authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

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

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action, and may involve only minor changes.

* * * * *

■ 4. Add § 402.17 to read as follows:

§ 402.17 Other provisions.

(a) *Activities that are reasonably certain to occur.* A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Factors to consider when evaluating whether activities caused by the proposed action (but not part of the proposed action) or activities reviewed under cumulative effects are reasonably certain to occur include, but are not limited to:

(1) Past experiences with activities that have resulted from actions that are similar in scope, nature, and magnitude to the proposed action;

(2) Existing plans for the activity; and

(3) Any remaining economic, administrative, and legal requirements necessary for the activity to go forward; and

(4) The amount of State, tribal, territorial, or local administrative discretion remaining to be exercised.

(b) *Consequences caused by the proposed action.* To be considered an effect of a proposed action, a consequence must be caused by the proposed action (*i.e.,* the consequence would not occur but for the proposed action and is reasonably certain to occur). A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Considerations for determining that a consequence to the species or critical habitat is not caused by the proposed action include, but are not limited to:

(1) The consequence is so remote in time from the action under consultation that it is not reasonably certain to occur; or

(2) The consequence is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur; or

(3) The consequence is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur; or

(4) The agency has no ability to prevent the consequence due to its limited statutory authority; or

(5) If the consequence would occur regardless of whether the proposed action goes forward.

(c) *Required consideration.* The provisions in paragraphs (a) and (b) of this section must be considered by the action agency and the Services.

* * * * *

Kevin Lilly,

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

Neil A. Jacobs,

Under Secretary of Commerce for Oceans and Atmosphere and NOAA Administrator.

[FR Doc. 2025–20551 Filed 11–19–25; 11:15 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–2025–0039, FXES11110900000–256–FF09E23000; Docket No. 251105–0168]

RIN 1018–B173; 0648–BN70

Endangered and Threatened Wildlife and Plants; 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: Proposed rule; request for comment.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS; collectively, the ''Services''), propose to revise portions of our regulations for section 4 of the Endangered Species Act of 1973, as amended (ESA or Act). The proposed revisions to the regulations clarify and interpret portions of the Act concerning the procedures and criteria used for listing, reclassifying, and delisting species on the Lists of Endangered and Threatened Wildlife and Plants and designating critical habitat.

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

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Search box, enter FWS–HQ–ES–2025–0039, which is the docket number for this rulemaking action. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment.'' Please ensure that you have found the correct rulemaking before submitting your comment. Comments must be submitted to *https://www.regulations.gov* before 11:59 p.m. (Eastern Time) on the date specified in **DATES**.

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–HQ–ES–2025–0039; U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

We request that you send comments only by the methods described above. We will post all comments on *https://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Request for Comments, below, for more information).

Availability of reference materials: References and, in accordance with 5 U.S.C. 553(b)(4), a summary of this proposed rule are available at *https://www.regulations.gov* at Docket No. FWS–HQ–ES–2025–0039.

FOR FURTHER INFORMATION CONTACT: FWS/NMFS, U.S. Fish and Wildlife Service, Division of Conservation and Classification, *fws@fws.gov,* 703–358–2163; or FWS/NMFS, National Marine Fisheries Service, Office of Protected Resources, FWS/NMFS, 301–427–8466. 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. Please see Docket No. FWS–HQ–ES–2025–0039 on *https://www.regulations.gov* for a document that summarizes this proposed rule.

SUPPLEMENTARY INFORMATION:

Background

The Secretaries of the Interior and Commerce (the ''Secretaries'') share responsibilities for administering most of the provisions of the Endangered Species Act, as amended (hereafter referred to as ESA or the Act; 16 U.S.C. 1531 *et seq.*), and authority to administer the Act has been delegated by the respective Secretaries to the Director of FWS and the Assistant Administrator for NMFS. Together, the Services have promulgated regulations that interpret aspects of the listing and critical habitat designation provisions of section 4 of the Act. These joint regulations, which are codified in the Code of Federal Regulations (CFR) at 50 CFR part 424, were revised in 2019 (84 FR 45020, August 27, 2019, effective September 26, 2019) and again most recently in 2024 (89 FR 24300, April 5, 2024; hereafter, ''the 2019 rule'' and ''the 2024 rule,'' respectively). The 2024 rule became effective on May 6, 2024.

Portions of the 2024 rule are subject to pending litigation in three different courts. First, the 2024 rule, along with other revisions to the ESA regulations finalized in 2019, are subject to both substantive and procedural challenges in *Center for Biological Diversity et al.* v. *Dep't of Interior et al.,* 4:24–cv–4651 (N.D. Cal.). In addition, the 2019 and 2024 amendments to 50 CFR 424.12(a)(1) have been challenged in *Defenders of Wildlife* v. *U.S. Fish & Wildlife Service,* 25–cv–45 (E.D. Cal.). Lastly, the 2024 rule changes to 50 CFR 424.11(e)(2) and 50 CFR 424.12(b)(2) have been challenged in *American Farm Bureau Federation et al.* v. *U.S. Fish & Wildlife Service et al.,* 1:25–cv–00947 (D. DC); plaintiffs in that case seek to have the 2019 rule reinstated. Prior litigation over the 2019 rule was not resolved on the merits (*Animal Legal Defense Fund* v. *Haaland, et al.* 4:19–cv–06812–JST (N.D. Cal.); *State of California et al. V. Haaland, et al.,* 4:19–cv–06013–JST (N.D. Cal.); *Center for Biological Diversity et al. V. Haaland, et al.,* 4:19–cv–05206–JST (N.D. Cal.)); rather, on November 16, 2022, the district court issued orders remanding the 2019 regulations to the Services without vacating them, as the Services had voluntarily asked the court to do. Accordingly, the Services developed the 2024 regulations to amend some aspects of the 2019 rule.

Executive Order (E.O.) 14154, ''Unleashing American Energy,'' issued January 20, 2025, directed all departments and agencies to immediately review agency actions to identify those actions that potentially impose an undue burden on the identification, development, or use of domestic energy resources, and, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding agency actions identified as unduly burdensome that conflict with this national objective. To administer provisions of E.O. 14154, the Secretary of the Interior subsequently issued Secretary's Order (S.O.) 3418, which indicated that FWS would work with NMFS to suspend, revise, or rescind the ESA regulations that had been revised in 2024. E.O. 14219 also directs all departments and agencies to review and rescind unlawful regulations that are ''based on anything other than the best reading of the underlying statutory authority.'' *See also Loper Bright Enterprises* v. *Raimondo,* 603 U.S. 369 (2024). In response to these orders, and in light of recent case law and ongoing litigation, the Services have reviewed the 2024 rule and evaluated the specific regulatory revisions promulgated through that process. Now, as discussed below, we propose to revise the regulations at 50 CFR part 424 by replacing the regulations promulgated in 2024 with those promulgated in 2019.

The regulations we propose in this document provide criteria or otherwise clarify the processes by which the Services will interpret various statutory requirements set forth in section 4 of the Act. This proposed rule is intended to provide the public with a clear, transparent explanation of how we are proposing to revise the regulations in 50 CFR part 424 and the opportunity to comment on these proposed revisions.

We interpret our authorities under the statutory scheme consistent with the best reading of the ESA. For example, the meaning of the term ''foreseeable future,'' which is used in the definition of ''threatened species'' and thus an innate part of making a listing decision under section 4(a), is not set out in the Act. By contrast, where the Act contains clear direction, regulatory text is less necessary to ensure that we efficiently and effectively apply the statute in our decision-making processes. While the regulations at 50 CFR part 424 are process-oriented regulations, they nonetheless are useful for administering the Act in a consistent manner, and for informing the public about those processes.

Section 2 of the Act states that the purposes of the ESA include providing a means to conserve the ecosystems upon which endangered and threatened species depend, developing a program for the conservation of listed species, and achieving the purposes of certain treaties and conventions (16 U.S.C. 1531(b)). Section 2 of the Act also makes explicit that it is the policy of Congress that all Federal agencies and departments seek to conserve endangered and threatened species and use their authorities to further the purposes of the Act (16 U.S.C. 1531(c)).

To receive the protections afforded by the Act, a species must first be listed as either an endangered or a threatened species. Whether a species warrants listing under the Act depends upon its risk of extinction. To determine whether listing a species is warranted, the Act requires that the Services conduct a review of the species' status and consider any efforts being made by any State or foreign nation (or subdivision thereof) to protect the species. The Act also requires that determinations of whether a species meets the definition of an endangered or threatened species be based solely on the best scientific and commercial data available (16 U.S.C. 1533(b)(1)(A)).

When the Services determine that a species warrants listing, the Act requires the Services to designate critical habitat concurrently with the listing rule to the maximum extent prudent and determinable, or up to 1 year following listing if critical habitat was not initially determinable. Critical habitat is defined in section 3 of the Act as: (1) the specific areas within the geographical area occupied by the species at the time it is listed on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (2) specific areas outside the geographic area occupied by the species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species (16 U.S.C. 1532(5)). Thus, and as explained in the 2019 and 2024 rules, the Act lays out two distinct types of areas that may be designated as critical habitat for a given species. For simplicity, throughout this document we will refer to the former type as ''occupied'' critical habitat and the latter type as ''unoccupied'' critical habitat.

In passing the Act, Congress viewed habitat loss as a significant factor contributing to species endangerment, and the ''present or threatened destruction, modification, or curtailment'' of a species' habitat or range is specifically listed in section 4(a)(1) of the Act as the first of the factors that may underlie a determination that a species meets the definition of an endangered species or a threatened species. The designation of critical habitat is a regulatory tool designed to further the conservation of a listed species, *i.e.,* to help bring the endangered or threatened species to the point at which protection under the Act is no longer necessary. More broadly, designation of critical habitat also serves as a tool for meeting one of the Act's stated purposes: providing a means for conserving the ecosystems upon which endangered and threatened species depend. Once critical habitat is designated, Federal agencies must ensure that any actions they authorize, fund, or carry out are not likely to result in destruction or adverse modification of the critical habitat (16 U.S.C. 1536(a)(2)).

Proposed Changes to 50 CFR Part 424

Following a review of the specific regulatory revisions made in the 2024 rule, the Services propose to revise the regulatory provisions in 50 CFR part 424 that were promulgated in 2024 and return to the version of these regulations promulgated in 2019. Each of the proposed revisions is described in the sections below. The specific changes to the regulations proposed herein are intended to be prospective standards only. If finalized, these regulations would apply to classification and critical habitat rules finalized after the effective date of the final rule and would not apply retroactively to classification and critical habitat rules finalized prior to the effective date of the final rule. Nothing in these proposed revisions to the regulations is intended to require (at such time as this rule becomes final) that any prior final listing, delisting, or reclassification determinations or previously completed critical habitat designations be reevaluated on the basis of any final regulations.

This proposed rule is one of four proposed rules publishing in today's **Federal Register** that affect the regulations for the ESA. Two of these proposed rules, including this one, are joint between the Services, and two proposed rules are specific to FWS.

Section 424.11—Factors for Listing, Delisting, or Reclassifying Species

Economic Impacts

The Act states that determinations under section 4(a)(1) are to be made solely on the basis of the best scientific and commercial data available after conducting a review of the status of the species.

To be consistent with the plain language of the statute requiring that classification determinations must be made solely on the basis of the best scientific and commercial data available, we are proposing to remove the phrase ''without reference to possible economic or other impacts of such determination'' from the end of 50 CFR 424.11(b). In 2019, this phrase was removed to more closely align with the statutory language. In 2024, we reinserted this phrase into the regulations. Based on our subsequent review of the 2024 rule, the language of the Act, and recent case law, we have concluded that reverting to the 2019 regulatory text best aligns with the Act.

Foreseeable Future

Section 3(20) of the Act defines a ''threatened species'' as any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (16 U.S.C. 1532(20)). The term ''foreseeable future'' is not further described within the Act, and until 2019, it was not further described in the Services' regulations either. The ''foreseeable future'' concept is a fundamentally important one, as it sets the analytical timeframe over which the Services must apply the best scientific data available when determining whether a species meets the Act's definition of a threatened species. How this term is interpreted and applied dictates whether species are listed and whether they are listed as an endangered species or a threatened species.

In 2019, as part of a larger effort to improve, clarify, and streamline the administration of the Act, we finalized the first regulatory framework for the statutory term ''foreseeable future'' to explain how the Services will consider and apply this term when making classification decisions under the Act. The foreseeable future regulatory framework that was finalized in 2019 was subsequently revised in the 2024 rule. That revised, and now current, version of the foreseeable future regulation reads as follows:

> In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The foreseeable future extends as far into the future as the Services can make reasonably reliable predictions about the threats to the species and the species' responses to those threats. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time. (See 50 CFR 424.11(d).)

After re-evaluating the current regulation and the justifications for the 2024 revisions, we propose reverting to the original regulation as finalized in 2019 to align with the best meaning of the Act and our best policy judgment about how to administer the Act. Thus, we propose to remove the current regulatory text in § 424.11(d) and replace it with the version of § 424.11(d) that was promulgated in 2019. (See 84 FR 45020 at 45052, August 27, 2019, and the proposed regulatory text in this document for 50 CFR 424.11(d).)

Both the 2019 and the current interpretations of the ''foreseeable future'' were based directly on a 2009 memorandum opinion from the Department of the Interior, Office of the Solicitor (M–37021, January 16, 2009; ''M-Opinion''), which provides guidance on addressing the concept of the foreseeable future within the context of determining the status of species under the ESA. The M-Opinion, which the Services have relied on since 2009, includes a detailed analysis of the Act,

legislative history, and case law, and—based on that analysis—develops a set of considerations for determining the extent of the foreseeable future. In initially developing the 2019 rule, the Services specifically worked to capture the guidance and considerations provided in the M-Opinion in a clear, concise, and understandable regulation.

A comparison between the 2019 and the current regulation describing the ''foreseeable future'' demonstrates that the text of the two regulations is largely the same but for a rewording of the second sentence of this regulation.

Compare:

''The foreseeable future extends as far into the future as the Services can make reasonably reliable predictions about the threats to the species and the species' responses to those threats.'' (Current regulation).

Versus:

''The term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely.'' (2019 version).

Returning to ''only so far into the future,'' from ''extends as far into the future,'' and to ''reasonably determine'' from ''reasonably reliable predictions'' more clearly expresses an interpretation of ''foreseeable future'' that is bounded by what is foreseeable based on the best scientific and commercial data available. Also, stating that ''foreseeable future'' requires a determination that ''*both* the future threats *and* the species' responses to those threats must be likely'' would clarify that these requirements are conjunctive. The language in the 2024 rule, by contrast, is insufficiently clear and risks (mistakenly) encouraging a reading of them as disjunctive.

Thus, after re-evaluating the revisions to the foreseeable future framework made in 2024, we now find it appropriate to revert to the regulation as finalized in 2019.

Factors Considered in Delisting Species

In 2019, the Services made revisions to § 424.11(e) to better clarify the procedure and standards that the Services apply when making delisting decisions. Prior to 2019, this section of the regulations, which had been unchanged since 1984 (see 49 FR 38900, October 1, 1984; see also 45 FR 13010 at 13022–13023, February 27, 1980), identified three main circumstances in which delisting a species was appropriate: (1) extinction of the species, (2) recovery of the species, and (3) error in the original classification data or their interpretation. Additional text in the regulations elaborated on these three circumstances but used some imprecise and unclear terms. For instance, to be considered extinct, the regulations stated that a ''sufficient period of time must be allowed before delisting to indicate clearly that the species is extinct'' (49 FR 38900 at 38909, October 1, 1984). What qualified as a ''sufficient period of time'' thus required additional interpretation. In addition, inclusion of the recovery circumstance in these regulations led to some later interpretations that, in order to delist a species due to its recovery, the criteria established under section 4(f)(1)(B)(ii) of the ESA as part of a species' recovery plan must be met.

In 2019, after accruing significant experience administering these regulations, the Services revised them to better clarify the circumstances in which species should be delisted (see, *e.g., Friends of Blackwater* v. *Salazar,* 691 F.3d 428 (D.C. Cir. 2012)). In making those revisions, the Services explained that some of the text of the regulations in place at that time had, in some instances, been misinterpreted as establishing criteria for delisting (83 FR 35193 at 35196, July 25, 2018). To streamline, simplify, and better align the regulatory text with section 4(a) of the Act, we also removed some of the unnecessary and potentially confusing language that had been in the regulations (See 84 FR 45020 at 45052, August 27, 2019, and the proposed regulatory text in this document for 50 CFR 424.11(e).)

As revised, the 2019 regulations achieved the Services' stated goal of aligning the regulations more closely with the text of the Act by making clear that the standards for delisting a species are the same as the standards for a decision not to list it in the first instance. In other words, they made clear that the parameters for both listing determinations and delisting determinations are the same—and that those parameters are reflected in the factors listed in section 4(a)(1) of the Act, the requirements of section 4(b) of the Act, and the definitions of ''endangered species'' and ''threatened species'' in sections 3(6) and 3(20) of the Act.

These regulations were revised again in 2024. After reviewing these regulations in response to E.O. 14154 and S.O. 3418, we now propose to revert to the 2019 regulations in § 424.11(e) that list three circumstances in which it is appropriate to delist a species: (1) the species is extinct, (2) the species does not meet the definition of an endangered species or a threatened species, and (3) the listed entity does not meet the definition of a species. We have considered that the revisions made in 2019 reflect the single, best meaning of the Act. *Loper Bright Enterprises* v. *Raimondo,* 603 U.S. 369 (2024). Fundamentally, the statute must be read to have the same criteria for delisting as for listing, and the regulations cannot artificially constrain the decisionmaker. In addition, as there is no express reference to ''recovery'' in section 4(c)(2) of the Act, we find that including mention of recovery in these regulations is not necessary, nor is it necessarily helpful. If a species has in fact recovered to the point at which the measures provided pursuant to the Act are no longer necessary, then it would no longer meet the definition of an endangered or threatened species and would warrant delisting. Accordingly, it is more straightforward to simply state that delisting is appropriate when the species no longer meets the definition of an endangered or threatened species. Thus, this proposed revision better aligns the regulations with the statute and better achieves the fundamental objective of clarifying the standards and requirements that apply to delisting decisions.

Section 424.12—Criteria for Designating Critical Habitat

Not-Prudent Determinations

We propose to revise § 424.12(a)(1), which provides circumstances in which the Services may, but are not required to, find it is not prudent to designate critical habitat. Section 4(a)(3) of the Act requires that, to the maximum extent prudent and determinable, we designate a species' critical habitat concurrently with listing the species. The statute does not define or further clarify the term ''not prudent''; this term and its application are instead clarified in § 424.12(a)(1), which identifies circumstances when it may not be prudent to designate critical habitat for a listed species. The first not-prudent circumstance—when the species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species—has been included in the regulations continuously for 40 years and has not been invalidated by the courts (*see Building Industry Ass'n* v. *Babbitt,* 979 F. Supp. 893, 906 (D.D.C. July 25, 1997)).

Other not-prudent circumstances have been added or removed at different times. For example, the additional circumstance in which no areas meet the definition of critical habitat was added to these regulations in 2016 (81

FR 7414, February 11, 2016). This circumstance was retained in both the 2019 and 2024 rules. Another example is the removal in 2024 of the circumstance that had been inserted in 2019 indicating that critical habitat designation may not be prudent when threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from section 7 consultations. Some revisions made in 2024 merely involved reorganization of text; in particular, the 2024 rule moved what had been listed as a fifth circumstance (the ''Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available'') into the opening paragraph of this section of the regulations. While the 2024 rule used different phrasing, it captured the same non-exhaustive nature of the list of not-prudent circumstances.

After re-evaluating the 2019 and 2024 revisions to the not-prudent regulations, we find it appropriate to revert to the regulations as finalized in 2019. This proposed revision would entail two changes to the text of 424.12(a)(1): (1) reinserting the specific circumstance into the regulations that had been removed in 2024 (*i.e.,* ''threats to a species' habitat that lead to endangered-species or threatened-species status stem solely from causes that cannot be addressed by management actions identified in a section 7(a)(2) consultation''); and (2) moving the language regarding non-exhaustive circumstances as one of the specific circumstances when a designation of critical habitat may not be prudent (''The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available''), instead of including this phrase in the introductory language at 50 CFR 424.12(a)(1).

The first of these two proposed changes would explicitly identify a circumstance when designation of critical habitat may not be prudent. As we explained during the rulemaking for the revisions in 2019, we have encountered situations in which the threats to a species' habitat that lead to endangered-species or threatened-species status stem solely from causes that cannot be addressed by management actions identified in a section 7(a)(2) consultation. Although listing this circumstance would not make a not-prudent finding mandatory or preclude a critical habitat designation, a not-prudent finding may nevertheless be appropriate in this circumstance (84 FR 45020 at 45042, August 27, 2019). We find it is clearer and more transparent to include this possible situation in the enumerated list of circumstances when designating critical habitat may not be prudent. As stated in the 2019 rule, we reiterate here that a not-prudent determination relying on this provision would need to take into account the specific factual circumstances at issue for the particular species, and that we anticipate not-prudent determinations will continue to be rare.

The second proposed change would not alter the non-exhaustive nature of the list of circumstances when a designation of critical habitat may not be prudent. As this concept was included in both the 2019 and 2024 rules, it does not represent a change in the Services' interpretation or administration of these regulations. However, we find that the text, as framed in the 2019 regulations, more clearly explained that any such determination must be based on the best available data. Thus, we propose to remove the current regulatory text in § 424.12(a)(1) and replace it with the version of § 424.12(a)(1) that was promulgated in 2019. (See 84 FR 45020 at 45053, August 27, 2019, and the proposed regulatory text below in this document for 50 CFR 424.12(a)(1).)

None of these revisions will affect the opportunity for public involvement in, or outcome of, either agency's analyses or decisions regarding critical habitat. Although reverting to the 2019 version of the regulation would increase the regulatory list of circumstances when designation of critical habitat may be not prudent, the changes to the regulations are not intended to increase the occurrence of not-prudent determinations, and as stated previously, the Services anticipate that not prudent determinations will continue to be rare. Rather, these revisions are intended to provide clarity and specificity with respect to the circumstances in which it may not be prudent to designate critical habitat. We emphasize that the circumstances that the regulations identify for when not-prudent findings may be appropriate are not mandatory, and a designation may nevertheless be prudent even if one of the enumerated not-prudent circumstances is present. The Services recognize the value of critical habitat as a conservation tool and, as demonstrated by past practice, expect to designate it in most cases.

Designating Unoccupied Areas

Section 4(a)(3) of the Act requires that, to the maximum extent prudent and determinable, we designate a species' critical habitat concurrently with listing the species. Section 3(5)(A) of the Act defines the term ''critical habitat'' as (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

The regulations governing the designation of unoccupied critical habitat at 50 CFR 424.12(b)(2) have been amended multiple times within recent years, once through a 2016 rule (81 FR 7414, February 11, 2016), then through the 2019 rule (84 FR 45020, August 27, 2019), and then again through the 2024 rule (89 FR 24300, April 5, 2024), which we are now revisiting. In all of these rules, the Services addressed the concept of prioritizing or sequencing how occupied and unoccupied areas should be considered when designating critical habitat.

In the 2019 rule, we revised the criteria for designating unoccupied critical habitat to explicitly require a two-step process that prioritizes the designation of occupied areas over unoccupied areas by adding the following sentence: The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species (84 FR 45020 at 45053, August 27, 2019). This requirement was included in the initial 1984 regulations but was removed from the regulations in 2016, because, at that time, we made a policy determination that it was an unnecessary and unintentionally limiting requirement (81 FR 7414 at 7434, February 11, 2016). The revisions made in 2016 instead allowed for simultaneous consideration of occupied and unoccupied habitat according to the definition of critical habitat in the Act.

In justifying the adoption of new regulations for designating unoccupied areas in 2019, which included a two-step prioritization process, we explained that we were responding to concerns that the Services would inappropriately designate overly expansive areas of unoccupied critical habitat (83 FR 35193 at 35197–35198,

July 25, 2018), and that a two-step approach would help further Congress' intent to place greater importance on habitat within the geographical area occupied by the species (84 FR 45020 at 45043, August 27, 2019). In the revisions made in 2024, the two-step process was again removed from the regulations. There was also a new change finalized in 2019 that, in order for an area to be considered ''essential,'' the Secretary was required to make a determination that there was reasonable certainty both that a particular unoccupied area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

After re-evaluating the revisions to the unoccupied critical habitat regulations made in 2024, we now propose reverting to the regulation as finalized in 2019. (See 84 FR 45020 at 45053, August 27, 2019, and see proposed regulatory text below in this document for 50 CFR 424.12(b)(2).) These proposed revisions would result in again requiring the two-step process of first evaluating occupied areas before considering unoccupied areas for designation. As a practical matter, we have always begun the process of identifying critical habitat by first evaluating occupied areas and then considering whether there may be any unoccupied areas that are essential for the conservation of the species. We find that requiring an express determination that a critical habitat designation limited to occupied areas would be inadequate to conserve the species more appropriately reflects how areas are prioritized biologically—*i.e.,* areas needed for survival of the species within its occupied range must be identified as critical habitat before we can determine what, if any, additional, unoccupied areas are necessary for future expansion of recovering populations.

In addition, this approach furthers Congress's intent to place greater importance on habitat within the geographical area occupied by the species when it originally defined ''critical habitat'' in 1978. The Conference Report accompanying the amendments specified that Congress was defining ''critical habitat'' as ''specific areas *within* the geographical area occupied by the species at the time it is listed that is essential to the species conservation and requires special management consideration'' (H.R. Rept. No. 95–1804, at 18 (emphasis in the original)). The report went on to state, ''In addition, the Secretary *may designate* critical habitat outside the geographical area occupied by the species at the time it is listed if he determines such areas are essential for the conservation of the species'' (emphasis added).

Reverting to the 2019 version of this regulation would also reinstate the requirement that, to designate unoccupied areas as critical habitat, the Secretary must make a determination that there is reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

This proposed change would align the regulations with the best meaning of the Act. *Loper Bright Enterprises* v. *Raimondo,* 603 U.S. 369 (2024). To begin, the Supreme Court recently held that an area must be habitat before an area can meet the definition of critical habitat. *Weyerhaeuser Company* v. *United States Fish & Wildlife Service,* 586 U.S. 9, 19–20 (2018) (interpreting Section 4(a)(3)(A)(i)). To say that an area that is currently *uninhabitable* for a species at the time of listing is ''essential'' for the conservation of such species defies logic. And to meet the definition of ''critical habitat,'' the ''specific areas outside the geographical area occupied by the species'' must be ''*essential* for the conservation of the species.'' Section 3(5)(A)(ii) (emphasis added). It follows, then, that when determining whether unoccupied areas are ''essential,'' the Services should determine that ''there is a *reasonable certainty* both that the area will contribute to the conservation of the species and that the area contains one or more physical or biological features essential to the conservation of the species.'' A ''reasonable certainty'' determination precludes designations of unoccupied land based upon mere potential or speculation; it requires high confidence that the unoccupied areas are essential. This reading accords with the language of other, related provisions in the Act. For example, the use of the present tense—''are essential''—in section 3(5)(A)(ii) indicates that for an unoccupied area to qualify as ''critical habitat,'' it must currently be essential for the conservation of the species.

Congress has also made clear that it intended for designation of unoccupied areas as critical habitat to meet a higher standard than designating occupied areas and that the Services should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied areas of the species (43 FR 870, January 4, 1978). Courts agree. *See, e.g., Home Builders Ass'n* v. *U.S. Fish & Wildlife Serv.,* 616 F.3d 983 (9th Cir. 2010). Therefore, including these two express requirements of reasonable certainty—that an area will contribute to the conservation of the species and that the area contains one or more of the physical or biological features essential for the conservation of the species—is a way to demonstrate that designations of unoccupied critical habitat will meet this higher bar and be consistent with the best reading of the Act, congressional intent, and case law. This proposed change would also represent the Services' best policy judgment about how to administer the Act. We also note that any designation of critical habitat must still be based on the best scientific data available and comply with the statutory definition of critical habitat in section 3(5)(A) of the Act.

Request for Comments

We are seeking comments from all interested parties on the specific revisions we are now proposing to 50 CFR part 424, as well as the regulatory revisions we made in the 2019 rule and in the 2024 rule, and any of our analyses or conclusions in the Required Determinations section of this document. All relevant information will be considered prior to making a final determination regarding these regulations. Depending on the comments received, we may change the final regulations based upon those comments.

You may submit your comments concerning this proposed rule by one of the methods listed in **ADDRESSES**. Comments sent by any other method, to any other address or individual, may not be considered. Comments must be submitted to *https://www.regulations.gov* before 11:59 p.m. (eastern time) on the date specified in **DATES**. We cannot guarantee that we will have time to consider hand-delivered or mailed comments that we do not receive by the date specified in **DATES**.

Comments and materials we receive will be posted and available for public inspection on *https://www.regulations.gov*. This generally means that we will post any personal information you provide us. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

Required Determinations

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

Executive Order (E.O.) 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this proposed rule is significant and has reviewed it.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. E.O. 13563 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

Unleashing Prosperity Through Deregulation—E.O. 14192

This proposed rule is expected to be an E.O. 14192 deregulatory action.

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

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; title II of Pub. L. 104–121, March 29, 1996), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or that person's designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We certify that, if adopted as proposed, this proposed rule would not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

This proposed rule would revise and clarify requirements for NMFS and FWS in classifying species and designating critical habitat under the Act. The proposed regulations would not expand the reach of species protections or designations of critical habitat. No external entities, including any small businesses, small organizations, or small governments, will experience any direct economic impacts from this proposed rule. Therefore, we certify that, if adopted as proposed, this rule would not have a significant economic effect on a substantial number of small entities.

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

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

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

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

Takings—E.O. 12630

In accordance with E.O. 12630, this proposed rule would not have significant takings implications. This proposed rule would not pertain to ''taking'' of private property interests, nor would it directly affect private property. A takings implication assessment is not required because this proposed rule (1) would not effectively compel a property owner to suffer a physical invasion of property and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This proposed rule would substantially advance a legitimate government interest (conservation and recovery of endangered species and threatened species) and would not present a barrier to all reasonable and expected beneficial use of private property.

Federalism—E.O. 13132

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

Civil Justice Reform—E.O. 12988

This proposed rule would not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of E.O. 12988. This proposed rule would clarify factors for listing, delisting, or reclassifying species and designation of critical habitat under the ESA.

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, and the Department of Commerce (DOC) ''Tribal Consultation and Coordination Policy'' (May 21, 2013), DOC Departmental Administrative Order (DAO) 218–8, and NOAA Administrative Order (NAO) 218–8 (April 2012), we considered possible effects of this proposed rule on federally recognized Indian Tribes. This proposed rule is general in nature and does not directly affect any specific Tribal lands, treaty rights, or Tribal trust resources. Therefore, we preliminarily conclude that this proposed rule does not have ''tribal implications'' under section 1(a) of E.O. 13175. Thus, formal government-to-government consultation is not required by E.O. 13175 and related policies of the Departments of Commerce and the Interior. We will continue to collaborate with Tribes on issues related to federally listed species and their habitats. See Joint Secretary's Order 3206 (''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,'' June 5, 1997).

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

This proposed rule does not contain any new collection of information that requires approval by the OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

We are analyzing this proposed rule in accordance with the criteria of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR part 46), the Department of the Interior Manual (516 DM 1), the NOAA Administrative Order 216–6A, and the companion manual, ''Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities,'' (June 30, 2025).

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

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

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

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

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

Clarity of the Proposed Rule

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

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

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

Authority

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

List of Subjects in 50 CFR Part 424

Administrative practice and procedure, Endangered and threatened species.

Proposed Regulation Promulgation

For the reasons set out in the preamble, we hereby propose to 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.*

■ 2. Amend § 424.11 by revising paragraphs (b), (d), and (e) to read as follows:

§ 424.11 Factors for listing, delisting, or reclassifying species.

* * * * *

(b) The Secretary shall make any determination required by paragraphs (c), (d), and (e) of this section solely on the basis of the best available scientific and commercial information regarding a species' status.

* * * * *

(d) In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time.

(e) The Secretary shall delist a species if the Secretary finds that, after conducting a status review based on the best scientific and commercial data available:

(1) The species is extinct;

(2) The species does not meet the definition of an endangered species or a threatened species. In making such a determination, the Secretary shall consider the same factors and apply the same standards set forth in paragraph (c) of this section regarding listing and reclassification; or

(3) The listed entity does not meet the statutory definition of a species.

* * * * *

■ 3. Amend § 424.12 by revising paragraphs (a)(1) and (b)(2) to read as follows:

§ 424.12 Criteria for designating critical habitat.

(a) * * *

(1) The Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances:

(i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;

(iv) No areas meet the definition of critical habitat; or

(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

* * * * *

(b) * * *

(2) The Secretary will designate as critical habitat, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species only upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

* * * * *

Kevin Lilly,

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

Neil A. Jacobs,

Under Secretary of Commerce for Oceans and Atmosphere and NOAA Administrator.

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