Also, regarding documentation of evidence, regardless of whether we exclude an area or not, whenever we conduct a weighing analysis we detail what was considered within our final rules for the critical habitat designation. We decline to include additional regulatory text regarding this aspect of the process.

Comment 3: Many commenters support inclusion of the non-exhaustive list of categories of potential impacts described at 50 CFR 17.90(a). Commenters stated that lists provide transparency and clarity and allow focused public comments while being adaptable to specific situations. Other commenters stated that the rule sets forth an unlawfully broad list of impacts. For example, for “economic impacts” they cited our example of “opportunity costs arising from the critical habitat designation (such as those anticipated from reasonable and prudent alternatives that may be identified through a section 7 consultation),” and “impacts to . . . Federal lands” (90 FR 52592 at 52599, November 21, 2025) which they point out would include routine regulatory costs that will exist for most areas of proposed critical habitat and therefore would be likely to result in a significant reduction in the number and extent of critical habitat designations. Others suggest the examples of “other relevant impacts” provides a nearly unlimited basis for exclusions. Some highlighted “community interests” as redundant, or subjective and vague.

Additionally, many commenters recommended revisions to regulatory text describing impacts. For example, commenters suggested that we add to or elaborate on the potential impacts listed in the proposed regulations, such as direct and indirect impacts, foreseeable delays in permitting, and economic effects on developers and builders. Commenters requested explicit inclusion of impacts to Tribes including treaty-reserved rights and the Federal trust responsibilities as other relevant impacts. Commenters suggested that we remove the term “nonbiological” in paragraphs (d)(1)(i), (d)(1)(ii), and (d)(1)(iv) or rephrase to expressly acknowledge and allow for external input within the Service’s areas of expertise as well as outside it.

Response: We will evaluate on a case-by-case basis any information that is submitted by a proponent of an exclusion to determine whether they have presented credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area. Therefore, with the application of the credible information standard, we anticipate that not every submission by a proponent of an exclusion would meet the standard of having a meaningful impact and thereby trigger an exclusion analysis.

We decline to make additional regulatory text revisions. The text of the regulation is clear that the examples of potential impacts provided at 50 CFR 17.90(a) are not exhaustive and “other relevant impacts” may include but are not limited to impacts to Tribes, States, local governments, public health and safety, community interests, the environment (such as increased risk of wildfire or pest and invasive species management), Federal lands, and conservation plans, agreements, or partnerships. Based on the specific facts in particular critical habitat designations, there may be other impacts identified, and we would consider those impacts.

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

Species Act," (*https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37016.pdf*) (October 3, 2008, p. 12), and the list provided in the preamble to the proposed rule and in the final regulatory text of this rule illustrates the types of information we may consider. Furthermore, subparagraphs (i)–(iv) in paragraph (d)(1) identify a non-exhaustive list of categories of impacts that may be outside the scope of the Service's expertise. Even though some of the categories on this list refer to "nonbiological impacts," we recognize that many sources outside of the Service also have information and expertise regarding biological impacts. The Service would consider that information or expertise in the weighing of benefits of inclusion or exclusion of particular areas.

Comment 4: Commenters stated that the proposed rule's non-exhaustive list of "other relevant impacts" and economic impacts is heavily weighted toward negative impacts of designating critical habitat on the community and other stakeholders. They state the list does not include the potential economic and community benefits, for example, socio-economic benefits, cultural or other ecological benefits, or co-benefits (such as protection of other species), that may be distinct from the "conservation value of the area." Commenters requested that full economic accounting of future designations include these potential benefits.

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

Comment 5: Commenters stated that the proposed rule does not address the impacts of excluding an area necessary to the recovery of a species and that impacts on recovery should be addressed because the goal of the Act is ultimately to recover and delist the species. Multiple comments highlight that incremental exclusions, each deemed non-extinction-causing, can collectively degrade ecosystems and recovery potential, contrary to the mandate of the Act. Commenters requested an evaluation of the cumulative effects of exclusions, rather than on a case-by-case basis. Others requested that proposed critical habitat designations essential for future climate adaptation be prohibited from exclusion.

Response: We note that critical habitat is one of many tools available to conserve species, and the exclusion of an area from a critical habitat designation does not mean that the area can no longer contribute to conservation. In fact, we have excluded many areas because they are already being managed for the conservation of a species, thereby reducing the benefits of including those areas within a critical habitat designation. Even though these areas are excluded from critical habitat designations, they will still contribute to the recovery of the species.

We consider the potential effects to species' recovery when we enter into an exclusion analysis under section 4(b)(2) of the Act. In giving weight to the benefits of including and excluding particular areas, we evaluate the conservation value of the area, including the current function of the area for the species and the future recovery value of the area to the species. Benefits of including or excluding an area from critical habitat are considered for each designation, are fact-specific to each species, and take into consideration the best scientific data available for the species.

With regards to evaluating the cumulative effects of individual exclusions for a critical habitat designation, the Act is clear that we are required to take into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. And as for the suggestion to prohibit any exclusions of critical habitat that may be important to provide areas for climate change adaptation, the Act does not contemplate any such prohibition, and we decline to include it in regulation.

Comment 6: Commenters cite the statutory requirement that the appropriate scale of an exclusion analysis is of the "particular area" of a proposed critical habitat designation and note that this is in conflict with the proposed rule allowing the Secretary to determine the appropriate scale for the consideration of impacts from a critical habitat designation. Many comments emphasize that the "particular area" should be a localized scale, such as individual parcels or counties rather than broad regional or national scales.

Some commenters state that scale decisions should be based on species' biological needs, not external economic or political factors. Other commenters suggest that the Secretary should retain the discretion to determine exclusions at whatever scale he deems to be appropriate, to specifically state what that scale is in the proposed rule when making a critical habitat designation, and to take into full consideration the economic impacts at that scale.

Response: We decline to define a scale for an exclusion analysis. If we were to suggest a consistent scale, it would need to be broad or generic to adequately address each species' situation and data availability which would not ultimately provide the desired clarity. The Service must have flexibility to evaluate these "particular areas" of critical habitat at whatever scale is appropriate to each situation. Each critical habitat proposal includes a description of the scope of the area being proposed and often includes "particular areas" that are being considered for exclusion and the Service then uses the scale of analysis appropriate to that situation. In one case, the court upheld the Service's analysis at the "subunit" level rather than individual parcels that the plaintiff argued was required (*Otay Mesa Prop. L.P.* v. *DOI*, 714 F. Supp. 2d 73, 84 (D.D.C. 2010) (rev'd on other grounds (646 F.3d 914 (D.C. Cir. 2011))).

Comment 7: Commenters stated that use of the incremental approach to assessing impacts of critical habitat prevents consideration of the full costs of a critical habitat designation. They requested that we include all economic impacts of a listing in our economic assessment following the coextensive approach, rather than limiting it to the incremental effects of critical habitat designation (citing *Skipper* v. *United States Fish & Wildlife Serv*., 796 F. Supp. 3d 996, 1006 (D. Ala 2025) (hereafter "*Skipper*")).

Response: The 2013 rule revisions to 50 CFR 424.19 codified the use of the "incremental analysis" or "baseline approach" method for conducting impact analyses, including economic, national security, or other relevant impacts analyses, for critical habitat designations. That final rule contains responses to public comments that clearly lay out the Services' rationale for using the incremental analysis method (78 FR 53058 at 53067, August 28, 2013). Evaluating incremental impacts that result from a regulation being promulgated, rather than considering coextensive impacts that may be ascribed to other regulations, is further supported by E.O. 12866, as applied by OMB Circular A-4. Agencies should identify the baseline to describe how the world would look in the absence of the proposed action. Identifying this baseline is necessary to allow assessment of the relative benefits and costs attributable to the proposed action (Regulatory Impact Analysis: Frequently Asked Questions (FAQs), February 7, 2011). In addition, a court decision addressing this question confirmed the validity of evaluating incremental impacts of critical habitat designations in the Tenth Circuit. See *Northern New Mexico Stockman's Ass'n* v. *United States Fish & Wildlife Serv.*, 30 F.4th 1210 (10th Cir. 2022) which concludes that the Service's incremental impacts approach was permissible in light of regulatory changes that post-dated the Tenth Circuit decision that had required coextensive approach. Recently, in *Skipper*, a district court "adopted the reasoning" of an earlier Tenth Circuit decision in *New Mexico Cattle Growers Ass'n* v. *U.S. Fish and Wildlife Service,* 248 F.3d

1277, 1285 (10th Cir. 2001) (hereafter "*New Mexico Cattle Growers*") which invalidated the Service's "baseline approach" to assessing the economic costs of critical habitat designations wherein the Service isolated the anticipated costs to those attributable solely to the designation itself. The *Skipper* court noted an apparent circuit split and distinguished *New Mexico Cattle Growers* from a Ninth Circuit decision that upheld the Service's use of the baseline approach. See *Arizona Cattle Growers' Ass'n* v. *Salazar,* 606 F.3d 1160 (9th Cir. 2010). In 2022, however, following revision of the relevant regulatory definitions in effect at the time of the 2001 *New Mexico Cattle Growers* decision, the Tenth Circuit issued a decision upholding the Service's use of the baseline methodology and, in doing so, resolved the previous circuit split. See *Northern New Mexico Stockman's Ass'n* v. *U.S. Fish and Wildlife Service*, 30 F.4th 1210, 1227 (10th Cir. 2022). The *Skipper* court failed to consider this development in its summary judgment opinion and order and Intervenor-Defendants moved for reconsideration, relying on the 2022 Tenth Circuit opinion; the court has not yet ruled on that motion.

Considering Relevant Impacts (§ 17.90(b))

Comment 8: Some commenters supported the proposed language at 50 CFR 17.90(b). However, some suggested that we should not consider economic or national security impacts when designating critical habitat. Others suggested the inclusion of the current language "probable economic, national security, and other relevant impacts" requires less certainty compared to the "clear and substantial" evidence requirement proposed for section 7 consultations at 50 CFR 402 or the proposed foreseeable future requirements at 50 CFR 424.11. Commenters are concerned the language will result in the Service prioritizing nonbiological impacts when weighing impacts. Commenters describe the need for evidentiary guardrails such that information used should be objective, rigorous, and consistent with "best available scientific and commercial data" mandate.

Response: Section 4(b)(2) of the Act requires us to take into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. We include “probable” from 50 CFR 424.19 as it provides guidance that the Service should not consider improbable or speculative impacts. However, as discussed in our 2013 rule (78 FR 53058, August 28, 2013), we do not intend that the term “probable” requires a showing of statistical probability or any specific numeric likelihood. Moreover, the “activities” at issue are only those that would require consultation under section 7 of the Act. Although impact analyses are based on the best scientific data available, any predictions of future impacts are inherently uncertain and subject to change. Thus, the Service will consider the likely impact of the designation using our experience administering the ESA and conducting section 7 consultations and will not make specific predictions about the outcome of particular section 7 consultations that have not been completed.

Realistically, the Service can only consider activities likely to occur, which we interpret for purposes of this rule to mean the same thing as the term “probable.” This use of “probable” reflects a reasonable interpretation of the statute. Furthermore, as stated in OMB Circular A-4, the assumptions of the analysis must be clearly articulated and should avoid speculation when assessing costs and benefits of a regulation. We use the best available information in our consideration of impacts of a critical habitat designation and fully describe the methods, assumptions, and results in our draft economic analysis.

Approach to Determining Whether To Conduct a Discretionary Exclusion Analysis (§ 17.90(c))

Comment 9: Some commenters interpreted the proposed rule as creating a provision that requires the Secretary to waive his discretion on whether to conduct an exclusion analysis given (1) the presence of the “credible information” trigger to enter into an exclusion analysis, and (2) the language “will conduct” which makes exclusion analyses mandatory whenever credible information is presented. Other commenters argue that exclusion analyses are already mandatory. Some cite *Weyerhaeuser* in stating that the regulation should include language requiring documentation of any rationale for not performing an exclusion analysis and, if an analysis is conducted, providing rationale for not excluding areas.

Response: Under this rule, the Secretary will conduct an exclusion analysis when credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area has been presented or whenever the Secretary otherwise decides to exercise discretion to evaluate any particular area for possible exclusion. The rule does not waive the Secretary's discretion; instead, the regulation constitutes the Secretary's decision on how to exercise his discretion under the Act on a consistent comprehensive basis.

We decline to include additional regulatory text requiring documentation of our rationale. As discussed in both the 2020 and 2025 proposed rules, and in accordance with *Weyerhaeuser*, the Service will document the basis for any decision whether or not to undertake an exclusion analysis in the final determination regarding critical habitat for the species.

Comment 10: Some commenters expressed concern that the proposed rule would reduce the Secretary's discretion as to whether to conduct an exclusion analysis because it would collapse the second step (the discretionary exclusion analysis) of the critical habitat designation process into the first step (the requirement to take into consideration economic and other relevant impacts). One commenter suggested the Service include additional fact patterns that would always trigger an exclusion analysis, such as when private property is being considered for designation as critical habitat and when considering Federal lands with privately held permits or licenses. Other commenters took the contrary view, suggesting the rule should narrow the Secretary's discretion to undertake an exclusion analysis by specifying when and how he will exercise that discretion. Multiple commenters requested additional clarification as to when the Secretary may exercise his discretion to improve predictability for stakeholders and the public, reduce complexity, and improve efficiency. Some of the commenters requested that the rule eliminate the Secretary's discretion on this issue by requiring the Secretary to always conduct an exclusion analysis to determine if the benefits of exclusion outweigh the benefits of inclusion because section 4(b)(2) of the Act requires the Secretary to take economic and other relevant impacts into consideration and the balancing of impacts in the exclusion analysis is part of that consideration.

Response: As discussed in our response to *Comment 3*, we will evaluate on a case-by-case basis any information that is submitted by a proponent of an exclusion to determine whether they have presented credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area or the Secretary otherwise decides to exercise discretion to evaluate any particular area for possible exclusion. These regulation revisions neither alters the structure of section 4(b)(2) nor collapses the two sentences together—it just describes how and when the Secretary will exercise the discretion to undertake an exclusion analysis. This framework facilitates the transparent and consistent implementation of the statute. We decline to provide additional specificity at 50 CFR 17.90(c)(2) regarding when the Secretary may exercise his discretion to undertake an exclusion analysis. We will document in final rules how the Secretary has exercised his discretion whether to undertake an exclusion analysis.

Comment 11: Commenters requested that the regulation include a definition of "meaningful" economic impacts and a description of their scope, along with a requirement to use a quantitative economic assessment whenever possible. At least one commenter noted that even minimal economic impacts should be considered meaningful because they could outweigh the benefit of designation if the area provides low conservation value. Additionally, some commenters requested that only economic impacts in a defined area and only those tied to Federal actions should be considered. Multiple commenters stated that economic analyses should account for localized impacts, particularly on rural communities and private landowners, and evaluate consequences at the county level rather than only statewide or national scales, especially given concerns about energy development and county revenues.

Response: We decline to define "meaningful," as we intend it to have its plain-language meaning. We included the word to indicate that evidence of only de minimis impacts of designating a particular area will not trigger an exclusion analysis for that particular area. Our consideration of economic or other relevant impacts includes an assessment of the probable impacts of a designation. We evaluate specific land uses or activities and projects that may occur in the area of the critical habitat. These impacts are considered part of the benefits of exclusion and are balanced against the benefits of inclusion which may include the importance or conservation value of a particular area. When considering the economic impacts of critical habitat designations, we follow the guidance and best practices set out in E.O.s 12866 and 13563, as well as OMB Circular A-4. Those guidelines direct Federal agencies to assess the costs and benefits of available regulatory alternatives in quantitative (to the extent feasible, including monetization) and qualitative terms.

Consistent with these E.O. regulatory analysis requirements, our effects analysis under the Act may take into consideration impacts to both directly and indirectly affected entities, where practicable and reasonable. To determine whether the designation of critical habitat may have an economic effect of $100 million or more in any given year, which would trigger section 3(f)(1) of E.O. 12866, we use a screening analysis to assess whether a designation of critical habitat is likely to exceed this threshold. This analysis can also assist with compilation of information that may be useful for exclusion analyses under section 4(b)(2).

As part of this process, we first develop an incremental effects memorandum (IEM) considering the probable incremental economic impacts that may result from a proposed designation of critical habitat. The information contained in our IEM is then used to develop the screening analysis of the probable effects of the designation of critical habitat. The screening analysis is used to focus our analysis on the key factors that are likely to result in incremental economic impacts. We invite public comment on both the IEM and screening analysis, which are made available in the docket accompanying each proposed critical habitat designation. One purpose of the screening analysis is to filter out particular geographic areas of critical habitat that are already subject to regulation due to the presence of the listed species or other similar listed species and critical habitat and are, therefore, unlikely to incur more than de minimus incremental economic impacts. Ultimately, the screening analysis allows us to focus our analysis on evaluating the specific areas or sectors that may incur probable incremental economic impacts as a result of the designation. The screening analysis combined with the information contained in our IEM constitute our draft economic analysis of a proposed critical habitat designation.

During the development of our draft economic analysis, we consider information at the scale available to us. With regard to including localized economic impacts, we have and will continue to conduct our exclusion analyses on the scale relevant for the analysis and based on the credible information available. We develop and share a draft of the IEM with our Federal partners that considers potential economic impacts requesting information on whether a Federal nexus may exist triggering future section 7 consultations. We request information on specific projects and the potential impacts of designations of critical habitat. When we consider potential economic impacts, we also acknowledge there may be effects to land values in areas that are designated critical habitat which may lead to an increase or a decrease in property values (see *Comment 15* below).

Our draft economic analysis is only one aspect of our exclusion process. When available at the proposed rule stage, we also describe exclusions we are considering and solicit public comments on specific information that may inform those potential exclusions and other potential impacts unknown to us at the time of the proposed designation. We evaluate, on a case-by-case basis, any information submitted by a proponent of an exclusion to determine whether credible information is provided regarding the impact and whether the benefits of exclusion are presented at the appropriate scale. We will conduct a discretionary exclusion analysis when we receive a request with credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area or when we otherwise decide to exercise our discretion to evaluate any particular area for possible exclusion. We can then refine our consideration of the relevant impacts with information provided during a public comment period for a given rulemaking.

Comment 12: Commenters stated that the phrase "credible information" was ambiguous and requested the Service provide a regulatory definition, outline a clear process for soliciting this information, and clarify how this information will be evaluated. Commenters added that the proposed "credible information" standard is subjective, resulting in an unnecessary burden on the Service to perform more exclusion analyses with limited resources. Multiple commenters called for clear procedures on submission of credible information, documentation of decisions, interim steps to inform proponents whether their information qualifies, and procedures for managing confidential business data and sensitive, confidential, or national security information. Others suggest replacing the term "credible information" with "best available data." However, some commenters noted that the standard allows the Service discretion and flexibility and recommended avoiding a regulatory definition or formal submission requirements.

Response: As stated in the 2025 proposed rule, "credible information" refers to information that constitutes a reasonably reliable indication regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for a particular area. We do not consider speculative, erroneous, intentionally misleading, or unsupported information to be credible information and will use our best professional judgment to evaluate all information critically before incorporating it into any exclusion analysis. Also, as stated in response to *Comment 11*, above, "meaningful" indicates evidence of more than de minimis impacts of a proposed designation that would trigger an exclusion analysis. Our consideration of economic or other relevant impacts includes an assessment of the probable impacts of a designation. We decline to further define "credible information" in regulation.

We also decline to replace the phrase "credible information" with "best available data," as section 4(b)(2) of the Act already requires that "[t]he Secretary shall designate critical habitat... on the basis of the best scientific data available...." In determining what constitutes “credible information,” we will look at whether the proponent has provided factual information in support of the claimed impacts. We use our IEM and screening analysis to help determine whether any economic impact information meets the credible information standard and, when appropriate, to confirm or rebut information that is provided by a proponent of an exclusion.

Comment 13: Commenters expressed both support and concern for identifying specific eligible proponents who can submit credible information. Some expressed concerns that an inclusive list of eligible proponents will result in outsized influence from non-conservation stakeholders with no biological expertise. Some commenters noted that the non-exhaustive list is currently focused on those with legal rights to use Federal lands. They suggest expanding the list to include proponents not engaged with a Federal entity that may be affected by critical habitat designations, including private property, counties, and industry. Others questioned whether applicants of Federal permits or funding should be treated the same as active Federal permittees or lessees, since applications do not constitute a Federal nexus or commitment.

Multiple commenters expressed concerns that corporate or industry actors could use proprietary, unverifiable data to influence decisions, overshadowing scientific integrity. These commenters note that using information from entities with direct financial interests over independent science undermines the intentions of the Act.

Response: We will evaluate any information provided from outside entities on a case-by-case basis and will decide whether to conduct an exclusion analysis based on whether the proponent of an exclusion has presented credible information regarding a meaningful impact supporting a benefit of exclusion. All information submitted to us in support of exclusion will be subject to the credible information standard. Under the credible information standard, an impact must be meaningful to justify an exclusion. It is likely that some submissions will not meet this standard; each will be reviewed individually to determine if credible information shows a meaningful impact, including information from proponents of an exclusion. With regards to Federal applicants, anyone can submit credible information regarding meaningful impacts of a critical habitat designation and request an exclusion, regardless of whether they may or may not have a future Federal nexus.

Approach to Conducting Discretionary Exclusion Analyses (§ 17.90(d))

Comment 14: Some commenters supported adding the requirement that the Service always exclude areas from critical habitat when the costs of designating areas (i.e., benefits of exclusion) outweigh the benefits of designating those areas as critical habitat, while others said that the proposed process would prioritize economics over species protection. Some were concerned that the proposed process for analyzing potential exclusions would base critical habitat exclusion decisions on analyses of incomparable ecological benefits with economic costs and could result in prioritization of economic and administrative impacts over biological value and conservation benefit.

Multiple commenters noted that the proposed regulation text did not sufficiently define benefits of critical habitat and others recommended that we clarify that benefits cannot be speculative. Additionally, some commenters requested that we determine the monetary value of species and habitats according to the ecosystem services they provide as a way to directly compare the economic costs of designation with biological benefits (some referencing OMB Circular A-4 and Natural Resource Damage Assessment valuation methods).

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

As described in the 2020 proposed rule, once the Secretary has identified and considered economic, national security, and other relevant impacts, he has discretion in how to determine whether the benefits of excluding a particular area from the designation outweigh the benefits of including that area in the designation. Regarding the comments about clarifying the benefits of critical habitat, we are not limited to considering the examples included in this rule. If the facts indicate that there are economic benefits from including a particular area in the designation, we would consider those benefits, where appropriate. In situations where economic benefits are relevant, we generally describe two broad categories of benefits of inclusion of particular areas of critical habitat: (1) those associated with the primary goal of species conservation and recovery, and (2) those that derive from the habitat conservation measures to achieve this primary goal. We may lack specific information to quantify the use or non-use benefits associated with critical habitat designations such as recreation, wildlife viewing, or ecosystem services that may result from critical habitat designations, but discuss them qualitatively, as per OMB Circular A-4 guidance. As a result, we focus our analysis of benefits of inclusion qualitatively to describe the conservation value of the particular area of critical habitat as weighed against the benefits of exclusion.

Comment 15: Commenters stated that impacts considered in the economic or exclusion analyses should be tied to the probability of Federal nexus, as critical habitat designations affect only Federal agency actions or federally funded or permitted activities. Conversely, at least one commenter suggested that the Service must make clear that we intend to adequately analyze perceptional effects to land values in its exclusion analyses. They suggested that it is widely recognized that a critical habitat designation will immediately reduce the value and damage the salability of any private property within its boundaries due to public recognition of the potential burdens that flow from the designation of critical habitat, citing Auffhammer et al. (2020, entire) and Klick and Ruhl (2020, entire). They also suggest that while we acknowledge this phenomenon, we generally fail to quantify or meaningfully analyze impacts from perceptional effects when making exclusion decisions under section 4(b)(2).

Response: Critical habitat receives protection under section 7 of the Act through the requirement that each Federal action agency ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of designated critical habitat. The section 7-related economic costs solely due to the critical habitat designation may include: costs of increased administrative efforts that result from the designation; costs of any project delays due to consideration of critical habitat; costs of conservation measures, including costs of reasonable and prudent alternatives adopted by Federal action agencies for consultations that conclude that the proposed action is likely to destroy or adversely modify critical habitat; and costs of discretionary actions that Federal agencies and applicants/permittees/project proponents or others may undertake due to the critical habitat designation.

However, within our draft economic analysis, we acknowledge incremental costs of critical habitat designations can also occur outside of the section 7 consultation process. These types of costs include triggering additional requirements or project modifications under state laws or regulations, and perceptional effects on land values. These types of costs may occur even when activities do not have a Federal nexus for consultation. In a 2023 review (Paterson and Flight, entire) of all known studies on the potential property value impacts of critical habitat, some studies identified negative property value effects of critical habitat designation (List et al. 2006, entire; Auffhammer et al. 2020, entire; and Klick and Ruhl 2020, entire), while others did not (Melstrom 2021, entire; and Mamun et al. 2023, entire). Further, some found that critical habitat can positively affect property values (Zabel and Paterson 2011, entire; Mamun et al 2023, entire). Mamun et al. (2024, entire) found that, at a national level on average, critical habitat designation has “little to no effect” on values for developed and undeveloped properties. They also examined several subsets of, or individual species’, critical habitat designations (e.g., riparian species, terrestrial animals, plants, jaguar, Gunnison sage-grouse) to investigate possible changes in land values and found mixed results with some positive and some negative effects on developed or undeveloped parcels. The impact of a designation of critical habitat on parcel prices cannot be reduced to a simple, consistent narrative (Mamun et al. 2024, p. 169). In general, the literature suggests that the potential for property value impacts is species-specific and not generalizable to all critical habitat designations. Therefore, while effects on property values are possible, the likelihood, magnitude, and duration of such effects for any given designation are uncertain. Over time, as public awareness of the potential regulatory burden placed on designated lands evolves, particularly where no Federal nexus compelling a section 7 consultation exists, the effect of critical habitat designation on property values may attenuate. Existing literature provides little specific insight into the time horizon of potential property value effects. However, Mamun et al. (2024, p. 160) observed that, nationally, parcel values fell just before critical habitat was proposed and then strongly rebounded soon after the finalized critical habitat designation. Further, the availability of species-specific or area-specific information is often lacking, and it is not possible to quantify or monetize with any accuracy. Therefore, our draft economic analyses generally do not quantify the impacts of perceptional effects of critical habitat designations due to the fact- and species-specific nature of these effects; however, we routinely address and consider information provided through public comments to evaluate the validity and likelihood of the impacts.

Comment 16: Commenters suggested an apparent inconsistency between suggesting that economics are outside of the Service's area of expertise in the proposed rule compared to our recent proposed revisions to protective regulations for threatened species (90 FR 52592, November 21, 2025) requiring the Service to conduct economic analyses.

Response: The Service routinely considers economic impacts of critical habitat (see *Response to Comment 11*). To support this required consideration of impacts of the designation of critical habitat, we contract with economists to ensure the information we base our consideration on is robust, thorough, and meets the requirements under E.O. 12866 and OMB Circular A-4. This rulemaking does not change our overall approach. However, we recognize that others may have expertise about their specific parcels and situation and we will consider that information along with the information in our draft economic analysis. We acknowledge that the

Service will consider impacts of 4(d) rules and we may consult with economists as part of that effort as well.

Comment 17: Commenters provided both support for and opposition to the provision at 50 CFR 17.90(d)(1) to assign the weight of benefits of inclusion or exclusion based on who has the expertise. Some commenters supported this provision because it allows for engagement from the public and stakeholders that will allow them to be part of the process and provide their firsthand knowledge. Some commenters supported the provision to weigh nonbiological impacts in accordance with information provided by State or local governments because these entities have special expertise that should be included in an exclusion analysis. Other commenters expressed support for allowing outside entities to provide information on economic impacts of the designation of critical habitat because they suggest information from outside entities would improve FWS's economic analyses, which currently do not provide enough granularity to allow the public to understand the impacts.

However, some commenters stated that it is unclear how the Service will determine if someone is an expert or what constitutes firsthand knowledge. Some commenters stated that the proposed rule would give too much discretion to the Secretary in assigning weights and ultimately deciding if an area is excluded, which would contradict congressional intent to afford imperiled species "the highest of priorities." Others were concerned that the broad discretion that the proposed rule gives to the Secretary in assigning weights to experts in nonbiological fields of knowledge runs the risk of placing disproportionate weight on the expertise of entities with private interests whose ultimate goal may not be conservation. Commenters expressed concern that this provision would inappropriately presume the validity of such information, which could include speculative economic analyses because the rule incentivizes inclusion of impacts provided by self-interested parties.

Commenters state that the proposed framework opens the door for industry influence, undermining the Act's mandate to base decisions solely on science. Commenters expressed concern that incorporating economic considerations and deferring to information from outside experts would inappropriately delegate expert judgment and authority to third parties who are not statutorily authorized to perform these duties, which risks prioritizing private, economic, and political interests over species protection. Multiple commenters disagreed with the language "will give weight to those benefits" suggesting this language infringes on the Service's regulatory discretion and amounts to impermissible subdelegation of statutory duties, citing *U.S. Telecom Ass'n* v. *FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004). One commenter noted the proposed rule forces the Service to weigh "credible" exclusion requests without sufficient means to challenge cost estimates, encouraging incomplete or even fraudulent submissions.

Some commenters found it reasonable for experts to provide information about costs and benefits but wanted to make sure that the Service ultimately retained the discretion to reject questionable claims by critical habitat opponents, as well as to "assign the weights" that result in the balance achieved by a particular decision meeting legal requirements. Some commenters went further and stated that only the Service has the expertise to determine the weight of costs and benefits.

Response: Section 4(b)(2) of the Act requires consideration of the economic impact, the impact on national security, and any other relevant impact of designating any particular area as critical habitat. The regulations set forth in this rule are intended to provide greater transparency and certainty for the public and stakeholders. As stated in the 2025 proposed rule, we will give weight to benefits of inclusion or exclusion based on who has the relevant expertise. We will base critical habitat designations on the best scientific data available, evaluate the information provided from outside entities on a case-by-case basis, and give weight to those benefits of inclusion or exclusion consistent with the available information from experts, firsthand knowledge, and the best available information that the Secretary may have to rebut or confirm that information. We do not consider speculative, erroneous, intentionally misleading, or unsupported information to be the best available information and will use our best professional judgment to evaluate all information critically before incorporating it into any exclusion analysis. We will not be subdelegating our statutory duties but rather more explicitly setting out a process to consider the information from affected entities. We continue to make critical habitat decisions based on the best scientific data available and the Secretary's discretionary authority.

Rather than ceding the Secretary's discretion, this rule enhances its implementation by establishing a transparent and balanced approach in exercising that discretion. Congress gave the Secretary authority to undertake exclusion analyses, and the Secretary delegated that authority to the Director of the Service because the Service has the expertise to evaluate the impact that excluding particular areas from a critical habitat designation would have on an endangered species or threatened species. Other relevant impacts of excluding or including particular areas in a critical habitat designation may not be within the Service's expertise. As some of the commenters pointed out, it is reasonable for the Secretary to seek input from experts regarding those other relevant impacts that are outside the scope of the Service's expertise. This rule strikes that balance by providing for the Service to seek input from experts and give weight to impacts accordingly, while also making clear that the Service ultimately retains the discretion to reject or adjust that input to the extent it is rebutted by the best information available to the Service, including information that the Service develops to consider economic or relevant impacts such as the IEM (see *Comment 11*). By retaining that discretion for the Service, the rule avoids putting disproportionate weight on the expertise of entities whose ultimate goal may not be conservation.

Comment 18: Several commenters requested a clear definition for "national security," with predetermined activities to avoid the use of open-ended terms. Commenters referenced national security as both a factor to be considered for exclusion as described in the rule and a reason for inclusion given that ecological degradation can pose a security risk (e.g., food and water security, disaster resilience).

Response: We will rely on the expertise of the Department of War, Department of Homeland Security, or affiliated agencies to make a determination as to what constitutes an impact to national or homeland security. The Service does not have the expertise to determine all activities or projects that may have national security implications; therefore, we decline to produce a list or further define “national security” in these regulations. We will continue to rely on the expert judgment of the agencies responsible for national security and homeland security and any reasonably detailed justification of the potential impacts that they provide regarding a designation of critical habitat to inform our discretionary exclusion analysis.

Comment 19: Commenters both opposed and supported the provision clarifying when the Service will consider excluding Federal lands. Those that expressed opposition to the proposed provision cited sections 2(c) and 7 of the Act, which generally state that Federal agencies shall seek to conserve listed species and use their authorities to further the purposes of the Act. Furthermore, commenters stated that, because section 7 of the Act requires consultation by Federal agencies to ensure their actions are not likely to jeopardize listed species or destroy or adversely modify their critical habitat, Federal lands are important for species recovery. Other commenters noted that the potential increase in exclusions of Federal lands could be a negative signal to private landowners regarding the commitment of Federal land managers to species recovery and section 7 consultation. Commenters also noted that, combined with national-security exclusions and exemptions, additional exclusion of Federal lands could skew critical habitat designations to, and pose an economic disadvantage to, State and private lands, especially in Western States. Commenters further stated that administrative or transactional costs tend to be minor and should not be a basis for exclusion.

Other commenters expressed support for the approach to Federal lands in the proposed rule and asked that additional provisions be added to the final rule, such as specifically including consideration of more than section 7 transactional costs (for example, considering impacts on the private property of a lessee or permittee). Commenters asked for additional specificity in the types of Federal lands and activities to be considered for exclusion; whether federally withdrawn lands (e.g., National Forest System lands withdrawn from public entry and reserved for

Reclamation Project purposes ("withdrawn lands")) on which non-Federal entities are conducting activities could be considered; and whether exclusion could apply only within a project footprint or would extend to adjacent areas on Federal land where there may be an effect from a project.

Response: The Act is clear in section 2(c)(1) and section 7(a)(1) that Federal agencies shall use their authorities to further the purposes of the Act and carry out programs for the conservation of endangered species and threatened species, and in section 7(a)(2) that Federal agencies must ensure their actions are not likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of their critical habitat. However, the Ninth Circuit held that the "ESA's declaration of purposes and policy" [Section 2] is a "non-operative statement of policy that 'does not create an enforceable mandate'" (*Bear Valley Mut. Water Co.* v. *Jewell*, 790 F.3d 977, 987 (9th Cir. 2015), hereafter "*Bear Valley*"). Regardless, the final regulation does not change any of the obligations of Federal agencies under the Act. Section 4(b)(2) of the Act does not provide for a different standard for exclusions on Federal lands relative to other lands.

While the standards for evaluating Federal and non-Federal lands are the same, we will consider the extent to which consultation may produce an outcome that has probable economic or other impacts, such as by requiring project modifications and additional conservation measures by the Federal agency or other affected parties, on a case-by-case basis. Additionally, we expect to evaluate the types of activities that are being permitted or the types of leases and activities being conducted on Federal land, any economic benefits associated with those leases and activities, and any potential impacts that designating the lands as critical habitat could have on those economic benefits, as well as the conservation value of the areas that qualify as critical habitat, including whether the areas are occupied or unoccupied. Regardless of inclusion or exclusion of Federal lands from a designation of critical habitat, we recognize that Federal lands may provide important areas for species recovery efforts.

In any exclusion analysis for Federal lands, we will consider not only the transactional costs associated with section 7 consultations, but also any potential costs to affected parties (including non-Federal entities) such as changes to anticipated permits, licenses, leases, or contracts that would stem from any project modifications that may be required to avoid destruction or adverse modification of critical habitat. We will now consider impacts on Federal lands the same as non-Federal lands by considering the impacts of the designation on applicants, permittees, or lessees. Consideration of those incremental costs will be done on a case-by-case basis. We decline to include additional details about what specific areas may be considered for exclusion.

Comment 20: One commenter said the Secretary's evaluations of proposed exclusions of critical habitat on Federal lands must be conducted under the lens of the mandated purposes Multiple Use and Sustained Yield Act of 1960 (MUSYA; 16 U.S.C. 528–531). The commenter stated this act established co-equal purposes for the administration and management of federal lands: outdoor recreation, range, timber, watershed, and wildlife and fish conservation. These purposes are to be achieved through "harmonious and coordinated management of the various resources, each with the other without impairment of the productivity of the land." The prevailing interpretation of this act is that each of the designated purposes have equal standing on federal lands.

Response: The MUSYA is not applicable to this rulemaking. The MUSYA directs the Secretary of Agriculture on administering national forests (*U.S.* v. *New Mexico,* 438 U.S. 696, 714 (1978)), and it does not apply to the Department of Interior. Furthermore, the language the commenter cites is from the portion of the MUSYA that is the declaration of congressional policy and as stated above, does not have any legal effect. See, for example, *Bear Valley*, holding that a declaration of purposes and policy is a non-operative statement of policy that does not create an enforceable mandate.

Comment 21: Some commenters supported the consideration of section 10(a) permitted plans and agreements such as habitat conservation plans, safe harbor agreements, candidate conservation agreements with assurances, or conservation benefit agreements in our exclusion process. Commenters appreciated that we stated that the Service places great value on the partnerships that are developed during the preparation and implementation of conservation plans in the proposed rule. Others requested the Service always exclude all areas covered by permitted plans from critical habitat designations and requested additional regulatory language stating this. Commenters requested that the Service revise the regulation to simplify the requirements for areas covered by permitted plans to be excluded from critical habitat to bolster the confidence of landowners, as well as incentivize participation in permitted plans.

However, several commenters shared concerns over the changed circumstance provision which allows changing conservation measures over time, the finite nature of the agreements, the question of whether the lands are in a currently acceptable state for the listed entity, the effectiveness of conservation plans, the lack of protective measures compared to a designation, and an overall concern regarding the durability of agreements compared to a critical habitat designation.

Response: As stated in the 2025 proposed rule in paragraph (d)(3) and associated preamble text, we place great value on the partnerships that are developed during the preparation and implementation of plans and agreements that have been permitted under section 10(a) of the Act. We anticipate consistently excluding areas covered by plans, agreements, or partnerships, such as those listed in the 2016 policy, as long as the conditions in paragraphs (d)(3)(i)–(iii) are met. Because section 10(a) permits authorize take of covered species that would otherwise be prohibited, permittees are incentivized to continue the implementation of the measures contained in the conservation plan and required by the associated permit following the exclusion of the covered area. Therefore, the benefits of inclusion are generally less than the benefits of exclusion. This is not the same fact pattern for draft plans or agreements, and we thus would generally give little weight to these draft agreements or unrealized or uncertain commitments of future conservation actions in a discretionary section 4(b)(2) exclusion analysis. The Service will always consider the plans or agreements that have been permitted under section 10(a) of the Act on a case-by-case basis to determine whether the benefits of exclusion outweigh the benefits of inclusion. We have been applying these concepts following the finalization of the 2016 policy, and our experience is that they work well, do not impose unnecessary burden on the Service, and provide the clarity needed for landowners and partners to meet the exclusion requirements.

Comment 22: A commenter suggests that excluding lands operating under a permitted agreement conflates the regulatory standard for "take" with the relevant standard for section 7 consultation relating to critical habitat (i.e., whether an action is likely to "destroy or adversely modify" designated critical habitat) and cited to *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1028 (9th Cir. 2012) (hereafter "*Karuk*"), which states "[w]hether mining activities effectuate a 'taking' under Section 9 of the ESA is a distinct inquiry from whether they 'may affect' a species or its critical habitat under Section 7." The commenter suggests that equating these two distinct standards ignores the ESA's plain language and the many independent conservation benefits that accrue from critical habitat designation.

The commenter also suggests the proposal to exclude areas based on permitted plans or agreements is inconsistent with the case law, and while such plans and agreements are important for species conservation, they are not a substitute for critical habitat designation. They cited to *NRDC*, in which the Ninth Circuit rejected FWS's argument that it did not need to designate critical habitat for the coastal California gnatcatcher because such lands were already covered by a Natural Community Conservation Plan (NCCP). The Ninth Circuit held that "the NCCP alternative cannot be viewed as a functional substitute for critical habitat designation" because such designation "triggers mandatory consultation requirements for [F]ederal agency actions involving critical habitat" (Id. at 1127). "The NCCP alternative, in contrast, is a purely voluntary program that applies only to non-[F]ederal land-use activities" (Id). Further, the commenter cited to *Bear Valley*, in which the Ninth Circuit held that FWS properly designated critical habitat that was also included in a habitat conservation plan (HCP). The commenter suggests the Service has now inexplicably reversed its position, pointing to language in the 2025 proposed rule that "the unhindered, continued ability to maintain existing partnerships, as well as the opportunity to seek new partnerships with potential plan participants," generally outweighs the benefits of designating areas subject to conservation plans as critical habitat (90 FR 52592 at 52596, November 21, 2025).

The commenter also states that the Service has failed to justify the proposed change from the 2016 policy about permitted plans that adds the phrase "or information provided by proponents of an exclusion." They suggest this language provides an opportunity for proponents of an exclusion—but not proponents of an inclusion—to provide relevant information to inform critical habitat designations.

Response: As we explained above, we anticipate consistently excluding areas covered by plans, agreements, or partnerships as long as the conditions in paragraphs (d)(3)(i)–(iii) are met. None of the court opinions cited by the commenter specifically address an application of these conditions, nor provide legal justification against this rule.

In reference to the commenter citing *Karuk*, we disagree with the commenter that excluding lands operating under a permitted agreement conflates the regulatory standards between section 7 and 9. While those are two different standards in two different sections of the ESA, section 4(b)(2) provides an independent standard for "The Secretary [to] exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." Also as discussed below, it is the Service's long-standing policy that the benefits of exclusion due to conservation plans or agreements, including the commenter's permitted agreement, that meet certain criteria (such as the conditions in paragraphs (d)(3)(i)–(iii)) generally outweigh the benefits of designating areas subject to conservation plans or agreements as critical habitat.

As for the 1997 *NRDC* Ninth Circuit opinion the commenter cites, that opinion was based on a challenge to the Service's "not prudent" critical habitat determination made under ESA section 4(a)(3). The Ninth Circuit language on the NCCP that the commenter provides was an argument to the determination that a critical habitat designation was "not prudent." Thus, the Ninth Circuit did not explicitly opine on the Secretary's discretion under 4(b)(2) to exclude areas designated as critical habitat, and the Ninth Circuit's opinion is not relevant on the matter of critical habitat exclusion.

As for the 2015 *Bear Valley* Ninth Circuit opinion the commenter cites, this rule is not a reversal on the Service's position on whether partnership and conservation benefits generally outweigh the benefits of designating areas subject to conservation plans or agreements as critical habitat. In *Bear Valley*, the Service made a specific determination, specific to that agreement (i.e., Western Riverside County Multiple Species HCP). That determination did not preclude the Service from future determinations related to critical habitat exclusions, such as this rule. In fact, it has been the Service's long-standing policy that the benefits of exclusion due to conservation plans or agreements that meet certain criteria (such as the conditions in paragraphs (d)(3)(i)–(iii)) generally outweigh the benefits of designating areas subject to conservation plans or agreements as critical habitat. A lower court, in an earlier decision, upheld the Service's exclusion of a regional HCP and Tribal lands from critical habitat based on the preservation of partnerships (*Cntr. for Biological Diversity* v. *FWS,* 2011 WL 13356055 (S.D. Cal. Sept. 26, 2011)).

Comment 23: Commenters both opposed and supported our consideration of non-permitted plans for possible exclusions. Commenters suggested that considering draft plans not yet proven effective creates perverse incentives for landowners to develop minimal conservation plans to avoid designation, knowing the Service will likely grant exclusions before implementation or effectiveness can be evaluated. Commenters also stated that the circumstances in which the Service proposes to exclude areas covered by conservation agreements fail to account for the actual benefit of those plans to listed species.

Commenters supporting the consideration of non-permitted plans recognized the incentives this creates for voluntary conservation and stated the regulation provides greater transparency and predictability for the public and stakeholders as to what elements might be needed for a conservation plan or agreement to serve as a basis for an exclusion. Of those that appreciated its inclusion, some were concerned that the Service would provide too little weight to draft voluntary agreements and emphasized that analysis of each agreement should be based on the past successes, on the strength of existing relationships, and on the stage of the process (e.g., whether the draft is an early version or a late version). Alternatively, other commenters agreed that a party must demonstrate that the voluntary conservation plan is being implemented consistent with its terms. Some commenters thought the factors set out in paragraphs (d)(4)(i)–(viii) are too onerous for the Service to consider in evaluating whether to exclude areas covered by non-permitted plans. For example, commenters suggested, the requirement to demonstrate "success" of the plan is overly broad and would place an unreasonable threshold and that instead of attempting to measure "success," the Service should instead consider whether the party is meeting or exceeding the metrics or goals identified within the applicable plan. Commenters stated that the regulations should provide clear and simple procedures to meet the exclusion threshold. Commenters suggest the Service should take the necessary steps to promote conservation plans and bring more attention to them, not disincentivize their use. Additionally, some commenters stated that the presumption of exclusion should extend to agreements not permitted under section 10(a) of the Act and that we should include regulatory text referring to automatic exclusions of such areas so long as: (1) the agreement or plan is being implemented in accordance with its terms; (2) the agreement or plan contains measures that provide for the protection or enhancement of habitat for the subject species; and (3) confirmation that exclusion of the covered area will not result in the extinction of the species concerned. At least one commenter urged the Service to clarify that the existence of an active or pending voluntary agreement constitutes credible information triggering a 4(b)(2) analysis.

Response: Adding the provision from our 2016 policy to consider non-permitted plans for possible exclusions to our regulations is intended to incentivize and recognize voluntary conservation efforts that provide conservation benefits to listed species and other at-risk species. When we consider plans, agreements, or partnerships that have not been authorized by a permit under section 10(a) of the Act, we evaluate a variety of factors. Paragraphs (d)(4)(i)–(viii) of the rule provide a non-exhaustive list of these factors. We use these factors to determine how the benefits of exclusion and the benefits of inclusion of a particular area are affected by the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships when we undertake a discretionary section 4(b)(2) exclusion analysis. We have been applying these concepts following the finalization of the 2016 policy, and our experience is that they work well. Further, as described in the preamble to the 2025 proposed rule, the Service is not required to be part of a non-permitted plan or agreement to consider the area for exclusion based on that plan. Evaluation of the success of a non-permitted plan or agreement directly relates to the benefits of exclusion of specific areas. We value the collaboration and conservation value provided by voluntary private or non-Federal conservation plans or agreements. It is in that context that we included in paragraphs (d)(4)(i)–(viii) descriptions of how we will consider these plans in a discretionary section 4(b)(2) exclusion analysis. Because every plan is unique, as are the specific needs of every species, it is difficult to offer an automatic exclusion and/or a single comprehensive analysis to cover all conservation agreements. For this reason, the Service has set out general conditions in the final regulation and conducts case-by-case analyses to determine whether to exclude areas covered by non-permitted, as well as permitted, plans.

Approach To Excluding Areas (§17.90(e) Discretion)

Comment 24: We received comments that both supported and opposed the inclusion of the phrase “shall exclude” in § 17.90(e). Specifically, commenters supported the conclusion that the Service will always exclude the areas where the benefits of exclusion outweigh the benefits of inclusion, as long as exclusion will not result in the extinction of the listed species.

Commenters stated that the proposed provision would create a clear standard, encourage consistent and transparent application of section 4(b)(2) of the Act, and support reasoned decision making (*Michigan* v. *EPA*, 576 U.S. 743 (2015)). In addition, in the view of some commenters, once the exclusion analysis is completed, if the benefits of exclusion outweigh the benefits of inclusion, there are no further considerations. If we did not exclude that area, our decision would be arbitrary and capricious, lack a rational basis, and run counter to the evidence evaluated by the Service.

Alternatively, other commenters opposed using the words “shall exclude” in § 17.90(e) because those words are more restrictive and would require the Service to automatically exclude an area from critical habitat if we determine that the benefits of exclusion outweigh the benefits of inclusion, regardless of the circumstances. Commenters expressed concern that use of the word “shall” constituted an arbitrary and capricious change in agency practice without justification, citing the language in the 2016 policy (i.e., that “the decision to exclude is always discretionary,” and, “[u]nder no circumstances is exclusion required under the second sentence of section 4(b)(2)”) (81 FR 7226 at 7229, February 11, 2016). Commenters expressed concern that this approach would result in more exclusions and contradict the purpose of the Act and Congress’s intent that the Secretary retain discretion in determining whether or not to exclude particular areas from critical habitat. Commenters also expressed concern that requiring the Secretary to exclude areas whenever the benefits of exclusion outweigh the benefits of inclusion would allow for detrimental impacts to a listed species’ habitat as long as the species does not go completely extinct.

Response: As described in the 2025 proposed rule, and in the **Summary** above, this final rule largely adopts the 2016 policy with further clarifications in the process that FWS will use when undertaking exclusion analyses. Using the phrase “shall exclude” in this rulemaking is not inconsistent with the statements that the commenters cite from the 2016 policy. The commenters’ excerpts from the 2016 policy make clear that decisions to exclude areas from critical habitat are discretionary under the structure and language of the statute. The regulation does not change or contravene that fact. Rather, this rulemaking is an exercise of the discretion referenced in those excerpts. The Secretary is choosing to exercise his discretion in this way to provide for transparency and certainty. Under the Act, the Secretary could have elected to undertake exclusion analyses on a case-by-case basis and exclude areas every time the benefits of exclusion outweigh the benefits of inclusion. However, the approach finalized here provides greater transparency and certainty because it explicitly states how the Secretary will proceed when the benefits of exclusion outweigh the benefits of inclusion. Our intent with applying the Secretary's discretion in this way is to incentivize conservation efforts. As we explained in the proposed rule, section 4(b)(2) of the Act gives the Secretary the discretion to exclude areas from critical habitat designations when certain criteria have been met. Using the phrase "shall exclude" in the regulation indicates how the Secretary is choosing to exercise his discretion, and making this choice is neither unlawful nor contrary to the purposes of the Act. Even with the words "shall exclude" in the regulation, under the statute the Secretary can only exclude areas if he determines that the benefits of exclusion outweigh the benefits of inclusion after considering the conservation value or benefit of inclusion of the area weighed against the impacts of the designation or benefits of exclusion, and the Secretary determines that exclusion will not lead to extinction of the species.

Comment 25: Commenters stated that using the standard "will result in extinction" sets too low of a bar (e.g., may allow significant habitat loss as long as species do not reach extinction) and may introduce legal vulnerability by ignoring the recovery mandate of the Act. Commenters also posed questions about whether extinction risk is considered immediate or over time. Commenters suggested alternatives such as "does not preclude recovery" or "essential to conservation."

Response: The standard of "will result in the extinction" comes directly from section 4(b)(2) of the Act. We decline to impose an alternative standard in regulation. Further, conservation is explicitly considered when determining whether or not an area should be excluded. The Secretary must determine that the benefits of exclusion outweigh the benefits of designating that particular area as critical habitat. The benefits of designating critical habitat include the conservation value or benefit that the particular area provides to the conservation of the species.

Required Determinations and Other Legal Requirements

Comment 26: Multiple commenters point out that E.O. 14154, and the related S.O. 3418, do not require or support the proposed rule. For example, commenters state that the Service does not explain how the proposed changes would reduce burdens on development of energy resources. At least one commenter suggested that the proposed rule should be reviewed by the Secretary and Solicitor of the Interior using the classes of regulations criteria in section 2(a) of E.O. 14219, "Ensuring Lawful Governance and Implementing the President's 'Department of Government Efficiency' Deregulatory Initiative."

Response: As explained above, while E.O. 14154 initiated our review, our goal in revising these regulations was to determine how best to designate critical habitat for endangered species and threatened species under section 4(b)(2) of the Act while also considering our experience administering the Act and policy preferences. We considered section 2(a) of E.O. 14219 and did not find that these regulation revisions met any of those criteria. These regulations primarily adopt and clarify the provisions in the 2016 policy and regulations at 50 CFR 424.19, which have been in place for over a decade. These regulations reflect the Service's experience and existing case law and intend to provide greater transparency and certainty for the public and stakeholders.

Comment 27: Several commenters stated that we did not comply with APA requirements. For example, commenters suggested that we did not provide a transparent, reasoned explanation for the proposed departure from our 2016 policy or justification supporting the 2022 recission of the 2020 rule or a complete and transparent analysis. At least one commenter stated that, at a minimum, the Service has not shown that there are good reasons for the new policy (see *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); hereafter "*FCC* v. *Fox*"). One commenter expressed concern about the Service's reliance on the APA's "good cause" exception (suggesting that we promulgated the rule without notice and comment and instead provided an immediate effective date for the rule). A commenter stated the APA prohibits agencies from segmenting actions to obscure their true impact (*Delaware Riverkeeper Network* v. *FERC*, 753 F.3d 1304, 1307 (D.C. Cir. 2014); hereafter "*Delaware Riverkeeper Network*") and if multiple rules are released on the same day and are functionally dependent on one another, we must explain their interrelationship.

Response: We do not agree with the assertion that we did not provide enough justification or logical rationale for the rule in compliance with the APA. We published our proposal, broadly explained our proposed revisions, explained our rationale for changes, and explicitly asked for public comment. We have now reviewed the public comments and in this final rule have provided responses to relevant, significant comments. We have provided the public with our rationale and a meaningful opportunity to comment on all aspects of the proposed rule. Thus, the process that we used to promulgate this rule complied with the applicable requirements of the APA. The process for revising regulations is governed by the APA as interpreted by relevant case law, with which the Service has complied fully.

Contrary to a commenter's assertion, we did not rely upon the APA's "good cause" exception and did not publish a rule with an immediate effective date. We published notice of the proposed rulemaking in the *Federal Register* (90 FR 52592, November 21, 2025), provided an opportunity for public comment, considered the relevant matter presented in those comments, and we have provided a rational explanation for our action. Regarding *Delaware Riverkeeper Network*, that opinion was specific to the National Environmental Policy Act and segmented environmental review.

In our 2020 rule (85 FR 82376 at 82376, December 18, 2020), we explained that we were ending our reliance on the 2016 policy and 50 CFR 424.19 to provide clarity to the Service and the public in light of agency experience and current practices, and to respond to the Supreme Court's decision in *Weyerhaeuser*. In our 2022 rescission (87 FR 43433, July 21, 2022), we rescinded the 2020 rule because we determined that the 2020 rule was problematic because it unduly constrained the Service's discretion in administering the Act, potentially limiting or undermining the Service's role as the expert agency and its ability to further the conservation of endangered and threatened species through designation of their critical habitats. We now find—as explained further in our preamble to the November 21, 2025, proposed rule (90 FR 52592 at 52594)—that reinstating the regulations at 50 CFR 17.90 is the preferable policy choice. This rule reflects the Service's experience and existing case law. The intended effect of these regulations is to provide greater transparency and certainty for the public and stakeholders. This is sufficient explanation under the Supreme Court's decision in *FCC* v. *Fox* (556 U.S. at 515), which concludes "it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates."

Comment 28: Commenters expressed concern that the regulatory changes outlined in the proposed rule are not grounded in the best available science, allow undue influence from the regulated community, weaken ESA mandates and protections, and are contrary to the stated conservation purpose of the Act.

Response: We do not share the commenters' concerns. We will continue to base critical habitat designations on the best scientific data available, evaluate the information provided from outside entities on a case-by-case basis, and give weight of the benefits of inclusion or exclusion consistent with the available information from experts, firsthand knowledge, and the best available information that the Secretary may have to rebut that information. We do not consider speculative or unsupported information to be credible information and will use our best professional judgment to evaluate all information critically before incorporating it into any exclusion analysis.

Comment 29: One commenter stated the proposed rule fails to fulfill the Alaska Native Claims Settlement Act (43 U.S.C. Chapter 33).

Response: Our obligation to have a government-to-government relationship with federally recognized Tribes is paramount and is addressed by S.O.s 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 the 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 (ANCs) on the same basis as Indian Tribes under E.O. 13175. Consistent with this obligation, the Service will consult on Federal decisions that have a substantial, direct effect on an ANC. This obligation to consult does not extend beyond the E.O. 13175 context and does not apply here. We will continue to collaborate with federally recognized Tribes and ANCs on a government-to-government basis on issues related to federally listed species and their habitats and will work with them as we administer the provisions of the ESA.

Comment 30: Commenters suggested additional analyses are required for our required determinations (for example, Regulatory Flexibility Act, Federalism, Paperwork Reduction Act, E.O. 12866, and Statement of Energy Effects). Several commenters stated that we need to complete intra-Service section 7 consultation on the rulemaking.

Response: Regarding all required determinations for this rulemaking, the primary change that this final rule makes is to put a regulatory framework in place for future application. In the future, for each critical habitat designation or revision, we will determine whether any areas should be excluded from designation. These changes provide transparency and clarity, and there are no identifiable, quantifiable effects from this rule. We further explain our rationale and compliance for each of the identified **Required Determinations** in their respective sections below.

Comment 31: Multiple commenters remarked on whether aspects of this rule are legal under the Act, whether they are the best interpretation of the Act, and whether they are consistent with congressional intent. Some commenters viewed aspects of the regulations as lawful and consistent with congressional intent. These commenters pointed out that the 2020 rule, and therefore the 2025 proposed rule, reversed the 2016 policy's impermissible de facto moratorium on section 4(b)(2) analyses whenever a potential critical habitat area was located on Federal land. They suggest this moratorium, which was reinstated by the 2022 rule, was squarely at odds with section 4(b)(2)'s requirement that the Service consider the economic and other impacts of designating critical habitat irrespective of where areas otherwise qualifying as critical habitat may be located. They suggest that Congress drafted section 4(b)(2) with the express intent that it would "cause the Secretary to be more judicious in specifying such a critical habitat, and to avoid conflicts between [species] and Federal activities at an early stage" (124 Cong. Rec. 38,128 (1978); H.R. Rep. No. 95-1625, at 16).

The same commenters found that for one aspect of the proposed rulemaking, neither the 2016 policy reflected in the 2022 rescission rule, nor the 2020 rule, reflected in the 2025 proposed rule, reflect the "single, best meaning" of the Act. They suggest that weighing the benefits of excluding an area against the benefits of including an area in a critical habitat designation is not "optional" or otherwise a matter of discretion and misreads the Supreme Court's decisions in *Weyerhaeuser* and *Bennett* v. *Spear*, 520 U.S. 154 (1997) (hereafter "*Bennett*"), and is at odds with Congress's intent in enacting section 4(b)(2).

Conversely, other commenters suggested that the regulations are unlawful and inconsistent with the best reading of the Act as required by *Loper Bright Enterprises* v. *Raimondo,* 603 U.S. 369 (2024) (hereafter, "*Loper Bright")*. For example, commenters state the proposed rule unlawfully conflated the initial, mandatory economic impact analysis in section 4(b)(2) with the subsequent, discretionary critical habitat exclusion analysis, and appears to unlawfully presume that such an exclusion analysis will occur in every case counter to *Weyerhaeuser* and *Bldg. Industry Ass'n of the Bay Area* v. *U.S. Dep't of Com.*, 792 F.3d 1027 (9th Cir. 2015) (hereafter "*Bldg. Industry Ass'n*").

Commenters also stated that we misconstrued the Supreme Court's ruling in *Loper Bright* because there was nothing in the court's decision that compels or even supports the decision to revise the implementing regulations. Further, these commenters stated that referring to the court's decision does not sufficiently justify the Service's change in position or provide a rational basis to rely on for the revisions to the regulations because it does not change how agencies interpret statutes or promulgate regulations. These commenters stated *Loper Bright* requires courts, when reviewing an agency action, to determine the "best reading" of a statute rather than defer to an agency's interpretation of ambiguous statutory language (603 U.S. at 400).

Response: These regulation revisions articulate when and how we determine whether the benefits of excluding an area outweigh the benefits of designating the area as critical habitat (exclusion analysis). As discussed above in the **Summary**, these regulations primarily adopt and clarify the provisions in the 2016 policy and regulations at 50 CFR 424.19 with a new information standard for when we enter into a discretionary weighing analysis, a clarification of how considerations for exclusions will be conducted for Federal lands, and an approach to giving weight to the benefits of inclusion or exclusion of any particular areas designated as critical habitat. We also removed a statement from the 2016 policy that "although the Services will explain their rationale for not excluding a particular area, that decision is committed to agency discretion." Additionally, as discussed in our 2020 proposed rule (85 FR 55398, September 8,

2020) we decided to revisit certain language in the preamble of the 2016 policy, as well as certain statements in the preamble to the 2013 rule that revised the regulations on the timing of our economic analyses at 50 CFR 424.19, to provide clarity to FWS staff and the public in light of the Supreme Court's decision in *Weyerhaeuser*. At the time we developed the 2013 rule and 2016 policy, the Services were guided by a line of cases in which courts had held that a decision by the Services not to exclude a particular area under section 4(b)(2) of the Act was committed to agency discretion by law and therefore not subject to judicial review.

In addition, regarding *Weyerhaeuser*, although the Supreme Court's opinion did not require promulgation of regulations on the procedure for exclusion analyses under section 4(b)(2) of the Act, it did establish that decisions not to exclude a particular area of critical habitat are judicially reviewable. See *Weyerhaeuser*, 586 U.S. at 25, noting that the challenge to the Service's decision not to exclude a particular area was a "familiar one in administrative law that the agency did not appropriately consider all of the relevant factors that the statute sets forth to guide the agency in the exercise of its discretion." *Weyerhaeuser* cited the Court's earlier decision *Bennett* to justify its decision (and though *Weyerhaeuser* does not cite the Ninth Circuit's 2015 *Bldg. Industry Ass'n* opinion, *Weyerhaeuser's* holding overturns the Ninth Circuit's holding that critical habitat exclusions are not judicially reviewable). In light of the Supreme Court's holding that decisions not to exclude may be reviewed by courts for abuse of discretion under section 706(2) of the APA, the Service is of the view that the Court's decision underscores the importance of being deliberate and transparent about how the Service goes about making decisions about whether to exclude areas from designations of critical habitat.

In response to the conflicting comments about whether section 4(b)(2) of the Act requires the Service to conduct weighing analyses or to exclude an area from designation as critical habitat when the benefits of exclusion outweigh the benefits of inclusion; regardless of these comments, crafting these regulations that provide greater transparency and certainty for the public and stakeholders is the most appropriate way for the Service to administer section 4(b)(2) of the Act and our preferred policy approach.

Comment 32: Commenters stated that the Service failed to comply with the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) because we merely solicited public comment on potential impacts of the regulatory revisions rather than drafting an environmental impact statement for public input. According to the commenters, this shifts the burden to the commenters to gather and review technical environmental and economic information during the 30-day comment period, prejudicing their ability to comment and protect their rights and interests. Multiple commenters asserted that a NEPA analysis was required because the proposed regulatory revisions constitute a “major Federal action” with significant environmental impacts. Some commenters asserted that the Service needs to prepare an environmental assessment or environmental impact statement pursuant to NEPA for these revisions to the regulations prior to adoption of the proposed changes, and that this rulemaking action should not be categorically excluded. Specifically, they suggest that we need to take a hard look at the foreseeable impacts of the regulatory changes, along with a reasonable range of alternatives. Some commenters stated that they do not believe that the proposed regulation changes are merely administrative or procedural actions, nor would result in environmental effects that are “too broad or speculative” for analysis. Some commenters noted “extraordinary circumstances” preclude use of a categorical exclusion; for example, those having significant impacts on species listed, or proposed to be listed under the Actor having significant impacts on designated critical habitat for these species (43 CFR 46.215(g)).

Commenters stated that NEPA did not permit the Services to consider each of the ESA rule changes proposed on November 21, 2025, independently and the Services were instead required to consider these four regulatory actions, along with the “harm” rule, collectively to avoid improperly segmenting their actions and obscuring the full environmental consequences of deregulation.

Response: NEPA establishes procedures for agencies to follow to determine the level of NEPA review (42 U.S.C. 4336). The Service elected to invite the public to provide comments on whether the proposed regulations may have a significant impact on the human environment, consistent with our past practice in promulgating the 2020 rule. This approach did not place a burden on commenters to develop technical analyses, as one commenter suggested, nor deprive or limit their ability to participate in the comment period effectively. There is no requirement under NEPA to make any draft environmental document or categorical exclusion documentation available to the public for comment. Exceeding the statutory minimum requirements here and allowing public input on our NEPA compliance does not violate NEPA.

The Service also voluntarily solicited input from the public on the extent to which the proposed rule fell within a categorical exclusion. Per NEPA, agencies must prepare EAs for actions that do not have a reasonably foreseeable significant effect on the quality of the human environment (or if the significance of the effect is unknown) unless, *inter alia*, the action is excluded under one of the agency's categorical exclusions (42 U.S.C. 4336(b)(2)). We have complied with NEPA by determining that the rule is covered by a categorical exclusion found at 43 CFR 46.210(i). We explained this determination in an environmental action statement (EAS) that is posted in the docket for this final rule. As explained in the EAS, this rulemaking primarily provides the procedure for excluding areas from a critical habitat designation but does not apply this procedure to any species' designation; it is not until we are in the process of determining what to designate as critical habitat that this procedure applies to that species. Because the revisions are intended to clarify, interpret, and implement portions of the Act concerning procedures for excluding critical habitat for endangered species or threatened species, we consider the action to be fundamentally administrative, technical, or procedural in nature. We determined that none of the extraordinary circumstances apply to this rulemaking. We appreciate that commenters may have preferred an environmental document that analyzed a range of alternatives, but because we have a categorical exclusion that can be applied to this action, we did not prepare an EA nor was an EIS required, as set forth above.

As explained more fully in our categorical exclusion document, this rulemaking clarifies the procedures and criteria used for designating or revising critical habitat under section 4 of the Act but does not apply these procedures to any species. As a result, the revisions to our regulations are of an administrative, technical, legal or procedural nature and none of the extraordinary circumstances apply (see **Required Determinations**, below, and our supporting NEPA documentation at available at https://www.regulations.gov at Docket No. FWS–HQ–ES–2025–0048). To the extent that some commenters assert that the rules are ineligible for these categorical exclusions because they are substantive and non-ministerial, such characteristics are not the focus of the agency's categorical exclusion.

Lastly, we disagree with comments stating that the Services were required to consider all four ESA regulatory provisions proposed on November 21, 2025, as well as the rule to rescind the Services' definition of "harm" under the ESA, in one environmental document to avoid improperly segmenting their actions. Each of these rules are separate actions and are not dependent on one another, i.e., any one of the individual rulemaking actions could proceed without any of the others and are not an interdependent part of a larger Federal action. Even within each of the separate, individual rulemaking actions, the regulatory provisions that are subject to revision can be severable from other regulatory provisions addressed in the same rulemaking action. Although each of the four regulations proposed on November 21, 2025, followed a review initiated by E.O. 14154 and S.O. 3418, none of these Executive or Cabinet-level orders are exclusively directed at the ESA and none of the regulations being finalized directly rely on these orders for the specific revisions we are now finalizing in this rule. We also note that two of the rules that the commenters identified (including this rule) are only applicable to FWS could not appropriately be evaluated by NMFS in any NEPA document, as NOAA and the Department of Commerce do not have decision-making authority over rules that apply only to other agencies. See NOAA Companion Manual at 34 that defines “connected action” in relevant part as “a separate Federal action within the authority of NOAA...”).

Other

Comment 33: Some commenters requested that we address in the final rule that there is a requirement to conduct NEPA analyses when designating critical habitat within the Tenth Circuit citing *Catron Cnty. Bd. of Comm’rs* v. *U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1436 (10th Cir. 1996) (hereafter “*Catron County*”). This addition to the rule would clarify that interested parties have a chance to participate in and meaningfully contribute to the environmental analysis underlying future critical habitat designations.

Response: Regulations adopted pursuant to section 4(a) of the Act are exempt from NEPA and do not require an environmental analysis under NEPA. We published a notice outlining our reasons for this determination in the *Federal Register* on October 25, 1983 (48 FR 49244). This includes listing, delisting, and reclassification rules, as well as critical habitat designations. In a line of cases starting with *Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the courts have upheld this position. However, as the commenter suggested, when any of the areas that meet the definition of “critical habitat” for the species are in States within the Tenth Circuit, we had been required to undertake a NEPA analysis for that critical habitat designation consistent with the Tenth Circuit ruling in *Catron County Board*. We have recently updated our NEPA practice (91 FR 8738, February 24, 2026), and note that the February 2026 Department of Interior Handbook of National Environmental Policy Act Implementing Procedures (516 DM 1; https://www.doi.gov/media/document/doi-nepa-handbook) states that critical habitat designations is not a “major federal action,” Section 1.1(a)(6)(iii)(D)(d) provides that “Certain decisions made by the U.S. Fish and Wildlife Service under the Endangered Species Act do not require NEPA compliance: ...(d) Determinations whether to designate, amend, or rescind critical habitat.” Therefore, we no longer conduct NEPA analyses for any critical habitat designations or revisions, including in the Tenth Circuit.

Comment 34: Commenters expressed concern that the proposed rule would result in inconsistent regulations in which the FWS follows one set of guidelines and NMFS retains their current regulations resulting in potential conflict and lack of transparency.

Response: In some situations, the regulated community is best served if the agencies have the same regulations and policy. However, in other situations it may make sense for the FWS and NMFS to apply their own regulations to be responsive to the needs and circumstances of the species for which they are responsible. We find in this particular instance that differing regulations is the preferred approach.

Comment 35: Several commenters expressed concern about the Service's resource constraints and potential delays associated with the rule. They suggested that expanded weighing analyses could result in slower critical habitat designations, undermining State and partner planning that relies on timely, clear designations. Alternatively, commenters recommended longer public comment windows for future critical habitat rulemakings and commitments to update and reopen analyses when new exclusion requests or data arrive. Commenters suggested that the Service should strengthen in-house expertise in economics, national security, and "other impacts" to put the agency in a position to better defend its determinations.

Response: The mandatory requirements to designate critical habitat according to section 4(b)(6)(A) and section 4(b)(2) of the Act will not change following the finalization of these regulations. These regulations primarily adopt and clarify the provisions in the 2016 policy and regulations at 50 CFR 424.19. These revisions articulate when and how we determine whether the benefits of excluding an area outweigh the benefits of designating the area as critical habitat (exclusion analysis). This rule will provide greater transparency and certainty for the public and stakeholders. The provisions added to the regulations will not create additional workload for the Service but will help to ensure that credible information is considered in making decisions related to exclusions of particular areas from critical habitat designations. We have a history of contracting support related to our consideration of economic impacts of a critical habitat designation, and this regulation revision will not change that practice. We find that it is more efficient and effective to contract support from experts in the field who stay informed and abreast of new techniques and availability of data sources than relying on internal staff to complete these analyses. We do not find it appropriate or necessary for the Service to become experts in national security impacts or all other relevant impacts of designation of critical habitat.

Comment 36: At least one commenter requested that we limit critical habitat designations to only regulations that are consistent with the U.S. Constitution and requested we make specific commitments concerning the content of future rulemakings.

Our Response: The Service only promulgates regulations that are consistent with the U.S. Constitution. The specific content of future individual rulemakings is beyond the scope of this rulemaking.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

E.O. 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is significant and has reviewed it. This rule is considered an E.O. 14192 deregulatory action and we anticipate cost-savings from the future implementation of the rule; however, cost-savings cannot be projected or quantified.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation’s regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. E.O. 13653 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this final rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; title II of Pub. L. 104–121, March 29, 1996), 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 RFA to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

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 (90 FR 52592, November 21, 2025). Nothing in this final rule changes the basis for that conclusion, and we received no information that changes the factual basis of this certification. The following discussion explains our rationale.

Under the RFA, as amended, and as understood in light of recent court decisions, Federal agencies are required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself; in other words, the RFA does not require agencies to evaluate the potential impacts to indirectly regulated entities. This rulemaking revises the Service's regulations designating critical habitat for endangered and threatened species under the Act. The Service is the only entity that is directly affected by this regulation change at 50 CFR part 17 because changes to this section of the Code of Federal Regulations merely describe how we will 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. Therefore,~~,~~ we certify that this rule will not have a significant economic effect on a substantial number of small entities.

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.), we make the following finding:

(a) On the basis of information contained above in the Regulatory Flexibility Act section, this rule will not "significantly or uniquely" affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act that this rule will not impose a cost of $100 million or more in any given year on local or State governments or private entities. A small government agency plan is not required. As explained above, small governments will not be affected because the 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 rule is not a "significant regulatory action" under the Unfunded Mandates Reform Act. This rule will impose no obligations on State, local, or Tribal governments.

Takings—E.O. 12630

In accordance with E.O. 12630, this rule will not have significant takings implications. This rule will not directly affect private property, nor will it cause a physical or regulatory taking. A takings implication assessment is not required because this rule (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. This rule will substantially advance 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 E.O. 13132, this rule does not have significant federalism effects. A federalism summary impact statement is not required. This rule pertains only to 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 will not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of E.O. 12988. This rule will clarify factors for designating critical habitat pursuant to the ESA.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of ("Government-to-Government Relations with Native American Tribal Governments"; 59 FR 22951, May 4, 1994), E.O.13175 ("Consultation and Coordination with Indian Tribal Governments"), the President's memorandum of November 30, 2022 ("Uniform Standards for Tribal Consultation;" 87 FR 74479, December 5, 2022), and the Department of the Interior's manual at 512 DM 2, we considered possible effects of this rule on federally recognized Indian Tribes and Alaska Native Corporations (ANCs). An informational webinar was held for federally recognized Tribes on December 3, 2025, and in response to Tribal interest, the Services held a question-and-answer session for federally recognized Tribes on December 10, 2025, to provide additional time for Tribal input and questions. After the opening of the public comment period, we received comments, requests for coordination, or requests for government-to-government consultation from multiple Tribes.

The Service has reached a conclusion that the changes to these regulations do not directly affect specific species or Tribal lands. This rule revises regulations for excluding critical habitat for endangered species and threatened species pursuant to the Act. 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 Department of the Interior. 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. We will continue to collaborate with Tribes and ANCs on issues related to federally listed species and their habitats and work with them as we administer the provisions of the Act; see Joint S.O. 3206 ("American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act," June 5, 1997)).

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collection of information that requires approval by the Office of Management and Budget (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 (42 U.S.C. 4321 et seq.)

We analyzed this rule pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR part 46), and the Department of the Interior Handbook of National Environmental Policy Act Implementing Procedures (516 DM 1). Federal agencies must prepare an environmental impact statement for a proposed major Federal action, that would have a reasonably foreseeable significant effect on the quality of the human environment (42 U.S.C. 4332(c)). We have determined that a detailed statement under NEPA is not required because the rule is covered by a categorical exclusion; we prepared an Environmental Action Statement accordingly. Please see our supporting NEPA documentation, available at https://www.regulations.gov at Docket No. FWS–HQ–ES–2025–0048, for additional details.

We find that the categorical exclusion found at 43 CFR 46.210(i) applies to these regulation changes. At 43 CFR 46.210(i), the Department of the Interior has found that the following category of actions do 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; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case. We have also considered whether any of the extraordinary circumstances described in 43 CFR 46.215 apply, and we did not identify any extraordinary circumstances that apply to this rulemaking.

Energy Supply, Distribution or Use—E.O. 13211

E.O. 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare statements of energy effects “to the extent permitted by law” when undertaking actions identified as significant energy actions (66 FR 28355, May 22, 2001). E.O. 13211 defines a “significant energy action” as an action that (i) is a significant regulatory action under E.O. 12866 (or any successor order); and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy. The revised regulations are not expected to affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and there is no requirement to prepare a statement of energy effects for this action.

Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.)

In developing this rule, the FWS is acting in our unique statutory role as administrator of the Act and is engaged in a legal exercise of interpreting the standards of the Act. The FWS’s administration of the Act is not in itself subject to the Act’s provisions, including section 7(a)(2). The FWS has a historical practice of issuing its general regulations under the ESA without undertaking section 7 consultation. This practice accords with the plain language, structure, and purposes of the ESA, which does not place a consultation obligation on the FWS's administration of the Act. Although the FWS consults on actions through intra-agency consultations where appropriate (e.g., issuance of section 10 permits and actions under statutory authorities other than the ESA), in those instances the FWS is acting principally as an "action agency" implementing provisions of the Act or other statutes. Here, by contrast, the FWS is acting solely in our role as administrator of the ESA; we are also not administering the Act to propose or take a specific action. The FWS is carrying out the most fundamental exercise of our role as administrator of the ESA, and the Act cannot reasonably be construed as requiring the FWS to "consult" with ourselves under section 7(a)(2) in such cases.

Authority

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

List of Subjects in 50 CFR Part 17

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

Regulation Promulgation

For the reasons discussed in the preamble, we hereby amend part 17 of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

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

Subpart J—[Redesignated as Subpart K]

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

Subpart I—[Redesignated as Subpart J]

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

4. Add new subpart I, consisting of § 17.90, to read as follows:

Subpart I—Considerations of Impacts and Exclusions from Critical Habitat

§ 17.90 Impact analysis and exclusions from critical habitat.

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

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

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

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

(i) The proponent of excluding a particular area (including, but not limited to, permittees, lessees, or others with a permit, lease, or contract on federally managed lands) has presented credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area; or

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

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

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

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

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

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

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

(2) When analyzing the benefit of including or excluding any particular area based on

economic impacts or other relevant impacts described in paragraph (b) of this section, the Secretary will weigh such impacts relative to the conservation value of that particular area. For benefits of inclusion or exclusion based on impacts that fall within the scope of the Service's expertise, the Secretary will give weight to those benefits in light of the Service's expertise.

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

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

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

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

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

(i) The degree to which the record of the plan, or information provided by proponents of an exclusion, supports a conclusion that a critical habitat designation would impair the realization of the benefits expected from the plan, agreement, or partnership.

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

(iii) The degree to which agency review and required determinations (e.g., State regulatory requirements) have been completed, as necessary and appropriate.

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

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

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

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

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

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

Kevin Lilly,

Principal Deputy for Fish and Wildlife and Parks, exercising the delegated authority of the Assistant Secretary for Fish and Wildlife and Parks,
Department of the Interior.

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