that the Commission's rejection of the *2015 NPRM* warrants reconsideration.

For the reasons stated above, the Commission denies the Petitions filed by Sennheiser and Shure requesting reconsideration and reversal of the *Termination Order* and declines to adopt rules proposed in the *2015 NPRM* to preserve a vacant channel for use wireless microphones use.

Accordingly, *it is ordered* that, pursuant to sections 1, 4(i), 4(j), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 303(r), 405 and § 1.429 of the Commission's rules, 47 CFR 1.429, the captioned Petitions for Reconsideration *are denied*, for the reasons discussed herein.

It is further ordered that, should no petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 15–146 *shall be terminated* and the docket closed.

Federal Communications Commission.

Marlene Dortch,

Secretary.

[FR Doc. 2022–13249 Filed 6–23–22; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 424

[Docket No. FWS–HQ–ES–2020–0047, FF09E23000 FXES1111090FEDR 223; Docket No. 220613–0133]

RIN 1018–BE69; 0648–BJ44

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

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

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (hereafter collectively referred to as the ''Services'' or ''we''), rescind the final rule titled ''Regulations for Listing Endangered and Threatened Species and Designating Critical Habitat'' that was published on December 16, 2020, and became effective on January 15, 2021. This rescission removes the regulatory definition of ''habitat'' established by that rule.

DATES: This final rule is effective July 25, 2022.

ADDRESSES: Public comments and materials received, as well as supporting documentation used in the preparation of this final regulation, are available online at *https://www.regulations.gov* in Docket No. FWS–HQ–ES–2020–0047.

FOR FURTHER INFORMATION CONTACT: Angela Somma, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301–427–8403; or Bridget Fahey, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703–358–2171. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

On January 20, 2021, the President issued Executive Order (E.O.) 13990, which, in section 2, required all executive departments and agencies to review Federal regulations and actions taken between January 20, 2017, and January 20, 2021. In support of E.O. 13990, a ''Fact Sheet'' was issued that set forth a non-exhaustive list of specific agency actions that agencies are required to review to determine consistency with the policy considerations articulated in section 1 of the E.O. (See *www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/*). Among the agency actions listed on the Fact Sheet was our December 16, 2020, final rule promulgating a regulatory definition for the term ''habitat'' (85 FR 81411) under the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.* (hereafter, ''the Act''). Following our review of this rule (the ''habitat definition rule''), we determined it was unclear and confusing and inconsistent with the conservation purposes of the Act, and we subsequently published a proposed rule to rescind it (86 FR 59353, October 27, 2021). We solicited public comments on the proposed rule through November 26, 2021. In response to several requests, we extended the deadline for submission of public comments to December 13, 2021 (86 FR 67013, November 24, 2021).

The December 2020 final rule defined ''habitat'' as follows: For the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species. The definition itself indicates that it applies only in the context of designating ''critical habitat,'' which is defined in section 3(5)(A) of the Act as specific areas within the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protections; and as specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

The two types of critical habitat described in this statutory definition are often referred to as ''occupied'' and ''unoccupied'' critical habitat, respectively, and for simplicity, we use those shorthand terms within this document. The Secretaries (of Commerce and the Interior) designate critical habitat for threatened and endangered species on the basis of the best scientific data available and after taking into consideration various impacts of the designation (16 U.S.C. 1533(b)(2)). Once critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that actions they authorize, fund, or carry out are not likely to destroy or adversely modify that habitat (16 U.S.C. 1536(a)(2)). Critical habitat requirements do not apply to actions on private land that do not involve the authorization or funding of a Federal agency.

On January 14, 2021, one day before the rule took effect, seven environmental groups challenged it, filing suit against the Services in Federal district court in Hawaii. Shortly thereafter on January 19, 2021, 19 States similarly filed suit challenging the habitat definition rule in the Northern District of California. Parties in both cases have agreed to long-term stipulated stays in the litigation as this rulemaking proceeds.

Following consideration of all public comments received in response to our proposed rule to rescind the habitat definition, and for reasons outlined both

in our proposed rule (86 FR 59353, October 27, 2021) and this document, we have decided to rescind the regulatory definition of ''habitat.'' We acknowledge that, in coming to this final decision to rescind the regulatory definition of ''habitat,'' we are changing our position on some aspects of the rationale underpinning the definition's adoption; accordingly, we have provided explanations for why rescission of the definition is appropriate.

Rationale for Rescission of the Habitat Definition Rule

As indicated in our initial proposed rule to define the term ''habitat,'' the impetus for developing the regulatory definition was the decision by the U.S. Supreme Court in *Weyerhaeuser Co.* v. *U.S.F.W.S.,* 139 S. Ct. 361, 372 (2018) (hereafter, ''*Weyerhaeuser*'') (85 FR 47333, August 5, 2020). The relevant holding in that case that prompted our rulemaking was: ''An area is eligible for designation as critical habitat under § 1533(a)(3)(A)(i) only if it is habitat for the species.'' The Court's decision in *Weyerhaeuser* did not address what should or should not qualify as habitat, nor did it require the Services to adopt a regulatory definition of ''habitat.'' Rather, the Court remanded the case to the lower court to consider whether the particular record supported a finding that the area disputed in the litigation was habitat for the particular species at issue (the dusky gopher frog). This dispute, however, was never resolved by any court. The Services subsequently adopted a regulatory definition of ''habitat,'' stating our intent was to provide transparency, clarity, and consistency for stakeholders (85 FR 81411, December 16, 2020). We have reconsidered the habitat definition rule and considered public comments, and we now conclude that codifying a single definition in regulation could impede the Services' ability to fulfill their obligations to designate critical habitat based on the best scientific data available. For reasons further outlined below, we find that it is instead more appropriate, more consistent with the purposes of the Act, and more transparent to the public to determine what areas qualify as habitat for a given species on a case-by-case basis using the best scientific data available for the particular species.

First and most problematically, the definition and statements made in the December 2020 final rule are in tension with the conservation purposes of the Act because they could inappropriately constrain the Services' ability to designate areas that meet the definition of ''critical habitat'' under the Act. As indicated by the plain text of the Act and as supported by extensive case law, critical habitat is defined to include areas that are essential to the recovery of listed species; critical habitat is not limited to areas that merely support the survival of the species (*Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Serv.,* 378 F.3d 1059, 1070 (9th Cir. 2004); *Sierra Club* v. *U.S. Fish and Wildlife Serv.,* 245 F.3d 434, 442 (5th Cir. 2001); *Center for Biological Diversity* v. *Kelly,* 93 F. Supp. 3d 1193, 1201 (D. Idaho 2015)). In order to fulfill the intended objective of critical habitat, the Services should be able to designate unoccupied areas as critical habitat if those areas fit within any reasonable biological understanding of ''habitat'' as established by the best available scientific data for a particular species, and if such areas are essential for the recovery of the species. However, the ''habitat'' definition rule did not afford the Services this ability in all cases. The preamble to the final rule stated that the ''habitat'' definition excludes areas that do not currently or periodically contain the requisite resources and conditions, even if such areas could meet this requirement in the future ''after restoration activities or other changes occur'' (85 FR 81411, p. 81413, December 16, 2020). Thus, the ''habitat'' definition rule eliminated from possible designation as critical habitat any area that does not ''currently or periodically'' contain something deemed a necessary ''resource or condition'' even though it would do so as a result of natural transition following a disturbance (*e.g.* fire or flood), in response to climate change, or after reasonable restoration. Because most species are faced with extinction as a result of habitat degradation and loss, it is more consistent with the purposes of the Act to avoid limiting the Services' ability to designate critical habitat to protect the habitats of listed species and support their recovery.

While we acknowledge that we can revise critical habitat designations after resources and conditions change (*e.g.,* the area is restored or naturally improves), Congress required the Services to identify unoccupied areas that are ''essential for the conservation'' of the species based on the best available scientific data when designating critical habitat (16 U.S.C. 1533(b)(2)). Identifying those areas by applying the best available science for the given species and its habitat, rather than delaying until an arbitrary point in time when conditions that are not required under the Act's definition are realized, better fulfills the conservation purposes of the Act, and ensures that important areas of habitat are protected from destruction or adverse modification. In other words, we find that a better reading of the Act, consistent with the statutory mandate to apply the best available science, is that an area should not be precluded from qualifying as habitat because some reasonable restoration or alteration, whether through reasonable human intervention or natural processes, is necessary for it to support a species' recovery. Rather, we find that relying on the best available scientific data, including species-specific ecological information, is the best way to determine whether areas constitute habitat and may meet the definition of ''critical habitat'' for a species. We note that this key concern with the ''habitat'' definition regarding its excessive constraint on the Services' ability to designate critical habitat under the Act cannot be remedied by issuing guidance on how to interpret the regulatory definition. Because a regulation is binding, we cannot remedy a problematic regulation through issuance of guidance. Further, interpretive guidance could not cure the statutory tension we have identified between the ''habitat'' definition and the conservation purposes and mandates of the Act.

Secondly, the habitat definition rule is not clear and thus does not achieve the ambitious goals of providing transparency and reproducibility of outcome. Application of the habitat definition fundamentally relies on subjective interpretations with respect to which areas would or would not qualify as habitat and, therefore, would or would not be eligible for designation as critical habitat under the Act. This conundrum would not be resolved by simply revising the current definition or resorting to another available definition. As we stated in the proposed rule to rescind the definition, prior to adopting the definition, we reviewed and considered many definitions, both from the ecological literature (*e.g.,* Odum 1971, Kearney 2006) and from numerous public comments. The resulting definition was one that neither stemmed from the scientific literature nor had a clear relationship to the statutory definition of ''critical habitat.'' Instead, in order to codify a sufficiently generalized definition that would cover a wide array of species' habitat requirements and simultaneously satisfy the underlying need to encompass unoccupied critical habitat as defined under the Act, the definition relied on

overly vague terminology. Its terms were neither clear nor sufficiently informative to allow for any conclusions to be reached about whether a particular area would be considered habitat for a particular species. This outcome would also inescapably be the case for any regulatory definition of the term ''habitat,'' which would need to be rather generic in order to encompass the wide range of species the Services must manage. Such a definition would have little to no practical value within the context of designating critical habitat, which is a specific subset of a species' habitat.

Although unintended at the time the definition was finalized, we used terminology that is unclear, has no established meaning in the statute or our prior regulations or practices (*e.g.,* ''abiotic and biotic setting'' and ''resources and conditions necessary to support''), and unavoidably competes with elements of the statutory definition of critical habitat (*e.g.,* ''physical or biological features essential to the conservation''). It is unclear, for example, how ''resources and conditions'' would be distinguished from the ''physical and biological features'' referenced in the statutory definition of ''critical habitat.'' Unlike terminology within the statutory definition of ''critical habitat'' (*e.g.,* ''geographical area occupied by the species'' and ''physical and biological features essential to the conservation of the species'') for which interpretations have been established through extensive practical application and implementing regulations (see 50 CFR 424.02), terminology in the ''habitat'' definition has no clearly established meanings or interpretations.

Because the terms have no clearly established meanings in either the scientific or legal contexts, they would be subject to various interpretations that could not be resolved simply by referring to the explanations that were included in the preamble of the final rule for the definition. For instance, it remains unclear how an area would be judged as containing or not containing all of the ''resources and conditions'' that are ''necessary to support'' a life process of the species, and how application of that terminology would be affected by how much is known about a given species. Knowing that a species occurs in a particular type of habitat does not necessarily equate to there being a scientific understanding of what resources and conditions in that area support a particular life process of that species. Given these ambiguities, we conclude that, despite our efforts to promulgate a definition that was both sufficiently broad and clear, the resulting definition is inadequate to achieve clarity or any practical value in assisting the Services or the public in better understanding what specific areas constitute habitat for a given species. This lack of clarity is also reflected in the public comments received that raised similar concerns, or suggested revisions or alternative definitions, as well as those that expressed opposing assertions that the definition was either too vague or too narrow. Furthermore, as stated above, interpretive guidance to address the lack of clarity would not remedy our primary concern with the ''habitat'' definition as outlined earlier (*i.e.,* that it inappropriately constrains the Services' ability to designate critical habitat under the Act),

In addition, the lack of clarity and potential for confusion extend to how the Services would use, or be required to use, the ''habitat'' definition. As we indicated when we adopted the ''habitat'' definition, by adding this definition to the Code of Federal Regulations, we did not intend to create an additional step in the process of designating critical habitat for all species (85 FR 81411, December 16, 2020). Rather, our intent was that this definition would act as a regulatory standard that primarily would be relevant in a limited set of cases where questions arose as to whether any of the unoccupied areas that we are considering designating as critical habitat qualify as habitat (85 FR 81411, p. 81414, December 16, 2020). (Such questions do not arise for the large majority of critical habitat designations, because most designations involve only ''occupied'' critical habitats, which are inherently ''habitat'' for that species.)

However, based on comments received in response to the proposal to rescind the habitat rule, it appears that this intention was either misinterpreted or considered incorrect. Some commenters appear to expect that, with the habitat rule in place, the Services would need to apply and document consideration of the regulatory definition in all instances when undertaking critical habitat designations, whether the areas were occupied by the listed species or not. Thus, and as we stated in our proposed rule to rescind the definition, we find that the approach of codifying a regulatory definition of ''habitat'' that was not intended to have a practical effect in the majority of designations in the course of designating critical habitat is inherently confusing (86 FR 59353, October 27, 2021). Rescinding the rule will eliminate this confusion and prevent the potential evolution of an additional, unnecessary procedural step that would likely only impede and complicate the Services' ability to fulfill their responsibilities under the Act to designate critical habitat.

Having reconsidered the definition as prompted by E.O. 13990 and in light of the considerations discussed herein, we conclude that the definition is unhelpful, unnecessary, and improperly and excessively constrains the Services' authority under the statute, and it is more appropriate to evaluate and determine what areas qualify as habitat (and that may as a separate matter be potentially also critical habitat) by considering the best available science for the particular species, the statutory definition of ''critical habitat,'' our implementing regulations, and existing case law. Therefore, we are removing and not replacing the definition of ''habitat'' from 50 CFR 424.02. Nevertheless, we recognize the importance of the Supreme Court's ruling in *Weyerhaeuser* and intend to designate as critical habitat only areas that are habitat for the given listed species. We will ensure that the administrative records for particular designations include an explanation for why any unoccupied areas are habitat for the species.

Public Comments

By the close of the public comment period on December 13, 2021, we received just under 13,000 public comments on our proposed rule to rescind the regulatory definition of ''habitat.'' Comments were received from a range of sources including individual members of the public, States, Tribes, industry organizations, legal foundations and firms, and environmental organizations. The vast majority of the comments received (~12,400) were nearly identical statements from individuals indicating their general support for rescission of the rule but not containing substantive content. During the public comment period, we received a request for public hearings. However, public hearings are not required for regulations of this type and we elected not to hold public hearings.

All public comments were reviewed and considered prior to developing this final rule. Summaries of substantive comments and our responses are provided below. Similar comments are combined where appropriate. We did not, however, consider or respond to comments that are not relevant to and are beyond the scope of this particular rulemaking. For example, we did not discuss and respond to comments regarding the FWS' proposed rule to

rescind regulations regarding section 4(b)(2) of the Act (see 86 FR 59346, October 27, 2021), previous versions of the Services' regulations in 50 CFR part 424, consistency of potential future land use actions by the FWS with State management plans, consultations between FWS and State management agencies, or general concerns regarding State versus Federal control as it relates to implementation of the Act (*e.g.,* listing species and designating critical habitat).

Comment 1: Numerous commenters stated they supported the proposal to rescind the habitat definition rule. Commenters stated the habitat definition rule should be rescinded because it is unnecessary, creates confusion, and could lead to absurd outcomes by excluding degraded habitats or habitats not yet occupied by the species from designation as critical habitat. Some commenters also stated that the habitat definition rule could hinder the Services from designating ephemeral habitats or areas where the precise resources and conditions are not well understood. Other commenters stated that the habitat definition rule violates the conservation purposes of the Act, was arbitrary and capricious under the Administrative Procedure Act, and its issuance violated the National Environmental Policy Act.

Response: As discussed more fully above, we share many of these concerns; as a result, we are rescinding the habitat definition rule.

Comment 2: Some commenters asserted that rescinding the habitat regulation will result in longer timelines and more litigation on critical habitat designations. Such delays would in turn lead to delays in Federal permitting and increased costs for infrastructure and other projects.

Response: The Services disagree that rescinding the habitat regulation will increase litigation, extend timelines for designating critical habitat, delay Federal permitting, or increase costs for projects. The Services note there is already ongoing litigation on the existing regulation's definition of ''habitat'' and, because the definition is highly controversial, its application in any future critical habitat designations would likely generate additional litigation and potential delays. Basing critical habitat designations on the best available scientific data as determined on a case-by-case basis will likely result in less litigation than designating critical habitat by applying a regulatory definition that is in tension with the Act's definition of ''conservation'' and inappropriately constrains the Services' ability to designate critical habitat.

Comment 3: Several commenters asserted that rescinding this regulation will affect the reliance interests of those who rely on this regulation now, and the rescission will be disruptive and result in added costs. One commenter, however, stated that rescission of the habitat rule would not impose any undue hardship because they were unaware of any reliance interests on the current definition and because previous interpretations of critical habitat were well understood.

Response: This regulation became effective on January 15, 2021. On January 20, 2021, the President issued E.O. 13990 and an associated Fact Sheet with a non-exhaustive list of agency actions, directing the Services to review the habitat rule and other regulations. The Services publicly announced on June 4, 2021, that they would propose to rescind the habitat definition rule. In the proposal to rescind the rule, the Services did not identify any affected reliance interests (*i.e.,* instances of a third party making a decision in reliance on application of the definition) because they were unaware that any existed, especially due to the rule's limited practical applicability and the limited time it has been in effect. Although several commenters expressed the possibility that there may have been reliance on the definition of ''habitat,'' none provided any specific examples of actual reliance, nor did any articulate why such reliance would have been reasonable given the limited time that elapsed between the rule's effective date and when it was identified for reconsideration. The regulatory definition has been in place for a relatively short time and has a potential bearing only on unoccupied areas. (As we explained in the final rule establishing the habitat definition, if an area is occupied by the species and meets the statutory definition for ''occupied'' critical habitat (which includes, notably, a requirement that physical or biological features essential to the conservation of the species be present), then as a matter of logic and rational inference, the area must also be habitat for the species (85 FR 81411, December 16, 2020).) Most of the Services' designations do not involve ''unoccupied'' critical habitat. As a result, the regulatory habitat definition has been relevant to only a small number of designations and was not determinative in the areas identified as critical habitat in those designations. Therefore, we have no basis to conclude that rescinding this definition and relying on the best available scientific data on a case-by-case basis will affect any reliance interests.

Comment 4: Some commenters stated the lack of a definition for ''habitat'' will place an increased burden on Service employees who will have to make independent assessments about habitat for each critical habitat designation. These commenters stated that those drafting critical habitat designations will now be required to demonstrate not only that the proposed designation of critical habitat meets the statutory definition of critical habitat, but also that the rule ensures that independent meaning is given to the term ''habitat,'' and that such meaning is consistent with the Act. The commenters asserted that this consideration is a heavy and inappropriate burden to place on an employee.

Response: Removing the regulatory definition of ''habitat'' will not place an increased burden on employees when designating critical habitat. The Services must make an independent assessment of areas occupied by the species as well as unoccupied areas that are essential for that species' conservation when we designate critical habitat regardless of whether ''habitat'' is defined in regulation. In addition, as noted in the final rule promulgating the definition, areas are inherently considered habitat for the species if they are occupied by the species and also meet the definitional elements of ''critical habitat'' provided in the statute. Although the Services agree that all critical habitat must be habitat, in practice, the regulatory definition would be relevant only in determining whether unoccupied areas that are essential for the conservation of the species constitute habitat for the species.

Comment 5: Several commenters expressed concerns about regulatory takings should the habitat definition rule be rescinded. These comments asserted that determinations that private lands are habitat, and more consequentially critical habitat, place onerous restrictions on those lands or result in the Services withholding permits to develop the land, and that rescinding the habitat definition rule would increase those uncompensated, unlawful regulatory takings exponentially. In particular, these commenters were concerned that rescinding the definition would allow the Services to designate critical habitat where the species could not currently survive and place the burden of restoring the area on the private landowner. Commenters stated that, consistent with case law addressing the Fifth Amendment's Takings Clause (*e.g., Nollan* v. *California Coastal*

Commission, 483 U.S. 825 (1987); *Dolan* v. *City of Tigard,* 512 U.S. 374 (1994); and *Koontz* v. *St. Johns River Water Management District,* 570 U.S. 595 (2013)), the Federal Government cannot impose conditions on land use permits that require the private landowner to mitigate adverse effects on the habitat where the necessary habitat features are lacking, and that retaining the habitat definition would help ensure avoidance of such Takings Clause violations.

Response: The rescission of the regulatory definition of ''habitat'' will not allow for unlawful takings by the Services as described by the commenters. In making future critical habitat designations, the Services will adhere to the Supreme Court's ruling in *Weyerhaeuser* that an area may be designated as critical habitat only if it is habitat for that species. The requirement to avoid the destruction or adverse modification of critical habitat applies to actions on private land only when they involve Federal authorization or Federal funding. Where an action does implicate authorization or funding by a Federal agency, any resulting section 7 consultation under the Act on the designated critical habitat would then consider the effects of the particular proposed action (*e.g.,* issuance of a land-use-related permit) to ensure the critical habitat is not likely to be destroyed or adversely modified by the action. Even a finding that the action was likely to destroy or adversely modify the critical habitat would not result in an unlawful taking, because that finding would not require the Federal action agency or the landowner to restore the critical habitat or recover the species, but rather to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat. Rather than imposing an affirmative requirement that Federal actions improve critical habitat, section 7(a)(2) prohibits Federal actions from reducing the critical habitat's existing capacity to conserve the species (Final Rule Establishing Definition of ''Destruction or Adverse Modification'' of Critical Habitat, 81 FR 7214, p. 7224, February 11, 2016; extending to the adverse-modification analysis the conclusion in *Nat'l Wildlife Fed'n* v. *National Marine Fisheries Service,* 524 F.3d 917, 930 (9th Cir. 2007), that agency action can only violate section 7(a)(2) of the Act ''if that agency action causes some deterioration in the species' pre-action condition''). In other words, the requirement for Federal agencies to ensure their actions are not likely to result in destruction or adverse modification of critical habitat is a prohibitory standard only; it does not mandate affirmative restoration of habitat.

Comment 6: Multiple commenters stated that rescinding the regulatory definition of ''habitat'' will undermine conservation, particularly in areas that currently lack the necessary resources and conditions to support the particular listed species. These commenters were concerned that rescission of the habitat definition will discourage habitat restoration or even create a perverse incentive for private landowners to make their land less hospitable for listed species in an effort to avoid the economic impacts due to the stigma effect associated with critical habitat designation. Commenters also stated that rescinding the habitat definition will increase the fears of private landowners that their land could be deemed habitat and designated as critical habitat, and as a result these landowners would be less likely to cooperate in conservation efforts or allow access for surveys and studies that could benefit recovery planning. Commenters noted that critical habitat is not a good tool for encouraging landowners to create habitat features and that non-regulatory approaches to habitat conservation would provide a greater benefit to listed species.

Response: Commenters have provided no basis upon which the Services could conclude that the act of rescinding the regulatory definition of ''habitat'' will discourage conservation or create a new, ''perverse'' incentive for landowners to modify their land in order to make it less hospitable for listed species. In the absence of the regulatory habitat definition, we will still be required to designate critical habitat based on the best scientific data available and after taking into consideration the economic, national security, and other relevant impacts of designating any particular area as critical habitat. Pursuant to the joint Policy Regarding Implementation of Section 4(b)(2) of the ESA (''Section 4(b)(2) Policy,'' 81 FR 7226, February 11, 2016), we will consider areas covered by conservation agreements or plans when assessing the benefits of including and excluding particular areas from a designation. In particular, the Services consider whether such conservation plans are already providing on-the-ground conservation that would reduce the benefit of designating the same area as critical habitat. Our approach of excluding from designations of critical habitat areas that are subject to voluntary conservation agreements and plans will continue to provide a substantial incentive to private landowners. Rescinding the habitat definition will in no way alter this process or how conservation plans and agreements affecting private lands are weighed when assessing the benefits of designating an area as critical habitat.

To the extent that any ''perverse incentives'' may exist with regard to modifying habitat conditions on private lands, it has been the Services' experience that these attitudes persist regardless of any specific regulation. Discussion in the final habitat definition rule implied that an area would qualify as habitat only if the area, without any restoration, currently has all of the requisite resources and conditions necessary to support the species (85 FR 81411, p. 81413, December 16, 2020). Thus, the Services find that with the habitat rule in place, it is equally, and likely more, plausible that the actions suggested in the comments would occur to prevent the particular area from becoming suitable habitat for a particular listed species and thereby eligible for designation as critical habitat. We also note that some of the cases cited by the commenters demonstrate that deliberate modification of areas to make private property less hospitable to listed species has sometimes occurred previously in response to species' listings under the Act—and not directly in response to, or in potential avoidance of, a critical habitat designation. Rescinding the regulatory definition of ''habitat'' has no effect on whether species are listed under the Act and therefore unlikely to have an effect on any such behaviors and attitudes.

Lastly, we emphasize that, in undertaking critical habitat designations, the Services will proceed in light of the Supreme Court's ruling in *Weyerhaeuser* that ''[s]ection 4(a)(3)(A)(i) does not authorize the Secretary to designate [an] area as critical habitat unless it is also habitat for the species'' (139 S. Ct. at 368). Rescinding the regulatory definition of ''habitat'' does not undermine this holding or the requirement that the Services adhere to it.

Comment 7: A commenter asserted that continuing to rely on the concept of habitat as reflected in the regulatory definition would improve communication with scientists and nonscientists, thereby benefiting conservation efforts. The commenter suggested that rescinding the definition would allow for other interpretations of ''habitat'' and that those other interpretations could allow for increased miscommunication, misinterpretation of scientific findings, limited comparability among studies, and inefficient use of conservation resources.

Response: The regulatory definition of ''habitat,'' which only applied to the designation of critical habitat, had no bearing on the comparability of studies or communication of scientific findings, nor did it prohibit the use or development of other definitions of the term ''habitat.'' Rescinding this rule will therefore not alter or exacerbate those issues where they may exist. Rescinding this rule may also allow the Services to better prioritize their limited conservation resources by removing an inappropriate limitation on their ability to designate as critical habitat, and therefore bring attention to, areas that are essential for the conservation and recovery of threatened and endangered species.

Comment 8: Several commenters said the rescission of the definition of ''habitat'' will increase regulatory uncertainty for landowners, stakeholders, and the public and would undermine the transparency, clarity, and consistency the definition provides. Some commenters noted that their industries need clarity and consistency in the application of the Act to be able to forecast the costs and timing of projects and expressed concern that, without a definition, the Services will return to designating critical habitat in an arbitrary or inconsistent way. One commenter asserted that a definition of ''habitat'' is necessary to inform the designation of critical habitat. Other commenters supported the rescission because doing so would eliminate confusion and uncertainty regarding critical habitat designations, as the definition is not consistent with the Services' past practice.

Response: Rescission of the definition of ''habitat'' will not increase regulatory uncertainty or undermine the transparency, clarity, and consistency of the critical habitat designation process. As discussed previously, the definition is in tension with the statutory definition of ''critical habitat,'' and is vague and confusing, such that interested landowners would not be able under the definition to confidently conclude whether any particular area would be considered ''habitat.'' Furthermore, applying the 2020 definition would leave future critical habitat designations open to continual challenge because that definition is in tension with the statute and inappropriately constrains our ability to designate as ''critical habitat''—thus creating greater regulatory uncertainty. In addition, as discussed previously, the habitat definition rule is not clear and thus does not achieve the intended goals of providing transparency and reproducibility of outcome. Application of the habitat definition would fundamentally rely on subjective interpretations with respect to which areas would or would not qualify as habitat and, therefore, would or would not be eligible for designation as critical habitat under the Act. Given the complexity and variety of factual information pertaining to each individual species that the Services must consider, it is not possible for perfect predictability in determining what areas constitute habitat. We do not agree that implementing a case-by-case approach will result in inconsistent application of the statutory definition of critical habitat. Our critical habitat designations are governed by the requirements of the Act, our regulations, the best scientific data available, and applicable court decisions, which results in substantial consistency in approach and application.

Comment 9: One commenter noted they agreed that the habitat needs for a specific species should be determined on a case-by-case basis but disagreed that a regulatory definition of ''habitat'' constrains the Services from making such determinations. They also said the Services should codify a straightforward and consistent process for defining the habitat needs for individual species.

Response: As a result of our review of the habitat definition rule, we determined there are significant shortcomings with its definition of ''habitat,'' as well as, more broadly, fatal flaws inherent in the approach of attempting to devise any single regulatory definition that would apply to all species. As we outlined in detail in the preceding ''Rationale for Rescission of the Habitat Definition Rule'' section of this document, we conclude that the definition is unhelpful, unnecessary, and improperly constrains the Services' authority under the statute, and it is more appropriate to evaluate and determine what areas qualify as habitat and potentially also as critical habitat by considering the best available science for the particular species, the statutory definition of ''critical habitat,'' our implementing regulations, and existing case law. In addition, any definition that would satisfy the underlying requirement that it encompass unoccupied critical habitat as defined under the Act, would need to be overly general and non-specific such that it would provide no added clarity, transparency, or regulatory certainty as to how particular areas would be understood in relation to particular species. Determinations of whether a particular area is habitat for a particular species must be tailored to consideration of the particular species' needs and how they interact with their environments, issues which vary tremendously across species and are not subject to meaningful generalization. As a result of the series of issues we have identified, we have concluded it is appropriate to rescind and not replace the definition. With regard to codifying a process for defining the habitat needs of species, our regulations at 50 CFR 424.12(b) specify a straightforward and consistent process by which we identify specific areas to be designated as critical habitat, including identification of those features of the habitat that are essential to the conservation of the species.

Comment 10: Multiple commenters expressed concern that, without the ''habitat'' definition, the Services will have carte blanche to decide what qualifies as habitat and is thus eligible for designation as critical habitat. Commenters also expressed concern that rescission of the ''habitat'' definition will lead to increased designation of unoccupied critical habitat. Some commenters asserted that the Services would return to previous practices that, in the commenters' view, ''over-designated'' areas and applied the Act's definition of ''critical habitat'' under the premise that any area that meets that definition must also be habitat.

Response: Rescinding the ''habitat'' definition does not grant the Services carte blanche to designate any area as critical habitat, nor does it alter our authorities for designating critical habitat. We will continue to adhere to the Supreme Court's ruling in *Weyerhaeuser* that any area that is designated as critical habitat must also be habitat. All designations must conform to the requirements and standards of the Act, our regulations, and applicable case law, and are reviewable by courts if challenged. We will continue to comply with the Act, which states in section 3(5)(C) that, except in circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species. We will also continue to comply with the other applicable statutory and regulatory requirements that govern how the Services may designate occupied and unoccupied critical habitat, including the requirements of section 4(b)(2) of the Act to base designations on the best scientific data available and after taking into account the impacts of designating any particular area (16 U.S.C. 1533(b)(2)).

Comment 11: Several commenters asserted that to be consistent with the Supreme Court's decision in

Weyerhaeuser it is necessary to have a definition of ''habitat'' that establishes that an area cannot be considered habitat if the species cannot survive there. Commenters asserted that returning to ''case-by-case'' determinations disregards this requirement.

Response: Rescinding this regulatory definition is not inconsistent with the Supreme Court's decision in *Weyerhaeuser.* As we noted previously in both the 2020 final rule (85 FR 81411, December 16, 2020) as well as in the proposed rule to rescind the ''habitat'' definition rule (86 FR 59353, October 27, 2021), the Court's decision did not require that the Services adopt a regulatory definition for ''habitat.'' Rather, the Court remanded the case to the lower court to consider whether the particular record supported a finding that the unoccupied area disputed in the litigation was habitat for the particular species at issue (the dusky gopher frog). The Court did not address what conditions may be necessary for an area to be considered habitat, nor did it state that an area can be considered habitat only if the species can survive there. Although the Services initially, if somewhat reflexively, concluded that the best response to the Supreme Court decision was to craft a new layer of regulation, we now conclude that that extra layer of regulation was not in fact a helpful response. The Services have concluded that we can adequately address, on a case-by-case basis and on the basis of the best scientific data available, any concerns that may arise in future designations as to whether unoccupied areas are habitat for a particular species. The administrative record for each designation will carefully document how the designated areas are in fact habitat for the particular species at issue, using the best available scientific information and explaining the needs of that species.

Comment 12: Multiple commenters stated their views that, to qualify as habitat, areas must be habitable or capable of sustaining the species in its present condition. Commenters asserted that this interpretation is consistent with the present tense language used by Congress to describe critical habitat in sections 3 and 4 of the Act and with the Supreme Court's use of the present tense in its ruling in the *Weyerhaeuser* case. Commenters also asserted that areas in need of restoration in order to support the species or be occupied by the species cannot be considered habitat for that species, and some asserted that the Act, as supported by *Weyerhaeuser,* prohibits designation of areas that cannot presently support the species. The commenters stated that rescission of the habitat definition rule indicates an intention by the Services to consider such areas as habitat and an intention to designate them as critical habitat or return to the previous practice of designating critical habitat where habitat did not exist.

Response: The Act defines two types of critical habitat—areas ''within the geographical area occupied by the species'' and areas ''outside the geographical area occupied by the species (16 U.S.C. 1532(5)(A)). Areas that are ''within the geographical area occupied'' at the time the species is listed under the Act are assessed under the first prong of the statutory definition of critical habitat, provided in section 3(5)(A)(i)—that is, the areas must be ones ''on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection'' (16 U.S.C. 1532(5)(A)(i)). Implicit within this text is that the appropriate timeframe for assessing whether physical or biological features ''are found'' is, in fact, the time of designation. This approach is consistent with the Services' longstanding interpretation and application of this statutory definition of ''occupied'' critical habitat and is also reflected in the Services' joint implementing regulations in 50 CFR 424.12(b)(1)(iii).

Areas that are ''outside the geographical area occupied'' by the species when it is listed under the Act are assessed under the prong of the statutory definition provided in section 3(5)(A)(ii)—that is, only areas that ''are essential for the conservation of the species'' qualify for designation (16 U.S.C. 1532(A)(ii)). Again, implicit within this text is the concept that the appropriate timeframe for assessing whether an area is essential for conservation is the time of designation. (We note, however, that the Act does not compel the Services to know specifically *when* a species will be ''conserved'' as a result of the designation of unoccupied critical habitat.) This approach, too, is consistent with the Services' longstanding interpretation and application of this statutory definition of ''unoccupied'' critical habitat. That a specific unoccupied area may remain inaccessible to the listed species, or may require some form of natural recovery or reasonable restoration in order to support the listed species over the long term, does not preclude a finding that the area is presently habitat or that the area is ''essential for the conservation'' of that species if the record of evidence regarding that species' needs and the resources available to it, such as limited availability of other habitat, supports such a conclusion at the time of designation.

As explained previously in our response to Comment 11, in contrast to assertions made in some of the comments, the Supreme Court in *Weyerhaeuser* did not reach any holding on the matter of whether an area must be capable of supporting the species in its present condition in order to qualify as habitat. Instead, it remanded the case to the Court of Appeals to consider whether the particular record supported a finding that the area disputed in the litigation was habitat for the particular species at issue (the dusky gopher frog). The *Weyerhaeuser* ruling also did not establish any prohibition on designating areas as critical habitat if those areas may require some reasonable restoration in order to become accessible, habitable, or capable of supporting the species.

As indicated previously, we recognize the Supreme Court's holding in *Weyerhaeuser* that any area that is designated as critical habitat must also be habitat. Rescinding the regulatory definition of ''habitat'' does not alter the need for the Services to undertake future critical habitat designations in light of that ruling.

Comment 13: A commenter stated that, without a regulatory definition of ''habitat,'' there would not be any meaningful standards for judicial review of the Services' exercise of discretion in a particular critical habitat designation decision, undermining the Supreme Court's holding in *Weyerhaeuser* that the Services' decisions not to exclude areas from critical habitat designations are reviewable under the Administrative Procedure Act.

Response: Although not stated explicitly or elaborated upon further in the comment, we interpret this comment to refer to the discretion the Secretary has under section 4(b)(2) of the Act to exclude particular areas from a designation provided the benefits of the exclusion outweigh the benefits of designation and provided that failure to designate the area will not result in the extinction of the species concerned (16 U.S.C. 1533(b)(2)). In *Weyerhaeuser,* the Supreme Court determined the Secretary's decision not to exclude an area from critical habitat under section 4(b)(2) of the Act is subject to judicial review. Under section 4(b)(2) of the Act, the Secretary is required to take into consideration economic and other impacts before designating any particular areas as critical habitat. The Secretary may exclude any area from critical habitat if she determines the

benefits of such exclusion outweigh the benefits of designation. A regulatory definition of ''habitat'' is irrelevant to the process of weighing these benefits and would not facilitate judicial review of the exercise of the Services' discretion in determining whether to exclude a particular area from designation under section 4(b)(2) of the Act.

Comment 14: Several commenters noted that the Supreme Court did not limit its holding in *Weyerhaeuser* to unoccupied areas, and that the prerequisite for an area to be habitat before it is designated as critical habitat applies irrespective of whether the area is occupied or unoccupied. Thus, any area must be habitat for the species in order for it to be eligible for designation as critical habitat regardless of whether it is occupied or unoccupied.

Response: We recognize that the Supreme Court's holding in *Weyerhaeuser* that any area designated as critical habitat must also be habitat was not limited to areas that are unoccupied by the species. As we explained in our final rule defining ''habitat,'' if an area is occupied by the species and meets the statutory definition of ''critical habitat,'' then as a matter of logic and rational inference, the area must also be habitat for the species (85 FR 81411, December 16, 2020). Thus, the definition of ''habitat'' would have a practical bearing only in cases where an area was unoccupied, and even among unoccupied areas only in the subset of cases where ''genuine questions'' might exist as to whether areas are habitat for a species (85 FR 81411, p. 81414, December 16, 2020). In all instances, however, the area must be habitat before it can be designated as critical habitat. Rescinding the regulatory definition does not affect that requirement.

Comment 15: Several commenters noted that the Supreme Court also found in *Weyerhaeuser* that even if an area otherwise meets the statutory definition of unoccupied critical habitat because the Secretary finds the area essential for the conservation of the species, section 4(a)(3)(A)(i) of the Act does not authorize the Secretary to designate the area as critical habitat unless it is also habitat for the species.

Response: As noted in prior responses, we acknowledge the Supreme Court's holding in *Weyerhaeuser* that any area must be habitat in order to be designated as critical habitat—whether the area is occupied by the species or not. We do not intend to designate any unoccupied area as critical habitat unless it is habitat for the species, nor have we indicated any such intention. We recognize that a finding that an area is ''essential for the conservation of the species'' is not a substitute for evidence that a particular area qualifies as habitat.

Comment 16: Some commenters asserted that the Services have incorrectly interpreted critical habitat as habitat necessary for the recovery of the species. These commenters stated that the broad definition of ''conservation'' in the Act does not allow for a broad interpretation of ''critical habitat'' or justify any action the Services want to take. Instead, the commenters asserted, Congress intended for critical habitat to have a limited role under the Act, and designations of critical habitat should be limited to what is needed to ensure the survival of the species.

Response: It is clear from the plain text of the Act that the purpose of critical habitat is to identify the areas that are essential to the recovery of listed species. The Act defines ''critical habitat'' in terms of its relationship to the species' ''conservation:'' Stated generally, ''critical habitat,'' as defined in section 3, includes areas and habitat features that are *essential for the conservation* of the listed species (16 U.S.C. 1532(5)(A), emphasis added). Section 3 of the Act in turn defines ''conservation'' as: ''To use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary; such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation'' (16 U.S.C. 1532(3), defining ''conserve,'' ''conserving,'' and ''conservation''). The point at which measures provided pursuant to the Act are no longer necessary is the point at which a listed species has been recovered and should be removed from the lists of threatened and endangered species (see also 50 CFR 424.02). Therefore, the plain text of the critical habitat definition in the Act indicates that critical habitat includes not just areas essential to support the continued survival of the species, but also areas that are essential to the recovery of threatened and endangered species.

Courts have also interpreted the Act's definition of ''critical habitat'' broadly to include areas that provide for the recovery of listed species. See *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Serv.,* 378 F.3d 1059, 1070 (9th Cir. 2004) (''Clearly, then, the purpose of establishing 'critical habitat' is for the government to carve out territory that is not only necessary for the species' survival but also essential for the species' recovery.''); *Sierra Club* v. *U.S. Fish and Wildlife Serv.,* 245 F.3d 434, 442 (5th Cir. 2001) (noting that the Act's definition of ''critical habitat'' ''is grounded in the concept of conservation' ''); *Center for Biological Diversity* v. *Kelly,* 93 F. Supp. 3d 1193, 1201 (D. Idaho 2015) (noting that critical habitat is ''defined and designated 'in relation to areas necessary for the conservation of the species, not merely to ensure its survival' '') (quoting *Arizona Cattle Growers' Ass'n* v. *Salazar,* 606 F.3d 1160, 1166 (9th Cir. 2010)). The Ninth Circuit also has recognized that ''it is logical and inevitable that a species requires more critical habitat for recovery than is necessary for the species' survival,'' which necessarily must include potentially suitable habitat areas that the species formerly occupied or may potentially occupy in the future. *Gifford Pinchot Task Force,* 378 F.3d at 1069.

The commenters have pointed to no legislative history specifically addressing the intended meaning or scope of ''habitat,'' as used in section 4(a)(3)(A)(i) of the Act, that is distinct from the term ''critical habitat.'' Legislative history on the meaning of ''critical habitat'' is not directly relevant here and does not help us discern any intended meaning of ''habitat''; therefore, we do not address that history here.

We acknowledge, however, that critical habitat designation alone is not necessarily sufficient to ensure the recovery of listed species. Critical habitat has a specific, limited regulatory role under the Act: It creates a requirement for Federal agencies to ensure that any actions they authorize, fund, or carry out are not likely to destroy or adversely modify designated critical habitat. Beyond this direct regulatory role, critical habitat can also contribute to the conservation of listed species in other ways. Critical habitat can facilitate 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 conservation purposes of the Act. In the absence of a recovery plan, critical habitat can provide a form of early conservation-planning guidance for the Services (*e.g.,* by identifying some of the areas that are needed for recovery, the physical and biological features needed for the species' life history, and special management considerations or protections), and it can also help focus

the conservation efforts of other conservation partners.

The Services do not rely on an assertion of an overly broad meaning for ''conservation'' to justify actions that are not otherwise authorized under the Act. In fulfilling their responsibilities under the Act, the Services undertake conservation actions that align with the statute's definition of ''conservation'' and also adhere to the many requirements outlined in the Act, implementing regulations in 50 CFR part 424, and formal policies.

Comment 17: Several commenters stated that the regulatory definition of ''habitat'' has not been in place long enough for the Services to determine its benefits, nor have the Services put sufficient effort into implementing the regulation. They argued that the Services could consider whether revisions to the definition may be necessary after a reasonable amount of time.

Response: Following a review of the regulatory definition of ''habitat,'' the Services have found the definition and the preamble of that final rule inappropriately constrain the Services' ability to designate areas that meet the definition of ''critical habitat'' under the Act and thus undermine the conservation purposes of the Act. In light of this shortcoming, as well as our finding that the definition cannot achieve its intended goals of providing transparency, clarity, and consistency, we have determined it is appropriate to rescind this definition. Because these shortcomings cannot be addressed by putting further effort into implementing the definition (including through issuing interpretive guidance), we have determined that it is in the best interests of stakeholders and for the conservation purposes of the Act to minimize the time that this definition is in effect by swiftly rescinding it. Interpretive guidance cannot overcome the statutory tension the Services have identified. Furthermore, waiting and then considering possible revisions to the definition is not likely to alter our current conclusion that any regulatory definition for this term would necessarily be too generic to provide any meaningful guidance to the Services or the public in terms of delineating what areas qualify as habitat for a given species. As we stated previously, the best approach for determining what areas are habitat for a listed species is to rely on the best available scientific data for that species, provide a thorough accounting of the information used, and subject that determination to peer and public comment during the course of a critical habitat rulemaking.

Comment 18: Multiple commenters requested that the Services revise the definition of ''habitat'' rather than rescind it. Commenters stated that, if the Services consider the definition to be vague or unclear, they are required to consider alternatives to complete revocation, and the definition should be revised to address those problems, rather than rescinded. Many commenters gave suggestions on how to revise the definition, suggested alternative definitions, or requested that we reconsider the definitions they had submitted previously in response to the initial proposed rule to define the term ''habitat.'' For example, some commenters stated the definition should be revised in a manner supported by regulated entities and to clearly exclude areas that are currently unsuitable for species conservation. One commenter suggested the Services establish a process to seek stakeholder input on a definition. Other commenters stated the definition was too narrow and should be broadened, or should be more holistic, or that the definition should be revised to avoid precluding areas that will have the necessary attributes for a species due to natural processes or proactive conservation efforts.

Response: As we outlined previously (see ''Rationale for Rescission of the Habitat Definition Rule'') we decline to revise the regulatory definition of ''habitat.'' The Supreme Court did not require us to promulgate a definition in the *Weyerhaeuser* decision, and upon reconsideration, we have recognized that the regulatory definition ultimately adopted in 2020 was inconsistent with the conservation purposes of the Act and did not meet the stated policy goals of providing clarity, transparency and certainty. Furthermore, which particular areas constitute habitat for any given species depends on that species' biology and ecology, and what in turn qualifies as critical habitat under the Act is guided by the statutory definition of ''critical habitat,'' regulations in 50 CFR part 424, and existing case law. When we engage in designation of critical habitat, we conduct an exhaustive review of the relevant scientific data and information and provide a detailed and specific as possible explanation in each proposal and final critical habitat rule of the particular listed species' habitats and distribution. A generic, definition of the general term ''habitat'' would not facilitate or provide any meaningful value to this process. Thus, and as stated previously, we find that application of the best available data regarding a listed species' habitats and adhering to the statutory and regulatory requirements, as well as being guided by case law, is the best path to fulfilling our statutory responsibilities to designate critical habitat under the Act.

Moreover, we have concluded that our 2020 reaction to *Weyerhaeuser—i.e.,* promulgating a regulatory definition to attempt to address the Supreme Court's interpretation of section 4(a)(3)(A)(i) of the ESA—did not take into account the value that the existing notice-and-comment rulemaking process applicable to specific critical habitat designations provides to meet the objectives of giving stakeholders transparency, clarity, and consistency. Rather, at that time, we made an unwarranted assumption that these qualities were lacking. (*See* 85 FR 47334, August 5, 2020, (''Given this holding in the Supreme Court's opinion in *Weyerhaeuser,* we are proposing to add a regulatory definition of 'habitat.' ''); *also* 85 FR 81418, 81419, December 16, 2020, (''As we made clear in the proposed rule, the objective of this rulemaking is to 'provide transparency, clarity and consistency for stakeholders' because the *Weyerhaeuser* decision may raise questions in some instances as to whether areas of unoccupied critical habitat are 'habitat.' '')). The rulemaking process for specific critical habitat designations gives all stakeholders an opportunity to evaluate and provide input on the Services' review of relevant scientific data and information and explanation of a specific species' habitat, necessitates that the Services provide a clear rationale for why a particular critical habitat designation meets the applicable statutory and regulatory standards, and offers substantial consistency in its application to the designation of areas as critical habitat. Because we now conclude that a regulatory definition of ''habitat'' is not an appropriate policy response to the holding in *Weyerhaeuser,* rescinding the definition is preferable to revising the definition.

In making this final decision, we have also reviewed and considered the suggested alternatives to rescinding the rule, including the various alternative versions of a definition of ''habitat'' that were newly submitted and resubmitted. The same challenges that we have identified for the definition codified in 2020 (*e.g.,* ambiguity, confusion, tension with the statutory definition of ''critical habitat'') would arise in attempting to revise the definition or adopt a new definition in response to these comments, as no definition would be sufficiently broad to accommodate the habitats of diverse taxa and both occupied and unoccupied critical habitat, yet simultaneously provide clarity, transparency, and consistency in

terms of indicating which specific areas qualify as habitat for a given species. For example, most suggested definitions used terminology, such as ''essential attributes,'' ''ecological attributes,'' and ''necessary attributes,'' that would have a similarly unclear meaning and relationship to the terminology in the statutory definition of ''critical habitat.'' Some other suggested definitions and approaches, in an attempt to be simple and straightforward or more holistic, would be overly vague and too ambiguous to serve any practical purpose in identifying which areas may or may not qualify as habitat, especially where the area is unoccupied by the species (*e.g.,* ''Habitat is defined as the cumulative influences that act upon, and/or are acted upon by, a living organism''; and ''The place or the location where an organism (or a biological population) lives, resides, or exists'').

In reconsidering the December 2020 rulemaking and reviewing alternative definitions submitted in response to the proposed rule for this action, we thoroughly considered alternatives to rescinding the habitat definition. Establishing an additional stakeholder process, beyond the public comment processes already undertaken for this rule and the prior rulemaking, will not help resolve the deficiencies we have identified with codifying a single regulatory definition for ''habitat.''

Despite its recency and the limited circumstances in which it would be brought to bear in a designation, the existing regulatory definition of ''habitat'' has generated extensive controversy and is the subject of ongoing litigation. Eliminating the regulatory definition of ''habitat'' will eliminate the extensive controversy it has engendered and the potential implementation problems it or any such definition would create. As previously stated, we find that elimination of this definition, and relying instead on the statute, the implementing regulations, existing case law (including *Weyerhaeuser*), and the best scientific data available, is the most transparent and reasonable action.

We also note that the commenters' examples of regulatory rescissions that were subject to legal challenges involved agencies that had rescinded full regulatory programs with multiple discrete components (*e.g.,* the Department of Homeland Security's Deferred Action for Childhood Arrivals program). In these examples, the particular agencies could have considered alternatives, such as rescinding only various parts of the regulatory program, but they did not. That is not the situation here. Rescission of the habitat definition rule has no effect on the existing statutory and regulatory framework establishing the process for the designation of critical habitat. The definition itself did not create any new or different procedural steps in the designation of critical habitat or implementation of the Act (85 FR 81414, December 16, 2020). Accordingly, there is not an array of alternatives that are implicated in the Services' consideration of whether the existence of any regulatory definition of ''habitat'' is appropriate or not. We are also aware of a recent ruling in response to a challenge regarding another agency's withdrawal of a rule clarifying a statutory definition (*Coalition for Workforce Innovation* v. *Walsh,* 1:21–cv–130, Dkt. 32 (E.D. Tex. Mar. 14, 2022)). In *Coalition,* the district court judge determined that the Department of Labor had prohibited public comments on its withdrawal rule and accordingly provided no discussion of *any* alternatives to withdrawal. Here, the Services sought, and have fully considered public comments on the proposed rescission rule. In responding to these comments, we discuss how alternatives, whether in terms of alternative definitions or the alternative of issuing interpretive guidance, would not sufficiently address the issues identified with the regulatory definition.

Comment 19: Several commenters stated the Services have not provided a reasoned basis for rescinding the regulatory definition of ''habitat.'' They also stated that the rule inappropriately relied on E.O. 13990 as its legal basis for rescinding the regulation and simply restated points that were adequately addressed in the 2020 regulation.

Response: E.O. 13990 required all agencies to review agency actions issued between January 20, 2017, and January 20, 2021, that may be inconsistent with the policies it set forward. Following the issuance of that E.O., we undertook a review of the habitat definition regulation. E.O. 13990 provided the impetus for the review, but the E.O. is not the legal basis of the rescission. We are rescinding the rule on the basis of our legal authority under the Act (16 U.S.C. 1531 *et seq.*). As described in the proposed rule to rescind this definition, after reviewing the regulation and its intended effect of eliminating as ''habitat'' areas in need of restoration, we concluded the final rule inappropriately constrains our ability to designate areas that meet the definition of ''critical habitat'' under the Act because it is in significant tension with the Act's broad definition of ''conservation.'' The statute's definition of ''conservation'' expressly contemplates a wide range of tools for furthering the ultimate goal of recovering listed species including management of habitat (see 16 U.S.C. 1532(3)), and the statute's definition of ''critical habitat'' is in turn expressly tied to the conservation of the listed species (see 16 U.S.C. 1532(5)(A)). The definition of ''habitat,'' however, required that areas already contain the resources and conditions necessary to support one or more life processes of a species, and eliminated areas that do not currently or periodically contain the requisite resources and conditions, even if they could after restoration activities or other changes occur and were otherwise considered essential to the conservation of the species.

We also reviewed the available ecological definitions for use as our regulatory definition but found they were either too broad or too narrow to guide designation of areas that could qualify under the statute as unoccupied critical habitat. The qualities that make certain areas habitat for a species vary based on the biology and ecology of the species; the scientific literature also evolves over time; and there is currently some ambiguity in the use of the term ''habitat.'' Therefore, codifying an inflexible single definition in the Act's regulations would constrain our ability to incorporate the best available ecological science in the future. For those reasons, we have decided to rescind the definition.

The Services disagree with the commenters who asserted our rationale for rescinding the ''habitat'' definition was insufficient. The specific reasons the commenters cite for that assertion (which we address in other responses to comments, *e.g.,* responses to Comments 18, 20, 21, and 24) do not undermine the legal bases or factual findings for the Services' action.

Comment 20: Some commenters said the rescission ignores a central reason why the ''habitat'' definition rule was promulgated: to modernize implementation of the Act and provide additional certainty to the regulated community and the public about ''habitat.''

Response: The policy reasons articulated for the proposed adoption of the definition are not the same as the policy reasons that guided the Services' reconsideration. As a result, these same goals are not discussed at length in our proposal to rescind the definition. However, following our review of the habitat definition regulation, we determined that, because that rule is in significant tension with the conservation mandate of the Act, it did

not in fact modernize implementation of the Act. As discussed in our response to Comment 8, we also determined that it would not provide additional certainty to the regulated community. Because of the significant shortcomings inherent in the definition, we conclude that continued application of the definition would not provide additional certainty to the regulatory community or the public and would likely lead to additional litigation.

Comment 21: Several commenters asserted the Services did not adequately justify the statements in the preamble of the proposed rule to rescind the habitat regulation that the definition is in tension with the Act's definition of ''conservation.''

Response: The Act authorizes the Services to designate as critical habitat unoccupied areas that are ''essential for the conservation'' of the species (16 U.S.C. 1532(5)(A)(ii)). Section 3 of the Act defines ''conservation'' as including a wide range of tools to specifically further the recovery of listed species. Therefore, and as discussed previously in our response to Comment 16, critical habitat includes areas needed to support the recovery of the species. In order to meet the regulatory definition of ''habitat'' codified in 2020 (and thus be eligible for designation as critical habitat), areas must already contain all the resources and conditions necessary to support one or more life processes of the species. That definition, as discussed in the preamble to that rule, excluded areas that do not currently or periodically contain the requisite resources and conditions even if those areas could meet this requirement after minor restoration or natural changes occur and are clearly (on the basis of the best available science) habitat from a biological perspective for a particular species. Because of that exclusion, we find the definition and the preamble of the 2020 final rule inappropriately constrain the Services' ability to designate areas that meet the definition of ''critical habitat'' under the Act and are therefore in tension with the Act's definition of ''conservation.'' Identifying and protecting those areas when we determine they are essential, rather than delaying until a future point in time when conditions that are not required under the Act's definition are realized, better fulfills the conservation purposes of the Act.

Comment 22: A commenter asserted that, in the preamble of the proposed rule to rescind the ''habitat'' definition, we said it is illogical to require that an area be habitable before designating it as critical habitat and that such an assertion is not consistent with the Act. The commenter further stated that the Services have tools other than the designation of critical habitat under the Act to conserve species in areas that should not be considered habitat.

Response: This comment misinterprets our statements. In the preamble to this final rule, we said the broad definition of ''conservation,'' along with the statute's recognition of destruction or loss of habitat as a key factor in the decline of listed species (in section 4(a)(1) of the Act), indicates that areas not currently in an optimal state to support a species could nonetheless be considered ''habitat'' and ''critical habitat'' (86 FR 59353, p. 59354, October 27, 2021). Including those areas in critical habitat designations, where appropriate, may be essential for the conservation of some species and is consistent both with the purposes of the Act and with the Services' practice prior to the habitat definition final rule becoming effective in January 2021. To find otherwise would lead to the illogical result that the more a species' habitat has been degraded, the less ability there is to attempt to recover the species. Our reference regarding illogical results was about our ability to attempt to recover species in furtherance of the purposes of the Act as a species' habitat becomes more degraded.

Designation of critical habitat is one important tool among the many tools the Act provides to conserve species. Congress recognized the importance of critical habitat for the conservation of listed species by mandating that the Services designate critical habitat at the time the species is listed except in very limited circumstances.

Comment 23: One commenter stated that, under the Supreme Court's holding in *Weyerhaeuser,* the Act's definition of ''conservation'' has no relevance to the meaning of habitat.

Response: The Services recognize the Supreme Court's holding in *Weyerhaeuser* that, for an area to be designated as critical habitat, it must also be habitat. However, the Supreme Court did not reach any holdings with regard to how the Services can or should interpret the term ''habitat'' as it is used in section 4(a)(3)(A)(i) of the Act, which generally compels the Services to designate for a species ''any habitat'' that is then considered to be critical habitat. Because the purpose of designating critical habitat, and the Act itself, is to conserve listed species, and because ''critical habitat'' is expressly defined with reference to ''conservation,'' the term ''conservation'' is inherently relevant to the determination of areas that are considered habitat for listed species. Further, habitat is a key concept in conservation biology and is integral to the conservation of the species.

Comment 24: Many commenters stated that the habitat definition will not limit what the Services can designate as critical habitat and that there is no evidence or indication that the definition has constrained the Services' ability to designate critical habitat. Some commenters asserted that the definition does not preclude designation of suboptimal areas or areas that are in need of restoration and that the definition precludes only designation of wholly uninhabitable areas. Commenters also stated that the Services can always revise critical habitat designations if and when an area becomes habitat, either through natural processes or through human efforts. Other commenters stated that the habitat definition was too narrow and could lead to the absurd outcome of excluding from critical habitat designations degraded areas or lost habitat, future habitat areas, areas that indirectly support the species, or areas where resources and conditions are not precisely known.

Response: We acknowledge that during the short time that the habitat definition rule has been in effect, the definition has not resulted in reduced designations over what we might have designated in the absence of the definition. Nevertheless, the definition and associated discussion in the preamble to the 2020 rule regarding restoration inappropriately constrain our ability to designate critical habitat. Although there has been limited opportunity for the Services to provide tangible examples of how this definition has affected a designation, we do not need to wait until that situation occurs in order to rescind the habitat definition rule.

The habitat definition rule limits our ability to designate as critical habitat areas that are degraded or considered suboptimal for all species if those areas are in need of management actions or restoration to support the species even though those areas may easily qualify, as a matter of biological science, as habitat for a particular species. The purpose of designating critical habitat is to conserve species that depend on those areas, and the statutory definition of ''conservation'' broadly includes actions that relate to management of habitat (16 U.S.C. 1532(3)). Therefore, it furthers the statutory purpose to designate areas that do not at the time of designation contain all of the resources and conditions that the species needs but could contain them

with some limited additional management or restoration. The limitations on what areas may qualify as habitat arise from the statements in the preamble to the December 2020 final rule that the habitat definition excludes areas that do not currently contain the requisite resources and conditions to support one or more life processes of the species even if these areas could do so after restoration activities or other changes occurred (85 FR 81411, p. 81413, December 16, 2020). Implicit in these statements is a requirement that no amount of restoration, however reasonable, can be needed for an area to qualify as habitat for a given species. These statements similarly imply that no changes to the habitat, however predictable or foreseeable, can be assumed, or even planned, in order for an area to qualify as habitat for a given species. The habitat definition rule, in effect, excludes areas from qualifying as habitat if they require any amount of restoration or lack any of what might be deemed a ''necessary resource or condition'' and in turn precludes such areas from designation as critical habitat.

Because most species are faced with extinction as a result of habitat degradation and loss, it is more consistent with the purposes of the ESA to avoid limiting the Services' ability to designate critical habitat to protect the habitats of listed species and support their recovery. Avoiding such a limitation is a primary reason we are rescinding the habitat rule. By rescinding the habitat definition rule and essentially retracting statements made in the preamble to the 2020 final rule, we reiterate that we do not intend to designate areas that are wholly unsuitable for the given listed species or that require extreme intervention or modification in order to support the species. We instead intend to proceed in light of the Supreme Court's ruling in *Weyerhaeuser* that an area must be habitat for the species in order for it to be designated as critical habitat. See also our response to Comment 10. Although the Services have the authority under the Act to revise critical habitat when appropriate, removing these potential limitations on the Services' ability to designate critical habitat in the first place is more consistent with the purposes of the Act and is also a more effective and efficient way to implement the Act.

Comment 25: Many commenters stated that the regulatory definition of ''habitat'' is not unclear and will not generate confusion or conflict with other programs or statutes, especially because its application is explicitly limited to critical habitat designation. Some commenters stated that the regulatory definition of ''habitat'' is similar to others and is consistent with definitions in the scientific literature, the plain language meaning of the term, and the Services' own interpretations of this term. The commenters asserted that, in proposing to rescind the definition, the Services had failed to provide a sufficient explanation or demonstration of how the definition was unclear or would generate confusion. In contrast, other comments expressed support for the rescission of the ''habitat'' definition in part because the definition is confusing or uses ambiguous terms that were inadequately explained.

Response: In the proposed rule to rescind the regulatory definition of ''habitat,'' we stated that we were proposing to rescind the definition, in part, because it was confusing and insufficiently clear (86 FR 59353, p. 59354, October 27, 2021). We briefly explained that, in our attempt to ensure that the final definition was sufficiently broad to capture the term ''critical habitat,'' we had deliberately avoided using the same terminology as in the statutory definition for ''critical habitat'' and instead resorted to using different terms, such as ''biotic and abiotic setting'' and ''resources and conditions,'' that have no established meaning in the Act, our regulations, or our prior practices. Although the preamble of the habitat definition rule explained the wording changes made in finalizing the definition and why those changes were made, the rule did not articulate interpretations for each of the terms used. The habitat definition rule did not articulate, for example, what will satisfy the ''necessary to support'' phrase or what the full scope of the necessary ''resources and conditions'' should include in a given ''setting.'' Thus, during the course of designating critical habitat, differing and potentially conflicting interpretations could arise regarding, for example, whether the existing resources and conditions are sufficient to meet the ''necessary to support'' standard and over what time period this should even be assessed; or how many members of a species must be able to use a particular ''setting'' in order for the setting to qualify as supporting ''one or more life processes of the species.''

Just because the regulatory definition we developed may be in some respects similar to, or generally consistent with, certain other dictionary and scientific definitions for this term does not alleviate these concerns or invalidate this reason for rescinding the definition. We instead conclude that a more reasonable and supportable approach is to apply species-specific ecological data when determining whether particular areas constitute habitat for that species. The fact that, in response to our proposed rule to rescind the existing definition, we received multiple proposed alternative definitions and various suggestions regarding how to potentially revise the definition serves as further indication that debate and disagreement over wording and interpretations of the definition are likely to continue, and that what qualifies as habitat is better determined on a fact-specific, case-by-case basis (see also response to Comment 18).

The language limiting the definition's applicability to critical habitat designations does not alleviate the potential for confusion or the potential for conflict with other programs or statutes. Although not a significant aspect of our rationale for rescinding the definition, we pointed out in the proposed rule that having multiple definitions and interpretations of what constitutes habitat that vary based on the particular Federal program or statutory authority may be confusing (86 FR 59353, p. 59355, October 27, 2021). It is also inherently confusing, likely for both the Services and the public, to limit the regulatory definition to only the designation of critical habitat when other provisions of the Act directly or indirectly address the habitats of listed species. This limitation on applicability implies that the term ''habitat'' will be interpreted differently when the Services are implementing other provisions or programs under the Act. For example, it implies that the Services will use a different definition of the term ''habitat'' when evaluating habitat conservation plans developed under section 10 of the Act; when identifying habitat conservation actions in a recovery plan prepared under section 4(f) of the Act; or when evaluating whether a species is threatened by the destruction, modification, or curtailment of habitat under section 4(a)(1)(A) of the Act. Therefore, in contrast to the comments that suggest this limited applicability eliminates the concern regarding varying interpretations of the term ''habitat'' and any resulting confusion, we find this limitation served only to substitute one source of potential confusion for another.

Comment 26: Several commenters stated the habitat definition rule does not prevent the use of, or reliance on, the best available scientific data. Further, they argued, the preamble to the proposed rule to rescind the definition provided no support for

statements that the definition could prevent the Services from relying on the best available scientific data when designating critical habitat; they also maintained that those statements conflict with statements we made in the 2020 final rule. Several other commenters stated that the best available scientific data is used to determine whether areas meet the definition of ''habitat,'' not to define the term ''habitat.'' The term ''habitat'' should have a fixed meaning and is a question of statutory interpretation, not the best available scientific information.

Response: As noted above, we have reassessed the habitat definition rule in light of E.O. 13990 and have concluded that statements in the preamble to the 2020 final rule inappropriately constrain the Services' ability to designate areas that meet the definition of ''critical habitat'' under the Act (85 FR 81411, p. 81413, December 16, 2020). As noted by the commenters, the Supreme Court determined in *Weyerhaeuser* that an area must be habitat in order to be designated as critical habitat. The Act requires us to identify areas for designation as critical habitat on the basis of the best available scientific data for a particular species. Although at the time of promulgating the definition we glossed over the difficulties, we see now that any definition that categorically precludes certain types of areas from being considered habitat for any species even though some areas would, on the basis of the best available science, easily be demonstrated to be habitat for that species is inappropriate. Such a narrow rule inappropriately limits our ability to rely on the best available scientific data to determine what is habitat for that species. In addition, because the scientific literature evolves over time, and our understanding of ''habitat'' could also evolve, codifying a single definition in regulation could constrain the Services' ability to incorporate the best available ecological science in the future.

Habitat is an ecological term that should be defined or identified based on the best available scientific data. The Act clearly requires that critical habitat should be determined on the basis of the best available science. The unique regulatory definition of ''habitat'' promulgated in 2020 could conflict with this mandate by requiring and shaping or limiting how the Services can consider which areas meet the definition of ''critical habitat.'' We find that relying on the best available scientific data as specified in the Act, including species-specific ecological information, is the best way to determine whether areas constitute habitat and meet the definition of critical habitat for a species.

Comment 27: A commenter disagreed with our statement in the preamble to the proposed rule to this final rule that the scientific literature evolves over time with regard to habitat. The commenter also stated there is no evidence that Congress, upon adopting the Act's provisions that deal with critical habitat designations in 1978, intended to adopt an evolving scientific definition of ''habitat'' or rely on concepts in the scientific literature. The commenter further asserted that it should be understood that Congress intended the term to have its ordinary meaning.

Response: Habitat is a key ecological concept in conservation biology and is linked to a scientific understanding of a particular species and its environment. What constitutes habitat for a particular species depends on complex considerations that must be informed by the best available scientific data regarding that species' life-history needs. Further, the scientific literature on species conservation continues to evolve, and the variety of definitions for ''habitat'' found in the conservation biology literature are reflective of that evolution (*e.g.,* Odum 1971, Whittaker et al. 1973, Hall et al. 1997, Kearney 2006). Because Congress did not define the term ''habitat'' but mandated that we designate critical habitat on the basis of the best available scientific data for a particular species, it is logical that our understanding of what areas serve as habitat for the species, and can therefore be potentially designated as critical habitat, must both itself be based on the best available scientific data and allow for application in the context of particular designations that will be consistent with the best available science for each particular species. Because Congress defined ''critical habitat,'' the term ''habitat'' must also be compatible with both prongs of the definition of ''critical habitat,'' including unoccupied areas, which generic dictionary definitions of ''habitat'' generally do not include.

Required Determinations

Regulatory Planning and Review (E.O.s 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this 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, reduce uncertainty, and encourage use of the best, most innovative, and least burdensome tools for achieving regulatory ends. We have developed this final rule in a manner consistent with the requirements of E.O. 13563, and in particular with the requirement 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.

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 their 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.

NMFS and FWS are the only entities that are directly affected by this rule because we are the only entities that designate critical habitat under the Act. This rule does not directly apply to any other entities. Thus, no other entities, including any small businesses, small organizations, or small governments, will experience any direct economic impacts from this rule. Entities other than NMFS and FWS, including small businesses, small organizations, and small governments, may, however, be affected by critical habitat designations, and any such impacts would be assessed and taken into consideration by the Services as part of those specific rulemakings. At the proposed rule stage, we certified that this rule would not have a significant economic effect on a substantial number of small entities. Nothing in this final rule changes that conclusion.

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, this rule does not ''significantly or uniquely'' affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this rule does 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 are not affected because the rule does not place additional requirements on any city, county, or other local municipalities.

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

Takings (E.O. 12630)

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

Federalism (E.O. 13132)

This rule does not have significant federalism effects, and a federalism summary impact statement is not required under E.O. 13132. This rule pertains only to designation of critical habitat under 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)

This rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of E.O. 12988. This rule pertains only to designation of critical habitat under the Act.

Government-to-Government Relationship With Tribes

In accordance with E.O. 13175, ''Consultation and Coordination with Indian Tribal Governments,'' the Department of the Interior's manual at 512 DM 2, the Department of Commerce Tribal Consultation and Coordination Policy (May 21, 2013), the Department of Commerce Departmental Administrative Order (DAO) 218–8 (April 2012), and the National Oceanic and Atmospheric Administration (NOAA) Administrative Order (NAO) 218–8 (April 2012), we considered the possible effects of this rule on federally recognized Tribes. This rule is general in nature and does not directly affect any specific Tribal lands, treaty rights, or Tribal trust resources. This regulation, which removes the definition of ''habitat'' from 50 CFR 424.02, has a direct effect on the Services only. With or without the regulatory definition of ''habitat,'' the Services would be obligated to continue to designate critical habitat based on the best available data and would continue to coordinate and consult as appropriate with Tribes and Alaska Native corporations on critical habitat designations, consistent with our longstanding practice.

During July 2021, we held three separate webinars for Tribes and Tribal organizations to provide an overview of, and information on how to provide input on, a series of rulemakings related to implementation of the Act that the Services were developing, including the proposed rule to rescind the habitat definition rule. We received written comments from Tribal organizations; however, we did not receive any requests for consultation regarding this action. Although this rule does not have ''tribal implications'' under section 1(a) of E.O. 13175, we will continue to collaborate with Tribes on issues related to federally listed species and their habitats and work with the Tribes as we implement the provisions of the Act. *See* Joint Secretarial Order 3206 (''American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act'', June 5, 1997).

Paperwork Reduction Act

This rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (PRA) (45 U.S.C. 3501 *et seq.*).

National Environmental Policy Act

We have analyzed this rule 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 8), the NOAA Administrative Order 216–6A, and the NOAA Companion Manual (CM), ''Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities'' (effective January 13, 2017). We have determined that a detailed statement under NEPA is not required because the rule is covered by a categorical exclusion. The Department of the Interior has found that the following categories of actions would not individually or cumulatively have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: ''Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature.'' 43 CFR 46.210(i). We have also determined that the rule does not involve any of the extraordinary circumstances listed in 43 CFR 46.215 that would require further analysis under NEPA.

NOAA's NEPA procedures include a similar categorical exclusion for ''preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature'' (Categorical Exclusion G7, at CM Appendix E). This rule does not involve any of the extraordinary circumstances provided in NOAA's NEPA procedures, and therefore does not require further analysis to determine whether the action may have significant effects (CM at 4.A).

As a result, we find that the categorical exclusion found at 43 CFR 46.210(i) and in the NOAA CM applies to this regulation rescission, and neither Service has identified any extraordinary circumstances that would preclude this categorical exclusion. We did not receive any public comments regarding our stated intention of invoking a

categorical exclusion, with the exception of comments asserting that the initial use of a categorical exclusion when the habitat definition rule was codified (*i.e.,* the rule we are now rescinding) was incorrect. These comments do not conflict with or undermine our analysis here or compliance with applicable NEPA regulations for this rule.

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

Executive Order 13211 requires agencies to prepare statements of energy effects when undertaking certain actions. The rescission of the regulatory definition of ''habitat'' is 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.

Signing Authority for the Department of the Interior

Shannon Estenoz, Assistant Secretary for Fish and Wildlife and Parks, approved this action on February 28, 2022, for publication. On June 16, 2022, Shannon Estenoz authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of the Interior.

Authority

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

List of Subjects in 50 CFR Part 424

Administrative practice and procedure, Endangered and threatened species.

Maureen D. Foster,

Chief of Staff, Office of the Assistant Secretary for Fish and Wildlife and Parks.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service, National Oceanic and Atmospheric Administration.

Regulation Promulgation

For the reasons set out in the preamble, we hereby amend part 424, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as set forth below:

PART 424—LISTING ENDANGERED AND THREATENED SPECIES AND DESIGNATING CRITICAL HABITAT

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

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

§ 424.02 [Amended]

■ 2. Amend § 424.02 by removing the definition for ''Habitat''.

[FR Doc. 2022–13368 Filed 6–23–22; 8:45 am]

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