Subpart G—Threatened Plants

■ 3. Amend § 17.71 by revising paragraph (a) and adding paragraph (d) to read as follows:

§ 17.71 Prohibitions.

(a) Except as provided in a permit issued pursuant to § 17.72, the provisions of paragraph (b) of this section and all of the provisions of § 17.61, except § 17.61(c)(2) through (4), apply to threatened species of plants that were added to the List of Endangered and Threatened Plants at § 17.12(h) on or prior to [EFFECTIVE DATE OF THE FINAL RULE], unless the Secretary has promulgated species-specific provisions (see paragraph (c) of this section), with the following exception: Seeds of cultivated specimens of species treated as threatened are exempt from all the provisions of § 17.61, provided that a statement that the seeds are of ''cultivated origin'' accompanies the seeds or their container during the course of any activity otherwise subject to the regulations in this subpart.

* * * * *

(d) Each species-specific rule proposed after [EFFECTIVE DATE OF THE FINAL RULE] will include a necessary and advisable determination (including consideration of conservation and economic impacts consistent with the findings and declaration of purposes and policy of the Endangered Species Act, 16 U.S.C. 1531, based on the best scientific and commercial data available) and will seek public comment on that determination.

Kevin Lilly,

Principal Deputy for Fish and Wildlife and Parks, Exercising the delegated authority of the Assistant Secretary for Fish and Wildlife and Parks. Department of the Interior.

[FR Doc. 2025–20552 Filed 11–19–25; 11:15 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–HQ–ES–2025–0048; FXES11110900000–256–FF09E23000]

RIN 1018–BI76

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 or the Service), propose to amend portions of our regulations for section 4 of the Endangered Species Act of 1973, as amended (Act or ESA). Specifically, we propose to revise regulations related to section 4(b)(2) of the Act. Section 4(b)(2) requires consideration of the economic impact, the impact on national security, and any other relevant impact of designating any particular area as critical habitat; and authorizes the exclusion of areas from critical habitat if the benefits of excluding the area outweigh the benefits of designating it as critical habitat. These proposed revisions articulate when and how we determine whether the benefits of excluding an area outweigh the benefits of designating the area as critical habitat (exclusion analysis). This proposed rule reflects the Service's experience and existing case law. The intended effect of this proposed rule is to provide greater transparency and certainty for the public and stakeholders.

DATES: Comments must be received by December 22, 2025.

ADDRESSES: You may submit comments and information on this document by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Search box, enter FWS–HQ–ES–2025–0048, which is the docket number for this rulemaking action. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment.'' Comments must be submitted to *https://www.regulations.gov* before 11:59 p.m. (Eastern Time) on the date specified in **DATES**.

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–HQ–ES–2025–0048; U.S. Fish and Wildlife Service, MS: PRB/3W, 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 *https://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Request for Comments, below, for more information).

Availability of reference materials: References and a document summarizing this proposed rule are available at *https://www.regulations.gov* at Docket No. FWS–HQ–ES–2025–0048.

FOR FURTHER INFORMATION CONTACT: John Tirpak, U.S. Fish and Wildlife Service, Division of Conservation and Classification, *john_tirpak@fws.gov,* 703–358–2163. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act of 1973, as amended (hereafter referred to as Act or ESA; 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 endangered and threatened species (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 shall seek to conserve endangered species and threatened species and shall 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 the FWS and by the Secretary of Commerce to the Assistant Administrator for the National Marine Fisheries Service (NMFS) (collectively, the Services). Together, the Services 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 administration 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 the FWS, the regulations 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 the FWS, when we refer to

the Secretary, we mean the Secretary of the Interior.

The regulations we propose in this rule provide criteria or otherwise clarify the processes by which the FWS will implement various statutory requirements set forth in section 4 of the Act. This proposed rule is intended to provide the public with a clear, transparent explanation of how we are proposing to revise the ESA regulations in 50 CFR part 17 and the opportunity to comment on these proposed revisions. We interpret our authorities under the statutory scheme consistent with the best reading of the Act as a whole. These regulatory guidelines are based on our expertise in evaluating and protecting species, as well as in employing traditional tools of statutory interpretation that the courts have outlined.

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 listed species' conservation. When the Services determine that a species warrants listing, the Act requires the Services to designate critical habitat concurrently with the listing rule to the maximum extent prudent and determinable, or up to 1 year following listing if critical habitat was not initially determinable. Critical habitat is defined in section 3 of the Act as: (1) the specific areas within the geographical area occupied by the species at the time it is listed on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections; and (2) specific areas outside the geographic area occupied by the species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species (16 U.S.C. 1532(5)).

When the 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. Therefore, the process begins by relying on the best scientific data available to identify the 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; and the specific areas of unoccupied habitat that are essential to the conservation (*i.e.,* recovery) of the species.

Section 4(b)(2) also requires that, in designating critical habitat, the Secretary must take into consideration the impacts of specifying any particular area as critical habitat (16 U.S.C. 1533(b)(2)). The second part of section 4(b)(2) 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. Our regulations in 50 CFR part 424 set forth relevant definitions (50 CFR 424.02), describe the standards and procedures for identifying critical habitat (50 CFR 424.12) and describe the standards and procedures for exclusions of particular areas of critical habitat (50 CFR 424.19). In addition to our joint regulations, the Services developed the joint Policy Regarding Implementation of Section 4(b)(2) of the ESA that provided direction regarding how we would exercise discretion to exclude areas from critical habitat designations (81 FR 7226, February 11, 2016; hereafter ''2016 policy''). On December 18, 2020, we finalized FWS-only regulations that set forth a process for excluding areas of critical habitat under section 4(b)(2) of the Act (85 FR 82376; hereafter, ''the 2020 rule''). Then on July 21, 2022, we rescinded those regulations (87 FR 43433). We again are undertaking a revision to the regulations pertaining to exclusions of particular areas of critical habitat under section 4(b)(2) of the ESA.

Executive Order (E.O.) 14154, ''Unleashing American Energy,'' issued January 20, 2025, directed all departments and agencies to immediately review agency actions that potentially impose an undue burden on the identification, development, or use of domestic energy resources, and, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding agency actions that conflict with this national objective. To implement provisions of E.O. 14154, the Department of the Interior subsequently issued Secretary's Order (S.O.) 3418, which directed Assistant Secretaries to take steps, as appropriate, to suspend, revise, or rescind multiple actions that had been finalized under the prior Administration. In response to E.O. 14154 and S.O. 3418, we propose to reinstate the 2020 rule. This proposed revision would not require review of, or alter, any designated critical habitat if and when the revision is finalized.

This proposed rule is one of four proposed rules publishing in today's **Federal Register** that propose changes to the regulations that implement the Act. Two of these proposed rules are joint between the Services, and two (including this document) are specific to the Service.

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

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 of specifying any particular area as critical habitat. As required by this sentence, FWS always considers those impacts for every designation of critical habitat. The statute does not prescribe how the FWS should take into consideration these impacts. The second sentence of section 4(b)(2) provides the authority for a process by which the Secretaries may exclude an area from critical habitat. The FWS's consideration of impacts under the first sentence of section 4(b)(2) informs the decision whether to engage in the discretionary exclusion analysis under the second sentence of section 4(b)(2). Although the term ''homeland security'' was not in common usage in 1982, the Services concluded in the 2016 policy that Congress intended that ''national security'' includes what we now refer to as ''homeland security'' (see 81 FR 7226, at 7227, February 11, 2016).

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 from the designation, unless the Secretary determines that the exclusion will result in the extinction of the species concerned.

As discussed earlier, the 2016 policy provided direction regarding how the Services would exercise this discretion to balance or weigh benefits and use that information to exclude areas from critical habitat designations. We have

concluded that adding elements of the 2016 policy back into our regulations would be more effective in guiding agency activities and would provide greater transparency and certainty to the public and stakeholders. The proposed regulations, however, would put into effect some differences in our approach relative to what was outlined in the 2016 policy. These differences from the 2016 policy include an information standard applicable to when FWS undertakes 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. If this proposed rule is finalized, NMFS will continue to implement the 2016 policy and regulations at 50 CFR 424.19.

Proposed Regulatory Revisions

This proposed rule provides the framework for the role of the FWS's consideration of the economic impact, impact on national security, and any other relevant impacts under section 4(b)(2) of the Act in identifying any potential exclusions from designations of critical habitat.

Once the Secretary has assessed the relevant impacts of designating particular areas as critical habitat, section 4(b)(2) authorizes the exclusion of any area from the designation if the Secretary determines that the benefits of excluding the area outweigh the benefits of including the area in the critical habitat designation (unless failure to designate the area will result in the extinction of the species) (16 U.S.C. 1533(b)(2)). The FWS refers to this comparative weighing of the impacts of excluding and including particular areas under 4(b)(2) as an ''exclusion analysis.''

To undertake an exclusion analysis, we first evaluate whether there are any meaningful impacts from designating any area such that avoiding those impacts may outweigh the benefits of including the area in the designation. If there are no such impacts, there is no need to proceed further with weighing the impacts of designation. If there are any such impacts, we undertake a comparative weighing of those impacts. The ESA does not prescribe any elements of the analysis, such as what weight to assign to each factor or impact in determining the benefits of inclusion and the benefits of exclusion. Therefore, as long as, in completing the exclusion analysis, the FWS has considered all the relevant impacts, as required by the Administrative Procedure Act (APA; 5 U.S.C. 551 *et seq.*), the ESA affords the Secretary broad discretion in deciding whether or not to exclude any area for which the benefits of exclusion outweigh the benefits of inclusion.

Framework for Considering an Exclusion and for Conducting a Discretionary 4(b)(2) Exclusion Analysis (§ 17.90(a))

We propose to reinstate § 17.90(a) as set forth in the 2020 rule and in the proposed regulation promulgation portion of this document. This reinstated section carries over the two sentences in the existing interagency regulation at 50 CFR 424.19(a) without change. It then makes clear that the proposed rule will identify known national security and other relevant impacts of the proposed designation and identify any 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.

The proposed regulations would explain that 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 (such as those anticipated from reasonable and prudent alternatives that may be identified through a section 7 consultation), 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 (*e.g.,* such as a planned school or hospital), 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.

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. Codifying and making transparent this existing practice is intended to allow commenters to provide information specific to those areas that the Secretary anticipates considering for exclusion. Additionally, as is current practice, as part of any proposed rulemaking we will continue to seek comment on any additional impacts that may result from including any area in the designation and to make 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.

Finally, we propose to carry over language from 50 CFR 424.19(b) that explains that the Secretary will consider impacts at a scale that the Secretary determines to be appropriate and that impacts may be qualitatively or quantitatively described.

Considering Relevant Impacts (§ 17.90(b))

Section 4(b)(2) of the Act sets out a mandatory requirement that the 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. The Act does not further define ''other relevant impacts.''

We propose to reinstate § 17.90(b) as set forth in the 2020 rule and in the proposed regulation promulgation portion of this document. This would carry over the language of the existing interagency regulation at 50 CFR 424.19(b) that already states that the Secretary will consider the probable economic, national security, and other relevant impacts of the designation.

Approach to Determining Whether To Conduct a Discretionary Exclusion Analysis (§ 17.90(c))

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

We propose to reinstate § 17.90(c) as set forth in the 2020 rule and in the proposed regulation promulgation portion of this document. This 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 discretion and articulate clearly the factors that will prompt the Secretary to undertake the discretionary exclusion analysis under section 4(b)(2) of the Act. Including this provision in the regulations will clarify and codify the process and standards underlying exclusion analyses and decisions. Proposed paragraph (c)(1) reiterates that the Secretary has discretion whether to undertake 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) if such information has not been presented, when the Secretary exercises his or her discretion to evaluate any particular area for potential exclusion.

As part of the public notice-and-comment process, the FWS routinely receives information from the public regarding probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation of critical habitat 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 undertake the exclusion analysis. See proposed paragraph (c)(2)(ii) in the proposed regulation promulgation section of this document. In either case, the 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.

In *Weyerhaeuser Co.* v. *U.S. FWS, 586 U.S. 9 (2018),* 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, 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 ESA 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, the FWS's current practice is to document the rational basis for such decisions. The proposed regulation simply codifies this practice.

Approach to Conducting Discretionary Exclusion Analyses (§ 17.90(d))

We propose to reinstate paragraph (d) as set forth as set forth in the 2020 rule and in the proposed regulation promulgation section of this document. Proposed paragraph (d) describes how the FWS would undertake an exclusion analysis once the Secretary exercises the discretion to undertake one.

Proposed paragraph (d)(1) describes how the FWS would consider benefits (of including or excluding any particular area) that may be outside the scope of FWS's expertise. The Secretary would give weight to benefits consistent with expert or firsthand information, unless the Secretary has knowledge or material evidence that rebuts that information. Proposed subparagraphs (i)–(iv) in paragraph (d)(1) identify a non-exhaustive list of categories of impacts that may be outside the scope of FWS's expertise. Even though some of the categories on this list refer to ''nonbiological impacts,'' we recognize that many sources outside of the FWS also have information and expertise regarding biological impacts. The FWS would consider that information or expertise in the weighing of benefits of inclusion or exclusion of particular areas. 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 the FWS's expert judgment about the likely effects of designating critical habitat upon the need to engage in, or likely outcomes of, consultations under section 7 of the Act, or other information available to the agency, such as the information in the economic analysis, as informed by public input. Therefore, if the Secretary has additional knowledge or material evidence that qualifies as the best information available, the Secretary would assign weights to the benefits of inclusion or exclusion consistent with the information from experts, firsthand knowledge, and the best information available that the Secretary may have to rebut that information.

The proposed revisions would not differ from the FWS's current practice in considering the benefits of including or excluding certain areas as critical habitat, except for the current practice in considering 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. This provision reverses the 2016 policy position that we generally do not exclude Federal lands from designations of critical habitat (outside of routine consideration of impacts to national security). There is nothing in the Act that states that lands could not be excluded from designation of critical habitat simply because that land is managed by the Federal Government. In some instances, the benefits of excluding Federal lands from a critical habitat designation may outweigh the benefits of including them.

It is noteworthy that Federal land managers will continue to have unique obligations under the Act, and that Congress declared as 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)). Further, 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 (section 7(a)(1)).

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 can be divided into two types: (1) the additional administrative or transactional costs associated with the consultation process with a Federal agency pursuant to section 7, (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, and (3) the opportunity cost associated with projects and activities (such as those anticipated from reasonable and prudent alternatives that may be identified through a section 7 consultation).

In contrast to the 2016 policy (see 81 FR 7226, at 7231, February 11, 2016), we now will consider the avoidance of the administrative or transactional costs associated with the consultation process as a benefit of exclusion of a particular area of Federal land. We did acknowledge then, and restate now, that we will also 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.

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). The 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, the FWS will continue to 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 or other 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), the FWS may consider excluding that particular unit. When analyzing whether to exclude any 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 the FWS's expertise, the Secretary will assign the weight given to those benefits in light of the FWS's expertise. The 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

Proposed paragraphs (d)(3) and (d)(4) address conservation plans, agreements, or partnerships, respectively, those permitted under, and those not permitted under, section 10 of the ESA. These proposed regulations generally follow our practices from the 2016 policy. We frequently exclude 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 the FWS. In the case of a habitat conservation plan, safe harbor agreement, candidate conservation agreement with assurances, or conservation benefit agreement, a plan or agreement is developed in partnership with the 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. We place great value on the partnerships that are developed during the preparation and implementation of conservation plans and agreements.

The benefits of excluding lands with conservation plans or agreements 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 the FWS would be unable to accomplish without their participation. These partnerships can lead to additional conservation efforts for listed species. This is particularly important because conservation plans or agreements often cover a wide range of species, including listed plant species and species that are not federally listed.

The protections that a conservation plan or agreement 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, the 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 plan under section 10 of the ESA is still under development when we undertake a discretionary 4(b)(2) exclusion analysis, we will evaluate these draft plans under regulations proposed at paragraph (d)(4).

Approach To Excluding Areas

We propose to reinstate paragraph (e) as set forth in the 2020 rule and in the proposed regulation promulgation portion of this document. Proposed paragraph (e) describes that the Secretary would exercise the broad discretion given under section 4(b)(2) by establishing as a principle that the 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.

Request for Comments

We are seeking comments from all interested parties on the specific revisions we are proposing, as well as on any of our analyses or preliminary conclusions in the Required Determinations section of this document. All relevant information will

be considered prior to making a final determination regarding these regulations. Depending on the comments received, we may change the final regulations based upon those comments.

You must submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. Comments sent by any other method, or to any other address or individual, may not be considered. Comments must be submitted to *http://www.regulations.gov* before 11:59 p.m. (Eastern Time) on the date specified in **DATES**. We cannot guarantee that we will be able to consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in **DATES**. Comments and materials we receive will be posted and available for public inspection on *https://www.regulations.gov.* This generally means that we will post any personal information you provide us. 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.

Required Determinations

Regulatory Planning and Review—E.O.s 12866 and 13563

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 proposed rule is significant and has reviewed it.

E.O. 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. 13653 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 proposed rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; title II of Pub. L. 104–121, March 29, 1996), 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 that person's designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the RFA 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 proposes to revise the Service's regulations designating critical habitat for endangered and threatened species under the Act.

The Service is the only entity that is directly affected by this proposed regulation change at 50 CFR part 17 because changes to this section of the Code of Federal Regulations merely describe how we will designate critical habitat under the ESA. Since the only potential entities directly affected by this proposed regulation change are not small entities, including any small businesses, small organizations, or small governments, we certify that, if adopted as proposed, this rule would not have a significant economic effect on a substantial number of small entities.

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 above in the Regulatory Flexibility Act section, this proposed rule would not ''significantly or uniquely'' affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act that this proposed 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)—E.O. 12630

In accordance with E.O. 12630, this proposed rule would not have significant takings implications. This proposed rule would not pertain to ''taking'' of private property interests, nor would it directly affect private property. A takings implication assessment is not required because this proposed rule (1) would not effectively compel a property owner to suffer a physical invasion of property and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This proposed rule 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 E.O. 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 designation of critical habitat under the ESA 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 would not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of E.O. 12988. This proposed rule would clarify factors for designating critical habitat under the ESA.

Government-to-Government Relationship With Tribes

In accordance with E.O.13175, (''Consultation and Coordination with Indian Tribal Governments''), and the Department of the Interior's manual at 512 DM 2, we considered possible

effects of this proposed rule on federally recognized Indian Tribes. This proposed rule is general in nature and does not directly affect any specific Tribal lands, treaty rights, or Tribal trust resources. Therefore, we preliminarily conclude that this proposed rule does not have ''tribal implications'' under section 1(a) of E.O. 13175. Thus, 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. See Joint Secretary's Order 3206, ''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,'' June 5, 1997.

Paperwork Reduction Act (44 U.S.C. 3501 et seq.)

This proposed rule does not contain any new collection of information that requires approval by the OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). 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 (42 U.S.C. 4321 et seq.)

We are analyzing this proposed rule in accordance with the criteria of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR part 46), and the Department of the Interior Manual (516 DM 1).

We invite the public to comment on the extent to which these proposed regulations may have a significant impact on the human environment or fall within one of the categorical exclusions for actions that have no reasonably foreseeable effects on the quality of the human environment. We will complete our analysis, in compliance with NEPA, before finalizing this proposed rule.

Energy Supply, Distribution or Use—E.O. 13211

E.O. 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare statements of energy effects ''to the extent permitted by law'' when undertaking actions identified as significant energy actions (66 FR 28355; May 22, 2001). E.O. 13211 defines a ''significant energy action'' as an action that (i) is a significant regulatory action under E.O. 12866 (or any successor order); and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy. The proposed revised regulations are not expected to affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and there is no requirement to prepare a statement of energy effects for this action.

Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.)

In developing this proposed rule, the FWS is acting in our unique statutory role as administrator of the Act and is engaged in a legal exercise of interpreting the standards of the Act. The FWS's administration of the Act is not in itself subject to the Act's provisions, including section 7(a)(2). The FWS has a historical practice of issuing its general regulations under the ESA without undertaking section 7 consultation. This practice accords with the plain language, structure, and purposes of the ESA, which does not place a consultation obligation on the FWS's administration of the Act. Although the FWS consults on actions through intra-agency consultations where appropriate (*e.g.,* issuance of section 10 permits and actions under statutory authorities other than the ESA), in those instances the FWS is acting principally as an ''action agency'' implementing provisions of the Act or other statutes. Here, by contrast, the FWS is acting solely in our role as administrator of the ESA in interpreting the Act's provisions; we are also not implementing the Act to propose or take a specific action. The FWS is carrying out the most fundamental exercise of our role as administrator of the ESA, and the Act cannot reasonably be construed as requiring the FWS to ''consult'' with ourselves under Section 7(a)(2) in such cases.

Clarity of the Proposed Rule

We are required by E.O.s 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 are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

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, and Wildlife.

Proposed Regulation Promulgation

For the reasons discussed in the preamble, we hereby propose 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 may be outside the scope of the Service's expertise, the Secretary will give 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 may be 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 Secretary's orders;

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

(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; and

(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.

Kevin Lilly,

Principal Deputy for Fish and Wildlife and Parks, Exercising the delegated authority of the Assistant Secretary for Fish and Wildlife and Parks. Department of the Interior.

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