

opportunity to review and comment on the proposed rules.

*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 would not impose recordkeeping or reporting requirements on State or local 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 these proposed regulations 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 1–6 and 8), and National Oceanographic and Atmospheric Administration (NOAA) Administrative Order 216–6. Our analysis includes evaluating whether the action is procedural, administrative, or legal in nature, and therefore a categorical exclusion applies. We invite the public to comment on whether, and if so, how this proposed regulation may have a significant effect upon the human environment, including any effects identified as extraordinary circumstances at 43 CFR 46.215. We will complete our analysis, in compliance with NEPA, before finalizing these proposed regulations.

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

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

*Clarity of This Policy*

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 or policy we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) 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 regulation, your comments should be as specific as possible. For example, you should tell us 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.

**References Cited**

A complete list of all references cited in this document is available on the Internet at <http://www.regulations.gov> or upon request from the U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

**Authority**

We are taking this action under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

**List of Subjects in 50 CFR Part 402**

Endangered and threatened species.

**Proposed Regulation Promulgation**

Accordingly, we propose to amend subpart A of part 402, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as set forth below:

**PART 402—[AMENDED]**

- 1. The authority citation for part 402 continues to read as follows:

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

- 2. In § 402.02, revise the definition for “*Destruction or adverse modification*” to read as follows:

**§ 402.02 Definitions.**

\* \* \* \* \*

*Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for listed species. Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of physical or biological features that support the life-history needs of the species for recovery.

\* \* \* \* \*

Dated: April 3, 2014.

**Rachel Jacobson,**

*Principal Deputy Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior.*

Dated: April 4, 2014.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

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**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–2012–0096; Docket No. 120106025–3256–01; 4500030114]

RIN 1018–AX86; RIN 0648–BB79

**Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat**

**AGENCY:** 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 amend portions of our regulations, which implements the Endangered Species Act of 1973, as amended (Act). Our regulation clarifies, interprets, and implements portions of the Act concerning the procedures and criteria used for adding species to the Lists of Endangered and Threatened Wildlife and Plants and designating and revising critical habitat. Specifically, we propose to amend portions of our regulations that clarify procedures for designating and revising critical habitat. The proposed amendments would make minor edits to the scope and purpose, add and remove some definitions, and clarify the criteria for designating critical habitat. These proposed amendments are based on the Services’ review of the regulations and are intended to add clarity for the public,

clarify expectations regarding critical habitat and provide for a credible, predictable, and simplified critical-habitat-designation process. Finally, the proposed amendments are also part of the Services' response to Executive Order 13563 (January 18, 2011), which directs agencies to review their existing regulations and, among other things, modify or streamline them in accordance with what has been learned.

**DATES:** We will accept comments from all interested parties until July 11, 2014. 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:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. In the Search box, enter the Docket Number for this proposed rule, which is FWS-HQ-ES-2012-0096. You may submit a comment by clicking on "Comment Now!". Please ensure that you have found the correct rulemaking before submitting your comment.

- *U.S. mail or hand delivery:* Public Comments Processing, Attn: [Docket No. FWS-HQ-ES-2012-0096]; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042-PDM; Arlington, VA 22203.

We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Request for Information section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Douglas Krofta, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 4401 N Fairfax Drive, Suite 420, Arlington, VA, 22203, telephone 703/358-2527; facsimile 703/358-1735; or Marta Nammack, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301/427-8469; facsimile 301/713-0376. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

**SUPPLEMENTARY INFORMATION:** Today, we publish in the *Federal Register* three related documents that are now open for public comment. We invite the public to comment individually on these documents as instructed in their preambles. This document is one of the three, of which two are proposed rules and one is a draft policy:

- A proposed rule to amend the existing regulations governing section 7 consultation under the Endangered Species Act to revise the definition of "destruction or adverse modification" of critical habitat. The current regulatory definition has been invalidated by several courts for being inconsistent with the language of the Act. This proposed rule would revise title 50 of the Code of Federal Regulations (CFR) at part 402. The Regulatory Identifier Number (RIN) is 1018-AX88, and the proposed rule may be found on <http://www.regulations.gov> at Docket No. FWS-R9-ES-2011-0072.

- A proposed rule to amend existing regulations governing the designation of critical habitat under section 4 of the Act. A number of factors, including litigation and the Services' experience over the years in interpreting and applying the statutory definition of critical habitat, have highlighted the need to clarify or revise the current regulations. This proposed rule would revise 50 CFR part 424. It is published under RIN 1018-AX86 and may be found on <http://www.regulations.gov> at Docket No. FWS-HQ-ES-2012-0096.

- A draft policy pertaining to exclusions from critical habitat and how we consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, tribal lands, national security and homeland security impacts and military lands, Federal lands, and economic impacts in the exclusion process. This policy is meant to complement the proposed revisions to 50 CFR part 424 and to provide for a simplified exclusion process. The policy is published under RIN 1018-AX87 and may be found on <http://www.regulations.gov> at Docket No. FWS-R9-ES-2011-0104.

### Background

The Endangered Species Act of 1973, as amended (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. 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 in furtherance of the purposes of the Act.

In passing the Act, Congress viewed habitat loss as a significant factor contributing to species endangerment. Habitat destruction and degradation have been a contributing factor causing the decline of a majority of species

listed as threatened or endangered under the Act (Wilcove *et al.* 1998). The present or threatened destruction, modification, or curtailment of a species' habitat or range is included in the Act as one of the factors on which to base a determination of threatened or endangered. 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 or will be essential to the species' recovery. Once critical habitat is designated, it provides for the conservation of listed species in several ways. Specifying the geographic location of critical habitat facilitates implementation of section 7(a)(1) of the Act by identifying areas where Federal agencies can focus their conservation programs and use their authorities to further the purposes of the Act. Designating critical habitat also helps focus the conservation efforts of other conservation partners, such as State and local governments, nongovernmental organizations, and individuals. Furthermore, when designation of critical habitat occurs near the time of listing it provides early conservation planning guidance (e.g., identifying some of the areas that are needed for recovery, the physical and biological features needed for the species, and special management considerations or protections) to bridge the gap until the Services can complete more thorough recovery planning.

In addition to serving as a notification tool, the designation of critical habitat also provides a significant regulatory protection—the requirement that Federal agencies consult with the Services under section 7(a)(2) of the Act to ensure that their actions are not likely to destroy or adversely modify critical habitat. The Federal Government, through its role in water management, flood control, regulation of resources extraction and other industries, Federal land management, and the funding, authorization, and implementation of a myriad of other activities, may propose actions that are likely to affect critical habitat. The designation of critical habitat ensures that the Federal Government considers the effects of its actions on habitat important to species' conservation and avoids or modifies those actions that are likely to destroy or adversely modify critical habitat. This benefit should be especially valuable when, for example, species presence or habitats are ephemeral in nature, species presence is difficult to establish through surveys (e.g., when a species such as a plant's "presence" may be limited to a seed bank), or protection of unoccupied habitat is

essential for the conservation of the species.

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.

There have been no comprehensive amendments to the Act since 1988, and no comprehensive revisions to part 424 of the implementing regulations since 1984. In the years since those changes took place, the Services have gained considerable experience in implementing the critical habitat requirements of the Act, and there have been numerous court decisions regarding the designation of critical habitat.

On May 1, 2012, the Services finalized the revised implementing regulations related to publishing textual descriptions of proposed and final critical habitat boundaries in the **Federal Register** for codification in the Code of Federal Regulations (77 FR 25611). That final rule revised 50 CFR 424.12(c) to make the process of designating critical habitat more user-friendly for affected parties, the public as a whole, and the Services, as well as more efficient and cost effective. Since the final rule became effective on May 31, 2012, the Services have maintained the publication of maps of proposed and final critical habitat designations in the **Federal Register**, but the inclusion of any textual description of the designation boundaries in the **Federal Register** for codification in the Code of Federal Regulations is optional. Because we revised 50 CFR 424.12(c) separately, we do not discuss that paragraph further in this proposed rule.

On August 28, 2013, the Services finalized revisions to the regulations for impact analyses of critical habitat (78 FR 53058). These changes were made as directed by the President’s February 28, 2012, Memorandum, which directed us to take prompt steps to revise our regulations to provide that the economic analysis be completed and made available for public comment at the time of publication of a proposed rule to designate critical habitat. These revisions also state that the impact analysis should focus on the incremental effects resulting from the designation of critical habitat. Because we have revised 50 CFR 424.19

separately, we do not discuss that section further in this proposed rule.

#### Discussion of Proposed Changes to Part 424

This proposal would amend 50 CFR 424.01, 424.02, and 424.12 (except for paragraph (c) as mentioned) to clarify the procedures and criteria used for designating critical habitat, addressing in particular several key issues that have been subject to frequent litigation.

In proposing the specific changes to the regulations that follow, and setting out the accompanying clarifying discussion in this preamble, the Services are establishing prospective standards only. Nothing in these proposed revised regulations is intended to require (now or at such time as these regulations may become final) that any previously completed critical habitat designation must be reevaluated on this basis.

##### Section 424.01 Scope and Purpose

We propose minor revisions to this section to update language and terminology. The first sentence in section 424.01(a) would be revised to remove reference to critical habitat being designated or revised only “where appropriate.” This wording implied a greater flexibility regarding whether to designate critical habitat than is correct. The Services believe that circumstances when critical habitat designation will be deemed not prudent are rare. Therefore, the new language removes the phrase “where appropriate.” Other revisions to this section are minor word changes to use more plain language.

##### Section 424.02 Definitions

This section of the regulations defines terms used in the context of section 4 of the Act. We propose revisions to section 424.02 to update it to current formatting guidelines, to revise several definitions related to critical habitat, to delete definitions that are redundant of statutory definitions, and to add two newly defined terms. Section 424.02 is currently organized with letters as paragraph designation for each term (e.g., 424.02(b) *Candidate*). The Office of the Federal Register now recommends setting out definitions in the CFR without paragraph designations. We propose to revise the formatting of the entire section accordingly. Discussion of the revised definitions and newly defined terms follows.

We note that, although revising the formatting of the section requires that the entirety of the section be restated in the proposed-amended-regulation section, we are not at this time revisiting the text of those existing definitions that

we are not specifically revising, including those that do not directly relate to designating critical habitat. In particular, we are not in this rulemaking proposing to amend the definitions of “plant,” “wildlife,” or “fish and wildlife” to reflect changes in taxonomy since the ESA was enacted in 1973. In 1973, only the Animal and Plant Kingdoms of life were universally recognized by science, and all living things were considered to be members of one of these kingdoms. Thus, at enactment, the ESA applied to all living things. Advances in taxonomy have subsequently split additional kingdoms from these two. Any species that was considered to be a member of the Animal or Plant Kingdoms in 1973 will continue to be treated as such for purposes of the administration of the Act regardless of any subsequent changes in taxonomy. We may address this issue in a future rulemaking relating to making listing determinations (as opposed to designating critical habitat). In the meantime, the republication of these definitions here should not be viewed as an agency determination that these definitions reflect the scope of the Act in light of our current understanding of taxonomy.

The current regulations include a definition for “Conservation, conserve, and conserving.” We propose to revise the title of this entry to “Conserve, conserving, and conservation,” changing the order of the words to conform to the statute. Additionally, we propose to revise the first sentence of the definition to include the phrase “i.e., the species is recovered” to clarify the link between conservation and recovery of the species. The statutory definition of “conserve, conserving, and conservation” is “to bring any endangered or threatened species to the point at which measures provided pursuant to the Act are no longer necessary.” This is the same concept as the definition of recovery found in section 402.02: “improvement in the status of listed species to the point at which listing is no longer appropriate.” The Services, therefore, view “conserve, conserving, and conservation” as a process culminating at the point at which a species is recovered.

We propose to delete definitions for “critical habitat,” “endangered species,” “plant,” “Secretary,” “State Agency,” and “threatened species,” because these terms are defined in the Act and the existing regulatory definitions do not add meaning to the terms.

We also propose to define the previously undefined term “geographical area occupied by the species” as: “the geographical area

which may generally be delineated around the species' occurrences, as determined by the Secretary (i.e., range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals)." This term appears in the definition of "critical habitat" found in section 3(5)(A)(i) and (ii) of the Act, but is not defined in the Act or in our current regulations. The inclusion of this new regulatory definition reflects the Services' efforts to clarify the critical-habitat-designation process.

The definition of "critical habitat" in the Act has two parts, section 3(5)(A)(i) and (ii), which establish two distinct categories of critical habitat, based on species occupancy in an area at the time of listing. Therefore, to identify specific areas to designate as critical habitat, we must first determine what area constitutes the "geographical area occupied by the species at the time of listing," which is the language used in the Act. The scale of this area is likely to be larger than the specific areas that would then be analyzed for potential designation under section 3(5)(A)(i). This is because the first part of the critical habitat definition in the Act directs the Services to identify "specific areas within" the geographical area occupied by the species at time of listing. This intentional choice to use more narrow terminology alongside broader terminology suggests that the "geographical area" was expected most often to be a larger area that could encompass multiple "specific areas." Thus, we find the statutory language supports the interpretation of equating the geographical area occupied by the species to the wider area around the species' occurrences at the time of listing. A species occurrence is a particular location in which members of the species are found throughout all or part of their life cycle. The geographic area occupied by the species is thus the broader, coarser-scale area that encompasses the occurrences, and is what is often referred to as the "range" 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 being designated or revised several 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 as surveys are not routinely carried out on private lands unless performed as part of an environmental analysis for a particular development proposal. Even then, such surveys typically focus on listed rather than unlisted species, so 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 a recent court 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 postlisting determination of occupancy based on the currently known distribution of the species. Although the D.C. Circuit disagreed with the district court that the record contained sufficient data to support the FWS's determination of occupancy in that case, the D.C. Circuit did not disagree that the Act allows FWS to make a postlisting determination of occupancy if based on adequate data. The FWS acknowledges that to make a postlisting determination of occupancy we must distinguish between actual changes to species occupancy and changes in available information. For succinctness, herein and elsewhere we refer to areas as "occupied" when we mean "occupied at the time of listing."

The second sentence of the proposed definition for "geographical area occupied by the species" would clarify that the meaning of the term "occupied" includes areas that are used only periodically or temporarily by a listed species during some portion of its life history, and is not limited to those areas where the listed species may be found more or less continuously. Areas of periodic use may include, for example, breeding areas, foraging areas, and migratory corridors. The Ninth Circuit recently supported this interpretation by FWS, holding that a determination that a species was likely to be temporarily present in the areas designated as

critical habitat was a sufficient basis for determining those areas to be occupied, even if the species was not continuously present. *Arizona Cattle Growers' Assoc. v. Salazar*, 606 F.3d 1160 (9th Cir. 2010) (Mexican spotted owl).

Nonetheless, periodic use of an area does not include use of habitat in that area by vagrant individuals of the species who wander far from the known range of the species. Occupancy by the listed species must be based on evidence of regular periodic use by the listed species during some portion of the listed species' life history. However, because some species are difficult to survey, or, we may otherwise have incomplete survey information, the Services will rely on the best available scientific data, which may include indirect or circumstantial evidence, to determine occupancy. We further note that occupancy does not depend on identifiable presence of adult organisms. For example, periodical cicadas occupy their range even though adults are only present for 1 month every 13 or 17 years. Similarly, the presence (or reasonably inferred presence) of eggs or cysts of fairy shrimp or seed banks of plants constitute occupancy even when mature individuals are not present.

We also propose a definition for the term "physical or biological features." This phrase is used in the statutory definition of "critical habitat" to assist in identifying the specific areas within the entire geographical area occupied by the species that can be considered for designation as critical habitat. We propose to define "physical or biological features" as "the features that support the life-history needs of the species, including but not limited to water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity."

The proposed definition clarifies that physical and biological features can be the features that support the occurrence of ephemeral or dynamic habitat conditions. For example, a species may require early-successional riparian vegetation in the Southwest to breed or feed. Such vegetation may exist only 5 to 15 years after a local flooding event. The necessary features, then, may include not only the suitable vegetation

itself, but also the flooding events, topography, soil type, and flow regime, or a combination of these characteristics and the necessary amount of the characteristics that can result in the periodic occurrence of the suitable vegetation. Thus, the Services could conclude that essential physical or biological features exist in a specific area even in the temporary absence of suitable vegetation, and could designate such an area as critical habitat if all of the other applicable requirements were met and if there were documented occurrences of the particular habitat type in the area and a reasonable expectation of that habitat occurring again.

In *Cape Hatteras Access Preservation Alliance v. DOI*, 344 F. Supp. 2d 108, 123 n.4 (D.D.C. 2004), the court rejected FWS's designation for the piping plover as including lands that did not currently contain the features defined by FWS, but noted that it was not addressing "whether dynamic land capable of supporting plover habitat can itself be one of the 'physical or biological features' essential to conservation." The new definition for "physical or biological features" would clarify that features can be dynamic or ephemeral habitat characteristics. However, an area within the geographical area occupied by the species, with habitat that is not ephemeral by nature but that has been degraded in some way, must have one or more of the physical or biological features at the time of designation.

Having proposed to define "physical or biological features," we also propose to remove the term "primary constituent element" and all references to it from the regulations in section 424.12. As with all other aspects of these proposed revisions, this will apply only to future critical habitat designations and is further explained below in the discussion of the proposed changes to section 424.12, where the term is currently used.

We are also proposing to revise the definition of "special management considerations or protection" which is found in section 424.02. Here we propose to remove the phrase "of the environment" from the current regulation. This phrase is not used in this context elsewhere in the regulations or the Act and, therefore, may create ambiguity. We also propose to insert the words "essential to" to conform to the language of the Act.

In determining whether an area has essential features that may require special management considerations or protection, the Services do not base their decision on whether management is currently in place or whether that

management is adequate. FWS formerly took the position that special management was required only if whatever management was in place was inadequate and that *additional* special management was needed. This position was rejected by the court in *Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090 (D. Ariz. 2003) (Mexican spotted owl), the only court to address this issue. The Services agree with the conclusion of the court on this point—it is incorrect to read the statute as asking whether *additional* special management may be required. The consideration of whether features in an area may require special management or protection occurs independent of whether any form of management or protection occurs in the area.

We expect that, in most circumstances, the physical or biological features essential to the conservation of endangered species may require special management in all areas in which they occur, particularly for species that have significant habitat-based threats. However, if in some areas the essential features do not require special management or protections because there are no applicable threats to the features that have to be managed or protected for the conservation of the species, then that area does not meet this part (section 3(5)(A)(i)) of the definition of "critical habitat." Nevertheless, we expect such circumstances to be rare.

Furthermore, it is not necessary that a feature currently *require* special management considerations or protection, only that it *may require* special management to meet the definition of "critical habitat." 16 U.S.C. 1532(5)(A)(i) (emphasis added). Two district court decisions have emphasized this point. *CBD v. Norton* (Mexican spotted owl); *Cape Hatteras Access Preservation Alliance v. DOI*, 344 F. Supp. 2d 108 (D.D.C. 2004) (piping plover). The legislative history supports the view that Congress purposely set the standard as "may require." Earlier versions of the bills that led to the statutory definition of "critical habitat" used the word "requires," but "may require" was substituted prior to final passage. In any case, an interpretation of a statute should give meaning to each word Congress chose to use, and our interpretation gives the word "may" meaning.

Finally, we explain our interpretation of the meaning of the phrase "interbreeds when mature," which is found in the definition of "species." The "interbreeds when mature" language is ambiguous. *Modesto*

*Irrigation Dist. v. Gutierrez*, 619 F.3d 1024, 1032 (9th Cir. 2010). Although we are not proposing to revise the regulations at this time, we are using this notice to inform the public of our longstanding interpretation of this phrase. We have always understood the phrase "interbreeds when mature" to mean that a distinct population segment (DPS) must consist of members of the same species or subspecies in the wild that would be biologically capable of interbreeding if given the opportunity, but all members need not actually interbreed with each other. A DPS is a subset of a species or subspecies, and cannot consist of members of different species or subspecies. The "biological species" concept, which defines species according to a group of organisms' actual or potential ability to interbreed, and their relative reproductive isolation from other organisms, is one widely accepted approach to defining species. We interpret the phrase "interbreeds when mature" to reflect this understanding and signify only that a DPS must be composed solely of members of the same species or subspecies. As long as this requirement is met, a DPS may include multiple groups of vertebrate organisms that do not actually interbreed with each other. For example, a DPS may consist of multiple groups of a fish species separated into different drainages. While it is possible that the members of these groups do not actually interbreed with each other, their members are biologically capable of interbreeding.

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

We propose to revise the first sentence of paragraph (a) to clarify that critical habitat shall be proposed and finalized "to the maximum extent prudent and determinable . . . concurrent with issuing proposed and final listing rules, respectively." The existing language is "shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing." We propose to add the words "proposed and finalized" to be consistent with the Act, which requires that critical habitat be finalized concurrent with listing. The existing language could be interpreted to mean *proposing* critical habitat concurrent with listing was the only requirement. Additionally, the existing phrase "shall be specified" is vague and not consistent with the requirements of the Act, which is to propose and finalize a designation of critical habitat. The last two sentences in proposed paragraph (a) contain minor language changes to use the active voice.

Paragraphs (a)(1) and (a)(1)(i) would not be changed.

The first sentence of paragraph (a)(1)(ii) would remain the same. However, we propose to add a second sentence to paragraph (a)(1)(ii) to provide examples of factors that we may consider in determining whether a designation would be beneficial to the species. A designation may not be beneficial and, therefore, not prudent, under certain circumstances, including but not limited to: The present or threatened destruction, modification or curtailment of a species' habitat or range is not a threat to the species, or no areas meet the definition of "critical habitat." For example, this provision may apply to a species that is threatened primarily by disease but the habitat that it relies upon continues to exist unaltered throughout an appropriate distribution that, absent the impact of the disease, would support conservation of the species. Another example is a species that occurs in portions of the United States and a foreign nation. In the foreign nation, there are multiple areas that have the features essential for the conservation of the species; however, in the United States there are no such areas. Consequently, there are no areas within the United States that meet the definition of "critical habitat" for the species. Therefore, there is no benefit to designation of critical habitat, and designation is not prudent.

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.

Section 424.12(a)(2) would remain unchanged from the current regulation, and proposed subparagraphs (i) and (ii) contain minor language changes to be consistent with the language in the Act.

The Services propose to completely revise section 424.12(b) of the current regulations. For the reason explained below, we also propose to remove the terms "principal biological or physical constituent elements" and "primary constituent elements" from this section. These concepts would be replaced by the statutory term "physical or biological features," which we propose to define as described above.

The first part of the statutory definition of "critical habitat" (section 3(5)(A)(i)) contains terms necessary for (1) identifying specific areas within the geographical area occupied by the species that may be considered for designation as critical habitat and (2) describing which features on those areas

are important to the species. In current section 424.12(b), the Services use the phrase "primary constituent elements" to focus identification of critical habitat on areas that contain these elements. However, the regulations are not clear as to how primary constituent elements relate to or are distinct from physical or biological features, which is the term used in the statute. Adding a term not found in the statute that is at least in part redundant with the term "physical or biological features" has proven confusing. Trying to parse features into elements and give them meaning distinct from one another has added an unnecessary layer of complication during the designation process.

The proposed definition of "physical or biological features," described above, would encompass similar habitat characteristics as currently described in section 424.12(b), such as roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types. Our proposal is intended to simplify and clarify the process, and to remove redundancy, without substantially changing the manner in which critical habitat is designated.

Proposed section 424.12(b) describes the process to be used to identify the specific areas to be considered for designation as critical habitat, based on the statutory definition of "critical habitat." With respect to both parts of the definition, the proposed regulations would emphasize that the Secretary would identify areas that meet the definition "at a scale determined by the Secretary to be appropriate." The purpose of this language is to clarify that the Secretary cannot and need not make determinations at an infinitely fine scale. Thus, the Secretary need not determine that each square inch, yard, acre, or even mile independently meets the definition of "critical habitat." Nor would the Secretary necessarily consider legal property lines in making a scientific judgment about what areas meet the definition of "critical habitat." Instead, the Secretary has discretion to determine at what scale to do the analysis. In making this determination, the Secretary may consider, among other things, the life history of the species, the scales at which data are available, and biological or geophysical boundaries (such as watersheds).

Under the first part of the statutory definition, in identifying specific areas for consideration, the Secretary must first identify the geographical area occupied by the species at the time of listing. Within the geographical area

occupied by the species, the Secretary must identify the specific areas on which are found those physical or biological features (1) essential to the conservation of the species, and (2) which may require special management considerations or protection.

Under proposed section 424.12(b)(1)(i), the Secretary would identify the geographical area occupied by the species using the definition of this term as proposed above. Under proposed section 424.12(b)(1)(ii), the Secretary would then identify those physical and biological features essential for the conservation of the species. These physical or biological features are to be described at an appropriate level of specificity, based on the best scientific data available at the time of designation. For example, physical features might include gravel of a particular size required for spawning, alkali soil for germination, protective cover for migration, or susceptibility to flooding that maintains early-successional habitat characteristics. Biological features might include prey species, forage grasses, specific kinds or ages of trees for roosting or nesting, symbiotic fungi, or a maximum level of nonnative species consistent with conservation needs of the listed species. The features may also be combinations of habitat characteristics and may encompass the relationship between characteristics or the necessary amount of a characteristic needed to support the life history of the species. For example, a feature may be a specific type of forage grass that is in close proximity to a certain type of shrub for cover. Because the species would not consume the grass if there were not the nearby shrubs in which to hide from predators, one of these characteristics in isolation would not be an essential feature; the feature that supports the life-history needs of the species would consist of the combination of these two characteristics in close proximity to each other.

In considering whether features are essential to the conservation of the species, the Services may consider an appropriate quality, quantity, and spatial and temporal arrangement of habitat characteristics in the context of the life-history needs, condition, and status of the species. For example, a small patch of meadow may have the native flowers, full sun, and a biologically insignificant level of invasive ants that have been determined to be important habitat characteristics that support the life-history needs of an endangered butterfly. However, that small patch may be too far away from other patches to allow for mixing of the

populations, or the meadow may be too small for the population to persist over time. So the area could have important characteristics, but those characteristics may not contribute to the conservation of the species because they lack the appropriate size and proximity to other meadows with similar characteristics. Conversely, the exact same characteristics (native flowers, full sun, and a biologically insignificant level of invasive ants), when combined with the additional characteristics of larger size and short dispersal distance to other meadows, may in total constitute a physical or biological feature essential to the conservation of the species.

Under proposed section 424.12(b)(1)(iii), the Secretary would then determine the specific areas within the geographical area occupied by the species on which are found those physical or biological features essential to the conservation of the species.

Proposed section 424.12(b)(1)(iv) provides for the consideration of whether those physical or biological features may require special management considerations or protection. In this portion of the analysis, the Secretary must determine whether there are any "methods or procedures useful in protecting physical and biological features for the conservation of listed species." Only those physical or biological features that may be in need of special management considerations or protection are considered further. The Services may conduct this analysis for the need of special management considerations or protection at the scale of all specific areas, but they may also do so within each specific area.

The "steps" outlined in subparagraphs (i) through (iv) above are not necessarily intended to be applied strictly in a stepwise fashion. The instructions in each subparagraph must be considered, as each relates to the statutory definition of "critical habitat." However, there may be multiple pathways in the consideration of the elements of the first part of the definition of "critical habitat." For instance, one may first identify specific areas occupied by the species, then identify all features needed by a species to carry out life-history functions in those areas through consideration of the conservation needs of the species, then determine which of those specific areas contain the features essential to the conservation of the species. The determination of which features are essential to the conservation of the species may consider the spatial arrangement and quantity of such features in the context of the life history,

status, and conservation needs of the species. In some circumstances, not every location that contains one or more of the habitat characteristics that a species needs would be designated as critical habitat. Some locations may have important habitat characteristics, but are too small to support a population of the species, or are located too far away from other locations to allow for genetic exchange. Considered in context of the conservation needs of the species, the proposed section 424.12(b)(1)(i) through (iv) would allow for sufficient flexibility to determine what areas within the geographical area occupied by the species are needed to provide for the conservation of the species.

Occasionally, new taxonomic information may result in a determination that a previously listed species or subspecies is actually two or more separate entities. In such an instance, the Services must have flexibility, when warranted, to continue to apply the protections of the Act to preserve the conservation value of critical habitat that has been designated for a species listed as one listable entity (i.e., species, subspecies, or distinct population segment (DPS)), and which is being repropounded for listing as one or more different listable entities (e.g., when the Services propose to list two or more species, subspecies, or DPSs that had previously been listed as a single entity). Where appropriate (such as where the range of an entity proposed for listing and a previously designated area of critical habitat align), the Services have the option to find, simultaneously with the proposed listing of the proposed entity or entities, that the relevant geographic area(s) of the existing designation continues to apply as critical habitat for the new entity or entities. Such a finding essentially carries forward the existing critical habitat (in whole or in part). Alternatively, the Services have the option to pursue a succinct and streamlined notice of proposed rulemaking to carry forward the existing critical habitat (in whole or in part), that draws, as appropriate, from the existing designation.

More broadly, when applying the proposed 424.12(b)(1) to the facts relating to a particular species, the Services will usually have more than one option available for determining what specific areas constitute the critical habitat for that species. In keeping with the conservation-based purpose of critical habitat, the relevant Service may find it best to first consider broadly what it knows about the biology and life history of the species, the

threats it faces, the species' status and condition, and therefore the likely conservation needs of the species with respect to habitat. If there already is a recovery plan for that species (which is not always the case and not a prerequisite for designating critical habitat), then that plan would be useful for this analysis.

Using principles of conservation biology such as the need for appropriate patch size, connectivity of habitat, dispersal ability of the species, or representation of populations across the range of the species, the Service may evaluate areas needed for the conservation of the species. The Service must identify the physical and biological features essential to the conservation of the species and unoccupied areas that are essential for the conservation of the species. When using this methodology to identify areas within the geographical area occupied by the species at the time of listing, the Service will expressly translate the application of the relevant principles of conservation biology into the articulation of the features. Aligning the physical and biological features identified as essential with the conservation needs of the species will maximize the effectiveness of the designation in promoting recovery of the species.

We note that designation of critical habitat relies on the best available scientific data at the time of designation. The Services may not know of, or be able to identify, all of the areas on which are found the features essential to the conservation of a species. After designation of final critical habitat for a particular species, the Services may become aware of or identify other features or areas essential to the conservation of the species, such as through 5-year reviews and recovery planning. Newly identified features that are useful for characterizing the conservation value of designated critical habitat can be considered in consultations conducted under section 7(a)(2) of the Act as part of the best available scientific and commercial data. We also note that if there is uncertainty as to whether an area was "within the geographical area occupied by the species, at the time it is listed," the Services may in the alternative designate the area under the second part of the definition if the relevant Service determines that the area is essential for the conservation of the species.

The second part of the statutory definition of "critical habitat" (section 3(5)(A)(ii)) provides that areas outside the geographical area occupied by the species at the time of listing should be

designated as critical habitat if they are determined to be “essential for the conservation of the species.” Proposed section 424.12(b)(2) further describes the factors the Services would consider in identifying any areas outside the geographical area occupied by the species at the time of listing that may meet this aspect of the definition of “critical habitat.” Under proposed section 424.12(b)(2), the Services will determine whether unoccupied areas are essential for the conservation of the species by considering “the life-history, status, and conservation needs of the species.”

Proposed section 424.12(b)(2) would subsume and supersede section 424.12(e) of the existing regulations. Section 424.12(e) currently provides that the Secretary shall designate areas 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.” Although the current provision represents one reasonable approach to giving meaning to the term “essential” as it relates to unoccupied areas, the Services believe this provision is both unnecessary and unintentionally limiting. While Congress supplied two different standards to govern the Secretary’s designation of these two types of habitat, there is no suggestion in the legislative history that the Services were expected to exhaust occupied habitat before considering whether any unoccupied area may be essential. In addition, although section 3(5)(C) of the Act reflects Congressional intent that a designation generally should not include every area that the species *can* occupy, this does not necessarily translate into a mandate to avoid designation of any unoccupied areas unless relying on occupied areas alone would be insufficient. Therefore, we conclude that deleting this provision would restore the two parts of the statutory definition (for occupied and unoccupied areas) to the appropriate relative statuses envisioned by Congress.

However, even if we were to conclude that Congress intended the Services to rely primarily on occupied areas, we think the existing regulatory provision is unnecessary because the Secretary in any case must find that the unoccupied area is “essential.” In many cases the Secretary may conclude that an integral part of analyzing whether unoccupied areas are essential is to begin with the occupied areas, but the Act does not require the Services to first prove that the occupied areas are insufficient before considering unoccupied areas.

As it is currently written, the provision in section 424.12(e) also confusingly references *present* range, while the two parts of the statutory definition refer to the area occupied *at the time of listing*. In practice, these concepts may be largely the same, given that critical habitat ideally should be designated at or near the time of listing. Nevertheless, the Services believe it will reduce confusion to change the regulations to track the statutory distinction. In addition, because critical habitat may be revised at any time, the statutory distinction may be important during a revision, which could occur several years after the listing of the species.

However, we note that unoccupied areas must be essential for the conservation of the species, but need not have the features essential to the conservation of the species: This follows directly from the inclusion of the “features essential” language in section 3(5)(A)(i) but not in section 3(5)(A)(ii). In other words, the Services may identify areas that do not yet have the features, or degraded or successional areas that once had the features, or areas that contain sources of or provide the processes that maintain the features as areas essential to the conservation of the species. Areas may develop features over time, or, with special management, features may be restored to an area. Under proposed section 424.12(b)(2), the Services would identify unoccupied areas, either with the features or not, that are essential for the conservation of a species. This proposed section is intended to be a flexible, rather than prescriptive, standard to allow the Services to tailor the inquiry about what is essential to the specific characteristics and circumstances of the particular species.

The Services anticipate that critical habitat designations in the future will likely increasingly use the authority to designate specific areas outside the geographical area occupied by the species at the time of listing. As the effects of global climate change continue to influence distribution and migration patterns of species, the ability to designate areas that a species has not historically occupied is expected to become increasingly important. For example, such areas may provide important connectivity between habitats, serve as movement corridors, or constitute emerging habitat for a species experiencing range shifts in latitude or altitude (such as to follow available prey or host plants). Where the best available scientific data suggest that specific unoccupied areas are, or it is reasonable to infer from the record that

they will eventually become, necessary to support the species’ recovery, it may be appropriate to find that such areas are essential for the conservation of the species and thus meet the definition of “critical habitat.”

An example may clarify this situation: A butterfly depends on a particular host plant. The host plant is currently found in a particular area. The data show the host plant’s range has been moving up slope in response to warming temperatures (following the cooler temperatures) resulting from climate change. Other butterfly species have been documented to have shifted from their historical ranges in response to changes in the range of host plants. Therefore, we rationally conclude that the butterfly’s range will likely move up slope, and we would designate specific areas outside the geographical area occupied by the butterfly at the time it was listed if we concluded this area was essential based on this information.

Adherence to the process described above will ensure compliance with the requirement in section 3(5)(C) of the Act, which states that, except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

Existing section 424.12(c) has been revised in a separate rulemaking (77 FR 25611).

The proposed section 424.12(d) would include minor language changes and would remove the example as it is not necessary for the text of the regulation.

We propose to remove current section 424.12(e), as this concept—designating specific areas outside the geographical 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—would be captured in proposed section 424.12(b)(2).

We propose to redesignate the current section 424.12(f) as section 424.12(e) and to add a second sentence to emphasize that designation of critical habitat for species that were listed prior to 1978 is at the discretion of the Secretaries. The first sentence of proposed section 424.12(e) would provide that the Secretary “may designate critical habitat for those species listed as threatened or endangered species but for which no critical habitat has been previously designated.” This is substantially the same as current paragraph section 424.12(f) in the existing regulations, although the Services have changed the passive voice to the active voice.



The new second sentence would codify in the regulations the principle that the decision whether to designate critical habitat for species listed prior to the effective date of the 1978 Amendments to the Act (November 10, 1978) is at the discretion of the Secretary. This principle is clearly reflected in the text of the statute and firmly grounded in the legislative history. The definition of “critical habitat” added to the Act in 1978 provided that the Secretary “may,” but was not required to, establish critical habitat for species already listed by the effective date of the 1978 amendments. See Public Law 95–632, 92 Stat. 3751 (Nov. 10, 1978) (codified at 16 U.S.C. 1532(5)(B)); see also *Conservancy of Southwest Florida v. United States Fish & Wildlife Service*, No. 2:10–cv–106–FtM–SPC, 2011 WL 1326805, \*9 (M.D. Fla. April 6, 2011) (Florida panther) (plain language of statute renders designation of habitat for species listed prior to the 1978 Amendments discretionary), *aff’d*, 677 F.3d 1073 (11th Cir. 2012); *Fund for Animals v. Babbitt*, 903 F. Supp. 96, 115 n.8 (D.D.C. 1995) (grizzly bear) (same). Similarly, the 1982 amendments expressly exempted species listed prior to the 1978 amendments from the requirement that critical habitat must be designated concurrently with listing. See Public Law 97–304, 96 Stat. 1411, § 2(b)(4) (Oct. 13, 1982). To reduce potential confusion, it will be useful for the regulations to reflect the discretionary nature of designations for such species.

As recent litigation has highlighted, the statutory history regarding the procedures for undertaking proposals to designate critical habitat for certain species is nuanced and has proven confusing in other respects as well. For species listed before passage of the 1982 amendments to the Act (October 13, 1982), any proposed regulations issued by the Secretary to designate critical habitat are governed by the provisions in section 4 of the Act applicable to proposals to revise critical habitat designations. This is specified in an uncodified provision of the 1982 amendments. See Public Law 97–304, 96 Stat. 1411, 1416, 2(b)(2), 16 U.S.C. 1533 (note) (“Any regulation proposed after, or pending on, the date of the enactment of this Act to designate critical habitat for a species that was determined before such date of enactment to be endangered or threatened shall be subject to the procedures set forth in section 4 of such Act of 1973 . . . for regulations proposing revisions to critical habitat instead of those for regulations

proposing the designation of critical habitat.”); see also *Center for Biological Diversity v. FWS*, 450 F.3d 930, 934–35 (9th Cir. 2006) (unarmored three-spine stickleback). While the Services do not propose to add regulatory text to address this narrow issue, we explain below how these provisions must be understood within the general scheme for designating critical habitat.

As a result of the above-referenced provision of the 1982 amendments, final regulations to designate critical habitat for species that were listed prior to October 13, 1982, are governed by section 4(b)(6)(A)(i) of the Act. By contrast, for species listed after October 13, 1982, final regulations are governed by section 4(b)(6)(A)(ii). Proposed rules for species listed both pre- and post-1982 are governed by section 4(b)(5). Thus, the Services have additional options at the final rule stage with regard to a proposal to designate critical habitat for those species listed prior to 1982 that they do not have when proposing to designate habitat for other species. These include an option to make a finding that the revision “should not be made” and to extend the 12-month deadline by an additional period of up to 6 months if there is substantial disagreement regarding the sufficiency or accuracy of available data. See 16 U.S.C. 1533(b)(6)(B)(i); see also *Center for Biological Diversity*, 450 F.3d at 936–37.

These provisions, however, do not affect the handling or consideration of *petitions* seeking designation of critical habitat for species listed prior to 1982. The term “petition” is not used in section 2(b)(2) of the 1982 amendments to the Act (compare to section 2(b)(1) of the same amendments, which mentions “[a]ny petition” and “any regulation”). Thus, the special rules for finalizing proposals to designate critical habitat for species listed prior to 1982 come into play only upon a decision by the Secretary to actually propose to designate critical habitat for such species. Petitions seeking such designations are governed just like any other petition seeking designation, which are governed by the provisions of the Administrative Procedure Act rather than section 4 of the Endangered Species Act. See 50 CFR 424.14(d); *Conservancy of Southwest Florida*, 2011 WL 1326805, at \*9 (“It is the Secretary’s proposal to designate critical habitat that triggers the statutory and regulatory obligations, not plaintiffs’ requests that the Secretary do so.”); *Fund for Animals v. Babbitt*, 903 F. Supp. at 115 (petitions to designate critical habitat are governed by the APA, not the ESA).

We propose to redesignate current section 424.12(g) as section 424.12(f) with minor language changes.

We propose to redesignate current section 424.12(h) as section 424.12(g) with minor language changes.

We propose to add a new section 424.12(h). Proposed section 424.12(h) would reflect the amendment to section 4(a)(3)(B)(i) of the Act in the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136). This proposed paragraph would codify the amendments to the Act that prohibit the Services from designating as critical habitat lands or other geographic areas owned or controlled by the Department of Defense, or designated for its use, if those lands are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act (16 U.S.C. 670a), and if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is being designated. In other words, if the Services conclude that an INRMP “benefits” the species, the area covered is ineligible for designation. Unlike the Secretary’s decision on exclusions under section 4(b)(2) of the Act, this result is not subject to the discretion of the Secretary (once a benefit has been found).

Neither the Act nor the National Defense Authorization Act for Fiscal Year 2004 defines the term “benefit.” However, the conference report on the 2004 National Defense Authorization Act (Report 108–354) instructed the Secretary to “assess an INRMP’s potential contribution to species conservation, giving due regard to those habitat protection, maintenance, and improvement projects . . . that address the particular conservation and protection needs of the species for which critical habitat would otherwise be proposed.” We therefore conclude that Congress intended “benefit” to mean “conservation benefit.” In addition, because a finding of benefit would result in an exemption from critical habitat designation, and given the specific mention of “habitat protection, maintenance, and improvement” in the conference report, we infer that Congress intended that an INRMP provide a conservation benefit to the habitat (e.g., essential features) of the species, in addition to the species. Examples of actions that would provide habitat-based conservation benefit to the species include: Reducing fragmentation of habitat; maintaining or increasing populations in the wild; planning for catastrophic events; protecting, enhancing, or restoring habitats; buffering protected areas; and testing

and implementing new habitat-based conservation strategies.

In the conference report, Congress further instructed the Secretary to “establish criteria that would be used to determine if an INRMP benefits the listed species.” The Services, therefore, also propose in section 424.12(h) to describe some factors that would help us determine whether an INRMP provides a conservation benefit: (1) The extent of area and features present; (2) the type and frequency of use of the area by the species; (3) the relevant elements of the INRMP in terms of management objectives, activities covered, and best management practices, and the certainty that the relevant elements will be implemented; and (4) the degree to which the relevant elements of the INRMP will protect the habitat from the types of effects that would be addressed through a destruction-or-adverse-modification analysis.

Under the Sikes Act, the Department of Defense is also instructed to prepare INRMPs in cooperation with FWS and each appropriate State fish and wildlife agency. The approved INRMP shall reflect the mutual agreement of the involved agencies on the conservation, protection, and management of fish and wildlife resources. In other words, FWS must approve an INRMP (reflected by signature of the plan or letter of concurrence pursuant to the Sikes Act (not to be confused with a letter of concurrence issued in relation to consultation under section 7(a)(2) of the Act)) before an INRMP can be relied upon for making an area ineligible for designation under section 4(a)(3)(B)(i). As part of this approval process, FWS will also conduct consultation under section 7(a)(2) of the Act, if listed species or designated critical habitat may be affected by the actions included in the INRMP. Section 7(a)(2) of the Act will continue to apply to any federal actions affecting the species once an INRMP is approved. However, if the area is ineligible for critical habitat designation under section 4(a)(3)(B)(i), then those consultations would address only effects to the species and the likelihood of the federal action to jeopardize the continued existence of the species.

Proposed new section 424.12(h) would specify that an INRMP must be approved to make an area ineligible for designation under section 4(a)(3)(B)(i). When the Department of Defense provides a draft INRMP for the Services’ consideration during development of a critical habitat designation, the Services will evaluate it.

Existing section 424.19 has been finalized in a separate rulemaking (78 FR 53058).

#### Request for Information

We intend that a final regulation will consider information and recommendations from all interested parties. We, therefore, solicit comments, information, and recommendations from governmental agencies, Native American tribes, the scientific community, industry groups, environmental interest groups, and any other interested parties. All comments and materials received by the date listed in **DATES** above will be considered prior to the approval of a final document.

You may submit your information concerning this proposed rule by one of the methods listed in **ADDRESSES**. If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>.

Information and supporting documentation that we receive in response to this proposed rule will be available for you to review at <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Conservation and Classification (see **FOR FURTHER INFORMATION CONTACT**).

#### 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. The Office of Information and Regulatory Affairs 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.

##### *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 are certifying that these proposed regulations would not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

This rulemaking revises and clarifies requirements for NMFS and FWS in designating critical habitat under the Endangered Species Act to reflect recent amendments to the Act and agency experience. This proposed rule, if made final, would revise the Services’ regulations to be consistent with recent statutory amendments that make certain lands managed by the Department of Defense ineligible for designation of critical habitat; be consistent with Congressional intent; be consistent with recent case law; and would clarify our process for designating critical habitat. The other changes included in these proposed regulations serve to clarify, and do not expand the reach of potential 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 designate critical habitat. No external entities, including any small businesses, small organizations, or small governments, will experience any economic impacts from this rule.

Therefore, the only effect to any external entities large or small would likely be positive, that is, gaining a greater understanding of the process we use for designating critical habitat.

*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, these proposed regulations 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 these regulations 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 regulations would not place additional requirements on any city, county, or other local municipalities.

(b) These proposed regulations 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, it is not a “significant regulatory action” under the Unfunded Mandates Reform Act. These proposed regulations would impose no obligations on State, local, or tribal governments.

*Takings (E.O. 12630)*

In accordance with Executive Order 12630, these proposed regulations would not have significant takings implications. These proposed regulations would not pertain to “taking” of private property interests, nor would they directly affect private property. A takings implication assessment is not required because these proposed regulations (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. These proposed regulations would substantially advance a legitimate government interest (conservation and recovery of endangered 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 these proposed regulations would have significant Federalism effects and have

determined that a Federalism assessment is not required. These proposed regulations pertain only to determinations to designate critical habitat under section 4 of the Act, and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

These proposed regulations do not unduly burden the judicial system and meet the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. These proposed regulations would clarify how the Services will make designations of critical habitat under section 4 of the Act.

*Government-to-Government Relationship With Tribes*

In accordance with the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951), Executive Order 13175, and the Department of the Interior’s manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In our proposed regulations, we explain that the Secretaries have discretion to exclude any particular area from the critical habitat upon a determination that the benefits of exclusion outweigh the benefits of specifying the particular area as part of the critical habitat. In identifying those benefits, the Secretaries may consider effects on tribal sovereignty.

*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 would not impose recordkeeping or reporting requirements on State or local 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 these proposed regulations 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 1–6 and 8)), and National Oceanic and Atmospheric Administration (NOAA) Administrative Order 216–6. Our analysis includes evaluating whether this action is procedural, administrative or legal in nature, and therefore a categorical exclusion applies. We invite the public to comment on whether, and if so, how this proposed regulation may have a significant effect upon the human environment, including any effects identified as extraordinary circumstances at 43 CFR 46.215. We will complete our analysis, in compliance with NEPA, before finalizing these proposed regulations.

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

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. These proposed regulations, if made final, 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 This Proposed 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 or policy we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) 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 proposed rule, your comments should be as specific as possible. For example, you should tell us 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.

**References Cited**

A complete list of all references cited in this document is available on the Internet at <http://www.regulations.gov> or upon request from the U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

**Authority**

We are taking this action under the authority of the Endangered Species Act of 1973, 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**

Accordingly, we propose to further amend part 424, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as proposed to be amended at 77 FR 51503, August 24, 2012, as set forth below:

**PART 424—[AMENDED]**

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

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

■ 2. Revise § 424.01 to read as follows:

**§ 424.01 Scope and purpose.**

(a) Part 424 provides regulations for revising the Lists of Endangered and Threatened Wildlife and Plants and designating or revising the critical habitats of listed species. Part 424 provides criteria for determining whether species are endangered or threatened and for designating critical habitats. Part 424 also establishes procedures for receiving and considering petitions to revise the lists and for conducting periodic reviews of listed species.

(b) The purpose of the regulations in part 424 is to interpret and implement those portions of the Act that pertain to the listing of species as threatened or endangered and the designation of critical habitat.

■ 3. Revise § 424.02 to read as follows:

**§ 424.02 Definitions.**

The definitions contained in the Act and parts 17, 222, and 402 of this title apply to this part, unless specifically modified by one of the following definitions. Definitions contained in part 17 of this title apply only to species under the jurisdiction of the U.S. Fish and Wildlife Service. Definitions contained in part 222 of this title apply only to species under the jurisdiction of the National Marine Fisheries Service.

*Candidate.* Any species being considered by the Secretary for listing as an endangered or threatened species, but not yet the subject of a proposed rule.

*Conserve, conserving, and conservation.* To use and the use of all methods and procedures that are necessary to bring any endangered or

threatened species to the point at which the measures provided pursuant to the Act are no longer necessary, i.e., the species is recovered in accordance with section 402.02. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

*Geographical area occupied by the species.* An area which may generally be delineated around species' occurrences, as determined by the Secretary (i.e., range). Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).

*List or lists.* The Lists of Endangered and Threatened Wildlife and Plants found at 50 CFR 17.11(h) or 17.12(h).

*Physical or biological features.* The features that support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

*Public hearing.* An informal hearing to provide the public with the opportunity to give comments and to permit an exchange of information and opinion on a proposed rule.

*Special management considerations or protection.* Methods or procedures useful in protecting the physical or biological features essential to the conservation of listed species.

*Species.* Any species or subspecies of fish, wildlife, or plant, and any distinct population segment of any vertebrate species that interbreeds when mature. A distinct population segment "interbreeds when mature" when it consists of members of the same species or subspecies in the wild that are capable of interbreeding when mature. Excluded is any species of the Class Insecta determined by the Secretary to constitute a pest whose protection

under the provisions of the Act would present an overwhelming and overriding risk to man.

*Wildlife or fish and wildlife.* Any member of the animal kingdom, including without limitation, any vertebrate, mollusk, crustacean, arthropod, or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

■ 4. In § 424.12, revise paragraphs (a), (b), and (d) through (h) to read as follows:

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

(a) To the maximum extent prudent and determinable, we will propose and finalize critical habitat designations concurrent with issuing proposed and final listing rules, respectively. If designation of critical habitat is not prudent or if critical habitat is not determinable, the Secretary will state the reasons for not designating critical habitat in the publication of proposed and final rules listing a species. The Secretary will make a final designation of critical habitat on the basis of the best scientific data available, after taking into consideration the economic impact, the impact on national security, and other relevant impacts of making such a designation in accordance with section 424.19.

(1) A designation of critical habitat is not prudent when any of the following situations exist:

(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; or

(ii) Such designation of critical habitat would not be beneficial to the species. In determining whether a designation would be beneficial, the factors the Services may consider include, but are not limited to: The present or threatened destruction, modification or curtailment of a species habitat or range is not a threat to the species, or no areas meet the definition of critical habitat.

(2) Designation of critical habitat is not determinable when one or both of the following situations exist:

(i) Data sufficient to perform required analyses are lacking; or

(ii) The biological needs of the species are not sufficiently well known to identify any area that meets the definition of critical habitat.

(b) Where designation of critical habitat is prudent and determinable, the Secretary will identify specific areas within the geographical area occupied by the species at the time of listing and any specific areas outside the

geographical area occupied by the species to be considered for designation as critical habitat.

(1) The Secretary will identify, at a scale determined by the Secretary to be appropriate, specific areas within the geographical area occupied by the species for consideration as critical habitat. The Secretary will:

(i) Identify the geographical area occupied by the species at the time of listing.

(ii) Identify physical and biological features essential to the conservation of the species at an appropriate level of specificity using the best available scientific data. This analysis will vary between species and may include consideration of the appropriate quality, quantity, and spatial and temporal arrangements of such features in the context of the life history, status, and conservation needs of the species.

(iii) Determine the specific areas within the geographical area occupied by the species that contain the physical or biological features essential to the conservation of the species.

(iv) Determine which of these features may require special management considerations or protection.

(2) The Secretary will identify, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the

species that are essential for its conservation, considering the life history, status, and conservation needs of the species.

\* \* \* \* \*

(d) When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, the Secretary may designate an inclusive area as critical habitat.

(e) The Secretary may designate critical habitat for those species listed as threatened or endangered but for which no critical habitat has been previously designated. For species listed prior to November 10, 1978, the designation of critical habitat is at the discretion of the Secretary.

(f) The Secretary may revise existing designations of critical habitat according to procedures in this section as new data become available.

(g) The Secretary will not designate critical habitat within foreign countries or in other areas outside of the jurisdiction of the United States.

(h) The Secretary will not designate as critical habitat land or other geographic areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an approved integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act (16

U.S.C. 670a) if the Secretary determines in writing that such plan provides a conservation benefit to the species for which critical habitat is being designated. In determining whether such a benefit is provided, the Secretary will consider:

(1) The extent of the area and features present;

(2) The type and frequency of use of the area by the species;

(3) The relevant elements of the INRMP in terms of management objectives, activities covered, and best management practices, and the certainty that the relevant elements will be implemented; and

(4) The degree to which the relevant elements of the INRMP will protect the habitat from the types of effects that would be addressed through a destruction-or-adverse-modification analysis.

Dated: April 3, 2014.

**Rachel Jacobson,**

*Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.*

Dated: April 4, 2014.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

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