DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 424

[Docket No. FWS–R9–ES–2011–0073]

[Docket No. NOAA-120606146-2146-01]

[4500030114]

RIN 1018–AY62; 0648–BC24

Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Impact Analyses of Critical Habitat

AGENCIES: Fish and Wildlife Service, Interior; National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the "Services" or "we"), propose to revise our regulations pertaining to impact analyses conducted for designations of critical habitat under the Endangered Species Act of 1973, as amended (the Act). These changes are being proposed as directed by the President's February 28, 2012, memorandum, which directed us to take prompt steps to revise our regulations to provide that the economic analysis be completed and made available for public comment at the time of publication of a proposed rule to designate critical habitat.

DATES: We will accept comments from all interested parties until [Insert date 60 days after date of FEDERAL REGISTER publication]. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on this date.

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

- *Federal eRulemaking Portal: http://www.regulations.gov.* Search for FWS–R9–ES–2011–0073, which is the docket number for this rulemaking.
- *U.S. mail or hand delivery:* Public Comments Processing, Attn: FWS–R9–ES–2011–0073; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, PDM–2042; Arlington, VA 22203.

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

FOR FURTHER INFORMATION CONTACT: Nicole Alt, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 4401 N Fairfax Drive, Suite 420, Arlington, VA, 22203, telephone 703/358–2171; facsimile 703/358–1735; or Marta Nammack, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301/713–1401; facsimile 301/713–0376. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. The Services have decided to revise our regulations to provide the public earlier access to the draft economic analysis supporting critical habitat designations, consistent with the President's memorandum (Memorandum for the Secretary of the Interior, Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens, 77 FR 12985 (March 5, 2012)). The President's February 28, 2012, memorandum directed the Secretary of the Interior to revise the regulations implementing

the Endangered Species Act to provide that a draft economic analysis be completed and made available for public comment at the time of publication of a proposed rule to designate critical habitat. Both transparency and public comment will be improved if the public has access to both the scientific analysis and the draft economic analysis at the same time. We are therefore publishing a proposed rule to achieve that goal and seeking public comments. Because the Act and its implementing regulations are jointly administered by the Departments of the Interior and Commerce, the Secretary of the Interior consulted with the Secretary of Commerce on the revision of this regulation. The proposed revisions would also address several court decisions and are informed by conclusions from a 2008 legal opinion by the Solicitor of the Department of the Interior. Specifically, we propose to revise 50 CFR 424.19 to clarify the instructions for making information available to the public, considering the impacts of critical habitat designations, and considering exclusions from critical habitat. The proposed rule is consistent with Executive Order 13563, and in particular with the requirement of retrospective analysis of existing rules, designed "to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives.

This rule proposes the following changes:

(1) We propose to change the title of § 424.19 from *"Final Rules—impact analysis of critical habitat"* to *"Impact analysis and exclusions from critical habitat."* We propose to remove the current reference to "[f]inal rules" to allow this section to apply to both proposed and final critical habitat rules. We propose to add the term "exclusions" in the title to more fully describe that this section addresses both

impact analyses and how they inform the exclusion process under section 4(b)(2) of the Act for critical habitat.

(2) We propose to divide current § 424.19 into three paragraphs. The division into three paragraphs closely tracks the requirements of the Act under section 4(b)(2) and provides for a clearly defined process for considerations of exclusions as required under the Act.

(3) Proposed paragraph (a) would implement the direction of the President's February 28, 2012, memorandum by stating that, at the time of proposing a designation of critical habitat, the Secretary will make available for public comment the draft economic analysis of the designation. This proposed paragraph also carries over the first half of the first sentence of the existing regulation, with modifications.

(4) Proposed paragraph (b) would implement the first sentence of section 4(b)(2) of the Act, which directs the Secretary to consider the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. This paragraph states that the impact analysis should focus on the incremental effects resulting from the designation of critical habitat.

(5) Proposed paragraph (c) would implement the second sentence of section 4(b)(2) of the Act, which allows the Secretary to exclude areas from the final critical habitat designation under certain circumstances.

Background

The purposes of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq*.) (Act), are to provide a means to conserve the ecosystems upon which listed

species depend, to develop a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions. Moreover, the Act states that it is the policy of Congress that the Federal Government will seek to conserve threatened and endangered species, and use its authorities in furtherance of the purposes of the Act.

In passing the Act, Congress viewed habitat loss as a significant factor contributing to species endangerment. Habitat destruction and degradation have been a contributing factor causing the decline of a majority of species listed as threatened or endangered under the Act (Wilcove *et. al.* 1998). The present or threatened destruction, modification, or curtailment of a species' habitat or range is included in the Act as one of the factors on which to base a determination that a species may be threatened or endangered. One of the tools provided by the Act to conserve species is designation of critical habitat.

Critical habitat represents the habitat necessary for the species' recovery. Once designated, critical habitat provides for the conservation of listed species in several ways. Specifying the geographic location of critical habitat facilitates implementation of section 7(a)(1) of the Act by identifying areas where Federal agencies can focus their conservation programs and use their authorities to further the purposes of the Act. Designating critical habitat also helps focus the efforts of other conservation partners, such as State and local governments, nongovernmental organizations, and individuals. Furthermore, when designation of critical habitat occurs near the time of listing, it provides early conservation planning guidance to bridge the gap until the Services can complete more thorough recovery planning.

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

The Secretaries of the Interior and Commerce (the "Secretaries") share responsibilities for implementing most of the provisions of the Act. Generally, marine and anadromous species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior, though jurisdiction is shared between the two departments for some species, such as sea turtles and Atlantic salmon. Authority to administer the Act has been delegated by the Secretary of the Interior to the Director of the FWS and by the Secretary of Commerce to the Assistant Administrator for NMFS.

This proposed rule addresses two developments related to 50 CFR 424.19. First, the Solicitor of the Department of the Interior issued a legal opinion on October 3, 2008, regarding the Secretary of Interior's authority to exclude areas from critical habitat designation under section 4(b)(2) of the Act (M–37016, "The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act" (Oct. 3, 2008)) (DOI 2008). The Solicitor concluded, among other things, that, while the Act requires the Secretary to consider the economic impact, the impact on national security, and any other relevant impact, the decision whether to make exclusions under section 4(b)(2) of the Act is at the discretion of the Secretary; that the Secretary has wide discretion when weighing the benefits of exclusion against the benefits of inclusion; and that it is appropriate for the Secretary to consider impacts of a critical habitat designation on an incremental basis. The Services have based this proposed rule on the reasoning and conclusions of this opinion and the President's February 28, 2012, memorandum.

Second, the President's February 28, 2012 memorandum that directed the Secretary of the Interior to revise the implementing regulations of the Act to provide that an analysis of the economic impacts of a proposed critical habitat designation be completed by the Services and made available to the public at the time of publication of a proposed rule to designate critical habitat. The memo stated: "Uncertainty on the part of the public may be avoided, and public comment improved, by simultaneous presentation of the best scientific data available and the analysis of economic and other impacts."

Discussion of Proposed Revisions to 50 CFR 424.19

This proposal would revise 50 CFR 424.19 to clarify the instructions for making information available to the public, considering the impacts of critical habitat designations, and considering exclusions from critical habitat.

In proposing the specific changes to the regulations that follow, and setting out the accompanying clarifying discussion in this preamble, the Services are establishing prospective standards only. Nothing in these proposed revised regulations is intended to require (now or at such time as these regulations may become final) that any previously completed critical habitat designation be reevaluated on this basis. Furthermore, if this proposed rule is finalized, we will adopt the requirements of this regulation after the effective date. For proposed critical habitat designations published prior to the effective date of any final regulation, the Services will continue to follow their current practices.

Statutory Authority

The proposed regulatory changes described below derive from sections 4(b)(2) and 4(b)(8) of the Act. For the convenience of the reader, we are reprinting those sections of the Act here:

> (2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion

outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

* * * * *

(8) The publication in the **Federal Register** of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this Act shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.

Definition of Key Terms

Under the first sentence of section 4(b)(2) of the Act, the Services are required to take "into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." This is referred to as the "impact analysis." Under the second sentence of section 4(b)(2) of the Act, the Secretary (via delegated authority to the Services) may exclude an area from critical habitat after identifying and weighing the benefits of inclusion and exclusion. This is referred to as the "weighing of benefits".

An economic analysis is a tool that informs both the required impact analysis and the discretionary weighing of benefits. Additionally, the draft economic analysis informs the determinations established under other statutes, regulations, or directives that are applicable to rulemakings generally, including critical habitat designations. However, the draft economic analysis only addresses the consideration of the potential economic impact of the designation of critical habitat.

An "incremental analysis" is a method of determining the probable impacts of the designation that seeks to identify and focus solely on the impacts over and above those caused by existing protections and is used in the impact analysis, weighing of benefits, and economic analysis.

Relationship of the Key Terms

The purpose of the impact analysis is to inform the Secretary's decision about whether and/or how to consider excluding any particular area from a designation of critical habitat, as authorized by the second sentence of section 4(b)(2) of the Act. Information that is used in the impact analysis can come from a variety of sources, one of which is the draft economic analysis of the proposed designation of critical habitat. The Secretary must consider the probable economic, national security and other relevant impacts of the designation of critical habitat. This comparison is done through the method of an incremental analysis; that is, comparing conditions with and without the designation of critical habitat. The incremental analysis methodology is also used in the economic analysis.

Proposed Revisions to 50 CFR 424.19

We propose to change the title of this section from "Final rules—impact analysis of critical habitat" to "Impact analysis and exclusions from critical habitat." The current reference to "[f]inal rules" would be deleted to allow for the application of this section to both proposed and final critical habitat rules. We propose to add the term "exclusions" to the title to more fully describe that this section addresses both impact analyses and how they inform the exclusion process under section 4(b)(2) of the Act for critical habitat.

In the following text, we frequently refer to the current regulatory language at 50 CFR 424.19 and then give detailed information about how we propose to revise that language. For your convenience, we set out the current text of § 424.19 here:

> The Secretary shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, after proposing designation of such an area, consider the probable economic and other impacts of the designation upon proposed or ongoing activities. The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. The Secretary shall not exclude any such area if, based on the best scientific and commercial data available, he determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

Rationale for the Proposed Paragraph (a)

We propose to divide current § 424.19 into three paragraphs. The first two sentences of proposed paragraph (a) are new and are being added to comply with the Presidential Memorandum. They would read:

At the time of publication of a proposed rule to designate critical habitat, the Secretary will make available for public comment the draft economic analysis of the designation. The draft economic analysis will be summarized in the Federal Register notice of the proposed designation of critical habitat.

The President's February 28, 2012 memorandum directed the Secretary of the Interior to take 'prompt steps' to revise the regulations. The first sentence of this proposed change to the regulations will comply with the President's direction. The second sentence specifies that a summary of the draft economic analysis would be published in the Federal Register notice of the proposed designation of critical habitat. The draft economic analysis itself would be made available on http://www.regulations.gov along with the proposed designation of critical habitat or on other websites as deemed appropriate by the Services.

The third sentence of proposed paragraph (a) would carry over the first half of the first sentence of the existing § 424.19, with modifications. It would read:

> The Secretary will, to the maximum extent practicable, when proposing and finalizing designation of critical habitat, briefly describe and evaluate in the Federal Register notice any significant activities that are known to have the potential to affect an area considered for designation as critical habitat or be likely to be affected by the designation.

This language implements section 4(b)(8) of the Act. We propose to add "to the maximum extent practicable" to track the statutory language. For the same reason, we would replace "identify" with "briefly describe and evaluate." We emphasize, however, the statutory term "brief," i.e., the description and evaluation is not meant to be an exhaustive analysis. The Services cannot predict the outcome of any potential section 7 consultation. Rather, the purpose of this language in section 4(b)(8) is merely to alert the public generally to the relationship between the designation of critical habitat and activities on the landscape. We add the phrase "in the Federal Register notice" to make clear that this brief description and evaluation will be published in the Federal Register notice of the designation of critical habitat.

We would keep the modifier "significant" with respect to activities, which clarifies that the statutory language should not be interpreted to apply to all activities, however insignificant. We propose to replace "would . . . affect an area" with "are known to have the potential to affect an area" to make clear that the Services are not able to predict with certainty what activities to address, but must infer the activities from the best available information.

Rationale for the Proposed Paragraph (b)

Proposed paragraph (b) would implement the first sentence of section 4(b)(2) of the Act ("The Secretary shall designate critical habitat . . . after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat."). The proposed first sentence would carry over the second half of the first sentence of the existing § 424.19, with modifications, and would thus repeat the basic statutory requirement. We propose to replace "after proposing designation of such an area" with "[p]rior to finalizing the designation of critical habitat" to expressly provide for more flexibility in the timing of the consideration. The proposed first sentence would read:

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

The statute itself requires only that the consideration occur—it does not specify when in the rulemaking process it must occur. That being said, we stress that the Act's legislative history is clear that Congress intended consideration of economic impacts to neither affect nor delay the listing of species. Therefore, regardless of the point in the rulemaking process at which consideration of economic impacts begins, that consideration must be kept analytically distinct from, and have no effect on the outcome or timing of, listing determinations. We also note that an draft economic analysis is only

one of many pieces of information the Secretary uses in consideration of whether to exclude areas under section 4(b)(2) of the Act.

Also in proposed paragraph (b), we retained the phrases "probable" and "upon proposed or ongoing activities." These phrases provide guidance that the Services should not consider improbable or speculative impacts, and clarify that whatever impacts the Services consider are merely generalized predictions. However, the Services do not intend that the term "probable" requires a showing of statistical probability or any specific numeric likelihood. Moreover, the "activities" at issue are only those that would require consultation under section 7 of the Act. *See* DOI 2008 at 10–12. Although impact analyses are based on the best scientific data available, any predictions of future impacts are inherently uncertain and subject to change. Thus, the Services should consider the likely general impact of the designation and not make specific predictions of the outcome of particular section 7 consultations that have not in fact been completed.

We propose to add the phrase "national security" to reflect statutory amendments to section 4(b)(2) of the Act (National Defense Authorization Act for Fiscal Year 2004, Pub. L. 108–136). Also, we propose to add the word "relevant" to the other impacts that the Services must consider to more closely track the statutory language.

The first sentence of proposed paragraph (b) uses the term "consider," which reflects the statutory term "consideration" in section 4(b)(2) of the Act. The proposed regulations would not further define this term. However, we agree with the Solicitor's 2008 Opinion that, in the context of section 4(b)(2) of the Act, to "consider" impacts the Services must gather available information about the impacts on proposed or ongoing activities that would be subject to section 7 consultation, and then must give careful

thought to the relevant information in the context of deciding whether to proceed with an exclusion analysis. *See* DOI 2008 at 14–16.

The second and third sentences of proposed paragraph (b) are additions that would provide further guidance on how the Services will consider impacts of critical habitat designation. They read:

> The Secretary will consider impacts at a scale that the Secretary determines to be appropriate, and will compare the impacts with and without the designation. Impacts may be qualitatively or quantitatively described.

The first phrase of the second sentence, "[t]he Secretary will consider impacts at a scale that the Secretary determines to be appropriate," would clarify that the Secretary has the discretion to determine the scale at which impacts are considered. The Secretary would determine the appropriate scale based on what would most meaningfully or sufficiently inform the decision in a particular context. For example, for a wide-ranging species with many square miles (kilometers) of potential habitat across several States, a relatively coarse-scale analysis would be sufficiently informative, while for a narrow endemic species, with specialized habitat requirements and relatively few discrete occurrences, it might be appropriate to engage in a relatively fine-scale analysis for the designation of critical habitat. The Secretary may also use this discretion to focus the analysis on areas where impacts are more likely, e.g., non-Federal lands. *See* DOI 2008 at 17.

The second phrase of the second sentence, "and will compare the impacts with and without designation," would clarify that impact analyses evaluate the *incremental* impacts of the designation. This is sometimes referred to as an "incremental analysis" or

"baseline approach." For the purpose of the impacts analysis required by the first sentence of section 4(b)(2) of the Act, the incremental impacts are those probable economic, national security, and other relevant impacts of the proposed critical habitat designation on ongoing or potential Federal actions that would not otherwise occur without the designation. Put another way, the incremental impacts are the probable impacts on Federal actions for which the designation is the "but for" cause.

To determine the incremental impacts of designating critical habitat, the Services compare the protections provided by the critical habitat designation (the world with the particular designation) to the combined effects of all conservation-related protections for the species (including listing) and its habitat in the absence of the designation of critical habitat (the world without designation, i.e., the baseline condition). Thus, determining the incremental impacts requires identifying at a general level the additional protections that a critical habitat designation would provide for the species; this does not require the prejudging of the precise outcomes of hypothetical section 7 consultations. Finally, the Services determine what probable impacts those incremental protections will have on Federal actions, in terms of economic, national security, or other relevant impacts (the incremental impacts). *See* DOI 2008 at 11. Potential impacts to Federal actions could occur on private as well as public lands.

In addition to using an incremental analysis in the impacts analysis, the Secretary will use an incremental analysis in the weighing of benefits under the second sentence of section 4(b)(2), if the Secretary decides to undertake that optional analysis. In that context, the Secretary will use an incremental analysis to identify the benefits (economic

and otherwise) of excluding an area from critical habitat, and will likewise use an incremental analysis to identify the benefits of specifying an area as critical habitat.

Benefits that may be addressed in the weighing of benefits can result from additional protections, in the form of project modifications or conservation measures due to consultation under section 7 of the Act; conversely, a benefit of exclusion can be avoiding costs associated with those protections. In addition, benefits (and associated costs) can result if the designation triggers compliance with separate authorities that are exercised in part as a result of the Federal critical habitat designation (e.g., additional reviews, procedures, or protections under State or local jurisdictional authorities). *See* DOI 2008 at 22–23.

Finally, because its primary purpose is to facilitate the impact analysis and the weighing of benefits, the draft and final economic analyses should focus on the incremental economic benefits of the designation.

Use of an incremental analysis in each of these contexts is the only logical way to implement the Act. The purpose of the impact analysis (described in the third sentence of proposed paragraph (a)) is to inform the Secretary's decision about whether to engage in the optional weighing of benefits under the second sentence of section 4(b)(2) of the Act (addressed in proposed paragraph (c)). To understand the difference that designation of an area makes and, therefore, the benefits of including an area in the designation or excluding an area from the designation, one must compare the hypothetical world with the designation to the hypothetical world without the designation. This is why the Services compare the protections provided by the designation to the protections without the designation. This is consistent with the general guidance given by the Office of

Management and Budget to executive branch agencies as to how to conduct cost-benefit analyses. *See* Circular A–4 (available at http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf).

Nonetheless, between 2002 and 2008, the Services generally did not conduct an incremental analysis; instead they conducted a broader analysis of impacts pursuant to *New Mexico Cattlegrowers Ass'n* v. *FWS*, 248 F.3d 1277 (10th Cir. 2001). The genesis of the court's conclusion in that case was the definitions of "jeopardize the continued existence of" and "destruction or adverse modification," which are the standards for section 7 consultations in the Services' 1986 joint regulations. *See* 50 CFR 402.02. Both phrases were defined in a similar manner in that they both looked to impacts on both survival and recovery of the species.

The court in *New Mexico Cattle Growers* noted the similarity of the definitions, concluding that they were "virtually identical" and that the definition of "destruction or adverse modification" was in effect subsumed into the jeopardy standard. 248 F.3d at 1283. According to the court, these definitions thus led FWS to conclude that designation of critical habitat usually had no incremental impact beyond the impacts of the listing itself. Thus, given these definitions, the court concluded that doing only an incremental analysis rendered meaningless the requirement of considering the impacts of the designation, as there were no incremental impacts to consider. Although the court noted that the regulatory definitions had previously been called into question, *id.* at 1283 n.2 (citing *Sierra Club* v. *U.S. Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001)), the validity of the regulations had not been challenged in the case before it. Instead, to cure this apparent problem, the court held that the FWS must analyze "all of the impacts of a

critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes." *Id.* at 1285.

In 2004, the Ninth Circuit (*Gifford Pinchot Task Force* v. *USFWS*, 378 F.3d 1059 (9th Cir. 2004)) invalidated the prior regulatory definition of "destruction or adverse modification." The court held that the definition gave too little protection to critical habitat by not giving weight to Congress's intent that designated critical habitat support the recovery of listed species. Since then, the Services have been applying "destruction or adverse modification" in a way that allows the Services to define an incremental effect of designation. This eliminated the predicate for the Tenth Circuit's analysis. Therefore, the Services have concluded that it is appropriate to consider the impacts of designation on an incremental basis.

Indeed, no court outside of the Tenth Circuit has followed *New Mexico Cattle Growers* after the Ninth Circuit issued *Gifford Pinchot Task Force*. In particular, the Ninth Circuit recently concluded that the "faulty premise" that led to the invalidation of the incremental analysis approach in 2001 no longer applies. *Arizona Cattle Growers Ass'n* v. *Salazar*, 606 F.3d 1160, 1173 (9th Cir. 2010). The court held, in light of this change in circumstances, that "the FWS may employ the baseline approach in analyzing a critical habitat designation." *Id.* In so holding, the court noted that the baseline approach is "more logical than" the coextensive approach. *Id.*; *see also*:

- *Maddalena* v. *FWS*, No. 08-CV-02292-H (AJB) (S.D. Cal. Aug. 5, 2010);
- *Otay Mesa Property L.P.* v. *DOI*, 714 F. Supp. 2d 73 (D.D.C. 2010);
- *Fisher* v. *Salazar*, 656 F. Supp. 2d 1357 (N.D. Fla. 2009);

- *Home Builders Ass'n of No. Cal.* v. *USFWS*, 2006 U.S. Dist. Lexis 80255 (E.D. Cal. Nov. 2, 2006), *reconsideration granted in part*, 2007 U.S. Dist. Lexis 5208 (Jan. 24, 2007), *aff'd*, 616 F.3d 983 (9th Cir. 2010);
- *CBD* v. *BLM*, 422 F. Supp. 2d 1115 (N.D. Cal. 2006);
- *Cape Hatteras Access Preservation Alliance* v. *DOI*, 344 F. Supp. 2d 108 (D.D.C. 2004).

The Solicitor's opinion also reaches this conclusion. *See* DOI 2008 at 18–22.

The Services may still, in appropriate circumstances, also analyze the broader impacts of conserving the species at issue to put the incremental impacts of the designation in context, or for complying with the requirements of other statutes or policies. *See:*

- *Arizona Cattle Growers' Ass'n* v. *Kempthorne*, 534 F. Supp. 2d 1013 (D. Ariz. 2008), *aff'd*, 606 F.3d 1160 (9th Cir. 2010);
- *Home Builders Ass'n of No. Cal.* v. *USFWS*, 2007 U.S. Dist. Lexis 5208 (E.D. Cal. Jan. 24, 2007), *aff'd*, 616 F.3d 983 (9th Cir. 2010);
- DOI 2008 at 21.

The third sentence of proposed paragraph (b) would clarify that impacts may be qualitatively or quantitatively described. In other words, there is no absolute requirement that impacts of any kind be quantified. *See Cape Hatteras Access Preservation Alliance* v. *DOI*, 731 F. Supp. 2d 15 (D.D.C. Aug. 17, 2010).

Rationale for the Proposed Paragraph (c)

Proposed paragraph (c) would implement the second sentence of section 4(b)(2) of the Act, which allows the Secretary to exclude areas from the final critical habitat designation under certain circumstances. It would read:

> The Secretary has discretion to exclude any particular area from the critical habitat upon a determination that the benefits of such exclusion outweigh the benefits of specifying the particular area as part of the critical habitat. In identifying those benefits, in addition to the impacts considered pursuant to paragraph (b) of this section, the Secretary may consider and assign the weight to any benefits relevant to the designation of critical habitat. The Secretary, however, will not exclude any particular area if, based on the best scientific and commercial data available, the Secretary determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

The first sentence of proposed paragraph (c) would carry over the second sentence of the existing section, with modifications. The phrase "the Secretary has discretion" would be added to emphasize that the exclusion of particular areas under section 4(b)(2) of the Act is always optional. *See* DOI 2008 at 6–9, 17. For example, the Secretary may choose not to exclude an area even if the impact analysis and subsequent balancing indicates that the benefits of exclusion exceed the benefits of inclusion and such exclusion would not result in the extinction of the species.

Additional minor changes to the first sentence would make it more closely track the statutory language.

The second sentence of paragraph (c) is new. They would codify aspects of the legislative history, the case law, and the Services' practices with respect to exclusions. The second sentence would clarify the breadth of the Secretary's discretion with respect to the types of benefits to consider. *See:*

- *CBD* v. *Norton*, 240 F. Supp. 2d 1090 (D. Ariz. 2003);
- *Home Builders Ass'n of No. Cal.* v. *USFWS*, 2006 U.S. Dist. Lexis 80255 (E.D. Cal. Nov. 2, 2006), *reconsideration granted in part* 2007 U.S. Dist. Lexis 5208 (Jan. 24, 2007), *aff'd*, 616 F.3d 983 (9th Cir. 2010);
- DOI 2008 at 25–28.

For example, the Secretary may consider effects on tribal sovereignty and the conservation efforts of non-Federal partners when considering excluding specific areas from a designation of critical habitat. The House Committee report that accompanied the 1978 amendments that added Section 4(b)(2) to the Act stated that "[t]he consideration and weight given to any particular impact is completely within the Secretary's discretion." H.R. Rep. No. 95-1625, at 17. Subsequent case law and the Solicitor's Opinion have reflected that view, as does the rule proposed here. *See:*

- *CBD v. Salazar*, 2011 U.S. Dist. Lexis 26967 (D.D.C. Mar. 16, 2011);
- *Wyoming State Snowmobile Ass'n* v. *USFWS*, 741 F. Supp. 2d 1245 (D. Wyo. 2010);
- DOI 2008 at 24.

The third sentence of paragraph (c) essentially repeats the third sentence of the existing section. This sentence incorporates the limitation in the last clause of section 4(b)(2) of the Act. *See* DOI 2008 at 25.

Request for Information

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

This rulemaking does not modify the current methods and procedures of identifying and evaluating potential incremental impacts of a designation of critical habitat. Nonetheless, we will accept comments on the Services' approach to incremental impacts as well as on the manner in which particular impacts are considered and weighed.

You may submit your information concerning this proposed rule by one of the methods listed in **ADDRESSES**. If you submit information via http://www.regulations.gov, your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your

document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on http://www.regulations.gov.

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

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) will review all significant rules. The Office of Information and Regulatory Affairs has determined that this rule is significant because it raises novel legal or policy issues.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best

available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This proposed rule is consistent with Executive Order 13563, and in particular with the requirement of retrospective analysis of existing rules, designed "to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq*.), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or his designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We are certifying that these proposed regulations would not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

The proposed revisions to the regulations revises and clarifies the regulations governing how the Services analyze and communicate the impacts of a possible designation of critical habitat, and how the Services may exercise the Secretary's discretion to exclude areas from designations. The proposed revisions to the regulations apply solely to the Services' procedures for the timing, scale, and scope of impact analyses and considering exclusions from critical habitat. The changes included in these proposed regulatory revisions serve to clarify, and do not expand the reach of, potential designations of critical habitat.

NMFS and FWS are the only entities that are directly affected by this rule because we are the only entities that can designate critical habitat. No external entities, including any small businesses, small organizations, or small governments, will experience any economic impacts from this rule. Therefore, the only effect on any external entities large or small would likely be positive through reducing any uncertainty on the part of the public by simultaneous presentation of the best scientific data available and the economic analysis of the designation of critical habitat.

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

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

(a) On the basis of information contained in the "Regulatory Flexibility Act" section above, these proposed regulations would not "significantly or uniquely" affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that these regulations would not impose a cost of $100 million or more in any given year on local or State governments or private entities. A

Small Government Agency Plan is not required. As explained above, small governments would not be affected because the proposed regulations would not place additional requirements on any city, county, or other local municipalities.

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

Takings (E.O. 12630)

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

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether these proposed regulations would have significant Federalism effects and have determined that a Federalism assessment is not required. These proposed regulations pertain only to determinations to designate critical habitat under section 4 of the Act, and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

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

Government-to-Government Relationship with Tribes

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

benefits of specifying the particular area as part of the critical habitat. In identifying those benefits, the Secretaries may consider effects on tribal sovereignty.

Paperwork Reduction Act

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

National Environmental Policy Act

We are analyzing these proposed regulations in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior Manual (318 DM 2.2(g) and 6.3(D)), and Department of Commerce Departmental Administrative Order 216–6. We will complete our analysis, in compliance with NEPA, before finalizing these proposed regulations.

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

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

Clarity of This Proposed Rule

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

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

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

(e) Use lists and tables wherever possible.

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

References Cited

A complete list of all references cited in this document is available on the Internet at *http://www.regulations.gov* at Docket No. FWS–R9–ES–2011–0073 or upon request from the U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Authority

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

List of Subjects in 50 CFR Part 424

Administrative practice and procedure, Endangered and threatened species.

Proposed Regulation Promulgation

PART 424—[AMENDED]

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

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

2. Revise § 424.19, including the section heading, to read as follows:

§ 424.19 Impact analysis and exclusions from critical habitat.

(a) At the time of publication of a proposed rule to designate critical habitat, the Secretary will make available for public comment the draft economic analysis of the designation. The draft economic analysis will be summarized in the Federal Register notice of the proposed designation of critical habitat.

The Secretary will, to the maximum extent practicable, when proposing and finalizing designation of critical habitat, briefly describe and evaluate in the Federal

Register notice any significant activities that are known to have the potential to affect an area considered for designation as critical habitat or be likely to be affected by the designation.

(b) Prior to finalizing the designation of critical habitat, the Secretary will consider the probable economic, national security, and other relevant impacts of the designation upon proposed or ongoing activities. The Secretary will consider impacts at a scale that the Secretary determines to be appropriate, and will compare the impacts with and without the designation. Impacts may be qualitatively or quantitatively described.

(c) The Secretary has discretion to exclude any particular area from the critical habitat upon a determination that the benefits of such exclusion outweigh the benefits of specifying the particular area as part of the critical habitat. In identifying those benefits, in addition to the impacts considered pursuant to paragraph (b) of this section, the Secretary may consider and assign the weight to any benefits relevant to the designation of critical habitat. The Secretary, however, will not exclude any particular area if, based on the best scientific and commercial data available, the Secretary determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

Dated: June 1, 2012

/s/ Eileen Sobeck

Acting Assistant Secretary for Fish and Wildlife and Parks
U.S. Department of the Interior

~~Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Impact Analyses of Critical Habitat~~

Dated: August 13, 2012

/s/ Alan D. Risenhoover

Acting Deputy Assistant Administrator for Regulatory Programs
National Marine Fisheries Service

~~Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Impact Analyses of Critical Habitat~~

Billing Code 4310–55–P; 3510–22–P