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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 424

[Docket No. FWS–R9–ES–2011–0073]

[Docket No. 120606146-3505-01]

[4500030114]

RIN 1018–AY62; 0648–BC24

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

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

ACTION: Final 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”), are finalizing a revision to our regulations pertaining to impact analyses conducted for designations of critical habitat under the Endangered Species Act of 1973, as amended (the Act). This regulation is being finalized as directed by the President’s February 28, 2012, memorandum, which directed us to take prompt steps to revise our regulations to provide that the economic analysis be completed and made available for public comment at the time of publication of a proposed rule to designate critical habitat.

DATES: This final rule is effective on October 30, 2013.

ADDRESSES: This final rule is available on the Internet at <http://www.regulations.gov>. Comments and materials received, as well as supporting documentation used in preparing this final regulation, are available for public inspection, by appointment, during normal business hours, at 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.

FOR FURTHER INFORMATION CONTACT: Douglas Krofta, Chief, Endangered Species Branch of Listing, 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 301/427-8469; facsimile 301/713–0376. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. On August 24, 2012, we published a proposed rule in the **Federal Register** to revise our regulations to provide the public earlier access to the draft economic analysis supporting critical habitat designations, as directed by the President’s February 28, 2012, memorandum (Memorandum for the Secretary of the Interior, Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens, 77 FR 12985 (March 5, 2012)). 77 FR 51503 (Aug. 24, 2012). The President’s February 28, 2012, memorandum directed the Secretary of the Interior to revise the regulations implementing the Endangered Species Act to provide that a draft economic analysis be completed and made available for public comment at the time of publication of a proposed rule to designate critical habitat. Both transparency and public comment will be

improved if the public has access to both the scientific analysis and the draft economic analysis at the same time. We are now issuing a final rule to achieve these goals. Because the Act and its implementing regulations are jointly administered by the Departments of the Interior and Commerce, the rule has been developed jointly. This final rule also addresses several court decisions and is informed by conclusions from a 2008 legal opinion by the Solicitor of the Department of the Interior. Specifically, we revise 50 CFR 424.19 to clarify the instructions for making information available to the public, considering the impacts of critical habitat designations, and considering exclusions from critical habitat. Except for the revision to the timing of making draft economic analyses available to the public, these revisions will not change how we implement the Act; rather, the revisions serve to codify the current practices of the agencies. This final rule is consistent with Executive Order 13563, and in particular with the requirement of retrospective analysis of existing rules, designed “to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.”

This rule makes the following changes:

- (1) We changed the title of section 424.19 from “*Final Rules—impact analysis of critical habitat*” to “*Impact analysis and exclusions from critical habitat.*” We removed the reference to “[f]inal rules” to allow this section to apply to both proposed and final critical habitat rules. We added the term “exclusions” in the title to more fully describe that this section addresses both impact analyses and

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

- (2) We divided section 424.19 into three paragraphs. The division into three paragraphs closely tracks the requirements of the Act under section 4(b)(2) and provides for a clearly defined process for consideration of exclusions as required under the Act.
- (3) Paragraph (a) implements the direction of the President's February 28, 2012, memorandum by stating that, at the time of proposing a designation of critical habitat, the Secretary will make available for public comment the draft economic analysis of the designation. As it was proposed, paragraph (a) included a third sentence, relating to section 4(b)(8) of the Act, which would have been carried over from the existing regulations with modifications. This sentence is not being implemented in this final rule to sharpen this regulation's focus on implementing section 4(b)(2) of the Act and to ensure consistency with other sections of part 424. Please see the discussion in the "Rationale for Revised Paragraph (a)," below.
- (4) Paragraph (b) implements the first sentence of section 4(b)(2) of the Act, which directs the Secretary to consider the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. This paragraph states that the impact analysis should focus on the incremental effects resulting from the designation of critical habitat.

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

Background

The purposes of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (Act), are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions. Moreover, the Act states that it is the policy of Congress that the Federal Government will seek to conserve threatened and endangered species, and use its authorities in furtherance of the purposes of the Act.

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

Critical habitat represents the habitat essential for the species' recovery. Once designated, critical habitat provides for the conservation of listed species in several ways. Specifying the geographic location of critical habitat facilitates implementation of section 7(a)(1) of the Act by identifying areas where Federal agencies can focus their

conservation programs and use their authorities to further the purposes of the Act. Designating critical habitat also helps focus the efforts of other conservation partners, such as State and local governments, nongovernmental organizations, and individuals. Furthermore, when designation of critical habitat occurs near the time of listing, it provides early conservation planning guidance to bridge the gap until the Services can complete more thorough recovery planning.

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

The Secretaries of the Interior and Commerce (the “Secretaries”) share responsibilities for implementing most of the provisions of the Act. Generally, marine and anadromous species are under the jurisdiction of the Secretary of Commerce and all

other species are under the jurisdiction of the Secretary of the Interior, though jurisdiction is shared between the two departments for some species, such as sea turtles and Atlantic salmon. Authority to administer the Act has been delegated by the Secretary of the Interior to the Director of the FWS and by the Secretary of Commerce to the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration.

This final rule addresses two developments related to 50 CFR 424.19. First, the Solicitor of the Department of the Interior issued a legal opinion on October 3, 2008, regarding the Secretary of the Interior's authority to exclude areas from critical habitat designation under section 4(b)(2) of the Act (M-37016, "The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act" (Oct. 3, 2008)) (DOI 2008). The Solicitor concluded, among other things, that, while the Act requires the Secretary to consider the economic impact, the impact on national security, and any other relevant impact, the decision whether to make exclusions under section 4(b)(2) of the Act is at the discretion of the Secretary; that the Secretary has wide discretion when weighing the benefits of exclusion against the benefits of inclusion; and that it is appropriate for the Secretary to consider impacts of a critical habitat designation on an incremental basis. These conclusions have been confirmed by judicial decision. *See Building Industry Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 2012 U.S. Dist. Lexis 170688 (N.D. Cal. Nov. 30, 2012).

Second, the President's February 28, 2012, memorandum directed the Secretary of the Interior to revise the implementing regulations of the Act to provide that an analysis of the economic impacts of a proposed critical habitat designation be completed by the Services and made available to the public at the time of publication of a proposed

rule to designate critical habitat. The memo stated: “Uncertainty on the part of the public may be avoided, and public comment improved, by simultaneous presentation of the best scientific data available and the analysis of economic and other impacts.” The Services have based this final rule on the reasoning and conclusions of the Solicitor’s opinion and the President’s February 28, 2012, memorandum.

Discussion of the Revisions to 50 CFR 424.19

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

In making the specific changes to the regulations that follow, and setting out the accompanying clarifying discussion in this preamble, the Services are establishing prospective standards only. Nothing in this final rule to revise the regulations is intended to require that any previously completed critical habitat designation be reevaluated on this basis. Furthermore, we will implement the requirements of this regulation following the effective date. For proposed critical habitat designations published prior to the effective date of this final regulation, the Services will continue to follow their current practices.

Statutory Authority

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

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Definition of Key Phrases

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

Based on public comment and for clarity, in this final rule, we have changed the reference to the analysis under the second sentence of 4(b)(2) of the Act from “optional weighing of benefits” to “discretionary 4(b)(2) exclusion analysis.”

An economic analysis is a tool that informs both the required impact analysis and the discretionary 4(b)(2) exclusion analysis. Additionally, the draft economic analysis informs the determinations established under other statutes, regulations, Executive Orders, or directives that apply to rulemakings generally, including critical habitat designations. However, the draft economic analysis addresses only the consideration of the potential economic impact of the designation of critical habitat.

An “incremental analysis” is a method of determining the probable impacts of the designation; it seeks to identify and focus solely on the impacts over and above those resulting from existing protections. This method applies to the impact analysis, discretionary 4(b)(2) exclusion analysis, and economic analysis.

Relationship of the Key Phrases

The purpose of the impact analysis is to inform the Secretaries’ decision about whether to engage in the discretionary exclusion analysis under the second sentence of section 4(b)(2) of the Act. Information that is used in the impact analysis can come from a variety of sources, one of which is the draft economic analysis of the proposed designation of critical habitat. The Secretaries must consider the probable economic, national security, and other relevant impacts of the designation of critical habitat. This comparison is done through the method of an incremental analysis of economic, national security, and other relevant impacts. The incremental-analysis methodology compares conditions with and without the designation of critical habitat.

Revisions to 50 CFR 424.19

We changed the title of this section from that of the previous regulation, which read, “Final rules—impact analysis of critical habitat” to “Impact analysis and exclusions from critical habitat.” The reference to “[f]inal rules” was deleted to allow for the application of this section to both proposed and final critical habitat rules. We added the term “exclusions” to the title to more fully describe that this section addresses both impact analyses and how they inform the exclusion process under section 4(b)(2) of the Act for critical habitat.

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

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

Rationale for the Revised Paragraph (a)

We divided the previous section 424.19 into three paragraphs. The two sentences of paragraph (a) are new and have been added to comply with the Presidential memorandum. They read:

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

The President's February 28, 2012 memorandum directed the Secretary of the Interior to take 'prompt steps' to revise the regulations. The first sentence of the revised regulations will comply with the President's direction. The second sentence specifies that a summary of the draft economic analysis is to be published in the **Federal Register** notice of the proposed designation of critical habitat. The draft economic analysis itself is to be made available on <http://www.regulations.gov> along with the proposed designation of critical habitat or on other websites as deemed appropriate by the Services. It is this summary of the draft economic analysis that will constitute the Services' consideration of the economic impact, as required under the first sentence of section 4(b)(2) of the Act, of the proposed designation of critical habitat for a species.

As set out in the proposed rule, paragraph (a) included a third sentence which would have carried over the first half of the first sentence of the previous section 424.19, with modifications. As a result of public comment and review of the provisions for

proposed and final rules at 50 CFR 424.16(b) (Proposed rules) and 424.18(a)(2) (Final rules—general), respectively, we have removed the proposed third sentence from this final regulation.

Sections 424.16(b) and 424.18(a)(2) govern the contents of Federal Register notices for proposed and final rules, respectively. Each states that the rule will, to the maximum extent practicable, “include a brief description and evaluation of those activities (whether public or private) that . . . may adversely modify such habitat or [may] be affected by such designation.” (The edited language varies slightly between the two provisions.) This language implements section 4(b)(8) of the Act. The third sentence of the proposed rule was similar. In this final rule, we are deleting that sentence because it is redundant with the language in sections 424.16(b) and 424.18(a)(2). Compliance with section 4(b)(8) of the Act fits more logically in those provisions, as they address the contents of Federal Register notices, which is the subject of section 4(b)(8) of the Act. This change also has the benefit of simplifying section 424.19 so that it addresses only one statutory provision (section 4(b)(2) of the Act), rather than two different provisions.

Although the language in sections 424.16(b) and 424.18(a)(2) repeats the statutory language, we note that the “may adversely modify” language could be misinterpreted to suggest that certain activities necessarily must undergo section 7 consultation, or that the Services must predetermine the result of any future section 7 consultation. Properly interpreted, this language reflects Congress’s intent that the Services alert the public to the general relationship between the designation of critical habitat and types of activities that may occur on the landscape, without definitively asserting that consultations are required for such activities, or what the results of any

consultations might be. Congress’s use of the word “may” in this phrase supports our interpretation. Thus, notwithstanding any statement in the proposed or final critical habitat designation about the relationship between the designation and particular types of activities, Federal agencies must determine whether their individual proposed actions trigger the requirement for section 7 consultations. And if an agency does consult on an action, the Services will make an adverse modification determination by applying the standards of section 7 to the facts of the action at issue, rather than by looking to the general statements made in compliance with section 4(b)(8) of the Act in the preamble to the critical habitat designation.

Rationale for the Revised Paragraph (b)

Paragraph (b) implements the first sentence of section 4(b)(2) of the Act (“The Secretary shall designate critical habitat . . . after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.”). The first sentence of new section 424.19(b) carries over the second half of the first sentence of the previous section 424.19, with modifications, and thus repeats the basic statutory requirement. We replaced “after proposing designation of such an area” with “[p]rior to finalizing the designation of critical habitat” to expressly provide for more flexibility in the timing of the consideration. Thus the first sentence of paragraph (b) reads:

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

The statute itself requires only that the consideration occur—it does not specify when in the rulemaking process it must occur. Furthermore, the Presidential memorandum only required the Services to change the timing of the availability of the economic analysis of designations of critical habitat and did not speak to the timing of the mandatory considerations specified in the Act. That being said, we stress that the Act’s legislative history is clear that Congress intended consideration of economic impacts to neither affect nor delay the listing of species. Therefore, regardless of the point in the rulemaking process at which consideration of economic impacts of a designation of critical habitat begins, that consideration must be kept analytically distinct from, and have no effect on the outcome or timing of, listing determinations. We also note that a draft economic analysis of a critical habitat designation is only one of many pieces of information the Secretaries use in determining whether to exclude areas under section 4(b)(2) of the Act, if the Secretary decides to engage in that discretionary analysis.

Also in paragraph (b), we retained from previous section 424.19 the phrases “probable” and “upon proposed or ongoing activities.” These phrases provide guidance that the Services should not consider improbable or speculative impacts. However, the Services do not intend that the term “probable” requires a showing of statistical probability or any specific numeric likelihood. Moreover, the “activities” at issue are only those that would require consultation under section 7 of the Act. *See* DOI 2008 at

10–12. Although impact analyses are based on the best scientific data available, any predictions of future impacts are inherently uncertain and subject to change. Thus, the Services should consider the likely general impact of the designation and not make specific predictions of the outcome of particular section 7 consultations that have not in fact been completed.

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

The first sentence of paragraph (b) uses the term “consider,” which reflects the statutory term “consideration” in section 4(b)(2) of the Act. This final regulation does not further define this term. However, we agree with the Solicitor’s 2008 Opinion that, in the context of section 4(b)(2) of the Act, to “consider” impacts the Services must gather available information about the impacts on proposed or ongoing activities that would be subject to section 7 consultation, and then must give careful thought to the relevant information in the context of deciding whether to proceed with the discretionary 4(b)(2) exclusion analysis. *See* DOI 2008 at 14–16.

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

The Secretary will consider impacts at a scale that the Secretary determines to be appropriate, and will compare the impacts with and without the designation.

Impacts may be qualitatively or quantitatively described.

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

The second phrase of the second sentence, “and will compare the impacts with and without designation,” clarifies that impact analyses evaluate the *incremental* impacts of the designation. This evaluation is sometimes referred to as an “incremental analysis” or “baseline approach.” For the purpose of the impacts analysis required by the first sentence of section 4(b)(2) of the Act, the incremental impacts are those probable economic, national security, and other relevant impacts of the proposed critical habitat designation on ongoing or potential Federal actions that would not otherwise occur

without the designation. Put another way, the incremental impacts are the probable impacts on Federal actions for which the designation is the “but for” cause.

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

In addition to using an incremental analysis in the impacts analysis, the Secretary will use an incremental analysis in the discretionary analysis under the second sentence of section 4(b)(2), if the Secretary decides to undertake that discretionary analysis. In that context, the Secretary will use an incremental analysis to identify the benefits (economic and otherwise) of excluding an area from critical habitat, and will likewise use an incremental analysis to identify the benefits of specifying an area as critical habitat.

Benefits that may be addressed in the discretionary 4(b)(2) exclusion analysis can result from additional protections, in the form of project modifications or conservation measures due to consultation under section 7 of the Act; conversely, a benefit of

exclusion can be avoiding costs associated with those protections. In addition, benefits (and associated costs) can result if the designation triggers compliance with separate authorities that are exercised in part as a result of the Federal critical habitat designation (e.g., additional reviews, procedures, or protections under legal authorities of States or local jurisdictions). *See* DOI 2008 at 22–23.

Finally, because the primary purpose of an economic analysis is to facilitate the mandatory consideration of the economic impact of a designation of critical habitat, to inform the discretionary 4(b)(2) exclusion analysis, and to determine compliance with relevant statutes and Executive Orders, the economic analysis should focus on the incremental impact of the designation.

Use of an incremental analysis in each of these contexts is the only logical way to implement the Act. The purpose of the impact analysis is to inform the Secretary's decision about whether to engage in the discretionary exclusion analysis under the second sentence of section 4(b)(2) of the Act (addressed in paragraph (c)). To understand the difference that designation of an area as critical habitat makes and, therefore, the benefits of including an area in the designation or excluding an area from the designation, one must compare the hypothetical world with the designation to the hypothetical world without the designation. For this reason, the Services compare the protections provided by the designation to the protections without the designation. This methodology is consistent with the general guidance given by the Office of Management and Budget to executive branch agencies as to how to conduct cost-benefit analyses. *See* Circular A–4 (available at <http://www.whitehouse.gov/omb/circulars/a004/a-4.pdf>).

Nonetheless, between 2002 and 2007, the Services generally did not conduct an incremental analysis; instead, they conducted a broader analysis of impacts pursuant to the guidance from the United States Court of Appeals for the Tenth Circuit in *New Mexico Cattlegrowers Ass'n v. FWS*, 248 F.3d 1277 (10th Cir. 2001). The genesis of the court's conclusion in that case was the definitions of "jeopardize the continued existence of" and "destruction or adverse modification," which are the standards for section 7 consultations in the Services' 1986 joint regulations. See 50 CFR 402.02. Both phrases were defined in a similar manner in that each looked to impacts on both survival and recovery of the species.

The court in *New Mexico Cattle Growers* noted the similarity of the definitions, concluding that they were "virtually identical" and that the definition of "destruction or adverse modification" was in effect subsumed into the jeopardy standard. 248 F.3d at 1283. According to the court, these definitions thus led FWS to conclude that designation of critical habitat usually had no incremental impact beyond the impacts of the listing itself. Thus, given these definitions, the court concluded that doing only an incremental analysis rendered meaningless the requirement of considering the impacts of the designation, as there were no incremental impacts to consider. Although the court noted that the regulatory definitions had previously been called into question, *id.* at 1283 n.2 (citing *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001)), the validity of the regulations had not been challenged in the case before it. Instead, to cure this apparent problem, the court held that the FWS must analyze "all of the impacts of a critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes." *Id.* at 1285.

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

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

- *Maddalena v. FWS*, No. 08-CV-02292-H (AJB) (S.D. Cal. Aug. 5, 2010);
- *Otay Mesa Property L.P. v. DOI*, 714 F. Supp. 2d 73 (D.D.C. 2010), *reversed on other grounds*, 646 F.3d 914 (D.C. Cir. 2011).
- *Fisher v. Salazar*, 656 F. Supp. 2d 1357 (N.D. Fla. 2009);

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

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

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

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

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

Rationale for the Revised Paragraph (c)

Paragraph (c) implements the second sentence of section 4(b)(2) of the Act, which allows the Secretary to exclude areas from the final critical habitat designation under certain circumstances. Paragraph (c) reads:

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

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

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

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

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

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

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

The third sentence of paragraph (c) essentially repeats the third sentence of the previous § 424.19. This sentence incorporates the limitation in the last clause of section 4(b)(2) of the Act. *See* DOI 2008 at 25.

Summary of Comments and Recommendations

On August 24, 2012, we published a proposed rule (77 FR 51503) that requested written comments and information from the public on the proposed revisions to the regulations pertaining to impact analyses conducted for designations of critical habitat under the Act. The first comment period opened on August 24, 2012, and closed on October 23, 2012. In response to that proposed rule, we received numerous requests for an extension of the first comment period, and we subsequently published a notice (77 FR 66946) that reopened the comment period from November 8, 2012, through February 6, 2013. Comments received from both comment periods are grouped into general categories specifically relating to the proposed regulation revisions.

General Comments

Comment (1): Many commenters, including federally-elected officials, requested an extension of the public comment period announced in the proposed regulation revision.

Response: On November 8, 2012 (77 FR 66946), we reopened the public comment period for an additional 90 days to accommodate this request and allow for additional review and public comment.

Comment (2): The Services should set out the clear expectations and consequences for publishing and implementing the final regulation.

Response: We agree with the commenter, and have further clarified to the extent possible within this final rule our expectations of the implications of this final rule, most specifically in our responses to comments. We have specifically provided clarifications on: paragraph (a) of the regulation, regarding the shift in timing of the economic analysis to comply with the intent of the Presidential memorandum of February 28, 2012; paragraph (b), concerning the incremental approach to impact analysis, the use of either a quantitative or qualitative analysis of economic impacts as permissible under the Office of Management and Budget (OMB) Circular A-4, and the scale of the impact analysis; and paragraph (c), the codification of Secretarial discretion as defined by the Act and case law. The desired consequences of this revision to the regulation are to further provide clarity, promote predictability and reduce uncertainty, and to codify established interpretation, practices, and prevailing case law.

Comment (3): One commenter disagrees that the proposed rule would not have significant takings implications because the Services should apply the *Penn Central* three-prong test for a taking. Also, the commenter states that the “legitimate

governmental interest” test has been invalidated by the U.S. Supreme Court, and the Services erred in relying on this test.

Response: To clarify any confusion in our required determination related to these comments, we have amended the language in the takings assessment. Again, we reiterate that these revisions to section 50 C.F.R. 424.19 do not affect private property. They only govern the process by which the Services will consider the impacts of designation of critical habitat and possible exclusions from those designations, and codify the Services’ current practices. Therefore, these revisions cannot affect areas that have already been designated as critical habitat nor change the outcome with respect to future designations, and therefore will not affect private property. Contrary to the assertion of the commenter, in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the Supreme Court did not set forth a discrete test for determining whether a constitutional taking has occurred. Rather, the court noted that there was no set formula for what were “essentially ad hoc, factual inquiries,” although it did identify three factors of particular significance: economic impact, reasonable investment-backed expectations, and the character of the government action. For a government action whose character and effect are limited to improving the efficiency and transparency of government procedures and that has no on-the-ground impact, there would not be any economic impact or interference with reasonable investment-backed expectations.

Comment (4): One commenter believes that because Federal critical habitat triggers additional state or local regulations, this rule should perform a takings

assessment because “a landowner is denied economically beneficial or productive use of its land” from the designation. The commenter gives an example of Washington’s state environmental policy act (SEPA) that Federal critical habitat triggers Class IV special forest practice restrictions.

Response: We reiterate that these regulations are procedural or administrative in nature, and will have no effect on the environment or on private property. These regulations do not designate critical habitat themselves, nor will they result in any change to the outcome of, public involvement in, or standards used for making any critical habitat determination. Therefore, the commenter’s example of a state statute in which additional protections are triggered when critical habitat is designated, would not be affected by these regulatory revisions. We have revised the required determination for takings to make this more clear.

Comment (5): Several commenters commented on the rationale for our certifications and statements regarding the statutes and executive orders in the Required Determinations.

Response: We have incorporated responses to these comments under the appropriate statutes or executive orders in the appropriate Required Determinations section, below.

Comment (6): The Services should recognize the central purpose of impact analyses, namely improving the information available to those potentially affected by critical habitat designations, and explain how this regulation will further that purpose.

Response: The Services recognize the importance of this regulation in providing information to the public and those entities potentially affected by the designation of critical habitat. The President's February 28, 2012, memorandum directed the Services to promulgate this rule "in order to provide more complete information in the future regarding potential economic impacts when critical habitat proposals are first offered to the public." Another important purpose of the impact analysis is to provide information to the Secretaries in order for them to consider economic impacts, the impacts to national security, and any other relevant impacts under section 4(b)(2) of the Act. Additionally, the Secretaries may exclude particular areas from a designation of critical habitat based on a discretionary 4(b)(2) exclusion analysis using this information.

Comment (7): Several commenters suggested specific line edits or word usage.

Response: We addressed these comments as appropriate in this document.

Comment (8): Several commenters suggested a change in the title of the regulation to "Analysis of Economic and Other Impacts and Exclusions from Critical Habitat."

Response: The revised title identified in the proposed and this final rule gives equal weight and consideration to all factors under section 4(b)(2) of the Act. Changing the title to that suggested by the commenter could imply greater consideration of economics, above that of national security and other relevant impacts. The Services do not agree that economics should be given greater consideration than other impacts. Therefore, we rejected this suggested edit.

Comment (9): The same commenters suggested substantial revisions to paragraphs (b) and (c) of the proposed regulation revision, and the addition of several paragraphs, and provided specific language edits. One commenter stated that the Services should amend paragraph (b) to add language directing that analyses are to be consistent with the Data Quality Act (i.e., best available data standard), to ensure the scale of impact analysis is sufficient to evaluate particular areas for exclusion under section 4(b)(2), and to indicate that quantitative assessments will be done to the maximum extent practicable. The commenter's suggested paragraph (c) would cover data disclosure requirements, and the suggested new paragraph (d) would detail the use of coextensive and incremental analyses to more fully analyze what the commenter viewed as the economic impacts. Finally, the suggested new paragraph (e) would state that the Secretaries will use the best available scientific and commercial data with respect to quantitative and qualitative analyses of the economic impacts of a proposed critical habitat designation.

Response: We disagree with the commenter's suggested edits for both procedural and substantive reasons. First, to adopt the changes suggested by the commenter would

be a significant deviation from the previous and proposed text of the regulation and go well beyond the Services' intent in undertaking this regulation. Furthermore, because they would raise new substantive issues not discussed in the proposed rule, any such changes likely would need to be proposed as a new regulation, and go through a new rulemaking procedure, which would take a significant amount of time. To adopt these changes and go through a new rulemaking would be counter to the intent of the Presidential memorandum, which was to promptly revise our regulations. Moreover, the Services do not find that there is a good basis for the substantive suggestions advanced by the commenter. Accordingly, the Services decline to expand the scope of the rule to address such issues.

In conducting impact analyses, of which an economic analysis is part, the Services use the best available scientific and commercial data available. However, the further analysis and interpretation of those data are subject to persons seeking correction to the resulting disseminated information. As a result of this final regulation, the draft economic analysis of the proposed critical habitat designation will be available concurrently with the proposed critical habitat designation and the Services will seek public comment on both. Any concerns identified by the public in analysis or data could be identified and considered in the final rule. If someone requests a correction under the Information Quality Act (also known as the Data Quality Act), the Services will consider the original source of the information used (best available scientific and commercial data) will be considered against the correction suggested by the complainant. Therefore, this recommendation need not be adopted. Further, the recommendation for disclosure of data is addressed by the requirements for Federal electronic rulemaking as part of the e-

Government Act, the Administrative Procedure Act (APA), and the Freedom of Information Act and would be redundant. We address the commenter's remaining specific suggested changes below in our responses grouped by subject matter.

Comments on Paragraph (a) of the Proposed Revision—Shift in Timing of Economic Analysis

Comment (10): The majority of commenters supported the shift in timing of the draft economic analysis, and stated that this approach will improve the regulatory process. Several commenters expressed concern that the shift in timing of the draft economic analysis would lead to a reduction in regulatory efficiency. They suggested that the Services need to clarify what measures will be taken to ensure that the proposed revisions to the economic analysis process will not introduce additional delays in the designation of critical habitat.

Response: We appreciate the concerns expressed by commenters on the shift in timing of the draft economic analysis, and we do not anticipate a reduction in regulatory efficiencies as a result. The Services are committed to doing an analysis sufficient, given the shift in timing and process, to provide the information needed by the Secretaries to make informed decisions on a factual basis. We do not anticipate that the shift in timing of the analysis will introduce delays in the designation process, as a summary of the draft economic analysis will be made available concurrently with the publication of the proposed rule.

Comment (11): Many commenters stated that shifting the timing of the draft economic analysis to be earlier in the rulemaking process will provide for earlier, more meaningful participation by the public. However, other commenters were concerned that this approach would limit public participation by interested and affected stakeholders in the decision-making process. They believe it may reduce the time the public has to comment on the proposed rule. Further, they stated this approach will lead to an overly narrow consideration of economic impacts, or might allow economic analyses to be ignored. Several commenters stated that, by changing the timing of the economic analysis to be earlier in the rulemaking process, the Services may fail to identify and adequately analyze impacts.

Response: Upon publication of the proposed designation of critical habitat, which will include a summary of the draft economic analysis, we will solicit information from the public through at least a 60-day comment period in accordance with our regulations, 50 CFR 424.16(c)(2), and the APA. During this comment period, the public will have opportunity to review the proposed designation and the supporting draft economic analysis, and provide information and comments on *both* the proposed rule *and* the draft economic analysis simultaneously. The Act requires the Secretaries to consider economic impacts of a designation of critical habitat, and the Services are committed to conducting an economic analysis, based on the best data available, given the shift in timing and process, sufficient to provide the information needed by the Secretaries to make informed decisions on a factual basis. The economic analysis is the vehicle by

which we take economic impacts into consideration. We do not anticipate that the shift in timing of the analysis will result in a failure of the Services to consider probable economic impacts.

Comment (12): The Services should publish an initial notice of impact analysis calling for submission of information to be evaluated prior to proposing a critical habitat designation. Only following the notice of the impact evaluation should the Services publish the proposed critical habitat.

Response: In general, the Services do not anticipate publishing an advanced notice of proposed rulemaking (ANPR) for our critical habitat actions prior to publication of a proposed designation. However, the Services are committed to providing the public with notice and materials related to planned actions for each upcoming year. The notice and materials will be made available on the Services' websites, and will include appropriate contact information, which will allow the public to provide information to the Services in advance of particular rulemakings. Further, the Services will be coordinating with potentially affected Federal agencies during the development of the critical habitat designation to assess the probable impacts of critical habitat designation. Information obtained from this coordination or otherwise provided by the public will be used to inform our proposed designation and economic analysis. Further, we will request public comment and any additional information available on the proposed designation and our draft economic analysis at the time the proposed rule publishes.

Comment (13): Several commenters expressed concern over the shift in timing of the economic analysis, as the proposed revision would allow for the draft economic analysis to take place at the same time that critical habitat designation is proposed, creating the potential for the analysis of economic impacts to inappropriately interfere with the designation process. The economic analysis should not influence the identification of critical habitat, which should be based solely on the best scientific data available. Any exclusion of critical habitat must be supported by the record and be made only at the final rulemaking stage.

Response: We appreciate and are cognizant of this concern. We base our identification of critical habitat solely on the best scientific data available. Although the relevant Service will have an economic analysis at the time it proposes to designate critical habitat, that analysis will not influence the biological determination of which areas meet the definition of critical habitat. The economic information, along with information related to national security and other relevant impacts, may be used in the discretionary analysis under the second sentence of section 4(b)(2) of the Act. A final decision on exclusions from critical habitat will be made at the final rulemaking stage and will be supported by information in the supporting record for the rulemaking.

Comment (14): Some commenters expressed concern that when the Services propose listing and critical habitat simultaneously, having available a draft economic analysis of the proposed critical habitat designation might result in that analysis

influencing the determination of whether a species warrants listing as a threatened or endangered species.

Response: Section 4(b)(1)(A) of the Act states that determinations required by section 4(a)(1) of the Act (i.e., determinations regarding the listing status of a species) be made solely on the basis of the best scientific and commercial data available. While having the draft economic analysis for a proposed critical habitat designation completed and available concurrent with the proposed listing determination may provide the opportunity for a real or perceived influence on the listing status ultimately given the species, the Services will ensure a separation of the two analyses and determinations. For example, one step that FWS has taken to ameliorate this concern is to develop listing determinations and critical habitat designation (if prudent and determinable) concurrently, but in separate rulemakings. Furthermore, the House of Representatives conference report (97-835) for the 1982 amendments to the Act specifically states that economic considerations have no relevance to determinations of species status under the Act.

Comment (15): Requiring the draft economic analysis to be completed at time of critical habitat proposal could result in more findings by the Services that critical habitat is not determinable.

Response: The regulations at 50 CFR 424.12 (a)(2) state that “critical habitat is not determinable when one or both of the following situations exist: (i) Information

sufficient to perform required analyses of the impacts of the designation is lacking, or (ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.” Thus, the Services may invoke subparagraph (i) of this provision to find that the designation of critical habitat is not determinable if the information to perform the economic analysis is lacking. However, it has generally not been our practice to find that a designation of critical habitat is not determinable on this basis. We do not anticipate using this provision with greater frequency in the future as a result of this rulemaking.

Comment (16): Several commenters were concerned that only a draft of the economic analysis, and not a final analysis, will be available at proposal.

Response: As a result of this final rule, the Services will be providing a summary of our economic analyses within our proposed designations of critical habitat. Furthermore, we will make available the economic analysis on <http://www.regulations.gov> in the docket of the proposed rulemaking. However, it is the draft economic analysis that should be available for the public to review and comment on concurrent with the proposed rule. Further, the Services have generally found in their experience that most economic analyses do not substantively change following public review and comment, so most draft analyses can be viewed as approximating the final analysis. However, we will incorporate comments and information received on the draft analysis as appropriate into the text of our final rule.

Comment (17): A commenter requested that, in addition to the analysis of economic impacts being made available prior to the proposal, the regulation be amended to include the analysis of all other impacts specified in the statute, and the balancing of all relevant benefits be done prior to publication of a proposed rule as well.

Response: While we appreciate the commenter's position, we do not agree that it is wise to mandate that these additional analyses and the discretionary 4(b)(2) exclusion analysis be available at that stage of the designation process in all circumstances. The statute does not specify when these additional analyses should be undertaken, and the Services find that the purposes of the statute are best served by retaining flexibility on this point to respond to the degree of available data and agency priorities in a particular circumstance. As a matter of practice, NMFS's current procedure is consistent with the commenter's request. FWS, as a matter of practice, prefers to retain a greater degree of discretion as to the timing of making these analyses available, although in cases where specific data on other impacts is available at the proposed rule stage, FWS may set forth the evaluation of these data and, if applicable, its provisional 4(b)(2) exclusion analysis in the proposed rule.

Comment (18): Providing a summary of the findings of the draft economic analysis in the proposed rule as published in the **Federal Register** is redundant if the draft economic analysis is otherwise available on the internet.

Response: This final regulation will require the Services to provide a summary of our draft economic analyses within our proposed designations of critical habitat.

Additional supporting documents will be available in the supporting record and <http://www.regulations.gov>. The Services conclude that we will further the purposes of the Act and the APA by including the summary of the draft economic analysis in the body of the proposed rule, as doing so will facilitate public review by having the key information available in one place. Further, that summary will provide the supporting information and factual basis for the certification of specific required determinations.

Comment (19): The proposed regulation would require description of any significant activities that are known to have the "potential to affect" an area considered for designation as critical habitat. But this language introduces a new standard not in the Act (potential to affect). Potential to affect is a broader standard; the standard "may adversely modify" from the statute should be used. Further, by using a new standard, critical habitat proposals would have to segregate activities that have the potential to affect from those that may adversely modify.

Response: We have removed the language containing this phrase from this final regulation. See the preamble discussion for further information.

Comment (20): The Services should add to paragraph (a), "To the maximum extent practicable" to lead off. And they should qualify that the economic analysis will be released at the same time as the proposed rule "or as soon thereafter as it is available."

Response: We have removed the language containing this phrase from this final regulation. However, to use this phrase to preface the requirements of paragraph (a) would indicate that the Services would provide a draft economic analysis to the maximum extent practicable, implying that the Services might elect not to release the draft economic analysis at the time of the proposed rule if inconvenient, which is contrary to the Presidential memorandum of February 29, 2012. The Presidential memorandum directs the Services to make available the draft economic analysis at the time of publication of the proposed critical habitat rule, and the Services intend to fulfill the President's direction because it is consistent with the purposes of both the Act and the APA.

Comments on Paragraph (b) of the Proposed Revision – Incremental vs. Coextensive Analyses

Comment (21): Absent a clear regulatory definition of adverse modification, the Service cannot reasonably assess the economic impact of any critical habitat designation.

Response: Courts invalidated the previous regulatory definition of destruction or adverse modification because they found it to be contrary to the language of the Act. However, at this time the Services are operating under a 2004 Director's memorandum and a 2005 Assistant Administrator's memorandum, which confirm that the Services use the statutory conservation standard in implementing the prohibition on destruction or adverse modification of critical habitat under section 7 of the Act. These memoranda

provide a clear and reasonable basis for the Services to evaluate incremental impacts due to the designation of critical habitat in a manner consistent with the purposes and text of the Act. Further, the Services plan to propose a new regulatory definition for destruction or adverse modification of critical habitat in the near future.

Comment (22): Many commenters oppose the incremental approach to conducting economic analyses, arguing that this approach does not capture the full impact of a critical habitat designation and that it would be less transparent than a coextensive approach. Other commenters were supportive of the incremental-analysis approach.

Response: As we discussed above in the preamble and in the proposed rule, we have concluded that an incremental analysis is consistent with the Act and general OMB guidance, and is the most logical way of analyzing impacts. The Services have consistently been evaluating the incremental impacts of a designation in the section 4(b)(2) evaluation process. FWS has been using the incremental analysis approach for economic analyses since 2007 in areas outside the jurisdiction of the Tenth Circuit Court. The Services have not found that there is a diminishment or lack of transparency in the process relative to the coextensive evaluation.

Comment (23): The incremental approach is contrary to the Services' prior practice and the Presidential memorandum.

Response: The incremental approach is not contrary to the Services' prior practices, nor is it contrary to the Presidential memorandum. The Presidential memorandum does not specify the type of analysis to use for consideration of impacts. The Services have consistently been evaluating the incremental impacts of a designation in the section 4(b)(2) evaluation process for some time, and this approach has been judicially recognized as more logical and appropriate. FWS has been using the incremental analysis approach for economic analyses since 2007 in areas outside the jurisdiction of the Tenth Circuit Court. The OMB Circular A-4 supports the use of the incremental approach of evaluating the effects of Federal rulemakings, including the evaluation of probable economic impacts.

Comment (24): The incremental approach is not consistent with Congressional intent in the Act and legislative history as it relates to section 4(b)(2) of the Act. To be more consistent with the Act, the Services should conduct an analysis that sums both a baseline and an incremental analysis (i.e., coextensive analysis). The Act does not qualify the mandatory consideration of economics and other relevant factors and, therefore, all impacts should be considered. Another commenter stated that the significant lag time between listing and critical habitat often done by the Services should not be used to hide the costs of the Act as "listing costs."

Response: Congressional intent is reflected in the language of the Act. The purpose of consideration of impacts is to inform decisions on possible exclusions from critical habitat; in turn, the purpose of exclusions is to avoid the probable negative

impacts of designating particular areas as critical habitat. Fundamentally, it is not an “impact” of a designation if an impact will happen with or without the designation—those impacts will not be avoided by exclusion. For example, the impacts due to the listing of a species will occur regardless of designation of critical habitat or exclusion of areas from critical habitat. Exclusion of a particular area because of an impact that will occur regardless of the exclusion will be completely ineffective at avoiding the impact and is illogical. We conclude that Congress did not intend to mandate consideration of impacts that cannot be avoided by exclusion from critical habitat, and therefore that Congress did not intend to mandate a coextensive analysis.

With respect to the commenter’s assertion that a delay of the critical habitat designation may hide the costs of the designation as listing costs, we disagree. As discussed above, the incremental-analysis approach is the correct approach regardless of whether the designation occurs at the time of listing, and that approach does not serve to “hide” the costs of the Act. Under the Act, the costs that stem from listing are simply not relevant, except as setting the baseline against which to measure the incremental impacts of designation. Moreover, as a factual matter, in the vast majority of cases, there is no longer a significant time lag between listing and critical habitat designation.

Comment (25): The total economic impact that should be considered is the impacts both before and after critical habitat is designated; in other words, both the baseline and the incremental together. This approach does not contradict the prohibition on consideration of economic impacts due to the original listing of a species, but it does allow consideration of the full magnitude of all economic pressures on a particular

community, industry, or activity when considering imposing the additional economic cost associated with a critical habitat designation, or granting exclusion (i.e., cumulative regulatory and economic impact).

Response: An economic analysis serves to inform the relevant Service's consideration of the economic impact of a critical habitat designation. That consideration is mandatory under the first sentence of section 4(b)(2) of the Act. That consideration, in turn, informs the Service's decision as to whether to undertake the discretionary exclusion analysis under the second sentence of section 4(b)(2) of the Act, and, if the Service chooses to do so, the ultimate outcome of that exclusion analysis. As discussed above, only incremental impacts of designation can be relevant to this analysis, because those impacts are the only ones that can be avoided by excluding a particular area from the designation. In other words, it would be illogical to exclude an area based on benefits of exclusion that will not in fact follow from the exclusion. Because implementation of the exclusions process of section 4(b)(2) of the Act necessarily depends on a weighing of the incremental benefits of exclusion and inclusion, and because there is an implied consistency between the two sentences of 4(b)(2) given that the process of the first sentence informs the process of the second, we conclude that the consideration of impacts required under the first sentence of section 4(b)(2) of the Act is likewise limited to incremental impacts.

The OMB Circular A-4 supports the use of the incremental approach of evaluating the effects of Federal rulemakings, including the evaluation of probable

economic impacts, in complying with other statutes and Executive Orders (which the economic analysis also informs). Further, as discussed in the preamble of our proposal, use of an incremental analysis is supported by relevant case law and the Solicitor's M-Opinion. It has also been the general practice of the Services (outside the jurisdiction of the 10th Circuit Court). Moreover, even if there was some nonstatutory policy benefit to doing a broader analysis of the economic impacts of species conservation, in most circumstances it is not practical to conduct a robust evaluation of baseline effects due to data limitations and resource and time constraints.

Comment (26): The incremental approach is overly narrow and allows the Services to easily discount the economic impacts of critical habitat designations or only consider those immediately visible. The Services currently narrowly interpret economic impact as the administrative costs incurred by the section 7 consultation process and discounts to zero virtually all other economic impacts because they are too speculative or are unquantifiable.

Response: The incremental approach is not overly narrow, as it properly focuses on the probable costs resulting from the designation of critical habitat. When the Services develop a draft economic analysis to consider the economic impacts of designating critical habitat, we include reasonably known or probable impacts reasonably likely to occur. Using the incremental approach, we often identify administrative costs that will result from section 7 consultation in critical habitat units that are occupied by the species. Substantive changes in the form of project modifications are less likely to be

attributable solely to critical habitat, as they may also be required to avoid jeopardy to the species, which is prohibited regardless of the designation of critical habitat. With respect to designation of critical habitat units that are unoccupied by the species, the Services may more frequently identify higher probable impacts. In that circumstance, any project modifications stemming from the consultation process would be due solely to the designation of critical habitat and the requirement of avoiding its adverse modification, because the species is not present in the area. By contrast, certain conservation measures that are attributable to the species' listed status, such as project modifications undertaken to avoid jeopardy to a species, fall under the baseline costs, and are not part of the incremental cost of a critical habitat designation.

Comment (27): Some commenters suggested that the Services use the incremental approach on all Federal lands and the coextensive approach on all State and private lands. They assert that this dual approach would fully analyze any economic impacts and would meet the intent of the President in considering maximum exclusion of the final revised critical habitat on private and State lands.

Response: For consistency, the incremental approach should be used for the entire designation, and not for specific land ownership. Further, based on OMB guidance in Circular A-4, as well as supportive case law, the Services' interpretation is that the incremental approach is the correct approach for impact analyses (see Comment (19) above for further elaboration on use of the incremental approach). Critical habitat receives regulatory protection under section 7 of the Act where there is a Federal nexus,

regardless of land ownership. Even if the Services were to use the approach suggested by the commenter, any potential exclusion analysis under section 4(b)(2) of the Act would be difficult, as two different standards would be applied based on landownership, thereby increasing complexity and decreasing transparency and credibility of such balancing.

The last part of the comment, regarding maximizing exclusions from critical habitat, is specifically in reference to the directives in the Presidential memorandum regarding revision of critical habitat for the northern spotted owl. We note that those directives in the Presidential memorandum do not apply to all critical habitat rulemaking. However, the Services do consider other relevant impacts of a designation of critical habitat, including probable impacts to private and State lands, in all critical habitat rulemakings. Designation of critical habitat on Federal lands provides clear conservation benefits because Federal land managers have an obligation under section 7(a)(1) of the Act to carry out programs to conserve listed species. A designation of critical habitat helps focus such programs. As a result of these considerations, the Secretaries may enter into the discretionary 4(b)(2) exclusion analysis to consider exclusion of non-Federal lands, and may exclude particular areas from a designation of critical habitat if the benefits of exclusion outweigh the benefits of inclusion.

Comment (28): Since the Act requires critical habitat to be designated concurrent with listing to the maximum extent prudent and determinable, if the Services follow the incremental approach, there is no regulatory baseline against which the impacts of critical habitat may be compared.

Response: While we agree that in some cases regulatory baseline information may be limited at the time of listing, the Services will use the best data available in considering the impacts of designating critical habitat. Thus, when developing a critical habitat designation for a species not yet listed, the Services will use their experience and the data that is available, including the regulatory baseline condition of comparable surrogate listed species, to establish a probable baseline condition, as well as to determine the probable incremental impacts. The Services conclude that the use of information derived from an evaluation of comparable surrogate species or conditions is reasonable and consistent with standard economic methodology.

Comment (29): The incremental approach erroneously assumes that occupied critical habitat will forever remain occupied. As a result, areas considered occupied critical habitat within the impact analysis will have little or no incremental impacts over baseline.

Response: Neither coextensive nor incremental approaches to evaluating impacts are dependent upon the occupancy of a particular area in a designation. While we acknowledge that the occupancy of a particular area may change over time regardless of designation of critical habitat or listing, the Act directs us to designate critical habitat at the time a species is listed, to the maximum extent prudent and determinable, based on best scientific data available at the time of the designation.

Should an occupied portion of a critical habitat unit become unoccupied over time, and a future project is initiated in that area, the probable incremental costs

associated with any project modifications needed to avoid adverse modification generally may be higher as they are no longer considered to be part of the baseline. However, as impact analyses are done at the time of critical habitat designation, it may not be possible to reliably predict when or where a range contraction may occur and whether this scenario would occur. In any event, the effects of an action on a designation would be evaluated in a section 7 consultation within the scope of that consultation and will be addressed on a case-by-case basis, and changes in occupancy that may result in range contraction as compared to the original designation, will be evaluated within the scope of future consultations. In some cases, the Services may elect to revise a critical habitat designation in the event of a serious or unanticipated range contraction to reflect a change in a species' range. In a revised rulemaking, the Services could reconsider prior exclusions from critical habitat or consider new exclusions from critical habitat.

Comment (30): One commenter cited a 2012 study of 4,000 biological opinions conducted under section 7 of the Act that identified no instances where a consultation concluded that the action resulted in an adverse modification of critical habitat, absent a comparable determination that the action would also jeopardize the continued existence of the species. As a consequence, the incremental approach for evaluating the impacts of critical habitat is of little value.

Response: Frequently, conservation measures and project modifications are negotiated with the Federal action agency during the informal and formal consultation processes, which can have the effect of precluding an adverse modification

determination. The cost of these conservation measures and project modifications, if resulting solely from the designation, and the cost of the consultation itself constitute the incremental impacts of the designation, which must be evaluated under section 4(b)(2) of the Act. Thus, the lack of a determination of adverse modification in a section 7 consultation does not mean there is no incremental impact resulting from the designation.

Comment (31): The Services have a burden to clearly delineate the difference between jeopardy and adverse modification when using the incremental approach.

Response: As part of our evaluation of the probable incremental effects, the Services make a reasonable effort to explain the distinction between the results of application of the jeopardy and destruction or adverse modification standards to the facts of each species within the limits of what can be predicted from the best available information. In the evaluation of incremental impacts, we acknowledge the distinction between jeopardy and adverse modification is often most difficult to determine and articulate.

Comment (32): The Tenth Circuit found that the incremental approach is meaningless. Through the use of this approach, the Service has found that critical habitat designations covering vast expanses of private and public lands have no economic impacts other than incremental administrative costs associated with future section 7 consultations. The incremental approach does not require the Services to consider all

economic impacts of a critical habitat designation and is, therefore, contrary to the Act and unlawful.

Response: In the preamble of our proposal and this final rule, the Services set forth in detail the rationale as to why the incremental approach is permissible and supported by the Act, relevant case law, and OMB Circular A-4. In particular, as the Ninth Circuit has noted, the Tenth Circuit’s conclusion in *New Mexico Cattle Growers* was based on a faulty premise. We also note that there has been confusion as to what constitutes “all” economic impacts of a designation. OMB Circular A-4 states that agencies should evaluate the specific cost and benefit of the subject regulation relative to a baseline, which is “the way the world would look absent the proposed action. It may be reasonable to forecast that the world absent the regulation will resemble the present.” This approach captures all of the impacts that are actually relevant to the decision to be made. As applied to the decision of whether to exclude an area from a critical habitat designation, an incremental approach evaluates the cost solely resulting from a specific designation, which equates to the incremental difference between the world with and without the designation in place. Thus, in determining the incremental impacts of a designation, the Services do consider “all” of the reasonably likely or probable economic impacts of a designation.

Comment (33): Federal agencies have no authorities to resolve circuit court splits involving matters of statutory interpretation. The proposed rule is, therefore, unlawful because it represents an improper attempt by the Services to resolve a circuit split

involving a matter of statutory interpretation. Rulemaking is not the way to resolve the judicial split between 10th and 9th circuit decisions. Congress or the Supreme Court should decide this issue. How would this rule, if finalized, apply in the 10th circuit?

Response: Federal agencies are empowered by Congress to interpret the laws that they implement. Courts also interpret the laws, and give varying degrees of deference to preexisting agency interpretations. Agencies may promulgate a rule that interprets a law differently than does a prior judicial opinion. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–85 (2005). This is precisely what we are doing here. In other words, it is completely appropriate for an agency to issue a rule that has the effect of resolving a split in the circuit courts, so long as the agency’s interpretation of the statute is permissible. And once it becomes effective, this regulation will apply to all subsequent critical habitat designations, whether or not that designation includes area within the geographic scope covered by the Tenth Circuit. Further, as we have explained, the more recent Ninth Circuit case law examined the predicate for the Tenth Circuit decision and found it no longer applied.

Comment (34): The incremental approach is not consistent with the “best scientific data” requirement.

Response: The Act specifies that we are to designate critical habitat based on the best scientific data available. The incremental approach broadly applies to analysis of probable impacts stemming from the designation of critical habitat. As stated above,

when evaluating probable impacts of a critical habitat designation, the Services' practice is to consider only those impacts resulting from the critical habitat (i.e., incremental approach), and not those impacts associated with a species' listed status or other conservation measures undertaken for that species. Furthermore, the purpose of the impact analysis is to inform decisions regarding exclusions from critical habitat. If the Secretaries exercise their discretion to exclude particular areas, the incremental impacts will be avoided. Data used to inform the impact analysis that are based on probable incremental impacts are the most useful in this evaluation. Therefore, the Services do use the best scientific information available to evaluate the incremental impacts of a critical habitat designation.

Comment (35): Commenters requested that the Services provide clarification of baseline and explain what is meant by "existing protections"?

Response: "Existing protections" make up the "baseline." As discussed in the preamble of our proposed regulation revision, the baseline condition for impact analyses is the evaluation of the combined effects of all conservation-related protections for a species (including listing) and its habitat, in the absence of the designation of critical habitat. The baseline includes the effects of all conservation measures and regulations that are in place as a result of the species being listed under the Act (i.e., the world without critical habitat for the subject species). An analysis of incremental impacts identifies and evaluates those impacts due solely to the designation of critical habitat, above and beyond those already in place (i.e., baseline condition).

Examples of existing protections may include: (1) Conservation measures such as Service-approved habitat conservation plans (HCPs) and safe harbor agreements (SHAs); (2) tribal and Federal wildlife-management and wildlife-conservation plans; (3) State endangered species act regulations; (4) other conservation measures at the State and local levels; and (5) project modifications resulting from section 7 consultations to avoid jeopardy to listed species.

Comments on Paragraph (b) of the Proposed Revision – Qualitative vs. Quantitative Analyses

Comment (36): Several commenters opposed the use of qualitative analyses in estimating potential economic impacts, and stated that all analyses should be quantitative in nature. Others suggested that consistency with the Act, the President’s March 9, 2010, Scientific Integrity memorandum, and the Data Quality Act require the Secretary to use, to the maximum extent practicable, a quantitative assessment method, and only use qualitative assessments if data required to conduct the analysis are not available. Further, if the Services adopt the incremental approach, the need for robust, quantitative economic impact assessments is even greater. The Services should closely examine the existing economic conditions and quantitatively compare the impacts of any critical habitat designation to ensure they obtain a complete picture of the consequences of the regulatory action.

Response: As described in OMB Circular A-4, “Sound quantitative estimates of benefits and costs, where feasible, are preferable to qualitative descriptions of benefits and costs because they help decisionmakers understand the magnitudes of the effects of alternative actions. However, some important benefits and costs (e.g., privacy protection) may be inherently too difficult to quantify or monetize given current data and methods.” Based on our years of designating critical habitat and evaluating resulting impacts, the Services have found that, in most instances, the data available to provide quantified estimates of specific impacts are limited, and as a result, the Services have relied on a combination of quantitative and qualitative approaches in performing our impact analyses. This approach is consistent with Circular A-4, which states “If you are not able to quantify the effects, you should present any relevant quantitative information along with a description of the unquantified effects, such as ecological gains, improvements in quality of life, and aesthetic beauty.” Our practice is also consistent with the President’s March 9, 2010, Scientific Integrity memorandum, and the Data Quality Act.

Comment (37): The qualitative approach makes sense under environmental law, but could be seen as subjective. However, quantitative analysis could be just as subjective based on how the numbers are assembled.

Response: We appreciate the observation. The Services are committed to using the best scientific information available in evaluating reasonably probable incremental impacts of a critical habitat designation in our impact analyses. We use these data, whether quantitative or qualitative, to make objective, substantiated conclusions.

Comments on Paragraph (b) of the Proposed Revision – Scale of Analyses and Other Issues Related to Paragraph (b)

Comment (38): The Services should establish guidelines for determining appropriate and meaningful scale of analyses. Another commenter noted that paragraph (b) gives the Secretaries additional flexibility to determine the scale of the analysis.

Response: Setting out defined guidelines for the scale of an analysis in regulations would not be practical. Each critical habitat designation is different in terms of area proposed, the scope of the applicable Federal actions, economic activity, and the scales for which data are available. Additionally, the scale of the analysis is very fact specific. Therefore, the Services must have flexibility to evaluate these different areas in whatever way is most meaningful. For example, for a narrow-endemic species, a critical habitat proposal may cover a small area; in contrast, for a wide-ranging species, a critical habitat proposal may cover an area that is orders of magnitude greater. The appropriate scale of the impact analysis for these two species may not be the same. For the narrow-endemic species, an impact analysis may look at a very fine scale with a great level of detail. In contrast, the impact analysis for the wide-ranging species, which may cover wide expanses of land or water, may use a coarser scale of analysis, due to the sheer size of the proposed designation. Each critical habitat proposal includes a description of the scope of the area being proposed, and uses the scale of analysis appropriate to that situation.

Comment (39): Commenters requested that the Services define “proposed and ongoing” activities and “other relevant impacts,” to promote consistent consideration of impacts of critical habitat designations.

Response: The Services interpret the Act as requiring us to consider and evaluate only activities that are proposed or ongoing. We note that the regulation sets out the minimum that is required to comply with the mandate of the first sentence of section 4(b)(2) of the Act. The Services may in appropriate circumstances choose to consider other reasonably probable impacts, especially in the discretionary exclusion analysis under the second sentence of section 4(b)(2) of the Act. The Services cannot speculate about what projects may occur in the future, but must rely on information available regarding reasonably foreseeable or probable projects as indicated in the original text of this revised regulation. To do otherwise would not provide for a reasonable or credible impact analysis. Proposed and ongoing also captures those section 7 consultations that have already occurred or are in progress, so that the possible effects of critical habitat may already be known, which allows for a more accurate and credible impact assessment.

Comment (40): The Services should add the phrase “domestic energy security” following the term "national security," as it is a critical component of national security.

Response: The current language in section 4(b)(2) of the Act includes the phrase “and any other relevant impact.” The legislative history indicates that Congress intended to give the Secretaries broad discretion as to what impacts to consider and what weight to

give particular impacts. H.R. Rep. 95-1625, at 17; *see, e.g., Cape Hatteras Access Preservation Alliance v. DOI*, 731 F. Supp. 2d 15 (D.D.C. 2010) (“the Service has considerable discretion as to what it defines to be “other relevant impacts” under the ESA”). Therefore, if the relevant Service determines in a particular designation that domestic energy security is a relevant impact of that designation, that Service will consider the impacts of designation on domestic energy security.

Comment (41): The change in the proposed revision of the standard of “potential” to “probable” would place a burden on landowners and users that is not authorized by the Act. This change is inconsistent with the statute because there are no such limitations on impacts considered by the Secretaries.

Response: The word “potential” was not in the previous language of this regulation. However, the word “probable” was in the original language of this regulation. As discussed in the preamble of our proposal, we are not changing the term “probable.” The use of this word reflects a reasonable interpretation of the statute. Realistically, the Services can only consider activities reasonably likely to occur, which we interpret for purposes of this rule to mean the same thing as the term “probable.”

Comments on Paragraph (c) of the Proposed Revision—Secretarial Discretion

Comment (42): The proposed regulation change would give too much latitude to the Services to make inconsistent and arbitrary decisions when designating critical

habitat, including the discretion to assign weights to the benefits of critical habitat designations. The proposed rule lacks criteria or guidance, which deprives the public of the opportunity to comment on how the rule will be implemented. Although the Act affords the Secretaries significant discretion in making these determinations, the Secretaries should articulate how they will exercise this discretion by regulation. The criteria and guidelines should be set forth in the final rule. The final regulation should outline how the Secretaries will exercise discretion with requirements and guidance to provide public understanding in the analysis of designation of critical habitat.

Response: One purpose of this paragraph of the revised regulations is to clarify the relationship between the mandatory consideration of impacts under the first sentence of section 4(b)(2) of the Act and the discretionary exclusion authority under the second sentence of section 4(b)(2) of the Act. This distinction has been recognized by courts. *Building Industry Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 2012 U.S. Dist. Lexis 170688 (N.D. Cal. Nov. 30, 2012). We disagree that it would be helpful to include specific guidance as to how this authority will be applied in binding regulations. However, the Solicitor's Section 4(b)(2) memorandum (M-37016, "The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act" (Oct. 3, 2008)) (DOI 2008) provides general guidance on how to implement section 4(b)(2) of the Act, and we are developing additional guidance in a forthcoming joint agency policy on section 4(b)(2) exclusions. Ultimately, the weight given to any impact or benefit and the decision to exercise discretion to exclude a particular area is fact specific and will continue to be addressed in each individual

rulemaking. As a matter of practice, the Services set forth the 4(b)(2) exclusion analysis in the final rule or supporting record for any area that the Secretaries exercise their discretion to exclude.

Comment (43): The preamble of the proposed regulation states that the weighing of benefits (exclusion analysis) under section 4(b)(2) is "optional," which raises serious concerns. Section 4(b)(2) requires that economic and other impacts be considered in designating critical habitat. This step is mandatory. The revisions to section 424.19 should make clear that the requirement to consider economic and other impacts when designating critical habitat is an integral part of the designation process and will be utilized to reduce adverse impacts on land and resource users, as Congress intended. With this new approach, the Services may consider the economic analysis to be discretionary. The Secretary's discretion to exclude or not exclude arises only after the Secretary has first engaged in a mandatory consideration of economic impacts, followed by a nondiscretionary weighing of benefits. The third and final step is a discretionary decision whether to exclude or not.

Response: There are two distinct processes under section 4(b)(2) of the Act—one mandatory and one discretionary—and this interpretation has been confirmed by the courts (*Building Industry Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 2012 U.S. Dist. Lexis 170688 (N.D. Cal. Nov. 30, 2012)). The first sentence of section 4(b)(2) of the Act 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. The economic analysis is the vehicle by which we consider the probable economic impacts of a critical habitat designation. Thus, contrary to the suggestion in the comment, we do not consider the consideration of the probable economic impacts of a critical habitat designation to be discretionary.

The second sentence of section 4(b)(2) of the Act outlines a separate discretionary exclusion-analysis process that the Services may elect to conduct depending on the specific facts of the designation. The Services are particularly likely to conduct this discretionary analysis if the consideration of impacts mandated under the first sentence suggests that the designation will have significant incremental impacts. In this exclusion analysis the Services analyze whether the benefits of excluding a particular area outweigh the benefits of including the area and determine whether to exclude such an area from the designation if the exclusion will not result in the extinction of the species.

The exclusion analysis outlined in the second sentence of section 4(b)(2) of the Act is not required under the statute, and for some designations the Services may choose not to engage in such an analysis. Thus, for the reasons discussed above and in the Solicitor's M-Opinion, we disagree with the commenter that the exclusion analysis is nondiscretionary.

However, separate and different from the 4(b)(2) exclusion analysis discussed above, agencies are required under E.O. 12866 to assess both the costs and the benefits of

the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. The requirement of E.O. 12866 is applicable to the process of designating critical habitat.

To minimize confusion between the two analyses, we have changed the reference to the analysis under the second sentence of 4(b)(2) of the Act in this final rule from “optional weighing of benefits” to “discretionary 4(b)(2) exclusion analysis.”

Comment (44): Some commenters were concerned that the Secretaries might not exclude areas even if the benefits of exclusion outweigh those of inclusion. They argued that this approach would conflict with the general principles of E.O. 13563 and the intent of the 2012 Presidential memorandum. The Secretaries do not have discretion to ignore economic or other impacts in designating critical habitat, as implied by the Services’ claim in having broad discretion in development of an economic impact analysis. If agency discretion is absolute, then this situation renders criteria set forth in section 4(b)(2) as serving no purpose. We understand the commenters to mean that this would render the Act’s requirement that the Services consider the impacts of a designation of critical habitat illusory.

Response: We agree that the requirement of E.O. 12866 (and incorporated by E.O. 13563) 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 is applicable to the process of designating critical habitat. However, as discussed above, the authority for the assessment of costs and benefits to satisfy the provisions of E.O. 12866 and E.O. 13563 is separate and different from the authority for the discretionary exclusion analysis conducted under the second sentence of section 4(b)(2) of the Act. Because the discretionary 4(b)(2) exclusion analysis and the assessment under the Executive Orders serve different purposes, we do not find that the discretionary 4(b)(2) exclusion analysis conflicts with the general principles of the Executive Orders. In fact, we believe that, in general, excluding an area because the benefits of exclusion outweigh the benefits of inclusion, and not excluding an area because the benefits of exclusion do not outweigh the benefits of inclusion, is fully consistent with the E.O. requirements discussed above.

In this final rule, we acknowledge that the first sentence of section 4(b)(2) of the Act sets forth a mandatory consideration of the economic, national security, or other relevant impacts of designating critical habitat. So we agree with the commenter that there is a mandatory consideration of economics and other impacts of designating critical habitat. However, we also acknowledge that the second sentence of section 4(b)(2) of the Act outlines a separate discretionary exclusion-analysis process that the Services may elect to conduct depending on the specific facts of the designation. The discretionary nature of this process has most recently been upheld in *Building Industry Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 2012 U.S. Dist. Lexis 170688 (N.D. Cal. Nov. 30, 2012). We note that the Services are particularly likely to conduct this discretionary analysis if the consideration of impacts mandated under the first sentence suggests that the designation will have significant incremental impacts, and, generally, the Services'

practice is to exclude an area from a designation when the benefits of exclusion outweigh the benefits of inclusion, provided that the exclusion will not result in the extinction of the species.

There is no single approach for evaluating and weighing incremental impacts resulting from a designation of critical habitat against the conservation needs of a species. Thus, the Secretaries must retain discretion in choosing the methods of evaluating these issues in the context of a particular designation. The Secretaries have broad discretion whether to exclude or not (*Building Industry Ass'n of the Bay Area v. U.S. Dep't of Commerce*, 2012 U.S. Dist. Lexis 170688 (N.D. Cal. Nov. 30, 2012)); the only conditions are that we must consider economic impacts, impacts to national security, and other relevant impacts; and we may not exclude an area when such exclusion will result in the extinction of the species. As discussed above, The Services' ability to apply this discretion is fully consistent with E.O. 12866, E.O. 13563, or the Presidential memorandum. The existence of the agencies' broad discretion does not mean that section 4(b)(2) of the Act serves no purpose. Section 4(b)(2) of the Act gives the agencies authority to exclude, absent which exclusions from critical habitat would not be possible. This authority serves an important purpose (although not the purpose of allowing others to force the agencies to exercise that authority).

Comment (45): The Act requires that, when the economic costs outweigh the benefits of designating critical habitat in a certain area, the Secretaries must exert their discretion to exclude that area from the designation.

Response: We disagree. The Act is quite clear and specifically states that the Secretaries “may exclude”—we interpret this to mean exclusions are always discretionary and never mandatory. This interpretation has been upheld by the courts (*Building Industry Ass’n of the Bay Area v. U.S. Dep’t of Commerce*, 2012 U.S. Dist. Lexis 170688 (N.D. Cal. Nov. 30, 2012)). Therefore, exclusion of a particular area is never mandatory.

Comment (46): The Services' section 4(b)(2) impact analyses should be reviewable. The proposed regulation would establish that the Secretaries’ decision not to exclude an area from critical habitat regardless of the result of the economic impact analyses would not be reviewable. Under the APA, agencies must respond to "significant comments." The failure of the Services to provide a meaningful response to a request made by the public or other entity, such as by providing findings regarding relative costs and benefits of designating a particular area, would be arbitrary, capricious, and in violation of the law. Further, if the Secretaries reject a request to exclude an area from critical habitat, and provide an explanation for that decision, that decision would be subject to APA review.

Response: Recent case law supports our conclusion that exclusions are discretionary and the discretion not to exclude an area is judicially unreviewable (*Building Industry Ass’n of the Bay Area v. U.S. Dep’t of Commerce*, 2012 U.S. Dist. Lexis 170688 (N.D. Cal. Nov. 30, 2012)). While the Services will consider all significant

comments, this process does not alter the fact that the Secretary has discretion as to whether to enter into the exclusion analysis under section 4(b)(2) of the Act and whether to exclude any particular areas. For example, an appropriate response to a comment seeking to force an exclusion analysis and subsequent exclusion would be that the Secretary has considered the relevant impacts under the first sentence of section 4(b)(2) of the Act but declines to exercise the Secretary's discretion to make an exclusion.

Comment (47): The public should be able to review and comment on the Secretary's rationale for an exclusion.

Response: In some cases, the Services are able to provide the public with opportunity to review and comment on particular areas considered for, or proposed for, exclusion from a designation of critical habitat. In other instances, the Services may not know which areas will be considered or ultimately excluded from the final designation of critical habitat until after receiving public comment. If the Secretary chooses to exercise his or her discretion to exclude a particular area, the discretionary 4(b)(2) exclusion analysis will be presented in the final rule designating critical habitat and supporting information will be contained in the administrative record for the action. The rationale supporting the exclusion is then available for review. This procedure is consistent with the APA. *See Home Builders Ass'n of No. Cal. v. USFWS*, 2006 U.S. Dist. Lexis 80255 (E.D. Cal. Nov. 2, 2006), *reconsideration granted in part* 2007 U.S. Dist. Lexis 5208 (Jan. 24, 2007), *aff'd*, 616 F.3d 983 (9th Cir. 2010) (specific exclusion from critical

habitat in final rule was a logical outgrowth of the proposed rule because the proposed rule had sought comment on whether any areas should be excluded).

Comment (48): The second sentence indicates that "the Secretary may consider and assign the weight to any benefits relevant to the designation of critical habitat." This language is an attempt to authorize the Secretary to consider factors beyond those specified in the Act, which are those directly related to the conservation of the species that is the subject of the designation.

Response: We disagree. The first sentence of section 4(b)(2) of the Act requires consideration of "any" relevant impacts of designation, and the second sentence of section 4(b)(2) of the Act places no limitations as to the nature of the benefits that may be weighed in the discretionary process of considering exclusions. Nothing in the Act suggests that only factors directly related to conservation of the species can be considered in implementing section 4(b)(2) of the Act. Section 4(b)(2) of the Act is inherently broad, and the regulation reflects the manner in which the Secretary should use that authority.

Comment (49): Paragraph (c) should be revised to specifically acknowledge and analyze the combined State, local, and volunteer conservation-related protections for a species, and the Services should compare these protections to the benefits of a critical habitat designation. Paragraph (c) should be revised to include language defining benefits as including, but not limited to, local and regional economic development and

sustainability, energy development and security, American job security, and volunteer conservation mitigation measures.

Response: While items such as those enumerated in the comment may well be relevant in a particular designation and may be considered if there is available information, the Services' intent in promulgating this revised regulation is to preserve the discretion and flexibility to shape the analysis as appropriate for each situation rather than to prescribe certain criteria for the discretionary analysis under the second sentence of section 4(b)(2) of the Act. Our intent in setting forth paragraph (c) is only to restate Secretarial discretion as provided by the Act and Congressional intent, and confirmed in relevant case law.

Comment (50): One commenter suggested that we revise paragraph (c) to clarify that any exclusion is not set forth until the rule is finalized; the commenter suggested the language "exclude any particular area from the [final] critical habitat."

Response: While we appreciate the comment, we find that the edit is not necessary, because anything set forth in a proposed regulation does not have the force of law until the rule is finalized and effective.

Comment (51): Add language to paragraph (c) to clarify that the Secretary has discretion to exclude areas from the "final" critical habitat "designation" upon a determination "supported by the record."

Response: We agree that decisions set forth in each rulemaking must be supported by the record. In fact, rational decisionmaking supported by the administrative record is a bedrock principle of the APA that applies to all final agency actions, and as such, does not need to be codified within this regulation.

Comment (52): The discretionary 4(b)(2) exclusion analysis must occur prior to including any specific area as critical habitat or excluding any specific area from critical habitat in the proposed rule.

Response: Initially, to the maximum extent prudent and determinable, the Services are required to identify those specific areas that meet the definition of critical habitat (in 16 U.S.C. 1532(5)), based on the best scientific data available. Subsequently, the Secretaries must consider the economic impact, the impact to national security, and any other relevant impact of designating any particular area as critical habitat. *See* 16 U.S.C. 1533(b)(2). We agree with the commenter that the Secretaries may exclude a particular area from critical habitat only after conducting a discretionary 4(b)(2) exclusion analysis (though such weighing and development of a 4(b)(2) report could be undertaken prior to release of the proposed rule). However, we note that the determination of areas meeting the definition of critical habitat is a biological determination and not done via a discretionary 4(b)(2) exclusion analysis.

Comments Regarding the Services' Response to the Presidential Memorandum

Comment (53): The proposed rule does not meet the Executive Order 13563 (January 18, 2011) objectives of promoting predictability and reducing uncertainty in regulatory processes. The Services should implement the Presidential memorandum of February 28, 2012, in a way that is consistent with the entire suite of regulation reform directives. The proposed regulation revision is inconsistent with the intent of the Presidential memorandum in that it does not promote "economic growth, innovation, competitiveness, and job creation," nor does it avoid the imposition of unnecessary costs and burdens to enhance regulatory flexibility. The Services go beyond the Presidential memorandum to advance vague standards that can further weaken economic impact analysis.

Response: Many commenters misinterpreted the scope of the Presidential memorandum. The Presidential memorandum was issued in response to the proposed revised critical habitat designation for the northern spotted owl, and focused specifically on the rulemaking process for that regulation, as evidenced in the title, *Presidential Memorandum—Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens*. Due to: (1) concern for not having the economic analysis available with the proposed revised critical habitat for the northern spotted owl that would allow for the evaluation of effects, and (2) FWS' interpretation that the existing regulations limited the ability to provide the economic analysis concurrent with proposal, the memorandum further directed the Secretary to revise the relevant regulation to shift the timing of the economic analysis such that all subsequent critical habitat proposals would be published

with a concurrent economic analysis. As a result, the core of the memorandum speaks to the designation process of the rulemaking for the northern spotted owl. This regulation addresses only that portion of the memorandum that requires a shift in the timing of the economic analysis. Further, the Services chose to revise the regulation to codify established interpretation, practices, and prevailing case law. We conclude that doing so will in fact provide clarity, promote predictability, and reduce uncertainty, consistent with Executive Order 13563.

Comment (54): One commenter asked the Services to explain how the proposed regulation change will decrease uncertainty and improve public participation, as directed by the Presidential memorandum.

Response: The revisions set forth in this regulation will provide clarity, promote predictability, and reduce uncertainty by making the economic analyses available concurrently with proposals to designate critical habitat so that the public has both the impact analysis and the proposal available for comment concurrently earlier in the process. The Presidential memorandum states “Uncertainty on the part of the public may be avoided, and public comment improved, by simultaneous presentation of the best scientific data available and the analysis of economic and other impacts.” We conclude that this regulation will achieve that goal. Further, the Services chose to address other relevant points within the revised regulation to codify established interpretation, practices, and prevailing case law, which also should decrease uncertainty and improve public participation.

Comment (55): Several commenters interpreted the Presidential memorandum to broadly instruct the Services to consider lessening the regulatory impacts on private and State land owners, and consider impacts to jobs.

Response: Please refer to our response under Comment 53, above.

Comment (56): The Services assert that they will use their current regulation until the new regulation is finalized, yet it used the proposed process in the recent rulemaking for the northern spotted owl. This appears to be a predecisional process approach for the final northern spotted owl regulation and for this proposed regulation.

Response: For the rulemaking for the northern spotted owl proposed revised critical habitat, the FWS followed the existing regulatory procedure set forth in 50 CFR 424.19 regarding the timing of the draft economic analysis, because it was made available following the publication of the proposed designation. The draft analysis used the incremental approach to evaluating impacts, which is consistent with agency practice since 2007, the Solicitor's memorandum (M-37016, "The Secretary's Authority to Exclude Areas from a Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act" (Oct. 3, 2008)) (DOI 2008) and case law in the Ninth Circuit. Thus we did not use a predecisional approach for the northern spotted owl revised critical habitat, but followed our normal practice.

Comment (57): The Services are improperly interpreting the February 28, 2012, Presidential memorandum, in which the Secretary of the Interior was simply directed to provide a draft economic analysis at the time of publication of the proposed northern spotted owl critical habitat rule. The Presidential memorandum did not require the Service to proceed with national rulemaking nor provide direction to utilize the incremental analysis in future critical habitat rulemaking.

Response: The Presidential memorandum specifically directs the Secretary of the Interior to “take prompt steps to propose revisions to the current rule (which, as noted, was promulgated in 1984 and requires that an economic analysis be completed after critical habitat has been proposed) to provide that the economic analysis be completed and made available for public comment at the time of publication of a proposed rule to designate critical habitat.” While the Presidential memorandum directed the Secretary of the Interior to revise the regulations to shift the timing of the economic impact analysis for critical habitat designation, it did not limit the scope of the revision to the regulations. To further provide clarity, promote predictability, and reduce uncertainty, the Services chose to address other relevant points within the revised regulation to codify established interpretation, practices, and prevailing case law.

Comments not directly relevant to this regulation

Comment (58): We received numerous specific comments in several categories which were not directly relevant to the regulation and are, therefore, not addressed in this

section. Below, we provide a summary of the topic areas that these comments encompass. While not directly relevant to this regulation, we may address some of these issues in future rulemaking and policy development by the Services.

- (1) Providing guidance for the methodology for conducting economic analyses including data collection from and coordinating with potentially affected parties;
- (2) Specific methodology for evaluation of direct and indirect economic effects;
- (3) The relationship between critical habitat and recovery;
- (4) The detrimental effect critical habitat may have on partnerships; and
- (5) Tribal sovereignty and coordination.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

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

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the

public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This final rule is consistent with Executive Order 13563 because it is designed “to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives.”

Regulatory Flexibility Act

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

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

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

We received no comments on the economic impact of this rule or the certification. A final regulatory flexibility analysis is not required, and one was not prepared.

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

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

(a) On the basis of information contained in the “Regulatory Flexibility Act” section above, these final regulations would not “significantly or uniquely” affect small governments. We have determined and certify pursuant to the Unfunded Mandates

Reform Act, 2 U.S.C. 1502, that these regulations would not impose a cost of \$100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the final regulations would not place additional requirements on any city, county, or other local municipalities.

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

Takings (E.O. 12630)

In accordance with Executive Order 12630, these final regulations would not have significant takings implications. These final regulations would not have any actual impacts to the environment or to private property interests, because they will not result in changes to applicable standards for identifying and designating critical habitat, the level of opportunity for public comment on critical habitat designations, or the outcome of critical habitat determinations. Because these final regulations affect only procedural or administrative matters, such as the timing of when the draft economic analysis will be prepared, they would not have the effect of compelling a property owner to suffer any physical invasion of their property; and would not deny any use of the land or aquatic

resources. Moreover, there would be neither any burden to public property from the regulations nor any barrier to reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

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

Civil Justice Reform (E.O. 12988)

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

Government-to-Government Relationship with Tribes

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

Paperwork Reduction Act

This final rule does not contain any new collections of information that require approval by the OMB under the Paperwork Reduction Act. This final 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 have analyzed this rule in accordance with the criteria of the National Environmental Policy Act (NEPA) (42 U.S.C. 4332(c)), the Council on

Environmental Quality's Regulations for Implementing the Procedural Provisions of NEPA (40 CFR 1500-1508), the Department of the Interior's NEPA procedures (516 DM 2 and 8; 43 CFR part 46), and NOAA's Administrative Order regarding NEPA compliance (NAO 216-6 (May 20, 1999)).

We have determined that this rule is categorically excluded from NEPA documentation requirements consistent with 40 CFR 1508.4 and 43 CFR 46.210(i). This categorical exclusion applies to policies, directives, regulations, and guidelines that are "of an administrative, financial, legal, technical, or procedural nature." This action does not trigger an extraordinary circumstance, as outlined in 43 CFR 46.215, applicable to the categorical exclusion. Therefore, this rule does not constitute a major Federal action significantly affecting the quality of the human environment.

We have also determined that this action satisfies the standards for reliance upon a categorical exclusion under NOAA Administrative Order (NAO) 216-6. Specifically, this action fits within the categorical exclusion for "policy directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature." NAO 216-6, section 6.03c.3(i). This action would not trigger an exception precluding reliance on the categorical exclusion because it does not involve a geographic area with unique characteristics, is not the subject of public controversy based on potential environmental consequences, will not result in uncertain environmental impacts or unique or unknown risks, does not establish a precedent or decision in principle about future proposals, will not have significant cumulative impacts, and will not have any adverse effects upon endangered or threatened species

or their habitats. *Id.* section 5.05c. As such, it is categorically excluded from the need to prepare an Environmental Assessment. In addition, NMFS finds that because this rule will not result in any effects to the physical environment, much less any adverse effects, there would be no need to prepare an Environmental Assessment even aside from consideration of the categorical exclusion. *See Oceana, Inc. v. Bryson*, No. C-11-6257-EMC, 2013 WL 1563675, *24-25, ---- F. Supp. 2d --- (N. D. Cal. April 12, 2013). Issuance of this rule does not alter the legal and regulatory status quo in such a way as to create any environmental effects. *See Humane Soc. of U.S. v. Johanns*, 520 F. Supp. 2d. 8, 12 (D.D.C. 2007).

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

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

References Cited

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

Authority

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

List of Subjects in 50 CFR Part 424

Administrative practice and procedure, Endangered and threatened species.

Regulation Promulgation

PART 424—[AMENDED]

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

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

2. Revise § 424.19 to read as follows:

§ 424.19 Impact analysis and exclusions from critical habitat.

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

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

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

May 14, 2013

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

August 20, 2013

Alan D. Risenhoover

Director, Office of Sustainable Fisheries,
performing the functions and duties of the
Deputy Assistant Administrator for Regulatory Programs

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

Billing Code 4310-55-P; 3510-22-P

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