AGENDA B-6
OCTOBER 2013

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Chris Oliver
Executive Director

DATE: September 20, 2013

SUBJECT: Protected Resources Report

ESTIMATED TIME
6 HOURS
All B Items

ACTION REQUIRED

Receive report on Protected Resources issues and take action as necessary.

BACKGROUND

Humpback whale
On April 10, 2013, the Hawai'I Fishermen's Alliance for Conservation and Tradition (HFACT), on behalf of several other organizations and more than 600 individual petitioners, submitted a petition to NMFS to classify the North Pacific population of humpback whale (*Megaptera novaeangliae*) as a Distinct Population Segment (DPS) under the U.S. ESA, and to delist the North Pacific DPS of humpback whale.

On August 29, 2013, the agency announced a 90-day finding (Item B-6(a)) that found that the petition viewed in the context of information readily available presented substantial scientific and commercial information indicating that the petitioned action may be warranted. The agency, therefore, initiated a status review of the North Pacific population of the humpback whale to determine whether the petitioned action is warranted. The agency is soliciting scientific and commercial information pertaining to this population from any interested party, until October 28, 2013.

North Pacific right whale
For the first time in over 60 years, a North Pacific right whale was spotted in British Columbia. The whale was sighted by Department of Fisheries and Oceans Canada biologists while surveying for whales off the west coast of Haida Gwaii (formerly known as the Queen Charlotte Islands) on June 9, 2013.

Coincidentally, the Final Recovery Plan for the North Pacific Right Whale was published by the National Marine Fisheries Service on June 13, 2013. The Executive Summary is attached as Item B-6(b).The plan identifies measures to protect, promote, and monitor the recovery of North Pacific right whale populations. Because the most significant historical threat (whaling) has been curtailed, and because of a paucity of population data for the species, the primary component of the recovery program is data collection to facilitate estimates of population size, monitoring trends in abundance, and determining population structure. Key elements of the recovery plan for this species are:

1. Coordinate state, federal, and international actions to maintain whaling prohibitions
2. Estimate population size and monitor trends in abundance
3. Determine North Pacific right whale occurrence, distribution and range
4. Identify, characterize, protect, and monitor habitat essential to North Pacific right whale

recovery, and
5. Investigate the impact of human-caused threats on North Pacific right whales.

The goal of the recovery plan is to promote the recovery of North Pacific right whales to the point at which they can be removed from the list of endangered and threatened Wildlife and Plants under the provision s of the ESA. The intermediate goal is to reach a sufficient recovery status to reclassify the species from endangered to threatened. Downlisting criteria include:

1. Each population (Eastern and Western) has no more than a 1% chance of extinction in 100 years, *and* there are at least 1,000 mature, reproductive individuals, consisting of at least 250 mature females and 250 mature males in each population.
2. None of the known threats to North Pacific right whales limit the continued growth of populations.

Delisting criteria include:

1. Each population (Eastern and Western) has no more than a 10% chance of becoming endangered in 100 years.
2. None of the known threats to North Pacific right whales are known to limit the continued growth of populations.

The estimated cost of recovery actions for the first 50 fiscal years is $27.3 million.

Bearded seals

On June 27, 2013, the State of Alaska filed a lawsuit challenging the decision by the National Marine Fisheries Service to list the Beringia and Okhotsk distinct population segments as threatened under the U.S. Endangered Species Act, adding to the suit filed by the North Slope Borough and the Alaska Oil and Gas Association. In a press release "State files suit, supports challenges to federal decision to list bearded seals as endangered, the Alaska Department of Fish and Game stated that bearded seals populations are healthy and abundant, numbering in the hundreds of thousands, and claimed that the decision to list the bearded seals as threatened will "add virtually no extra protections or conservation benefits to the species, and...will impose additional regulatory costs and burdens on the State".

Ribbon seals

On July 10, 2013, the National Marine Fisheries Service noticed the completion and availability of a comprehensive status review of the ribbon seal under the ESA that concluded that listing the ribbon seas as threatened or endangered under the ESA is not warranted at this time. The original petition from the Center for Biological Diversity to list the ribbon seal was filed on December 20, 2007. On December 30, 2008, NMFS published the 12-month finding that determined that listing was not warranted. The petitioners announced their intention to appeal that ruling on January 18, 2011. However, new information available to the agency subsequent to the December 30, 2008 12-month finding had potential implications for the status of the ribbon seal, and the petitioners agreed to voluntarily withdraw their notice to appeal provided NMFS reinitate a status review of the Ribbon seal. That review was initiated on December 13, 2011, and the 12-month deadline was extended to July 10, 2013. The status review announced in July underwent independent peer review by three scientists with expertise in marine mammal biology and ecology, including specifically ribbon seals.

The status review is available on the NMFS website at http://www.afsc.noaa.gov/Publications/AFSC-TM/NOAA-TM-AFSC-255.pdf.

Harbor seals

On June 7, 2013, NMFS announced the extension of the comment period soliciting information about harbor seals in Iliamna Lake, Alaska from July 16 to August 16, 2013. The extension was made in

response to a request from the Bristol Bay Native Association/Bristol Bay Marine Mammal Council. Although the public comment period was extended, the deadline for the status review was not changed. NOAA Fisheries expects to complete the status review by the end of November, 2013.

ESA issues

On August 28, 2013, the U.S. Fish and Wildlife Service and National Marine Fisheries Service (Services) finalized a revision to regulations pertaining to impact analyses conducted for designations of critical habitat under the ESA (Item B-6(c)). This action provides that economic analyses be completed and made available for public comment at the time of publication of a proposed rule to designate critical habitat.

On September 4, 2013, the Services also published a proposal to amend the regulations governing consultation under Section 7 of the ESA regarding incidental take statements (Item B-6(d)). The proposed amendments affect the use of surrogates to express the amount or extent of anticipated incidental take, and incidental take statements for programmatic actions where implementation of the program requires later authorization, funding, or implementation of site-specific actions that will be subject to Section 7 consultation and incidental take statements, as appropriate.

Mr. Jon Kurland (NMFS AKR PRD) is here at this meeting to discuss the implications of these final rules and proposed amendments on current and future Council actions.

Steller sea lions

All Steller sea lion issues will be addressed under Agenda Item C-2.

SUPPLEMENTARY INFORMATION:

Background

On August 20, 2012, we published a proposed rule to designate critical habitat for the jaguar (77 FR 50214). That proposal had a 60-day comment period, ending October 19, 2012. On July 1, 2013, we published a revised proposal that incorporated new information received since the August 20, 2012, proposal (78 FR 39237). That revised proposal had a comment period that ended August 9, 2013. In the July 1, 2013, revised proposed rule, we proposed to designate approximately 858,137 acres (ac) (347,277 hectares (ha)) as critical habitat in six units located in Pima, Santa Cruz, and Cochise Counties, Arizona, and Hidalgo County, New Mexico. In the July 1, 2013, revised proposed rule, we also noticed the availability of a draft economic analysis and draft environmental assessment for public comment. We received requests for a public hearing, and a public hearing was held in Sierra Vista, Arizona, on July 30, 2013. We are now reopening a comment period on the August 20, 2012, proposed rule, as revised on July 1, 2013. Finally, pursuant to a court-approved settlement agreement, the Service agreed to deliver the final designation of critical habitat to the **Federal Register** no later than December 16, 2013.

Information Requested

We will accept written comments and information during this reopened comment period on our July 1, 2013, revised proposed rule to designate critical habitat for the jaguar (78 FR 39237), draft economic analysis, and draft environmental assessment. For more information on the specific information we are seeking, please see the July 1, 2013, revised proposed rule. You may submit your comments and materials concerning the proposed rules by one of the methods listed in **ADDRESSES.**

If you submitted comments or information on the proposed rule (77 FR 50214; August 20, 2012) during the initial comment period from August 20, 2012, to October 19, 2012; or the revised proposed rule (78 FR 39237; July 1, 2013) during the second comment period from July 1, 2013, to August 9, 2013, please do not resubmit them. We have incorporated them into the public record, and we will fully consider them in the preparation of our final rule. Further, any comments and information received after the closing of the second comment period on August 9, 2013, will be incorporated into the record during this comment period and will be fully considered. Our final determination concerning critical habitat will take into consideration all written comments and any additional information we receive during all three comment periods. On the basis of public comments and other relevant information, we may, during the development of our final determination on the proposed critical habitat designation, find that areas proposed are not essential, are appropriate for exclusion under section 4(b)(2) of the Act, or are not appropriate for exclusion.

You may submit your comments and materials concerning the revised proposed rule, draft economic analysis, or draft environmental assessment by one of the methods listed in the **ADDRESSES** section. We request that you send comments only by the methods described in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov*, your entire comment—including any personal identifying information—will be posted on the Web site. We will post all hardcopy comments on *http://www.regulations.gov* as well. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Comments and materials we receive, as well as supporting documentation we used in preparing the revised proposed rule, draft economic analysis, and draft environmental assessment, will be available for public inspection on *http://www.regulations.gov* at Docket No. FWS–R2–ES–2012–0042, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Arizona Ecological Services Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**). You may obtain copies of the original proposed rule, the revisions published on July 1, 2013, the draft economic analysis, and the draft environmental assessment on the Internet at *http://www.regulations.gov* at Docket Number FWS–R2–ES–2012–0042, or by mail from the Arizona Ecological Services Fish and Wildlife Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this notice are the staff members of the Arizona Ecological Services Fish and Wildlife Office, Southwest Region, U.S. Fish and Wildlife Service.

Authority

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

Dated: August 21, 2013.

Stephen Guertin,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2013–21168 Filed 8–28–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 223 and 224

[Docket No. 130708594–3594–01]

RIN 0648–XC751

Endangered and Threatened Wildlife; 90-Day Finding on a Petition To Delist the North Pacific Population of the Humpback Whale and Notice of Status Review

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: 90-day petition finding, request for information, and initiation of status review.

SUMMARY: We, NMFS, announce a 90-day finding on a petition to identify the North Pacific population of the humpback whale (*Megaptera novaeangliae*) as a Distinct Population Segment (DPS) and delist the DPS under the Endangered Species Act (ESA). The humpback whale was listed as an endangered species in 1970 under the Endangered Species and Conservation Act of 1969, which was later superseded by the Endangered Species Act of 1973, as amended (ESA). We find that the petition viewed in the context of information readily available in our files presents substantial scientific and commercial information indicating that the petitioned action may be warranted.

We are hereby initiating a status review of the North Pacific population of the humpback whale to determine whether the petitioned action is warranted. To ensure that the status review is comprehensive, we are soliciting scientific and commercial information pertaining to this population from any interested party.

DATES: Scientific and commercial information pertinent to the petitioned action must be received by October 28, 2013.

ADDRESSES: You may submit information or data, identified by

"NOAA–NMFS–2013–0106," by any one of the following methods:

• *Electronic Submissions:* Submit all electronic information via the Federal eRulemaking Portal *http://www.regulations.gov*. To submit information via the e-Rulemaking Portal, first click the "submit a comment" icon, then enter "NOAA–NMFS–2013–0106" in the keyword search. Locate the document you wish to provide information on from the resulting list and click on the "Submit a Comment" icon to the right of that line.

• *Mail or Hand-Delivery:* Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

Instructions: All information received is a part of the public record and may be posted to *http://www.regulations.gov* without change. All personally identifiable information (for example, name, address, etc.) voluntarily submitted may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information. NMFS will accept information from anonymous sources. Attachments to electronic submissions will be accepted in Microsoft Word, Excel, Corel WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Marta Nammack, NMFS, Office of Protected Resources, (301) 427–8469.

SUPPLEMENTARY INFORMATION:

Background

On April 17, 2013, we received a petition from the Hawai'i Fishermen's Alliance for Conservation and Tradition, Inc., to identify the North Pacific population of the humpback whale as a DPS and to delist it under the ESA. Copies of the petition are available upon request (see **ADDRESSES**, above).

ESA Statutory, Regulatory, and Policy Provisions and Evaluation Framework

In accordance with section 4(b)(3)(A) of the ESA, to the maximum extent practicable, within 90 days of receipt of a petition to list a species as threatened or endangered, the Secretary of Commerce is required to make a finding on whether that petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted, and to promptly publish such finding in the **Federal Register** (16 U.S.C. 1533(b)(3)(A)). When we find that substantial scientific or commercial information in a petition indicates the petitioned action may be warranted, as is the case here, we are required to promptly commence a review of the status of the species concerned, during which we will conduct a comprehensive review of the best available scientific and commercial information. In such cases, within 12 months of receipt of the petition, we conclude the review with a finding as to whether, in fact, the petitioned action is warranted. Because the finding at the 12-month stage is based on a comprehensive review of all best available information, as compared to the narrow scope of review at the 90-day stage, which focuses on information set forth in the petition, this 90-day finding does not prejudge the outcome of the status review.

Under the ESA, the term "species" means a species, a subspecies, or a DPS of a vertebrate species (16 U.S.C. 1532(16)). A joint policy issued by NMFS and the U.S. Fish and Wildlife Service (the Services) clarifies the Services' interpretation of the phrase "Distinct Population Segment," or DPS (61 FR 4722; February 7, 1996). The DPS Policy requires the consideration of two elements when evaluating whether a vertebrate population segment qualifies as a DPS under the ESA: Discreteness of the population segment in relation to the remainder of the species; and, if discrete, the significance of the population segment to the species.

A species is "endangered" if it is in danger of extinction throughout all or a significant portion of its range, and "threatened" if it is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (ESA sections 3(6) and 3(20), respectively, 16 U.S.C. 1532(6) and (20)). Pursuant to the ESA and our implementing regulations, we determine whether a species is threatened or endangered based on any one or a combination of the following section 4(a)(1) factors: (1) The present or threatened destruction, modification, or curtailment of habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) inadequacy of existing regulatory mechanisms; and (5) any other natural or manmade factors affecting the species' existence (16 U.S.C. 1533(a)(1), 50 CFR 424.11(c)).

Under section 4(a)(1) of the ESA and the implementing regulations at 50 CFR 424.11(d), a species shall be removed from the list if the Secretary of Commerce determines, based on the best scientific and commercial data available after conducting a review of the species' status, that the species is no longer threatened or endangered because of one or a combination of the section 4(a)(1) factors. A species may be delisted only if such data substantiate that it is neither endangered nor threatened for one or more of the following reasons:

(1) Extinction. Unless all individuals of the listed species had been previously identified and located, and were later found to be extirpated from their previous range, a sufficient period of time must be allowed before delisting to indicate clearly that the species is extinct.

(2) Recovery. The principal goal of the Services is to return listed species to a point at which protection under the ESA is no longer required. A species may be delisted on the basis of recovery only if the best scientific and commercial data available indicate that it is no longer endangered or threatened.

(3) Original data for classification in error. Subsequent investigations may show that the best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error (50 CFR 424.11(d)).

ESA-implementing regulations issued jointly by the Services (50 CFR 424.14(b)) define "substantial information," in the context of reviewing a petition to list, delist, or reclassify a species, as the amount of information that would lead a reasonable person to believe that the measure proposed in the petition may be warranted. In evaluating whether substantial information is contained in a petition, the Secretary must consider whether the petition (1) Clearly indicates the administrative measure recommended and gives the scientific and any common name of the species involved; (2) contains detailed narrative justification for the recommended measure, describing, based on available information, past and present numbers and distribution of the species involved and any threats faced by the species; (3) provides information regarding the status of the species over all or a significant portion of its range; and (4) is accompanied by the appropriate supporting documentation in the form of bibliographic references, reprints of pertinent publications, copies of reports or letters from authorities, and maps (50 CFR 424.14(b)(2)).

Judicial decisions have clarified the appropriate scope and limitations of the Services' review of petitions at the 90-day finding stage, in making a determination that a petitioned action may be warranted. As a general matter, these decisions hold that a petition need not establish a strong likelihood or a high probability that the petitioned

action is warranted to support a positive 90-day finding.

To make a 90-day finding on a petition to list, delist, or reclassify a species, we evaluate whether the petition presents substantial scientific or commercial information indicating the petitioned action may be warranted, including its references and the information readily available in our files. We do not conduct additional research, and we do not solicit information from parties outside the agency to help us in evaluating the petition. We will accept the petitioners' sources and characterizations of the information presented if they appear to be based on accepted scientific principles, unless we have specific information in our files that indicates that the petition's information is incorrect, unreliable, obsolete, or otherwise irrelevant to the requested action. Information that is susceptible to more than one interpretation or that is contradicted by other available information will not be disregarded at the 90-day finding stage, so long as it is reliable and a reasonable person would conclude it supports the petitioners' assertions. In other words, conclusive information indicating that the species may meet the ESA's requirements for delisting is not required to make a positive 90-day finding.

In evaluating whether a petition to delist a population is warranted, first we evaluate whether the information presented in the petition, along with the information readily available in our files, indicates that the petitioned entity constitutes a "species" eligible for delisting under the ESA. If so, we then evaluate whether the information indicates that the species no longer faces an extinction risk that is cause for concern; this may be indicated in information expressly discussing the species' status and trends, or in information describing impacts and threats to the species. We evaluate any information on specific demographic factors pertinent to evaluating extinction risk for the species (e.g., population abundance and trends, productivity, spatial structure, age structure, sex ratio, diversity, current and historical range, habitat integrity or fragmentation), and the potential contribution of identified demographic risks to extinction risk for the species. We then evaluate the potential links between these demographic risks and the causative impacts and threats identified in section 4(a)(1).

Distribution and Life History of the North Pacific Population of the Humpback Whale

The following description of the distribution and life history of the North Pacific population of the humpback whale is from Fleming and Jackson (2011), Global Summary of the Humpback Whale, information that was recently compiled for NMFS' 5-year review of the humpback whale and published as a NOAA Technical Memorandum. Humpback whales are large, globally distributed, baleen whales with long pectoral flippers, distinct ventral fluke patterning, dark dorsal coloration, a highly varied acoustic call (termed song) and a diverse repertoire of surface behavior (Fleming and Jackson, 2011). The mating system for humpback whales is generally thought to be male-dominance polygyny, also described as a 'floating lek' (Clapham, 1996). In this system, multiple males compete for individual females and exhibit competitive behavior. Humpback song is a long, complex vocalization (Payne and McVay, 1971) produced by males on the winter breeding grounds, and also, less commonly, on migration (Cato, 1991; Clapham and Mattila, 1990) and seasonally on feeding grounds (Clark and Clapham, 2004). Behavioral studies suggest that song is used to advertise for females, and/or to establish dominance among males (Darling and Bérubé, 2001; Darling *et al.*, 2006; Tyack, 1981).

In the Northern Hemisphere, sexual maturity has been estimated at 5–11 years of age and appears to vary both within and among populations (Clapham, 1992; Gabriele *et al.*, 2007b; Robbins, 2007). Gestation is 11–12 months, and calves are born in sub-tropical waters (Matthews, 1937). In the Northern Hemisphere, humpback whales exhibit maternal fidelity to specific feeding regions (Baker *et al.*, 1990; Martin *et al.*, 1984). The sex ratio of adults is roughly 1:1 males:females. The average generation time for humpback whales (the average age of all reproductively active females at carrying capacity) has been estimated at 21.5 years, based on a compilation of some of the life history parameters reviewed above (Taylor *et al.*, 2007). Estimated annual rates of population increase range from 0–4 percent to 12.5 percent for different times and areas throughout the range and in the Northern Hemisphere (Baker *et al.*, 1992; Barlow and Clapham, 1997; Clapham *et al.*, 2003a; Steiger and Calambokidis, 2000); however, it is generally accepted that any rate above 11.8 percent per year is biologically impossible for this species (Zerbini *et al.*, 2010). Annual adult mortality rates between 0.049 and 0.037 have been estimated for the Gulf of Maine and the North Pacific Hawaiian Islands populations (Barlow and Clapham, 1997; Mizroch *et al.*, 2004). Using associations of calves with identified mothers (newborn calves are not uniquely identifiable) on North Pacific breeding and feeding grounds, Gabriele (2001) estimated 6-month mortality to be 0.182 (95-percent confidence intervals (CI) 0.023–0.518).

In the Northern Hemisphere, humpback whales summer in the biologically productive northern higher latitudes and most individuals travel south to sub-tropical and tropical waters in winter to mate and calve. Migratory routes and behavior are likely to be maternally directed (Baker *et al.*, 1990; Martin *et al.*, 1984). Feeding areas are often near or over the continental shelf and associated with cooler temperatures and oceanographic or topographic features that serve to aggregate prey. Feeding areas in the North Pacific Ocean range widely in latitude from California north into the Bering Sea. There are at least four known breeding areas in the North Pacific Ocean (with different subareas) including the western Pacific Ocean and waters off the Hawaiian Islands, Mexico, and Central America.

Humpback whales take in large mouthfuls of prey during feeding rather than continuously filtering food, as may be observed in some other large baleen whales (Ingebrigtsen, 1929). Humpback whales have a diverse diet that appears to vary slightly across feeding aggregation areas. The species is known to feed on both small schooling fish and on euphausiids (krill). Feeding behavior is varied as well and frequently features novel capture methods involving the creation of bubble structures to trap and corral fish; bubble nets, clouds and curtains are often observed when humpback whales are feeding on schooling fish (Hain *et al.*, 1982). Lobtailing and repeated underwater looping movements have also been observed or recorded during surface feeding events, and it may be that certain feeding behavior is spread through the population by cultural transmission (Friedlaender *et al.*, 2009; Weinrich *et al.*, 1992).

Analysis of Petition and Information Readily Available in NMFS Files

The petition contains information, much of it from Fleming and Jackson (2011), on the humpback whale, including its biology and ecology, geographic range and migratory

patterns, feeding ecology, reproduction, and genetics, including supporting information. The petitioner asserts that the North Pacific population of the humpback whale qualifies as a DPS under our DPS Policy and that it should be delisted if the best scientific and commercial information available substantiate that it is neither endangered nor threatened and protection under the ESA is no longer required. The petitioner notes that in determining whether a species should be delisted NMFS considers: (1) The present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence. The petitioner also asserts that the interim goal set forth in NMFS' Final Recovery Plan for the Humpback Whale (NMFS, 1991) has been met and that the long-term goal has also likely been met.

Below, we summarize our analysis and conclusions regarding the relevant information presented by the petitioner and in our files.

Does the information in the petition and in our files support identification of the North Pacific population as a DPS?

To support the assertion that the North Pacific population of the humpback whale should be identified as a DPS, the petitioner provides information indicating that the population is discrete from other humpback whale populations and significant to the global species.

The petitioner states that the population is discrete from other humpback whale populations because it is spatially separated, genetically distinct, and morphologically different from other populations. The petitioner notes that humpback whales in the northern and southern hemispheres of the Pacific Ocean are separated spatially based on their seasonal migratory patterns. In the North Pacific Ocean, humpback whales feed in higher latitudes during the boreal summer and breed in lower latitudes north of the equator during the boreal winter. In the South Pacific, humpback whales feed in the Antarctic during the austral summer (boreal winter) and breed in lower latitudes south of the equator during the austral winter (boreal summer). Individual humpback whales in the Southern Hemisphere differ from those in the two Northern Hemisphere oceans in the timing and location of reproduction. Differing estimates of testis weight from the breeding and feeding grounds (and no spermatozoa detected on feeding grounds (Symons and Weston, 1958)) indicate that there is seasonal variation in sperm production (Chittleborough, 1965; Omura, 1953), further supporting the asynchrony of seasonal mating between the Northern and Southern Hemisphere populations. Finally, ovulation is also seasonal (Chittleborough, 1957), suggesting that if individual whales travel between the hemispheres outside their usual estrus period, this seasonality may prohibit successful reproduction.

The petitioner also notes that significant differences among the three principal oceanic populations in the North Pacific, North Atlantic, and Southern Oceans have been shown through mitochondrial DNA (mtDNA) and microsatellite analyses, suggesting that gene flow between oceans is minimal and migration between oceanic populations is limited to no more than a few females per generation (Baker *et al.*, 1993, 1994; Valsechi *et al.*, 1997). Of the 22 mtDNA haplotypes found in the world-wide survey of 230 individuals, only three were found in more than one ocean (Baker *et al.*, 1994), and of these three, only one was found to be common to the North Pacific and Southern Oceans. No haplotype was common to all three oceanic populations.

The petitioner asserts that, morphologically, individual humpback whales in the Southern Hemisphere differ from those in the two Northern Hemisphere oceans in the patterning and extent of ventral fluke and lateral pigmentation (Rosenbaum *et al.*, 1995). There are significantly more dark-colored flukes in the North Pacific populations of humpback whales, and significantly more light-colored flukes in the Southern Ocean populations (Rosenbaum *et al.*, 1995).

The petitioner asserts that the North Pacific population of the humpback whale is significant to the taxon to which it belongs because: (1) There would be a significant gap in the species' range if the North Pacific population were lost, as there are no other breeding populations in the northern hemisphere of the Pacific Ocean that migrate to higher latitudes of the North Pacific; and (2) the North Pacific population of the humpback whale has unique genetic traits. Migration between North Pacific, Southern Ocean, and North Atlantic populations of humpback whales is considered to be approximately one female per generation (Baker *et al.*, 1994), making timely repopulation from the southern hemisphere unlikely if the North Pacific population were extirpated from its range. The petition suggests that the genetic uniqueness of the North Pacific population further increases the importance of the population, as complete extirpation of the North Pacific population would eliminate those genetic traits and lineages from the worldwide population of humpback whales. The information presented by the petitioner is also in our files, with Fleming and Jackson (2011) providing some of the most updated information. The petition presents substantial information indicating that the North Pacific population of the humpback whale may qualify as a DPS.

Does the information in the petition and in our files support the assertion that none of the ESA Section 4(a)(1) factors are contributing to the extinction risk of the North Pacific population of Humpback Whale?

We must determine whether a species is an endangered species or a threatened species on the basis of any of the following factors: (1) The present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5) other natural or manmade factors affecting its continued existence. Here we evaluate the information provided in the petition and in our files with regard to these factors to determine whether it would lead a reasonable person to conclude that none of these factors are contributing to the extinction risk of the North Pacific population of humpback whale.

The Present or Threatened Destruction, Modification, or Curtailment of Its Habitat or Range

The petitioner states that we identified chemical pollution (including oil spills) and coastal development as two primary threats to humpback whale habitat in our 1991 recovery plan and notes that a recent assessment of humpback whales worldwide (Fleming and Jackson, 2011) identified pollution as a threat but did not identify coastal development as a threat. The petitioner notes that humpback whale populations throughout the Pacific Ocean have more than doubled since the recovery plan was completed, during which time coastal development has continued in both breeding and feeding habitats. According to Fleming and Jackson (2011), the highest levels of DDT were found in whales feeding off southern California, a highly urbanized region of

the coast with substantial discharges (Elfes et al., 2010). The health effects of different doses of contaminants are currently unknown for humpback whales (Krahn *et al.*, 2004). There is evidence of detrimental health effects from these compounds in other mammals, namely disease susceptibility, neurotoxicity, reproductive and immune system impairment (Reijnders, 1986; DeSwart *et al.*, 1996; Eriksson *et al.*, 1998). Contaminant levels have been suggested as a causative factor in lower reproductive rates found among humpback whales off southern California (Steiger and Calambokidis, 2000), but at present the threshold level for negative effects and transfer rates to calves are unknown for humpback whales. For humpback young of the year biopsy-sampled in the Gulf of St. Lawrence, Metcalfe *et al.* (2004) found PCB levels similar to that of their mothers and other adult females, indicating that bioaccumulation can be rapid and that transplacental and lactational partitioning did little to reduce contaminant loads. According to the petition, however, the health effects of different contaminants are currently unknown for humpback whales (Fleming and Jackson, 2011), and Elfes (2010) suggests the levels found in humpback whales are unlikely to have a significant impact on their persistence as a population (Fleming and Jackson, 2011).

The petition also notes that very little is known about the effects of oil or petroleum on cetaceans and especially on mysticetes (Fleming and Jackson, 2011), but that the Exxon Valdez oil spill of 1989 did not significantly impact humpback whales in Prince William Sound (Dahlheim and Von Ziegesar, 1993). The petitioner adds that naturally occurring toxin poisoning can be the cause of whale stranding events and is particularly implicated when unusual mortality events occur, but that the threat is negligible to North Pacific humpback whales because the several documented cases of these events have all occurred on the U.S. East Coast. As noted in Fleming and Jackson (2011), however, but not in the petition, regional-level stranding networks and sampling protocols in Oceania and the United States, Canada, Bahamas, and Australia can provide the means for monitoring trends in humpback whale mortality events and their causes, but there is still a great need for better diagnostic testing of marine mammal tissue samples from these stranding events to determine the cause of death (Gulland, 2006).

Finally, the petitioner notes that while several possible impacts from global climate change have been suggested, including impacts to abundance and distribution of prey (Fleming and Jackson, 2011), there are no known adverse effects to humpback whales.

On the basis of this information, the petitioner concludes that the North Pacific humpback whale population does not appear to be faced with any threatened destruction, modification, or curtailment of its habitat or range. We find that the petition presents substantial information indicating that the North Pacific humpback whale population may not be at risk from destruction, modification, or curtailment of its habitat or range.

Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

The petitioner asserts that the North Pacific humpback whale population is not subject to commercial harvest. It acknowledges that tissue from 17 different humpback whales has been detected in Japanese market whale products (1993–2009) through genetic monitoring surveys, but states that these takes are likely to have negligible impact on the population.

The petitioner notes that although whale watching operations have been documented on many humpback whale feeding grounds, breeding grounds, and migratory corridors (O'Connor *et al.*, 2009), Weinrich and Corbelli (2009) concluded that calving rate and calf survival at age two were not negatively affected by whale watching activities. Senigaglia *et al.* (2012) concluded that the most common response of humpback whales to whale watch boats is increased swimming speed and that little evidence exists that whale watching activities have significant effects on interbreath intervals and blow rates. The petitioner adds that efforts to manage whale watching operations include limiting the number of whale watching vessels, limiting vessel approach distances to whales, specifying the manner of operating around whales, and establishing limits to the period of exposure of the whales. Also, in Hawaii and Alaska, Federal law prohibits approaching humpback whales closer than 100 yards (91.4 m) when on the water or disrupting behavior (50 CFR 224.103). Operating any aircraft within 1,000 feet (305 m) of humpback whales is also prohibited in Hawaii.

On the basis of this information, the petitioner concludes that the North Pacific humpback whale population is not subject to overutilization for commercial or recreational purposes. We find that the petition presents substantial information indicating that the North Pacific humpback whale population may not be at risk from overutilization for commercial, recreational, scientific, or educational purposes.

Disease and Predation

The petitioner states that there is little published information on humpback whale disease, but that the humpback whale does carry a crustacean ectoparasite (the cyamid *Cyamus hoopis*). While the whale is the main source of nutrition for this parasite (Schell *et al.*, 2000), there is little evidence that it contributes to whale mortality (Fleming and Jackson, 2011). The petitioner also asserts that predation of the North Pacific population of the humpback whale by the killer whale (*Orcinus orca*) occurs at or near the wintering grounds, but that it is unlikely to be significantly affecting the humpback whale's recovery; attacks by large sharks and false killer whales (*Pseudorca* crassidens) are rare. The petitioner concludes that disease and predation are not significantly affecting the North Pacific humpback whale's recovery. We find that the petition presents substantial information indicating that disease and predation may not be contributing to the North Pacific humpback whale's extinction risk.

Inadequacy of Regulatory Mechanisms

The petitioner asserts that the humpback whale is protected by local, Federal, and international regulatory mechanisms. It is protected as indigenous wildlife under Hawaii Administrative Rule 13–124, which prohibits the capture, possession, injury, killing, destruction, sale, transport, or export of indigenous wildlife. All marine mammals are protected under the U.S. Marine Mammal Protection Act of 1972 (MMPA), which prohibits, with certain exceptions, the "take" of marine mammals in U.S. waters and by U.S. citizens on the high seas, and the importation of marine mammals and marine mammal products into the United States. Because human-caused mortality and serious injury (M&SI) levels for the three North Pacific humpback whale stocks are below Potential Biological Removal (PBR) as calculated under the MMPA (Allen and Angliss, 2012; Caretta *et al.*, 2011), no Take Reduction Team has been convened to date for these stocks to

develop a plan to reduce incidental take to sustainable levels.

The Hawaii breeding population of the North Pacific humpback whale is protected by the Hawaiian Islands Humpback Whale National Marine Sanctuary, and five additional National Marine Sanctuaries are located within the North Pacific humpback whale range: Olympic Coast, Cordell Bank, Gulf of the Farallones, Monterey Bay, and Channel Islands. Additional protection for humpback whales and their habitat is provided by the Papahanaumokuakea Marine National Monument, which encompasses 139,797 square miles (~36.2 hectares) of ocean around the Northwestern Hawaiian Islands.

Internationally, humpback whales are protected under the International Whaling Commission (IWC), established under the International Convention for the Regulation of Whaling of 1946 (ICRW). The IWC prohibited commercial whaling of North Pacific humpback whales in 1966, and an international moratorium on the whaling of all large whale species was established in 1982. Some nations have continued to hunt whales under Article VIII of the ICRW, which allows the killing of whales for scientific research purposes, but no humpback whales are currently declared as a target of scientific research takes. The current moratorium on commercial whaling will remain in place unless a 75-percent majority of IWC signatory members vote to lift it.

We find that the petition presents substantial information indicating that the North Pacific population of the humpback whale may be sufficiently protected by state, Federal, and international regulatory mechanisms.

Other Natural or Man-Made Factors

As the petitioner points out, the NMFS recovery plan for the humpback whale identified several known and potential impacts to humpback whales, including collision with ships, entrapment and entanglement in fishing gear, and acoustic disturbance (NMFS, 1991).

The petitioner notes that collisions with ships have been reported in both feeding and breeding areas of the North Pacific humpback whale range, adding that ship strikes may result in life-threatening trauma or mortality for the whale, though the severity of injuries depends primarily on speed and size of the vessel. According to Fleming and Jackson (2011), humpback whales are the second most commonly reported species involved in vessel strikes after fin whales. Calves and juvenile whales are thought to be more susceptible to vessel collisions (Wiley and Asmutis, 1995). The petitioner provides some information on vessel strike reports and attributes the increased number of ship strike reports in Hawaii and Alaska over the years to the increasing abundance of humpback whale populations and the increase in vessels operating in humpback whale habitat (Lammers *et al.*, 2003). According to the petitioner, a large percentage of ship strikes in Hawaii and Alaska are non-fatal and primarily occur with pleasure crafts and commercial whale watching vessels (Douglas *et al.*, 2008). The petitioner notes that the most recent stock assessment reports for the three North Pacific humpback whale stocks report a small number of ship strikes. For the California/Oregon/Washington stock, the average number of documented humpback whale deaths by ship strikes for 2004–2008 was 0.4 animals per year, with a PBR of 11.3 (Caretta *et al.*, 2011) and for the Central North Pacific stock, the average number of M&SI from ship strikes for 2003–2007 was estimated at 1.6 animals per year, with a PBR of 61.2 (Allen and Angliss, 2012). However, the petitioner acknowledges that no estimate of ship strike mortality is reported for the Western North Pacific stock. The petitioner concludes that the available data on ship strikes in the North Pacific show that vessel strikes are not affecting the continued existence of humpback whales. The petition presents substantial information indicating that vessel strikes may not be affecting the continued existence of humpback whales in the North Pacific.

Entanglement in fishing gear and other marine debris is a documented source of injury and mortality to cetaceans. Since 2002, the Hawaiian Islands Large Whale Entanglement Response Network has confirmed 112 reports of entangled large whales as true entanglement of large whales, with all but three reports involving humpback whales (Lyman, 2012). The petitioner notes that these reports have increased over time, corresponding to the increasing wintering population in Hawaiian waters. Though not noted in the petition, NMFS' Alaska Region received over 170 reports of humpback whale entanglement (both confirmed and unconfirmed) in Alaska from 1990–2011. According to the petitioner, the average number of humpback whales resulting in M&SI from commercial fisheries is 3.2 animals for the California/Oregon/Washington stock (Caretta *et al.*, 2011) and 3.8 animals for the Central Pacific stock (Allen and Angliss, 2012), and these interaction rates are below the stocks' calculated PBRs, suggesting that fishery interactions do not affect the continued existence of these stocks. Again, limited information is available on entanglement and fishery interactions in the western Pacific (Allen and Angliss, 2012). We find that the petition presents substantial information indicating that fishery interactions may not be affecting the continued existence of these stocks.

Acoustic disturbance is another threat to cetaceans, especially anthropogenic low-frequency sound produced by shipping, oil and gas development, defense related activities, and research activities. The petitioner asserts that available evidence suggests that anthropogenic noise does not threaten the continued existence of North Pacific humpback whales, pointing out that only one record is known in which two humpback whales were stranded with extensive damage to the temporal bones from a large-scale explosion (Fleming and Jackson, 2011). Impact of low-frequency noise on variation of humpback whale songs appears to be minimal, though studies have shown that song length increased in response to low-frequency broadcasts (Miller *et al.*, 2000; Fristrup *et al.*, 2003).

The petitioner concludes that the steady increase in the humpback whale population throughout the North Pacific indicates that these threats have not cumulatively curtailed the recovery and growth of the humpback whale population, and therefore, are not affecting its continued existence. We find that the petition presents substantial information indicating that these factors may not be contributing to the extinction risk of this population.

Petition Finding

Based on the above information and criteria specified in 50 CFR 424.14(b)(2), we find that the petitioners present substantial scientific and commercial information indicating that identifying the North Pacific population of humpback whale as a DPS and delisting this DPS may be warranted. Under section 4(b)(3)(A) of the ESA, an affirmative 90-day finding requires that we promptly commence a status review of the petitioned species (16 U.S.C. 1533 (b)(3)(A)).

Information Solicited

To ensure that the status review is based on the best available scientific and commercial data, we are soliciting information on the humpback whale, with a focus on the North Pacific population, in the following areas: (1) Historical and current population status and trends; (2) historical and current

distribution; (3) migratory movements and behavior; (4) genetic population structure, as compared to other populations; (5) current or planned activities that may adversely impact humpback whales; and (6) ongoing efforts to conserve humpback whales. We request that all information and data be accompanied by supporting documentation such as (1) maps, bibliographic references, or reprints of pertinent publications; and (2) the submitter's name, address, and any association, institution, or business that the person represents.

References Cited

A complete list of references is available upon request from the NMFS Office of Protected Resources (see **ADDRESSES**).

Authority

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

Dated: August 22, 2013.

Alan D. Risenhoover,

Director, Office of Sustainable Fisheries, Performing the functions and duties of the Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2013–21066 Filed 8–28–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 130426413–3719–01]

RIN 0648–BD24

Atlantic Highly Migratory Species; Vessel Monitoring Systems

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to modify the declaration requirements for vessels required to use Vessel Monitoring System (VMS) units in Atlantic Highly Migratory Species (HMS) fisheries. This proposed rule would require operators of vessels that have been issued HMS permits and are required to use VMS to use their VMS units to provide hourly position reports 24 hours a day, 7 days a week (24/7). The proposed rule would also allow the operators of such vessels to make declarations out of the fishery when not retaining or fishing for HMS for specified periods of time encompassing two or more trips. These changes would make the current Atlantic HMS VMS requirements consistent with other VMS-monitored Atlantic fisheries and provide additional reporting flexibility for vessel operators by eliminating the requirement to hail-out two hours in advance of leaving port. Additionally, these changes will continue to provide NOAA's Office of Law Enforcement (OLE) with information necessary to facilitate enforcement of HMS regulations. This rule would affect all commercial fishermen who fish for Atlantic HMS who are required to use VMS.

DATES: Submit comments on or before September 30, 2013. We will hold an operator-assisted public hearing via conference call and webinar for this proposed rule on September 23, 2013, from 1 p.m. to 3 p.m., EDT. We will also discuss the proposed rule with the HMS Advisory Panel during the AP meeting the week of September 9, 2013; the details of that meeting were published in a separate **Federal Register** notice on July 23, 2013 (78 FR 44095).

ADDRESSES:

You may submit comments on this document, identified by NOAA–NMFS–2013–0132, by any one of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0132*, click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Margo Schulze-Haugen, NMFS/SF1, 1315 East West Highway, National Marine Fisheries Service, SSMC3, Silver Spring, MD 20910.
- *Fax:* 301–713–1917, Phone: 301–427–8503; *Attn:* Margo Schulze-Haugen.

Instructions: Please include the identifier NOAA–NMFS–2013–0132 when submitting comments. Comments sent by any other method, to any other address or individual, or received after the close of the comment period, may not be considered by NMFS. All comments received are a part of the public record and generally will be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.*, name, address), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. We will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only. Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to the Atlantic Highly Migratory Species Management Division by email to *OIRA_Submission@omb.eop.gov*, or fax to 202–395–7285.

Public Hearing and Webinar Information

The call-in information for the public hearing is phone number 888–997–8509; participant pass code 3166031. We will also provide a brief presentation via webinar. Participants can register for the webinar at *https://www1.gotomeeting.com/register/242124417*. Following the registration process, participants will receive a confirmation email with webinar log-in information. Presentation materials and other supporting information will be posted on the HMS Web site at: *http://www.nmfs.noaa.gov/sfa/hms*.

FOR FURTHER INFORMATION CONTACT: Cliff Hutt or Karyl Brewster-Geisz by phone at 301–427–8503 or by fax at 301–713–1917.

Copies of this proposed rule and any related documents can be obtained by writing to the HMS Management Division, 1315 East-West Highway, Silver Spring, MD 20910, visiting the HMS Web site at *http://www.nmfs.noaa.gov/sfa/hms/*, or by contacting Cliff Hutt.

SUPPLEMENTARY INFORMATION:

Background

Atlantic HMS fisheries are managed under the dual authority of the Magnuson-Stevens Fishery Conservation and Management Act (MSA) and the Atlantic Tunas Conservation Act (ATCA). Under the MSA, management measures must be consistent with ten National Standards, and fisheries must be managed to maintain optimum yield, rebuild overfished fisheries, and prevent overfishing. Under ATCA, the Secretary of Commerce shall promulgate regulations, as necessary and appropriate, to implement measures adopted by the International Commission for the Conservation of Atlantic Tunas (ICCAT). The implementing regulations for Atlantic HMS are at 50 CFR part 635.

Maintaining the VMS monitoring program ensures compliance with both

EXECUTIVE SUMMARY

Current Species Status: The North Pacific right whale, *Eubalaena japonica*, is among the rarest of all large whale species. The northern right whale, *E. glacialis*, was listed as endangered under the precursor to the Endangered Species Act (ESA) of 1973, the Endangered Species Conservation Act of 1969 (35 FR 18319, December 2, 1970), and remained on the list of threatened and endangered species after the passage of the ESA in 1973. In 2008, the National Marine Fisheries Service (NMFS) reclassified the northern right whale as two separate endangered species, North Pacific right whale (*E. japonica*) and North Atlantic right whale (*E. glacialis*) (73 FR 12024, March 6, 2008).

Past commercial whaling depleted North Pacific right whales, with the species now likely numbering fewer than 500 individuals. This Plan identifies two populations within the species of North Pacific right whales. The eastern population is located primarily in the U.S. Exclusive Economic Zone (EEZ), with an estimated historical seasonal migration range extending from the Bering Sea and Gulf of Alaska in the north down the west coast of the United States to Baja California in the south. The eastern population is estimated to consist of approximately 30 individuals. The western population is located primarily in the EEZs of Russian Federation, Japan, and China. Its estimated historical seasonal migration range extends from north of the Okhotsk Sea to the coasts of China and Vietnam to the south. Scientists do not agree on the reliability of the only existing abundance estimate for the western population; the lower bound on this estimate is approximately 400 individuals, but there is disagreement about the validity of the underlying data (Reilly *et al.* 2008).

Right whale sightings have been very rare (notably for the eastern population) and geographically scattered, leading to persistent uncertainty regarding population size and distribution. Small populations and rarity of sightings make it very difficult to estimate current range, habitat use, and population parameters. Therefore, a primary goal of this Recovery Plan is to gain more data needed for effective management.

Habitat Requirements and Limiting Factors: North Pacific right whale populations have been legally protected from commercial whaling for the past several decades, and this protection continues. Although the main direct threat to the species was addressed by the International Whaling Commission's (IWC) 1982 moratorium on commercial whaling, several potential threats remain. Among the current potential threats are environmental contaminants; reduced prey abundance or location due to climate change; increased risk of ship collisions; and exposure to anthropogenic noise, particularly from the use of the Arctic for energy development and commercial maritime traffic, all of which may increase as climate change makes the Arctic more accessible for longer periods of the year. The most significant threat to the eastern population is its extremely small population size, posing a heightened risk for biological extinction if individuals are removed from the population.

Recovery Strategy: This plan identifies measures to protect, promote, and monitor the recovery of North Pacific right whale populations. Because the most significant historical threat to North Pacific right whales (whaling) has been and continues to be addressed, and there is a paucity of population data for the species, the primary component of this recovery program is data

collection. The collection of additional data will facilitate estimating population size, monitoring trends in abundance, and determining population structure. These data will also provide greater understanding of natural and anthropogenic threats to the species. Key elements of the recovery program for this species are: 1) coordinate state, federal, and international actions to maintain whaling prohibitions; 2) estimate population size and monitor trends in abundance; 3) determine North Pacific right whale occurrence, distribution, and range; 4) identify, characterize, protect, and monitor habitat essential to North Pacific right whale recovery; and 5) investigate the impact of human-caused threats on North Pacific right whales.

Recovery Goals and Criteria: The goal of this recovery plan is to promote the recovery of North Pacific right whales to the point at which they can be removed from the list of endangered and threatened Wildlife and Plants under the provisions of the ESA. The intermediate goal is to reach a sufficient recovery status to reclassify the species from endangered to threatened.

The recovery criteria presented in this Recovery Plan were based on the *Report of the Workshop on Developing Recovery Criteria for Large Whales Species* (Angliss *et al.* 2002). Workshop objectives were to develop (a) a general framework for the development of recovery criteria that would be applicable to most marine mammal species, large whale species in particular, and (b) specific criteria that can be used to apply the framework to specific populations. A major goal was to use North Pacific and North Atlantic right whales as case studies, and to develop a specific set of recovery criteria which could be used for these populations.

Downlisting Criteria:

North Pacific right whales will be considered for reclassifying from endangered to threatened when both of the following criteria are met:

1. Given current and projected threats and environmental conditions, each North Pacific right whale population (eastern and western) satisfies the risk analysis standard for threatened status (has no more than a 1% chance of extinction in 100 years) *and* there are at least 1,000 mature, reproductive individuals (consisting of at least 250 mature females and at least 250 mature males in each population). Mature is defined as individuals known, estimated, or inferred to be capable of reproduction.

2. None of the known threats to North Pacific right whales limit the continued growth of populations. Specifically, the factors in section 4(a)(l) of the ESA are being or have been addressed: (A) the present or threatened destruction, modification, or curtailment of a species' habitat or range; (B) overutilization for commercial, recreational, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors. Any factors or circumstances that substantially contribute to a real risk of extinction but cannot be incorporated into a Population Viability Analysis will be carefully considered before downlisting takes place.

It is important to emphasize that North Pacific right whales will be considered for downlisting only when all criteria are met globally—minimum abundance level is met, risk analysis standard for threatened status (has no more than a 1% chance of extinction in 100 years) has been

satisfied, and all known threats have been addressed.

Delisting Criteria:

North Pacific right whales will be considered for removal from the list of Endangered and Threatened Wildlife and Plants under the provisions of the ESA when both of the following criteria are met:

1. Given current and projected threats and environmental conditions, each North Pacific right whale population (eastern and western) has less than a 10% probability of becoming endangered (as defined above) in 25 years. Any factors or circumstances that are thought to substantially contribute to a real risk of extinction that cannot be incorporated into a Population Viability Analysis will be carefully considered before delisting takes place.

2. None of the known threats to North Pacific right whales are known to limit the continued growth of populations. Specifically, all the factors in section 4(a)(l) of the ESA have been addressed: (A) the present or threatened destruction, modification or curtailment of a species' habitat or range; (B) overutilization for commercial, recreational or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; and (E) other natural or manmade factors.

Anticipated Date of Recovery: The time and cost to recovery is not predictable with the current information on North Pacific right whales. The difficulty in gathering data and the extremely small abundance of eastern North Pacific right whales make it impossible to give a timeframe to recovery for this species. While we estimate costs for some recovery actions, any projections of total costs to accomplish recovery would be imprecise and unrealistic. Therefore, for ongoing actions we have estimated only costs for the next 50 years, as it is expected that recovery would take at least that long. Currently it is impossible to predict when the protections provided by the ESA will no longer be warranted. In the future, as more information is obtained, it should be possible to make better informed projections about the time for recovery and its expense.

Estimated Cost of Recovery Actions (First 50 Fiscal Years): $27.283 Million

Type of proceeding	Fee
(v) Appeals of Arbitration Decisions or Petitions to Modify or Vacate an Arbitration Award	$150.
(88) Basic fee for STB adjudicatory services not otherwise covered	$250.
(89)–(95) [Reserved]	
PART VII: Services:	
(96) Messenger delivery of decision to a railroad carrier's Washington, DC, agent	$34 per delivery.
(97) Request for service or pleading list for proceedings	$26 per list.
(98) Processing the paperwork related to a request for the Carload Waybill Sample to be used in a Surface Transportation Board or State proceeding that:	
(i) Does not require a Federal Register notice:	
(a) Set cost portion	$150.
(b) Sliding cost portion	$50 per party.
(ii) Does require a Federal Register notice:	
(a) Set cost portion	$400.
(b) Sliding cost portion	$50 per party.
(99)(i) Application fee for the Surface Transportation Board's Practitioners' Exam	$200.
(ii) Practitioners' Exam Information Package	$25.
(100) Carload Waybill Sample data:	
(i) Requests for Public Use File for all years prior to the most current year Carload Waybill Sample data available, provided on CD–R.	$250 per year.
(ii) Specialized programming for Waybill requests to the Board	$112 per hour.

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[FR Doc. 2013–20999 Filed 8–27–13; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 424

[Docket No. FWS–R9–ES–2011–0073; Docket No. 120606146–3505–01; 4500030114]

RIN 1018–AY62; 0648–BC24

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

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

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the "Services" or "we"), are finalizing a revision to our regulations pertaining to impact analyses conducted for designations of critical habitat under the Endangered Species Act of 1973, as amended (the Act). This regulation is being finalized as directed by the President's February 28, 2012, memorandum, which directed us to take prompt steps to revise our regulations to provide that the economic analysis be completed and made available for public comment at the time of publication of a proposed rule to designate critical habitat.

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

ADDRESSES: This final rule is available on the Internet at *http://www.regulations.gov*. Comments and materials received, as well as supporting documentation used in preparing this final regulation, are available for public inspection, by appointment, during normal business hours, at U.S. Fish and Wildlife Service, Division of Conservation and Classification, 4401 N Fairfax Drive, Suite 420, Arlington, VA 22203, telephone 703/358–2171; facsimile 703/358–1735.

FOR FURTHER INFORMATION CONTACT: Douglas Krofta, Chief, Endangered Species Branch of Listing, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 4401 N. Fairfax Drive, Suite 420, Arlington, VA 22203, telephone 703/358–2171; facsimile 703/358–1735; or Marta Nammack, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301/427–8469; facsimile 301/713–0376. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why we need to publish a rule. On August 24, 2012, we published a proposed rule in the **Federal Register** to revise our regulations to provide the public earlier access to the draft economic analysis supporting critical habitat designations, as directed by the President's February 28, 2012, memorandum (Memorandum for the Secretary of the Interior, Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens, 77 FR 12985 (March 5, 2012)). 77 FR 51503 (Aug. 24, 2012). The President's February 28, 2012, memorandum directed the Secretary of the Interior to revise the regulations implementing the Endangered Species Act to provide that a draft economic analysis be completed and made available for public comment at the time of publication of a proposed rule to designate critical habitat. Both transparency and public comment will be improved if the public has access to both the scientific analysis and the draft economic analysis at the same time. We are now issuing a final rule to achieve these goals. Because the Act and its implementing regulations are jointly administered by the Departments of the Interior and Commerce, the rule has been developed jointly. This final rule also addresses several court decisions and is informed by conclusions from a 2008 legal opinion by the Solicitor of the Department of the Interior. Specifically, we revise 50 CFR 424.19 to clarify the instructions for making information available to the public, considering the impacts of critical habitat designations, and considering exclusions from critical habitat. Except for the revision to the timing of making draft economic analyses available to the public, these revisions will not change how we implement the Act; rather, the revisions serve to codify the current practices of the agencies. This final rule is consistent with Executive Order 13563, and in particular with the requirement of retrospective analysis of existing rules, designed "to make the

agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

This rule makes the following changes:

(1) We changed the title of section 424.19 from *"Final Rules—impact analysis of critical habitat"* to *"Impact analysis and exclusions from critical habitat."* We removed the reference to "[f]inal rules" to allow this section to apply to both proposed and final critical habitat rules. We added the term "exclusions" in the title to more fully describe that this section addresses both impact analyses and how they inform the exclusion process under section 4(b)(2) of the Act for critical habitat.

(2) We divided section 424.19 into three paragraphs. The division into three paragraphs closely tracks the requirements of the Act under section 4(b)(2) and provides for a clearly defined process for consideration of exclusions as required under the Act.

(3) Paragraph (a) implements the direction of the President's February 28, 2012, memorandum by stating that, at the time of proposing a designation of critical habitat, the Secretary will make available for public comment the draft economic analysis of the designation. As it was proposed, paragraph (a) included a third sentence, relating to section 4(b)(8) of the Act, which would have been carried over from the existing regulations with modifications. This sentence is not being implemented in this final rule to sharpen this regulation's focus on implementing section 4(b)(2) of the Act and to ensure consistency with other sections of part 424. Please see the discussion in the "Rationale for Revised Paragraph (a)," below.

(4) Paragraph (b) implements the first sentence of section 4(b)(2) of the Act, which directs the Secretary to consider the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat. This paragraph states that the impact analysis should focus on the incremental effects resulting from the designation of critical habitat.

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

Background

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

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

Critical habitat represents the habitat essential for the species' recovery. Once designated, critical habitat provides for the conservation of listed species in several ways. Specifying the geographic location of critical habitat facilitates implementation of section 7(a)(1) of the Act by identifying areas where Federal agencies can focus their conservation programs and use their authorities to further the purposes of the Act. Designating critical habitat also helps focus the efforts of other conservation partners, such as State and local governments, nongovernmental organizations, and individuals. Furthermore, when designation of critical habitat occurs near the time of listing, it provides early conservation planning guidance to bridge the gap until the Services can complete more thorough recovery planning.

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

The Secretaries of the Interior and Commerce (the "Secretaries") share responsibilities for implementing most of the provisions of the Act. Generally, marine and anadromous species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior, though jurisdiction is shared between the two departments for some species, such as sea turtles and Atlantic salmon. Authority to administer the Act has been delegated by the Secretary of the Interior to the Director of the FWS and by the Secretary of Commerce to the Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration.

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

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

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

Discussion of the Revisions to 50 CFR 424.19

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

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

Statutory Authority

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

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

Definition of Key Phrases

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

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

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

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

Relationship of the Key Phrases

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

Revisions to 50 CFR 424.19

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

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

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

Rationale for the Revised Paragraph (a)

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

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

The President's February 28, 2012 memorandum directed the Secretary of the Interior to take 'prompt steps' to revise the regulations. The first sentence of the revised regulations will comply with the President's direction. The second sentence specifies that a summary of the draft economic analysis is to be published in the **Federal Register** notice of the proposed designation of critical habitat. The draft economic analysis itself is to be made available on *http://www.regulations.gov* along with the proposed designation of critical habitat or on other Web sites as deemed appropriate by the Services. It is this summary of the draft economic

analysis that will constitute the Services' consideration of the economic impact, as required under the first sentence of section 4(b)(2) of the Act, of the proposed designation of critical habitat for a species.

As set out in the proposed rule, paragraph (a) included a third sentence which would have carried over the first half of the first sentence of the previous section 424.19, with modifications. As a result of public comment and review of the provisions for proposed and final rules at 50 CFR 424.16(b) (Proposed rules) and 424.18(a)(2) (Final rules—general), respectively, we have removed the proposed third sentence from this final regulation.

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

Although the language in sections 424.16(b) and 424.18(a)(2) repeats the statutory language, we note that the "may adversely modify" language could be misinterpreted to suggest that certain activities necessarily must undergo section 7 consultation, or that the Services must predetermine the result of any future section 7 consultation. Properly interpreted, this language reflects Congress's intent that the Services alert the public to the general relationship between the designation of critical habitat and types of activities that may occur on the landscape, without definitively asserting that consultations are required for such activities, or what the results of any consultations might be. Congress's use of the word "may" in this phrase supports our interpretation. Thus, notwithstanding any statement in the proposed or final critical habitat designation about the relationship between the designation and particular types of activities, Federal agencies must determine whether their individual proposed actions trigger the requirement for section 7 consultations. And if an agency does consult on an action, the Services will make an adverse modification determination by applying the standards of section 7 to the facts of the action at issue, rather than by looking to the general statements made in compliance with section 4(b)(8) of the Act in the preamble to the critical habitat designation.

Rationale for the Revised Paragraph (b)

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

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

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

Also in paragraph (b), we retained from previous section 424.19 the phrases "probable" and "upon proposed or ongoing activities." These phrases provide guidance that the Services should not consider improbable or speculative impacts. However, the Services do not intend that the term "probable" requires a showing of statistical probability or any specific numeric likelihood. Moreover, the "activities" at issue are only those that would require consultation under section 7 of the Act. *See* DOI 2008 at 10–12. Although impact analyses are based on the best scientific data available, any predictions of future impacts are inherently uncertain and subject to change. Thus, the Services should consider the likely general impact of the designation and not make specific predictions of the outcome of particular section 7 consultations that have not in fact been completed.

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

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

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

> The Secretary will consider impacts at a scale that the Secretary determines to be appropriate, and will compare the impacts with and without the designation. Impacts may be qualitatively or quantitatively described.

The first phrase of the second sentence, "[t]he Secretary will consider impacts at a scale that the Secretary

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

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

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

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

Benefits that may be addressed in the discretionary 4(b)(2) exclusion analysis can result from additional protections, in the form of project modifications or conservation measures due to consultation under section 7 of the Act; conversely, a benefit of exclusion can be avoiding costs associated with those protections. In addition, benefits (and associated costs) can result if the designation triggers compliance with separate authorities that are exercised in part as a result of the Federal critical habitat designation (e.g., additional reviews, procedures, or protections under legal authorities of States or local jurisdictions). *See* DOI 2008 at 22–23.

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

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

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

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

In 2004, the Ninth Circuit (*Gifford Pinchot Task Force* v. *USFWS*, 378 F.3d 1059 (9th Cir. 2004)) invalidated the prior regulatory definition of "destruction or adverse modification." The court held that the definition gave too little protection to critical habitat by not giving weight to Congress's intent that designated critical habitat support the recovery of listed species. Since then, the Services have been applying "destruction or adverse modification" in a way that allows the Services to define an incremental effect of

designation. This process eliminated the predicate for the Tenth Circuit's analysis. Therefore, the Services have concluded that it is appropriate to consider the impacts of designation on an incremental basis.

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

- *Maddalena* v. *FWS*, No. 08–CV–02292–H (AJB) (S.D. Cal. Aug. 5, 2010);
- *Otay Mesa Property L.P.* v. *DOI*, 714 F. Supp. 2d 73 (D.D.C. 2010), *reversed on other grounds*, 646 F.3d 914 (D.C. Cir. 2011).
- *Fisher* v. *Salazar*, 656 F. Supp. 2d 1357 (N.D. Fla. 2009);
- *Home Builders Ass'n of No. Cal.* v. *USFWS*, 2006 U.S. Dist. Lexis 80255 (E.D. Cal. Nov. 2, 2006), *reconsideration granted in part*, 2007 U.S. Dist. Lexis 5208 (Jan. 24, 2007), *aff'd*, 616 F.3d 983 (9th Cir. 2010);
- *CBD* v. *BLM*, 422 F. Supp. 2d 1115 (N.D. Cal. 2006);
- *Cape Hatteras Access Preservation Alliance* v. *DOI*, 344 F. Supp. 2d 108 (D.D.C. 2004).

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

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

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

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

Rationale for the Revised Paragraph (c)

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

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

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

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

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

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

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

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

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

Summary of Comments and Recommendations

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

General Comments

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

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

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

Response: We agree with the commenter, and have further clarified to the extent possible within this final rule our expectations of the implications of this final rule, most specifically in our responses to comments. We have

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

Comment (3): One commenter disagrees that the proposed rule would not have significant takings implications because the Services should apply the *Penn Central* three-prong test for a taking. Also, the commenter states that the "legitimate governmental interest" test has been invalidated by the U.S. Supreme Court, and the Services erred in relying on this test.

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

Comment (4): One commenter believes that because Federal critical habitat triggers additional state or local regulations, this rule should perform a takings assessment because "a landowner is denied economically beneficial or productive use of its land" from the designation. The commenter gives an example of Washington's state environmental policy act (SEPA) that Federal critical habitat triggers Class IV special forest practice restrictions.

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

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

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

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

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

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

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

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

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

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

Response: We disagree with the commenter's suggested edits for both procedural and substantive reasons. First, to adopt the changes suggested by the commenter would be a significant deviation from the previous and proposed text of the regulation and go well beyond the Services' intent in undertaking this regulation. Furthermore, because they would raise new substantive issues not discussed in the proposed rule, any such changes

likely would need to be proposed as a new regulation, and go through a new rulemaking procedure, which would take a significant amount of time. To adopt these changes and go through a new rulemaking would be counter to the intent of the Presidential memorandum, which was to promptly revise our regulations. Moreover, the Services do not find that there is a good basis for the substantive suggestions advanced by the commenter. Accordingly, the Services decline to expand the scope of the rule to address such issues.

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

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

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

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

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

Response: Upon publication of the proposed designation of critical habitat, which will include a summary of the draft economic analysis, we will solicit information from the public through at least a 60-day comment period in accordance with our regulations, 50 CFR 424.16(c)(2), and the APA. During this comment period, the public will have opportunity to review the proposed designation and the supporting draft economic analysis, and provide information and comments on both the proposed rule and the draft economic analysis simultaneously. The Act requires the Secretaries to consider economic impacts of a designation of critical habitat, and the Services are committed to conducting an economic analysis, based on the best data available, given the shift in timing and process, sufficient to provide the information needed by the Secretaries to make informed decisions on a factual basis. The economic analysis is the vehicle by which we take economic impacts into consideration. We do not anticipate that the shift in timing of the analysis will result in a failure of the Services to consider probable economic impacts.

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

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

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

Response: We appreciate and are cognizant of this concern. We base our identification of critical habitat solely on the best scientific data available. Although the relevant Service will have an economic analysis at the time it proposes to designate critical habitat, that analysis will not influence the biological determination of which areas meet the definition of critical habitat. The economic information, along with information related to national security

and other relevant impacts, may be used in the discretionary analysis under the second sentence of section 4(b)(2) of the Act. A final decision on exclusions from critical habitat will be made at the final rulemaking stage and will be supported by information in the supporting record for the rulemaking.

Comment (14): Some commenters expressed concern that when the Services propose listing and critical habitat simultaneously, having available a draft economic analysis of the proposed critical habitat designation might result in that analysis influencing the determination of whether a species warrants listing as a threatened or endangered species.

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

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

Response: The regulations at 50 CFR 424.12 (a)(2) state that "critical habitat is not determinable when one or both of the following situations exist: (i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or (ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat." Thus, the Services may invoke subparagraph (i) of this provision to find that the designation of critical habitat is not determinable if the information to perform the economic analysis is lacking. However, it has generally not been our practice to find that a designation of critical habitat is not determinable on this basis. We do not anticipate using this provision with greater frequency in the future as a result of this rulemaking.

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

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

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

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

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

Response: This final regulation will require the Services to provide a summary of our draft economic analyses within our proposed designations of critical habitat. Additional supporting documents will be available in the supporting record and *http://www.regulations.gov.* The Services conclude that we will further the purposes of the Act and the APA by including the summary of the draft economic analysis in the body of the proposed rule, as doing so will facilitate public review by having the key information available in one place. Further, that summary will provide the supporting information and factual basis for the certification of specific required determinations.

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

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

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

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

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

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

Response: Courts invalidated the previous regulatory definition of destruction or adverse modification because they found it to be contrary to the language of the Act. However, at this time the Services are operating under a 2004 Director's memorandum and a 2005 Assistant Administrator's memorandum, which confirm that the Services use the statutory conservation standard in implementing the prohibition on destruction or adverse modification of critical habitat under section 7 of the Act. These memoranda provide a clear and reasonable basis for the Services to evaluate incremental impacts due to the designation of critical habitat in a manner consistent with the purposes and text of the Act. Further, the Services plan to propose a new regulatory definition for destruction or adverse modification of critical habitat in the near future.

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

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

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

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

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

Response: Congressional intent is reflected in the language of the Act. The purpose of consideration of impacts is to inform decisions on possible exclusions from critical habitat; in turn, the purpose of exclusions is to avoid the probable negative impacts of designating particular areas as critical habitat. Fundamentally, it is not an "impact" of a designation if an impact will happen with or without the designation—those impacts will not be avoided by exclusion. For example, the impacts due to the listing of a species will occur regardless of designation of critical habitat or exclusion of areas from critical habitat. Exclusion of a particular area because of an impact that will occur regardless of the exclusion will be completely ineffective at avoiding the impact and is illogical. We conclude that Congress did not intend to mandate consideration of impacts that cannot be avoided by exclusion from critical habitat, and therefore that Congress did not intend to mandate a coextensive analysis.

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

Comment (25): The total economic impact that should be considered is the impacts both before and after critical habitat is designated; in other words, both the baseline and the incremental together. This approach does not contradict the prohibition on consideration of economic impacts due to the original listing of a species, but it does allow consideration of the full magnitude of all economic pressures on a particular community, industry, or activity when considering imposing the additional economic cost associated with a critical habitat designation, or granting exclusion (i.e., cumulative regulatory and economic impact).

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

The OMB Circular A–4 supports the use of the incremental approach of evaluating the effects of Federal rulemakings, including the evaluation of probable economic impacts, in complying with other statutes and Executive Orders (which the economic analysis also informs). Further, as

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

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

Response: The incremental approach is not overly narrow, as it properly focuses on the probable costs resulting from the designation of critical habitat. When the Services develop a draft economic analysis to consider the economic impacts of designating critical habitat, we include reasonably known or probable impacts reasonably likely to occur. Using the incremental approach, we often identify administrative costs that will result from section 7 consultation in critical habitat units that are occupied by the species. Substantive changes in the form of project modifications are less likely to be attributable solely to critical habitat, as they may also be required to avoid jeopardy to the species, which is prohibited regardless of the designation of critical habitat. With respect to designation of critical habitat units that are unoccupied by the species, the Services may more frequently identify higher probable impacts. In that circumstance, any project modifications stemming from the consultation process would be due solely to the designation of critical habitat and the requirement of avoiding its adverse modification, because the species is not present in the area. By contrast, certain conservation measures that are attributable to the species' listed status, such as project modifications undertaken to avoid jeopardy to a species, fall under the baseline costs, and are not part of the incremental cost of a critical habitat designation.

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

Response: For consistency, the incremental approach should be used for the entire designation, and not for specific land ownership. Further, based on OMB guidance in Circular A–4, as well as supportive case law, the Services' interpretation is that the incremental approach is the correct approach for impact analyses (see Comment (19) above for further elaboration on use of the incremental approach). Critical habitat receives regulatory protection under section 7 of the Act where there is a Federal nexus, regardless of land ownership. Even if the Services were to use the approach suggested by the commenter, any potential exclusion analysis under section 4(b)(2) of the Act would be difficult, as two different standards would be applied based on landownership, thereby increasing complexity and decreasing transparency and credibility of such balancing.

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

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

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

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

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

Should an occupied portion of a critical habitat unit become unoccupied over time, and a future project is initiated in that area, the probable incremental costs associated with any project modifications needed to avoid adverse modification generally may be higher as they are no longer considered to be part of the baseline. However, as impact analyses are done at the time of critical habitat designation, it may not be possible to reliably predict when or where a range contraction may occur and whether this scenario would occur. In any event, the effects of an action on a designation would be evaluated in a section 7 consultation within the scope of that consultation and will be addressed on a case-by-case basis, and changes in occupancy that may result in range contraction as compared to the original designation, will be evaluated within the scope of future consultations. In some cases, the Services may elect to revise a critical habitat designation in

the event of a serious or unanticipated range contraction to reflect a change in a species' range. In a revised rulemaking, the Services could reconsider prior exclusions from critical habitat or consider new exclusions from critical habitat.

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

Response: Frequently, conservation measures and project modifications are negotiated with the Federal action agency during the informal and formal consultation processes, which can have the effect of precluding an adverse modification determination. The cost of these conservation measures and project modifications, if resulting solely from the designation, and the cost of the consultation itself constitute the incremental impacts of the designation, which must be evaluated under section 4(b)(2) of the Act. Thus, the lack of a determination of adverse modification in a section 7 consultation does not mean there is no incremental impact resulting from the designation.

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

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

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

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

Comment (33): Federal agencies have no authorities to resolve circuit court splits involving matters of statutory interpretation. The proposed rule is, therefore, unlawful because it represents an improper attempt by the Services to resolve a circuit split involving a matter of statutory interpretation. Rulemaking is not the way to resolve the judicial split between 10th and 9th circuit decisions. Congress or the Supreme Court should decide this issue. How would this rule, if finalized, apply in the 10th circuit?

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

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

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

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

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

Examples of existing protections may include: (1) Conservation measures such as Service-approved habitat

conservation plans (HCPs) and safe harbor agreements (SHAs); (2) tribal and Federal wildlife-management and wildlife-conservation plans; (3) State endangered species act regulations; (4) other conservation measures at the State and local levels; and (5) project modifications resulting from section 7 consultations to avoid jeopardy to listed species.

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

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

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

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

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

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

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

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

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

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

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

Response: The current language in section 4(b)(2) of the Act includes the phrase "and any other relevant impact." The legislative history indicates that Congress intended to give the Secretaries broad discretion as to what impacts to consider and what weight to give particular impacts. H.R. Rep. 95–1625, at 17; *see, e.g., Cape Hatteras Access Preservation Alliance* v. *DOI,* 731 F. Supp. 2d 15 (D.D.C. 2010) ("the Service has considerable discretion as to what it defines to be "other relevant impacts" under the ESA"). Therefore, if the relevant Service determines in a particular designation that domestic energy security is a relevant impact of that designation, that Service will consider the impacts of designation on domestic energy security.

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

Response: The word "potential" was not in the previous language of this regulation. However, the word "probable" was in the original language of this regulation. As discussed in the preamble of our proposal, we are not

changing the term "probable." The use of this word reflects a reasonable interpretation of the statute. Realistically, the Services can only consider activities reasonably likely to occur, which we interpret for purposes of this rule to mean the same thing as the term "probable."

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

Comment (42): The proposed regulation change would give too much latitude to the Services to make inconsistent and arbitrary decisions when designating critical habitat, including the discretion to assign weights to the benefits of critical habitat designations. The proposed rule lacks criteria or guidance, which deprives the public of the opportunity to comment on how the rule will be implemented. Although the Act affords the Secretaries significant discretion in making these determinations, the Secretaries should articulate how they will exercise this discretion by regulation. The criteria and guidelines should be set forth in the final rule. The final regulation should outline how the Secretaries will exercise discretion with requirements and guidance to provide public understanding in the analysis of designation of critical habitat.

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

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

Response: There are two distinct processes under section 4(b)(2) of the Act—one mandatory and one discretionary—and this interpretation has been confirmed by the courts (*Building Industry Ass'n of the Bay Area* v. *U.S. Dep't of Commerce,* 2012 U.S. Dist. Lexis 170688 (N.D. Cal. Nov. 30, 2012)). The first sentence of section 4(b)(2) of the Act sets out a mandatory requirement that the Services consider the economic impact, impact on national security, and any other relevant impacts prior to designating an area as part of a critical habitat designation. The Services will always consider such impacts as required under this sentence for each and every designation of critical habitat. The economic analysis is the vehicle by which we consider the probable economic impacts of a critical habitat designation. Thus, contrary to the suggestion in the comment, we do not consider the consideration of the probable economic impacts of a critical habitat designation to be discretionary.

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

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

However, separate and different from the 4(b)(2) exclusion analysis discussed above, agencies are required under E.O. 12866 to assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs. The requirement of E.O. 12866 is applicable to the process of designating critical habitat.

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

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

Response: We agree that the requirement of E.O. 12866 (and incorporated by E.O. 13563) to assess the costs and benefits of a rule, and, to the extent permitted by law, to propose or adopt the rule only upon a reasoned determination that the benefits of the intended regulation justify the costs is applicable to the process of designating critical habitat. However, as discussed above, the authority for the assessment

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

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

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

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

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

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

Response: Recent case law supports our conclusion that exclusions are discretionary and the discretion not to exclude an area is judicially unreviewable (*Building Industry Ass'n of the Bay Area* v. *U.S. Dep't of Commerce,* 2012 U.S. Dist. Lexis 170688 (N.D. Cal. Nov. 30, 2012)). While the Services will consider all significant comments, this process does not alter the fact that the Secretary has discretion as to whether to enter into the exclusion analysis under section 4(b)(2) of the Act and whether to exclude any particular areas. For example, an appropriate response to a comment seeking to force an exclusion analysis and subsequent exclusion would be that the Secretary has considered the relevant impacts under the first sentence of section 4(b)(2) of the Act but declines to exercise the Secretary's discretion to make an exclusion.

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

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

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

Response: We disagree. The first sentence of section 4(b)(2) of the Act requires consideration of "any" relevant impacts of designation, and the second sentence of section 4(b)(2) of the Act places no limitations as to the nature of the benefits that may be weighed in the discretionary process of considering exclusions. Nothing in the Act suggests that only factors directly related to conservation of the species can be

considered in implementing section 4(b)(2) of the Act. Section 4(b)(2) of the Act is inherently broad, and the regulation reflects the manner in which the Secretary should use that authority.

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

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

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

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

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

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

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

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

Comments Regarding the Services' Response to the Presidential Memorandum

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

Response: Many commenters misinterpreted the scope of the Presidential memorandum. The Presidential memorandum was issued in response to the proposed revised critical habitat designation for the northern spotted owl, and focused specifically on the rulemaking process for that regulation, as evidenced in the title, *Presidential Memorandum—Proposed Revised Habitat for the Spotted Owl: Minimizing Regulatory Burdens.* Due to: (1) Concern for not having the economic analysis available with the proposed revised critical habitat for the northern spotted owl that would allow for the evaluation of effects, and (2) FWS' interpretation that the existing regulations limited the ability to provide the economic analysis concurrent with proposal, the memorandum further directed the Secretary to revise the relevant regulation to shift the timing of the economic analysis such that all subsequent critical habitat proposals would be published with a concurrent economic analysis. As a result, the core of the memorandum speaks to the designation process of the rulemaking for the northern spotted owl. This regulation addresses only that portion of the memorandum that requires a shift in the timing of the economic analysis. Further, the Services chose to revise the regulation to codify established interpretation, practices, and prevailing case law. We conclude that doing so will in fact provide clarity, promote predictability, and reduce uncertainty, consistent with Executive Order 13563.

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

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

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

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

Comment (56): The Services assert that they will use their current regulation until the new regulation is finalized, yet it used the proposed process in the recent rulemaking for the

northern spotted owl. This appears to be a predecisional process approach for the final northern spotted owl regulation and for this proposed regulation.

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

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

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

Comments Not Directly Relevant to This Regulation

Comment (58): We received numerous specific comments in several categories which were not directly relevant to the regulation and are, therefore, not addressed in this section. Below, we provide a summary of the topic areas that these comments encompass. While not directly relevant to this regulation, we may address some of these issues in future rulemaking and policy development by the Services.

(1) Providing guidance for the methodology for conducting economic analyses including data collection from and coordinating with potentially affected parties;

(2) Specific methodology for evaluation of direct and indirect economic effects;

(3) The relationship between critical habitat and recovery;

(4) The detrimental effect critical habitat may have on partnerships; and

(5) Tribal sovereignty and coordination.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

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

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This final rule is consistent with Executive Order 13563 because it is designed "to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives."

Regulatory Flexibility Act

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

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

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

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

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

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

(a) On the basis of information contained in the "Regulatory Flexibility Act" section above, these final regulations would not "significantly or uniquely" affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that these regulations would not impose a cost of $100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the final regulations would not place additional requirements on any city, county, or other local municipalities.

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

Takings (E.O. 12630)

In accordance with Executive Order 12630, these final regulations would not have significant takings implications. These final regulations would not have any actual impacts to the environment or to private property interests, because they will not result in changes to applicable standards for identifying and designating critical habitat, the level of opportunity for public comment on critical habitat designations, or the outcome of critical habitat determinations. Because these final regulations affect only procedural or administrative matters, such as the timing of when the draft economic analysis will be prepared, they would not have the effect of compelling a property owner to suffer any physical invasion of their property; and would not deny any use of the land or aquatic resources. Moreover, there would be neither any burden to public property from the regulations nor any barrier to reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

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

Civil Justice Reform (E.O. 12988)

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

Government-to-Government Relationship with Tribes

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

Paperwork Reduction Act

This final rule does not contain any new collections of information that require approval by the OMB under the Paperwork Reduction Act. This final rule would not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We have analyzed this rule in accordance with the criteria of the National Environmental Policy Act (NEPA) (42 U.S.C. 4332(c)), the Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), the Department of the Interior's NEPA procedures (516 DM 2 and 8; 43 CFR part 46), and NOAA's Administrative Order regarding NEPA compliance (NAO 216–6 (May 20, 1999)).

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

We have also determined that this action satisfies the standards for reliance upon a categorical exclusion under NOAA Administrative Order (NAO) 216–6. Specifically, this action fits within the categorical exclusion for "policy directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature." NAO 216–6, section 6.03c.3(i). This action would not trigger an exception precluding reliance on the categorical exclusion because it does not involve a geographic area with unique characteristics, is not the subject of public controversy based on potential environmental consequences, will not result in uncertain environmental impacts or unique or unknown risks, does not establish a precedent or decision in principle about future proposals, will not have significant cumulative impacts, and will not have any adverse effects upon endangered or threatened species or their habitats. *Id.* section 5.05c. As such, it is categorically excluded from the need to prepare an Environmental Assessment. In addition, NMFS finds that because this rule will not result in any effects to the physical environment, much less any adverse effects, there would be no need to prepare an Environmental Assessment even aside from consideration of the categorical exclusion. *See Oceana, Inc.* v. *Bryson,* No. C–11–6257–EMC, 2013 WL 1563675, *24–25,—F. Supp. 2d—(N. D. Cal. April 12, 2013). Issuance of this rule does not alter the legal and regulatory status quo in such a way as to create any environmental effects. *See Humane Soc. of U.S.* v. *Johanns,* 520 F. Supp. 2d. 8, 12 (D.D.C. 2007).

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

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

References Cited

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

Authority

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

List of Subjects in 50 CFR Part 424

Administrative practice and procedure, Endangered and threatened species.

Regulation Promulgation

PART 424—[AMENDED]

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

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

■ 2. Revise § 424.19 to read as follows:

§ 424.19 Impact analysis and exclusions from critical habitat.

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

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

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

Dated: May 14, 2013.

Rachel Jacobson,

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

Dated: August 20, 2013.

Alan D. Risenhoover,

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

[FR Doc. 2013–20994 Filed 8–27–13; 8:45 am]

BILLING CODE 4310–55–P; 3520–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 121018563–3148–02]

RIN 0648–XC831

Fisheries of the Exclusive Economic Zone Off Alaska; Reallocation of Pacific Cod in the Bering Sea and Aleutian Islands Management Area

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Temporary rule; reallocation.

SUMMARY: NMFS is reallocating the projected unused amounts of Pacific cod from vessels using jig gear and catcher vessels greater than 60 feet (18.3 meters) length overall (LOA) using hook-and-line gear to catcher vessels less than 60 feet (18.3 meters) LOA using hook-and-line or pot gear in the Bering Sea and Aleutian Islands management area. This action is necessary to allow the 2013 total allowable catch of Pacific cod to be harvested.

DATES: Effective August 23, 2013, through 2400 hrs, Alaska local time (A.l.t.), December 31, 2013.

FOR FURTHER INFORMATION CONTACT: Steve Whitney, 907–586–7269.

SUPPLEMENTARY INFORMATION: NMFS manages the groundfish fishery in the Bering Sea and Aleutian Islands (BSAI) according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (FMP) prepared by the North Pacific Fishery Management Council under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The 2013 Pacific cod total allowable catch (TAC) specified for vessels using jig gear in the BSAI is 3,251 metric tons (mt) as established by the final 2013 and 2014 harvest specifications for groundfish in the BSAI (78 FR 13813, March 1, 2013). The Administrator, Alaska Region, NMFS, (Regional Administrator) has determined that jig vessels will not be able to harvest 2,500 mt of the remaining 2013 Pacific cod TAC allocated to those vessels under § 679.20(a)(7)(ii)(A)(*1*). Therefore, in accordance with § 679.20(a)(7)(iii)(A), NMFS apportions 2,500 mt of Pacific cod to catcher vessels less than 60 feet (18.3 meters(m)) LOA using hook-and-line or pot gear.

The 2013 Pacific cod TAC specified for catcher vessels greater than or equal to 60 feet LOA using hook-and-line gear in the BSAI is 463 mt as established by the final 2013 and 2014 harvest specifications for groundfish in the BSAI (78 FR 13813, March 1, 2013). The Regional Administrator has determined that catcher vessels greater than or equal to 60 feet LOA using hook-and-line gear will not be able to harvest 450 mt of the remaining 2013 Pacific cod TAC allocated to those vessels under § 679.20(a)(7)(ii)(A)(*3*). Therefore, in accordance with § 679.20(a)(7)(iii)(A), NMFS apportions 450 mt of Pacific cod to catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear.

The harvest specifications for Pacific cod included in the final 2013 harvest specifications for groundfish in the BSAI (78 FR 13813, March 1, 2013) are revised as follows: 751 mt for vessels using jig gear, 13 mt for catcher vessels greater than or equal to 60 feet (18.3 m) LOA using hook-and-line gear, and 7,577 mt to catcher vessels less than 60 feet (18.3 m) LOA using hook-and-line or pot gear.

Classification

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the reallocation of Pacific cod specified from other sectors to catcher vessels less than 60 feet (18.3 m) LOA

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 402

[Docket No. FWS–R9–ES–2011–0080; FXES11120900000–134–FF09E30000]

RIN 1018–AX85; 0648–BB81

Interagency Cooperation—Endangered Species Act of 1973, as Amended; Incidental Take Statements

AGENCY: Fish and Wildlife Service, Interior; National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the Services), propose to amend the regulations governing consultation under section 7 of the Endangered Species Act of 1973, as amended (ESA), regarding incidental take statements. The purpose of the proposed changes is to address the use of surrogates to express the amount or extent of anticipated incidental take, and incidental take statements for programmatic actions where implementation of the program requires later authorization, funding, or implementation of site-specific actions that will be subject to section 7 consultation and incidental take statements, as appropriate. These changes are proposed to improve the flexibility and clarify the development of incidental take statements. The Services believe these proposed regulatory changes are a reasonable exercise of their discretion in interpreting particularly challenging aspects of section 7 of the ESA related to incidental take statements.

DATES: We will accept comments received or postmarked on or before November 4, 2013.

ADDRESSES: You may submit comments by one of the following methods: *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments for Docket No. FWS–R9–ES–2011–0080.

U.S. mail or hand-delivery: Public Comments Processing, Attn: Docket No. FWS–R9–ES–2011–0080; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept email or faxes. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal information—may be made publicly available at any time. While you can ask in your comment to withhold your personal identifying information from public review, this cannot be guaranteed.

FOR FURTHER INFORMATION CONTACT: Rick Sayers, Chief, Division of Environmental Review, U.S. Fish and Wildlife Service, Department of the Interior, Washington, DC 20240 (telephone: 703–358–2171); or Kristine Petersen, Chief (Acting), Endangered Species Act Interagency Cooperation Division, Office of Protected Resources, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce, Department of Commerce, Washington, DC (telephone: 301–427–8453).

SUPPLEMENTARY INFORMATION:

Background

Section 9 of the ESA prohibits the take of listed animal species with certain exceptions. Under the ESA, the term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Section 7 of the ESA provides for the exemption of incidental take of listed animal species caused by, but not the purpose of, actions that the Services have found to be consistent with the provisions of section 7(a)(2).

Under those conditions, if a proposed action is anticipated to cause incidental take, the Services issue an incidental take statement under 50 CFR 402.14(i) with the biological opinion that specifies, among other requirements: the impact of such incidental taking on the listed species; measures considered necessary to minimize the impact of such take; requirements for the action agency or the applicant to monitor and report the progress of the action and its impact on the species to the Service as specified in the incidental take statement; and the procedures for handling or disposing of individuals that are taken.

The current regulations at § 402.14(i)(1)(i) require the Services to express the impact of such incidental taking of the species in terms of amount or extent. The preamble to the final rule that set forth the current regulations discusses the use of a precise number of individuals or a description of the land or marine area affected to express the amount or extent of anticipated take, respectively (51 FR 19954; June 3, 1986).

Court decisions rendered over the last decade regarding the adequacy of incidental take statements have prompted the Services to consider clarifying two aspects of incidental take statements: (1) The use of surrogates such as habitat, ecological conditions, or similar affected species, to express the amount or extent of anticipated incidental take, including circumstances where project impacts to the surrogate are coextensive with at least one aspect of the project's scope; and (2) incidental take statements for programmatic actions where implementation of the program requires later authorization, funding, or implementation of site-specific actions that will be subject to future section 7 consultation and incidental take statements, as appropriate. After careful consideration of the following and other court decisions, the Services are proposing to modify the ESA section 7 regulations to address those aspects of incidental take statements:

- *Arizona Cattle Growers' Association* v. *U.S. Fish and Wildlife Service,* 273 F.3d 1229 (9th Cir. 2001);
- *Natural Res. Def. Council, Inc.* v. *Evans,* 279 F. Supp. 2d 1129, 1184–85 (N.D. Cal. 2003);
- *Ctr. for Biological Diversity* v. *Bureau of Land Mgmt.,* 422 F. Supp. 2d 1115, 1137–38 (N.D. Cal. 2006);
- *Oregon Natural Resources Council* v. *Allen,* 476 F.3d 1031 (9th Cir. 2007);
- *Miccosukee Tribe of Indians of Florida* v. *U.S. Fish and Wildlife Service,* 566 F.3d 1257 (11th Cir. 2009);
- *Wild Fish Conservancy* v. *Salazar,* 628 F.3d 513 (9th Cir. 2010);
- *Center for Biological Diversity* v. *Salazar,* 695 F.3d 893 (9th Cir. 2012).

Through this action, the Services are proposing to establish prospective standards regarding incidental take statements. Nothing in these proposed regulations is intended to require, now or at such time as these proposed regulations become final, reevaluation of any previously completed biological opinions or incidental take statements.

Use of Surrogates

The Services acknowledge congressional preference for expressing the impacts of take in incidental take statements in terms of a numerical limitation with respect to individuals of

the listed species. However, Congress also recognized that a numerical value would not always be available and intended that such numbers only be established where possible (H.R. Rep. No. 97–567, at 27). The preamble to the final rule that set forth the current regulations also acknowledges that exact numerical limits on the amount of anticipated incidental take may be difficult to determine and the Services may instead specify the level of anticipated take in terms of the extent of the land or marine area that may be affected. In fact, as the Services explained in the preamble, the use of descriptions of extent of take can be more appropriate than the use of numerical amounts "because for some species loss of habitat resulting in death or injury to individuals may be more deleterious than the direct loss of a certain number of individuals" (51 FR 19954). Over the last 25 years of developing incidental take statements, the Services have found that in many cases the biology of the listed species or the nature of the proposed action makes it impractical to detect or monitor take of individuals. In those situations, evaluating impacts to a surrogate such as habitat, ecological conditions, or similar affected species may be the most reasonable and meaningful measure of assessing take of listed species.

The courts also have recognized that it is not always practicable to establish the precise number of individuals that will be taken and that "surrogate" measures are acceptable to establish the impact of take on the species if there is a link between the surrogate and take. *Arizona Cattle Growers' Association* v. *U.S. Fish and Wildlife Service*, 273 F.3d 1229 (9th Cir. 2001). It is often more practical and meaningful to monitor project effects upon surrogates, which can also provide a clear standard for determining when the amount or extent of anticipated take has been exceeded and consultation should be reinitiated. Accordingly, the Services have adopted the use of surrogates as part of our national policy for preparing incidental take statements:

> "Take can be expressed also as a change in habitat characteristics affecting the species (e.g., for an aquatic species, changes in water temperature or chemistry, flows, or sediment loads) where data or information exists which links such changes to the take of the listed species. In some situations, the species itself or the effect on the species may be difficult to detect. However, some detectable measure of effect should be provided. . . . [I]f a sufficient causal link is demonstrated (i.e., the number of burrows affected or a quantitative loss of cover, food, water quality, or symbionts), then this can establish a measure of the impact on the species or its habitat and provide the yardstick for reinitiation." *Endangered Species Consultation Handbook*, U.S. Fish and Wildlife Service and National Marine Fisheries Service (March 1998; p. 4–47–48).

An example of when we might use a surrogate measure for take is timber harvest activities within habitat of the threatened northern spotted owl *(Strix occidentalis caurina)*. Such activities can cause take by modifying habitat conditions that significantly disrupt the spotted owl's nesting, roosting, or foraging behavior. Although the number of spotted owls likely to be taken as a result of project effects to its habitat can be estimated, detection and monitoring of the affected owls to determine when take has occurred or when the amount or extent of anticipated take has been reached is not practical for two reasons. First, there is a low likelihood of finding an injured or dead spotted owl because their home ranges are large (about 3,000 acres on average) and there is a high rate of removal of injured or dead individuals by predators and scavengers. Second, the nature of the anticipated take impact to the spotted owl is primarily in the form of reduced fitness of adult owls, leading to reduced survival and reproduction in the future. Documenting this reduction is very difficult, and doing so may take months or years at considerable expense. Using habitat metrics to express the extent of take and to evaluate the impacts of take on the species is a practical alternative because effects to habitat: are causally related to take of spotted owls; can be readily monitored; and provide a clear standard for when the anticipated amount has been exceeded.

In some situations, the most practical surrogate for expressing the amount or extent of anticipated take of listed species is the amount of listed species' habitat impacted by the proposed action, and the expression of the habitat surrogate is fully coextensive with the project's impacts on the habitat. For example, under a proposed Clean Water Act permit issued by the Army Corps of Engineers, a quarter-acre of wetlands composed of three vernal pools occupied by the threatened vernal pool fairy shrimp (*Branchinecta lynchi*) would be filled to construct a road-crossing; no other habitat of the vernal pool fairy shrimp would be affected by this action. The wetland fill is likely to kill all of the shrimp occupying the three vernal pools. A single pool may contain thousands of individual shrimp as well as their eggs or cysts. For that reason, it is not practical to express the amount or extent of anticipated take of this species or monitor take-related impacts in terms of individual shrimp. Quantifying the area encompassing the three vernal pools supporting this species as a surrogate for incidental take would be a practical and meaningful alternative to quantifying and monitoring the anticipated incidental take in terms of individual shrimp caused by the proposed Federal permit action. In this case, the habitat surrogate for the amount or extent of anticipated take is coextensive with at least one aspect of the project's scope—the anticipated amount (i.e., a quarter of an acre) of vernal pool habitat to be affected by the project.

The Ninth Circuit Court's holding in *Oregon Natural Resources Council* v. *Allen*, 476 F.3d 1031 (9th Cir. 2007) could be read to suggest that such surrogates cannot be coextensive with the project's scope for fear that reinitiation of consultation would not be triggered until the project is complete. However, even under circumstances of a coextensive surrogate (such as in the above example), the incidental take statement will require the action agency to monitor project impacts to the surrogate during the course of the action, which will determine whether these impacts are consistent with the analysis in the biological opinion. This assessment will ensure a trigger for reinitiation of formal consultation if the amount or extent of the anticipated taking specified in the incidental take statement is exceeded during the course of the action where discretionary Federal involvement or control over the action has been retained or is authorized by law in accordance with § 402.16. In the above example, reinitiation of formal consultation would be triggered in the event a fourth vernal pool was discovered during wetland fill or it was determined that the total amount of vernal pool habitat modified by the project exceeded the identified one-quarter of an acre of wetland habitat. Thus, although fully coextensive with the *anticipated* impacts of the project on vernal pool fairy shrimp, the surrogate nevertheless provides for a meaningful reinitiation trigger consistent with the purpose of an incidental take statement.

We propose to amend § 402.14(i)(1)(i) of the regulations to clarify that surrogates may be used to express the amount or extent of anticipated take, provided the biological opinion or the incidental take statement: (1) Describes the causal link between the surrogate and take of the listed species; (2) describes why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species; and (3) sets a clear standard for determining when the

extent of taking has been exceeded. This amendment to the regulations would clarify the Services' discretion to use surrogates to express and monitor the amount or extent of anticipated take when they determine it is the most practical means to do so. Such flexibility may be especially useful in cases where the biology of the listed species or the nature of the proposed action makes it impractical to detect or monitor take-related impacts to individual animals.

We also propose to amend the regulations at § 402.14(i)(3) to clarify that monitoring project impacts to a surrogate meets the requirement for monitoring the impacts of take on the listed species.

Incidental Take Statements for Programmatic Actions

For purposes of this proposed rule, a programmatic action means an action, as defined at 50 CFR 402.02, that is designed to provide a framework for the development of future, site-specific Federal actions that are authorized, funded, or carried out at a later time. Such site-specific actions will be subject to separate section 7 consultation and incidental take statements, as appropriate. Examples of programmatic actions include land resource management plans established under the National Forest Management Act or the Federal Land Policy Management Act, broadly defined actions supported by programmatic Environmental Impact Statements and associated Records of Decision such as designations of certain geographic areas for a particular purpose (e.g., energy corridors), or promulgation of regulations that guide an agency's activities in general ways without authorizing specific projects. The key distinguishing characteristics of programmatic actions for purposes of this proposed rule are: (1) They provide the framework for future, site-specific actions which are subject to section 7 consultations and incidental take statements, but they do not authorize, fund, or carry out those future site-specific actions; and (2) they do not include sufficient site-specific information to inform an assessment of where, when, and how listed species are likely to be affected by the program. The Services are committed to coordinating with action agencies in deciding whether an action fits the definition of "programmatic action."

In biological opinions on programmatic actions where the Services concluded that the action is not likely to violate section 7(a)(2) and incidental take of listed species is anticipated, we have struggled with expressing the amount or extent of the anticipated take in an incidental take statement. The statutory and regulatory provisions for incidental take statements were clearly designed to address site-specific projects, not an over-arching program that is the precursor for those specific projects. The methodologies and rationale developed by the Services over many years of developing biological opinions and incidental take statements are based on a review of the impacts of a site-specific action on listed species and a determination as to whether those impacts conform to the statutory definition of take.

Addressing incidental take in the context of a programmatic action has recently become a subject of litigation. Courts have issued varied rulings on this issue of whether a biological opinion for a programmatic action can or should contain an incidental take statement. A California district court (*Ctr. for Biological Diversity* v. *U.S. Fish and Wildlife Service,* 2009 U.S. Dist. LEXIS 48376 (N.D. Cal., June 8, 2009) held that an incidental take statement should have been provided at the programmatic scale. *See also, Center for Biological Diversity* v. *Salazar,* 695 F.3d 893 (9th Cir. 2012); *NRDC* v. *Evans,* 279 F.Supp.2d 1129 (N.D. Cal. 2003) (each holding an incidental take statement should have been provided in the context of incidental take regulations under the Marine Mammal Protection Act). However, other courts have held that incidental take statements are not required in biological opinions addressing programmatic actions if site-specific actions under the program are subject to future consultation where an incidental take statement can be prepared, as appropriate. *Western Watersheds Project* v. *BLM,* 552 F.Supp.2d 1113 (D. Nev. 2008).

Because programmatic actions provide frameworks without details related to the where, when, and how future site-specific actions are likely to impact a listed species, attempts to identify a specific amount or extent of incidental take that is caused by a programmatic action absent that specificity would in most instances be speculative and unlikely to provide an accurate and reliable trigger for reinitiation of consultation. To address the issue of incidental take statements for programmatic actions, the Services are proposing to revise 50 CFR 402.14 and to promulgate new regulatory definitions of the terms "programmatic action" and "programmatic incidental take statement" in 50 CFR 402.02. These definitions are intended to distinguish the inherent differences between a programmatic action and a typical site-specific project relative to site-specific information (or the lack thereof) that provides details on where, when, and how listed species are likely to be impacted. The definitions are promulgated to respect the purpose of the ESA relative to providing incidental take statements in biological opinions, including those for programmatic actions.

The Services intend that a "programmatic incidental take statement" for a "programmatic action" will not include a specific amount or extent of anticipated take of listed species because programmatic actions do not include sufficient site-specific information to inform an assessment of where, when, and how listed species are likely to be affected by the program. Instead, the Services will, as appropriate, develop a programmatic incidental take statement that anticipates an unquantifiable amount or extent of take at the programmatic scale in recognition that subsequent site-specific actions authorized, funded, or carried out under the programmatic action will be subject to subsequent section 7 consultation and incidental take statements, as appropriate.

Another purpose of the ESA relative to providing incidental take statements in biological opinions is to establish a trigger for reinitiation of formal consultation during the course of the action when the amount or extent of anticipated take is exceeded. The implementing regulations for section 7 address this requirement at 50 CFR 402.16(a). Satisfying this requirement for programmatic actions that lack sufficient specificity to support quantification of an amount or extent of anticipated take is very challenging. To address the requirement for a reinitiation trigger when take is exceeded, the Services took an approach that reflects the inherent differences between a programmatic action and a typical site-specific project relative to site-specific information (or the lack thereof) that provides details on where, when, and how listed species are likely to be impacted.

Under the proposed regulatory definition of "programmatic incidental take statement" the reinitiation trigger at 402.16(a) may, as appropriate, be expressed as a reasonable and prudent measure(s) that adopts either specific provisions of the proposed programmatic action, such as spatial or timing restrictions, to limit the impacts of the program on listed species or similar types of restrictions identified by the Services that would function to minimize the impacts of anticipated take on listed species at the

programmatic level. In the event the action agency proposes a site-specific action under the programmatic action that is likely to cause take of a listed species but the site-specific action does not conform to the specified provisions of the incidental take statement for the programmatic action, reinitiation of consultation on the programmatic action would be triggered.

The Services would have substantial flexibility to adopt these programmatic reinitiation triggers as reasonable and prudent measures to address the particular circumstances of the programmatic action under consultation and the manner in which the action agency is expected to carry out later site-specific actions. For example, if a proposed forest plan includes 100-foot wide riparian buffers for timber harvest actions along streams occupied by listed fish, the incidental take statement for the plan-level biological opinion could adopt the riparian buffer as a reasonable and prudent measure and identify encroachments on the 100-foot wide riparian buffer as a reinitiation trigger for exceeding anticipated take. If a subsequent, site-specific timber harvest action developed under the programmatic action adopted more narrow riparian buffers, reinitiation of formal consultation on the programmatic action would be triggered because the take exemption provided by the programmatic incidental take statement is likely to be exceeded.

Similarly, the Services could include a reasonable and prudent measure under a programmatic incidental take statement that requires the action agency to engage in section 7(a)(2) consultation for site-specific actions that are anticipated to cause take of listed species under the programmatic action. Such a reasonable and prudent measure would be appropriate for three reasons. First, although the action agency's duty to consult already exists under the statute, imposing the requirement as a reasonable and prudent measure would require site-specific consultation in order to maintain the exemption of incidental take at the programmatic level. Second, many biological opinions for programmatic actions rely on the second look afforded by site-specific consultation to support a no-jeopardy conclusion. An action agency's failure to consult at the site-specific level would undermine that conclusion. Third, with adequate procedures for notice to the action agency provided as terms and conditions, a reinitiation trigger for a failure to consult on a site-specific project would serve as a clear standard for when reinitiation was required under the programmatic incidental take statement.

The Services also anticipate that specific provisions or restrictions proposed under a programmatic action may, in some circumstances, be included or augmented as reasonable and prudent measures in the programmatic incidental take statement, as appropriate, to minimize the impacts of anticipated take of listed species. Monitoring requirements at the programmatic action scale would also be included as a reasonable and prudent measure in the incidental take statement for a programmatic action pursuant to the requirements of 50 CFR 402.14(i)(3).

Required Determinations

Regulatory Planning and Review (E.O. 12866)

The Office of Management and Budget (OMB) has determined that this proposed rule is significant and has reviewed this proposed rule under Executive Order 12866 (E.O. 12866). OMB bases its determination on the following four criteria:

(a) Whether the proposed rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the proposed rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the proposed rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the proposed rule raises novel legal or policy issues.

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

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 (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 are certifying that this rule will not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

Incidental take statements describe the amount or extent of incidental take that is anticipated to occur when a Federal action is implemented. The incidental take statement conveys an exemption from the ESA's take prohibitions provided that the action agency (and any applicant) complies with the terms and conditions of the incidental take statement. Terms and conditions cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes (50 CFR 402.14(i)(2)). The changes embodied by this proposed regulation will neither expand nor contract the reach of terms and conditions of an incidental take statement. As such, we foresee no economic effects from implementation of this proposed 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) If adopted, this proposal will not "significantly or uniquely" affect small governments. We have determined and certify under the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this proposed rulemaking will not impose a cost of $100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the proposed regulation will not place additional requirements on any city, county, or other local municipalities.

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

Takings (E.O. 12630)

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

A takings implication assessment is not required because this rule (1) will not effectively compel a property owner to suffer a physical invasion of property

and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. This rule would substantially advance a legitimate government interest (conservation and recovery of listed species) and would not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether this proposed rule has significant Federalism effects and have determined that a Federalism assessment is not required. This rule 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. No intrusion on State policy or administration is expected; roles or responsibilities of Federal or State governments would not change; and fiscal capacity would not be substantially directly affected. Therefore, this rule does not have significant Federalism effects or implications to warrant the preparation of a Federalism Assessment under the provisions of Executive Order 13132.

Civil Justice Reform (E.O. 12988)

This proposed rule will not unduly burden the judicial system and meets the applicable standards provided in sections s (3)(a) and (3)(b)(2) of Executive Order 12988.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with affected recognized Federal Tribes on a government-to-government basis. We have determined that there are no tribal lands affected by this rule and therefore, no such communications were made.

Paperwork Reduction Act

Office of Management and Budget (OMB) regulations at 5 CFR part 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), require that Federal agencies obtain approval from OMB before collecting information from the public. This proposed rule does not contain any new information collections that require approval. We may not collect or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

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

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

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

Clarity of This Regulation (E.O. 12866)

We are required by E.O. 12866, E.O. 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 feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comment should be as specific as possible. For example, you should tell us the numbers of the sections and paragraphs that are unclearly written, which sections or sentences are too long, or the sections where you feel lists and tables would be useful. The Services would particularly welcome any comments that address whether it would be more appropriate to not provide programmatic incidental take statements and instead defer the exemption of incidental take for programmatic actions, as appropriate, until subsequent site-specific actions that would provide site-specific information regarding where, when, and how listed species are likely to be incidentally taken. Comments on this topic would be most helpful if they specifically address how such an approach is consistent with the Act and how such an approach could be reconciled with existing caselaw and agency practices.

Authority

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

List of Subjects in 50 CFR Part 402

Endangered and threatened wildlife, Fish, Intergovernmental relations, Plants (agriculture).

Proposed Regulation Promulgation

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

PART 402—[AMENDED]

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

Authority: 16 U.S.C. 1531 et seq.

■ 2. Amend § 402.02 by adding definitions of "Programmatic action" and "Programmatic incidental take statement" in alphabetical order to read as follows:

§ 402.02 Definitions.

* * * * *

Programmatic action means, for purposes of an incidental take statement, an action that provides a framework for the development of future, site-specific actions occurring in the action area of the programmatic action, that are authorized, funded, or implemented at a later time and subject to section 7 consultation requirements, as appropriate, and for which site-specific information regarding where, when, and how listed species will be affected will become available at the time of a subsequent section 7 consultation.

Programmatic incidental take statement means an incidental take statement prepared in those cases where the Services conclude in a biological

opinion that a programmatic action will not violate section 7(a)(2) of the Act and where incidental take of listed species is reasonably certain to occur but where the amount or extent of anticipated take cannot be quantified because site-specific information regarding where, when and how listed species will be taken is not yet available.

* * * * *

■ 3. Amend § 402.14 by revising paragraphs (i)(1)(i) and (i)(3), and by adding paragraph (i)(6) to read as follows:

§ 402.14 Formal consultation.

* * * * *

(i) * * *

(1) * * *

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species. A surrogate (e.g., habitat or ecological conditions or similarly affected species) may be used to express the amount or extent of anticipated take provided that the incidental take statement describes the causal link between effects to the surrogate and take of the listed species, why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded;

* * * * *

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. When the Services use a surrogate to express the amount or extent of take, the Federal agency or applicant must monitor the surrogate to ensure that the action does not exceed the anticipated amount or extent of take.

* * * * *

(6) A programmatic incidental take statement will be provided in a biological opinion for a programmatic action that is anticipated to cause incidental take. In such circumstances, the programmatic incidental take statement will include specific provisions as reasonable and prudent measures under paragraph (i)(1) of this section to minimize the impacts of take caused by the programmatic action and to serve as a trigger to reinitiate formal consultation on the programmatic action.

* * * * *

Dated: August 6, 2013.

Rachel Jacobson,

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

Dated: August 21, 2013.

Alan D. Risenhoover,

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

[FR Doc. 2013–21423 Filed 9–3–13; 8:45 am]

BILLING CODE 3510–22–P; 4310–55–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

RIN 0648–BD40

Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Annual Catch Limits and Accountability Measures

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Availability of proposed fishery management plan amendments; request for comments.

SUMMARY: NMFS announces that the Mid-Atlantic Fishery Management Council has submitted the Recreational Accountability Measures Omnibus Amendment incorporating a draft Environmental Assessment, for review by the Secretary of Commerce. NMFS is requesting comments from the public on the Recreational Accountability Measures Omnibus Amendment, which was developed by the Council to modify the accountability measures for the Atlantic mackerel, Atlantic bluefish, summer flounder, scup, and black sea bass recreational fisheries.

DATES: Public comments must be received on or before November 4, 2013.

ADDRESSES: A draft environmental assessment (EA) was prepared for the Recreational Accountability Measures (AM) Omnibus Amendment that describes the proposed action and other considered alternatives, and provides a thorough analysis of the impacts of the proposed measures and alternatives. Copies of the Recreational AM Omnibus Amendment, including the draft EA, are available on request from Dr. Christopher M. Moore, Executive Director, Mid-Atlantic Fishery Management Council (Council), 800 North State Street, Suite 201, Dover, DE 19901. This document is also available online at *http://www.mafmc.org.*

You may submit comments on this document, identified NOAA–NMFS–2013–0108, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2013-0108,* click the "Comment Now!" icon, complete the required fields, and enter or attach your comments.
- *Fax:* (978) 281–9135, Attn: Comments on Recreational Omnibus Amendment, NOAA–NMFS–2013–0108.
- *Mail and Hand Delivery:* John K. Bullard, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope: "Comments on Recreational Omnibus Amendment."

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Moira Kelly, Fishery Policy Analyst, (978) 281–9218; fax: (978) 281–9135.

SUPPLEMENTARY INFORMATION:

Background

In 2011, the Council adopted, and NMFS implemented, an Omnibus Annual Catch Limit (ACL) and AM Amendment to establish AMs for the commercial and recreational fisheries that catch Atlantic mackerel, butterfish, Atlantic bluefish, summer flounder, scup, black sea bass, golden tilefish, ocean quahog, and Atlantic surfclams. The AMs for the recreational fisheries included in-season closure authority for the Regional Administrator when landings were known to have reached the recreational harvest limit (RHL) and pound-for-pound payback of any overage. In 2012, the recreational black