

**Billing Codes 4310–55–P; 3510–22–P**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**DEPARTMENT OF COMMERCE**

**National Marine Fisheries Service**

**50 CFR Part 402**

**[Docket No. FWS–R9–ES–2011–0072]**

**[Docket No. 120106026-3731-01]**

**[92210–0–0009–B4]**

**RINs 1018–AX88, 0648–BB80**

**Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition  
of Destruction or Adverse Modification of Critical Habitat**

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

**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the “Services” or “we”) propose to amend title 50, part 402, of the Code of Federal Regulations, which implements the Endangered Species Act of 1973, as amended (Act). Part 402 establishes the procedural regulations governing interagency cooperation under section 7 of the Act. The Act requires Federal agencies, in consultation with and with the assistance of the Secretaries of the Interior and Commerce, to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. In 1986, the Services established a definition for “destruction or adverse modification” (§ 402.02) that was found to be invalid by the U.S. Court of Appeals for the Fifth (2001) and Ninth (2004) Circuits. We propose to amend part 402 to replace the invalidated definition with one that is consistent with the Act and the circuit court opinions. Finally, the proposed amendment is part of the Services’ response to Section 6 of Executive Order 13563 (January 18, 2011), which directs agencies to analyze their existing regulations and, among other things, modify or streamline them in accordance with what has been learned.

**DATES:** We will accept comments from all interested parties until [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>. In the box that reads “Enter Keyword or ID,” enter the Docket number for this proposed rule, which is FWS–R9–ES–2011–0072. Then, in the Search panel, under the Document Type heading, check the box next to Proposed Rules. You may enter a comment by clicking on “Submit a Comment.” Please ensure that you have found the correct rulemaking before submitting your comment.
- *U.S. mail or hand delivery:* Public Comments Processing, Attn: [Docket No. FWS–R9–ES–2011–0072]; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; 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:** Patrice Ashfield, U.S. Fish and Wildlife Service, Division of Environmental Review, 4401 N Fairfax Drive, Suite 420, Arlington, VA, 22203, telephone 703/358–2171; facsimile 703/358–1735; or Cathryn E. Tortorici, National Marine Fisheries Service, Office of Protected Resources, Interagency Cooperation Division, 1315 East-West Highway, Silver Spring, MD 20910, telephone

301/427–8405; facsimile 301/713–0376. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800/877–8339.

#### **SUPPLEMENTARY INFORMATION:**

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

- A proposed rule to amend the existing regulations governing section 7 consultation under the Endangered Species Act to revise the definition of “destruction or adverse modification” of critical habitat. The current regulatory definition has been invalidated by several courts for being inconsistent with the language of the Act. This proposed rule would revise title 50 of the Code of Federal Regulations (CFR) at part 402. The Regulatory Identifier Number (RIN) is 1018–AX88, and the proposed rule may be found on <http://www.regulations.gov> at Docket No. FWS–R9–ES–2011–0072.
- A proposed rule to amend existing regulations governing the designation of critical habitat under section 4 of the Act. A number of factors, including litigation and the Services’ experience over the years in interpreting and applying the statutory definition of critical habitat, have highlighted the need to clarify or revise the current regulations. This proposed rule would revise 50 CFR part 424. It is published under RIN 1018–AX86 and may be found on <http://www.regulations.gov> at Docket No. FWS–HQ–ES–2012–0096.
- A draft policy pertaining to exclusions from critical habitat and how we consider

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

## **Background**

The Act requires Federal agencies, in consultation with and with the assistance of the Secretaries of the Interior and Commerce, to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. In 1978, the Services promulgated regulations governing interagency cooperation under section 7 of the Act. (50 CFR Part 402). These regulations provided a definition for “destruction or adverse modification” of critical habitat, which was later updated in 1986 to conform with amendments made to the Act. The 1986 regulations defined “destruction or adverse modification” as: “a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.” (50 CFR 402.02). The preamble to the 1986 regulation contained relatively little discussion on the concept of “destruction or adverse modification of critical habitat.”

In 2001, the Fifth Circuit Court of Appeals reviewed the 1986 regulatory definition of destruction and adverse modification and found it exceeded the Service's discretion. *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5<sup>th</sup> Cir. 2001). Specifically, the court found the regulatory definition to be invalid on its face and inconsistent with the Act. The court reasoned that the regulatory definition set too high a threshold for triggering adverse modification by its requirement that both recovery and survival be diminished before adverse modification would be the appropriate conclusion. The court determined that the regulatory definition actually established a standard that would only trigger an adverse modification determination if the "survival" of the species was diminished, while ignoring the role critical habitat plays in the recovery of species. Citing legislative history and the Act itself, the court was persuaded that Congress intended the Act to "enable listed species not merely to survive, but to recover from their endangered or threatened status." *Sierra Club* at 436. Noting the Act defines critical habitat as areas that are "essential to the conservation" of listed species, the court determined that "conservation" is a much "broader concept than mere survival." *Sierra Club* at 436. The court concluded that the Act's definition of conservation "speaks to the recovery" of listed species.

In 2004, the Ninth Circuit Court of Appeals also reviewed the 1986 regulatory definition of destruction or adverse modification. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9<sup>th</sup> Cir. 2004). That court agreed with the Fifth Circuit's determination that the regulation was facially invalid. The Ninth Circuit, following similar reasoning set out in the *Sierra Club* decision, determined that Congress viewed conservation and survival as "distinct, though complementary, goals and the

requirement to preserve critical habitat is designed to promote both conservation and survival.” Specifically, the court found that “the purpose of establishing ‘critical habitat’ is for the government to designate habitat that is not only necessary for the species’ survival but also essential for the species’ recovery.” *Gifford Pinchot Task Force* at 1070.

After the Ninth Circuit’s decision, the Services each issued guidance to discontinue the use of the 1986 adverse modification regulation (FWS Acting Director Marshall Jones Memo to Regional Directors, “Application of the ‘Destruction or Adverse Modification’ Standard under Section 7(a)(2) of the Endangered Species Act 2004;” NMFS Assistant Administrator William T. Hogarth Memo to Regional Administrators, “Application of the ‘Destruction or Adverse Modification’ Standard under Section 7(a)(2) of the Endangered Species Act, 2005”). Specifically, in evaluating an action’s effects on critical habitat as part of interagency consultation, the Services began applying the definition of “conservation” as set out in the Act, which defines conservation (and conserve and conserving) to mean “to use and 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 this Act are no long necessary.” 16 U.S.C. § 1532(3). Further, after examining the baseline and the effects of the action, the Services began analyzing whether the implementation of the Federal action under consultation, together with any cumulative effects, would result in the critical habitat remaining “functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species.”

## **Proposed Definition**

After considering relevant case law and our collective experience in applying the “destruction or adverse modification” standard over the last three decades, the Services propose to amend the definition of “destruction or adverse modification” to (1) more explicitly tie the definition to the stated purpose of the Act; and, (2) more clearly contrast the definitions of “destruction or adverse modification” and “jeopardize the continued existence of.” To achieve these purposes, the Services propose the following definition:

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

Use of the term “conservation value” is intended to align the definition of “destruction or adverse modification” with the conservation purposes of the Act and the Act’s definition of “critical habitat.” Specifically, the term “conservation value” is intended to capture the role that critical habitat should play for the recovery of listed species. We believe by focusing on the conservation value of critical habitat, which also necessarily includes attributes critical to a species’ survival, this definition will be consistent with the Fifth and Ninth Circuit Court of Appeals decisions referenced above. The Services note that “value” within “conservation value” refers to its utility or importance. It does not refer to a quantified value.

The proposed definition also better clarifies and preserves the existing distinction between the definitions of “destruction or adverse modification” and “jeopardize the continued existence of” by focusing the analysis for “destruction or adverse modification” on how the effects of a proposed action affect the value of critical habitat for the recovery of threatened or endangered species. The focus of the “jeopardize the continued existence of” definition, on the other hand, is the status of the species, which concentrates on a species’ reproduction, numbers, and distribution. The second sentence of the Services’ proposed definition of “destruction or adverse modification” simply acknowledges that some important physical or biological features may not be present or are present in a sub-optimal quantity or quality. This could occur when, for example, the habitat has been degraded by human activity or is part of an ecosystem adapted to a particular natural disturbance (e.g., fire or flooding), which does not constantly occur but is likely to recur. The critical habitat area may either be unoccupied habitat, which is not required to have physical or biological features present, or may be an area within an occupied habitat that has only some but not all features. The area may have been designated because of its potential to support the physical or biological features that fulfill the species’ life-history needs and its potential recovery. A species life-history needs may include, but are not limited to, food, water, light, shelter from predators, competitors, weather and physical space to carry out normal behaviors or provide dispersal or migratory corridors. Thus, an action that would preclude or significantly delay habitat regeneration or natural successional processes, to an extent that it appreciably diminishes the conservation value of critical habitat, would result in destruction or adverse modification.

The Act defines critical habitat to include those specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features essential to the conservation of species. Our use of the phrase “physical or biological features” is consistent with the recently proposed definition of “physical or biological features” in 50 CFR 424.02 but is intended to apply more broadly than in defining specific areas of critical habitat within the geographic area occupied by the species at the time of listing. All habitats are comprised of physical or biological features. Consistent with current practice, we anticipate that our analyses of the effects of the action to critical habitat will necessarily consider, in part, effects to features irrespective of whether the specific area was designated within or outside of the geographic area occupied by the species at the time it was listed.

In proposing a new definition for “destruction or adverse modification,” 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 biological opinions must be reevaluated on this basis.

#### **Basis for Term “Conservation Value”**

Our proposed definition of “destruction or adverse modification” of critical habitat is based on an understanding of the role that habitat – which includes the physical or biological features required for a species’ life-history needs – generally plays for species. The size of species’ populations will fluctuate with, among other things, the availability of the physical or biological features the species finds in its habitat (for more

detailed definitions of habitat and reviews of the relationship between a species and its habitat, see Gilpin and Soule 1986; Hall *et al.* 1997; MacArthur and Wilson 1967; Odum 1971).

Our proposed definition is further shaped by the purpose of designating critical habitat. Both for occupied and unoccupied habitat, Congress focused on what habitat was essential to the “conservation” of listed species when designating critical habitat. As discussed above, the courts have concluded that Congress intended that “conservation and survival be two different (though complementary) goals of the (Act).” *Gifford Pinchot* at 1070. In light of congressional intent that critical habitat be established for conservation purposes, the courts concluded, and we agree, that the purpose of establishing “critical habitat” is for the government to designate habitat “that is not only necessary for the species' survival but also essential for the species' recovery.” *Id.* From these cases, it is clear that any definition of “destruction or adverse modification” must reflect the purpose for which the critical habitat was designated—the recovery of the species.

After reviewing the court cases discussed above, the Act’s definitions of “conservation” and “critical habitat,” and our understanding of the role habitat plays for species’ conservation, we determined that “conservation value” embodies the intended recovery role of critical habitat and, therefore, is relevant in a determination as to whether an action is likely to destroy or adversely modify that habitat. “Conservation value,” as used in the definition, then, is the contribution the critical habitat provides, or has the ability to provide, to the recovery of the species.

## **Determination of “Conservation Value” of Critical Habitat**

Our determination of the conservation value of critical habitat for a particular species will be based on our current understanding of the life-history needs of that particular species, and how the features of the critical habitat provide or have the ability to provide for those life-history needs to continue the survival and promote the recovery of that species. As a practical matter, to determine the conservation value of critical habitat, we will need to consider several variables for the entire critical habitat, including for the specific areas (or units, as appropriate) designated. The variables include:

- Life-history needs of the species being provided for by critical habitat.
- Current condition of the critical habitat, which requires consideration of:
  - The quantity of features and habitat necessary to support the life-history needs of the species for recovery.
  - The quality of features and habitat necessary to support the life-history needs of the species for recovery.
  - The ability (or likelihood) for the critical habitat to fulfill its role in the recovery of the species.

In conducting a section 7 analysis under the Act on the impacts of an action on critical habitat, the Services will first consider the information set out in the final rule designating the critical habitat. In some cases, the final rules designating critical habitat contain sufficient information to characterize the “conservation value” of the critical habitat overall, and of any discrete areas that are designated. In other cases, the available information may be quite limited. With time, new information may become available and enable us to refine our determination of the conservation value of the critical habitat.

For each section 7 consultation, we will rely upon the best scientific and commercial data available to describe the life-history needs of the species, and how the features or areas of the critical habitat provide or have the ability to provide for those life-history needs and the recovery of that species. In the future, an emphasis will be placed on preparing final critical habitat rules that explicitly describe the conservation value of critical habitat, both overall and at the scale of individual specific areas designated, if applicable.

Our determination of conservation value is based not only on the current status of the critical habitat but also, in cases where it is degraded or depends on ongoing ecological processes, on the potential for the habitat to provide further recovery support for conserving the species. While occupied critical habitat would always contain at least one or more of the physical or biological features that provide for some life-history needs of the listed species, an area of critical habitat may be in a degraded condition or less than optimal successional stage and not contain all physical or biological features at the time it is designated or those features may be present but in a degraded or less than optimal condition. The area may have been designated as critical habitat, however, because of the potential for some of the features not already present or not yet fully functional to be developed, restored, or improved and contribute to the species' recovery. The condition of the critical habitat would be enhanced as the physical or biological features important to the species life-history needs are developed, restored, or improved and the area is able to provide the recovery support for the species on which the designation is based. The conservation value of critical habitat also includes consideration of the likely capability, in the foreseeable future, of the critical habitat to support the species' recovery given the backdrop of past and present actions that may impede formation of the optimal

successional stage or otherwise degrade the critical habitat. Therefore, an action that would preclude or significantly delay the development or restoration of the physical or biological features needed to achieve that capability, to an extent that it appreciably diminishes the conservation value of critical habitat relative to that which would occur without the action undergoing consultation, is likely to result in destruction or adverse modification.

We note that habitat suitability for any particular species will vary through time as a result of natural processes and, in a natural system, these habitats would not be considered “degraded.” For example, willow flycatchers generally nest in a specific age-class of willows. In a dynamic riverine system this age-class of willows is continually created and destroyed by periodic flooding, bank erosion, and deposition. An area of riverine habitat would not be considered “degraded” during periods when the appropriate age-class of willows is not present. However, as with “degraded” habitat, an action that would preclude or significantly delay the development of those features that support the life-history needs of the species—the appropriate age-class of willows—is likely to result in destruction or adverse modification of critical habitat if it occurs to an extent that it appreciably diminishes the conservation value of critical habitat relative to that which would occur without the action undergoing consultation.

We are cognizant that section 7(a)(2) only applies to discretionary agency actions. *See* 50 CFR 402.03. Further, while other parts of the Act create certain responsibilities for all Federal agencies (such as section 7(a)(1)), we recognize that section 7(a)(2) does not create an affirmative duty for action agencies to recover listed species. The consultation provision requires that agencies insure that any action they authorize, fund,

or carry out is “not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of [critical habitat].” 16 U.S.C. § 1536(a)(2). This is a standard of prohibition rather than a mandate to further recovery. Thus, the Ninth Circuit has made it clear that for an action “to jeopardize” listed species, it has to cause “some deterioration in the species’ pre-action condition.” *National Wildlife Federation v. NMFS*, 543 F.3d 917 (9<sup>th</sup> Cir. 2008).

We think the same is true for a finding of adverse modification (or destruction) of critical habitat—that is, in order for an action to be found to adversely modify critical habitat, it must in some way cause the deterioration of the critical habitat’s pre-action condition, which includes its ability to provide recovery support to the species based on ongoing ecological processes. For example, if one aspect of the conservation value of the critical habitat is the capacity to develop into a specific age-class of willows in a riverine system, an action agency is not required under section 7(a)(2) to affirmatively assist the transition of the habitat to that state. But, an adverse modification may occur if the action agency takes an action that would appreciably diminish the capacity of that habitat to complete that transition relative to the conditions which would occur without the action undergoing consultation. Conversely, if the proposed action does not preclude or significantly delay the ability for that habitat to develop through ecological processes into a specific age-class of willows, then the habitat has not been adversely modified.

### **Determination of “Appreciably Diminish”**

Once the conservation value of the habitat is determined, then the question becomes whether the effects of the action (as defined in § 402.02) “appreciably diminish”

that value of the critical habitat. The preamble to the 1986 regulations provides no guidance regarding the meaning of the words “appreciably diminish.” The Joint Consultation Handbook (Services 1998), however, defines “appreciably diminish the value” as “to considerably reduce the capability of designated or proposed critical habitat to satisfy the requirements essential to both the survival and recovery of a listed species.”

We find this definition to be no longer valid in light of the courts’ rulings with regard to the regulatory definition of “destruction or adverse modification.” That is, that portion of the definition that requires a reduction in the likelihood of “both the survival and recovery” of listed species is no longer valid. Further, we think the use of the term “considerable” to modify “appreciably” does not add any real value to help interpret what “appreciably diminish” means with regard to the modification of critical habitat, and may lead to disparate outcomes in consultations. For example, the word “considerable” can mean “large in amount or extent” but it can also mean “worthy of consideration” or “significant.” To further complicate matters, “significant” can mean “measurable.” So, some could interpret a “considerable” reduction to mean a massive reduction in the value of critical habitat and others could interpret it to mean a measurable reduction in the value of critical habitat. In light of the range of results various interpretations of “considerable” could lead one to, we have set out below a more detailed interpretation of the phrase “appreciably diminish the conservation value.”

A determination that an action’s effects will “appreciably diminish” the conservation value of critical habitat requires an understanding of both the words “diminish” and “appreciable” and how they relate to each other in the context of the definition. A review of the definition of (and the synonyms for) “diminish” establishes

that to diminish is to reduce, lessen, or weaken. As applied to the definition of “destruction or adverse modification,” then, the inquiry is whether the relevant effects have reduced, lessened, or weakened the conservation value of the critical habitat. If so, then, the inquiry is whether that reduction or diminishment is “appreciable” to the conservation value of the critical habitat.

Appreciable is generally defined as “noticeable” or “measurable.” In this context, however, that definition is too simplistic because, to determine a diminishment of the conservation value—or a reduction, lessening, or weakening of that value—one would have had to be able to notice or recognize the diminishment. Using this unhelpful meaning, the inclusion of the term “appreciably” would not add anything to the definition of “destruction or adverse modification.” To determine the appropriate meaning of the term “appreciably,” we ultimately found it helpful to look at the definition of “appreciate,” which means to “recognize the quality, significance, or magnitude” or “grasp the nature, worth, quality or significance.” This usage makes more sense to us in the actual application of the phrase “appreciably diminish.” The relevant question, then, becomes whether we can recognize the quality, significance, or magnitude of the diminishment. In other words, is there a diminishment to the value of the critical habitat that has some relevance because we can recognize or grasp the quality, significance, magnitude, or worth of the diminishment in a way that affects the conservation value of the critical habitat.

It is important to understand that the determination of “appreciably diminish” will be based upon the effect to the conservation value of the designated critical habitat. That is, the question is whether the “effects of the action” will appreciably diminish the

conservation value of the critical habitat as a whole, not just in the area where the action takes place. For example, an action may have an adverse effect to a portion of critical habitat. The question would be, then, whether the adverse effect in that one part of the critical habitat will diminish the conservation value of the critical habitat overall in such a manner that we can appreciate the difference it will have to the recovery of the listed species. Specifically, some factors to be considered will be: will recovery be delayed, will recovery be more difficult, and will recovery be less likely. At the appropriate time after rulemaking, the Services plan to update guidance or handbook material to reflect any identified changes to the “appreciably diminish” definition in the March 1998 Consultation Handbook. These considerations should be applied cautiously so the Services do not apply a standard that is either too sensitive in light of the particular circumstances, or not sensitive enough. In a biological opinion, the Services provide an accurate assessment of the status of critical habitat, (including threats and trends), the environmental baseline (describing all past and present impacts), and cumulative effects (i.e., future State or private activities). The effects of any particular action are evaluated in the context of the status, environmental baseline, and cumulative effects. This avoids situations where each individual action is viewed as causing only insignificant adverse effects but, over time, the aggregate effects of these actions would erode the conservation value of the critical habitat.

Finally, we note that the term “appreciably” also appears in the regulatory definition of “jeopardize the continued existence of,” although in that definition it modifies “to reduce.” A similar interpretation of “appreciably” should be applied to the definition of “jeopardize the continued existence of.” In other words, is the reduction one

we can recognize or grasp the quality, significance, magnitude, or worth of in a way that makes a difference to the likely survival and recovery of the listed species?

### **The Relationship Between the Standards of Section 7 of the Act**

The relationship between the “jeopardize the continued existence of” standard and the “destruction or adverse modification” standard reflects the ecological relationship between a species’ population dynamics and the physical or biological features a species needs to grow and recover. To fulfill their responsibilities during interagency consultation, the Services conduct separate analyses for the two standards that are founded on this relationship. The difference between the outcomes of the “jeopardize the continued existence of” and “destruction or adverse modification” analyses will depend on a variety of factors. The results from applying the “jeopardize the continued existence of” and “destruction or adverse modification” standards tend to converge and diverge depending on whether the area designated as critical habitat currently encompasses the physical or biological features that a species would need to be “conserved,” and whether the species’ reproduction, numbers, or distribution will be affected. There is an inherent linkage, though, between a species and its habitat, and that linkage means those alterations to a species’ habitat will in many cases cause alterations in the numbers, reproduction, or distribution of the species.

The “destruction or adverse modification” standard focuses on how Federal actions affect the quantity and quality of the physical or biological features in the area that is designated as critical habitat for a listed species and, especially in the case of unoccupied habitat, on any impacts to the area itself. Specifically, as discussed above,

the Services should first evaluate Federal actions against the “destruction or adverse modification” definition standard by considering how the action affects the quantity and quality of the physical or biological features that determine the habitat’s ability to support recovery of a listed species. If the effects of an action appreciably diminish the quantity and quality of those features to support the conservation value of critical habitat, then the Services generally conclude that the Federal action is likely to “destroy or adversely modify” the designated critical habitat.

In addition, the Services may consider other kinds of impacts to the designated areas. For example, some areas that are currently in a degraded condition may have been designated as critical habitat for their potential to develop or improve habitat and eventually provide the needed ecological functions to support species’ recovery. Under these circumstances, the Services generally conclude that an action is likely to “destroy or adversely modify” the designated critical habitat if the action will alter the ecology of the habitat in ways that prevent the habitat from improving over time relative to pre-action condition. For example, by artificially maintaining an area of critical habitat in a relatively late successional stage, to the detriment of a species dependent upon periodic flooding or fire to establish early successional stages.

Conversely, the “jeopardize the continued existence of” definition focuses on the effects of a Federal action on a listed species’ likelihood of continuing to survive and recover in the wild. Specifically, the Services evaluate Federal actions against the “jeopardize the continued existence of” definition by considering how the action affects a species’ reproduction, numbers, or distribution. If the effects of an action would likely reduce the species’ reproduction, numbers, or distribution in a manner or to a degree that

would appreciably reduce the species' likelihood of surviving and recovering in the wild, the Services would conclude that the Federal action is likely to "jeopardize" the species' continued existence.

The distribution and/or abundance of some species are not currently limited by the quantity or quality of their habitat (for example, population densities may be suppressed by other factors such as over-exploitation, disease, or predators, and often persist well below population sizes that could be supported by the available habitat). In such circumstances where habitat modifications associated with a Federal action are not expected to reduce the species' reproduction, numbers, or distribution, the Services might conclude that a Federal action "adversely modified" designated critical habitat, but they would not conclude that the action "jeopardized the continued existence of" the species (unless the modifications were dramatic). Application of the two section 7 standards should produce different outcomes whenever a proposed Federal action affects a portion of designated critical habitat that will not result in an appreciable reduction of the species' reproduction, numbers, or distribution (for example, because the species exists as very small populations that do not fully occupy the designated critical habitat).

### **Request for Information**

We intend that a final regulation will consider information and recommendations from all interested parties. We therefore solicit comments, information, and recommendations from governmental agencies, Native American tribes, the scientific community, industry groups, environmental interest groups, and any other interested

parties. All comments and materials received by the date listed in **DATES** above will be considered prior to the approval of a final document.

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

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

We are particularly interested in comments concerning whether the phrases “conservation value” and “appreciably diminish” are clear and can be applied consistently across consultations and we invite the public to suggest alternative phrases that might improve clarity and consistency in implementing the “destruction or adverse modification” provisions of the section 7(a)(2) of the Act.

### **Required Determinations**

*Regulatory Planning and Review (E.O. 12866)*

The Office of Management and Budget (OMB) has determined that this proposed rule is a significant regulatory action and has reviewed this proposed rule under Executive Order 12866 (E.O. 12866).

### *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 certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA requires 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 this regulation would not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

This rulemaking clarifies existing requirements for Federal agencies under the Endangered Species Act. Federal agencies are the only entities that are directly affected by this rule, and they are not considered to be small entities under SBA's size standards. No other entities are directly affected by this rule.

This proposed rule, if made final, would be applied in determining whether a Federal agency has ensured, in consultation with the Services, that any action it would authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. Based on procedures applied through existing agency (Guidance [see addresses]), this proposed rule is substantially unlikely to affect our determinations. The proposed rule would serve to provide clarity to the standard with which we will evaluate agency actions pursuant to section 7 of the Endangered Species Act.

*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) If adopted, this proposal will not “significantly or uniquely” affect small governments. We have determined and certify under the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this proposed rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the proposed regulation will not place additional requirements on any city, county, or other local municipalities.

(b) This rule will not produce a Federal mandate of \$100 million or greater in any year (i.e., it is not a “significant regulatory action” under the Unfunded Mandates Reform Act). This proposed regulation would not impose any additional management or protection requirements on the States or other entities.

*Takings (E.O. 12630)*

In accordance with Executive Order 12630, we have determined the proposed rule does not have significant takings implications.

A takings implication assessment is not required because this rule (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. This rule would substantially advance a legitimate government interest (conservation and recovery of listed species) and would not present a barrier to all reasonable and expected beneficial use of private property.

*Federalism (E.O. 13132)*

In accordance with Executive Order 13132, we have considered whether this proposed rule would have significant Federalism effects and have determined that a Federalism assessment is not required. This proposed rule pertains only to determinations of Federal agency compliance with section 7 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)*

This proposed rule will not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. This proposed rule would clarify how the Services will make determinations whether a

Federal agency has ensured that any action it would authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat.

#### *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. We cannot reasonably predict the species or particular locations where we would designate critical habitat in the future. Thus, we cannot predict whether tribal lands would be affected by a proposal to designate critical habitat. However, the Act requires that we give notice of and seek comment on any proposal to designate critical habitat prior to a final decision. Our proposed rules to designate critical habitat would indicate the types of activities that may be affected by resulting regulatory requirements of the Act. Any potentially affected federally recognized Indian tribes would be notified of a proposed determination and given the opportunity to review and comment on the proposed rules.

#### *Paperwork Reduction Act*

This proposed rule does not contain any new collections of information that require approval by the OMB under the Paperwork Reduction Act. This proposed rule would not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or

sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

#### *National Environmental Policy Act*

We are analyzing these proposed regulations in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10-46.450), the Department of the Interior Manual (516 DM 1-6 and 8)), and National Oceanographic and Atmospheric Administration (NOAA) Administrative Order 216-6. Our analysis includes evaluating whether the action is procedural, administrative, or legal in nature, and therefore a categorical exclusion applies. We invite the public to comment on whether, and if so, how this proposed regulation may have a significant effect upon the human environment, including any effects identified as extraordinary circumstances at 43 CFR 46.215. We will complete our analysis, in compliance with NEPA, before finalizing these proposed regulations.

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

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

#### *Clarity of this Policy*

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

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

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

### **References Cited**

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

### **Authority**

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

## List of Subjects in 50 CFR Part 402

Endangered and threatened species.

### Proposed Regulation Promulgation

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

#### **PART 402—[AMENDED]**

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

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

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

#### **§ 402.02 Definitions.**

\* \* \* \* \*

*Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for listed species. Such

alterations may include, but are not limited to, effects that preclude or significantly delay the development of physical or biological features that support the life-history needs of the species for recovery.

\* \* \* \* \*

APR 03 2014

Dated:

Signed:

  
Rachel Jacobson

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

~~Interagency Cooperation—Endangered Species Act of 1973, as  
Amended; Definition of Destruction or Adverse Modification of Critical Habitat~~

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AD

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Dated:

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Signed:



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Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service

~~Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition  
of Destruction or Adverse Modification of Critical Habitat~~