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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–HQ–ES–2019–0115; FF09E23000 FXES1111090FEDR 201]

RIN 1018–BD84

Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat

AGENCY: U.S. Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS), propose to amend portions of our regulations that implement section 4 of the Endangered Species Act of 1973, as amended (Act). The proposed revisions set forth a process for excluding areas of critical habitat under section 4(b)(2) of the Act, which mandates our consideration of the impacts of designating critical habitat and permits exclusions of particular areas following a discretionary exclusion analysis.

We want to articulate clearly when and how FWS will undertake an exclusion analysis, including identifying a non-exhaustive list of categories of potential impacts for FWS to consider. The proposed rulemaking would respond to applicable Supreme Court case law, reflect agency experience, codify some current agency practices, and make some modifications to current agency practice. The intended effect of this proposed rule is to provide greater transparency and certainty for the public and stakeholders.

DATES: We will accept comments from all interested parties until [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on this date.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. In the Search box, enter FWS–HQ–ES–2019–0115, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document.

You may submit a comment by clicking on “Comment Now!”

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–HQ–ES–2019–0115; U.S. Fish and Wildlife Service, MS:JAO/1N, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any

personal information you provide us (see **Public Comments** below for more information).

FOR FURTHER INFORMATION CONTACT: DOI, U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240, telephone 202/208–4646. If you use a telecommunications device for the deaf, call the Federal Relay Service at 800/877–8339.

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act of 1973, as amended (“Act”; 16 U.S.C. 1531 *et seq.*), states that the purposes of the 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. 16 U.S.C. 1531(b). 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 to further the purposes of the Act. 16 U.S.C. 1531(c)(1).

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. Authority to administer the Act has been delegated by the Secretary of the Interior to the Director of FWS and by the Secretary of Commerce to the Assistant Administrator for the National Marine Fisheries Service (NMFS) (collectively, the Services). Together, FWS and NMFS administer the Act via joint regulations in chapter IV of title 50 of the Code of Federal Regulations (CFR). In addition, each of the Services also has

regulations specific to its own implementation of the Act (located at 50 CFR part 17 for FWS and at 50 CFR parts 222 through 226 for NMFS). Because this rulemaking, if finalized, would only apply to FWS, the regulatory requirements proposed in this rulemaking would not require NMFS to change its processes for consideration of exclusions under section 4(b)(2) of the Act. Since this rulemaking is solely applicable to FWS, when we refer to the Secretary, we mean the Secretary of the Interior.

One of the tools that the Act provides to conserve species is the designation of critical habitat. The purpose of critical habitat is to identify the areas that are essential to the species' conservation and recovery. When FWS lists a species, the Act requires that, to the maximum extent prudent and determinable, 16 U.S.C. 1533(a), the Secretary, acting through FWS, designate critical habitat after taking into consideration the economic impact, the impact on national security, and any other relevant impact, 16 U.S.C. 1533(b)(2).

In section 3(5)(A) of the Act, Congress defined "critical habitat" as: (i) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

Section 4(b)(2) of the Act then provides the Secretary the authority to exclude any particular area from a critical habitat designation if the benefits of exclusion outweigh the benefits of inclusion for that area, so long as excluding it will not result in the extinction of the

species: “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.” 16 U.S.C. 1533(b)(2).

Our implementing regulations in 50 CFR part 424 set forth relevant definitions (50 CFR 424.02) and describe the standards and procedures for identifying critical habitat (50 CFR 424.12). On February 11, 2016, the Services issued a joint policy describing how they implement their authority to exclude areas from critical habitat designations. “Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act,” 81 FR 7226 (Policy).

This proposed rule carries out Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” and is part of a larger effort by DOI to identify regulations for repeal, replacement, or modification.

Additionally, we decided to revisit certain language in the preamble of the Policy, as well as certain statements in the preamble to the 2013 rule that revised the regulations on the timing of our economic analyses at 50 CFR 424.19 (August 28, 2013; 78 FR 53058), to provide clarity to the FWS and the public in light of the Supreme Court’s recent decision in *Weyerhaeuser Co. v. U.S. FWS*, 139 S. Ct. 361 (2018). At the time we developed the 2013 rule and Policy, the Services were guided by a line of cases in which courts had held that a decision by the Services not to exclude a particular area under section 4(b)(2) of the Act was committed to agency

discretion by law and therefore not subject to judicial review. *See, e.g., Bldg. Indus. Ass'n v. U.S. Dept. of Commerce*, 792 F.3d 1027, 1035 (9th Cir. 2015)); *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 989 (9th Cir. 2015); *Cape Hatteras Access Preservation Alliance v. DOI*, 731 F. Supp. 2d 15, 29-30 (D.D.C. 2010). Thus, for example, we stated in the Policy that “[r]ecent court decisions have resoundingly upheld the discretionary nature of the Secretaries’ consideration of whether to exclude areas from critical habitat.” 81 FR 7226 and 7233 (February 11, 2016) (citing cases listed above). In our 2013 final rule, we cited *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) as case law that supported our conclusion that exclusions are discretionary and the discretion not to exclude an area is judicially unreviewable (78 FR 53072). We also stated in the Policy that “although the Services will explain their rationale for not excluding a particular area, that decision is committed to agency discretion.” *Id.* at 7234.

The Supreme Court has now definitively held, to the contrary, that decisions not to exclude a particular area are judicially reviewable. *Weyerhaeuser*, 139 S. Ct. at 371 (noting that the challenge to the Service’s decision not to exclude a particular area was a “familiar one in administrative law that the agency did not appropriately consider all of the relevant factors that the statute sets forth to guide the agency in the exercise of its discretion”). Thus, the Court held that, although a decision not to exclude a particular area is discretionary, that decision may be reviewed by courts for abuse of discretion under section 706(2) of the Administrative Procedure Act (APA, 5 U.S.C 706(2)). 139 S. Ct. at 371. To provide transparency about how the Secretary intends to exercise his discretion regarding exclusions under section 4(b)(2), we are proposing this regulation, which would supersede the regulations at 50 CFR 424.19 and the Policy with respect to FWS’s implementation of the Act. The regulations at 50 CFR 424.19 and the Policy

remain in effect with respect to NMFS's implementation of the Act.

In proposing the specific changes to the regulations in this document and setting out the accompanying clarifying discussion in this preamble, FWS is proposing prospective standards only. Nothing in these proposed regulations is intended to require (if this rule becomes final) that any proposed rules published prior to the effective date of any final regulation or any previously finalized critical habitat designations be reevaluated on the basis of the final regulations.

We are proposing to redesignate 50 CFR part 17, subpart I, as subpart J, and to add new regulations in 50 CFR part 17, subpart I. Specifically, we propose to add a new § 17.90. Some aspects of new § 17.90 are carried over unchanged from the existing joint regulations at 50 CFR 424.19 and, accordingly, are not discussed further here. Other aspects of proposed § 17.90 reflect new regulatory language, and those aspects are the focus of the preamble discussion below.

Section 4(b)(2) of the Endangered Species Act

As noted above, on February 11, 2016, the Services published the Policy. That policy provided direction regarding how the Services would exercise their discretion to exclude areas from critical habitat designations. Since issuance of the Policy, FWS has concluded that adding some elements of the policy to the implementing regulations would be more effective in guiding agency activities and would provide greater transparency and certainty to the public and stakeholders. In addition, the proposed regulations would put into effect some differences in our approach relative to what was outlined in the Policy, including an information standard for when we enter into a discretionary weighing analysis, a clarification of how considerations for

exclusions will be conducted for Federal lands, and an approach to assigning the weight of the benefits of inclusion or exclusion of any particular areas designated as critical habitat. NMFS will continue to implement the Policy and regulations at 50 CFR. 424.19.

In 1982, Congress added section 4(b)(2) to the Act, both to require the Secretaries to consider the relevant impacts of designating critical habitat and to provide a means for minimizing negative impacts of designation by excluding, in appropriate circumstances, particular areas from a designation. The first sentence of section 4(b)(2) sets out a mandatory requirement that the Secretaries 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. As required by this sentence, FWS always considers those impacts, for every designation of critical habitat. The statute does not prescribe how FWS should take into consideration these impacts. This proposed rule provides the framework for the role that FWS's consideration of the economic impact, impact on national security, and any other relevant impacts will play when identifying any potential exclusions from designations of critical habitat. Although the term "homeland security" was not in common usage in 1982, the Services concluded in the joint Policy that Congress intended that "national security" includes what we now refer to as "homeland security." 81 FR 7227; 2016.

The second sentence of section 4(b)(2) provides the authority for a process by which the Secretaries may elect to determine whether to exclude an area from the designation by performing an exclusion analysis. FWS's consideration of impacts under the first sentence of section 4(b)(2) informs the decision whether to engage in the exclusion analysis under the second sentence of section 4(b)(2).

Conducting an exclusion analysis under section 4(b)(2) involves balancing or weighing

the benefits of excluding a particular area from a critical habitat designation against the benefits of including that area in the designation. The Act provides that if the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exclude the particular area, unless the Secretary determines that the exclusion will result in the extinction of the species concerned.

Overview of Proposed Regulatory Provisions on Discretionary 4(b)(2) Exclusion Analyses

The language of proposed § 17.90(a) carries over the two sentences in the existing interagency regulation at 50 CFR 424.19(a) without change. It then makes clear that, in addition to summarizing the draft economic analysis, the proposed rule will identify known national security and other relevant impacts of the proposed designation, and identify areas that the Secretary has reason to consider for exclusion and explain why.

We also propose to include a non-exhaustive list of categories of potential impacts that the Secretary will identify, when known, at the proposed rule stage. We note that these impacts are the same as those that the Secretary will consider, as appropriate, when conducting the mandatory consideration of any other relevant impacts as expressed in the first sentence of section 4(b)(2) of the Act. Including this list of categories for consideration provides greater transparency and clarity to the public and stakeholders.

Making clear to the public the areas that the Secretary has reason to consider excluding allows the public not only to submit comments on the benefits of exclusion and inclusion in general, but to focus their comments on those benefits as they relate to the specific areas most likely to be considered for exclusion. Additionally, the regulation makes clear that, at any time during the process of designating critical habitat, the Secretary may still consider additional exclusions, including areas that were not identified in the proposed rule. This codifies and

makes transparent the Secretary's existing practice and is intended to allow commenters to provide information specific to those areas that the Secretary anticipates considering for exclusion.

We propose to add § 17.90(b), which would carry over the language of the existing interagency regulation at 50 CFR 424.19(b) that already requires the Secretary to consider the probable economic, national security, and other relevant impacts of the designation.

We propose to add § 17.90(c), which would carry over the language of the existing interagency regulation at 50 CFR 424.19(c) but modify the language to describe how the Secretary intends to exercise his discretion and articulate clearly the factors that will prompt the Secretary to enter into the discretionary exclusion analysis under section 4(b)(2). Including this provision in the regulations will clarify and codify the process and standards underlying exclusion analyses and decisions. In addition, codifying certain aspects of the nonbinding Policy into the regulations provides greater transparency and predictability by making those aspects of the Policy binding.

Proposed paragraph (c)(1) reiterates that the Secretary has discretion whether to enter into an exclusion analysis under section 4(b)(2) of the Act. Proposed paragraph (c)(2) describes the two circumstances in which FWS will conduct an exclusion analysis for a particular area: either (1) when a proponent of excluding the area has presented credible information in support of the request; or (2) where such information has not been presented, when the Secretary exercises his or her discretion to evaluate any particular area for potential exclusion. In *Weyerhaeuser*, the Supreme Court held that decisions not to exclude areas from critical habitat designations are judicially reviewable under the abuse-of-discretion standard. The Court reasoned that, although the use of the word "may" in section 4(b)(2) clearly confers discretion, that "does not segregate"

the decision not to exclude from the procedures mandated by the Act. Among those mandated procedures, the Court referred specifically to the requirement in section 4(b)(2) to consider relevant impacts and the APA requirement to consider all of the relevant factors. Because a decision not to undertake a discretionary exclusion analysis precludes the Secretary from excluding any areas from the designation, FWS therefore intends to document the rational basis for such decisions. FWS also intends that this documentation of the exclusion analysis will demonstrate compliance with mandated procedures.

Proposed paragraph (d) describes how FWS would undertake an exclusion analysis once the Secretary exercises the discretion to enter into one. We recognize that assigning weights to different impacts or benefits requires expertise. Therefore, we propose to assign weights of benefits of inclusion and exclusion based on who has the relevant expertise. Proposed paragraphs (d)(1) through (d)(4) describe factors that FWS considers with respect to conservation plans or agreements, tribal implications, national-security implications, and Federal lands, in parallel to paragraphs 2 through 6 of the Policy.

In proposed paragraph (e) the Secretary would exercise the broad discretion given under section 4(b)(2) by establishing as a principle that FWS will exclude areas whenever it determines that the benefits of exclusion outweigh the benefits of inclusion, as long as exclusion will not result in the extinction of the species.

Framework for Considering an Exclusion and Conducting a Discretionary 4(b)(2) Exclusion Analysis

When FWS concludes that a critical habitat designation is prudent and determinable for species listed under the Act, FWS must follow the statutory and regulatory provisions to

designate critical habitat. The Act's language makes clear that biological considerations drive the initial step of identifying critical habitat. Section 4(b)(2) expressly requires designations to be made based on the best scientific data available. In accordance with the Court's decision in *Weyerhaeuser*, the process begins by identifying a species' habitat. Next, the Act's definition of "critical habitat" requires the Secretary to identify those areas of habitat occupied by the species at the time of listing that contain physical or biological features that are essential to the conservation of the species and that may require special management considerations or protection. FWS also identifies the specific areas of unoccupied habitat that are essential to the conservation (i.e., recovery) needs of the species. Implementing regulations at 50 CFR 424.12 specify the criteria for designation of critical habitat.

If the Secretary enters into a discretionary 4(b)(2) exclusion analysis, the Secretary has broad discretion as to what factors to consider as benefits of inclusion and benefits of exclusion, and the weight to assign to each factor. In a 4(b)(2) exclusion analysis, we determine if the benefits of exclusion outweigh the benefits of inclusion for a particular area. If so, the statute provides the Secretary with discretion to exclude that area, unless the Secretary determines on the basis of the best scientific and commercial data available that failure to designate the area as critical habitat will result in the extinction of the species concerned. 16 U.S.C. 1533(b)(2).

Proposed Approach to Determining Whether to Conduct a Discretionary Exclusion Analysis

We have not previously articulated our general approach to determining whether to exercise the discretion afforded under the statute to undertake the optional weighing process under the second sentence of 4(b)(2) of the Act. Although the Policy identified specific factors to consider if a discretionary exclusion analysis is conducted, it stopped short of articulating

more generally how we approach the determination to undertake that analysis. We now propose to describe specifically what “other relevant impacts” may include and articulate how we approach determining whether we will undertake the discretionary exclusion analysis. We therefore propose paragraph (b) as set forth in the rule portion of this document.

Consistent with the first sentence of section 4(b)(2), proposed paragraph (b) sets out a mandatory requirement that FWS 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. These economic impacts may include, for example, the economy of a particular area, productivity, and creation or elimination of jobs, opportunity costs potentially arising from critical habitat designation, and potential benefits from a potential designation such as outdoor recreation or ecosystem services. The proposed regulations would provide categories of “other relevant impacts” that we may consider, including: public health and safety; community interests; and the environment (such as increased risk of wildfire or pest and invasive species management). This list is not an exhaustive list of the types of impacts that may be relevant in a particular case; rather, it provides additional clarity by identifying some additional types of impacts that may be relevant. Our discussion of proposed new paragraph (d), below, describes specific considerations related to Tribes, States, and local governments; national security; conservation plans, agreements, or partnerships; and Federal lands.

After we consider the relevant impacts, we must determine whether to undertake a discretionary exclusion analysis. We propose paragraph (c) to provide clarity and transparency about how the Secretary intends to exercise his discretion regarding when he will enter into the discretionary exclusion analysis under section 4(b)(2).

Proposed paragraph (c)(1) states the Secretary has discretion to enter into a discretionary

exclusion analysis subject to the provisions of proposed paragraph (c)(2).

Under proposed paragraph (c)(2), we propose to always enter into a discretionary exclusion analysis to compare the benefits of inclusion and the benefits of exclusion of particular areas for which credible information supporting exclusion is presented. As part of the public notice-and-comment process, FWS routinely receives information from the public regarding any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation and the benefits of including or excluding areas that exhibit these impacts. The term “credible information” refers to information that constitutes a reasonably reliable indication regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for a particular area. In evaluating whether a proponent has provided “credible information” in support of a claim that an area should be excluded, we look at two factors--whether the proponent has provided factual information in support of the claimed impacts and whether the claimed impacts may be meaningful for purposes of an exclusion analysis. The information provided by submitters or proponents could address either the benefits of exclusion, or the benefits of inclusion, and we do not expect proponents to conduct a comparison of the impacts relative to the conservation value of the specific area. The “credible information” standard would be relevant only to the question of whether to undertake an analysis—meeting this standard would not indicate that the area will in fact be excluded from the designation.

The second pathway to an exclusion analysis for a particular area would be if the Secretary decides to exercise his or her discretion to do so. *See* proposed paragraph (c)(2)(ii) in the rule portion of this document. In either case, FWS intends to document the basis for any decision not to undertake an exclusion analysis. An explanation of the decision not to undertake

an exclusion analysis for a particular area will be included in the final determination regarding critical habitat for the species.

Proposed Approach to Conducting Discretionary Exclusion Analyses

We propose to add a new paragraph (d) as set forth in the proposed regulatory text. Under proposed paragraph (d), we describe how FWS will undertake an exclusion analysis once the Secretary exercises the discretion to conduct that analysis. We recognize that assigning weight to different impacts or benefits requires expertise. Therefore, we propose to assign weights of benefits of inclusion and exclusion based on who has the relevant expertise (e.g., a commenter on the proposed designation of critical habitat or FWS). Quantification of benefits, if appropriate and feasible, will be conducted and explained on a case-by-case basis in individual critical habitat rulemakings.

With respect to benefits that are outside FWS' expertise and as described in proposed paragraph (d)(1), the Secretary would assign weights to benefits consistent with expert or firsthand information, unless the Secretary has knowledge or material evidence that rebuts that information. Expert or firsthand information should describe the implications of designating a particular area as critical habitat and include supporting documentation of the nature, scope, and magnitude of the impacts and the degree to which designation or exclusion would affect interested parties. Additionally, the impacts described must be attributable to the incremental effect of the designation of critical habitat, not attributable to the listing of the species. Under paragraph (a), if finalized, FWS would continue to make available for public comment the draft economic analysis of the critical habitat designation at the time of the proposed critical habitat

designation. This information may be used in weighing the benefits of including or excluding a particular area.

However, in some instances the Secretary may have knowledge or material evidence that rebuts the information provided by experts or sources with firsthand knowledge. This information could include FWS' expert judgment about the likely effects of designating critical habitat upon the need to engage in, or outcomes of, consultations under section 7 of the Act, or other information available to FWS, such as the information in the economic analysis, as informed by public input. The Service will continue to base critical habitat designations on the best available information. Therefore, if the Secretary has additional knowledge or material evidence that qualifies as the best information available, the Secretary would assign weights of the benefits of inclusion or exclusion consistent with the available information from experts, firsthand knowledge, and the best available information that the Secretary may have to rebut that information.

Proposed subparagraphs in paragraph (d)(1) identify a non-exhaustive list of categories of impacts that are outside the scope of FWS' expertise. Even though some of the categories on this list refer to "nonbiological impacts," we recognize that many sources outside FWS also have information and expertise regarding biological impacts. FWS would consider that information or expertise in the weighing of benefits of inclusion or exclusion of particular areas.

Tribal Lands

Proposed paragraph (d)(1)(i) addresses nonbiological impacts identified by federally recognized Indian Tribes. Executive Orders, Secretarial Orders, and policies guide how FWS works with federally recognized Indian Tribes. These guidance documents generally confirm

our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control Tribal lands, emphasize the importance of developing partnerships with Tribal governments, and direct FWS to consult with Tribes on a government-to-government basis.

Secretarial Order 3206, *American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act* (June 5, 1997) (S.O. 3206), is the most comprehensive of the various guidance documents related to Tribal relationships and Act implementation, and it provides the most detail directly relevant to the designation of critical habitat. In light of this order, we would undertake a discretionary 4(b)(2) exclusion analysis of any Tribal lands included in a potential designation prior to finalizing a designation of critical habitat and would consider all relevant available information, including Tribal expertise, firsthand information, and traditional ecological knowledge. Neither S.O. 3206 nor these proposed revisions preclude FWS from designating Tribal lands or waters as critical habitat.

State and Local Governments

Proposed paragraph (d)(1)(ii) addresses nonbiological impacts identified by State or local governments. It has been the experience of FWS that in some cases a designation of critical habitat may affect State or local government operations in a material way. For example, a State or local government may be in the planning stages of a public-works project such as a hospital or school and may have concerns that a designation of critical habitat would delay or preclude their project. This proposed regulatory provision specifically recognizes that, because these projects and the importance they may have to the community are not within FWS's expertise, the weight that the Secretary assigns to the benefits of designating or excluding specific areas based on impacts to these projects or plans should be consistent with the information provided by the State

or local government, unless we have rebutting knowledge or material information. Additionally, State and local governments may have credible information regarding potential economic or employment losses from a proposed critical habitat designation. The FWS will consider such information as part of any proposed critical habitat exclusion.

Impacts on National Security and Homeland Security

Proposed paragraph (d)(1)(iii) addresses impacts based on national-security or homeland-security implications identified by the Department of Defense, Department of Homeland Security, or any other Federal agency responsible for national security or homeland security. Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)), as revised in 2003, provides: The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DoD), or designated for its use, that are subject to an integrated natural resources management plan (INRMP) prepared under section 101 of the Sikes Act Improvement Act of 1997 (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation. Section 4(a)(3)(B)(i) of the Act does not cover all DoD lands or areas that are subject to national-security concerns (e.g., activities on lands not owned or managed by DoD);. When designating critical habitat under section 4(b)(2) of the Act, the Secretary is required to consider impacts on national security on lands or areas not covered by section 4(a)(3)(B)(i).

Federal Lands

Proposed paragraph (d)(1)(iv) addresses Federal lands where there are non-Federal entities that have a permit, lease, contract, or other authorization for use. While we continue to

recognize that Federal land managers have unique obligations under the Act, we are reversing the 2016 Policy's prior position that we generally do not exclude Federal lands from designations of critical habitat. We recognize that first, Congress declared its policy that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act" (section 2(c)(1)). Second, all Federal agencies have responsibilities under section 7 of the Act to carry out programs for the conservation of listed species and to ensure that their actions are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of designated critical habitat. However, there is nothing in the Act that states that Federal lands shall be exempted from the consideration of a discretionary 4(b)(2) analysis simply because land is managed by the Federal government. Thus, proposed paragraph (d)(1)(iv) allows for consideration of an exclusion analysis on lands managed by the Federal government.

With regard to consideration of an exclusion based on economic or other relevant considerations, under the Act, the costs that a critical habitat designation may impose on Federal agencies can be divided into two types: (1) the additional administrative or transactional costs associated with the consultation process with a Federal agency, and (2) the costs to Federal agencies and other affected parties, including applicants for Federal authorizations (e.g., permits, licenses, leases, contracts), of any project modifications necessary to avoid destruction or adverse modification of critical habitat.

In contrast to the Policy, we now will consider the avoidance of the administrative or transactional costs as a benefit of exclusion of a particular area of Federal land. We did acknowledge then, and restate now, that we will consider the extent to which consultation would produce an outcome that has economic or other impacts, such as by requiring project

modifications and additional conservation measures by the Federal agency or other affected parties. While we acknowledge that Federal lands are important areas to the conservation of species habitat, we do not wish to foreclose the potential to exclude areas under Federal ownership . Therefore, we will now consider whether to exclude (and depending on the outcome of that analysis, may exclude) Federal lands on which non-Federal entities have a permit, lease, contract or other authorization for use where the benefits of exclusion outweigh the benefits of inclusion, so long as the exclusion of a particular area does not cause extinction of a species.

Economic Impacts and Other Relevant Impacts

Proposed paragraph (d)(2) addresses economic impacts or other relevant impacts as identified in proposed paragraph (b). Economic impacts may play an important role in the discretionary 4(b)(2) exclusion analysis under the second sentence of section 4(b)(2). FWS always considers the probable incremental economic impacts of the designation of critical habitat. When undertaking a discretionary 4(b)(2) exclusion analysis with respect to a particular area, FWS would weigh the economic benefits of exclusion (and any other benefits of exclusion) against any benefits of inclusion (primarily the conservation value of designating the area). The nature of the probable incremental economic impacts, and not necessarily a particular threshold level, should trigger considerations of exclusions based on probable incremental economic impacts. For example, if an economic analysis indicates high probable incremental impacts of designating a particular critical habitat unit of lesser conservation value (relative to other areas potentially included in the designation), FWS may consider excluding that particular unit.

Other relevant impacts may also result in exclusions. In some circumstances, the Secretary may exclude particular areas based on specific “community impacts” as a result of the designation of critical habitat. FWS wants to ensure, through weighing the benefits of exclusion against the benefits of inclusion, that the designation of critical habitat in areas where community development projects are expected or planned to occur does not unnecessarily disrupt those projects. We would consider excluding from a proposed critical habitat designation a particular area where there is a planned community development project, such as a school or hospital, if the benefits of exclusion outweigh the benefits of inclusion. In this instance, the benefits of exclusion may include avoidance of additional permitting requirements, time delays, or additional cost requirements to the community development project (which may in turn delay or diminish the benefits attributable to the project) due to the designation of critical habitat. When analyzing whether to exclude such an area, the Secretary will weigh such impacts relative to the conservation value of that area.

For benefits of inclusion or exclusion based on impacts that fall within the scope of FWS’s expertise, the Secretary will assign the weight given to those benefits in light of FWS’s expertise. FWS’s expertise includes, but is not limited to, implementation and enforcement of the Act; identification of the biological needs of species; identification of threats to species and their habitats; identification of important or essential components of habitat; species protection measures; and the process and outcomes of interagency consultations under section 7 of the Act.

Conservation Plans or Agreements and Partnerships, in General

FWS sometimes excludes specific areas from critical habitat designations based on the existence of private or other non-Federal conservation plans or agreements and their attendant

partnerships when the benefits of exclusion outweigh the benefits of inclusion. A conservation plan or agreement describes actions that are designed to provide for the conservation needs of a species and its habitat and may include actions to minimize or mitigate negative effects on the species caused by activities on or adjacent to the area covered by the plan. Conservation plans or agreements can be developed by private entities with no involvement of the FWS, or in partnership with FWS. In the case of a habitat conservation plan (HCP), safe harbor agreement (SHA), or a candidate conservation agreement with assurances (CCAA), a plan or agreement is developed in partnership with FWS for the purposes of obtaining a permit under section 10 of the Act to authorize any take of listed species caused incidentally by the activities described in the plan or agreement.

Conservation Plans Related to Permits Under Section 10 of the Act

Proposed paragraph (d)(3) addresses particular areas covered by conservation plans, agreements, or partnerships that have been permitted under section 10 of the Act. HCPs for incidental take permits under section 10(a)(1)(B) of the Act provide for partnerships with non-Federal entities to minimize and mitigate impacts to listed species and their habitat. In most cases, HCP permittees commit to do more for the conservation of the species and their habitats on their non-Federal lands than designation of critical habitat would provide alone. We place great value on the partnerships that are developed during the preparation and implementation of HCPs.

CCAAs and SHAs are voluntary agreements designed to conserve candidate and listed species, respectively, on non-Federal lands. In exchange for actions that contribute to the conservation of species on non-Federal lands, participating property owners are covered by an

“enhancement of survival” permit under section 10(a)(1)(A) of the Act, which authorizes incidental take of the covered species that may result from implementation of conservation actions, specific land uses, and, in the case of SHAs, the option to return to a baseline condition at the conclusion of the agreement.

FWS’s expertise includes anticipating the extent to which permitted CCAAs, SHAs, and HCPs provide for the conservation of the species. When we undertake a discretionary 4(b)(2) exclusion analysis, we will always consider whether to exclude areas covered by a permitted CCAA/SHA/HCP, and we anticipate consistently excluding such areas from a designation of critical habitat if incidental take caused by the activities in those areas is covered by the permit under section 10 of the Act and the CCAA/SHA/HCP meets all of the following conditions:

1. The permittee is properly implementing the conservation plan or agreement and is expected to continue to do so for the term of the agreement. A CCAA/SHA/HCP is properly implemented if the permittee is, and has been, fully implementing the commitments and provisions in the CCAA/SHA/HCP, Implementing Agreement, and permit.

2. The species for which critical habitat is being designated is a covered species in the conservation plan or agreement, or very similar in its habitat requirements to a covered species. The recognition that FWS extends to such an agreement depends on the degree to which the conservation measures undertaken in the CCAA/SHA/HCP would also protect the habitat features of the similar species.

3. The conservation plan or agreement specifically addresses the habitat of the species for which critical habitat is being designated and meets the conservation needs of the species in the planning area.

We will undertake a case-by-case analysis to determine whether these conditions are met

and, as with other conservation plans, whether the benefits of exclusion outweigh the benefits of inclusion.

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

As is the case with conservation plans generally, the protections that a CCAA, SHA, or HCP provides to habitat can reduce the benefits of including the covered area in the critical habitat designation. However, even in light of such reduction, there may still be significant benefits of critical habitat designation. As such, FWS will weigh the benefits of inclusion against the benefits of exclusion (usually the maintenance or fostering of partnerships that provide existing conservation benefits or may result in future conservation actions).

If a CCAA, SHA, or HCP is still under development when we undertake a discretionary 4(b)(2) exclusion analysis, we will evaluate these draft plans under the framework of general

plans and partnerships (see *Conservation Plans Not Related to Permits Under Section 10 of the Act*, below). In other words, we will consider factors, such as partnerships that have been developed during the preparation of draft CCAAs, SHAs, and HCPs, and broad public benefits, such as encouraging the continuation of current, and development of future, conservation efforts with non-Federal partners, as possible benefits of exclusion. However, we will generally give little weight to unrealized promises of future conservation actions in draft CCAAs, SHAs, and HCPs that have not been permitted. Therefore, we anticipate finding that such promises will not reduce the benefits of inclusion in the discretionary 4(b)(2) exclusion analysis, even if such promises could, if realized, benefit the species for which a critical habitat designation is proposed.

Conservation Plans Not Related to Permits Under Section 10 of the Act

Proposed paragraph (d)(4) addresses particular areas covered by conservation plans, agreements, or partnerships that have not been authorized by a permit under section 10 of the Act. We evaluate a variety of factors to determine how the benefits of exclusion and the benefits of inclusion of a particular area are affected by the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships when we undertake a discretionary 4(b)(2) exclusion analysis. FWS' expertise includes anticipating the extent to which the conservation plans, agreements, or partnerships provide protection or conservation value for the species. The list below is intended to illustrate the types of factors that FWS will use when evaluating non-permitted plans. This list is not exclusive or absolute. Not all factors may apply to every instance of evaluating a plan or partnership; and the listed factors are not requirements for plans or partnerships to be considered for exclusion.

- i. The degree to which the record of the plan, or information provided by proponents of an exclusion, supports a conclusion that a critical habitat designation would impair the realization of benefits expected from the plan, agreement, or partnerships;
- ii. The extent of public participation in the development of the conservation plan;
- iii. The degree to which agency review and required determinations (e.g., State regulatory requirements) have been completed, as necessary and appropriate;
- iv. Whether National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) reviews or similar reviews occurred, and the nature of any such reviews;
- v. The demonstrated implementation and success of the chosen mechanism;
- vi. The degree to which the plan or agreement provides for the conservation of the physical or biological features that are essential to the conservation of the species;
- vii. Whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan or agreement will be implemented; and
- viii. Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.

FWS will typically consider whether a plan or agreement has previously been subjected to public comment, agency review, and NEPA review or similar review processes, because these kinds of processes may indicate the degree of critical analysis the plan or agreement has already received. For example, if a particular plan was developed by a county-level government pursuant to environmental review processes provided by State law or regulation, FWS would likely give greater weight to that plan in its evaluation.

Public Comments

You may submit your comments and materials concerning the proposed rule by one of the methods listed in **ADDRESSES**. Comments must be submitted to <http://www.regulations.gov> before 11:59 p.m. (Eastern Time) on the date specified in **DATES**. We will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in **DATES**.

We will post your entire comment—including your personal identifying information—on <http://www.regulations.gov>. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>.

Because we will consider all comments and information received during the comment period, our final regulation may differ from this proposal in light of our experience in administering the Act, consistent with legal requirements.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this 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. E.O. 13563 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 further emphasizes that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This proposed rule is consistent with E.O. 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.”

Executive Order 13771

This proposed rule is not expected to be subject to the requirements of E.O. 13771 because this proposed rule is expected to result in no more than *de minimis* costs.

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 certify that, if adopted as proposed, this proposed rule would not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

This rulemaking responds to applicable Supreme Court case law and revises and clarifies procedures for FWS regarding designating critical habitat under the Endangered Species Act to reflect agency experience and, with minor changes, codifies current agency practices. The proposed changes to these regulations, if finalized, are unlikely to result in any critical habitat designation having a larger scope.

FWS is the only entity that is directly affected by this rule because FWS is the only entity that will be designating critical habitat under the Endangered Species Act in accordance with this portion of the CFR. No external entities, including any small businesses, small organizations, or small governments, will experience any economic impacts directly from this rule.

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

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

Takings (E.O. 12630)

In accordance with Executive Order 12630, this proposed rule would not have significant takings implications. This proposed rule would not directly affect private property, nor would it cause a physical or regulatory taking. It would not result in a physical taking because it would not effectively compel a property owner to suffer a physical invasion of property. Further, the proposed rule would not result in a regulatory taking because it would not deny all economically beneficial or productive use of the land or aquatic resources and it would substantially advance a legitimate government interest (conservation and recovery of endangered species and threatened species) and would not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether this proposed rule would have significant federalism effects and have determined that a federalism summary impact statement is not required. This proposed rule pertains only to factors for designation of critical habitat under the Endangered Species Act, and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

This proposed rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. This proposed rule would clarify factors for designation of critical habitat under the Endangered Species Act.

Government-to-Government Relationship with Tribes

In accordance with Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” and the Department of the Interior’s manual at 512 DM 2, we are considering possible effects of this proposed rule on federally recognized Indian Tribes. FWS has reached a preliminary conclusion that the changes to these implementing regulations are general in nature and do not directly affect specific species or Tribal lands. These proposed regulations modify certain aspects of the critical habitat designation processes that we have been implementing in accordance with previous guidance and policies, including the 2008 DOI SOL M-opinion and the final Policy. These regulatory revisions directly affect only FWS, and with or without these revisions FWS would be obligated to continue to designate critical habitat based on the best available data. Therefore, we conclude that these proposed regulations do not have “tribal implications” under section 1(a) of E.O. 13175, and therefore formal government-to-government consultation is not required by E.O. 13175 and related policies of the Department of the Interior. We will continue to collaborate with Tribes on issues related to federally listed species and their habitats and work with them as we implement the provisions of the Act. *See* Secretarial Order 3206 (“American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,” June 5, 1997).

Paperwork Reduction Act

This proposed rule does not contain any new collections of information that require approval by the OMB under the Paperwork Reduction Act. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We are analyzing this proposed regulation in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10–46.450), and the Department of the Interior Manual (516 DM 8). This proposed rulemaking in part responds to applicable Supreme Court case law and revises procedures for FWS regarding designating critical habitat under the Endangered Species Act.

As a result, we anticipate that the categorical exclusion found at 43 CFR 46.210(i) likely applies to the proposed regulation changes. At 43 CFR 46.210(i), the Department of the Interior has found that the following categories of actions would not individually or cumulatively have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: “Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature.” However, as a result of public comments received, the final rule may differ from this proposed rule and our analysis under NEPA may also differ from the proposed rule. We invite public comment regarding our initial determination under NEPA and

we will complete our analysis, in compliance with NEPA, before finalizing this regulation.

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

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The proposed revised 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.

Clarity of the Rule

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

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) Use lists and tables wherever possible.

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

Authority

We issue this proposed rule under the authority of the Endangered Species Act, as amended (16 U.S.C. 1531 et seq.).

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

For the reasons discussed in the preamble, the U.S. Fish and Wildlife Service proposes to amend part 17 of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

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

Subpart J—[Redesignated as Subpart K]

2. Subpart J, consisting of §§ 17.100 through 17.199, is redesignated as subpart K.

Subpart I—[Redesignated as Subpart J]

3. Subpart I, consisting of §§ 17.94 through 17.99, is redesignated as subpart J.

4. New subpart I, consisting of § 17.90, is added to read as follows:

Subpart I—Considerations of Impacts and Exclusions from Critical Habitat

§ 17.90 Impact analysis and exclusions from critical habitat.

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

draft economic analysis will be summarized in the *Federal Register* notice of the proposed designation of critical habitat. The Secretary will also identify any national security or other relevant impacts that the Secretary determines are contained in a particular area of proposed designation. Based on the best information available regarding economic, national security, and other relevant impacts, the proposed designation of critical habitat will identify the areas that the Secretary has reason to consider for exclusion and explain why. The identification of areas in the proposed rule that the Secretary has reason to consider for exclusion is neither binding nor exhaustive. “Economic impacts” may include, but are not limited to, the economy of a particular area, productivity, jobs, and any opportunity costs arising from the critical habitat designation (such as those anticipated from reasonable and prudent alternatives that may be identified through a section 7 consultation) as well as possible benefits and transfers (such as outdoor recreation and ecosystem services). “Other relevant impacts” may include, but are not limited to, impacts to Tribes, States, local governments, public health and safety, community interests, the environment (such as increased risk of wildfire or pest and invasive species management), federal lands, and conservation plans, agreements, or partnerships. 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.

(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.

(c)(1) Subject to paragraph (c)(2) of this section, the Secretary has discretion as to whether to conduct an exclusion analysis under 16 U.S.C. 1533(b)(2).

(2) The Secretary will conduct an exclusion analysis when:

(i) The proponent of excluding a particular area (including but not limited to permittees, lessees or others with a permit, lease or contract on federally managed lands) has presented credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area; or

(ii) The Secretary otherwise decides to exercise discretion to evaluate any particular area for possible exclusion.

(d) When the Secretary conducts a discretionary exclusion analysis pursuant to paragraph (c) of this section, the Secretary shall weigh the benefits of including or excluding particular areas in the designation of critical habitat, according to the following principles:

(1) When analyzing the benefits of including or excluding any particular area based on impacts identified by experts in, or by sources with firsthand knowledge of, areas that are outside the scope of the Service's expertise, the Secretary will assign weight to those benefits consistent with the expert or firsthand information, unless the Secretary has knowledge or material evidence that rebuts that information. Impacts that are outside the scope of the Service's expertise include, but are not limited to:

(i) Nonbiological impacts identified by federally recognized Indian Tribes, consistent with all applicable Executive and Secretarial orders;

(ii) Nonbiological impacts identified by State or local governments; and

(iii) Impacts based on national security or homeland security implications identified by the Department of Defense, Department of Homeland Security, or any other Federal agency responsible for national security or homeland security;

(iv) Nonbiological impacts identified by a permittee, lessee, or contractor applicant for a permit, lease, or contract on Federal lands.

(2) When analyzing the benefit of including or excluding any particular area based on economic impacts or other relevant impacts described in paragraph (b) of this section, the Secretary will weigh such impacts relative to the conservation value of that particular area. For benefits of inclusion or exclusion based on impacts that fall within the scope of the Service's expertise, the Secretary will assign weight to those benefits in light of the Service's expertise.

(3) When analyzing the benefits of including or excluding particular areas covered by conservation plans, agreements, or partnerships that have been authorized by a permit under section 10 of the Act, the Secretary will consider the following factors:

- (i) Whether the permittee is properly implementing the conservation plan or agreement;
- (ii) Whether the species for which critical habitat is being designated is a covered species in the conservation plan or agreement; and
- (iii) Whether the conservation plan or agreement specifically addresses the habitat of the species for which critical habitat is being designated and meets the conservation needs of the species in the planning area.

(4) When analyzing the benefits of including or excluding particular areas covered by conservation plans, agreements, or partnerships that have not been authorized by a permit under section 10 of the Act, factors that the Secretary may consider include, but are not limited to:

- (i) The degree to which the record of the plan, or information provided by proponents of an exclusion, supports a conclusion that a critical habitat designation would impair the realization of the benefits expected from the plan, agreement, or partnership.
- (ii) The extent of public participation in the development of the conservation plan.
- (iii) The degree to which agency review and required determinations (e.g., State regulatory requirements) have been completed, as necessary and appropriate.

(iv) Whether National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) reviews or similar reviews occurred, and the nature of any such reviews.

(v) The demonstrated implementation and success of the chosen mechanism.

(vi) The degree to which the plan or agreement provides for the conservation of the physical or biological features that are essential to the conservation of the species.

(vii) Whether there is a reasonable expectation that the conservation management strategies and actions contained in a management plan or agreement will be implemented.

(viii) Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.

(e) If the Secretary conducts an exclusion analysis under paragraph (c) of this section, and if the Secretary determines that the benefits of excluding a particular area from critical habitat outweigh the benefits of specifying that area as part of the critical habitat, then the Secretary shall exclude that area, unless the Secretary determines, based on the best scientific and commercial data available, that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

George Wallace

Assistant Secretary for Fish and Wildlife and Parks

Department of the Interior.