

Billing Code 4333–15

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 17**

**[Docket No. FWS–R8–ES–2018–0076; FF09E21000 FXES11110900000 201]**

**RIN 1018–BD19**

**Endangered and Threatened Wildlife and Plants; Threatened Species Status for Coastal Distinct Population Segment of the Pacific Marten with a Section 4(d) Rule**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), determine threatened species status under the Endangered Species Act of 1973 (Act), as amended, for the coastal distinct population segment (DPS) of Pacific marten (*Martes caurina*), a small mammal from coastal California and Oregon. We also issue final regulations that are necessary and advisable to provide for the conservation of this DPS under section 4(d) of the Act (a “4(d) rule”). This final rule extends the Act’s protections to the coastal DPS of Pacific marten, subject to the 4(d) rule’s exceptions.

**DATES:** This rule is effective [**INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER***].

**ADDRESSES:** This final rule is available on the Internet at <http://www.regulations.gov> under Docket No. FWS–R8–ES–2018–0076. Comments and materials we received, as well as supporting documentation we used in preparing this rule, are available for public

inspection at <http://www.regulations.gov> under Docket No. FWS–R8–ES–2018–0076.

**FOR FURTHER INFORMATION CONTACT:** Dan Everson, Field Supervisor, U.S. Fish and Wildlife Service, Arcata Fish and Wildlife Office (see **ADDRESSES**). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

**SUPPLEMENTARY INFORMATION:**

**Executive Summary**

*Why we need to publish a rule.* Under the Endangered Species Act, a species may warrant protection through listing if it is endangered or threatened throughout all or a significant portion of its range. Listing a species as an endangered or threatened species can only be completed by issuing a rule. Further, under the Endangered Species Act, any species that is determined to be an endangered or threatened species requires critical habitat to be designated, to the maximum extent prudent and determinable.

*What this document does.* This rule lists the coastal distinct population segment (DPS) of Pacific marten (*Martes caurina*) as a threatened species under the Endangered Species Act. This document also finalizes a rule under the authority of section 4(d) of the Act that provides measures that are necessary and advisable to provide for the conservation of the coastal DPS of Pacific marten.

*The basis for our action.* Under the Act, we may determine that a species is an endangered or threatened species because of any of five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other

natural or manmade factors affecting its continued existence. We have determined that the coastal DPS of the Pacific marten is likely to become in danger of extinction within the foreseeable future primarily due to habitat loss (including fragmentation) and associated changes in habitat quality and distribution.

Section 4(a)(3) of the Act requires the Secretary of the Interior (Secretary) to designate critical habitat concurrent with listing to the maximum extent prudent and determinable. In this case, we have found that the designation of critical habitat for the coastal DPS of Pacific marten is not determinable at this time.

*Peer review and public comment.* During the proposed rule stage, we sought the expert opinions of 8 peer reviewers and 3 technical experts regarding the species status assessment report. We received responses from 4 specialists, which informed our determination. We also considered all comments and information received from the public during the comment period.

### **Previous Federal Actions**

On October 9, 2018, we published a proposed rule in the *Federal Register* (83 FR 50574) to list the coastal DPS of Pacific marten (coastal marten) as a threatened species under the Act (16 U.S.C. 1531 *et seq.*). Our proposed rule included a proposed 4(d) rule for the coastal marten. Please refer to that proposed rule for a detailed description of previous Federal actions concerning this DPS, which we refer to as a “species” in this rule, in accordance with the Act’s definition of “species” at 16 U.S.C. 1532(16).

### **Summary of Changes From the Proposed Rule**

In preparing this final rule, we reviewed and fully considered comments from the public on the proposed rule. We did not make any substantive changes to this final rule

after consideration of the comments we received. We did update the Species Status Assessment (SSA) report (to version 2.1) based on comments and some additional information provided, as follows: (1) We made many small, nonsubstantive clarifications and corrections throughout the SSA report, including ensuring consistency, providing details about data sources used, and updating references; and (2) we included additional information we received regarding observations of the coastal marten, hypothesized historical range of the coastal marten, and more detailed life-history data for the species. We also updated our discussion of predators and the influence of vegetation management on their use of areas occupied by the coastal marten. However, the information we received during the comment period for the proposed rule did not change our previous analysis of the magnitude or severity of threats facing the species.

In addition, as a result of Federal, State, and public comment, we have added clarifying language, improved our rationale, revised our preamble discussion of the 4(d) rule, incorporated more specifics into the 4(d) rule itself, and added information on management or cleanup activities in response to public comments (see **Final Rule Issued Under Section 4(d) of the Act**). The commenters stated that additional detail or examples would help them better understand the forest management activities excepted by the 4(d) rule. Other comments requested that we add additional 4(d) exceptions regarding State employees or agents and activities for cleanup of disturbed habitat. In response, we added clarifying language as follows: (1) added an exception for activities conducted in accordance with a permit issued under 50 CFR 17.32; (2) revised the exception and gave examples of forestry management activities to potentially reduce the risk or severity of wildfire (see § 17.40(s)(2)(ii) below); (3) clarified the use of State

Natural Communities Conservation Plan or State Safe Harbor Agreements ((see § 17.40(s)(2)(iii) below); (4) added examples of forestry management activities which promote the conservation needs of the coastal marten (see § 17.40(s)(2)(iv) below); (5) added an exception for removal of toxicants and cleanup of coastal marten habitat (see § 17.40(s)(2)(v) below); and (6) added an exception for activities conducted by State conservation agency employees or agents that conserve coastal marten (see § 17.40(s)(2)(vi) below).

We also considered the recent Oregon Fish and Wildlife Commission decision and associated rule by the Oregon Department of Fish and Wildlife (ODFW) banning trapping of marten west of I-5 in Oregon, which includes the coastal DPS. Although this new ODFW regulation is expected to reduce marten mortality in the Oregon portion of the DPS, trapping was considered as one of several threats coastal marten faced, and it occurred at a low level (on average, less than 1 marten harvested per year over the past 28 years). We considered banning of trapping in one of our future scenarios (scenario 2) generated in the coastal marten SSA, and it did not result in any projected improvement in population resiliency for any of the Oregon populations (Service 2019, pp. 104–105). Hence, while banning trapping of martens in the coastal DPS will reduce marten mortality, there are still substantial threats to the DPS. We do not expect this change in management to improve the status of the coastal marten to the point that it does not meet the definition of a threatened species under the Act.

### **Supporting Documents**

A species status assessment (SSA) team prepared an SSA report for the species. The SSA team was composed of Service biologists, in consultation with other species

experts. The SSA report represents a compilation of the best scientific and commercial data available concerning the status of the species, including the impacts of past, present, and future factors (both negative and beneficial) affecting the species. The SSA report underwent independent peer review by scientists with expertise in carnivore biology, habitat management, and stressors (factors negatively affecting the species) to the species.

In accordance with our joint policy on peer review published in the *Federal Register* on July 1, 1994 (59 FR 34270), and our August 22, 2016, memorandum updating and clarifying the role of peer review of listing actions under the Act, we sought peer review of the SSA report. The Service sent the SSA report to eight independent peer reviewers and received two responses. The purpose of peer review is to ensure that our listing determinations and 4(d) rules are based on scientifically sound data, assumptions, and analyses. The peer reviewers have expertise that includes familiarity with the coastal marten and its habitat, biological needs, and threats. In addition, we sent the SSA report to three technical experts to review specific aspects and use of scientific information therein. We received responses from two of the technical experts.

## **I. Final Listing Determination**

### **Background**

On June 23, 2014, we published a notice in the *Federal Register* (79 FR 35509) that summarized the taxonomic classification of the subspecies (based on current genetic information) and indicated our intent to conduct an evaluation of a potential DPS of martens in coastal Oregon and coastal northern California relative to the full species classification level. On April 7, 2015, we published a DPS analysis (80 FR 18742)

concluding that Pacific martens in coastal Oregon and northern coastal California were both discrete and significant to the taxon to which it belongs, and constituted a listable entity referred to collectively as the “coastal DPS of the Pacific marten.” This document and the associated SSA reflect our analysis of that DPS. A recent publication evaluating Pacific marten genetics indicates that coastal Oregon and northern coastal California marten populations likely represent a single subspecies, the Humboldt marten (*M. c. humboldtensis*) (Schwartz *et al.* 2020, p. 11). Although our listable entity may be a subspecies based on this evaluation, the DPS analysis for coastal marten as described above remains valid for the purposes of this rule.

The coastal marten is a medium-sized carnivore that historically occurred throughout the coastal forests of northwestern California and Oregon. The coastal marten has a long and narrow body type typical of the mustelid family (e.g., weasels, minks, otters, and fishers), generally with brown fur overall, but with distinctive coloration on the throat and upper chest that varies from orange to yellow to cream. The coastal marten has large and distinctly triangular ears and a bushy tail. Its lifespan is usually less than 5 years. The coastal marten feeds mainly on small mammals, but also consumes birds, insects, and fruits. Coastal martens tend to select older forest stands (e.g., late-successional, old-growth, large-conifer, mature, late-seral, structurally complex forests), or forests that have old-forest characteristics such as old and large trees, multiple canopy layers, snags, downed logs and other decay elements, dense understory development, and biologically complex structure and composition.

Please refer to the October 9, 2018, proposed rule (83 FR 50574) and the species status assessment (SSA) report (Service 2019, entire) for a full summary of species

information. Both documents are available at <http://www.regulations.gov> under Docket No. FWS–R8–ES–2018–0076, and on the Arcata Fish and Wildlife Office’s website at <https://www.fws.gov/arcata/>.

## **Regulatory and Analytical Framework**

### *Regulatory Framework*

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species is an “endangered species” or a “threatened species.” The Act defines an endangered species as a species that is “in danger of extinction throughout all or a significant portion of its range,” and a threatened species as a species that is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” The Act requires that we determine whether any species is an “endangered species” or a “threatened species” because of any of the following factors:

- (A) The present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) Overutilization for commercial, recreational, scientific, or educational purposes;
- (C) Disease or predation;
- (D) The inadequacy of existing regulatory mechanisms; or
- (E) Other natural or manmade factors affecting its continued existence.

These factors represent broad categories of natural or human-caused actions or conditions that could have an effect on a species’ continued existence. In evaluating these actions and conditions, we look for those that may have a negative effect on individuals

of the species, as well as other actions or conditions that may ameliorate any negative effects or may have positive effects.

We use the term “threat” to refer in general to actions or conditions that are known to or are reasonably likely to negatively affect individuals of a species. The term “threat” includes actions or conditions that have a direct impact on individuals (direct impacts), as well as those that affect individuals through alteration of their habitat or required resources (stressors). The term “threat” may encompass—either together or separately—the source of the action or condition or the action or condition itself.

However, the mere identification of any threat(s) does not necessarily mean that the species meets the statutory definition of an “endangered species” or a “threatened species.” In determining whether a species meets either definition, we must evaluate all identified threats by considering the expected response by the species, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have positive effects on the species, such as any existing regulatory mechanisms or conservation efforts. The Secretary determines whether the species meets the definition of an “endangered species” or a “threatened species” only after conducting this cumulative analysis and describing the expected effect on the species now and in the foreseeable future.

The Act does not define the term “foreseeable future,” which appears in the statutory definition of “threatened species.” Our implementing regulations at 50 CFR

424.11(d) set forth a framework for evaluating the foreseeable future on a case-by-case basis. The term “foreseeable future” extends only so far into the future as the Services can reasonably determine that both the future threats and the species’ responses to those threats are likely. In other words, the foreseeable future is the period of time in which we can make reliable predictions. “Reliable” does not mean “certain”; it means sufficient to provide a reasonable degree of confidence in the prediction. Thus, a prediction is reliable if it is reasonable to depend on it when making decisions.

It is not always possible or necessary to define foreseeable future as a particular number of years. Analysis of the foreseeable future uses the best scientific and commercial data available and 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.

Our proposed rule described “foreseeable future” as the extent to which we can reasonably rely on predictions about the future in making determinations about the future conservation status of the species. The Service since codified its understanding of foreseeable future in 50 CFR 424.11(d) (84 FR 45020). In those regulations, we explain the term “foreseeable future” extends only so far into the future as the Service can reasonably determine that both the future threats and the species’ responses to those threats are likely. The Service 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 Service need not identify the foreseeable future in terms of a specific period of time. These regulations did not significantly modify the Service's interpretation; rather they codified a framework that sets forth how the Service will determine what constitutes the foreseeable future based on our long-standing practice. Accordingly, though the regulations do not apply to the final rule for the coastal DPS of the Pacific marten because it was proposed prior to their effective date, they do not change the Service's assessment of foreseeable future for the coastal DPS of the Pacific marten as contained in our proposed rule and in this final rule.

#### *Analytical Framework*

The SSA report documents the results of our comprehensive biological status review for the species, including an assessment of the potential threats to the species. The SSA report does not represent a decision by the Service on whether the species should be listed as an endangered or threatened species under the Act. It does, however, provide the scientific basis that informs our regulatory decisions, which involve the further application of standards within the Act and its implementing regulations and policies. The following is a summary of the key results and conclusions from the SSA report; the full SSA report can be found at Docket No. FWS-R8-ES-2018-0076, and on the Arcata Fish and Wildlife Office's website at <https://www.fws.gov/arcata/>.

To assess the species' viability, we used the three conservation biology principles of resiliency, redundancy, and representation (Shaffer and Stein 2000, pp. 306–310). Briefly, resiliency supports the ability of the species to withstand environmental and demographic stochasticity (for example, wet or dry, warm or cold years), redundancy supports the ability of the species to withstand catastrophic events (for example,

droughts, large pollution events), and representation supports the ability of the species to adapt over time to long-term changes in the environment (for example, climate changes). In general, the more resilient and redundant a species is and the more representation it has, the more likely it is to sustain populations over time, even under changing environmental conditions. Using these principles, we identified the species' ecological requirements for survival and reproduction at the individual, population, and species levels, and described the beneficial and risk factors influencing the species' viability.

The SSA process can be categorized into three sequential stages. During the first stage, we evaluated the individual species' life-history needs. The next stage involved an assessment of the historical and current condition of the species' demographics and habitat characteristics, including an explanation of how the species arrived at its current condition. The final stage of the SSA involved making predictions about the species' responses to positive and negative environmental and anthropogenic influences. This process used the best available information to characterize viability as the ability of a species to sustain populations in the wild over time. We use this information to inform our regulatory decision.

### **Summary of Biological Status and Threats**

Our assessment evaluated the biological condition of the species and its resources, and the threats that influence the species' current and future condition, in order to assess the species' overall viability and the risks to that viability. It was based upon the best available scientific and commercial data, including the SSA report (Service 2019, entire), and the expert opinion of the SSA team members. Please refer to chapter 3 of the SSA report (Service 2019, pp. 36–71) for a more detailed discussion of the factors affecting

the coastal marten. The following is a summary of the key results and conclusions from the SSA report.

The coastal marten historically ranged throughout coastal Oregon and coastal northern California, but the species has not recently been detected throughout much of the historical range, despite extensive surveys. The coastal marten currently exists in four small populations (fewer than 100 individuals each) in Oregon and California, and is absent from the northern and southern ends of its historical range. The current range is approximately 7 percent of its known historical range. The coastal marten has been extirpated from Sonoma and Mendocino Counties, California, and occupies small portions of Humboldt, Del Norte, and Siskiyou Counties. In Oregon, coastal martens have been largely extirpated from much of the inland counties within the historical range and are known to currently occur in portions of Coos, Curry, Josephine, Douglas, Lane, and Lincoln Counties, Oregon.

We have assessed the coastal marten's levels of resiliency, redundancy, and representation currently and into the future by first ranking the condition of each population. We ranked the four populations into three categories (high, moderate, and low) based on key population factors and habitat elements. We used three between-population factors (least-cost path distance, filters, and number of populations in proximity) and four within-population factors (population size, available male home ranges, available female home ranges, and proportion of habitat subject to high predation risk). Least-cost path distance describes the distance a coastal marten must travel for dispersal needs in order to reach the next closest population. Filters are barriers to this movement and can be either natural or manmade, such as large rivers or highways. This

analysis provided condition categories to describe the resiliency of each population. A summary of this analysis is provided in table 4.3 of the SSA report (Service 2019, p. 96).

Maintaining representation in the form of genetic or ecological diversity is important to maintain the coastal marten's capacity to adapt to future environmental changes. We consider the coastal marten to have representation in the form of two different ecological settings. Some animals are adapted to the shore pine (*Pinus contorta*) forests found in coastal margins and dune ecosystems, and others are adapted to late-seral forest and serpentine ridges. One population represents the shore pine ecological setting, and three represent the forest and serpentine ecological settings. Genetic variation between populations is unknown at this time, as no studies have been conducted to determine the degree of genetic variation between the four populations.

The coastal marten needs to have multiple resilient populations distributed throughout its range to provide for redundancy. The more populations, and the wider the distribution of those populations, the more redundancy the species exhibits. Based on the distributions of current verifiable coastal marten detections and adjacent suitable habitat, we identified four extant population areas (EPAs) within coastal Oregon and northern coastal California:

- (1) Central Coastal Oregon EPA;
- (2) Southern Coastal Oregon EPA;
- (3) Oregon–California Border EPA; and
- (4) Northern Coastal California EPA.

Additional detections of coastal martens have occurred outside of the current EPAs, but they did not meet the criteria of a population (most likely, they represent

transient individuals in search of new territories) according to methods used in the Humboldt Marten Conservation Strategy and Assessment (Slauson *et al.* 2019, pp. 72–73), a synthesis of literature on marten ecology developed by the Humboldt Marten Conservation Group. This group is made up of State, Federal, Tribal, private, and nongovernmental organizations in coastal Oregon and northwestern California to conserve and manage coastal martens.

Our analysis of the past, current, and future influences on what the coastal marten needs for long-term viability revealed that two factors pose the largest risk to future viability of the species. These risks are primarily related to habitat loss and associated changes in habitat quality and distribution (including habitat fragmentation) (Factor A) and include: (1) A decrease in connectivity between populations; and (2) habitat conversion from that suitable for coastal martens to that suitable for generalist predators and competitors, thereby potentially increasing interactions and subsequent coastal marten injury, mortality, or predation. These factors are all influenced by vegetation management, wildfire, and changing climate.

Predation of coastal martens (Factor B) may be affected by changes in forest composition, potentially increasing predator habitat and increasing coastal marten vulnerability to predation. Bobcats are the coastal marten's predominant predator, with predation accounting for 41 percent of mortalities documented in one study. Bobcats prefer regenerating harvested stands less than 30 years old, and are nearly absent from older forests, the preferred habitat used by coastal marten. Coastal martens are vulnerable to predation and increased competition in habitats that have been subject to either high- or moderate-severity fires or intensive logging in the last 40 years where these events

remove the structural characteristics of the landscape that provide escape cover and are important to coastal marten viability (canopy cover, shrub cover, etc.). These older forests have declined substantially from historical amounts: older forests historically encompassed greater than 75 percent of the coastal California area, 50 percent of the Klamath and Siskiyou region in northern California and southwest Oregon, and 25 to 85 percent of the Oregon Coast Range. Estimates of the remaining older forests in the redwood region, Oregon Coast Range, and Klamath–Siskiyou region are around 5, 20, and 38 percent, respectively, of what occurred historically.

In addition to timber harvest activities, wildfires also destroy or remove forested habitat and occur regularly throughout the range of the coastal marten outside the coastal dunes population. Between 2000 and 2014, approximately 17 percent of the suitable coastal marten habitat in the north coastal California population burned. In 1987, in the California–Oregon border population area, roughly 12 percent of suitable habitat burned in the Longwood Fire. Substantial amounts of habitat occupied by the coastal marten have the potential to burn at varying severities in single wildfire events or over a few years. The effects from climate change are projected to result in longer wildfire seasons, producing more frequent and larger wildfires. Wildfires large enough to totally encompass all or most of all four individual population areas are already occurring throughout the range of the coastal marten and are expected to increase in frequency, raising concern over the resiliency of at least the three southern coastal marten population areas, which have been most affected by recent fires and are in a fire regime particularly vulnerable to future fires.

Dispersal is the means by which coastal marten populations maintain and expand their distribution. Successful dispersal is assisted by having suitable habitat between patches occupied by the species. Connectivity of habitat between populations allows for the coastal marten to maintain or expand population size and distribution. A resilient coastal marten population would have suitable habitat maintained between populations that provides important habitat for key prey, abundant daily resting sites, and a distance between populations that is within the range of an average coastal marten dispersal distance. Neither of the Oregon populations has functional connectivity to any other population and if a stochastic or catastrophic event eliminated either of these two populations, natural recolonization from the California populations would not be feasible. The two California populations have connectivity to one another, but not to the Oregon populations.

In addition to being mostly isolated, all four populations are relatively small and face other threats in addition to habitat loss. Since 1980, 19 mortalities of coastal martens caused by vehicles (Factor E) have been documented, all in Oregon and mostly along U.S. Highway 101. We expect that some unknown amount of coastal marten roadkill goes undetected, so this is likely an underestimate of the number of coastal martens killed by cars. Exposure to rodenticides (Factor E), through direct ingestion or the consumption of exposed prey, has been documented in coastal martens. This exposure has lethal and sub-lethal effects on other mammal species, and similar effects are expected for coastal martens. Illegal cannabis cultivation sites on public, tribal, and private forest lands are implicated as the likely source of these rodenticides in the California and Southern Oregon populations. In a similar carnivore species (fisher (*Pekania pennanti*)), 85 percent

of carcasses tested were exposed to rodenticides, with the exposure in 13 percent being the direct cause of death.

Certain diseases (Factor C) are also a concern to coastal martens including canine distemper viruses (CDV), rabies viruses, parvoviruses, and the protozoan (single-celled organism) *Toxoplasma gondii*. We acknowledge that there has been limited testing of coastal martens for the presence of pathogens or exposure to pathogens, but exposure levels and ultimate effect on populations are difficult to document until an outbreak is actually observed. While larger populations might display a mass mortality as a result of disease infections, extinction or extirpation is rare. With population sizes estimated at fewer than 100 each for all four coastal marten populations, an outbreak in an individual population puts it at a higher risk for extirpation.

The coastal marten faces a variety of threats including loss of habitat, threats from wildfire, and increased predation risk. These risks play a large role in the resiliency and future viability of the coastal marten. Given the lack of connectivity between populations, availability of suitable habitat, and increases in predation within the populations, we forecasted in the SSA report what the coastal marten may have in terms of resiliency, redundancy, and representation under three plausible future scenarios. All three scenarios were forecast out over the next 15, 30, and 60 years. A range of timeframes with a multitude of possible scenarios allows us to create a “risk profile” for the coastal marten and its viability into the future. Scenario 1 evaluates the future condition of the coastal marten if there is no change in trends in threats to the populations from what exists today, while the other two scenarios evaluate the response of the species to increases or decreases in the major factors that are influencing coastal marten viability. While we do

not expect every condition for each scenario to be realized, we are using these scenarios to bound the range of possibilities. Scenarios 2 and 3 are considered the “outside bounds” for the range of potential plausible future conditions. For each scenario, we describe the stressors that would occur in each population. We use the best available science to predict trends in future stressors (timber harvest, wildfire, effects of climate change, etc.). Data availability varies across States and populations. Where data on future trends are not available, we look to past trends and evaluate if it is reasonable to assume these trends will continue. The results of the analysis of resiliency in our plausible future scenarios are described in further detail in the SSA report and summarized in table 5.1 of the SSA report (Service 2019, p. 104).

We note that, by using the SSA framework to guide our analysis of the scientific information documented in the SSA report, we have not only analyzed individual effects on the species, but we have also analyzed their potential cumulative effects. We incorporate the cumulative effects into our SSA analysis when we characterize the current and future condition of the species. Our assessment of the current and future conditions encompasses and incorporates the threats individually and cumulatively. Our current and future condition assessment is iterative because it accumulates and evaluates the effects of all the factors that may be influencing the species, including threats and conservation efforts. Because the SSA framework considers not just the presence of the factors, but to what degree they collectively influence risk to the entire species, our assessment integrates the cumulative effects of the factors and replaces a standalone cumulative effects analysis.

### **Summary of Comments and Recommendations**

On October 9, 2018, we published in the *Federal Register* a proposed rule (83 FR 50574) to list the coastal marten as a threatened species and adopt a 4(d) rule for the coastal marten, which applies the prohibitions and provisions of section 9(a)(1) of the Act to the species with certain, specific exceptions. We requested that all interested parties submit written comments on the proposed rule by December 10, 2018. We also contacted appropriate Federal and State agencies, scientific experts and organizations, tribal entities, and other interested parties, and invited them to comment on the proposed rule. Notices inviting the public to comment were published in newspapers across the areas where the species is believed to occur. We did not receive any requests for a public hearing. All substantive information provided to us during the comment period is incorporated directly into this final rule, has been used to clarify the information in our SSA report, or is addressed (by topic) below.

We reviewed all the comments we received from the peer and technical reviewers for substantive issues and new information regarding the coastal marten and its habitat contained in the SSA report. We addressed peer reviewer comments in the final SSA and this rule as appropriate. We include a summary of the peer review comments below.

#### *Peer Review Comments*

As discussed in **Supporting Documents** above, we received comments from two peer reviewers and two technical experts. We reviewed all comments we received from the reviewers for substantive issues and new information regarding the information contained in the SSA report. The peer and technical reviewers generally concurred with our methods used to determine, and conclusions drawn from the available information regarding, the status of coastal marten populations and their biology in California and

Oregon. In some cases, they provided additional information, clarifications, and suggestions to improve the final SSA report. The reviewers also provided or corrected references we cited in our SSA report. The additional details and information provided, which have been incorporated into the current SSA report and this final listing rule, did not substantially alter any of our conclusions, including those concerning population resiliency, and current and future conditions.

In addition, we also received comments on the proposed listing and 4(d) rule during the open comment period. Below, we categorize the comments and our responses by Federal, State, Tribal, and public comments.

#### *Federal Agency Comments*

*Comment 1:* The U.S. Forest Service (USFS) encouraged the Service to develop additional 4(d) exceptions to include a more diverse set of management activities that are more consistent with coastal marten conservation (e.g., road closures and removal to increase habitat security, restoration to increase habitat connectivity).

*Our Response:* We have added clarifying language, improved our rationale, and incorporated more specific information into the 4(d) rule, as well as added an additional exception related to clean up of toxicants and other chemicals from forested areas. The 4(d) rule exceptions may include potential road closures and restoration efforts if they are consistent with conservation of the coastal marten and included in a finalized Service approved conservation plan or strategy. Please see our discussions under **Summary of Changes From the Proposed Rule**, above, and **Final Rule Issued Under Section 4(d) of the Act**, below.

*Comment 2:* The USFS highlighted work in the Oregon Dunes National Recreation Area (Oregon Dunes NRA) to increase understanding of the central coastal Oregon coastal marten population that occupies the shore pine ecosystem in the recreation area. They also noted a collaborative of local landowners, small businesses, the environmental community, and off-highway vehicle users that formed several years back to restore the dunes ecosystem and maintain the area for recreational use. The USFS suggests that working with this group may be a key component for successful recovery of the coastal marten, and that support for recovery of the species is more likely when communities choose to support the efforts rather than being limited by regulations.

*Our Response:* We agree that working with local stakeholders to develop support and ownership for species recovery is key for successful implementation of the Act, and, as is our practice for listed species, we have and will continue to work with government and nongovernmental entities to recover the coastal marten.

#### *State Comments*

*Comment 3:* The California Department of Fish and Wildlife (CDFW) suggested that the Service identify, either within the 4(d) rule or within a supplemental habitat management guide, the key structural features important to marten and their prey for planning and risk analysis prior to finalizing the listing rule. CDFW states that such clarification or guide would inform land managers and the Service of the suite of essential and preferred elements to analyze and conserve in a wildfire reduction program, while maintaining marten resiliency of large populations capable of withstanding stochastic events.

*Our Response:* We have added clarifying language, improved our rationale, and incorporated more specific information into the 4(d) rule. Please see our discussions under **Summary of Changes From the Proposed Rule**, above, and **Final Rule Issued Under Section 4(d) of the Act**, below. In addition, the SSA report for the coastal marten identifies those key structural features important to the species. We are also working with our Federal and State wildlife agency partners in California and Oregon, as well as other land management entities, to develop various mechanisms (including those identified by the CDFW) to assist in conservation of the coastal marten and its habitat.

*Comment 4:* CDFW raised a concern that a wide range of forest management activities could be interpreted to fall under the proposed 4(d) rule because these activities typically include the reduction of fire risk as a goal even when reductions are incidental to the production of timber for economic reasons. CDFW recommends aligning the rule with existing laws governing the approval and exception of certain activities designed to reduce wildfire fuels. Specifically, CDFW recommends limiting the application of the 4(d) rule in California to projects consistent with large-scale strategic fuel reduction projects carried out or overseen by land management agencies (Cal Fire, USFS, State and Federal Parks, etc.) and Fire Safe Councils, and only to those activities that fall within the following exceptions, prescriptions, and limitations described in the California Forest Practice Rules (CA FPR): Forest fire prevention exceptions that allow for: (1) elimination of vertical and horizontal fuel continuity provided certain conditions are met; (2) removal of dead and dying trees provided certain conditions are met; (3) removal of fuels within 150 feet of legally permitted structures and within 300 feet of habitable structures provided certain conditions are met; and (4) fuelbreak/defensible space prescription that

allows for removal of trees or other vegetation to create a shaded fuelbreak or defensible space.

*Our Response:* We have revised the exceptions listed in the 4(d) rule, and added explanatory language to clarify our intent and to more explicitly describe specific actions subject to this rule. Please see our discussions under **Summary of Changes From the Proposed Rule**, above, and **Final Rule Issued Under Section 4(d) of the Act**, below.

*Comment 5:* For the portion of the 4(d) rule that excepts take prohibitions for forest management activities in State-approved plans or agreements, CDFW pointed out that if the Service uses this rule to rely on the State safe harbor agreement (State SHA) to avoid “take” of a federally listed species, the distinction between State and Federal definitions may be important in considering how the State SHA meets the intended purpose of Federal protection under the Act. CDFW stated that the definition of “take” under California Code (section 86) is narrower in scope than is “take” under the Federal Endangered Species Act. While both Federal and State SHAs allow for incidental take of a species, it is unclear whether a State SHA is consistent with Federal SHA definitions.

*Our Response:* We are not relying on existing State SHAs, or other State-approved plans or agreements addressed in the 4(d) rule, to avoid take of a federally listed species, nor for such plans to meet the intended purpose of Federal protection under the Act. Rather, we are relying on these types of plans to serve their intended purpose of improving overall habitat conditions, which will result in a conservation benefit to the coastal marten. We recognize that implementation of such State-approved plans may result in some short-term or small level of localized negative effects to coastal martens or their habitat, but also that the success of these plans in improving habitat conditions may

subsequently contribute to the long-term viability of the species. As such, we are identifying that take that occurs as a result of these plans would be an exception to those actions prohibited under section 9 of the Act.

*Comment 6:* CDFW recommends defining “conservation needs of the coastal marten,” as phrased in the 4(d) rule, to ensure that excepted activities will contribute to the recruitment or conservation of high-quality coastal marten habitat. CDFW stated that one option is to establish, within this rule, large tree structure density targets, shrub layer species composition and coverage targets, and landscape-scale habitat composition targets to be used by land managers and Service biologists when developing and evaluating management activities that may be covered by the 4(d) rule.

*Our Response:* We have revised the exceptions listed in the 4(d) rule; added explanatory language, including specific examples of activities designed to promote, retain, or restore suitable coastal marten habitat; and more explicitly described, to clarify intent, specific actions subject to the 4(d) rule. Coastal martens use a variety of habitats, and it would be inappropriate to establish, in the 4(d) rule, habitat composition targets for the variety of habitats they occupy. We encourage land managers to work cooperatively with the Service to develop conservation plans or strategies that are consistent with the needs of the coastal marten.

*Comment 7:* CDFW recommends defining “Federal or State plans,” as phrased in the 4(d) rule, and clarifying the process for determining consistency of such plans. As an example, CDFW stated it is not clear if this provision would apply to California timber harvest plans (THP), non-industrial timber management plans (NTMP), program timber harvest plans (PTHP), and exceptions reviewed and approved by CalFire. Ensuring that

these plans rise to the level of “consistent with the conservation needs of coastal marten” would require a case-by-case review. CDFW stated that if this was the Service’s intent, an outline in the rule would be helpful to address whether a consultation with the Service is required to determine whether proposed activities will conserve suitable habitat. CDFW stated that without consultation, additive effects could result, which may lead to significant impacts not intended by the rule. Alternatively, the rule could state that THPs, NTMPs, and PTHPs are not included unless they are part of a larger plan to improve habitat for coastal martens.

*Our Response:* We have revised the exceptions listed in the 4(d) rule, and added explanatory language, to clarify our intent and to more explicitly describe specific actions subject to this rule. The revised language identifies only State approved NCCPs and State SHAs that address and authorize State take under CESA and does not discuss or include Federal plans. However, activities that may be conducted by Federal entities if found to be beneficial to the conservation of the coastal marten and is included as part of a Service approved conservation strategy or plan would fall under an exception in the 4(d) rule. In development of the 4(d) rule, we identified those prohibitions and exceptions which would focus on conservation of the coastal marten and its habitat. We purposefully did not include exceptions for THPs, NTHPs, and PTHPs per se due to their general broad nature and their focus on timber harvest rather than habitat management and conservation which would benefit the coastal marten. As a result, the mere submittal, or State approval, of a timber harvest plan will not meet any of the section 9(a)(1) prohibition exceptions listed in the 4(d) rule (see **Regulation Promulgation**, below). However, some measures in timber harvest plans may qualify for exception under the 4(d) rule if those

activities are designed for reducing the risk or severity of wildfire or are consistent with finalized coastal marten conservation plans or strategies for which the Service has determined that such plans or strategies would be consistent with conservation strategies for the coastal marten. Please see our discussions under **Summary of Changes From the Proposed Rule**, above, and **Final Rule Issued Under Section 4(d) of the Act**, below.

*Comment 8:* With respect to our description of the conservation benefit of the proposed 4(d) rule, CDFW generally agreed that a tradeoff between short-term impacts and long-term habitat improvement may be necessary for the conservation and recovery of the coastal marten. However, they believe that each proposed project should be weighed carefully to ensure that short-term impacts do not accumulate to levels that would further threaten the persistence of the species. CDFW recommends establishing a system with identified minimum habitat distribution and population size thresholds to track the cumulative effect of excepted management activities and to verify suitable habitat and population thresholds are not exceeded in the pursuit of long-term benefits. CDFW stated that special emphasis should be given to Conservation Emphasis Areas, as identified in the Humboldt marten conservation assessment and strategy (Slauson *et al.* 2019, entire), because they have the greatest potential to meet overall conservation goals, and are also the areas where short-term impacts have the greatest potential to preclude long-term recovery. CDFW recommended that projects in these areas should receive specific review to ensure management actions resulting in “minimal and temporary harm,” as stated in the proposed 4(d) rule, are beneficial and consistent with the Conservation Emphasis Area goals.

*Our Response:* We appreciate the CDFW comments on tracking and focusing conservation efforts for the coastal marten through the implementation of the 4(d) rule and agree that there is a tradeoff between short-term impacts and long-term benefits to habitat depending on the type of activity. We are in the process of developing such or similar tracking methods suggested by the commenter through our section 7 consultation process. Activities on Federal lands or requiring Federal permitting or authorization will be subject to section 7 consultation requirements under the Act for federally listed species. In addition, once critical habitat is established, we would evaluate potential effects of Federal project activities on areas designated as critical habitat. With respect to guidance, the SSA report for the coastal marten and the proposed and final critical habitat rules once developed will describe the physical or biological features for the coastal marten, as well as any special management that should occur in critical habitat units. If landowners have questions or need further assistance, we strongly encourage them to contact their local U.S. Fish and Wildlife Service office; contact information is available from the person listed under **FOR FURTHER INFORMATION CONTACT**, above.

*Comment 9:* CDFW noted that the proposed 4(d) rule objective of maintaining “complex tree and shrub conditions needed to support persistence” is a broad condition not defined in the rule and could be interpreted as contradictory. As an example, CDFW stated that a project may focus on a single component (increasing shrub complexity) by, or in concert with, removing the other entity (large, overstory trees or retention trees from past harvest). CDFW stated that this could be counterproductive to maintaining or promoting coastal marten habitat. CDFW recommended that it would be helpful to

provide guidance on the range of desirable coastal marten habitat conditions on managed landscapes.

*Our Response:* We have revised the exceptions listed in the 4(d) rule, and added explanatory language, to clarify our intent and to more explicitly describe specific actions subject to this rule. Specifically, we added the following examples: forestry management activities that promote, retain, or restore suitable coastal marten habitat that increase percent canopy cover, percent ericaceous shrub cover, and denning and resting structures. See also response to *Comment 7*. Please see our discussions under **Summary of Changes From the Proposed Rule**, above, and **Final Rule Issued Under Section 4(d) of the Act**, below.

*Comment 10:* The Oregon Department of Fish and Wildlife (ODFW) listed several conservation measures underway that should be considered in our determination. These include: (1) ODFW, through the Oregon Fish and Wildlife Commission, is in a rulemaking process to restrict trapping of coastal marten west of Interstate 5 (note: this action was a possible occurrence in Scenario 2 of the SSA report that suggested a population improvement through threat reduction); (2) ODFW is working on a connectivity analysis for multiple species, including the coastal marten, to help identify areas for habitat restoration or protection; (3) Federal agencies are currently implementing fuels-reduction efforts on Federal forests across the coastal marten's range to decrease wildfire impact, frequency, and intensity; and (4) ODFW has capitalized on renewed interest in the coastal marten by acquiring funds and establishing partnerships to expand monitoring efforts, with the intent of gaining information that will guide the management and restoration of coastal marten.

*Our Response:* With respect to conservation measure (1), we acknowledge the recent decision (September 2019) by the Oregon Fish and Wildlife Commission (OFWC) to ban marten trapping in the DPS (OFWC 2019, entire) (also see *Comment 43*). Regarding conservation measure (2), we commend the ODFW for their proactive work on martens in the coastal DPS; while their connectivity analysis, when completed, will help inform recovery actions for martens, it is not sufficient to reduce the threats to a level where we can determine that listing the coastal marten DPS is no longer warranted. With respect to conservation measure (3), we evaluated the impact of wildfire and fuels reduction efforts currently in place in our threats analysis, and have included such measures to reduce the impact of wildfire in our 4(d) rule's exceptions. Finally, as to conservation measure (4), we appreciate our partnership with ODFW and look forward to continuing our joint efforts in working towards coastal marten conservation.

#### *Tribal Comments*

We solicited information from and met with members of the Yurok Tribe regarding the proposed listing of the coastal marten. We also sent the draft SSA report to the Yurok Tribe; the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians; the Coquille Indian Tribe; the Cow Creek Band of Umpqua Tribe of Indians; the Confederated Tribes of Grand Ronde; and the Confederated Tribes of Siletz Indians for comment. We did not receive comments on the proposed rule from any tribal entities.

#### *Public Comments*

##### 4(d) Rule

*Comment 11:* Two commenters requested that forest practices conducted under the Oregon Forest Practices Act and its implementing regulations be included under the

4(d) rule. One of these commenters also requested that activities certified by third-party forest sustainability systems (e.g., Sustainable Forestry Initiative) be excepted from take prohibitions under the 4(d) rule.

*Our Response:*

We did not specifically identify the Oregon Forest Practices Act (OFPA) as a mechanism for excepting activities from section 9(a)(1) prohibitions as actions undertaken through the OFPA may include additional activities outside our intended scope of the 4(d) rule. The commenters did not provide specific forestry practices that should be considered for exception under the 4(d) rule; however, our 4(d) rule does provide that certain forestry management activities that are for the purpose of reducing the risk or severity of wildfire may be excepted from the section 9(a)(1) prohibitions, as described in 50 C.F.R. 17.40(s)(2)(ii), and this may include actions conducted under the Oregon Forest Practice Act if those activities meet the descriptions in our 4(d) rule.

Regarding third-party forest sustainability certifications, the commenter did not provide specific application and subsequent conservation benefits these certifications would provide to coastal martens. As a result, we could not evaluate the commenter's request. However, the exception under 50 CFR 17.40(s)(2)(iv) (see **Regulation Promulgation**, below) allows for forest management activities consistent with the conservation needs of the coastal marten developed in finalized conservation plans and strategies that are determined by the Service to be consistent with conservation strategies for the coastal marten.

*Comment 12:* One commenter suggested that the willingness of private landowners to implement a full suite of additional conservation measures, such as

environmental research and site-specific conservation plans, should also be recognized by the Service as “activities consistent with formal approved conservation plans or strategies,” as described in our proposed 4(d) rule.

*Our Response:* We concur with the commenter and recognize private landowner activities furthering conservation of the coastal marten as important. Such activities would be reviewed under the applicable exceptions of the 4(d) rule, and the Service will determine if the activity is consistent with conservation strategies for the coastal marten, and thus qualifies as an exception under the 4(d) rule.

*Comment 13:* One commenter stated that the 4(d) rule is vague and will be difficult to apply because it is based on language subject to interpretation. Another commenter believed more clarity was needed on specific activities not covered by the 4(d) rule and raised several questions about how it should be interpreted.

*Our Response:* We have revised the exceptions listed in the 4(d) rule, and added explanatory language, to clarify our intent and to more explicitly describe specific actions subject to the 4(d) rule.

*Comment 14:* One commenter stated that rather than using vague and confusing language in a 4(d) rule to except landowners from take, we should have landowners use the Act’s existing regulatory framework and develop habitat conservation plans (HCPs) or other mechanisms under section 10 of the Act. The commenter stated that an HCP would provide a more tailored and particularized look at the individual circumstances of the landowner and of the species’ use of their land.

*Our Response:* To improve clarity and avoid confusion, we have revised the exceptions listed in the 4(d) rule, and added explanatory language to clarify our intent

and to more explicitly describe specific actions subject to the 4(d) rule. In our 4(d) rule, we provide specific exceptions from take for those forestry management activities such as fuels reduction and other vegetation management to assist in preventing catastrophic wildfire or are consistent with conservation strategies for the coastal marten through State or Service approved plans. Landscape planning efforts such as HCPs are large scale conservation efforts developed to conserve sensitive species and their habitats while providing long term planning assurances and consistency. Although we agree with the commenter that HCPs are a valuable conservation tool, they are not the only tool available for conservation and recovery of a threatened species. We determined that by specifically providing exceptions from take for a few specific activities which overall provide benefits for the coastal marten and its habitat, we can further conservation of the coastal marten.

Applicants conducting activities that may cause incidental take of coastal martens as a result of any activity not described in our 4(d) rule may seek an HCP and a permit under section 10(a) of the Act, or consultation under section 7 of the Act if there is a Federal nexus.

*Comment 15:* One commenter stated that a broader 4(d) rule may provide landowners incentive to retain forests (as opposed to converting forest land to other land uses) and to participate in cooperative conservation measures.

*Our Response:* One of the reasons we issue 4(d) rules is to incentivize positive conservation actions and streamline the regulatory process for land managers. Our 4(d) rule for the coastal marten is just one of many tools we use to accomplish conservation. Although a broader 4(d) rule may allow for additional actions to take place without

significant regulatory oversight, we have determined that such a strategy would not be necessary or advisable for conservation of the coastal marten. We conclude that broadening the 4(d) rule will not result in a benefit to the species, and may increase its likelihood of becoming an endangered species.

We strongly encourage landowners working with the Service to cooperatively develop conservation measures for the coastal marten. In both Oregon and California, the Service has already begun working with Federal, State, and nongovernmental forest managers to develop a conservation strategy that would meet the requirements of the final 4(d) rule (50 CFR 17.40(s)(2)(iii and iv)) (see **Regulation Promulgation**, below).

*Comment 16:* One commenter stated that the Service’s authority to issue 4(d) rules is narrowly confined by the definition of “conservation,” which the Act defines as the use of *all* [emphasis added by the commenter] methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided are no longer necessary. The commenter points to the Service’s policy of extending all the section 9 prohibitions of endangered species to threatened species (50 CFR 17.31(a)), which, according to the commenter, means the Service found that the best way to “conserve” threatened species is to apply all prohibitions afforded to endangered species. The commenter concluded that, if the Service decides to depart from this practice, then the Service must otherwise “provide for the conservation of the species.”

*Our Response:* We have determined to extend all the section 9 prohibitions of an endangered species to the coastal marten, with certain specific exceptions, in order specifically to provide for the conservation of the species. The exceptions in the 4(d) rule were identified as actions that will assist in potentially reducing the risk of largescale

wildfire, as well as other State or Service approved measures that are consistent with conservation strategies for the coastal marten. We have determined that such exceptions will benefit the overall conservation of the species.

*Comment 17:* One commenter stated that the portion of the 4(d) rule referring to State-approved plans or agreements that cover the coastal marten and are approved by CDFW is a special exception for Green Diamond Resource Company because they are the only large industrial timberland owner in the range that has obtained such an approved agreement with CDFW. The commenter believes the agreement fails to provide meaningful benefits to coastal martens and is insufficient to conserve the coastal marten as required under the Act. The commenter raised several issues with the agreement, including the reliance on translocation when it is unknown if translocation is feasible, changes to the company's wildlife tree retention program that do not allow trees to become old and complex, designating a "marten habitat reserve" in an area that was already unavailable for harvesting, and espousing agreement benefits that are already in place.

*Our Response:* We are not intending that the conservation of the coastal marten be achieved solely through the implementation of the State issued Green Diamond SHA. Conservation of the species, as required under the Act, will depend on a variety of recovery actions over time. In addition, although the Green Diamond SHA currently is the only CDFW-approved plan in place for the coastal marten, we anticipate additional plans to be developed by other entities in the future. We have revised the 4(d) to specifically except only those forestry management activities included in a plan or agreement for lands covered by NCCPs or State SHAs that address and authorize take of

coastal marten as a covered species and which have been approved by the CDFW under the California Endangered Species Act. The Green Diamond SHA allows for certain forestry management activities conducted on their lands that are reasonably expected to provide a net conservation benefit for the coastal marten. The Green Diamond SHA provides aspects of habitat retention and wildfire management which will benefit the coastal marten. However, we also understand that the Green Diamond SHA does not provide for all aspects of coastal marten conservation. Any activities outside those described in the plan would not be included within the 4(d) exceptions as they would not be part of a CDFW-approved plan or agreement as described in 50 C.F.R. 17.40(s)(2)(iii)

The Act provides a broad and flexible framework to facilitate conservation with a variety of stakeholders through various means. Working with our State resource agency partners in implementing conservation is one of many ways we work with, leverage, and expand our existing network of conservation partnerships to produce effective conservation practices and conservation strategies on the ground for all endangered or threatened species and their habitats. Working and collaborating with our State wildlife agency partners, tribes, private landowners, non-governmental organizations, and Federal partners to achieve on-the-ground conservation for endangered or threatened species and habitats will lead to greater conservation than if done independently. It is only through our inclusive efforts with the conservation community that we can collectively protect our shared resources.

*Comment 18:* One commenter pointed out that the Service did not cover the coastal marten under the habitat conservation plan with Green Diamond Resource Company (Green Diamond), wherein the company attempted to cover the same

prescriptions currently in place in the Green Diamond safe harbor agreement (SHA) (see *Comment 17*). The commenter stated that the Service rejected the inclusion of coastal martens because of insufficient information available to consider the range of effects. The commenter questioned how the Service could conclude that the SHA would promote the conservation of the species if the prescribed management in the HCP was too uncertain to meet HCP issuance criteria. The commenter stated that, although the legal standard for issuing an incidental take permit (the Service needs to find the HCP minimizes and mitigates take to the maximum extent practicable) differs from issuing a 4(d) rule (covered actions must provide for the conservation of the species), the practical result of the 4(d) rule will forgive all taking of coastal marten by Green Diamond.

*Our Response:* The commenter is correct that the coastal marten is not a covered species in the Green Diamond HCP. However, since the implementation of the Green Diamond HCP, a conservation strategy has been developed (Slauson *et al.* 2019, entire) that outlines a three-pronged conservation strategy for the coastal marten and its habitat. The first two prongs of this strategy seek to: (1) Protect existing populations and currently suitable habitat, and (2) reestablish coastal marten populations where currently suitable habitat is inaccessible owing to existing dispersal barriers. Green Diamond and CDFW have developed a State SHA that is reasonably expected to provide a net conservation benefit for the coastal marten on Green Diamond lands for certain activities. The Green Diamond SHA is authorized under the CESA, and addresses, in part, the first and second prongs of the strategy. The Green Diamond SHA accomplishes this by implementing certain coastal marten habitat management and assisted dispersal commitments including funding, monitoring, and adaptive management (see CDFW

2018, entire). Moreover, the State SHA includes measures that were not originally included in the HCP, including financial and technical assistance for assisted dispersal. Accordingly, the State SHA provides additional protections for the coastal marten beyond those contained in the Green Diamond HCP. The commenter's statement that the practical result of the 4(d) exception of the State SHA would allow Green Diamond any manner of take is not correct because the 4(d) rule sets out specific and limited exceptions to the section 9 prohibition on take; as applicable to this comment, forestry management activities may be exempted from the take prohibition if included in a plan or agreement for lands covered by a NCCP or State SHA that addresses and authorizes State take of coastal marten as a covered species and is approved by the CDFW under CESA.

*Comment 19:* One commenter stated the Service failed to provide an adequate rationale for the 4(d) rule. The commenter stated that the Service's rationale that the exception of forestry management activities will, "encourage active forest management that creates and maintains the complex tree and shrub conditions needed to support the persistence of marten populations" would not occur under the Green Diamond SHA (see *Comments 17 and 18*). The commenter stated that management under the Green Diamond SHA prevents the development of suitable complex tree conditions and shrub layer because it will lower the age class of forests outside of riparian reserves. The commenter also stated that those riparian reserves were already protected prior to the State SHA and therefore the State SHA does not provide additional conservation for the coastal marten. The commenter further stated that the Service also claims that by excepting some forest management activities from take prohibitions, "these provisions can encourage cooperation . . . in implementing conservation measures that will maintain or enhance

habitat and expand the population,” yet provides no explanation of how excepting take would encourage better behavior.

*Our Response:* We have determined that the measures identified in the 4(d) rule are necessary and advisable for conservation of the coastal marten. The provisions of the 4(d) rule for coastal marten will promote conservation of the species and its habitat by encouraging management of the landscape in ways that allow land management considerations while meeting the conservation needs of the coastal marten. This is accomplished by applying all the prohibitions for an endangered species, except as otherwise authorized or permitted. The long-term viability of the coastal marten, as with many wildlife species, is directly tied to the condition of its habitat. As described in our analysis of the species’ status, one of the primary driving threats to the coastal marten’s continued viability is the destruction of its habitat from catastrophic wildfires. The potential for an increase in frequency and severity of these catastrophic wildfires from the effects of climate change subsequently increases the risk to the species posed by this threat. We have determined that actions taken by forest management entities in the range of the coastal marten for the purpose of reducing the risk or severity of catastrophic wildfires, or conducting forestry management activities covered by California-approved SHAs or NCCPs, even if these actions may result in some short-term or small level of localized negative effect to coastal martens, will further the goal of reducing the likelihood of the species from becoming an endangered species, and will also likely contribute to its conservation and long-term viability. We have added clarifying language, improved our rationale, and incorporated more specifics into the 4(d) rule. Additionally, we removed the language within the preamble of the 4(d) rule that states,

“These provisions can encourage cooperation . . . in implementing conservation measures that will maintain or enhance habitat and expand the population.” Please see our discussions under **Summary of Changes From the Proposed Rule**, above.

*Comment 20:* One commenter stated that in order to issue a 4(d) rule the Service must adhere to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) and complete internal section 7 consultation under the Act, and that failure to conduct these activities is a violation of NEPA and the Act.

*Our Response:* The courts have ruled that NEPA does not apply to listing decisions under section 4(a) of the Act, nor to 4(d) rules issued concurrent with listing (see *Pacific Legal Foundation v. Andrus*, 657 F.2d 829 (6th Cir. 1981); and *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, No. 04–4324, 2005 WL 2000928, at \*12 (N.D. Cal. Aug. 19, 2005). In addition, the Service has determined that section 7 does not apply to the promulgation of 4(d) rules. Under the Act, we are to base listing decisions on the best available scientific and commercial information. If a species warrants listing under the Act based on a review of the best available scientific and commercial information, the Service must list the species, if not precluded by other higher priority listing actions. In other words, the Service does not have discretion to not list a species in consideration of other information, including the results of a section 7 analysis. This 4(d) rule is being promulgated concurrent with the listing of the species, and by extension, is therefore also not subject to section 7 consultation requirements. Further, the Service’s determination that a 4(d) rule is necessary and advisable to provide for conservation of the species necessarily subsumes a determination that the rule will not jeopardize the species or adversely modify its critical habitat.

*Comment 21:* One commenter supported the 4(d) rule but stated its benefits were primarily afforded to non-Federal activities because the consultation requirements of section 7 for Federal activities remain in place. The commenter requested that we except Federal activities from section 7 consultation if they are consistent with the 4(d) rule, as it is well within the Service's general rulemaking authority under the Act.

*Our Response:* The overall intent of any 4(d) rule is to develop protective regulations necessary and advisable for the conservation of the species, not necessarily to provide regulatory "benefits" to any Federal entity. The 4(d) rule for the coastal marten applies all the prohibitions and provisions for the protection of endangered wildlife under section 9(a)(1) of the Act, with the exception of certain activities that we have determined are not likely to be primary drivers of the species' status, and which are likely to provide an overall conservation benefit by reducing wildfire impact, providing for habitat management, and allowing clean-up of contaminated habitat. Under section 7(a)(2) of the Act, Federal agencies, in consultation with the Service, must insure that their action, viewed against the aggregate effects of everything that has led to the species' current status and the cumulative effects of non-federal activities that are likely to affect the species in the future, is not likely to jeopardize the continued existence of the species. However, section 7 consultations for actions that are not prohibited by a 4(d) rule should be streamlined, as any action that we determine is compatible with the conservation of the species in a 4(d) rule should not result in jeopardy to the species.

*Comment 22:* More than 2,500 commenters, submitting the same or similar comment letters, stated that the 4(d) rule is insufficient to ensure the coastal marten's survival and will condemn the coastal marten to extinction because it largely excepts

“State logging plans” (timber harvest plans), even though logging has been the main driver of the marten’s decline. Another 190 comments by email, submitting the same or similar text, stated that the proposed 4(d) rule excepts from section 9 prohibitions the very things that have brought coastal martens to the point where they should be listed as endangered under the Act.

*Our Response:* The 4(d) rule does not specifically identify or except timber harvest plans (including THPs, NTHPs, and PTHPs) per se due to their general broad nature and their focus on timber harvest rather than habitat management and conservation that would benefit the coastal marten. As a result, the mere submittal, or State approval, of a timber harvest plan will not meet any of the section 9(a)(1) prohibition exceptions listed in the 4(d) rule (see **Regulation Promulgation**, below). However, some measures in timber harvest plans may qualify for exception under the 4(d) rule if those activities are designed for reducing the risk or severity of wildfire or are consistent with finalized coastal marten conservation plans or strategies for which the Service has determined that such plans or strategies would be consistent with conservation strategies for the coastal marten.

As for the remaining comments on the proposed 4(d) rule, we have excepted certain activities from take that would reduce habitat loss through fire, or that would occur subject to a plan or agreement covered by a NCCP or State Safe Harbor Agreement approved by CDFW under the authority of CESA, or forestry management activities consistent with marten conservation that are also consistent with finalized conservation plans or strategies for which the Service has determined that meeting such plans or strategies would be consistent with marten conservation strategies. We conclude that

these activities meet the standards set out in the 4(d) rule and in addressing the stressors of fire and timber harvest that could result in habitat loss for the coastal marten.

*Comment 23:* One commenter stated that the 4(d) rule is overly broad and lacks conservation measures to protect the marten from jeopardy. The commenter stated that the protections afforded to endangered species by the Act are necessary to protect the coastal marten because State regulations are not protective of the species, and are pushing the species towards extinction. The commenter raised concerns that the State of Oregon's authorizations of forestry practices, which allow the use of strychnine and other poisons, are not compatible with marten conservation. The commenter concludes that a 4(d) rule that would except State-approved logging plans is not adequately protective and will not provide for the survival and recovery of the coastal marten.

*Our Response:* Under the 4(d) rule, State-approved logging plans are not excepted from section 9(a)(1) prohibitions (see our responses to *Comments 11* and *22*). The exception under 50 C.F.R. 17.40(s)(2)(iii) (see **Regulation Promulgation**, below) is specific to agreements approved by the CDFW under the authority of the CESA. Oregon does not have analogous agreement instruments under its Endangered Species Act; hence, there is not a similar exception in Oregon. The exception at 50 C.F.R. 17.40(s)(2)(iv) (see **Regulation Promulgation**, below) applies to forest management activities consistent with marten conservation needs, and any forest management activity must be consistent with finalized conservation plans or strategies which the Service has determined is consistent with the conservation strategies of the coastal marten.

*Comment 24:* One commenter stated that a 4(d) rule for the marten is not needed, but should the Service proceed with one, it must include enforceable protective

conservation measures to ensure the marten is not lost in the few areas where it persists. The commenter stated that conservation measures should prohibit logging within extant coastal marten population areas and curtail clear-cut logging and similar logging activities in mature forests between existing coastal marten population areas to facilitate habitat development. The commenter stated that projects that leave shelter trees or resting structures in an otherwise inhospitable landscape would not meet the definition of conservation measures. The commenter stated that Federal lands alone cannot provide enough habitat to ensure marten viability without connectivity on private and State lands.

*Our Response:* Without a 4(d) rule for the coastal marten, the species would have no protective regulations in effect. By applying all the prohibitions and provisions of section 9(a)(1) of the Act, which are the same for endangered species, to the coastal marten, except for certain forest management activities associated with: (1) wildfire management activities intended to reduce the risk or severity of wildfire; (2) State NCCPs or SHAs approved by CDFW under CESA; (3) finalized plans or strategies consistent with conservation needs of the coastal marten and which are Service approved for coastal marten; and (4) removal of toxicants consistent with conservation of the coastal marten, the 4(d) rule includes protective measures to ensure the coastal marten and its habitat is conserved. The 9(a)(1) prohibitions mean that any activity apart from those excepted in this 4(d) rule that would result in take of the marten, such as those examples described by the commenter, would be unlawful. The exceptions outlined in the 4(d) rule are not ownership specific and are not intended to rely on just Federal lands or on Federal agency conservation actions; the exceptions would apply to those entities that have appropriate plans in place across the landscape that provide for management and are

designed to reduce the risk of coastal marten habitat loss. We conclude that allowing these specific activities under the conditions described in the 4(d) rule would promote conservation of the species and its habitat.

*Comment 25:* One commenter urged the Service to condition any listing of the marten with measures such as a 4(d) rule that would allow and promote continued and expanded vegetation management in the Oregon Dunes National Recreation Area (NRA) that is necessary to control invasion by both native and nonnative plants that are rapidly colonizing and eliminating unique elements of this ecosystem. The commenter believes the Service must consider the long-term risk to the broader dunes ecosystem, including marten and other at-risk organisms residing there, and allow invasive plant control intended to protect and/or restore sites. The commenter believes slowing or stopping these efforts at this time risks irreversible loss of the dunes and the diverse habitats associated with them.

*Our Response:* Portions of the Oregon Dunes NRA provide nearly all of the coastal shore pine habitat known to be used by coastal martens in the central coastal Oregon population. Activities associated with removal of shore pine habitat that is used by coastal marten in restoration of dune habitat are not part of the 4(d) exceptions. Conservation of the shore pine ecosystem is important for the conservation of the coastal marten. We are in conference, under section 7 of the Act, with the Oregon Dunes NRA on the impacts of implementing the Oregon Dunes Restoration Project on the coastal marten population. We will continue with section 7 consultation after listing becomes final, working with the agencies managing the Oregon Dunes NRA to help meet the project objectives while also meeting the conservation needs of the marten and ensuring

the project does not jeopardize the species. As a result of the section 7 consultation efforts, any restoration efforts associated with the Oregon Dunes NRA will also take into consideration conservation of the coastal marten and its shore pine habitat within the area.

#### Existing Regulatory and Conservation Actions

*Comment 26:* One commenter encouraged the Service to consider not only the threats, but also the existing conservation measures in place to conserve coastal martens, including the Northwest Forest Plan, Redwood National Park management, listing status in California and associated CESA regulations, and the Green Diamond Resource Company SHA for coastal martens in California.

*Our Response:* In the SSA report, we describe the current resiliency of the coastal marten. Our conclusions on current resiliency for the coastal marten took into consideration the existing conservation actions as well as any regulatory mechanisms being implemented to conserve habitat used by the species.

*Comment 27:* One Board of County Commissioners and two nongovernmental organizations pointed out that we did not address existing State and Federal regulatory mechanisms that provide substantial conservation benefits to coastal martens. Coastal martens are listed under the CESA, and take of coastal martens is negligible in Oregon. The commenters stated that other regulatory mechanisms are in place, such as the Northwest Forest Plan (NWFP), Oregon Dunes management plans, and Oregon land use laws that provide protection for coastal martens and need to be considered in a listing determination. One commenter pointed out specific aspects of the NWFP that we noted in the SSA report as providing benefits to coastal martens, including habitat recruitment that

would contribute to coastal marten population connectivity, as well as reduced levels of timber harvest compared to non-Federal forests. The commenter stated that the prohibition of take of coastal martens as a listed species under the CESA is not addressed in terms of its reduction of threat levels to coastal martens, at least in California. The commenters believe that these mechanisms, as well as ODFW management programs, research efforts, and initiation of rulemaking to ban coastal marten trapping, are either adequate to the degree that listing the coastal DPS is not warranted, or need to be fully and robustly considered before a listing decision is made.

*Our Response:* We agree with the comments regarding the benefits of State and Federal regulatory mechanisms for the conservation of listed species. For the coastal marten, we took into account Federal, State, and Tribal regulatory mechanisms and conservation measures when determining the Federal listing status of the DPS and have concluded that even with the existing regulatory mechanisms in place, the coastal marten still needs protections under the Act. See **Determination of Coastal Marten Status**, below, for our review of existing regulatory mechanisms.

*Comment 28:* Three commenters stated that the Service did not fully consider existing regulatory mechanisms because we inadequately addressed the potential ban on coastal marten trapping in Oregon.

*Our Response:* At the time of our proposed listing rule for the coastal marten (83 FR 50574; October 9, 2018), the State of Oregon had not yet proposed or finalized restrictions on trapping in the State. We have revised this final rule to incorporate the latest status of ODFW's rulemaking effort to ban harvest of coastal martens by trapping in western Oregon. However, although trapping is considered a threat to the coastal

marten, trapping is not considered one of the main drivers leading toward our determination of threatened status for the species, but is considered along with all other threats cumulatively affecting the species.

*Comment 29:* Two commenters stated that the Service did not fully consider existing regulatory mechanisms because we inadequately addressed the effect of legalization of cannabis on coastal marten exposure to anticoagulant rodenticides. One of the commenters further stated that cannabis growers in California are required to apply pesticides in accordance with U.S. Environmental Protection Agency (U.S. EPA)-approved labeling, as well as State and local permitting requirements. The commenters stated that these requirements would result in a reduced incidence of unlawful cannabis growing and pesticide application, thereby reducing the threats from this activity on the species.

*Our Response:* We discuss legalization of cannabis and its effects on anticoagulant rodenticide exposure to coastal martens in our SSA report (Service 2018, pp. 48–49; Service 2019, pp. 39–42). However, it is unclear at this time as to how legalization will influence the use of anticoagulant rodenticides or other toxicants and subsequent coastal marten exposures, especially with respect to illegal cannabis grow sites. The commenter seems to assume that regulation of legalized cannabis cultivation has reduced the amount of unlawful cannabis cultivation and unlawful use of pesticides. However, the commenter provides no information to support that assumption.

We have no information to indicate that legalization of cannabis cultivation will reduce “black market” activities and associated grow sites, or how local regulations and zoning ordinances for cannabis cultivation on private lands will alter the number of

illegal grows on public land (Owley 2018, pp. 1713–1714). There is no indication illegal growing has decreased with legalization of cannabis; continued lack of enforcement, as well as financial advantages over legally registered businesses, allow illegal underground operations to thrive (Bureau of Cannabis Control California 2018, pp. 28, 30). In fact, legalization may increase “black market” sales in other States, thereby increasing illegal grows to meet demand (Hughes 2017, entire).

Although cannabis growers are required to apply pesticides in accordance with U.S. EPA-approved labeling requirements, no pesticides are currently registered by the U.S. EPA for application on cannabis, because the U.S. EPA cannot recognize cannabis as a legal crop due to its status as a federally controlled substance. Unless exempt from registration requirements, use of a pesticide on a crop for which it is not registered is illegal. Yet tests of cannabis products grown by the cannabis industry reveal the presence of pesticides applied contrary to their registered label, including 71 percent of cannabis flowers grown for medical marijuana in Oregon (Voelker and Holmes 2015, pp. 7–8; Sandler *et al.* 2019, pp. 41–42). None of the pesticides tested were rodenticides, but the assertion that cannabis legalization has reduced the unlawful use of pesticides appears to be unfounded.

Moreover, legalization of cannabis cultivation may have increased the number of grow sites in some areas. Within the DPS counties in Oregon, over 2,000 legal operations have been permitted (Oregon Liquor Control Commission (OLCC) 2019, unpaginated); this number is in addition to existing illegal grow sites, which may not diminish as a result of legalized cultivation. Associated rodenticide use on the permitted grow sites is difficult to determine, and, as far as we know, has not been assessed.

Hence, we stand by our conclusion that the threat of coastal marten exposure to rodenticides remains, and it is uncertain as to whether cannabis legalization will decrease the threat to coastal martens by toxicant exposure.

#### Distinct Population Segment

*Comment 30:* The Douglas County Board of Commissioners stated that designation of the DPS is arbitrary and capricious, basing this conclusion on the premise that if there is no contemporary or historical biogeographic barrier to the interaction between coastal marten populations in Oregon and coastal marten populations in California (citing Slauson *et al.* 2009), then there similarly is no reason to conclude that the coastal population as a whole in California and Oregon cannot interact with the rest of the *M. caurina* taxon in Oregon or elsewhere in North America (see *Comment 31*).

*Our Response:* Contemporary or historical biogeographic barriers are only one of multiple factors we consider when determining whether a population meets the standards for designation as a DPS. Under our DPS Policy (Service 1996), a population segment of a vertebrate taxon must be both discrete and significant to the taxon to which it belongs. The commenter is referring to the discreteness portion of the policy, which we address here. A population segment may be considered discrete if it satisfies either of two conditions. The condition relevant to this comment states that the population segment is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors. Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation. We articulate our position in detail in our April 7, 2015, 12-month finding (80 FR 18742, pp. 18744–18746). In short, we found substantial genetic differences between the coastal

marten population (combined coastal Oregon and California) and other populations of Pacific martens, indicating that they are markedly separated from each other and providing evidence of a long-standing geographic separation. Although some low degree of introgression indicates occasional past movement of individuals between coastal and inland marten populations, evidence suggests this was an infrequent occurrence. Further, recently published results of a genetic evaluation of the Pacific marten indicate that coastal Oregon and coastal California marten populations likely represent a single subspecies (Schwartz *et al.* 2020, p. 11). Consequently, the coastal marten may actually be a subspecies, which is also a listable entity under section 3(16) of the Act.

*Comment 31:* As a follow up to *Comment 30*, the same commenter stated that researchers (Dawson *et al.* 2017, entire) provided further evidence that our DPS determination was arbitrary and capricious. Specifically, the commenter believes this publication continues to reflect a wider range for *Martes americana caurina*, providing a context not only for characterizing the genetics of *M. a. caurina* and *M. a. humboldtensis*, but also providing a context for the Federal listing status of *M. a. caurina* relative to its wider range rather than just the Oregon and California coastal populations.

*Our Response:* It appears the commenter has misapplied the results of Dawson *et al.* (2017) for the coastal marten. First, the commenter incorrectly labels the two currently designated subspecies as belonging to the American marten species (*Martes americana*) when in fact they belong to the Pacific marten species (*M. caurina*), as supported by recent data (Dawson and Cook 2012, p. 35; Dawson *et al.* 2017, p. 716). Consequently, the correct nomenclature for these two subspecies is *M. c. caurina* and *M. c. humboldtensis*, not *M. a. caurina* and *M. a. humboldtensis*. In that light, Dawson *et al.*

(2017, pp. 721, 724) further supports our DPS designation because they determined that American marten populations exhibit greater genetic variability among populations and greater geographic distribution of individual genetic haplotypes than do Pacific martens, indicating American marten populations are more similar to each other than are Pacific marten populations. Because Dawson *et al.* conclusions support a determination that the Pacific marten is a different entity than the American marten, the status of the American marten is not relevant to this determination.

*Comment 32:* The Douglas County Board of Commissioners stated that we assumed that the three coastal marten populations identified in the SSA report were in decline and that we based this assumption on a reduction in the number of coastal martens trapped and anecdotal observations of road-killed coastal martens. They believe these records may not provide scientific evidence to support a declining population. In addition, the commenters believe that a more robust survey effort in the Oregon Coast Range would likely result in finding additional populations of coastal martens. Finally, they conclude that in order for the Service to make a finding on the listing status of the coastal marten, we must first determine the size and extent of the current population(s).

*Our Response:* The best available scientific information for the coastal marten does not allow us to determine the exact number of individuals and population sizes. However, we did not intend our discussion of trapping and anecdotal records in our analysis to be used to demonstrate that coastal martens are declining in trend. The only available population estimates are a single recent estimate for the central coastal Oregon population published in 2018, and two estimates for the northern coastal California population, one from 2008 and a subsequent estimate in 2012 that estimated fewer coastal

martens than in 2008. Without additional information, it is not clear whether the decreased population estimate for the northern coastal California population represents a true long-term population decline, a short-term decline in response to a stochastic event such as a weather event or disease outbreak, or natural variation. Our only conclusion specific to a coastal marten population trend was our finding that the distribution of the coastal marten and its habitat has substantially declined from its historical range.

We do not feel that a more robust survey effort in coastal Oregon would result in discovering additional populations of coastal martens. Central and southern coastal Oregon was surveyed systematically in 2014 and 2015 with 348 sample units (908 survey stations), which was the largest carnivore survey done in Oregon up to that time (Moriarty *et al.* 2016, pp. 72, 76–77). The authors surveyed 70 percent of the coastal marten's historical range in Oregon; they acknowledged that while their survey methodology may have missed individuals, they were unlikely to miss a thriving, sizeable population of coastal martens. Hence, published research indicates additional coastal marten populations do not currently occur in central and southern coastal Oregon. Apparently suitable marten habitat occurs in northern coastal Oregon, some of which has since been surveyed with no detections. Further surveys in this area would be desirable to settle questions about coastal marten distribution along the north coast. However, even if a coastal marten population were found in northern coastal Oregon, it would still be an isolated population removed from the remainder of the taxon, with low likelihood of genetic intermixing with populations to the south.

The commenter believes that the Service must determine the current population (we assume they mean population size) and quantify what represents a population that

needs protection under the Act. To determine population size requires a census, which is rarely done for wild animal populations, and then usually only when the population is extremely small and survey methodology can reliably detect all individuals. Instead, we rely on population estimates, which have inherent variability. As noted above, we have three empirical estimates for coastal martens, and alone they tell us little about current population trends of coastal martens. The commenter seems to believe that without quantitative data, we must refrain from making a decision on the listing status of a species. However, upon receiving a petition to list a species, the Act and our regulations require us to make our determination solely on the basis of the best scientific and commercial data available. Hence, we have used the population estimate and distribution data combined with other available data on coastal martens to inform our analysis in the SSA report to assess the viability of the coastal marten. This assessment of the biological information, along with the threats facing the species or its habitat, was used to inform the Service in making a listing determination for the coastal marten.

*Comment 33:* One commenter questioned the accuracy of the historical range and its use in deriving the DPS boundary, stating that the historic range is a coarse boundary and that no genetic data have been used to confirm its validity southeast of the Klamath River. In addition, the commenter states that the occurrence of the Humboldt (*Martes caurina humboldtensis*) and Sierran (*M. c. sierra*) subspecies in the same wilderness area with no discernable barriers creates confusion and raises questions about the discreteness of the DPS.

*Our Response:* Additional genetic information would be useful in further defining the boundary of the DPS. We used the best available information to determine where to

most accurately capture the DPS boundary (Grinnell and Dixon 1926, p. 415; Bailey 1936, p. 296; Grinnell *et al.* 1937, pp. 190, 207, 209; Zielinski and Golightly 1996, p. 115; Zielinski *et al.* 2001, p. 480; Slauson *et al.* 2019, entire) (see section 4.1, Historical Range and Distribution, of the SSA report; Service 2019, pp. 73–75). In addition, a DPS may be considered discrete if it is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors.

Quantitative measures of genetic or morphological discontinuity may provide evidence of this separation. Complete separation is not necessary under our DPS policy. Given this definition of discreteness and the most recently available genetic analysis, we continue to assert that the coastal marten meets the definition of, and qualifies as a valid, DPS under our policy. This conclusion is further supported by recent information that the coastal marten may be a valid subspecies of the Pacific marten (Schwartz *et al.* 2020, p. 11).

#### Forest Management

*Comment 34:* Several commenters raised concerns regarding forest management. One commenter stated that we automatically correlated forest management with habitat loss (83 FR 50574, October 9, 2018, p. 50577). In addition, they believed that we need to acknowledge that coastal martens exist across a range of habitat and management conditions, including intensively managed forests. They stated that we further need to acknowledge that coastal martens use a variety of habitat types (e.g., young forests with abundant shrub cover in the central Oregon coast population) and should not be singly focused on a specific habitat type, specifically old forest, as preferential for coastal martens (83 FR 50574, October 9, 2018, pp. 50575–50576). As an example, one of the commenters referenced a comparison of coastal marten survival between unharvested

reserves and a clear-cut landscape (Payer and Harrison 1999). The commenter states that the study found no differences in survival for coastal marten in the two landscapes.

*Our Response:* Coastal martens exist across a range of habitat and management conditions, and we acknowledge the coastal marten's use of serpentine and shore pine vegetation types, contrasting them with the older forest stands used elsewhere in the study area (Service 2018, pp. 34–35). We also acknowledge the coastal marten's use of intensively managed forests, although research indicates that coastal martens still need a high proportion of older forest or serpentine habitat at the home range and landscape scale (Service 2018, pp. 36–40). Payer and Harrison (1999, pp. 43–44) also acknowledge this, noting that coastal marten densities were higher in reserve landscapes, and that in areas managed as industrial forest landscapes, coastal martens positioned their home ranges in areas with more mature forest habitat and less in recently clear-cut forests.

We did not automatically correlate forest management with habitat loss. In the referenced page of the October 9, 2018, proposed rule (83 FR 50577), we note that habitat loss has and continues to be influenced by wildfire, vegetation management, and a changing climate, but we do not maintain that all forest management results in habitat loss, or similarly, that all wildfire or climate change effects will result in habitat loss.

*Comment 35:* One commenter states that the Service should recognize that managed forest landscapes are dynamic through space and time, with recent harvest units interspersed across landscapes with younger or mature forest stands and retention buffers. In addition, the commenter states that modern forest practice regulations, such as the Oregon Forest Practices Act (OFPA) provide, at the landscape level, forests that produce a mixture of old and large trees, multiple canopy layers, snags and other decay elements,

understory development, and biologically complex structure and composition. The commenter believes these structural attributes complement late-successional conditions often associated with public forests.

*Our Response:* Managed forest landscapes are dynamic with shifting mosaics of forest stand ages, and that forest practice regulations require retention of some forest structural components. However, the quantity and scale of these components, as required in the OFPA, does not necessarily result in suitable coastal marten habitat, and may have resulted in a landscape that has increased competition and predation pressures on coastal martens. While the OFPA requires retention of certain types of vegetation and structure at the landscape scale, coastal martens respond to threats at smaller scales including home-range and stand scales where this mixture of elements necessary for survival are not always present.

*Comment 36:* One commenter stated that vegetation management is not a threat, per se, because recent experience suggests that timber harvest and coastal marten occupancy are not mutually exclusive. The commenter believes there is no definitive research that shows coastal martens do not use younger forest stands on managed lands, and in fact, coastal martens are found in managed forests. The commenter states that the frequency, extent, and quality of timber harvesting varies greatly across the DPS with varying adverse and even beneficial effects, and some forest management provides coastal marten habitat and contradicts blanket assertions that younger forests are a threat to coastal martens. The commenter also asserts that the Service did not adequately address how managed forests provide suitable habitat for coastal martens and how these forests function to connect coastal marten populations.

*Our Response:* Definitive research is not available that shows coastal martens do not use younger forest stands on managed lands. We have acknowledged the coastal marten's use of intensively managed forest landscapes (see our response to *Comments 34*), and find that the degree to which timber harvest will affect coastal marten habitat may vary greatly with the magnitude, intensity, frequency, and other site-specific and landscape conditions. We acknowledge some of these effects in the SSA report (Service 2019, pp. 61–62). However, multiple studies show the importance of mature and old forests to coastal martens. Coastal marten densities are higher in reserve landscapes, and in areas managed as industrial forest landscapes, coastal martens position their home ranges in areas with more mature forest habitat and less in recently clear-cut forests (Payer and Harrison 1999, pp. 43–44; Thompson *et al.* 2012, p. 228; Service 2018, p. 61).

#### Habitat and Habitat Modeling

*Comment 37:* Two commenters stated that the habitat model used in the SSA report was insufficient, and raised multiple technical issues regarding its development and applicability. They believe that more effort is needed to assess potential predicted coastal marten habitat.

*Our Response:* The SSA report (Service 2019, pp. 84-86) acknowledges limitations with the coastal marten habitat model used, particularly its application in Oregon. However, while we agree that more improved habitat modeling for the species would be useful, we are required to make our listing determinations on the best scientific and commercial data available at the time of listing. While the commenters pointed out limitations with the model, they did not provide an alternative to the information resulting from the model. One of the commenters suggested we consider an independent analysis

similar to what was done for northern spotted owls (Davis *et al.* 2016, entire). To account for the limitations of the model developed by researchers, we adjusted certain aspects of the model such as elevation and removed areas where the species is known not to occur. As a result, we consider the modeling as described in the SSA to be an appropriate tool for assisting to determine the distribution of habitat and conservation status of the coastal marten. Although we are pursuing additional modeling to better represent coastal marten habitat in Oregon, such a model is not yet available. Until it is, we are relying on the existing habitat modeling used in the SSA report as the best available data, while still acknowledging the limitations of its application in Oregon.

*Comment 38:* One commenter felt that the habitat model used in the proposed rule likely underestimates habitat suitability for the coastal marten and should be updated to include seral stages in addition to the Old Growth Structure Index (OGSI) to evaluate connectivity of habitats used in the Service's least cost path modeling analysis that was used to evaluate population resiliency in the SSA report. The commenter states that given that coastal martens clearly occupy and reproduce on managed lands, these younger forests should be incorporated into a least cost path model, which may provide a much different assessment of connectivity.

*Our Response:* We acknowledge the limitations with the coastal marten habitat model used and took those limitations into consideration in determining the status of the coastal marten. While there is evidence that coastal martens use a variety of habitats, there is no evidence that younger seral stages would improve the model fit or provide the necessary elements required for dispersal. While we are aware that coastal martens occur on and reproduce in managed forests, multiple studies of martens across North America

show the importance of mature and old forests to martens in general (Thompson *et al.* 2012, p. 228), and the coastal marten model performed best when using OGS. Further, the Service's least cost model did identify connectivity across managed lands and currently remains the best available data to use to evaluate connectivity.

*Comment 39:* One commenter stated that the SSA report and proposed rule regarding understory shrub associations with both managed and unmanaged forests do not reflect the uncertainty in the science. The commenter provides information indicating that vegetation associations, including understory shrub layers, can be highly variable within the coastal marten's range and it is not clear that past or present forest management activities have substantially altered, or will substantially alter, vegetation associations in a manner that will limit habitat suitability for the species.

*Our Response:* While we agree with the commenter that understory shrub layers can be highly variable within the range of the coastal marten, and that landscapes managed for timber harvest, depending on frequency, intensity, and extent of activities, may provide some level of understory shrub habitat for the coastal marten, the best available literature indicates that coastal martens select habitat that has a dense understory shrub layer (Andruskiw *et al.* 2008, pp. 2275–2277; Slauson and Zielinski 2009, pp. 39–42; Eriksson 2016, pp. 19–23). These areas provide food and prey resources for coastal martens and provide cover from predators. Dense understory shrub layers, used by coastal martens for breeding, are most often found outside of areas subject to timber harvest activities.

Listing Status

*Comment 40:* Two commenters stated that we should list the coastal marten as endangered rather than threatened. One commenter based that opinion on researchers' estimates of the coastal marten total population of fewer than 500 animals. The other commenter based their opinion on a variety of factors, including a population of fewer than 400 animals; the coastal marten's extirpation from 93 percent of its range, with 72 percent of mature forest logged, leaving coastal martens in isolated, remnant populations; increased threats to isolated populations; human-caused mortalities in the central coastal Oregon population resulting in a 99 percent risk of population extirpation within 30 years (Linnell *et al.* 2018); suitable habitat conditions in central and northern coastal Oregon being so curtailed as to only be capable of supporting a single population (Slauson *et al.* 2018 [2019]); increased threats specifically to the California population; and California's listing of the coastal marten as endangered under the CESA.

*Our Response:* The Act defines an endangered species as any species which is in danger of extinction throughout all or a significant portion of its range (section 3(6)), and a threatened species as any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (section 3(20)). Although smaller populations are often more at risk of extinction than larger populations, whether a population meets the definition of endangered or threatened under the Act is not solely limited to population size, and varies by species and circumstance. Vulnerability to extinction is a complex interplay between the species' existing condition, including population size, the types and timing of threats and their interactions and magnitude, and how populations respond or are expected to respond to those threats.

We took into consideration the factors identified by the commenter (i.e., small, isolated, populations; human-caused mortalities) in our determination of threatened status. We also reviewed the literature cited by the commenter, which references coastal marten population persistence and habitat conditions in Oregon (Linnell *et al.* 2018; Slauson *et al.* 2018 [2019]). We find that Linnell *et al.* (2018) gives a range of modeled outcomes regarding persistence of the single population analyzed by the researchers and that the modeled outcome depends on population size and number of human-caused mortalities (Linnell *et al.* 2018, pp. 14–15). The statement by the commenter points to the smallest potential population (20 individuals) having the highest human-caused mortalities (3 mortalities) per year. The commenter also points to trapping in Oregon as being part of the reason for increased human-caused mortalities. With trapping of the coastal marten now being banned by Oregon, the threat from trapping taking coastal martens has been greatly reduced, thereby making this “worst-case” scenario less likely.

Regarding the commenter’s reference to Slauson *et al.* 2018 (published February 2019), we acknowledge that the existing populations of coastal marten are isolated and small, and that habitat conditions in some cases are limiting. However, the conclusion made by the researchers that habitat is limited in central and northern coastal Oregon is based on modeled habitat that in some cases does not reflect the areas actually being used by the coastal marten. For example, the model does not take into consideration lower elevation areas that are being used by the coastal marten.

The commenter stated that the CDFW’s determination of endangered status under the CESA was reason to conclude federally endangered status under the Act. Comparing the analysis conducted by the CDFW determining that the coastal marten should be

considered endangered under the CESA to that of the Service’s threatened determination is not appropriate. The CDFW determination does not take into consideration Oregon populations. In our analysis of the best available commercial and scientific information, we determined that the coastal marten is not in danger of extinction (i.e., “endangered”), but is likely to become an endangered species within the foreseeable future (“threatened”) based on the timing of threats acting on the species and its habitat. See **Determination of Coastal Marten Status**, below.

*Comment 41:* One Board of County Commissioners stated that it is inappropriate for the Service to list the coastal marten as threatened because we know very little about the actual prevalence of the species due to limited and inadequate surveying effort and data.

*Our Response:* We are required to make listing determinations based on the best scientific and commercial information available. Since 2014, extensive coastal marten surveys have been conducted encompassing more than 70 percent of the coastal marten’s predicted historical range in Oregon, including survey stations in Lincoln, Benton, Lane, Douglas, Coos, Curry, and Josephine Counties (Moriarty *et al.* 2016, pp 72–73). Extensive surveys for coastal marten have also been conducted in California (Service 2018, p. 82). Although the survey methodology may have resulted in some individuals being missed in some locations, the existing survey protocol was unlikely to miss a “thriving, sizable population” of coastal martens (Moriarty *et al.* 2016, p. 77).

*Comment 42:* One commenter encouraged the Service to consider the positive impacts that private timberlands have on coastal martens, including restricted public access that reduces the risk of illegal activities such as illegal cannabis cultivation sites

and associated toxicants, reduced road traffic and associated road mortalities, and reduced trapping pressures. They concluded that managed timberlands contribute to a lessened risk of mortality from these factors.

*Our Response:* While some of the stressors may be reduced on managed timberlands, or other ownerships for that matter, we still look at the cumulative effect of all stressors and conservation actions addressing them collectively across the DPS to assess their effects on coastal martens and determine the DPS' listing status. Based on our consideration of the five listing factors, we find that the current condition of the coastal marten still provides for enough resiliency, redundancy, and representation within the four existing populations; however, the threats from wildfire and habitat loss, exacerbated by small population size, are expected to manifest in a decline of the species' status into the future. The association of specific threats to specific ownerships, geographic locations, or other conditions will be important in recovery planning and developing conservation strategies for the coastal marten.

*Comment 43:* One commenter requested that the Service "emergency list" the coastal marten because of the ongoing coastal marten trapping season on Federal lands. The commenter stated that recent research on coastal martens in the central coastal Oregon population concluded that human-caused mortality of two to three coastal martens per year in this area could extirpate this population within 30 years. The commenter stated that continued trapping clearly meets the statutory definition of jeopardy and should be halted immediately. The commenter postulated that the Service has the authority to end trapping of coastal martens on Federal lands by enacting

emergency protection for the coastal marten under the Act while the Federal listing is in process.

*Our Response:* Although trapping has been identified as a threat to coastal martens, we did not consider this threat to be a driver for determining if the coastal marten should be listed as an endangered or threatened species. We considered trapping to be part of the cumulative threats facing the species. Our analysis of the threat from trapping indicated that, on average, less than one animal has been lost annually over the last 28 years due to trapping. Additionally, there have been no legally trapped or harvested coastal martens in Oregon since 2014. Further, on September 13, 2019, the Oregon Fish and Wildlife Commission banned trapping coastal martens in areas where it is known to occur in Oregon, which includes Federal lands (OFWC 2019, entire). As a result, we do not consider trapping impacts to be as severe as characterized by the commenter, and with the new restrictions, we do not consider trapping a threat to the viability of the coastal marten and as a result not a condition for emergency listing under section 4(b)(7) of the Act.

*Comment 44:* One commenter, concerned with the central coastal Oregon population and its associated habitat located within the Oregon Dunes ecosystem, suggested that the coastal marten in this area should not be listed because coastal marten and habitat in this area are already adequately protected under existing Federal law and regulations, and because a listing will add a complex, time-consuming procedural consultation hurdle that will slow and/or limit critical and time-sensitive habitat protection and restoration work in the Oregon Dunes. The commenter stated that this would likely result in the following immediate and long-term detrimental effects to the

broader dunes ecosystem, which supports other rare, at-risk, and listed species: (1) Risk to maintenance of high-quality coastal marten habitat conditions in this area; (2) threat to the long-term persistence of values for which the Oregon Dunes NRA was established; and (3) associated negative economic effects on surrounding communities. In addition, the commenter stated that other listed or rare species depend on the restoration of the Oregon dunes, including the threatened western snowy plover (*Charadrius alexandrinus nivosus*), and several rare plants and invertebrates.

The commenter went on to recognize the work of the Oregon Dunes Restoration Collaborative (ODRC), which was formed to increase engagement of local communities and coordinate efforts to significantly expand protection and restoration of the dunes. The commenter stated that there are limited resources for the ODRC to complete restoration work, and the commenter believes additional administrative procedures associated with listing the coastal marten, or slowing the process, will be burdensome and likely result in loss of public interest and support for restoration. In addition, the commenter stated that the coastal marten and its habitat are already adequately protected under the National Forest Management Act, and because it is a candidate species under the Act and is on the Regional Forester's (USFS) sensitive species list.

*Our Response:* Based on our assessment of the threats facing the coastal marten as well as conservation measures, management, and regulatory mechanisms in place, we have determined that the coastal marten meets the definition of a threatened species under the Act. We are working with the USFS and stakeholders such as ODRC on management of the Oregon Dunes NRA. We agree that working with land managers and local stakeholders to develop support and ownership for species recovery is key for successful

implementation of the Act, and, as is our practice for listed species, we will work with government and nongovernmental entities as we work to recover the coastal marten.

#### Off-Highway Vehicle Recreation

*Comment 45:* One commenter stated that coastal martens co-exist with off-highway vehicle (OHV) activities that occur in the Oregon Dunes NRA. They stated that if the coastal marten is listed, then listing should not limit the ability to recreate in the area in designated riding routes.

*Our Response:* Habitat use of the Oregon Dunes NRA by coastal marten is mostly within forested areas not used by recreational OHV enthusiasts, and we did not identify OHV activities as a threat to the coastal marten. Consequently, we find it unlikely that listing the coastal marten as threatened will significantly impact OHV use within the area. We will continue to work with our Federal and State partners regarding conservation of coastal marten and its habitat with the Oregon Dunes NRA.

#### Population Status

*Comment 46:* Three commenters stated that additional coastal marten locations in southern Oregon, not considered in the SSA report or the proposed rule to list the coastal marten, suggest the possibility of increased redundancy and resiliency. One of these commenters stated that this suggests the coastal marten is not likely to become endangered in the foreseeable future. Specifically, two new locations were found in near-coastal forests, suggesting redundancy with the central coastal Oregon population, although there is no information on the number of individuals in this area. The commenters stated that between the southern coastal Oregon population and the Oregon-California border population, two new coastal marten locations were found near

detections from 1997 and 2001, suggesting increased connectivity between these two populations.

*Our Response:* We have reviewed the occurrence information the commenter provided and incorporated this information as appropriate into our analysis of the status of the coastal marten. Although the new detections are encouraging, they do not lead us to believe that redundancy or resiliency has increased to the level that listing is not warranted. None of the detections meet our ruleset for delineating additional coastal marten population areas, nor are the detections close enough to existing population areas to be subsumed by them, again according to our ruleset (Service 2019, pp. 75, 82). It is difficult to determine whether the two coastal marten detections located between the southern coastal Oregon population and the Oregon-California border population suggest increased connectivity. Again, there are not enough locations within proximity of each other to derive a separate population; if there were, such a population area would provide for additional connectivity between populations and improve the overall resiliency of the coastal marten (Service 2019, pp. 94–95). However, there is not sufficient evidence to conclude whether these two detections represent: (1) Coastal marten connectivity between the two extant populations (either as individuals or over multiple generations); (2) coastal marten reestablishment in their historical range; or (3) remnant individuals from a once existing population. The best available data suggest that these detections do not represent a separate population, because the survey methodology, while it may have missed individual coastal martens, was unlikely to miss a sizable population (Moriarty *et al.* 2016, p. 77).

*Comment 47:* Three commenters stated that their beliefs the number of individuals in the northern coastal California population is larger than estimated in the SSA report due to flawed survey methodology and analysis methods. The commenters believe the estimate does not reflect recent coastal marten captures of a third or more of the population size outside of the population area, which provide evidence that coastal martens occur outside of the area bounded in the SSA report and that there is a potential for a larger population size. The commenters also state that the population estimate does not reflect available coastal marten habitat and that coastal marten detections south of this population and within the DPS may also be Humboldt martens and that they should be included in the population estimate.

*Our Response:* We based our determination of population estimates on the best scientific and commercial information available and do not consider the survey methodology or analysis methods for population estimates to be flawed. The population estimates were not intended to reflect available marten habitat but instead to capture what we know about current population numbers and their distribution. Coastal marten suitable habitat was analyzed and is reflected in tables 4.2 and 4.3 of the SSA report under the number of available male and female home ranges. We are not aware of any verifiable marten detections south of the northern coastal California population and within the DPS other than a few detections in Prairie Creek Redwoods State Park (PCRSP). At the time of publication of the proposed rule (October 9, 2018), there were two detections in PCRSP, with three additional detections since that time. We decided to not include these detections within the northern coastal California population because they were separated from the extant populations by more than 5 kilometers and there were only two

individuals at the time of publication of the proposed rule (October 9, 2018) (see section 4.2 of the SSA report for further explanation of extant population areas [EPAs]). We have determined that the increase in detections to five is still an insignificant number and thus we still do not include them in our analysis of the status of this population. The information in our SSA report was peer reviewed by knowledgeable species experts. These experts agreed with our characterizations of populations and distribution, and concurred with our determination of the species' DPS, which coincides with a subspecies determination for the taxon. The commenters did not provide any substantial information to support their comments regarding population size and distribution.

#### Predation and Competition

*Comment 48:* Four commenters questioned our statement in the proposed rule (83 FR 50574, 50577, October 9, 2018) that predation of martens has increased due to changes in forest composition. In the absence of historical and empirical data indicating changes in predation rates, one commenter suggested this should be presented only as a potential hypothesis.

*Our Response:* Data are lacking to definitively conclude that predation of coastal martens in the DPS has increased. Our statement was based on our observation that areas subject to timber harvest are usually more open and provide less cover from predators than areas with higher shrub density, downed logs, and standing snags. We have modified the language in our SSA report and this rule to state that the increase in predation may be linked to changes in forest composition but that this increase may be hypothetical.

*Comment 49:* Three commenters questioned our conclusion in the proposed rule that viability risks to coastal martens, “are primarily related to habitat loss and associated

changes in habitat quality and distribution and include: (1) A decrease in connectivity between populations; and (2) habitat conversion from that suitable for martens to that suitable for generalist predators and competitors, thereby increasing potential interactions and subsequent marten injury, mortality, or predation. The factors are all influenced by vegetation management, wildfire, and changing climate” (83 FR at 50577, October 9, 2018). The commenters believe that we phrased these conclusions as factual when there is uncertainty around a decrease in connectivity, an increase in bobcats associated with changes in forest composition, whether bobcats are the predominant coastal marten predators across the coastal marten’s range, whether bobcats prefer stands less than 30 years old, and what constitutes coastal marten habitat. The commenters also stated that the Service should not rely on an inference drawn from mortality observations on a small coastal marten population without any control or historical point of reference to support a conclusion that vegetation management leads to predation that is a relatively worse threat to the coastal marten than would otherwise exist.

*Our Response:* Regarding population connectivity, the commenters did not provide any information to support their statements on population connectivity for coastal martens. However, based on Zielinski *et al.* 2001 (p. 486), we have concluded that the coastal martens’ historical range has been reduced. This research indicates that the species has been extirpated from a significant part of its range and that coastal martens may be sensitive to forest fragmentation, given marten sensitivity elsewhere in North America. Based on this information, survey efforts, and habitat modeling, we conclude that connectivity between coastal marten populations has been reduced, especially between Oregon populations, limiting the species’ overall resiliency.

Regarding statements relating to predators and increased predation, some of the commenters provided technical information regarding the other uncertainties around the influence of vegetation management on predators, and their subsequent effect on coastal martens. Although the commenters raised concerns with the local, unpublished works that indicated bobcats are the primary coastal marten predator and are associated with younger forests, our suggestion that increased forest fragmentation or reduced canopy cover increases predation risk by coastal martens is consistent with marten research elsewhere in North America (as cited in Service 2019, pp. 43–44, or as provided by the commenter [e.g., Joyce 2018, p. 126]). Moreover, the commenters provided no information to the contrary. Regardless, we have revised our description regarding the certainty of predation and its potential increase within the SSA report and this final rule to clarify that it is difficult to determine at this time if the rate of predation on marten has increased compared to historical levels and that further information is needed to determine if predation is increasing and how predation rates correspond to habitat fragmentation.

#### Significant Portion of the Range

*Comment 50:* One commenter stated the Service erred in failing to evaluate whether the coastal marten is endangered in a significant portion of its range. They postulated that by not doing this evaluation, the Service violated the Act and the decision to list as threatened is arbitrary and capricious. The commenter stated that the Service’s position that a “significant portion of the range” analysis is not warranted because the coastal marten already qualified for listing contradicts the letter and intent of Congress

and the Act. Hence, the commenter believes the Service must complete a significant portion of the range analysis.

*Our Response:* Under the Act and our implementing regulations, a species may warrant listing if it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. The court in *Center for Biological Diversity v. Everson*, 2020 WL 437289 (D.D.C. Jan. 28, 2020), vacated the aspect of the 2014 Significant Portion of its Range Policy that provided that the Services do not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range. Therefore, we evaluated whether the coastal marten is endangered in a significant portion of its range—that is, whether there is any portion of the species' range for which both (1) the portion is significant; and, (2) the species is in danger of extinction in that portion. See *Status Throughout a Significant Portion of Its Range*.

*Comment 51:* One commenter stated that Humboldt [coastal] martens are in danger of extinction in the central coastal Oregon population area, that this constitutes a significant portion of their range, and thus the species should be listed rangewide as endangered. They believe this population is significant, surviving in a unique ecological setting of shrubby shore pine habitat, and represents the northernmost extent of the species' range. They state that the species is at risk of extinction, threatened by trapping, vehicle mortality, small population size, population isolation, stochastic events, and impending habitat loss due to restoration activities in the Oregon Dunes NRA. The commenter states that researchers (Linnell *et al.* 2018) concluded that the population has as much as a 99 percent risk of extirpation within 30 years with two to three annual

human-caused mortalities. In addition, the commenter stated that the SSA report demonstrates the population is not only significant, but also gravely endangered, given that all three future scenarios result in the population remaining in a low resiliency condition. Hence, the commenter believe the coastal marten should be listed as endangered rangewide because it is endangered in a significant portion of its range in central coastal Oregon. The commenter went on to apply much of the same rationale for listing as endangered in the rest of Oregon and California citing additional loss from logging, wildfire, and rodenticides. Further, the commenter stated that the CDFW concluded that some of these similar threats were the basis for their determination listing the species as endangered in the State under CESA. As a result, the commenter concluded that the coastal marten should be listed as endangered rangewide.

*Our Response:* The commenter does not present any new information regarding the timing or severity of threats facing the coastal marten which we have not already considered in our current threatened determination. We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the coastal marten. 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 “which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” A thorough analysis and discussion of the threats that may impact the coastal marten are included in the final SSA report (Service 2019, entire) associated with this document, and we applied those threats to the statutory listing criteria to which they apply. We considered whether the coastal marten is presently in danger of extinction and determined

that proposing endangered status is not appropriate. While threats are currently acting on the species and many of those threats are expected to continue into the future, we did not find that the species is currently in danger of extinction throughout all of its range. With four populations occurring across the range of the species, the current condition of the species still provides for enough resiliency, redundancy, and representation such that it is not currently in danger of extinction but may become so in the future. Furthermore, we considered whether the species was in danger of extinction throughout a significant portion of its range, and determined that it is not because the threats acting on the species were uniform and there were no concentration of threats leading us to believe that any one area may be endangered. See *Comment 40*, above, for additional response.

#### Species Status Assessment

*Comment 52:* One Board of County Commissioner pointed out discrepancies between version 1.1 of the coastal marten SSA report and version 2.0 of the SSA report, stating that there was no reasoned explanation provided for the “rushed amendments” to the SSA report within the span of a month. They stated the SSA report process should be a much more open and public process. They considered the revisions and additions “hasty” and believed the changes were arbitrary and capricious.

*Our Response:* Our SSA report is the biological document upon which our listing determination is based. Species status assessments are peer-reviewed, as well as reviewed by technical experts and our State, Federal, and Tribal partners. Changes between version 1.1 and version 2.0 of the coastal marten SSA report were mainly reflective of substantive comments from our peer reviewers, technical experts, and government partner reviewers. We further solicited public comment on the SSA report when the

proposed listing determination was published in the *Federal Register* (83 FR 50574; October 9, 2018), and we incorporated substantive comments in the 2019 version of the SSA report (Service 2019, entire).

### **Determination of Coastal Marten Status**

Section 4 of the Act (16 U.S.C. 1533) and its implementing regulations (50 CFR part 424) set forth the procedures for determining whether a species meets the definition of “endangered species” or “threatened species.” The Act defines an “endangered species” as a species that is “in danger of extinction throughout all or a significant portion of its range,” and a “threatened species” as a species that is “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” The Act requires that we determine whether a species meets the definition of “endangered species” or “threatened species” because of any of the following factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence.

In determining whether a species meets the definition of an endangered or threatened species, we must evaluate all identified threats by considering the expected response by the species, and the effects of the threats—in light of those actions and conditions that will ameliorate the threats—on an individual, population, and species level. We evaluate each threat and its expected effects on the species, then analyze the cumulative effect of all of the threats on the species as a whole. We also consider the cumulative effect of the threats in light of those actions and conditions that will have

positive effects on the species, such as any existing regulatory mechanisms or conservation efforts.

In conducting our status assessment of the coastal marten, we evaluated all identified threats under the section 4(a)(1) factors and assessed how the cumulative impact of all threats combined are acting on the viability of the coastal marten as a whole. We used the best available information as summarized in our Draft SSA and Final SSA reports, information received from peer review and comments on the 2018 proposed listing rule (83 FR 50574), as well as our most recent analysis summarized herein to gauge the magnitude of each individual threat on the coastal marten. We then assessed how those effects combined and may be ameliorated by any existing regulatory mechanisms or conservation efforts and how that will impact the coastal marten's future viability. This included effects from both habitat-based and direct mortality-based threats and what those combined effects will mean to the future condition of the DPS. Depending on the scope and degree of each of the threats and how they cumulatively combine, these threats can be of particular concern where populations are small and isolated, as is the case for the coastal marten.

The loss of habitat and habitat patch size in the future across the range of the coastal marten is exposing coastal martens to increased threats from direct mortality and decreased habitat availability and increased fragmentation, resulting in low resiliency and reduced viability for the coastal marten as a whole. Based on our analysis, we find the cumulative impact of all identified threats on the coastal marten, especially habitat loss and fragmentation due to high-severity wildfire (Factor A) and vegetation management (Factor A) (noting that the threats are exacerbated by changing climate

conditions and thus also play a role under Factor E), will act upon the coastal marten to such a degree that the DPS is likely to become endangered in the foreseeable future. The existing regulatory mechanisms (Factor D) and current conservation efforts are not addressing these threats to the level that will likely preclude the coastal marten from becoming an endangered species in the foreseeable future.

### *Status Evaluation*

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats to the coastal marten. A thorough analysis and discussion of the threats that are affecting the coastal marten are included in the final SSA report (Service 2019, entire) associated with this document.

A large proportion of the area where coastal marten occurs is on Federal or State land that has various regulatory mechanisms in place to manage forested habitat (Factor D). However, coastal marten populations continue to be small and isolated, and habitat connecting populations is often degraded or fragmented despite regulatory mechanisms in place for forestry management practices in both California and Oregon. The current status of coastal marten habitat is, in part, an artifact of silvicultural practices and wildfires that reset the successional forest stage and structure favoring early successional habitat components which may lack the appropriate cover or structure preferred by the coastal marten for foraging, resting, or denning. The late-successional associated structures or habitat preferred by coastal martens will most likely require several decades of appropriate forest and species management to reduce habitat fragmentation, increase population numbers and distribution, and achieve the forest structure that will assist in restoring the natural ecology of this ecosystem for this species and connect the existing

fragmented habitats. Although the coastal marten can use and cross areas of lesser habitat value (containing less cover and structure) within these fragmented habitats, the management prescriptions provided through the various regulatory mechanisms are, in some instances, not likely alleviating or addressing the future threat of continued habitat loss, habitat fragmentation, or disturbance from wildfire to coastal marten. Remedies to address such impacts are multi-decadal, are not logistically easy to implement, may be expensive to address, and may meet social resistance. Therefore, we have determined that, while existing regulatory mechanisms enable land managers within the DPS to ameliorate to some extent the identified threats to the coastal marten, the existing regulatory mechanisms, although being implemented as designed, do not completely address the identified threats to adversely impact habitat for the coastal marten. As a result, we do not consider that the regulatory mechanisms in place, in and of themselves, alleviate the need for listing the coastal marten as a threatened species.

During the public comment period for the proposed rule (83 FR 50574; October 9, 2018), we received comments from the public stating that the coastal marten should receive an endangered status determination, based on the timing and magnitude of threats facing the coastal marten. The DPS does not meet the Act's definition of an endangered species. The current conditions of the coastal marten, as assessed in the SSA report, show extant coastal marten populations in four areas (EPAs) across its range, including large areas of occupied habitat in Oregon and California. The best available data do not indicate a declining trend in abundance, and it is likely that the low abundance (and, therefore, low resiliency) indicated in our analysis is partly due to the species being difficult to detect. While threats are currently acting on the species and many of those

threats are expected to continue into the future, with four populations occurring across the range of the species, the current condition of the coastal marten still provides for enough resiliency, redundancy, and representation such that it is not currently in danger of extinction. Therefore, we do not find that the species meets the definition of an endangered species under the Act. Our analysis and determination on whether the coastal marten meets the definition of a threatened species is outlined below. A threatened species is any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

#### *Foreseeable Future*

In order to determine if the coastal marten is a threatened species under the Act, we must first determine what the foreseeable future timeframe is for the species. The term foreseeable future extends only so far into the future as we can reasonably determine that both the future threats and the marten's responses to those threats are likely according to 50 C.F.R. 424.11(d). As stated above, the coastal marten faces a variety of threats including loss of habitat, wildfire, and increased predation risk (see **Summary of Biological Status and Threats**). These threats play a large role in the coastal marten's resiliency and future viability. Future conditions and future threat analysis is particularly challenging for the coastal marten, because one of the major threats facing the species and its habitat (wildfire) is unpredictable as to exactly when it may occur and to what extent it may impact the species. In addition, the timeframe of regeneration of habitat of the appropriate age class and structure needed for the coastal marten after a wildfire or habitat removal can be decadal in nature. In our SSA, we identified several timeframes based on the information available on threats and future habitat and environmental

conditions for the species. Our future scenario analysis forecast the likely coastal marten viability over the next 15, 30, and 60 years, depending on the threat and information available about its future condition and impacts (see Future Condition, Service 2019, pp. 97–109). In cases where future trends in threats were not available, we looked to past frequency and severity of the threat and projected that into the future. As a result, based on the information available on potential future conditions, we selected the extent of the foreseeable future for the coastal marten to be approximately 60 years. This timeframe allows for multiple generations of coastal marten to occur and accounts for some development and reestablishment of appropriate structural habitat conditions and takes into consideration wildfire return intervals. Looking out past this time period, the predictability of threats (especially wildfire) would lose their capacity to be meaningful.

Estimates of future resiliency, redundancy, and representation for the coastal marten are low. As discussed in detail in the SSA report, the species faces a variety of threats including loss and fragmentation of habitat (Factor A) due to wildfire, timber harvest, and vegetation management. In addition, collisions with vehicles (Factor E) and rodenticides (Factor E) are all impacting coastal marten individuals, and the threat of disease (Factor C) carries the risk of further reducing populations. Changes in vegetation composition and distribution from large-scale wildfire and timber harvest activities may also make coastal martens more susceptible to predation (Factor C) from larger carnivores. These threats, which are expected to be exacerbated by the species' small and isolated populations (Factor E) and the effects of climate change (Factor E), were central to our assessment of the future viability of the coastal marten. In our analysis of the factors affecting this species, we found no evidence that the existing regulatory

mechanisms (Factor D) are contributing to declines in the species' status, nor do they alleviate the need for listing.

Given current and future decreases in resiliency, populations will become more vulnerable to extirpation from stochastic events, in turn, resulting in concurrent losses in representation and redundancy. All three scenarios presented in the SSA report as representative of plausible future scenarios create conditions where the coastal marten would not have enough resiliency, redundancy, or representation to sustain populations over time. While determining the probability of each scenario was not possible with the available data, the entire range of future risk revealed by the three plausible scenarios showed that the species would likely continue to lose resiliency, redundancy, and representation throughout its range in all scenarios.

#### *Status Throughout All of Its Range*

After evaluating threats to the species and assessing the cumulative effect of the threats under the section 4(a)(1) factors, we have found that the loss of habitat, threats to individuals, and lack of connectivity between populations will continue to impact the coastal marten despite conservation efforts. Further, the population and habitat factors used to determine the resiliency, representation, and redundancy for coastal marten will continue to decline into the future. Thus, after assessing the best available information, we conclude that the coastal marten is not currently in danger of extinction, but is likely to become in danger of extinction within the foreseeable future throughout all of its range.

#### *Status Throughout a Significant Portion of Its Range*

Under the Act and our implementing regulations, a species may warrant listing if

it is in danger of extinction or likely to become so in the foreseeable future throughout all or a significant portion of its range. The court in *Center for Biological Diversity v. Everson*, 2020 WL 437289 (D.D.C. Jan. 28, 2020) (*Everson*), vacated the aspect of the 2014 Significant Portion of its Range Policy that provided that the Services do not undertake an analysis of significant portions of a species' range if the species warrants listing as threatened throughout all of its range. Therefore, we proceed to evaluating whether the species is endangered in a significant portion of its range—that is, whether there is any portion of the species' range for which both (1) the portion is significant; and, (2) the species is in danger of extinction in that portion. Depending on the case, it might be more efficient for us to address the “significance” question or the “status” question first. We can choose to address either question first. Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.

Following the court's holding in *Everson*, we now consider whether there are any significant portions of the species' range where the species is in danger of extinction now (i.e., endangered). In undertaking this analysis for the coastal marten, we choose to address the status question first—we consider information pertaining to the geographic distribution of both the species and the threats that the species faces to identify any portions of the range where the species is endangered.

For the coastal marten, we considered whether the threats are geographically concentrated in any portion of the species' range at a biologically meaningful scale. The threats, which are discussed further in the SSA report, include: loss of habitat and

modification due to wildfire, timber harvest, and vegetation management (Factor A); trapping (Factor B); disease and predation (Factor C); collisions with vehicles (Factor E); rodenticides (Factor E); and the effects of climate change (Factor E). These threats are expected to be exacerbated by the species' small and isolated populations (Factor E). These threats, including their cumulative effects, were central to our assessment of the future viability of the coastal marten. From the threats facing the coastal marten, we have determined that habitat loss and modification, predation, and the effects of climate change in the context of having small and isolated populations are the driving threats leading to the species' threatened status. These threats can have large impacts on habitat availability and condition and lead to direct or indirect impacts on the species. Distribution of these threats is, for the most part, uniform across the known populations. We found no concentration of threats in any portion of the coastal marten's range at a biologically meaningful scale. Thus, there are no portions of the species' range where the species has a different status from its rangewide status. Therefore, no portion of the species' range provides a basis for determining that the species is in danger of extinction in a significant portion of its range, and we determine that the species is likely to become in danger of extinction within the foreseeable future throughout all of its range. This is consistent with the courts' holdings in *Desert Survivors v. Department of the Interior*, No. 16-cv-01165-JCS, 2018 WL 4053447 (N.D. Cal. Aug. 24, 2018), and *Center for Biological Diversity v. Jewell*, 248 F. Supp. 3d , 946, 959 (D. Ariz. 2017).

#### *Determination of Status*

Our review of the best scientific and commercial information available indicates that the coastal DPS of the Pacific marten meets the Act's definition of a threatened

species. Therefore, we are listing the coastal DPS of the Pacific marten as a threatened species in accordance with sections 3(20) and 4(a)(1) of the Act.

### **Available Conservation Measures**

Conservation measures provided to species listed as endangered or threatened species under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing results in public awareness, and conservation by Federal, State, Tribal, and local agencies, private organizations, and individuals. The Act encourages cooperation with the States and other countries and calls for recovery actions to be carried out for listed species. The protection required by Federal agencies and the prohibitions against certain activities are discussed, in part, below.

The primary purpose of the Act is the conservation of endangered and threatened species and the ecosystems upon which they depend. The ultimate goal of such conservation efforts is the recovery of these listed species, so that they no longer need the protective measures of the Act. Subsection 4(f) of the Act calls for the Service to develop and implement recovery plans for the conservation of endangered and threatened species. The recovery planning process involves the identification of actions that are necessary to halt or reverse the species' decline by addressing the threats to its survival and recovery. The goal of this process is to restore listed species to a point where they are secure, self-sustaining, and functioning components of their ecosystems.

Recovery planning consists of preparing draft and final recovery plans, beginning with the development of a recovery outline and making it available to the public within 30 days of a final listing determination. The recovery outline guides the immediate

implementation of urgent recovery actions and describes the process to be used to develop a recovery plan. Revisions of the plan may be done to address continuing or new threats to the species, as new substantive information becomes available. The recovery plan also identifies recovery criteria for review of when a species may be ready for reclassification from endangered to threatened (“downlisting”) or removal from protected status (“delisting”), and methods for monitoring recovery progress. Recovery plans also establish a framework for agencies to coordinate their recovery efforts and provide estimates of the cost of implementing recovery tasks. Recovery teams (composed of species experts, Federal and State agencies, nongovernmental organizations, and stakeholders) are often established to develop recovery plans. When completed, the recovery outline, draft recovery plan, and the final recovery plan will be available on our website (<http://www.fws.gov/endangered>).

Implementation of recovery actions generally requires the participation of a broad range of partners, including other Federal agencies, States, Tribes, nongovernmental organizations, businesses, and private landowners. Examples of recovery actions include habitat restoration (e.g., restoration of native vegetation), research, captive propagation and reintroduction, and outreach and education. The recovery of many listed species cannot be accomplished solely on Federal lands because their range may occur primarily or solely on non-Federal lands. To achieve recovery of these species requires cooperative conservation efforts on private, State, and Tribal lands.

Following publication of this final rule, funding for recovery actions will be available from a variety of sources, including Federal budgets, State programs, and cost share grants for non-Federal landowners, the academic community, and nongovernmental

organizations. In addition, pursuant to section 6 of the Act, the States of California and Oregon will be eligible for Federal funds to implement management actions that promote the protection or recovery of the coastal marten. Information on our grant programs that are available to aid species recovery can be found at: <http://www.fws.gov/grants>.

Please let us know if you are interested in participating in recovery efforts for this species. Additionally, we invite you to submit any new information on this species whenever it becomes available and any information you may have for recovery planning purposes (see **FOR FURTHER INFORMATION CONTACT**, above).

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is listed as an endangered or threatened species and with respect to its critical habitat, if any is designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with the Service.

Several Federal agency actions that occur within the species' habitat may require consultation as described in the preceding paragraph. These actions include management and any other landscape-altering activities on lands administered by the Service and the Department of the Interior's Bureau of Indian Affairs, Bureau of Land Management, and National Park Service and the Department of Agriculture's U.S. Forest Service; issuance of section 404 Clean Water Act (33 U.S.C. 1251 et seq.) permits by the U.S. Army Corps

of Engineers; and construction and maintenance of roads or highways by the Department of Transportation's Federal Highway Administration or the California Department of Transportation or Oregon Department of Transportation.

It is our policy, as published in the *Federal Register* on July 1, 1994 (59 FR 34272), to identify to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of a final listing on proposed and ongoing activities within the range of a listed species. The discussion below regarding protective regulations under section 4(d) of the Act complies with our policy.

## **II. Final Rule Issued Under Section 4(d) of the Act**

### **Background**

Section 4(d) of the Act contains two sentences. The first sentence states that the "Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation" of species listed as threatened. The U.S. Supreme Court has noted that statutory language like "necessary and advisable" demonstrates a large degree of deference to the agency (see *Webster v. Doe*, 486 U.S. 592 (1988)). Conservation is defined in the Act to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary." Additionally, the second sentence of section 4(d) of the Act states that the Secretary "may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants." Thus, the combination of the two sentences of section 4(d) provides the Secretary with wide latitude of discretion to

select and promulgate appropriate regulations tailored to the specific conservation needs of the threatened species. The second sentence grants particularly broad discretion to the Service when adopting the prohibitions under section 9.

The courts have recognized the extent of the Secretary's discretion under this standard to develop rules that are appropriate for the conservation of a species. For example, courts have upheld rules developed under section 4(d) as a valid exercise of agency authority where they prohibited take of threatened wildlife, or include a limited taking prohibition (see *Alsea Valley Alliance v. Lautenbacher*, 2007 U.S. Dist. Lexis 60203 (D. Or. 2007); *Washington Environmental Council v. National Marine Fisheries Service*, 2002 U.S. Dist. Lexis 5432 (W.D. Wash. 2002)). Courts have also upheld 4(d) rules that do not address all of the threats a species faces (see *State of Louisiana v. Verity*, 853 F.2d 322 (5th Cir. 1988)). As noted in the legislative history when the Act was initially enacted, "once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species, or he may choose to forbid both taking and importation but allow the transportation of such species" (H.R. Rep. No. 412, 93rd Cong., 1st Sess. 1973).

Exercising its authority under section 4(d), the Service has developed a rule that is designed to address the coastal marten's specific threats and conservation needs. Although the statute does not require the Service to make a "necessary and advisable" finding with respect to the adoption of specific prohibitions under section 9, we find that this rule as a whole satisfies the requirement in section 4(d) of the Act to issue regulations deemed necessary and advisable to provide for the conservation of the coastal marten. As

discussed above under **Summary of Biological Status and Threats**, the Service has concluded that the coastal marten is likely to become in danger of extinction within the foreseeable future primarily due to habitat loss (including fragmentation) and associated changes in habitat quality and distribution. Under this 4(d) rule for the coastal marten, except as described and explained below, all prohibitions and provisions that apply to endangered wildlife under section 9(a)(1) of the Act will apply to the coastal marten. Applying these section 9(a)(1) prohibitions will help minimize threats that could cause further declines in the status of the species. The provisions of this 4(d) rule will promote conservation of the coastal marten by encouraging management of the landscape in ways that meet both land management considerations and the conservation needs of the DPS. The provisions of this rule are one of many tools that the Service will use to promote the conservation of the coastal marten.

#### **Provisions of the 4(d) Rule**

This 4(d) rule will provide for the conservation of the coastal marten by prohibiting the following activities, except as otherwise authorized or permitted: import or export; take; possession and other acts with unlawfully taken specimens; delivery, receipt, transportation, or shipment in interstate or foreign commerce in the course of commercial activity; or sale or offer for sale in interstate or foreign commerce. These prohibitions mimic those prohibitions afforded to endangered species under section 9(a)(1) of the Act.

In addition to the prohibited activities identified above, we also provide for exceptions to those prohibitions for certain activities as described below.

We note that the long-term viability of the coastal marten, as with many wildlife species, is intimately tied to the condition of its habitat. As described in our analysis of the species' status, one of the primary driving threats to the coastal marten's continued viability is the destruction of its habitat from catastrophic wildfires. The potential for an increase in frequency and severity of these catastrophic wildfires from the effects of climate change subsequently increases the risk to the species posed by this threat. We have determined that actions taken by forest management entities in the range of the coastal marten for the purpose of reducing the risk or severity of catastrophic wildfires, even if these actions may result in some short-term or small level of localized negative effect to coastal martens, will further the goal of reducing the likelihood of the species from becoming an endangered species, and will also likely contribute to its conservation and long-term viability. Therefore, these actions are excepted from the section 9(a)(1) prohibitions.

We also recognize that there are other actions undertaken by forest management entities, such as the CDFW under the authority of the CESA, where the intended purpose of the action is not the reduction of catastrophic wildfire risk, but to improve overall habitat conditions for coastal marten. We realize that these actions may also result in some short-term or small level of localized negative effects to coastal martens or their habitat. However, we acknowledge that these types of actions are often undertaken through inclusion in NCCPs or State SHAs, which are approved by the CDFW under the authority of the CESA, and that these plans and agreements address identified effects to the coastal marten (a CESA-listed species). We have determined that actions under such State approved plans or agreements will adequately reduce or offset any negative effects

to the coastal marten so that they will not result in a further decline of the species; therefore, we are excepting them from the section 9(a)(1) prohibitions in the 4(d) rule.

In addition, we note that there are activities undertaken by forest management entities that are consistent with the conservation needs of coastal marten and include activities consistent with finalized conservation plans, or strategies for the coastal marten and for which the Service has explicitly determined that meeting such plans or strategies, or portions thereof, would be consistent with the conservation needs of the coastal marten. While we recognize the potential that these types of actions may result in some small level of localized disturbance or temporary negative effects to coastal martens or their habitat, these conservation efforts will improve overall habitat conditions or contribute to the species' overall long-term viability and we have excepted them from section 9(a)(1) prohibitions in the 4(d) rule.

Toxicants, especially anticoagulant rodenticides, are recognized as a threat to the closely related fisher, and have been detected in coastal martens and other non-target predators within the historical range of the coastal marten. Illegal cannabis cultivation sites are considered a likely source. When these sites are found, they often require reclamation (waste cleanup and removal of fertilizers, pesticides, and other chemicals that were left behind). Cleanup of these sites may involve activities that may cause localized, short-term disturbance to coastal martens (e.g., helicopters or off-road vehicles), as well as potential removal of some habitat structures valuable to coastal martens (e.g., removal of hazard trees that may be a suitable den site in order to allow helicopter access). However, the removal of known rodenticides and other chemicals that can have long-term effects on coastal martens, their prey, and the surrounding

environment is encouraged and is considered to have a long-term beneficial contribution to coastal marten resiliency. Hence, short-term disturbances or small-scale habitat loss associated with rodenticide removal are excepted from the section 9(a)(1) prohibitions in the 4(d) rule.

We recognize the special and unique relationship with our State natural resource agency partners in contributing to conservation of listed species. State agencies often possess scientific data and valuable expertise on the status and distribution of endangered, threatened, and candidate species of wildlife and plants. State agencies, because of their authorities and their close working relationships with local governments and landowners, are in a unique position to assist the Services in implementing all aspects of the Act. In this regard, section 6 of the Act provides that the Services shall cooperate to the maximum extent practicable with the States in carrying out programs authorized by the Act. Therefore, any qualified employee or agent of a State conservation agency that is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, will be able to conduct activities designed to conserve the coastal marten that may result in otherwise prohibited take without additional authorization.

Under the Act, “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Some of these provisions have been further defined in regulation at 50 CFR 17.3. Take can result knowingly or otherwise, by direct and indirect impacts, intentionally or incidentally.

We may issue permits to carry out otherwise prohibited activities, including those described above, involving threatened wildlife under certain circumstances. Regulations

governing permits are codified at 50 CFR 17.32. With regard to threatened wildlife, a permit may be issued for the following purposes: for scientific purposes, to enhance propagation or survival, for economic hardship, for zoological exhibition, for educational purposes, for incidental taking, or for special purposes consistent with the purposes of the Act. There are also certain statutory exemptions from the prohibitions, which are found in sections 9 and 10 of the Act.

Therefore, as explained above, we are issuing protective regulations under section 4(d) of the Act, in which all the prohibitions and provisions that apply to endangered wildlife under section 9(a)(1) of the Act, with the exceptions outlined below, apply to the coastal marten:

(1) Activities which are conducted in accordance with a permit issued by the Service under 50 CFR 17.32. These include actions for one of the following purposes: Scientific purposes, or the enhancement of propagation or survival, or economic hardship, or zoological exhibition, or educational purposes, or incidental taking, or special purposes consistent with the purposes of the Act. Such permits may authorize a single transaction, a series of transactions, or a number of activities over a specific period of time.

(2) Forest management activities for the purposes of reducing the risk or severity of wildfire. These activities may include fuels reduction projects, firebreaks, and wildfire firefighting activities. Fuels reduction projects include forest management practices such as those that treat vertical and horizontal (ladder) fuels in an effort to reduce continuity between understory and the overstory vegetation and the potential for crown fires, removal of fuels within 150 feet of legally permitted structures and within 300 feet of

habitable structures, or implementation of Fuelbreak/Defensible Space Prescriptions which allow for removal of trees or other vegetation to create a shaded fuelbreak along roads or other natural features, or create defensible space.

(3) Forestry management activities included in a plan or agreement for lands covered by a Natural Communities Conservation Plan or State Safe Harbor Agreement that addresses and authorizes State take of coastal marten as a covered species and is approved by the California Department of Fish and Wildlife under the authority of the California Endangered Species Act.

(4) Forestry management activities, approved by the Service, under finalized conservation plans or strategies, that are consistent with the conservation needs of the coastal marten (includes activities that promote, retain, or restore suitable coastal marten habitat, increase percent canopy cover, increase percent ericaceous shrub cover, and denning and resting structures). These activities must be consistent with conservation plans or strategies which identify coastal marten conservation prescriptions or compliance and for which the Service has determined that meeting such plans or strategies, or portions thereof, would be consistent with conservation of the coastal marten.

(5) Activities to remove toxicants and other chemicals consistent with conservation strategies for coastal marten. Such activities include management or cleanup activities that remove toxicants and other chemicals from forested areas, for which the Service has determined that such activities to remove toxicants and other chemicals would be consistent with conservation strategies for coastal marten. Cleanup of these sites may involve activities that may cause localized, short-term disturbance to coastal

martens, as well as require limited removal of some habitat structures valuable to coastal martens (e.g., hazard trees that may be a suitable den site).

(6) Activities conducted by any qualified employee or agent of a State conservation agency which is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by his or her agency for such purposes, and who will be able to conduct activities designed to conserve the coastal marten that may result in otherwise prohibited take for wildlife without additional authorization.

While we are providing these exceptions to the prohibitions and provisions of section 9(a)(1), we clarify that all Federal agencies (including the Service) that fund, permit, or carry out the activities described above will still need to ensure, in consultation with the Service (including intra-Service consultation when appropriate), that the activities are not likely to jeopardize the continued existence of the species. Private entities who undertake any actions other than those described in the exceptions above that may result in adverse effects to the coastal marten, when there is no associated Federal nexus to the action, may wish to seek an incidental take permit from the Service before proceeding with the activity.

Nothing in this 4(d) rule will change in any way the recovery planning provisions of section 4(f) of the Act, the consultation requirements under section 7 of the Act, or the ability of the Service to enter into partnerships for the management and protection of the coastal marten. However, interagency cooperation may be further streamlined through planned programmatic consultations for the species between Federal agencies and the Service.

### **III. Critical Habitat Prudence and Determinability**

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12), require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. In this final rule, we affirm the determinations we made in our October 9, 2018, proposed rule (83 FR 50574) concerning the prudence and determinability of critical habitat for the coastal marten. In our proposed rule, we found that designating critical habitat for the coastal marten may be prudent, but that a designation was not determinable at that time because information sufficient to perform a required analysis of the impacts of the designation was lacking. We continue to develop a careful assessment of the economic impacts that may occur due to a critical habitat designation and to work with the States and other partners in acquiring the complex information needed to perform that assessment. At this time, however, the information sufficient to perform a required analysis is incomplete, and, therefore, we find designation of critical habitat for the coastal marten to be not determinable at this time. When we have completed our assessment, we will publish in the *Federal Register* a proposed rule to designate critical habitat for the coastal marten and solicit public comments on that proposal.

#### **Required Determinations**

*National Environmental Policy Act (42 U.S.C. 4321 et seq.)*

We have determined that environmental assessments and environmental impact statements, as defined under the authority of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), need not be prepared in connection with listing a species

as an endangered or threatened species under the Endangered Species Act. We published a notice outlining our reasons for this determination in the *Federal Register* on October 25, 1983 (48 FR 49244).

*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 (Consultation and Coordination With Indian Tribal Governments), 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 accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. In development of the SSA report, we sent letters noting our intent to conduct a status review and requested information from all tribal entities within the historical range of the coastal marten, as well as providing a draft SSA report to the tribes for review. The tribes within the range of the coastal marten include the Yurok Tribe; the Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians; the Coquille Indian Tribe; the Cow Creek Band of Umpqua Tribe of Indians; the Confederated Tribes of Grand Ronde; and the Confederated Tribes of Siletz Indians. As discussed earlier in this rule, we did not receive comments on the October 9, 2018, proposed rule (83 FR 50574) from any tribal entities.

As such, we believe we have fulfilled our relevant responsibilities.

### **References Cited**

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

### **Authors**

The primary authors of this final rule are the staff members of the Fish and Wildlife Service's Species Assessment Team, the Arcata Fish and Wildlife Office, and the Oregon Fish and Wildlife Office.

### **List of Subjects in 50 CFR Part 17**

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

### **Regulation Promulgation**

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

#### **PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS**

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

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

2. Amend § 17.11(h) by adding an entry for “Marten, Pacific [Coastal DPS]” to the List of Endangered and Threatened Wildlife in alphabetical order under MAMMALS to read as set forth below:

**§ 17.11 Endangered and threatened wildlife.**

\* \* \* \* \*

(h) \* \* \*

Common name	Scientific name	Where listed	Status	Listing citations and applicable rules
MAMMALS				
* * * * *				
Marten, Pacific [Coastal DPS]	<i>Martes caurina</i>	U.S.A. (CA (northwestern), OR (southwestern)).	T	85 FR [Insert <i>Federal Register</i> page where the document begins], [Insert date of publication in the <i>Federal Register</i> ]; 50 CFR 17.40(s). <sup>4d</sup>
* * * * *				

3. Amend § 17.40 by adding a paragraph (s) to read as set forth below:

**§ 17.40 Special rules—mammals.**

\* \* \* \* \*

(s) Pacific marten (*Martes caurina*), Coastal DPS.

(1) *Prohibitions.* Except as provided in paragraph (s)(2) of this section, all prohibitions and provisions of section 9(a)(1) of the Act apply to the Coastal DPS of the Pacific marten.

(2) *Exceptions from prohibitions.* In regard to the Coastal DPS of the Pacific marten (“coastal marten”), you may:

- (i) Conduct activities as authorized by a permit under § 17.32.
- (ii) Take as set forth at § 17.21(c)(2) through (c)(4) for endangered wildlife.
- (iii) Take as set forth at § 17.31(b).
- (iv) Conduct forest management activities for the purposes of reducing the risk

or severity of wildfire, which include fuels reduction projects, firebreaks, and wildfire

firefighting activities. More specifically, forest management practices such as those that treat vertical and horizontal (ladder) fuels in an effort to reduce continuity between understory and the overstory vegetation and the potential for crown fires, remove fuels within 150 feet of legally permitted structures and within 300 feet of habitable structures, or implement Fuelbreak/Defensible Space Prescriptions that allow for removal of trees or other vegetation to create a shaded fuelbreak along roads or other natural features, or create defensible space.

(v) Conduct forestry management activities included in a plan or agreement for lands covered by a Natural Communities Conservation Plan or State Safe Harbor Agreement that addresses and authorizes State take of coastal marten as a covered species and is approved by the California Department of Fish and Wildlife under the authority of the California Endangered Species Act.

(vi) Conduct forestry management activities consistent with the conservation needs of the coastal marten (e.g., activities that promote, retain, or restore suitable coastal marten habitat that increase percent canopy cover, percent ericaceous shrub cover, and denning and resting structures). These include activities consistent with finalized conservation plans or strategies, such as plans and documents that include coastal marten conservation prescriptions or compliance, and for which the Service has determined that meeting such plans or strategies, or portions thereof, would be consistent with conservation strategies for coastal marten.

(vii) Conduct activities to remove toxicants and other chemicals consistent with conservation strategies for coastal marten. Such activities include management or cleanup activities that remove toxicants and other chemicals from forested areas, for which the

Service has determined that such activities to remove toxicants and other chemicals would be consistent with conservation strategies for coastal marten. Cleanup of these sites may involve activities that may cause localized, short-term disturbance to coastal martens, as well as require limited removal of some habitat structures valuable to coastal martens (e.g., hazard trees that may be a suitable den site).

Dated: \_\_\_\_\_

\_\_\_\_\_.

**Aurelia Skipwith**

*Director, U.S. Fish and Wildlife Service.*