

**Billing Codes 4333-15-P; 3510-22-P**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 424**

**[Docket No. FWS-HQ-ES-2018-0006; Docket No. 180202112-8112-01; 4500030113]**

**RIN 1018-BC88; 0648-BH42**

**Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Listing Species and Designating Critical Habitat**

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

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the “Services” or “we”), propose to revise portions of our regulations that implement section 4 of the Endangered Species Act of 1973, as amended (Act). The proposed revisions to the regulations clarify, interpret, and implement portions of the Act concerning the procedures and criteria used for listing

or removing species from the Lists of Endangered and Threatened Wildlife and Plants and designating critical habitat. We also propose to make multiple technical revisions to update existing sections or to refer appropriately to other sections.

**DATES:** We will accept comments from all interested parties until [INSERT DATE 60 DAYS AFTER THE DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on this date.

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

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

<http://www.regulations.gov>. In the Search box, enter FWS–HQ–ES–2018–0006, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on “Comment Now!”

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–HQ–ES–2018–0006; U.S. Fish & Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803 or National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will

post any personal information you provide us (see **Public Comments** below for more information).

**FOR FURTHER INFORMATION CONTACT:** Bridget Fahey, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703/358–2171; or Samuel D. Rauch, III, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301/427–8403. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800/877–8339.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Endangered Species Act of 1973, as amended (“Act”; 16 U.S.C. 1531 *et seq.*), states that the purposes of the Act are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions. 16 U.S.C. 1531(b). Moreover, the Act states that it is the policy of Congress that the Federal Government will seek to conserve threatened and endangered species, and use its authorities to further the purposes of the Act. 16 U.S.C. 1531(c)(1).

The Act defines an endangered species as any species that is “in danger of extinction throughout all or a significant portion of its range” and a threatened species as any species “that is likely to become an endangered species within the foreseeable future

throughout all or a significant portion of its range.” 16 U.S.C. 1532(6); (20). The Act requires the Services to determine whether species meet either of these definitions. 16 U.S.C. 1533(a); 1532(15). Section 4 of the Act and its implementing regulations in Title 50 of the Code of Federal Regulations at 50 CFR part 424 set forth the procedures for adding, removing, or reclassifying species to the Federal Lists of Endangered and Threatened Wildlife and Plants (lists). The lists are in 50 CFR 17.11(h) (wildlife) and 17.12(h) (plants). Section 4(a)(1) of the Act sets forth the factors that we evaluate when we issue rules for species to list (adding a species to one of the lists), delist (removing a species from one of the lists), and reclassify (changing a species’ classification or its status).

One of the tools provided by the Act to conserve species is the designation of critical habitat. The purpose of critical habitat is to identify the areas that are essential to the conservation of the species. The Act generally requires that the Services, to the maximum extent prudent and determinable, designate critical habitat when determining that a species is either an endangered species or a threatened species. 16 U.S.C. 1533(a)(3)(A).

The Secretaries of the Interior and Commerce (the “Secretaries”) share responsibilities for implementing most of the provisions of the Act. Generally, marine and anadromous species are under the jurisdiction of the Secretary of Commerce, and all other species are under the jurisdiction of the Secretary of the Interior. Authority to administer the Act has been delegated by the Secretary of the Interior to the Director of FWS and by the Secretary of Commerce to the Assistant Administrator for NMFS.

## **Proposed Regulatory Revisions**

In carrying out Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” the Department of the Interior (DOI) published a document with the title “Regulatory Reform” in the *Federal Register* of June 22, 2017 (82 FR 28429). The document requested public comment on how DOI can improve implementation of regulatory reform initiatives and policies and identify regulations for repeal, replacement, or modification. This proposed rule addresses comments that DOI has received in response to the regulatory reform docket.

As part of implementing E.O. 13777, the National Oceanic and Atmospheric Administration (NOAA) published a notice entitled, "Streamlining Regulatory Processes and Reducing Regulatory Burden" (82 FR 31576, July 7, 2017). The notice requested public comments on how NOAA could continue to improve the efficiency and effectiveness of current regulations and regulatory processes. This proposed rule addresses comments NOAA received from the public.

This proposed rule is one of three related proposed rules, two of which are joint between the Services, that are publishing in today’s *Federal Register*. All of these documents propose revisions to various regulations that implement the ESA.

Beyond the specific revisions to the regulations highlighted in this proposed rule, the Services are comprehensively reconsidering the processes and interpretations of statutory language set out in part 424. Thus, this rulemaking should be considered as applying to all of part 424, and as part of the rulemaking initiated today, the Services will consider whether additional modifications to the regulations setting out procedures and criteria for listing or delisting species and designating critical habitat would improve,

clarify, or streamline the administration of the Act. We seek public comments recommending, opposing, or providing feedback on specific changes to any provisions in part 424 of the regulations, including but not limited to revising or adopting as regulations existing practices or policies, or interpreting terms or phrases from the Act. In particular, we seek public comment on whether we should consider modifying the definitions of “geographical area occupied by the species” or “physical or biological features” in section 424.02. Based on comments received and on our experience in administering the Act, the final rule may include revisions to any provisions in part 424 that are a logical outgrowth of this proposed rule, consistent with the Administrative Procedure Act.

In proposing the specific changes to the regulations in this rule and setting out the accompanying clarifying discussion in this preamble, the Services are proposing prospective standards only. Nothing in these proposed revisions to the regulations is intended to require (at such time as this rule becomes final) that any prior final listing, delisting, or reclassification determinations or previously completed critical habitat designations be reevaluated on the basis of any final regulations.

#### **Section 424.11—Factors for Listing, Delisting, or Reclassifying Species**

##### *Economic Impacts*

We propose to remove the phrase, “without reference to possible economic or other impacts of such determination”, from paragraph (b) to more closely align with the statutory language. Section 4(b)(1)(A) of the Act requires the Secretary to make determinations based “solely on the basis of the best scientific and commercial data

available after conducting a review of the status of the species”. The word “solely” was added in the 1982 amendments to the Act (Pub. L. No. 97-304, 96 Stat. 1411) to clarify that the determination of endangered or threatened status was intended to be made “solely upon biological criteria and to prevent non-biological considerations from affecting such decisions.” In making the clarification, Congress expressed concerns with the requirements of the Regulatory Flexibility Act, Paperwork Reduction Act, and EO 12291 potentially introducing economic and other factors into the basis for determinations under the Act (H.R. Rep. No. 97-567 at 19-20, May 17, 1982).

In removing the phrase, the Services will continue to make determinations based solely on biological considerations. However, there may be circumstances where referencing economic, or other impacts may be informative to the public. For example, the Environmental Protection Agency conducts benefits and costs analyses of each proposed or revised National Ambient Air Quality Standard. These regulatory impact analyses are designed to inform the public and state, local, and tribal governments about the potential costs and benefits of implementation; however, the regulatory impact analyses are not a part of the standard selection process. While Congress precluded consideration of economic and other impacts from being the basis of a listing determination, it did not prohibit the presentation of such information to the public. Since 1982, Congress has consistently expressed support for informing the public as to the impacts of regulations in subsequent amendments to statutes and executive orders governing the rulemaking process.

In removing the phrase, “without reference to possible economic or other impacts of such determination”, the Services are not suggesting that all listing determinations will

include a presentation of economic or other impacts. Rather, there may be circumstances where such impacts are referenced while ensuring that biological considerations remain the sole basis for listing determinations. The Services seek comment on this modification.

### *Foreseeable Future*

We propose to add to section 424.11 a new paragraph (d) that sets forth a framework for how the Services will consider the foreseeable future. Section 3(20) of the Act defines a “threatened species” as “any species which is likely to become endangered within the foreseeable future throughout all or a significant portion of its range.” The term “foreseeable future” is not further described within either the Act or the Services’ current implementing regulations. Guidance addressing the concept of the foreseeable future within the context of determining the status of species is articulated in a 2009 opinion from the Department of the Interior, Office of the Solicitor (M–37021, January 16, 2009). The Services have found the reasoning and conclusions expressed in this document to be well-founded, and this guidance has been widely applied by both Services. We are proposing to amend section 424.11 to include a framework that sets out how the Services will determine what constitutes the foreseeable future when determining the status of species.

Specifically, we propose the following framework: In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The term foreseeable future extends only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are

probable. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the "foreseeable future" in terms of a specific period of time, but may instead explain the extent to which they can reasonably determine that both the future threats and the species' responses to those threats are probable.

As stated above, under the proposed section 424.11(d), as under current practice, the foreseeable future will be described on a case-by-case basis. Congress did not set a uniform timeframe for the Secretary's consideration of whether a species was likely to become an endangered species, nor did Congress intend that the Secretary set a uniform timeframe. For each species considered for listing, the Services must review the best scientific and commercial data available regarding the likelihood of extinction over time, and then determine, with each status review, whether the species meets the definition of an endangered species or a threatened species. The foreseeable future is uniquely related to the particular species, the relevant threats, and the data available. Courts have expressly endorsed the Services' approach of tailoring analysis of the foreseeable future to each listing determination and considering the foreseeability of each key threat and the species' likely response. *See, e.g., In Re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation*, 709 F.3d 1, 15-16 (D.C. Cir. 2013) (noting that FWS "determines what constitutes the 'foreseeable' future on a case-by-case basis in each listing decision" based on how far into the future the available data allow for reliable prediction of effects to the species from key threats), *cert. denied sub nom. Safari Club Intern. v. Jewell*, 134 S. Ct. 310 (2013).

The analysis of the foreseeable future should, to the extent practicable, account for any relevant environmental variability, such as hydrological cycles or oceanographic cycles, which may affect the reliability of projections. Analysis of the foreseeable future should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Under proposed section 424.11(d), as under current practice, the foreseeable future for a particular status determination extends only so far as predictions about the future are reliable. "Reliable" does not mean "certain"; it means sufficient to provide a reasonable degree of confidence in the prediction. "Reliable predictions" is also used here in a non-technical, ordinary sense and not necessarily in a statistical sense.

As outlined in section 4(b)(1)(A) of the Act, status determinations must be based on the best scientific and commercial data available. By extension, in the context of determining whether a species meets the definition of a threatened species, the foreseeable future must also be based on the best scientific and commercial data available. The Services assess the data concerning each threat and the degree to which reliable predictions can be made. In many instances, the amount or quality of data available is likely to vary with respect to the relevant issues evaluated in a particular status determination; consequently, the Services may find varying degrees of foreseeability with respect to the multiple threats and their effects on a particular species. Although the Secretary's analysis as to the future status of a species may be based on

reliable predictions with respect to multiple trends and threats over different periods of time or even threats without specific time periods associated with them, the final conclusion is a synthesis of that information. Thus, the foreseeable future is not necessarily reducible to a particular number of years. Nevertheless, if the information or data are susceptible to such precision, it may be helpful to identify the time scale used.

Depending on the nature and quality of the available data, predictions regarding the future status of a particular species may be based on analyses that range in form from quantitative population-viability models and modelling of threats to qualitative analyses describing how threats will affect the status of the species. In some circumstances, such analyses may include reliance on the exercise of professional judgment by experts where appropriate. In cases where the available data allow for quantitative modelling or projections, the time horizon presented in these analyses does not necessarily dictate what constitutes the “foreseeable future” or set the specific threshold for determining when a species may be in danger of extinction. Rather, the foreseeable future can extend only as far as the Services can reasonably depend on the available data to formulate a reliable prediction and avoid speculation and preconception. Regardless of the type of data available underlying the Service’s analysis, the key to any analysis is a clear articulation of the facts, the rationale, and conclusions regarding foreseeability. Ultimately, to determine that a species is likely to become an endangered species in the foreseeable future, the Services must be able to determine that the conditions potentially posing a danger of extinction in the future are probable. The Services will avoid speculating as to what is hypothetically possible.

### *Factors Considered in Delisting Species*

In section 424.11, we propose to redesignate current paragraph (d) as paragraph (e) and revise it to clarify that we determine whether a species is a threatened species or an endangered species using the same standards regardless of whether a species is or is not listed at the time of that determination. After identifying a “species” as defined under the Act and conducting a review of the species’ status considering the factors under section 4(a)(1) of the Act, the Services determine if the species meets the definition of a threatened species or an endangered species. If the species does not meet either definition, the species should not be listed (if it is not already), or should be delisted (if it is currently listed). The standard for a decision to delist a species is the same as the standard for a decision not to list it in the first instance. This is consistent with the statute, under which the five-factor analysis in section 4(a)(1) and the definitions of “endangered species” and “threatened species” in sections 3(6) and 3(20) establish the parameters for both listing and delisting determinations without distinguishing between them.

Additionally, we propose to modify the current regulatory text to clarify the situations in which it would not be appropriate for species to remain on the lists of endangered and threatened species. The current regulatory language was intended to provide examples of when a species should be removed from the lists; however, the language in the current regulations has been, in some instances, misinterpreted as establishing criteria for delisting. This proposed change is consistent with the Services’ longstanding practice and the decision in *Friends of Blackwater v. Salazar*, 691 F.3d 428 (D.C. Cir. 2012). That decision confirms that, when reviewing whether a listed species

should be delisted, the Services must apply the factors in section 4(a) of the Act. 691 F.3d at 433 (upholding FWS’s decision to delist the West Virginia northern flying squirrel because the agency was not required to demonstrate that all of the recovery plan criteria had been met before it could delist the species and it was reasonable to construe the recovery plan as predictive of the delisting analysis rather than controlling it). In that case, the court held that “Section 4(a)(1) of the Act provides the Secretary ‘shall’ consider the five statutory factors when determining whether a species is endangered, and section 4(c) makes clear that a decision to delist ‘shall be made in accordance’ with the same five factors.” *Id.* at 432.

To more clearly align section 424.11 with section 4(a) of the Act we are proposing to streamline it. As is currently the case,, any determination to remove a species from the lists because it is has become extinct is subject to the Act’s requirement that any determination as to the species’ status must be based on the best scientific and commercial data available. Thus, we are proposing to retain text at the beginning of the new section 424.11(e) that states; “The Secretary will delist a species if the Secretary finds that, after conducting a status review based on the best scientific and commercial data available:”

Secondly, to align more closely with the Act, we are proposing to replace the current section 424.11(d)(1) with a new section 424.11(e)(1) that simply states the first reason for delisting a species as, “The species is extinct.” Our conclusion that a species is extinct will be based on the best scientific and commercial data available, as required under section 4(b)(1)(A), which may include survey data and information regarding the period of time since the last detection (e.g., documented occurrence or sighting) of the

species. It is unnecessary, and potentially confusing in the context of particular determinations, to specifically address these matters in the regulatory text. Our evaluations will be conducted on a case-by-case basis, considering the species-specific biological evidence for species extinction.

Third, we are replacing current section 424.11(d)(2), which referred to “recovery,” with language in new section 424.11(e)(2) that aligns with the statutory definitions of an endangered species or a threatened species. Although we are proposing to remove the word “recovery” from the current section 424.11(d)(2), we intend the proposed language to continue to refer, among other things, to species that have been recovered, because species that have been recovered no longer meet the definition of either an endangered species or a threatened species.

Fourth, we are proposing to add a new provision, section 424.11(e)(3), clarifying that listed entities will be delisted if they do not meet the definition of “species” as set forth in the Act. This could occur if new information, or new analysis of existing information, leads the Secretary to determine that a currently listed entity is neither a taxonomic species or subspecies, nor a “distinct population segment.” For example, where, after the time of listing, the Services conclude that a species or subspecies should no longer be recognized as a valid taxonomic entity, the listed entity would be removed from the list because it no longer meets the definition of a “species.” In other instances, new data could indicate that a particular listed distinct population segment does not meet the criteria of the Services’ Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (“DPS Policy”; 61 FR 4722,

February 7, 1996). In either circumstance, the entity would not meet the definition of a “species” and would not qualify for listing under the Act.

Fifth, we are proposing to remove current section 424.11(d)(3), which specifies that delisting could be due to error in the original data that the Services relied upon when adding species to the lists. This language is unnecessary because any circumstance in which a species was listed in error would be covered by new section 424.11(e)(2) or (e)(3).

Lastly, we are proposing technical changes to the existing regulations that remain in place to accommodate the proposed revisions discussed above. We are proposing to modify current section 424.11(b) to include a reference to the proposed section 424.11(d) regarding the foreseeable future and the proposed section 424.11(e) regarding delisting. We are proposing to modify current section 424.11(c) by adding minor clarifying language to specify that this paragraph refers to the statutory definitions of an endangered species and a threatened species.

## **Section 424.12—Criteria for Designating Critical Habitat**

### *Not Prudent Determinations*

We propose to revise section 424.12(a)(1) to set forth a non-exhaustive list of circumstances in which the Services may find it is not prudent to designate critical habitat as contemplated in section 4(a)(3)(A) of the Act. Under the clarifications that we propose in this revision, the Services would have the authority but would not be required to find that designation would not be prudent in the enumerated circumstances. This is a change from the current framework, which sets forth two situations in which critical

habitat is not prudent. We anticipate that not-prudent determinations would continue to be rare. While this provision is intended to reduce the burden of regulation in rare circumstances in which designation of critical habitat does not contribute to the conservation of the species, the Services recognize the value of critical habitat as a conservation tool and expect to designate it in most cases.

We propose to retain the circumstance described in the longstanding language of current section 424.12(a)(1)(i), which is that the species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species.

We propose to remove the language in section 424.12(a)(1)(ii) indicating that it would not be prudent to designate critical habitat when “designation of critical habitat would not be beneficial to the species.” In a number of cases, courts have remanded not-prudent findings to the Service(s) because the courts construed “would not be beneficial” in ways the Services had not intended. For example, a number of courts have held that it was unreasonable for FWS to make a not-prudent determination simply because most or all of the areas that would be designated would not be subject to consultations under ESA section 7. *E.g., Natural Resources Defense Council v. U.S. Dept. of Interior*, 113 F.3d 1121 (9th Cir. 1997); *Conservation Council for Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Haw. 1998). In *Conservation Council*, the court concluded that FWS had not determined that designation would “not be beneficial to the species” because designating critical habitat could bring other benefits to the species beyond consultation, such as informational benefits. 2 F. Supp. 2d at 1288. In *NRDC*, the court held that determining critical habitat to be not prudent because the majority of the areas that would be

designated as critical habitat would not be subject to consultation was based on an improper interpretation of the regulatory phrase “not beneficial to the species” to mean “not beneficial to most of the species.” 113 F.3d 1125-16. The existing regulatory language is not in the statute, and the Services consider the language unnecessary and difficult to understand and apply.

Basing determinations on whether particular circumstances are present, rather than on whether a designation would be beneficial, provides an interpretation of the statute that is clearer, more transparent, and more straightforward. In some situations, the Services may conclude, after a review of the best available scientific data, that a designation would nevertheless be prudent even in the enumerated circumstances. Conversely, the Services may find in some circumstances that are not enumerated in the proposed language that a designation of critical habitat would otherwise be not prudent.

We propose a number of circumstances in which designation of critical habitat would generally be not prudent, including some circumstances that were already captured in the current regulations at section 424.12(a)(1)(ii) and some additional circumstances that we have identified based on our experience in designating critical habitat. We propose to retain and move into new section 424.12(a)(1)(iv) the circumstance described in current section 424.12(a)(1)(ii), which is that no areas meet the definition of critical habitat. It is not possible for us to designate critical habitat when no areas meet the definition of critical habitat in the Act; therefore, in these cases, designation is not prudent. We also propose to retain and expand the concept of current section 424.12(a)(1)(ii) regarding the lack of habitat-based threats to the species.

In our 2016 revision of section 424.12(a)(1)(ii) (81 FR 7414, February 11, 2016), we clarified that, in determining whether designation may not be prudent, the Services could consider whether the present or threatened destruction, modification, or curtailment of a species' habitat or range (i.e., considerations under section 4(a)(1)(A) of the Act (Factor A)) is not a threat to the species. In the 2016 revision, we provided an example of a designation that would not be prudent due to the lack of habitat-based threats: A species is threatened primarily by disease, but the habitat upon which it relies remains intact without threat and would support conservation of the species if not for the threat of disease. Since then, we have encountered situations in which threats to the species' habitat stem solely from causes that cannot be addressed by management actions that may be identified through consultation under section 7(a)(2) of the Act. In those situations, a designation could create a regulatory burden without providing any conservation value to the species concerned. Examples would include species experiencing threats stemming from melting glaciers, sea level rise, or reduced snowpack but no other habitat-based threats. In such cases, a critical habitat designation and any resulting section 7(a)(2) consultation, or conservation effort identified through such consultation, could not prevent glaciers from melting, sea levels from rising, or increase the snowpack. Thus, we propose in section 424.12(a)(1)(ii) that designation of critical habitat in these cases may not be prudent because it would not serve its intended function to conserve the species.

We also propose to add as an additional circumstance under section 424.12(a)(1)(iii) situations where critical habitat areas under the jurisdiction of the United States provide negligible conservation value for a species that primarily occurs in areas outside of U.S. jurisdiction. In our 2016 revision of these regulations, we noted in the

preamble that this could be a basis for determining that critical habitat designation would be not prudent; however, we find it is clearer to add this consideration directly to the regulatory text. We would apply this determination only to species that primarily occur outside U.S. jurisdiction, and where no areas under U.S. jurisdiction contain features essential to the conservation of the species. The circumstances when a critical habitat designation would provide negligible conservation value for a species will be determined on a case-by-case basis and may consider such factors as threats to the species or habitat and the species needs.

#### *Designating Unoccupied Areas*

On February 11, 2016, the Services published a final rule revising the regulations at section 424.12, which establish criteria for designating critical habitat (81 FR 7439). One of the revisions we made was to eliminate the following paragraph (e): “The Secretary shall designate as critical habitat outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.” The Services explained in the preamble to the final rule that we had concluded that the “rigid step-wise approach” prescribed in that prior regulatory language may not be the best conservation strategy for the species and in some circumstances may result in a designation that is geographically larger, but less efficient as a conservation tool (81 FR 7415). Nonetheless, we are aware of continued perceptions that, by eliminating this provision, the Services intended to designate as critical habitat expansive areas of unoccupied habitat. To address this concern, the Services propose to revise section 424.12(b)(2) by restoring the requirement

that the Secretary will first evaluate areas occupied by the species. We also propose to clarify when the Secretary may determine unoccupied areas are essential for the conservation of the species.

In the Act, the term “geographical area occupied by the species” is further modified by the clause “at the time it is listed.” However, if critical habitat is not designated concurrently with listing, or is revised years after the species was listed, it can be difficult to discern what was occupied at the time of listing. The known distribution of a species can change after listing for many reasons, such as discovery of additional localities, extirpation of populations, or emigration of individuals to new areas. In many cases, information concerning a species’ distribution, particularly on private lands, is limited because surveys are not routinely carried out on private lands. Although surveys may be performed as part of an environmental analysis for a particular development proposal, such surveys typically focus on listed rather than non-listed species. Thus, our knowledge of a species’ distribution at the time of listing in these areas is often limited and the information in our listing rule may not detail all areas occupied by the species at that time.

Thus, while some of these changes in a species’ known distribution reflect changes in the actual distribution of the species, some reflect only changes in the quality of our information concerning distribution. In these circumstances, the determination of which geographic areas were occupied at the time of listing may include data developed since the species was listed. This interpretation was supported by the court’s decision, *Otay Mesa Property L.P. v. DOI*, 714 F. Supp. 2d 73 (D.D.C. 2010), *rev’d on other grounds*, 646 F.3d 914 (D.C. Cir. 2011) (San Diego fairy shrimp). In that decision, the

judge noted that the clause “occupied at the time of listing” allows FWS to make a post-listing determination of occupancy based on the currently known distribution of the species in some circumstances. Although the D.C. Circuit disagreed with the district court that the record contained sufficient data to support the FWS’ determination of occupancy in that case, the D.C. Circuit did not express disagreement with (or otherwise address) the district court’s underlying conclusion that the Act allows FWS to make a post-listing determination of occupancy if based on adequate data. The Services acknowledge that to make a post-listing determination of occupancy we must distinguish between actual changes to species occupancy and changes in available information.

The Act defines unoccupied critical habitat in terms of a determination that such areas are essential for the conservation of the species. The proposed section 424.12(b)(2) specifies how the Services would determine whether unoccupied areas are essential. The proposed language states the Services would only consider unoccupied areas to be essential in two situations: When a critical habitat designation limited to geographical areas occupied would (1) be inadequate to ensure the conservation of the species, or (2) result in less-efficient conservation for the species. The proposed changes will provide additional predictability to the process of determining when designating unoccupied habitat may be appropriate. For example, the Services could consider unoccupied habitat to be essential when a designation limited to occupied habitat would result in a geographically larger but less effective designation.

There are situations where a designation focused on occupied critical habitat would result in less efficient conservation for the species than a designation that includes a mix of occupied and unoccupied critical habitat. In these cases, the designation of

some unoccupied areas would result in the same or greater conservation for the species but would do so more efficiently. Efficient conservation for the species refers to situations where the conservation is effective, societal conflicts are minimized, and resources expended are commensurate with the benefit to the species. The flexibility to include unoccupied areas in a designation where limiting the designation to occupied areas would have resulted in less-efficient conservation of the species will allow the Services to focus agency resources thoughtfully in both designating critical habitat and conducting future consultations on the critical habitat.

In addition, we propose to further clarify when the Secretary may determine that an unoccupied area may be essential for the conservation of the species. In order for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable likelihood that the area will contribute to the conservation of the species. In making a determination as to whether such a reasonable likelihood exists, the Services will continue to take into account the best available science regarding species-specific and area-specific factors. This could include such factors as: (a) whether the area is currently or is likely to become usable habitat for the species; (b) the likelihood that interagency consultation under Section 7 will be triggered, i.e., whether any federal agency actions are likely to be proposed with respect to the area; and, (c) how valuable the potential contributions of the area are to the biological needs of the species.

When the Services evaluate if an area is now, or is likely to become, usable habitat for the species we would take into account, among other things, the current state of the area and extent to which extensive restoration would be needed for the area to become usable. For example, the Services might conclude that an area is unlikely to

contribute to the conservation of the species where it would require extensive affirmative restoration that does not seem likely to occur such as when a non-federal landowner or necessary partners are unwilling to undertake or allow such restoration. Although the expressed intentions of such landowners or partners will not necessarily be determinative, the Services would consider those intentions in light of the mandatory duties and conservation purposes of the Act.

When the Services evaluate the likelihood that interagency consultation under section 7 will be triggered, we would consider whether there are any federal agency actions likely to be proposed within the area (i.e., federal nexus). Because the only regulatory effect of a designation of critical habitat is the requirement that federal agencies avoid authorizing, funding, or undertaking actions that may destroy or adversely modify such habitat, the likelihood that an area will contribute to conservation is, in most cases, greater for public lands and lands for which such federal actions can be reasonably anticipated than for other types of land.

However, the Services would continue to consider the conservation purposes of the Act in determining how valuable the potential contributions of the area are to the biological needs of the species. In practice, this means that, in the rare instance where the potential contribution of the unoccupied area to the conservation of the listed species is extremely valuable, a lower threshold than “likely” may be appropriate. For example, where an area represents the only potential habitat of its type (i.e., is uniquely able to support certain life functions of the species), the Services may reasonably classify that area as essential even in the face of a low likelihood that the area would contribute to species conservation. Conversely, a greater showing of likelihood may be required for an

area that provides less significant conservation value.

## **Public Comments**

You may submit your comments and materials concerning the proposed rule by one of the methods listed in **ADDRESSES**. Comments must be submitted to <http://www.regulations.gov> before 11:59 p.m. (Eastern Time) on the date specified in **DATES**. We will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in **DATES**.

We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>.

## **Required Determinations**

### *Regulatory Planning and Review—Executive Orders 12866 and 13563*

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce

uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This proposed rule is consistent with Executive Order 13563, and in particular with the requirement of retrospective analysis of existing rules, designed “to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.”

#### *Executive Order 13771*

This proposed rule is expected to be an Executive Order 13771 deregulatory action.

#### *Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no

regulatory flexibility analysis is required if the head of an agency, or his designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We certify that, if adopted as proposed, this proposed rule would not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

This rulemaking revises and clarifies requirements for NMFS and FWS regarding factors for listing, delisting, or reclassifying species and designating critical habitat under the Endangered Species Act to reflect agency experience and to codify current agency practices. The proposed changes to these regulations do not expand the reach of species protections or designations of critical habitat.

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

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

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.):

(a) On the basis of information contained in the Regulatory Flexibility Act section above, this proposed rule would not “significantly or uniquely” affect small governments.

We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this rule would not impose a cost of \$100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the proposed rule would not place additional requirements on any city, county, or other local municipalities.

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

*Takings (E.O. 12630)*

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

*Federalism (E.O. 13132)*

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

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

This proposed rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. This proposed rule would clarify factors for listing, delisting, or reclassifying species and designation of critical habitat under the Endangered Species Act.

*Government-to-Government Relationship with Tribes*

In accordance with Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” the Department of the Interior’s manual at 512 DM 2, and the Department of Commerce (DOC) Tribal Consultation and Coordination Policy (May 21, 2013), DOC Departmental Administrative Order (DAO) 218–8 (April 2012), and NOAA Administrative Order (NAO) 218–8 (April 2012), we are considering possible effects of this proposed rule on federally recognized Indian Tribes. We will continue to

collaborate/coordinate with tribes on issues related to federally listed species and their habitats. See Joint Secretarial Order 3206 (“American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,” June 5, 1997).

#### *Paperwork Reduction Act*

This proposed rule does not contain any new collections of information that require approval by the OMB under the Paperwork Reduction Act. This proposed rule will not impose recordkeeping or reporting requirements on State, local, or Tribal governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

#### *National Environmental Policy Act*

We are analyzing this proposed regulation in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10–46.450), the Department of the Interior Manual (516 DM 8), the NOAA Administrative Order 216–6A, and the NOAA Companion Manual (CM), “Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities” (effective January 13, 2017).

We anticipate that the categorical exclusion found at 43 CFR 46.210(i) likely applies to the proposed regulation changes. At 43 CFR 46.210(i), the Department of the Interior has found that the following category of actions would not individually or

cumulatively have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: “Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature.”

NOAA’s NEPA procedures include a similar categorical exclusion for “preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature.” (Categorical Exclusion G7, at CM Appendix E).

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

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

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

#### *Clarity of the Rule*

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

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

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

### **Authority**

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

### **List of Subjects in 50 CFR Part 424**

Administrative practice and procedure, Endangered and threatened species.

### **Proposed Regulation Promulgation**

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

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

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

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

2. Amend § 424.11 by revising paragraphs (b) through (f) and adding a new paragraph (g) to read as follows:

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

\* \* \* \* \*

(b) The Secretary shall make any determination required by paragraphs (c), (d), and (e) of this section *solely* on the basis of the best available scientific and commercial information regarding a species' status.

(c) A species shall be listed or reclassified if the Secretary determines, on the basis of the best scientific and commercial data available after conducting a review of the species' status, that the species meets the definition of an endangered species or a threatened species because of any one or a combination of the following factors:

- (1) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (2) Overutilization for commercial, recreational, scientific, or educational purposes;
- (3) Disease or predation;

- (4) The inadequacy of existing regulatory mechanisms; or
- (5) Other natural or manmade factors affecting its continued existence.

(d) In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The term foreseeable future extends only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time, but may instead explain the extent to which they can reasonably determine that both the future threats and the species' responses to those threats are probable.

(e) The Secretary will delist a species if the Secretary finds that, after conducting a status review based on the best scientific and commercial data available:

(1) The species is extinct;

(2) The species does not meet the definition of an endangered species or a threatened species. In making such a determination, the Secretary shall consider the same factors and apply the same standards set forth in paragraph (c) of this section regarding listing and reclassification; or

(3) The listed entity does not meet the statutory definition of a species.

(f) The fact that a species of fish, wildlife, or plant is protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (see part 23 of

this title 50) or a similar international agreement on such species, or has been identified as requiring protection from unrestricted commerce by any foreign nation, or to be in danger of extinction or likely to become so within the foreseeable future by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish, wildlife, or plants, may constitute evidence that the species is endangered or threatened. The weight given such evidence will vary depending on the international agreement in question, the criteria pursuant to which the species is eligible for protection under such authorities, and the degree of protection afforded the species. The Secretary shall give consideration to any species protected under such an international agreement, or by any State or foreign nation, to determine whether the species is endangered or threatened.

(g) The Secretary shall take into account, in making determinations under paragraphs (c) or (e) of this section, those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

3. Amend § 424.12 by revising paragraphs (a)(1) and (b)(2) to read as follows:

**§ 424.12 Criteria for designating critical habitat.**

(a) \* \* \*

(1) The Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances:

(i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

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

(iv) No areas meet the definition of critical habitat; or

(v) After analyzing the best scientific data available, the Secretary otherwise determines that designation of critical habitat would not be prudent.

\* \* \* \* \*

(b) \* \* \*

(2) The Secretary will designate as critical habitat, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species only upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species or would result in less efficient conservation for the species. Efficient conservation for the species refers to situations where the conservation is effective, societal conflicts are minimized, and

resources expended are commensurate with the benefit to the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable likelihood that the area will contribute to the conservation of the species.

\* \* \* \* \*

Dated: 07/18/18



A handwritten signature in black ink, appearing to read "R. Zinke", is written over a horizontal line. The signature is stylized and cursive.

Ryan K. Zinke,  
*Secretary*  
*Department of the Interior.*

~~Endangered and Threatened Wildlife and Plants; Revision of the Regulations for  
Listing Species and Designating Critical Habitat~~

Dated: 7/16/18

Wilbur Ross

Wilbur Ross,

*Secretary*

*Department of Commerce.*

~~Endangered and Threatened Wildlife and Plants; Revision of the Regulations for  
Listing Species and Designating Critical Habitat~~