

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

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**DEPARTMENT OF COMMERCE**

**National Marine Fisheries Service**

**[Docket No. FWS-R9-ES-2011-0104]**

**[Docket No. 120206102-336501]**

**[4500030114]**

**RIN 1018-AX87; 0648-BB82**

**Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act**

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

**ACTION:** Announcement of draft policy and solicitation of public comment.

**SUMMARY:** We, the U.S Fish and Wildlife Service and the National Marine Fisheries Service, announce a draft policy on exclusions from critical habitat under the Endangered Species Act.

This draft policy provides the Services' position on 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 draft policy is meant to complement the amendments to our regulations regarding impact analyses of critical habitat designations and is intended to clarify expectations regarding critical habitat and provide for a credible, predictable, and simplified critical-habitat-exclusion process.

**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** section below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on this date.

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

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. In the Search box enter the Docket number for this proposed policy, which is FWS–R9–ES–2011–0104. You may enter a comment by clicking on “Comment Now!.” Please ensure that you have found the correct document before submitting your comment.
- *U.S. mail or hand delivery:* Public Comments Processing, Attn: Docket No. FWS–R9–ES–2011–0104; 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:** Douglas Krofta, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 4401 N Fairfax Drive, Suite 420, Arlington, VA, 22203, telephone 703/358–2171; 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:**

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 National Marine Fisheries Service (NMFS) and Fish and Wildlife Service (FWS) are charged with implementing the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), the goal of which is to provide a means to conserve the ecosystems upon which listed species depend and a program for listed species conservation. Critical habitat is one tool in the Act that Congress established to achieve species conservation. In section 3(5)(A) of the Act Congress defined “critical habitat” as:

- (i) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
- (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

Specifying the geographic location of critical habitat helps facilitate implementation of section 7(a)(1) by identifying areas where Federal agencies can focus their conservation programs and utilize their authorities to further the purposes of the Act. 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) to insure their actions are not likely to destroy or adversely modify critical habitat.

Section 4 of the Act requires the Services to designate critical habitat and sets out standards and processes for determining critical habitat. Congress authorized the Secretaries to “exclude any area from critical habitat if [s]he determines that the benefits of 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” (section 4(b)(2)).

Over the years there have been legal challenges to the Services’ process for considering exclusions. Several court decisions have addressed the Services’ implementation of section 4(b)(2). In 2008, the Solicitor of the Department of the Interior issued a legal opinion on implementation of section 4(b)(2) (<http://www.doi.gov/solicitor/opinions.html>). That opinion is

based on the text of the Act and principles of statutory interpretation and relevant case law. The opinion explained the legal considerations that guide the Secretary's exclusion authority and discussed and elaborated on the application of these considerations to the circumstances commonly faced by the Services (e.g., habitat conservation plans, Tribal lands).

To provide predictability and transparency regarding how the Services consider exclusions under section 4(b)(2), the Services are announcing a draft policy on several issues that frequently arise in the context of exclusions. The draft policy on implementation of specific aspects of section 4(b)(2) does not cover the entire range of factors that may be considered as the basis for an exclusion in any given designation, nor does it serve as a comprehensive interpretation of all the provisions of section 4(b)(2).

This draft policy, when finalized, will set forth the Services' position regarding 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. The Services intend to apply this policy when considering exclusions from critical habitat. That being said, under the terms of the policy as proposed, the Services retain a great deal of discretion in making decisions with respect to exclusions from critical habitat.

#### *Implementation of Section 4(b)(2) of the Act*

On August 24, 2012 (77 FR 51503) the Services published a proposed rule to revise 50 CFR 424.19. In that rule the Services proposed to elaborate on the process and standards for implementing section 4(b)(2) of the Act. The final rule was published on August 28, 2013 (78

FR 53058). This draft policy is meant to complement those revisions to 50 CFR 424.19 and provides further clarification as to how we will implement section 4(b)(2) when designating critical habitat.

Section 4(b)(2) of the Act provides that:

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.

In 1982, Congress added this provision to the Act, both to require the Services to consider the broader impacts of designation of critical habitat and to provide a means for the Services to ameliorate potentially negative impacts of designation by excluding, in appropriate circumstances, particular areas from a designation. The first sentence of section 4(b)(2) sets out a mandatory requirement that the Services consider the economic impact, impact on national security, and any other relevant impacts prior to designating an area as part of a critical habitat designation. The Services will always consider such impacts, as required under this sentence, for each and every designation of critical habitat. Although the term “homeland security” was not in

common usage in 1982, the Services acknowledge that homeland security is fairly embodied within the mandatory requirement that the Services consider impacts on national security within the intent and meaning of section 4(b)(2).

The second sentence of section 4(b)(2) outlines a separate, discretionary process by which the Secretaries may elect to go further in order to determine whether to exclude such an area from the designation, by performing an exclusion analysis. The Services use their compliance with the first sentence of section 4(b)(2), their consideration of whether to engage in the discretionary exclusion analysis under the second sentence of section 4(b)(2), and any exclusion analysis that the Services undertake, as the primary basis for satisfying the provisions of Executive Orders 12866 and 13563. E.O. 12866 (and incorporated by E.O. 13563) requires agencies to assess the costs and benefits of a rule, and, to the extent permitted by law, to propose or adopt the rule only upon a reasoned determination that the benefits of the intended regulation justify the costs.

Conducting an exclusion analysis under section 4(b)(2) involves balancing or weighing the benefits of excluding a specific area from a designation of critical habitat against the benefits of including that area in the designation. If the benefits of exclusion outweigh the benefits of inclusion, the Secretaries may exclude the specific area so long as an explicit determination is made that an exclusion of the specific area would not result in the extinction of the species concerned. The discretionary 4(b)(2) exclusion analysis is fully consistent with the E.O. requirements in that it permits excluding an area where the benefits of exclusion outweigh the benefits of inclusion, and not excluding an area when the benefits of exclusion do not outweigh the benefits of inclusion. This draft policy sets forth specific categories of information that we often consider when we enter into the discretionary 4(b)(2) exclusion analysis and exercise the

Secretaries' discretion to exclude areas from critical habitat. We do not intend to cover in these examples all the categories of information that may be relevant, or to limit the Secretaries' discretion under this section to weight the benefits as appropriate.

Moreover, revisions to 50 CFR 424.19 further explain how the Services clarify the exclusion process for critical habitat and address statutory changes and case law. The revisions to 50 CFR 424.19 state that the Secretaries have the 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. Furthermore, the Secretaries may consider any relevant benefits, and the weight and consideration given to those benefits is within the discretion of the Secretaries. The revisions to 50 CFR 424.19 provide the framework for how the Services intend to implement section 4(b)(2) of the Act. This draft policy further details the discretion available to the Services (acting for the Secretaries) and provides detailed examples of 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 when we undertake a discretionary exclusion analysis.

*a. The Services' discretion.*

The Act affords a great degree of discretion to the Services in implementing section 4(b)(2). This discretion is applicable to a number of aspects of section 4(b)(2). Most significant is that the decision to exclude is always completely discretionary, as the Act states that the Secretaries "may" exclude areas. In no circumstance is exclusion required under the second

sentence of section 4(b)(2).

It is the general practice of the Services to exercise this discretion to exclude an area when the benefits of exclusion outweigh the benefits of inclusion, and not exclude an area when the benefits of exclusion do not outweigh the benefits of inclusion. In articulating this general practice, the Services do not intend to limit in any manner the discretion afforded to the Secretaries by the statute.

*b. Private or other non-Federal conservation plans and partnerships, in general.*

We sometimes exclude specific areas from critical habitat designations in part based on the existence of private or other non-Federal conservation plans or partnerships. A conservation plan describes actions that minimize and/or mitigate impacts to species and their habitats. Conservation plans can be developed by private entities with no Service involvement, or in partnership with the Services. In the case of a habitat conservation plan (HCP), safe harbor agreement (SHA), or a candidate conservation agreement with assurances (CCAA), a plan or agreement is developed in partnership with the Services for the purposes of attaining a permit under section 10 of the Act. See paragraph C, below, for a discussion of HCPs, SHAs, and CCAs.

In determining how the benefits of exclusion and the benefits of inclusion are affected by the existence of private or other non-Federal conservation plans and partnerships, when we undertake a discretionary exclusion analysis, we evaluate a variety of factors. These factors include:

- (i) The degree to which the record supports a conclusion that a critical habitat designation would impair the realization of benefits expected from the plan,

agreement, or partnership;

- (ii) The extent of public participation in the development of the conservation plan;
- (iii) The degree to which there has been agency review and required determinations;
- (iv) Whether National Environmental Policy Act (NEPA) compliance was required;
- (v) The demonstrated implementation and success of the chosen mechanism;
- (vi) The degree to which the plan or agreement provides for the conservation of the essential physical or biological features for the species;
- (vii) Whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan or agreement will be implemented; and
- (viii) Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.

Whether a plan or agreement has previously been subject to public comment, agency review, and NEPA compliance processes are factors that may indicate the degree of critical analysis the plan or agreement has already received. These factors influence the Services' determination of the appropriate weight that should be given in any particular case.

Achieving the conservation benefits of a particular existing plan is usually not a *benefit of exclusion*, because we expect such plans to be implemented and, therefore, those conservation benefits are expected to occur, regardless of inclusion or exclusion of the covered areas in critical habitat. Instead, the benefit of excluding from critical habitat a specific area covered by an existing plan is typically the maintenance of an existing partnership or the potential for creation of new conservation partnerships with the plan's signatories or other parties. On the other hand,

the conservation benefits of a particular existing plan, agreement, or partnership may serve to reduce the *benefits of including* in critical habitat a specific area that is covered by an existing plan. The benefits of inclusion in critical habitat include that amount of conservation of the species habitat provided by the designation of critical habitat above the baseline (i.e., above the conservation benefits from listing of the species or other measures not dependent on this designation of critical habitat). Where there is an existing plan, that plan (and the conservation benefits it provides) may appropriately be included in the baseline. Therefore, to the extent the plan provides some protection for the species' habitat that would to some degree be duplicated by designating the area at issue as critical habitat, the benefits of inclusion of that area covered by the plan are reduced.

*c. Private or other non-Federal conservation plans related to permits under section 10 of the Act.*

Habitat conservation plans (HCPs) for incidental take permits under section 10(a)(1)(B) of the Act provide for partnerships with non-Federal entities to minimize and mitigate impacts to listed species and their habitat. In most cases HCP permittees agree to do more for the conservation of the species and their habitats on private lands than designation of critical habitat would provide alone. We place great value on the partnerships that are developed during the preparation and implementation of HCPs.

Candidate conservation agreements with assurances (CCAAs) and safe harbor agreements (SHAs) are voluntary agreements designed to conserve candidate and listed species, respectively, on non-Federal lands. In exchange for actions that contribute to the conservation of

species on non-Federal lands, participating property owners are covered by an enhancement of survival permit under section 10(a)(1)(A) of the Act, which authorizes incidental take of the covered species that may result from implementation of conservation actions, specific land uses, and return to baseline under the agreements. The Services also provide enrollees assurances that we will not impose further land-, water-, or resource-use restrictions or additional commitments of land, water, or finances beyond those agreed to in the agreements.

When we undertake a discretionary exclusion analysis, we will always consider areas covered by an approved CCAA/SHA/HCP, and generally exclude such areas from a designation of critical habitat if three conditions are met:

- 1) The permittee is properly implementing the CCAA/SHA/HCP and is expected to continue to do so for the term of the agreement. A CCAA/SHA/HCP is properly implemented if the permittee is and has been fully implementing the commitments and provisions in the CCAA/SHA/HCP, Implementing Agreement, and permit.
- 2) The species for which critical habitat is being designated is a covered species in the CCAA/SHA/HCP, or very similar in its habitat requirements to a covered species. The recognition that the Services extend to such an agreement depends on the degree to which the conservation measures undertaken in the CCAA/SHA/HCP would also protect the habitat features of the similar species.
- 3) The CCAA/SHA/HCP specifically addresses that species' habitat (and does not just provide guidelines) and meets the conservation needs of the species in the planning area.

We will undertake a case-by-case analysis to determine whether these conditions are met and, as with other conservation plans, whether the benefits of exclusion outweigh the benefits of

inclusion.

The benefits of excluding lands with CCAAs, SHAs, or properly implemented HCPs that have been permitted under section 10 of the Act from critical habitat designation include relieving landowners, communities, and counties of any potential additional regulatory burden that might be imposed as a result of the critical habitat designation. A related benefit of exclusion is the unhindered, continued ability to maintain existing partnerships and seek new partnerships with potential plan participants, including States, counties, local jurisdictions, conservation organizations, and private landowners. Together, these entities can implement conservation actions that the Services would be unable to accomplish without private landowners. These partnerships can lead to additional CCAAs, SHAs, and HCPs. This is particularly important because HCPs often cover a wide range of species, including listed plant species (for which there is no general take prohibition under section 9 of the Act) and species that are not state or federally listed (which do not receive the Act's protections). Neither of these categories of species may receive much protection from development in the absence of HCPs.

As is the case with conservation plans generally, the protection that a CCAA, SHA, or HCP provides to habitat can reduce the benefits of including the area covered by a CCAA, SHA, or HCP in the designation. With specific regard to HCPs, because the Services generally approve HCPs on the basis of their efficacy to minimize and mitigate impacts to listed species and their habitat, these plans tend to be very effective at reducing those benefits of inclusion. Nonetheless, HCPs often are written with the understanding that some of the covered area will be developed, and the associated permit provides authorization of incidental take caused by that development (although a properly designed HCP will tend to steer development toward the least

biologically important habitat). Thus, designation of the areas specified for development that meet the definition of “critical habitat” may still conceivably provide a conservation benefit to the species. In addition, if activities not covered by the HCP are affecting or may affect an area that is identified as critical habitat, then the benefits of inclusion of that specific area may be relatively high because additional conservation benefits may be realized by the designation of critical habitat in that area. In any case, the Services will weigh whatever benefits of inclusion there are against the benefits of exclusion (usually the fostering of partnerships that may result in future conservation actions).

For CCAAs, SHAs, and HCPs that are still under development, when we undertake a discretionary exclusion analysis, we generally will not exclude those areas from a designation of critical habitat. If a CCAA, SHA, or HCP is close to being approved, we will evaluate these draft plans under the framework of general plans and partnerships (subsection b, above). In other words, we will consider factors such as partnerships that have been developed during the preparation of draft CCAAs, SHAs, and HCPs and broad public benefits such as encouraging the continuation of current and development of future conservation efforts with non-Federal partners, and consider these factors as possible benefits of exclusion. However, promises of future conservation actions in draft CCAAs, SHAs, and HCPs will be given little weight in the discretionary exclusion analysis, even if they may directly benefit the species for which a critical habitat designation is proposed.

*d. Tribal lands.*

There are several Executive Orders, Secretarial Orders, and policies that relate to working

with tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control Tribal lands, emphasize the importance of developing partnerships with Tribal governments, and direct the Services to consult with Tribes on a government-to-government basis.

A joint Secretarial Order that applies to both FWS and NMFS, Secretarial Order 3206, *American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act* (June 5, 1997) (S.O. 3206), is the most comprehensive of the various guidance documents related to Tribal relationships and ESA implementation, and it provides the most detail directly relevant to the designation of critical habitat. In addition to the general direction discussed above, S.O. 3206 explicitly recognizes the right of Tribes to participate fully in the listing process, including designation of critical habitat. The Order also states: “Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.” In light of this instruction, when we undertake a discretionary exclusion analysis we will always consider exclusions of Tribal lands under section 4(b)(2) of the Act prior to finalizing a designation of critical habitat and will give great weight to Tribal concerns in analyzing the benefits of exclusion.

However, S.O. 3206 does not preclude us from designating Tribal lands or waters as critical habitat nor does it state that Tribal lands or waters cannot meet the Act’s definition of “critical habitat.” We are directed by the Act to identify areas that meet the definition of “critical habitat,” (i.e., occupied lands that contain the essential physical or biological features that may require special management or protection and identification of unoccupied areas that are

essential to the conservation of a species) without regard to landownership. While S.O. 3206 provides important direction, it expressly states that it does not modify the Departments' statutory authority.

*e. Impacts on national security and homeland security.*

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)), as revised in 2003 provides: “The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense [DoD], or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.” In other words, as articulated in the proposed rule revising 50 CFR 424.12(h) published elsewhere in today's edition of the **Federal Register**, if the Services conclude that an INRMP “provides a benefit” to the species, the area covered is ineligible for designation. Thus that area cannot be designated as critical habitat.

Section 4(a)(3)(B)(i) of the Act, however, may not cover all DoD lands or areas that pose potential national security concerns (e.g., a DoD installation that is in the process of revising its integrated natural resources management plan). If a particular area is not covered under section 4(a)(3)(B)(i), national security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of “critical habitat.” Nevertheless, when designating critical habitat under section 4(b)(2), the Secretaries must consider impacts on national security, including homeland security, on DoD lands or areas ineligible for consideration under section

4(a)(3)(B)(i). Accordingly, we will always consider for exclusion from the designation areas for which DoD, DHS, or another Federal agency has requested exclusion based on an assertion of national security or homeland-security concerns.

We cannot, however, automatically exclude requested areas. When DoD, DHS, or another Federal agency requests exclusion from critical habitat on the basis of national-security or homeland-security impacts, it must provide a specific justification. Such justification could include demonstration of probable impacts, such as impacts to ongoing border security patrols and surveillance activities, or a delay in training or facility construction, as a result of compliance with section 7(a)(2) of the Act. If the agency requesting the exclusion does not provide us with a specific justification, we will contact the agency to recommend that it provide a specific justification. If the agency provides a specific justification, we will defer to the expert judgment of DoD, DHS, or another Federal agency as to: (1) Whether activities on its lands or waters, or its activities on other lands or waters, have national-security or homeland-security implications; and (2) the importance of those implications. In that circumstance, in conducting a discretionary exclusion analysis, we will give great weight to national-security and homeland security concerns in analyzing the benefits of exclusion.

*f. Federal lands.*

We recognize that we have obligations to consider the impacts of designation of critical habitat on Federal lands under the first sentence of section 4(b)(2) and under E.O. 12866. However, as mentioned above, the Services have broad discretion under the second sentence of 4(b)(2) on how to weigh those impacts. In particular, “[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 (1978). In considering how to exercise this broad discretion, we are mindful that Federal land managers have unique obligations under the Act. First, Congress declared that it was its policy that “all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.” Section 2(c)(1). Second, all Federal agencies have responsibilities under section 7 of the Act to carry out programs for the conservation of listed species and to ensure their actions are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

We also note that, while the benefits of excluding non-Federal lands include development of new conservation partnerships and fostering existing partnerships, those benefits do not generally arise with respect to Federal lands, because of the independent obligations of Federal agencies under section 7 of the Act. Conversely, the benefits of including Federal lands in a designation are greater than non-Federal lands because there is a Federal nexus for any project on Federal lands that may affect critical habitat, so section 7 consultation would be triggered and an analysis under the destruction and adverse-modification standard would always be conducted.

Under the Act, the only direct consequence of critical habitat designation is to require Federal agencies to ensure, through section 7 consultation, that any action they fund, authorize, or carry out does not destroy or adversely modify designated critical habitat. The costs that this requirement may impose on Federal agencies can be divided into two types: the additional administrative or transactional costs associated with the consultation process, and the costs to Federal agencies and other affected parties, including applicants for Federal permits, of any project modifications necessary to avoid adverse impacts to critical habitat. Consistent with the unique obligations that Congress created for Federal agencies in conserving endangered and

threatened species, we generally will not consider avoiding the administrative or transactional costs associated with the section 7 consultation process to be a “benefit” of excluding a particular area from a critical habitat designation in any discretionary exclusion analysis. We will, however, consider the extent to which such consultation would produce an outcome that has economic or other impacts, such as by requiring project modifications and additional conservation measures by the Federal agency or other affected parties.

Lands owned by the Federal government should be prioritized as sources of support in the recovery of listed species. To the extent possible, we will focus designation of critical habitat on Federal lands in an effort to avoid the real or perceived regulatory burdens on non-Federal lands. We do greatly value the partnership of other Federal agencies in the conservation of listed and non-listed species. However, for the reasons listed above, we will focus our exclusions on non-Federal lands. Circumstances where we determine that the benefits of excluding Federal lands outweigh the benefits of not doing so are most likely when national security or homeland-security concerns are present.

*g. Economic impacts.*

The first sentence of section 4(b)(2) of the ESA requires the Services to consider the economic impacts (as well as the impacts on national security and any other relevant impacts) of designating critical habitat. In addition, economic impacts may for some particular areas play an important role in the discretionary exclusion analysis under the second sentence of section 4(b)(2). In both contexts, the Services will consider the probable incremental economic impacts of the designation. When the Services undertake a discretionary exclusion analysis with respect

to a particular area, they will weigh the economic benefits of exclusion (and any other benefits of exclusion) against any benefits of inclusion (primarily the conservation value of designating the area). The conservation value may be influenced by the level of effort needed to manage degraded habitat to the point where it could support the listed species. The Services will use their discretion in determining how to weigh probable incremental economic impacts against conservation value. It is the nature of the probable incremental economic impacts, not necessarily a particular threshold level, that triggers considerations of exclusions based on probable incremental economic impacts. For example, if an economic analysis indicates high probable incremental impacts in a proposed critical habitat unit of low conservation value (relative to the remainder of the designation), the Services may consider exclusion of that particular unit.

#### **Draft Policy on Implementation of Section 4(b)(2) of the Act**

1. The decision to exclude any specific area from a designation of critical habitat is always discretionary, as the Act states that the Secretaries “may” exclude any area. In no circumstances is an exclusion of any specific area required by the Act.
2. When we undertake a discretionary exclusion analysis, we will evaluate the effect of conservation plans and partnerships on the benefits of inclusion and the benefits of exclusion of any particular area from critical habitat by considering a number of factors including:
  - a. The degree to which the record supports a conclusion that a critical habitat designation would impair the realization of benefits expected from the plan, agreement, or partnership.

- b. The extent of public participation in the development of the conservation plan.
  - c. The degree to which there has been agency review and required determinations.
  - d. Whether National Environmental Policy Act (NEPA) compliance was required.
  - e. The demonstrated implementation and success of the chosen mechanism.
  - f. The degree to which the plan or agreement provides for the conservation of the essential physical or biological features for the species.
  - g. Whether there is a reasonable expectation that the conservation management strategies and actions contained in the management plan or agreement will be implemented.
  - h. Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.
3. When we undertake a discretionary exclusion analysis, we will always consider areas covered by a permitted CCAA, SHA, or HCP, and generally exclude such areas from a designation of critical habitat if incidental take caused by the activities in those areas is covered by a permit under section 10 of the Act and the CCAA/ SHA/HCP meets the following conditions:
- a. The permittee is properly implementing the CCAA/SHA/HCP and is expected to continue to do so for the term of the agreement. A CCAA/SHA/HCP is properly implemented if the permittee is and has been fully implementing the commitments and provisions in the HCP, Implementing Agreement, and permit.
  - b. The species for which critical habitat is being designated is a covered species in the CCAA/SHA/HCP, or very similar in its habitat requirements to a covered

species. The recognition that the Services extend to such an agreement depends on the degree to which the conservation measures undertaken in the CCAA/SHA/HCP would also protect the habitat features of the similar species.

- c. The CCAA/SHA/HCP specifically addresses that species' habitat (not just providing guidelines) and meets the conservation needs of the species in the planning area.

We generally will not rely on CCAAs/SHAs/HCPs that are still under development as the basis of exclusion from a designation of critical habitat.

4. When we undertake a discretionary exclusion analysis, we will always consider exclusion of Tribal lands, and give great weight to Tribal concerns in analyzing the benefits of exclusion. However, Tribal concerns are not a factor in determining what areas, in the first instance, meet the definition of "critical habitat."
5. When we undertake a discretionary exclusion analysis, we will always consider exclusion of areas for which a Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns, and give great weight to national-security or homeland-security concerns in analyzing the benefits of exclusion. National-security and or homeland-security concerns are not a factor, however, in the process of determining what areas, in the first instance, meet the definition of "critical habitat."
6. Except in the circumstances described in 5 above, we will focus our exclusions on non-Federal lands. Because all actions on Federal lands are subject to the requirements of Section 7(a)(2) of the Act, the benefits of designating Federal lands as critical habitat are always present and are typically greater than the benefits of not designating Federal lands or of designating other lands.

7. When the Services are determining whether to undertake a discretionary exclusion analysis as a result of the probable incremental economic impacts of designating a particular area, it is the nature of those impacts, not necessarily a particular threshold level, that is relevant to the Services' determination.
8. For any area to be excluded, we must find that the benefits of excluding that area outweigh the benefits of including that area in the designation. We must not exclude an area if the failure to designate it will result in the extinction of the species.

### **Request for Information**

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

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 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>.

We seek comments and recommendations in particular on:

1. Whether this policy sets out clearly defined expectations regarding critical habitat and the exclusion process. If not, please provide detailed comments so we can clarify our draft policy.
2. Whether this draft policy provides enough or too little detail regarding how the Services will consider and conduct the discretionary 4(b)(2) exclusion analysis for each of the categories described in this draft policy.
3. Whether, in general, there may be other factors or considerations that we should evaluate when considering exclusions from critical habitat.
4. Regarding consideration of conservation plans and partnerships, whether our draft policy appropriately characterizes the importance of partnerships relative to the conservation benefits of a plan or partnership.
5. Regarding habitat conservation plans (HCPs), whether our draft policy works for large-scale regional plans as well as smaller project-specific plans
6. Relative to our consideration for Tribal lands, whether our draft policy provides clearly defined expectations and appropriate consideration of Tribal sovereignty. If not, please describe in detail how we could improve this consideration.
7. Whether our consideration of impacts to national security and homeland security accurately captures our responsibilities under the Act and the Sikes Act (16 U.S.C. 670a).

### **Required Determinations**

As mentioned above, we intend to apply this policy, when finalized, in considering exclusions from critical habitat designations. The general policy reserves much discretion that

will be applied by the agencies in particular designations, and in each we are required to comply with various Executive Orders and statutes for those individual rulemakings. Below we discuss compliance with several Executive Orders and statutes as they pertain to this draft policy.

### **Regulatory Planning and Review (Executive Orders 12866 and 13563)**

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

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 our regulatory system 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 policy in a manner consistent with these requirements.

### **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) We find this draft policy would not “significantly or uniquely” affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act,

2 U.S.C. 1502, that this policy would not impose a cost of \$100 million or more in any given year on local or State governments or private entities. Small governments would not be affected because the draft policy would not place additional requirements on any city, county, or other local municipalities.

(b) This draft policy would not produce a Federal mandate on State, local, or Tribal governments or the private sector of \$100 million or greater in any year; that is, it is not a “significant regulatory action” under the Unfunded Mandates Reform Act. This policy would impose no obligations on State, local, or tribal governments because this draft policy is meant to complement the amendments to 50 CFR 424.19, and is intended to clarify expectations regarding critical habitat and provide for a credible, predictable, and simplified critical-habitat-exclusion process. The only entities directly affected by this draft policy are the FWS and NMFS. As such, a Small Government Agency Plan is not required.

### **Takings—Executive Order 12630**

In accordance with Executive Order 12630, this draft policy would not have significant takings implications. This draft policy would not pertain to “taking” of private property interests, nor would it directly affect private property. A takings implication assessment is not required because this draft policy (1) would not effectively compel a property owner to suffer a physical invasion of property and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This draft policy would substantially advance a legitimate government interest (clarify expectations regarding critical habitat and provide for a credible, predictable, and simplified critical-habitat-exclusion process) and would not present a barrier to

all reasonable and expected beneficial use of private property.

### **Federalism—Executive Order 13132**

In accordance with Executive Order 13132 (Federalism), this draft policy does not have significant Federalism effects and a Federalism assessment is not required. This draft policy pertains only to exclusions from designations of 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—Executive Order 12988**

In accordance with Executive Order 12988 (Civil Justice Reform), this draft policy would not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. The clarification of expectations regarding critical habitat and providing a credible, predictable, and simplified critical-habitat-exclusion process will make it easier for the public to understand our critical-habitat-designation process, and thus should not significantly affect or burden the judicial system.

### **Paperwork Reduction Act of 1995**

This draft policy does not contain any new collections of information that require

approval by OMB under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This draft policy will 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 (NEPA)**

We are analyzing this draft policy 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 C.F.R. 46.10-46.450), the Department of the Interior Manual (516 DM 1-6 and 8), and National Oceanic and Atmospheric Administration (NOAA) Administrative Order 216-6. We invite the public to comment on the extent to which any of these proposed regulations may have a significant impact on the human environment, or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. We will complete our analysis, in compliance with NEPA, before finalizing this draft policy.

### **Government-to-Government Relationship with Tribes**

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175 "Consultation and Coordination with Indian Tribal Governments," and the

Department of the Interior Manual at 512 DM 2, and the Department of Commerce *American Indian and Alaska Native Policy* (March 30, 1995), we have considered possible effects on federally recognized Indian tribes and have preliminarily determined that there are no potential adverse effects of issuing this draft policy. Our intent with this draft policy is to provide a consistent approach to the consideration of exclusion of areas from critical habitat, including Tribal lands. This draft policy does not establish a new direction, but does establish a consistent approach and direction for the Services. We will continue to work with Tribes as we finalize this draft policy and promulgate individual critical habitat designations.

### **Energy Supply, Distribution, or Use**

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This draft policy, if made final, is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

### **Clarity of this Draft 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 this draft policy, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

### **Authors**

The primary authors of this draft policy are the staff members of the Endangered Species Program, U.S. Fish and Wildlife Service, 4401 N. Fairfax Drive, Arlington, VA 22203, and the National Marine Fisheries Service's Endangered Species Division, 1335 East-West Highway, Silver Spring, MD 20910.

### **Authority**

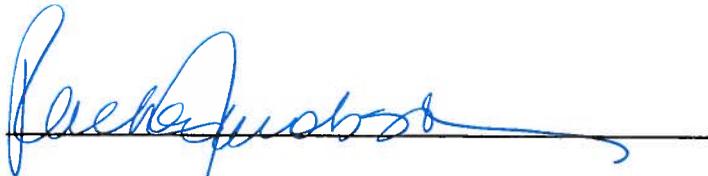
The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

APR 28 2014

Dated:

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Signed:



Principal Deputy Assistant Secretary for Fish and Wildlife and Parks  
**Rachel Jacobson**

~~Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act~~

Dated: APR 28 2014

Signed: 

Samuel D. Rauch III  
Deputy Assistant Administrator  
for Regulatory Programs,  
National Marine Fisheries Service.

~~Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act~~