Billing Codes 4333–15; 3510–22–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Dockets FWS–R9–ES–2011–0104 and 120206102-5603-03; 4500030114]

RIN 1018–AX87; 0648–BB82

Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act

AGENCIES: U.S. Fish and Wildlife Service (FWS), Interior; National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice of final policy.

SUMMARY: We, the U.S Fish and Wildlife Service and the National Marine Fisheries Service, (jointly, the "Services") announce our final policy on exclusions from critical habitat under the

Endangered Species Act. This non-binding policy provides the Services' position on how we consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process. This policy complements our implementing regulations regarding impact analyses of critical habitat designations and is intended to clarify expectations regarding critical habitat and provide for a more predictable and transparent critical-habitat-exclusion process.

DATES: This policy is effective [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may review the reference materials and public input used in the creation of this policy at *http://www.regulations.gov* at Docket No. FWS–R9–ES–2011–0104. Some of these materials are also available for public inspection at U.S. Fish and Wildlife Service, Division of Conservation and Classification, MS: ES, 5275 Leesburg Pike, Falls Church, VA 22041–3803 during normal business hours.

FOR FURTHER INFORMATION CONTACT: Douglas Krofta, U.S. Fish and Wildlife Service, Division of Conservation and Classification, MS: ES, 5275 Leesburg Pike, Falls Church, VA 22041–3803; telephone 703/358–2171; facsimile 703/358–1735; or Marta Nammack, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910; telephone 301/427–8469; facsimile 301/713–0376. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service

(FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Today, we publish in the **Federal Register** three related documents that are final agency actions. This document is one of the three, of which two are final rules and one is a final policy:

- A final rule that amends the regulations governing section 7 consultation under the Endangered Species Act to revise the definition of "destruction or adverse modification" of critical habitat. That regulatory definition had been invalidated by several courts for being inconsistent with the Act. This final rule amends title 50 of the Code of Federal Regulations (CFR) at part 402. The Regulation Identifier Numbers (RIN) are 1018–AX88 and 0648–BB82, and the final rule may be found on *http://www.regulations.gov* at Docket No. FWS–R9–ES–2011–0072.
- A final rule that amends the regulations governing the designation of critical habitat under section 4 of the Act. A number of factors, including litigation and the Services' experience over the years in interpreting and applying the statutory definition of "critical habitat," highlighted the need to clarify or revise the regulations. This final rule amends 50 CFR part 424. It is published under RINs 1018–AX86 and 0648-BB79 and may be found on *http://www.regulations.gov* at Docket No. FWS–HQ–ES–2012–0096.
- A final policy pertaining to exclusions from critical habitat and how we may consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process. This final policy complements the final rule

amending 50 CFR 424.19 and provides for a predictable and transparent exclusion process. The policy is published under RINs 1018–AX87 and 0648–BB82 and is set forth below in this document. The policy may be found on *http://www.regulations.gov* at Docket No. FWS–R9–ES–2011–0104.

Background

The National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (FWS) are charged with implementing the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq*.) (Act), the goal of which is to provide a means to conserve the ecosystems upon which listed species depend and to provide a program for listed species conservation. Critical habitat is one tool in the Act that Congress established to achieve species conservation. In section 3(5)(A) of the Act Congress defined "critical habitat" as:

(i) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

Specifying the geographic location of critical habitat helps facilitate implementation of section 7(a)(1) by identifying areas where Federal agencies can focus their conservation programs and use their authorities to further the purposes of the Act. In addition to serving as an

educational tool, the designation of critical habitat also provides a significant regulatory protection—the requirement that Federal agencies consult with the Services under section 7(a)(2) to insure their actions are not likely to destroy or adversely modify critical habitat.

Section 4 of the Act requires the Services to designate critical habitat, and sets out standards and processes for determining critical habitat. Congress authorized the Secretaries to "exclude any area from critical habitat if [s]he determines that the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [s]he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned" (section 4(b)(2)).

Over the years, legal challenges have been brought to the Services' process for considering exclusions. Several court decisions have addressed the Services' implementation of section 4(b)(2). In 2008, the Solicitor of the Department of the Interior issued a legal opinion on implementation of section 4(b)(2) (*http://www.doi.gov/solicitor/opinions.html*). That opinion is based on the text of the Act and principles of statutory interpretation and relevant case law. The opinion explained the legal considerations that guide the Secretary's exclusion authority, and discussed and elaborated on the application of these considerations to the circumstances commonly faced by the Services (e.g., habitat conservation plans, Tribal lands).

To provide greater predictability and transparency regarding how the Services generally consider exclusions under section 4(b)(2), the Services announce this final policy regarding several issues that frequently arise in the context of exclusions. This policy on implementation of specific aspects of section 4(b)(2) does not cover the entire range of factors that may be considered as the basis for an exclusion in any given designation, nor does it serve as a comprehensive interpretation of all the provisions of section 4(b)(2).

This final policy sets forth the Services' position regarding how we consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process. The Services intend to apply this policy when considering exclusions from critical habitat. That being said, under the terms of the policy, the Services retain a great deal of discretion in making decisions with respect to exclusions from critical habitat. This policy does not mandate particular outcomes in future decisions on critical habitat designations.

Changes to the Proposed Policy Elements

Below are a summary of changes to the proposed policy elements as a result of public comment and review. The final policy elements can be found at the end of this policy.

1. Added language to policy element 2 to make clear that the list presented in this policy is not a list of requirements for non-permitted plans, but rather factors the Services will use to evaluate non-permitted plans and partnerships. This list is not exclusive; all items may not apply to every plan.
2. In policy element 2(c), added text to the criterion in the non-permitted plans policy element to clarify that required determinations may be a factor considered in a discretionary 4(b)(2) exclusion analysis where such determinations are "necessary and appropriate."
3. Removed the phrase, "not just providing guidelines," from paragraph 3(c).
4. Made several other minor edits to increase clarity and readability of the policy elements.

Implementation of Section 4(b)(2) of the Act

On August 28, 2013 (78 FR 53058), the Services published a final rule revising 50 CFR 424.19. In that rule the Services elaborated on the process and standards for implementing section 4(b)(2) of the Act. This final policy is meant to complement those revisions to 50 CFR 424.19, and provides further clarification as to how the Services will implement section 4(b)(2) when designating critical habitat.

Section 4(b)(2) of the Act provides that:

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

In 1982, Congress added this provision to the Act, both to require the Services to consider the relevant impacts of designating critical habitat and to provide a means for the Services to reduce potentially negative impacts of designation by excluding, in appropriate

circumstances, particular areas from a designation. The first sentence of section 4(b)(2) sets out a mandatory requirement that the Services consider the economic impact, impact on national security, and any other relevant impacts prior to designating an area as part of a critical habitat designation. The Services always consider such impacts, as required under this sentence, for each and every designation of critical habitat. (Although the term "homeland security" was not in common usage in 1982, the Services conclude that Congress intended that "national security" includes what we now refer to as "homeland security.")

The second sentence of section 4(b)(2) outlines a separate, discretionary process by which the Secretaries may elect to determine whether to exclude an area from the designation, by performing an exclusion analysis. The Services use their consideration of impacts under the first sentence of section 4(b)(2), their consideration of whether to engage in the discretionary exclusion analysis under the second sentence of section 4(b)(2), and any exclusion analysis that the Services undertake, as the primary basis for satisfying the provisions of Executive Orders 12866 and 13563. E.O. 12866 (incorporated by E.O. 13563) requires agencies to assess the costs and benefits of a rule, and, to the extent permitted by law, to propose or adopt the rule only upon a reasoned determination that the benefits of the intended regulation justify the costs.

Conducting an exclusion analysis under section 4(b)(2) involves balancing or weighing the benefits of excluding a particular area from a designation of critical habitat against the benefits of including that area in the designation. If the benefits of exclusion outweigh the benefits of inclusion, the Secretaries may exclude the particular area, unless they determine that the exclusion will result in the extinction of the species concerned. The discretionary 4(b)(2) exclusion analysis is fully consistent with the E.O. requirements in that the analysis permits excluding an area where the benefits of exclusion outweigh the benefits of inclusion, and would

not lead to exclusion of an area when the benefits of exclusion do not outweigh the benefits of inclusion.

This policy sets forth specific categories of information that we often consider when we enter into the discretionary 4(b)(2) exclusion analysis and exercise the Secretaries' discretion to exclude areas from critical habitat. We do not intend to cover in these examples all the categories of information that may be relevant, or to limit the Secretaries' discretion to consider and assign weight to any relevant benefits as appropriate.

Moreover, our implementing regulations at 50 CFR 424.19 further clarify the exclusion process for critical habitat and address statutory changes and case law. The regulations at 50 CFR 424.19, as well as the statute itself, state that the Secretaries have the discretion to exclude any particular area from the critical habitat upon a determination that the benefits of such exclusion outweigh the benefits of specifying the particular area as part of the critical habitat. Furthermore, the Secretaries may consider any relevant benefits. The weight and consideration given to those benefits is within the discretion of the Secretaries. The regulations at 50 CFR 424.19 provide the framework for how the Services intend to implement section 4(b)(2) of the Act. This policy further details the discretion available to the Services (acting for the Secretaries), and provides detailed examples of how the Services may consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process when we undertake a discretionary 4(b)(2) exclusion analysis.

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

When the Services determine that critical habitat is prudent and determinable for species listed as endangered or threatened species under the Act, they must follow the statutory and regulatory provisions of the Act to designate critical habitat. The Act's language makes clear that biological considerations drive the initial step of identifying critical habitat. First, the Act's definition of "critical habitat" requires the Secretaries to identify areas based on the conservation needs of the species. Second, section 4(b)(2) expressly requires designations to be made based on the best scientific data available. (It is important to note that, once the Secretaries identify specific areas that meet the definition of "critical habitat," the Secretaries do not have the discretion to decline to recognize those areas as potential critical habitat. Only areas subject to an integrated natural resources management plan (INRMP) that meets the requirements of section 4(a)(3)(B)(i) are categorically ineligible for designation.)

Having followed the biologically driven first step of identifying "critical habitat" for a species, the Secretaries turn to the remaining procedures set forth in section 4(b)(2), which allow for consideration of whether those areas ultimately should be designated as critical habitat. Thus, pursuant to the first sentence of section 4(b)(2), the Secretaries then undertake the mandatory consideration of impacts on the economy and national security, as well as any other impact that the Secretaries determine is relevant.

The Act provides a mechanism that allows the Secretaries to exclude particular areas only upon a determination that the benefits of exclusion outweigh those of inclusion, so long as the exclusion will not result in the extinction of the species concerned. The Services call this the discretionary 4(b)(2) exclusion analysis. Neither the Act nor the implementing regulations at 50 CFR 424.19 require the Secretaries to conduct a discretionary 4(b)(2) exclusion analysis (see,

e.g., *Cape Hatteras Access Preservation Alliance* v. *DOI*, 731 F. Supp. 2d 15, 29-30 (D.D.C. 2010)). Rather, the Secretaries have discretion as to whether to conduct that analysis. If a Secretary decides not to consider exclusion of any particular area, no additional analysis is required. However, if the Secretary contemplates exclusion of a particular area, an initial screening may be conducted to evaluate potential exclusions. The Secretary may undertake a preliminary evaluation of any plans, partnerships, economic considerations, national-security considerations, or other relevant impacts identified after considering the impacts required by the first sentence of section 4(b)(2). Following the preliminary evaluation, the Secretary may choose to enter into the discretionary 4(b)(2) exclusion analysis for any particular area. If the Secretary does so, the Secretary has broad discretion as to what factors to consider as benefits of inclusion and benefits of exclusion, and what weight to assign to each factor—nothing in the Act, its implementing regulations, or this policy limits this discretion.

When conducting a discretionary 4(b)(2) exclusion analysis, one of the factors that the Secretaries may consider is the effect of existing conservation plans or programs. Those plans and programs can reduce the benefits of including particular areas in a designation of critical habitat. To state this another way, because there are already conservation actions occurring on the ground as a result of the plan or program, the regulatory benefit of overlaying a designation of critical habitat may be reduced, because the designation may be redundant, or may provide little more conservation benefit compared to what is already being provided through the conservation plan or program. As a result, the existence of these conservation plans or programs reduces the benefits of including an area in critical habitat. As a matter of logic, however, the conservation benefits of an existing conservation plan or program generally cannot be considered benefits of excluding the area it covers from designation as critical habitat. This is because the

conservation plan or program neither results from the exclusion being contemplated, nor is its continuation dependent on the exclusion being contemplated. The conservation plan or program is materially unaffected regardless of inclusion or exclusion from critical habitat.

In addition, the Services wish to encourage and foster conservation partnerships, which can lead to future conservation plans that benefit listed species. This is particularly important because partnerships can lead to conservation actions that provide benefits, with respect to private lands, that often cannot be achieved through designation of critical habitat and section 7 consultations. Because conservation partnerships are voluntary, the Services have concluded that excluding areas covered by existing plans and programs can encourage land managers to partner with the Services in the future, by removing any real or perceived disincentives for engaging in conservation activities. Those future partnerships do not necessarily reduce the benefits of including an area in critical habitat now; they may, however, provide a benefit by encouraging future conservation action. That benefit is a benefit of excluding an area from the designation. Thus, an existing plan or program can reduce the benefits of inclusion of an area covered by the plan or program, and at the same time the Secretaries' choice to exclude the area may encourage future conservation partnerships. Moreover, because the fostering and maintenance of partnerships can greatly further the conservation goals of the Act, we generally give great weight to the benefits of excluding areas where we have demonstrated partnerships.

In a discretionary 4(b)(2) exclusion analysis, the Services compare benefits of inclusion with benefits of exclusion. Some examples of benefits of including a particular area in critical habitat include, but are not limited to: (1) The educational benefits of identifying an area as critical habitat (e.g., general increase of awareness of listed species and their designated critical habitat); and (2) the regulatory benefit of designating an area as critical habitat as realized

through an adverse modification analysis in a section 7 consultation. As discussed above, these benefits of inclusion may be reduced by the conservation provisions of a plan or program, in that the educational benefit may have already been realized through development of the plan, and the on-the-ground conservation actions may already provide some or all of the benefit that could be reasonably expected as the outcome of a section 7 consultation. The weights assigned to the benefits of inclusion in any particular case are determined by the Secretaries. Some examples of benefits of excluding a particular area from critical habitat include: (1) where there is an existing conservation plan or program, the encouragement of additional conservation partnerships in the future; and (2) the avoidance of probable negative incremental impacts from designating a particular area as critical habitat, including economic impacts and impacts to national security and public safety.

The next step in the discretionary 4(b)(2) exclusion analysis is for the Secretaries to determine if the benefits of exclusion outweigh the benefits of inclusion for a particular area. If so, they may exclude that area, unless they determine that the exclusion will result in the extinction of the species concerned. We note that exclusions primarily based on conservation plans will likely maintain the overall level of protection for the species in question, because the plans will have reduced or eliminated the benefit of designating that area, as discussed above. In contrast, exclusions primarily based on economic or national security considerations may result in less overall protection for the species (i.e., forgoing significant benefits of inclusion). However, regardless of conservation outcome as outlined above, the Secretaries may still exclude such areas as long as they conclude that the benefits of exclusion outweigh the benefits of inclusion (and the exclusion itself would not result in extinction of the species).

Policy Elements

a. The Services' Discretion.

The Act affords a great degree of discretion to the Services in implementing section 4(b)(2). This discretion is applicable to a number of aspects of section 4(b)(2) including whether to enter into the discretionary 4(b)(2) exclusion analysis and the weights assigned to any particular factor used in the analysis. Most significant is that the decision to exclude is always discretionary, as the Act states that the Secretaries "may" exclude any areas. Under no circumstances is exclusion required under the second sentence of section 4(b)(2).

This policy explains how the Services generally exercise their discretion to exclude an area when the benefits of exclusion outweigh the benefits of inclusion. In articulating this general practice, the Services do not intend to limit in any manner the discretion afforded to the Secretaries by the statute.

b. Private or Other Non-Federal Conservation Plans or Agreements and Partnerships, in General.

We sometimes exclude specific areas from critical habitat designations based in part on the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships. A conservation plan or agreement describes actions that are designed to provide for the conservation needs of a species and its habitat, and may include actions to reduce or mitigate negative effects on the species caused by activities on or adjacent to the area covered by the plan. Conservation plans or agreements can be developed by private entities with no Service involvement, or in partnership with the Services. In the case of a habitat conservation

plan (HCP), safe harbor agreement (SHA), or a candidate conservation agreement with assurances (CCAA), a plan or agreement is developed in partnership with the Services for the purposes of attaining a permit under section 10 of the Act. See paragraph c, below, for a discussion of HCPs, SHAs, and CCAAs.

We evaluate a variety of factors to determine how the benefits of any exclusion and the benefits of inclusion are affected by the existence of private or other non-Federal conservation plans or agreements and their attendant partnerships when we undertake a discretionary 4(b)(2) exclusion analysis. A non-exhaustive list of factors that we will consider for non-permitted plans or agreements is shown below. These factors are not required elements of plans or agreements, and all items may not apply to every plan or agreement.

(i) The degree to which the record of the plan supports a conclusion that a critical habitat designation would impair the realization of benefits expected from the plan, agreement, or partnership;

(ii) The extent of public participation in the development of the conservation plan;

(iii) The degree to which there has been agency review and required determinations (e.g., State regulatory requirements), as necessary and appropriate;

(iv) Whether National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) compliance was required;

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

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

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

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

The Services will consider whether a plan or agreement has previously been subjected to public comment, agency review, and NEPA compliance processes because that may indicate the degree of critical analysis the plan or agreement has already received. For example, if a particular plan was developed by a county-level government that had been required to comply with a State-based environmental-quality regulation, the Services would take that into consideration when evaluating the plan. The factors outlined above influence the Services' determination of the appropriate weight that should be given to a particular conservation plan or agreement.

c. Private or Other Non-Federal Conservation Plans Related to Permits Under Section 10 of the Act.

HCPs for incidental take permits under section 10(a)(1)(B) of the Act provide for partnerships with non-Federal entities to minimize and mitigate impacts to listed species and their habitat. In some cases, HCP permittees agree to do more for the conservation of the species and their habitats on private lands than designation of critical habitat would provide alone. We place great value on the partnerships that are developed during the preparation and implementation of HCPs.

CCAAs and SHAs are voluntary agreements designed to conserve candidate and listed species, respectively, on non-Federal lands. In exchange for actions that contribute to the conservation of species on non-Federal lands, participating property owners are covered by an "enhancement of survival" permit under section 10(a)(1)(A) of the Act, which authorizes

incidental take of the covered species that may result from implementation of conservation actions, specific land uses, and, in the case of SHAs, the option to return to a baseline condition under the agreements. The Services also provide enrollees assurances that we will not impose further land-, water-, or resource-use restrictions, or require additional commitments of land, water, or finances, beyond those agreed to in the agreements.

When we undertake a discretionary 4(b)(2) exclusion analysis, we will always consider areas covered by a permitted CCAA/SHA/HCP, and we anticipate consistently excluding such areas from a designation of critical habitat if incidental take caused by the activities in those areas is covered by the permit under section 10 of the Act and the CCAA/SHA/HCP meets all of the following conditions:

1. The permittee is properly implementing the CCAA/SHA/HCP, and is expected to continue to do so for the term of the agreement. A CCAA/SHA/HCP is properly implemented if the permittee is, and has been, fully implementing the commitments and provisions in the CCAA/SHA/HCP, Implementing Agreement, and permit.
2. The species for which critical habitat is being designated is a covered species in the CCAA/SHA/HCP, or very similar in its habitat requirements to a covered species. The recognition that the Services extend to such an agreement depends on the degree to which the conservation measures undertaken in the CCAA/SHA/HCP would also protect the habitat features of the similar species.
3. The CCAA/SHA/HCP specifically addresses the habitat of the species for which critical habitat is being designated and meets the conservation needs of the species in the planning area.

We will undertake a case-by-case analysis to determine whether these conditions are met and, as with other conservation plans, whether the benefits of exclusion outweigh the benefits of inclusion.

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

As is the case with conservation plans generally, the protections that a CCAA, SHA, or HCP provide to habitat can reduce the benefits of including the covered area in the critical habitat designation. However, those protections may not eliminate the benefits of critical habitat designation. For example, because the Services generally approve HCPs on the basis of their efficacy at minimizing and mitigating negative impacts to listed species and their habitat, these plans generally offset those benefits of inclusion. Nonetheless, HCPs often allow for development of some of the covered area, and the associated permit provides authorization of

incidental take caused by that development (although a properly designed HCP should steer development toward the least biologically important habitat). Thus, designation of the areas specified for development that meet the definition of "critical habitat" may still provide a conservation benefit to the species. In addition, if activities not covered by the HCP are affecting or may affect an area that is identified as critical habitat, then the benefits of inclusion of that specific area may be relatively high, because additional conservation benefits may be realized by the designation of critical habitat in that area. In any case, the Services will weigh the benefits of inclusion against the benefits of exclusion (usually the fostering of partnerships that may result in future conservation actions).

We generally will not exclude from a designation of critical habitat any areas likely to be covered by CCAAs, SHAs, and HCPs that are still under development when we undertake a discretionary 4(b)(2) exclusion analysis. If a CCAA, SHA, or HCP is close to being approved, we will evaluate these draft plans under the framework of general plans and partnerships (subsection b, above). In other words, we will consider factors, such as partnerships that have been developed during the preparation of draft CCAAs, SHAs, and HCPs, and broad public benefits, such as encouraging the continuation of current and development of future conservation efforts with non-Federal partners, as possible benefits of exclusion. However, we will generally give little weight to promises of future conservation actions in draft CCAAs, SHAs, and HCPs; therefore, we will generally find that such promises will do little to reduce the benefits of inclusion in the discretionary 4(b)(2) exclusion analysis, even if they may directly benefit the species for which a critical habitat designation is proposed.

d. Tribal Lands.

There are several Executive Orders, Secretarial Orders, and policies that relate to working with Tribes. These guidance documents generally confirm our trust responsibilities to Tribes, recognize that Tribes have sovereign authority to control Tribal lands, emphasize the importance of developing partnerships with Tribal governments, and direct the Services to consult with Tribes on a government-to-government basis.

A joint Secretarial Order that applies to both FWS and NMFS, Secretarial Order 3206, *American Indian Tribal Rights, Federal–Tribal Trust Responsibilities, and the Endangered Species Act* (June 5, 1997) (S.O. 3206), is the most comprehensive of the various guidance documents related to Tribal relationships and Act implementation, and it provides the most detail directly relevant to the designation of critical habitat. In addition to the general direction discussed above, S.O. 3206 explicitly recognizes the right of Tribes to participate fully in the listing process, including designation of critical habitat. The Order also states: "Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands." In light of this instruction, when we undertake a discretionary 4(b)(2) exclusion analysis, we will always consider exclusions of Tribal lands under section 4(b)(2) of the Act prior to finalizing a designation of critical habitat, and will give great weight to Tribal concerns in analyzing the benefits of exclusion.

However, S.O. 3206 does not preclude us from designating Tribal lands or waters as critical habitat, nor does it state that Tribal lands or waters cannot meet the Act's definition of "critical habitat." We are directed by the Act to identify areas that meet the definition of "critical habitat" (i.e., areas occupied at the time of listing that contain the essential physical or biological

features that may require special management or protection and unoccupied areas that are essential to the conservation of a species), without regard to landownership. While S.O. 3206 provides important direction, it expressly states that it does not modify the Secretaries' statutory authority.

e. Impacts on National Security and Homeland Security.

Section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)), as revised in 2003, provides: "The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense (DoD), or designated for its use, that are subject to an integrated natural resources management plan [INRMP] prepared under section 101 of the Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation." In other words, as articulated in the final revised regulations at 50 CFR 424.12(h), if the Services conclude that an INRMP "provides a benefit" to the species, the area covered is ineligible for designation and thus cannot be designated as critical habitat.

Section 4(a)(3)(B)(i) of the Act, however, may not cover all DoD lands or areas that pose potential national-security concerns (e.g., a DoD installation that is in the process of revising its INRMP <u>for a newly listed species or a species previously not covered</u>). If a particular area is not covered under section 4(a)(3)(B)(i), national-security or homeland-security concerns are not a factor in the process of determining what areas meet the definition of "critical habitat." Nevertheless, when designating critical habitat under section 4(b)(2), the Secretaries must consider impacts on national security, including homeland security, on lands or areas not covered by section 4(a)(3)(B)(i). Accordingly, we will always consider for exclusion from the

designation areas for which DoD, Department of Homeland Security (DHS), or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns.

We cannot, however, automatically exclude requested areas. When DoD, DHS, or another Federal agency requests exclusion from critical habitat on the basis of national-security or homeland-security impacts, it must provide a reasonably specific justification of an incremental impact on national security that would result from the designation of that specific area as critical habitat. That justification could include demonstration of probable impacts, such as impacts to ongoing border-security patrols and surveillance activities, or a delay in training or facility construction, as a result of compliance with section 7(a)(2) of the Act. If the agency requesting the exclusion does not provide us with a reasonably specific justification, we will contact the agency to recommend that it provide a specific justification or clarification of its concerns relative to the probable incremental impact that could result from the designation. If the agency provides a reasonably specific justification, we will defer to the expert judgment of DoD, DHS, another Federal agency as to: (1) Whether activities on its lands or waters, or its activities on other lands or waters, have national-security or homeland-security implications; (2) the importance of those implications; and (3) the degree to which the cited implications would be adversely affected in the absence of an exclusion. In that circumstance, in conducting a discretionary 4(b)(2) exclusion analysis, we will give great weight to national-security and homeland-security concerns in analyzing the benefits of exclusion.

f. Federal Lands.

We recognize that we have obligations to consider the impacts of designation of critical

habitat on Federal lands under the first sentence of section 4(b)(2) and under E.O. 12866. However, as mentioned above, the Services have broad discretion under the second sentence of 4(b)(2) on how to weigh those impacts. In particular, "[t]he consideration and weight given to any particular impact is completely within the Secretary's discretion." (H.R. Rep. No. 95–1625, at 17 (1978)). In considering how to exercise this broad discretion, we are mindful that Federal land managers have unique obligations under the Act. First, Congress declared its policy that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." (section 2(c)(1)). Second, all Federal agencies have responsibilities under section 7 of the Act to carry out programs for the conservation of listed species and to ensure their actions are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

We also note that, while the benefits of excluding non-Federal lands include development of new conservation partnerships, those benefits do not generally arise with respect to Federal lands, because of the independent obligations of Federal agencies under section 7 of the Act. Conversely, the benefits of including Federal lands in a designation are greater than non-Federal lands because there is a Federal nexus for projects on Federal lands. Thus, if a project for which there is discretionary Federal involvement or control is likely to adversely affect the critical habitat, a formal section 7 consultation would occur and the Services would consider whether the project would result in the destruction or adverse modification of the critical habitat.

Under the Act, the only direct consequence of critical habitat designation is to require Federal agencies to ensure, through section 7 consultation, that any action they fund, authorize, or carry out does not destroy or adversely modify designated critical habitat. The costs that this

requirement may impose on Federal agencies can be divided into two types: (1) the additional administrative or transactional costs associated with the consultation process with a Federal agency, and (2) the costs to Federal agencies and other affected parties, including applicants for Federal authorizations (e.g., permits, licenses, leases), of any project modifications necessary to avoid destruction or adverse modification of critical habitat. Consistent with the unique obligations that Congress imposed for Federal agencies in conserving endangered and threatened species, we generally will not consider avoidance of the administrative or transactional costs associated with the section 7 consultation process to be a "benefit" of excluding a particular area from a critical habitat designation in any discretionary 4(b)(2) exclusion analysis. We will, however, consider the extent to which such consultation would produce an outcome that has economic or other impacts, such as by requiring project modifications and additional conservation measures by the Federal agency or other affected parties.

Federal lands should be prioritized as sources of support in the recovery of listed species. To the extent possible, we will focus designation of critical habitat on Federal lands in an effort to avoid the real or perceived regulatory burdens on non-Federal lands. We do greatly value the partnership of other Federal agencies in the conservation of listed and non-listed species. However, for the reasons listed above, we will focus our exclusions on non-Federal lands. We are most likely to determine that the benefits of excluding Federal lands outweigh the benefits of including those lands when national-security or homeland-security concerns are present.

g. Economic Impacts.

The first sentence of section 4(b)(2) of the Act requires the Services to consider the economic impacts (as well as the impacts on national security and any other relevant impacts) of

designating critical habitat. In addition, economic impacts may, for some particular areas, play an important role in the discretionary 4(b)(2) exclusion analysis under the second sentence of section 4(b)(2). In both contexts, the Services will consider the probable incremental economic impacts of the designation. When the Services undertake a discretionary 4(b)(2) exclusion analysis with respect to a particular area, they will weigh the economic benefits of exclusion (and any other benefits of exclusion) against any benefits of inclusion (primarily the conservation value of designating the area). The conservation value may be influenced by the level of effort needed to manage degraded habitat to the point where it could support the listed species. The Services will use their discretion in determining how to weigh probable incremental economic impacts against conservation value. The nature of the probable incremental economic impacts and not necessarily a particular threshold level triggers considerations of exclusions based on probable incremental economic impacts. For example, if an economic analysis indicates high probable incremental impacts of designating a particular critical habitat unit of low conservation value (relative to the remainder of the designation), the Services may consider exclusion of that particular unit.

Summary of Comments and Recommendations

On May 12, 2014, we published a document in the **Federal Register** (79 FR 27052) that requested written comments and information from the public on the draft policy regarding implementing section 4(b)(2) of the Act. In that document, we announced that the comment period would be open for 60 days, ending July 11, 2014. We received numerous requests to extend the comment period, and we subsequently published a document on June 26, 2014 (79 FR

36330), extending the comment period to October 9, 2014. Comments we received are grouped into general categories specifically relating to the draft policy.

Comment (1): Many commenters, including federally elected officials, requested an extension of the public comment period announced in the draft policy. Additionally, we received requests to reopen the comment period that ended on October 9, 2014.

Our Response: On June 26, 2014 (79 FR 36330), we extended the public comment period on the draft policy for an additional 90 days to accommodate this request and to allow for additional review and public comment. The comment period for the draft policy was, therefore, open for 150 days, which provided adequate time for all interested parties to submit comments and information. Additionally, the Services held numerous outreach initiatives that included briefings and webinars for elected officials, States, potentially affected Federal agencies, and interest groups, both environmental- and industry-focused.

Secretarial Discretion

Comment (2): We received many comments regarding the Services' delegated discretion from the Secretaries. Commenters expressed concern that the Services' delegated discretion is too broad, the assigning of weight to benefits is subjective, and the proposed policy would greatly extend the Services' discretionary authority and allow for subjective disregard of voluntary State and private conservation efforts.

Our Response: This policy does not expand or reduce Secretarial authority. The policy reflects only the discretion expressly provided for in the Act. The word "shall" is used to denote

mandatory actions or outcomes, and "may" is used to indicate where there is discretion in particular matters. In the Act, the word "may," as it prefaces the phrase "exclude a particular area," thus clearly provides the Secretaries a choice, the ability to decide whether areas should be excluded based on weighing benefits of inclusion against the benefits of exclusion. The Secretaries may choose to exclude particular areas if those benefits of exclusion outweigh benefits of inclusion, unless the exclusion will result in the extinction of the species concerned. Commenters appear to be questioning the Secretary's ability to choose whether to enter into the discretionary weighing of benefits. Congress expressly provided the Secretaries discretion to decide whether to enter into the exclusion analysis described in the second sentence of section 4(b)(2). By contrast, the Secretaries do not have discretion when it comes to the requirement to consider the economic impact, impacts to national security, and any other relevant impact of specifying an area as critical habitat, as described in the first sentence of section 4(b)(2).

Finally, this policy generally reflects the practices followed by the Services regarding their implementation of section 4(b)(2), and provides greater transparency by explaining to the public how the Services generally exercise the discretion granted by the Act.

Comment (3): Some commenters suggested that the Services need to clarify that the Secretaries have discretion in whether to conduct an exclusion analysis. They stated that, while the draft policy does identify the discretionary nature of exclusions under 4(b)(2), language in other areas of the policy, such as "we will always consider" and "generally exclude," may cause confusion, and appear contradictory. Furthermore, some commenters stated that discussion of the discretionary 4(b)(2) exclusion analysis should clearly state that such analysis occurs only after the Secretary has identified an area she "may" consider for exclusion, based on

consideration of the economic impact, the impact on national security, and any other relevant impact (see M-Opinion at 2. Step 2, p. 17).

Our Response: We agree with the commenter, and have made edits in the final policy to reflect and clarify what are requirements under the Act and where discretion is provided, in particular with the discretionary 4(b)(2) exclusion analysis.

Comment (4): Commenters noted that the Services are required to consider all reasonable requests for exclusion, which is in contrast to the Services' position that they cannot be required to grant an exclusion request, and state that "in no circumstances is exclusion required." The commenters stated that the Services' narrow view of section 4(b)(2) cannot be reconciled with the Act, or the history surrounding the 1978 amendments, and there is nothing in the statute that confers broad discretion. The two sentences of 4(b)(2) require the Services to "consider" economic impacts, and then to consider excluding a particular area from the designation of critical habitat. The commenters suggested that these are not separate obligations, and that it is illogical for the Services to suggest that Congress intended to require the Services to identify the economic impacts without intending for the Services to apply any consideration of those impacts.

Our Response: We disagree with the commenter. Section 4(b)(2) of the Act sets forth a mandatory consideration of impacts and a discretionary consideration of possible exclusions. The commenter is mistaken that the Act requires any particular "action" that must be taken following the consideration of impacts. The text of the Act is clear in the second sentence of section 4(b)(2):

> The Secretary may exclude any area from critical habitat if [s]he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the

critical habitat, unless [s]he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Recent court decisions have resoundingly upheld the discretionary nature of the Secretaries' consideration of whether to exclude areas from critical habitat. *See Bldg. Indus. Ass'n v. U.S. Dept. of Commerce*, 792 F.3d.1027 (9th Cir. 2015), *aff'g* 2012 WL 6002511 (N.D. Cal. Nov. 30, 2012) (unreported); *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d. 977 (9th Cir. 2015); *Cape Hatteras Access Pres. Alliance* v. *DOI*, 731 F. Supp. 2d 15, 28–30 (D.D.C. 2010). The operative word is "may." There is no requirement to exclude, or even to enter into a discretionary 4(b)(2) exclusion analysis for, any particular area identified as critical habitat. The Services do consider economic impacts, and apply the consideration of those probable incremental economic impacts in considering whether to enter into the discretionary 4(b)(2) exclusion analysis. Based on the results of the economic analysis, the Services may elect not to enter into the discretionary 4(b)(2) exclusion analysis based on economic impact alone. If they engage in a discretionary exclusion analysis, the Services may consider information from different sources (e.g., the economic analysis and conservation plan) in one section 4(b)(2) exclusion analysis.

Comment (5): Numerous commenters interpreted the draft policy as a significant change in how the Services will consider exclusions under 4(b)(2).

Our Response: The Services are not changing our practice of considering or conducting discretionary 4(b)(2) exclusion analyses. The 2008 Department of the Interior Solicitor's Section 4(b)(2) memorandum (M–37016, "The Secretary's Authority to Exclude Areas from a

Critical Habitat Designation under Section 4(b)(2) of the Endangered Species Act" (Oct. 3, 2008)) (DOI 2008) and the regulations at 50 CFR 424.19 provide general guidance on how to implement section 4(b)(2) of the Act, and form the basis for this policy. This policy generally reflects the practices followed by the Services, and provides greater transparency by explaining to the public how the Services generally exercise the discretion granted by the Act.

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Framework for Discretionary 4(b)(2) Exclusion Analysis

Comment (6): A commenter noted that, rather than considering partnership opportunities as a benefit of exclusion, the Services expect that benefits of an existing conservation plan will continue regardless of critical habitat designation and, therefore, do not consider an existing plan when weighing the benefits of exclusion. Furthermore, the Services will consider these benefits to reduce the benefits of inclusion. The commenter expressed concern that this position could serve as a disincentive for voluntary conservation. Furthermore, the commenter suggested that under the new policy, the Services will have to review for potential exclusion each plan on a case-by-case basis, giving the Services broader discretion than previously held.

Our Response: Because we received many similar comments, we have added a section, *General Framework for Considering an Exclusion and Conducting a Discretionary 4(b)(2) Exclusion Analysis*, to the preamble of this document to clarify the way we consider and conduct exclusions. Furthermore, this section explains the way in which we consider conservation plans and partnerships when conducting a discretionary 4(b)(2) exclusion analysis. In brief, the commenters appear to misunderstand how we account for the benefits of conservation plans. The accounting that we use (what counts as a benefit of exclusion, and what serves to reduce

benefits of inclusion) is the only logical way of parsing the effects of conservation plans consistent with the statute. But in no way does this accounting discount the benefits of conservation plans—it just puts those benefits in the proper context. Therefore, we disagree with the commenters that our accounting will in any way act as a disincentive for voluntary conservation. In fact, one of the primary purposes of this policy is to explain the important role that conservation plans play in our implementation of section 4(b)(2), and thus, in effect, to explain the existing incentive for land managers to create those plans.

The Services have reviewed and will continue to review each plan for potential exclusion on a case-by-case basis; we are continuing our existing practice, and not broadening our discretion. Adopting a policy that would exclude areas without an analysis and weighing of the benefits of inclusion and exclusion on a case-by-case basis, as the commenters appear to suggest, would not be consistent with the requirements of the Act or our implementing regulations at 50 CFR 424.19.

Comment (7): One commenter suggested that the policy should be revised to give greater detail on the processes the Services will use to review and exclude areas covered by existing conservation plans. When determining whether the benefits of exclusion outweigh the benefits of inclusion, the commenter noted that the Services will evaluate a variety of factors; however, no metrics were provided. For example, it is uncertain if each factor must be considered or if only three or four are sufficient. The commenter posed questions such as: will the Services give all factors equal weight or will some be deemed more important, and what evidence must be provided to demonstrate that the thresholds have been met? While the factors provide general direction, the commenter stated the Services provide no indication of how the evaluations will be

conducted or what the thresholds might be. Finally, the commenter suggested it is unclear how the Services plan on evaluating whether the agreements are being properly implemented and how the Services will evaluate whether the permittee is expected to continue to properly implement the agreement.

Our Response: The Services cannot prescribe which factors should be used when developing a conservation plan that does not have Federal involvement. The list provided in the draft policy and in this final policy is not exhaustive; rather, it is intended to illustrate the types of factors that the Services will use when evaluating such plans.

Conservation plans that lead to the issuance of a permit under section 10 of the Act (including HCPs) go through a rigorous analysis under the Act to qualify for that permit. As discussed above, we will often exclude areas covered by such conservation plans. On the other hand, non-permitted conservation plans may not go through such analysis, and therefore must be more thoroughly analyzed before we will consider excluding areas covered by these plans.

The list of factors for non-permitted plans is not exclusive, not all factors may apply to every instance of evaluating a plan or partnership, and the listed factors are not requirements of plans or partnerships to be considered for exclusion. Criteria for non-permitted plans differ from criteria for permitted plans because the latter have already undergone rigorous analysis for the issuance of the associated permit and may have been measured or evaluated by additional criteria. For example, NEPA analysis has already been conducted before a permitted plan is finalized and a permit issued.

Comment (8): Several commenters suggested that the methodology for exclusion should be defined, and the draft policy grants the agencies much more leeway to include or exclude

lands from critical habitat designation, by requiring that each area considered for exclusion be reviewed on a case-by-case basis. Commenters also stated that, although the policy states that the benefits of designation of critical habitat will be weighed against the costs of such designation in a cost/benefit analysis, there is no clearly defined methodology included in the draft policy. Commenters stated that, when exercising their discretion, the Services should explain fully the basis, including the weighing of benefits, for any determination that exclusion is not warranted for any of the areas covered by the policy.

Our Response: As discussed in our response to comment (2) above, this policy does not increase the discretion granted to the Secretaries by the Act. Moreover, each area considered for exclusion is unique, and evaluations are highly fact-specific; thus it is not possible to give a simple, formulaic methodology that will be used in all landscapes and situations. Further, it is important that the Secretaries retain discretion in assigning appropriate weight to benefits of inclusion and exclusion. Whenever the Services exclude areas under section 4(b)(2), they will explain the factors considered and the weighing of benefits. If the Services do not exclude an area that has been requested to be excluded through public comment, the Services will respond to this request. However, although the Services will explain their rationale for not excluding a particular area, that decision is committed to agency discretion. (*Cape Hatteras Access Preservation Alliance* v. *DOI*, 731 F. Supp. 2d 15, 29–30 (D.D.C. 2010)).

Blanket or Presumptive Exclusions

Comment (9): Many commenters suggested there is a lack of certainty that areas covered by permitted conservation plans will be excluded. Commenters stated that permitted

conservation plans, including HCPs, SHAs, and CCAAs, provide a much greater conservation benefit to private land areas than other programs implemented under the Act. Many commenters asked that the final policy be modified to categorically exclude from critical habitat lands covered by permitted plans, provided that the plan is being properly implemented and the species is a covered species under the plan. Commenters noted that the conservation benefits from such agreements and the investment of effort and collaboration between the private sector and the Services should be acknowledged, and areas covered by conservation agreements developed and approved by the Services should expressly be excluded from designation of critical habitat. Commenters expressed concern that the need for a factual balancing test each time critical habitat is designated for a covered species poses major uncertainties for permittees.

Our Response: The Services agree with the goal of providing greater certainty through this policy. However, each plan is different, covers different areas with different objectives, and will likely have differences in implementation and effectiveness, differences in duration, and so forth. Therefore, the Services must consider each plan on a case-by-case basis.

As stated above, the Services do greatly value the commitments of private landowners and conservation partners to conserve species and their habitats. Even so, the Services cannot presumptively exclude particular areas from a designation of critical habitat. Should the Services enter into a discretionary 4(b)(2) exclusion analysis, the Act requires the Services to compare the benefits of including a particular area in critical habitat with the benefits of excluding the particular area. The Secretary may exclude an area if the benefits of exclusion outweigh those of inclusion, as long as the exclusion will not result in extinction of the species. Where they have decided to exclude an area, the Services must provide a reasonable consideration of factors on each side of the balance. The Services' draft policy and this final policy articulate clearly that

the Services will give great weight and consideration to partnerships resulting from the development of HCPs, SHAs, and CCAAs. Additionally, the Services will give great weight to the conservation measures delivered on the ground by the plans mentioned above. The weight of the conservation measures will be applied to reduce the benefits of inclusion of that particular area in critical habitat, and in many cases the benefits of exclusion will outweigh the benefits of inclusion.

However, a permitted plan and a critical habitat designation may further different conservation goals. A permitted plan for a covered species addresses certain specific activities in a discrete area. It is designed to mitigate or minimize impacts from specific projects. By contrast, we designate critical habitat to conserve a species throughout its range (and sometimes beyond) in light of the varying threats facing the species. Thus, in a discretionary 4(b)(2) exclusion analysis, the Services must undertake a thorough balancing analysis for those areas that may be excluded, and cannot presume that the fact pattern is the same for each specific instance of a general category of plans.

Comment (10): Despite acknowledging the utility of non-permitted private and non-Federal conservation plans and partnerships, several commenters expressed the concern that the exclusion of these areas is not automatically guaranteed. Instead, the commenters noted that the Services will "sometimes exclude specific areas" from a critical habitat designation based on the existence of these plans or partnerships. In order to be successful, commenters stated private/non-Federal plans must be supported by the Services and automatically excluded from critical habitat designations. If not, future conservation plans may be at risk because applicants will feel uncertainty regarding the utility of their efforts. Commenters requested the Services to

codify this change and ensure that land protected through voluntary conservation efforts will not be subjected to critical habitat overlays.

Our Response: Please see our response to the previous comment. Just as the Services cannot automatically guarantee exclusion of permitted conservation plans, we cannot presumptively exclude, or automatically exclude, private and non-Federal plans. When undertaking the discretionary 4(b)(2) exclusion analysis, the Services are obligated by section 4(b)(2) to weigh the benefits of inclusion and exclusion. The Services conduct this evaluation on a case-by-case, fact-specific basis. In this context, automatically excluding certain classes of lands or certain classes of agreements would be arbitrary.

However, as noted above, the Services do highly value private and non-Federal conservation plans and partnerships, and our objective is to encourage participation in voluntary conservation planning and collaborative partnerships. When entering into the discretionary 4(b)(2) exclusion analysis, the Services will consider fully the value and benefits of such plans and partnerships. The Services acknowledge that such programs and partnerships can implement conservation actions that the Services would be unable to accomplish without private and non-Federal landowners and partners.

Comment (11): Certain States requested the addition of a policy element to categorically or presumptively exclude all lands managed by State wildlife agencies. They stated that the Services should consider partnerships with State wildlife agencies similarly to the way they consider partnerships with Native American Tribes, and exclude lands managed by the State as they do Tribal lands. Whether a State conservation plan has been vetted through the public process should not have any relevance to the exclusion of such lands from critical habitat.

Our Response: As noted above, the Services must follow the direction of the Act and identify those lands meeting the definition of "critical habitat," regardless of landownership. It is only after the identification of lands that meet the definition of "critical habitat" that we can consider other relevant factors. It appears that the commenter is requesting presumptive exclusion of specific State lands without a case-by-case analysis. As discussed above, the Act does not give the Secretaries the authority to exclude areas from critical habitat without first undertaking a discretionary 4(b)(2) exclusion analysis. As we consider areas for potential exclusion, as discussed throughout this policy, we give great weight and consideration to conservation partnerships, including those partnerships with States and Tribes. The Services note that S.O. 3206 has no applicability to State governments or State lands. Even in the context in which it applies, S.O. 3206 does not provide a blanket exclusion or automatic exemption of Tribal lands.

Comment (12): To further provide incentives for landowners or local and State governments to enter into conservation plans, agreements, or partnerships, a commenter stated the Services should, if they conduct a discretionary exclusion analysis, always exclude such areas from critical habitat designation if the benefits of exclusion outweigh the benefits of inclusion. The commenter stated that exclusion may incentivize parties to participate in future conservation plans or partnerships, especially the prelisting conservation measures encouraged by the Fish and Wildlife Service's recent draft policy regarding voluntary prelisting conservation actions.

Our Response: The Services agree that recognition of partnerships through exclusion from critical habitat may serve to remove any real or perceived disincentive that a designation of

critical habitat may produce, and encourage parties to further engage in future conservation planning efforts. Should the Services elect to conduct a discretionary 4(b)(2) exclusion analysis, and if the benefits of exclusion outweigh the benefits of inclusion, in almost all situations we expect to exclude that particular area. Although the Services find it necessary to retain some discretion for the Secretaries because we cannot anticipate all fact patterns that may occur in all situations when considering exclusions from critical habitat, it is the general practice of the Services, consistent with E.O. 12866, to exercise this discretion to exclude an area when the benefits of exclusion outweigh the benefits of inclusion. However, the Secretaries may not exclude a particular area if the exclusion will result in the extinction of the species concerned. Please see the section *General Framework for Considering an Exclusion and Conducting a Discretionary 4(b)(2) Exclusion Analysis*, above, for more information regarding the exclusion process.

Plans Permitted Under Section 10 of the Act

Comment (13): One commenter suggested that the draft policy should not contain a categorical rejection of an agreement with "guidelines" for habitat management. Even if the agreement provides guidelines relating to the species' habitat, rather than specifically addressing habitat, the commenter noted that if those guidelines were followed they may provide a greater benefit to the species than would a critical habitat designation. Finally the commenter noted that each plan should be analyzed individually for its benefit to the species; this would support the Services' stated policy of encouraging the development of section 10 agreements.

Our Response: We agree with the commenter regarding plans with guidelines that, if followed, may provide a greater benefit to a species than would a designation of critical habitat. However, should the Services choose to enter into the discretionary 4(b)(2) exclusion analysis for a plan that only has guidelines, the Services will evaluate the benefits of inclusion and exclusion based on the specific facts of the plan in question. We have removed the language regarding guidelines from the final policy.

Comment (14): One commenter stated that the Services should not designate or exclude mere portions of HCPs. An HCP, taken as a whole, is designed to meet the conservation needs of the species and is specifically developed to meet those needs while still allowing certain development impacts to occur. The commenter suggested the policy would allow the Services to exclude just beneficial parts of an approved HCP, and designate those areas that are less desirable but still an integral component of the HCP.

Our Response: If the HCP has been approved and permitted, and if the Services undertake a discretionary 4(b)(2) exclusion analysis and find that the benefits of exclusion outweigh the benefits of inclusion, we intend to exclude the entire area covered by the HCP from the final designation of critical habitat for the species.

Comment (15): One commenter stated that the Services should consider excluding areas covered by HCPs and SHAs that are under development, but not yet completed or fully implemented. The draft policy proposes to give very little weight to section 10 agreements that are in process but not formalized. The commenter expressed a concern that not giving weight to developing voluntary conservation plans could greatly reduce incentives for private landowners

and other entities to continue these efforts. The Services should analyze in-progress agreements individually. The agreements will vary greatly in scope, coverage, and the level of protections granted to the species and the extent of progress towards a formal agreement. If a comprehensive agreement is close to being formalized at the time of critical habitat designation, the commenter suggested there is no reason for the Services to designate that land as critical habitat and ignore the effort of the parties involved to benefit the species and its habitat. To ignore those efforts would discourage other landowners from pursuing similar plans or partnerships in the future, undermining future cooperation for the benefit of the species. Finally, the commenter suggested that the policy should be revised to give greater detail on the processes the Services will use to efficiently review and exclude areas covered by conservation plans being developed.

Our Response: Should the Services elect to undergo a discretionary 4(b)(2) exclusion analysis of an area in which a voluntary conservation plan is being developed, we will consider the facts specific to the situation. If a draft HCP has undergone NEPA and section 7 analysis, the Services could evaluate that plan under the provisions of this policy that are applicable to conservation plans and partnerships for which no section 10 permit has been issued. The track record of the partnership and the time taken to develop the draft HCP would be considerations in any discretionary 4(b)(2) exclusion analysis. The Services would not ignore ongoing efforts to develop plans. Some of the factors we consider are the degree of certainty that the plan will be implemented, that it will continue into the future, and that it may provide equal or greater protection of habitat than would a critical habitat designation. Therefore, the Services would expect to evaluate draft permitted plans on a case-by-case basis, and may evaluate them under the non-permitted-plans-and-partnerships sections of this policy.

Comment (16): A commenter asked the Services to clarify that not every conservation plan will undergo a weighing and balancing process. Paragraph 3 of the draft policy states: "When we undertake a discretionary exclusion analysis, we will always consider areas covered by an approved CCAA/SHA/HCP, and generally exclude such areas from a designation of critical habitat if three conditions are met …." The commenter questioned whether the discretionary analysis is triggered by potential "severe" impacts (as described in step 2 of the M Opinion at p. 17: "if [she] deems the impacts of the designation severe enough, [she] will proceed with an exclusion analysis under section 4(b)(2)") on a particular area covered by a CCAA/SHA/HCP, or whether the presence of such conservation plan(s) triggers the discretionary analysis regardless of impacts. If the former, the Services should clarify that only the potentially affected conservation plan(s) will be subjected to the discretionary exclusion analysis. If the latter, the commenter expressed a concern that the result of such a policy is to significantly limit Secretarial discretion.

Our Response: The Services are not limiting Secretarial discretion through this policy. The presence of a conservation plan or partnership does not mandate a discretionary 4(b)(2) exclusion analysis. If the Secretary decides to enter into the discretionary 4(b)(2) exclusion analysis, the Services may consider, among other things, whether a plan is permitted, or whether we receive information during a public comment period that we should consider a certain plan for exclusion. However, it is possible that the Secretaries will not conduct a discretionary 4(b)(2) exclusion analysis for each and every conservation plan. As noted in the final rule revising 50 CFR 424.19, the Secretaries are particularly likely to conduct this discretionary

analysis if the consideration of impacts mandated under the first sentence suggests that the designation will have significant incremental impacts.

Tribal Comments

Comment (17): Numerous Tribes have asked to have their lands presumptively or categorically excluded from critical habitat designation. The commenters stated that, absent evidence that exclusion would lead to the extinction of the species, Tribal lands should always be excluded. While the Tribes appreciate the Services giving great weight and consideration to excluding Tribal lands, Tribes would prefer their lands to be categorically excluded.

Our Response: While the Services recognize their responsibilities and commitments under Secretarial Order 3206 and in light of Tribal sovereignty, the statute is clear on the process of designating critical habitat, and does not allow for presumptive exclusion of any areas, regardless of ownership, from critical habitat without conducting a discretionary 4(b)(2) exclusion analysis. If we determine that Tribal lands meet the definition of "critical habitat," the statute requires we identify those lands as meeting that definition. However, as discussed in the draft and this final policy, great weight and consideration will be given to Tribal partnerships and conservation plans if the Services enter into the discretionary 4(b)(2) exclusion analysis.

Comment (18): Many commenters expressed that the designation of critical habitat on Tribal lands would have an unfortunate and substantial negative impact on the working relationships the Services and Tribes have established. The Services should state that, when they undertake a discretionary exclusion analysis, they will always consider exclusions of Tribal lands

and not designate such areas, unless it is determined such areas are essential to conserve a listed species.

Our Response: The Services recognize our trust responsibilities with Tribes, and value our collaborative conservation partnerships. Secretarial Order 3206, which provides guidance to the Departments in exercising their statutory authorities – but does not modify those authorities – states:

> Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.

Therefore, the Services generally will not designate critical habitat on Tribal lands if the conservation needs of the listed species can be achieved on other lands. However, if it is determined such areas are essential to conserve the listed species, then, as discussed in the previous comment response, the Services will give great weight and consideration to Tribal partnerships and conservation plans if the Services enter into the discretionary 4(b)(2) exclusion analysis.

Comment (19): Several Tribes expressed a concern that the new policy will result in greater economic and social burdens on Tribes. Tribes bear a disproportionate burden through the consultation process under section 7 of the Act, as compared to State and local governments and private citizens, because so many basic Tribal functions are contingent on actions authorized, funded, or carried out by Federal agencies. Therefore, the commenters stated that, where Tribal lands are designated as critical habitat, the proposed regulations and policies will

require an onerous, time-consuming, bureaucratic process that infringes on Tribal sovereignty and treaty rights and frustrates the ability of the Tribe to provide basic government services and achieve wildlife-conservation and economic-development goals.

Our Response: While the Services recognize that a critical habitat designation may have real or perceived direct and indirect impacts, the Services are committed to assisting Tribes in conserving listed species and their habitats on Tribal lands, where appropriate. Where collaborative conservation partnerships and programs have been developed with Tribes, many of these real or perceived impacts have been ameliorated or relieved. The revised regulations and new policy are intended to provide clarity, transparency, and certainty regarding the development and designation of critical habitat, and provide for a more predictable and transparent critical-habitat-exclusion process. All three initiatives work together to provide greater clarity to the public and Tribes as to how the Services develop and implement critical habitat designations.

Comment (20): One commenter stated that, as written, the policy fails to acknowledge the sovereignty of Tribes and Tribal self-governance by noting only that "Tribal concerns" will be considered in the discretionary exclusion analysis. These proposed regulations and policies represent a missed opportunity to effectuate the letter and spirit of Secretarial Orders 3206 and 3335, and to ameliorate the potentially harsh consequences on Tribes of the proposed regulatory revisions for designating critical habitat. Of even more concern, the Service completely ignores the fundamental disagreement concerning the applicability of the Endangered Species Act to Tribes.

Our Response: Secretarial Order 3206 explicitly recognizes the right of Tribes to participate fully in the listing process, including designation of critical habitat. The Order states:

> Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.

However, S.O. 3206 does not limit the Services' authorities under the ESA or preclude the Services from designating Tribal lands or waters as critical habitat, nor does it suggest that Tribal lands or waters cannot meet the Act's definition of "critical habitat." We are directed by the Act to identify areas that meet the definition of "critical habitat" (i.e., occupied lands that contain the essential physical or biological features that may require special management considerations or protection and unoccupied areas that are essential to the conservation of a species) without regard to landownership. While S.O. 3206 provides important guidance, it does not relieve or supersede the Secretaries' statutory obligation to identify as critical habitat those specific areas meeting the definition of "critical habitat" and to designate such areas unless otherwise exempted by statute or excluded following the discretionary 4(b)(2) exclusion analysis.

Further, following the language and intent of S.O. 3206, when we undertake a discretionary 4(b)(2) exclusion analysis we will always consider exclusions of Tribal lands prior to finalizing a designation of critical habitat, and will give great weight to the collaborative conservation partnerships the Services have with the Tribes, as well as Tribal conservation programs and plans that address listed species and their habitats. The effects of critical habitat designation on Tribal sovereignty and the Services' working relationship with Tribes are relevant impacts that the Services will generally consider in the context of any exclusion analysis under Section 4(b)(2). See, e.g., Center for Biological Diversity v. Norton, 240 F. Supp. 2d 1090, 1105 (D. Ariz. 2003).

State Comments

Comment (21): One commenter asked the Services to use the same standards for evaluating State conservation plans as those used for evaluating federally permitted plans for possible exclusions. The commenter noted that in the draft policy the Services have outlined different conditions for exclusion for HCPs, SHAs, and CCAAs versus all other conservation plans (including State plans). The former must only meet three conditions, while the latter are evaluated based on eight factors. Justification is not provided for why two different sets of criteria are being used. For example, HCP/SHA/CCAA plans need only be "properly implemented" while other conservation plans must show not only implementation but also "success of the chosen mechanism." No explanation for this difference is provided. Furthermore, the commenter noted that all plans should be held to the same threshold for exclusion consideration. States spend enormous amounts of time to craft species-conservation plans. Finally, the commenter stated that plans are developed and implemented based on extensive scientific expertise housed in State wildlife agencies and they are crafted to meet State and Federal laws, rules, and regulations applicable to the protection of wildlife.

Our Response: The Services recognize that considerable time and expertise go into creating State management plans. Any requests for exclusions by States will be considered, whether based on a State management plan or for a State wildlife area. The Services need to evaluate any exclusion request on a case-by-case, fact-specific basis. The Services recognize that not all State plans are the same, and not all plans are designed to meet applicable Federal laws, rules, and regulations. The eight factors presented in this final policy regarding non-

permitted plans are factors the Services will consider when conducting a discretionary 4(b)(2) exclusion analysis evaluating a State conservation plan or wildlife management area for exclusion. We will not hold State or other non-Federal conservation plans to higher standards than permitted plans; the list of eight factors simply indicates the types of factors we will evaluate in any conservation plan. It should be noted that HCPs and SHAs have already been subjected to rigorous analyses of numerous criteria through the permitting process that are not expressly listed in the policy.

Comment (22): A commenter suggested that the Services add the following language to the policy regarding State lands:

> We recognize Congress placed high value in working with State partners in the conservation of threatened and endangered species and we will give great weight to the recommendations from our State partners when evaluating critical habitat on State lands. Many States have land holdings that cross a broad spectrum of uses that can range from lands primarily managed for conservation purposes while other lands are owned to provide maximum economic return as in the case of some State school lands. The Service, in weighing the benefits of inclusion versus exclusion of State lands, will conduct a discretionary analysis if the State indicates a wish to be excluded from a critical habitat designation and provides a detailed assessment on the merits of their requested exclusion. The Service is not under obligation to exclude those State lands but will use the State's assessment as we weigh the expected gain in conservation value for inclusion of a tract of State land in a final critical habitat designation.

Our Response: As stated above, the Services decline to add a specific policy element suggesting that we would give great weight to recommendations of our State partners when evaluating critical habitat on State lands. The Services agree with the commenter's premise that conservation of endangered and threatened species cannot be done without cooperation of State partners. We also agree that we generally will consider exclusions of State lands if requested by States; however, we are under no obligation to exclude such lands, even where requested.

Comments Regarding Federal Lands

Comment (23): One commenter stated that the Services should not "focus" designation of critical habitat on Federal lands, nor assume that the benefits of critical habitat designations on Federal lands "are typically greater" than the benefits of excluding these areas.

Our Response: When designating critical habitat, the Services follow the Act and implementing regulations to develop a designation based solely on the best scientific data available, and that identifies physical or biological features essential to the conservation of a species or areas that are essential for the conservation of a species. This initial identification of eligible areas that meet the definition of "critical habitat" is conducted without regard to landownership or the identity of land managers. Before finalizing a designation of critical habitat, the Services must consider economic impacts, the impact on national security, and any other relevant impact of designating critical habitat. It is following this consideration of potential impacts that the Secretary may then exclude particular areas from critical habitat, but only if the exclusion will not result in the extinction of the species.

The Services look to the Congressional intent of the Act—in particular, section 2(c) states that all Federal agencies shall seek to conserve listed species and their habitats. Additionally, section 7(a)(2) of the Act requires Federal agencies that fund, authorize, or carry out projects to ensure their actions are not likely to destroy or adversely modify critical habitat. The commenter does not explain why the Services should not focus, to the extent practicable and allowed by the Act, on designation of critical habitat on Federal lands. Also, the commenter does not provide an explanation to support its view that the benefits of including Federal lands in a designation of critical habitat are not typically greater than including other areas. In fact, because Federal agencies are required to ensure that their actions are not likely to destroy or adversely modify critical habitat, the benefits of including Federal lands are typically greater than the benefits of including other areas.

Comment (24): Another commenter asked the Services to consider excluding Federal lands that are subject to special management by land-management agencies. Congress has mandated that Federal lands, such as lands managed by the Bureau of Land Management (BLM) and the U.S. Forest Service, be available for multiple uses. The commenter stated the Services' designation of critical habitat primarily on Federal lands upsets the balance struck in land-management decisions made by the agencies charged with administering Federal lands and, moreover, interferes with the directives established by Congress.

Our Response: Complying with the Act does not interfere with other Federal agency mandates. The Act is one of many Federal mandates with which all Federal agencies must comply, and Federal agencies must use available discretion to take into account the needs of listed species when implementing their other duties. The Services are also required to comply

with the Act as they manage their lands, monuments, trust resources, and sanctuaries for multiple purposes. It has been the experience of the Services that listing or designating critical habitat for species does not drastically alter existing management schemes of other Federal agencies. In those instances where conflicts arise, the Services have successfully worked with the affected Federal agency to reduce conflicts with its mission. The Services are committed to continuing the collaborative relationships with other Federal agencies to further conservation of species and their habitats.

Comment (25): One commenter stated that a reasonable exclusion policy should allow the Services to recognize and consider exclusions for all types of conservation projects, whether they occur on Federal or non-Federal lands. The commenter understands the Services' intent to reduce regulatory burdens on private lands. However, the commenter opposes a policy that would disqualify exclusions on Federal lands, while prioritizing them for recovery. The commenter strongly stated that exclusions should be based on the criteria outlined in section 4(b)(2) of the Act, whether the land is Federal or non-Federal. Section 4(b)(2) of the Act provides the Secretary the discretion to "exclude any area from critical habitat if [s]he determines that the benefits of exclusion outweigh the benefits of specifying such area as part of the critical habitat," but does not delineate whether landownership should play a factor in the decision to exclude lands from designation.

Our Response: To the extent that the commenter is suggesting that discretionary 4(b)(2) exclusion analyses are done on a case-by-case basis and are highly fact-specific, we agree. This policy does not preclude exclusions of Federal lands; in fact, the Services have excluded particular Federal lands in the recent past. However, the Services maintain their policy position

that Federal lands will typically have greater benefits of inclusion compared to the benefits of exclusion. This position is consistent with the purposes of the Act as outlined in section 2. Section 2(c)(1) states:

> It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act.

Additionally, section 7(a)(1) restates this responsibility and specifically requires all Federal agencies to consult with the Services to carry out programs for conservation of endangered and threatened species. Because the section 7 consultation requirements apply to projects carried out on Federal lands where there is discretionary Federal involvement or control, designation of critical habitat on Federal lands is more likely to benefit species than designation of critical habitat on private lands without a Federal nexus.

Comment (26): A commenter suggested that the Services should create an incentive for Federal land managers. The Services could consider a similar approach to Federal land exclusions that are provided for Department of Defense installations. Applying this same standard to all Federal lands, the commenter stated, would create a stronger incentive for more agencies to live up to the requirements of section 7(a)(1) of the Act.

Our Response: Congress intended for Federal agencies to participate in the conservation of endangered and threatened species. As discussed above, section 2(c)(1) of the Act clearly states this responsibility. Additionally, section 7(a)(1) restates this responsibility and specifically requires all Federal agencies to consult with the Services to carry out programs for conservation of endangered and threatened species. Section 7(a)(2) of the Act requires Federal agencies to

consult with the Services to "insure that any action authorized, funded, or carried out by such agency … is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species."

Exemption of Department of Defense lands from critical habitat is mandated under section 4(a)(3)(B)(i) of the Act, and is thus entirely different from discretionary exclusions of particular lands from a designation of critical habitat under section 4(b)(2). Exemption of an area covered under an INRMP under the Sikes Act is based on the statutory condition that the Secretary has determined the plan provides a benefit to a species, whereas an exclusion of a particular area is based on the discretionary 4(b)(2) weighing of the benefits of inclusion and exclusion.

Comments on Economics

Comment (27): A commenter asked the Services to provide details of how costs and benefits are evaluated. The draft policy does not clearly define how benefits and costs will be determined, giving the Services a great deal of discretion. The commenter noted that the draft policy does not adequately explain how the consideration of economic impacts will be applied during the exclusion process. The phrase "nature of those impacts" in the draft policy fails to provide a description that will give adequate notice of what will actually be considered.

Our Response: The policy is not intended to present a detailed treatment of economic impact analysis methodology. The **Summary of Comments and Recommendations** section of the Service's final rule regarding revisions to the regulations for impact analyses of critical

habitat, which was published on August 28, 2013 (78 FR 53058), contains a discussion of cost and benefit analysis of critical habitat designations.

To aid in the consideration of probable incremental economic impacts under section 4(b)(2) of the Act, the Services conduct an economic analysis of the designation of critical habitat, which satisfies the mandatory consideration of economic impacts. Should the Secretaries consider excluding a particular area from critical habitat, the economic analysis is one tool the Secretaries may use to inform their decision whether to exclude the particular area.

The commenter points out that the phrase "nature of those impacts" is not defined. The Services intentionally did not define this phrase, because it has been the experience of the Services that economic impacts of critical habitat designations vary widely, making it infeasible to quantify the level of impacts that would trigger further consideration in all cases.

Comment (28): Because the Services use an incremental approach to estimating economic impacts, one commenter suggested that the economic impacts of critical habitat are vastly underestimated. The commenter suggested the Services should conduct an economic analysis that evaluates the cumulative and co-extensive costs of critical habitat. Focusing on incremental economic impacts does not provide an accurate picture, as it discounts the full financial implications of a listing for landowners, businesses, and communities. The commenter expressed the opinion that the incremental approach effectively shifts the economic costs of critical habitat designations to the listing process under the Act where the Service is prohibited from considering costs. Ultimately, because this approach will result in fewer costs being attributed to critical habitat designation, it will greatly reduce the usefulness of the 4(b)(2) process.

Our Response: We disagree. Our final rule amending 50 CFR 424.19, published August 28, 2013 (78 FR 53058), codified the use of the incremental method for conducting impact analyses, including economic analyses, for critical habitat designations. That final rule contains responses to public comments that clearly lay out the Services' rationale for using the incremental method. Please refer to that rule for more information. Evaluating incremental impacts that result from a regulation being promulgated, rather than considering coextensive impacts that may be ascribed to various previous regulations, is further supported by Executive Order 12866, as applied by OMB Circular A-4.

Comment (29): Congress expressly required the Secretaries to consider economic impacts when they designate critical habitat (16 U.S.C. 1533(b)(2)). A commenter stated the Services have interpreted this requirement to limit their use of the economic analysis to the exclusion process. The commenter further noted that the draft policy restricts discussions of the economic impacts from critical habitat designation to determinations of whether an area will be excluded from a critical habitat designation. Economic concerns are arguably the most important consideration for those being regulated. The commenter expressed the opinion that the designation of critical habitat has economic impacts on States, counties, local governments, and landowners. These impacts include increased regulatory burdens that delay projects. The commenter stated it is important that the Services recognize the economic impacts of critical habitat designation and consider those impacts throughout the designation process, as required by Congress under the Endangered Species Act. The commenter asked that the draft policy be amended to emphasize use of economic impacts analyses in each stage of the designation process, not just exclusion of an area from a critical habitat designation.

Our Response: We agree that the mandatory consideration of economics is an important step in the designation of critical habitat. However, we disagree that economic impact analyses should be used at each step of the designation process. The process of developing a designation is based on the best available scientific information, and consists of a determination of what is needed for species conservation. Congress expressly prohibited the Secretaries from using anything other than the best available scientific information in identifying areas that meet the definition of "critical habitat." However, Congress expressly required the Secretaries to consider economic impacts, national-security impacts, and other relevant impacts before finalizing the critical habitat designation.

The Services prepare an economic analysis of each proposed designation of critical habitat and may use that information in discretionary 4(b)(2) exclusion analyses. Our final rule that amended our implementing regulations at 50 CFR 424.19, which was published on August 28, 2013 (78 FR 53058), contains more information regarding impact analyses, including economics. This final policy is focused on the discretionary process of excluding areas under section 4(b)(2).

Comment (30): A commenter stated that the economic impact of critical habitat designations on the exercise of rights to Federal lands is significant and should not be discounted. In the preamble to the draft policy, the Services state that they "generally will not consider avoiding the administrative or transactional costs associated with the section 7 consultation process to be a 'benefit' of excluding a particular area from a critical habitat designation in any discretionary exclusion analysis." The commenter suggested this statement ignores that administrative and transactional costs of critical habitat designations can be

significant, particularly when critical habitat will cover a large area. The commenter stated that Federal agencies are not the only entities that must absorb the costs of section 7 consultation. Administrative and transactional costs are also borne by non-Federal parties, such as applicants for permits or licenses. The commenter further noted that, if the exclusion analysis is limited to non-Federal lands, where section 7 consultation is often not triggered, the economic benefits of exclusion will rarely be considered. For proponents of large projects on Federal lands, these economic benefits of exclusion can be significant.

Our Response: We agree with the commenter that the Services should consider the indirect effects resulting from a designation of critical habitat. In fact, the Services are required to evaluate the direct and indirect costs of the designation of critical habitat under the provisions of Executive Order 12866, and we do so through the economic analyses of the designation of critical habitat. However, as noted previously, we do not consider avoidance of transactional costs associated with section 7 consultation to be a benefit of exclusion. Rather, those costs represent the inherent consequence of Congress' decision to require Federal agencies to avoid destruction or adverse modification. Please refer to the **Summary of Comments and Recommendations** section of the final rule amending 50 CFR 424.19 (78 FR 53058, August 28, 2013), particularly our response to Comment 44, for more information regarding direct and indirect costs.

Comment (31): One commenter suggested that the Services should also consider potential economic benefits of inclusion. Economic benefits of designating critical habitat include a potentially faster rate of recovery for the species, which could result in less long-term costs for the agency and partners.

Our Response: The Act requires a mandatory consideration of the economic impact of designating a specific area as critical habitat. The Services interpret this statement to be inclusive of benefits and costs that result from the designation of critical habitat. This interpretation is further supported by Executive Order 12866 as clarified in OMB Circular A–4. The Services do consider non-consumptive use benefits, such as hiking, increased tourism, or appreciation of protected open or green areas, in a qualitative manner where credible data are available. Further, in rare circumstances, when independent and credible research can be conducted on the benefits for a particular species, that information is used. However, for most species, credible studies and data related to potential economic benefits of designating their habitat as critical habitat are not available or quantifiable.

Comment (32): One commenter expressed the opinion that listing decisions under the Act have real economic impacts for State and local governments, through restriction on rangeland grazing, hunting, tourism, and development of resources on public and private lands. It may well be that, in some circumstances, the economic benefits of exclusion outweigh the conservation benefits of inclusion. The commenter suggested that such situations should be recognized by the Services and granted exclusion in order to provide maximum flexibility for a balanced mix of conservation and economic activities.

Our Response: The Services recognize that the listing of species may result in an economic impact; however, the Act does not allow the consideration of potential economic impacts when listing a species. The Act expressly limits the basis of our determination of the status of a species to the best scientific and commercial information available. The Services also cannot consider the potential economic impact of listing a species in an exclusion analysis under

section 4(b)(2) of the Act. This consideration of economics in the discretionary 4(b)(2) exclusion analysis is to be based on the incremental impacts that result solely from the designation of critical habitat, and not those impacts that may result from the listing of the species. 50 CFR 424.19.

We assume the commenter is referring to considerations of economics prior to finalizing a designation of critical habitat. The Services always consider potential economic impacts that may result from the designation of critical habitat. The purpose of the second sentence of section 4(b)(2) is to authorize the Secretaries to exclude particular areas from a designation if the benefits of exclusion outweigh the benefits of inclusion. The Services recognize that there may be circumstances when the economic benefits of exclusion (together with any other benefits of exclusion) do in fact outweigh the conservation benefits of inclusion (together with any other benefits of inclusion). In that case, the Services may decide to exclude the particular area at issue (unless exclusion will result in extinction of the species). The Services will evaluate the best available scientific information when undertaking a discretionary 4(b)(2) exclusion analysis.

Comment (33): A commenter noted that the Services should consider financial commitments made in HCPs, SHAs, and CCAAs. Proponents could commit serious finances only to have the area later designated as critical habitat.

Our Response: The Services do not consider the financial commitments made in HCPs, SHAs, or CCAAs, as a standalone factor when evaluating areas for exclusion. The Services, however, do consider the conservation benefits associated with financial commitments of a plan to reduce the benefits of including a particular area in critical habitat. The fostering and maintenance of conservation partnerships can be a benefit of exclusion, and can serve as an

incentive to future financial commitments to further conservation. The Services greatly value the on-the-ground conservation delivered by these partnerships and their associated permitted plans.

Comments on National Security

Comment (34): A commenter asked the Services to clarify how national-security concerns will be considered. The commenter stated that the Services say they will give "great weight" to these concerns, but this phrase is a subjective term and could use additional clarity. The use of the phrase implies national-security concerns will always outweigh the benefits of inclusion. The commenter recommends expanding or altering this phrase to better clarify how national-security concerns will be considered.

Our Response: The Services do not consider the phrase "great weight" to imply a predetermined exclusion based on national-security concerns, as the commenter is suggesting. The Services always consider for exclusion from the designation areas for which DoD, DHS, or another Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns. The agency requesting such exclusion must provide a reasonably specific rationale for such exclusion. The Service will weigh heavily those concerns regarding the probable incremental impact to national security as a result of designating critical habitat. This does not mean the Services will then in turn give little weight to any benefits of inclusion. It is not the Services' intent to predetermine the outcome of a discretionary 4(b)(2) exclusion analysis.

General Comments

Comment (35): One commenter asked for an explanation of how the two proposed critical habitat rules and draft policy will work together, discussing the challenges and benefits they provide together. E.O. 13563 states that regulations "must promote predictability and reduce uncertainty."

Our Response: The regulations and policy are intended to provide clarity, transparency, and certainty regarding the development and implementation of critical habitat, and provide for a more predictable and transparent process for designating critical habitat. All three initiatives work together to provide greater clarity to the public as to how the Services develop and implement critical habitat designations. The rule amending 50 CFR part 424 provides new definitions and clarifications that will inform the process of designating critical habitat. The rule revising the definition of "destruction or adverse modification" (at 50 CFR 402.02) redefines that term and clarifies its role in section 7 consultations. This policy focuses on how the Services implement section 4(b)(2) of the Act, with regard to excluding areas from critical habitat designations.

Comment (36): The draft policy states that it will be prospective only and will not apply to any "previously completed" critical habitat designations. One commenter stated the policy should more clearly state that the revised language will not be used in reassessing or reassigning critical habitat; only future designations of critical habitat will fall under the new policy.

Our Response: The commenter is correct that this final policy does not apply to designations of critical habitat finalized prior to the effective date of this policy (see **DATES**, above). This policy applies to future designations of critical habitat that are completed after the

effective date of this policy. If the Services choose to revise previous designations, the Services will use the operative regulations and policies in place at the time of such revision. Of course, as we have indicated elsewhere, this policy does not establish binding standards that mandate particular outcomes.

Comment (37): We received many comments that the policy proposed changes that were arbitrary and without merit, because they will deprive private property owners and States of incentives and tools to conserve species and their habitat.

Our Response: The Services have developed, and continue to develop, considerable tools to assist landowners in the conservation of species and their habitats. Nothing in this policy takes away from those tools and reliance on, and recognition of, collaborative conservation partnerships. Rather, the Services believe the elements of this policy provide greater clarity and certainty on how those conservation tools are regarded and evaluated when considering designations of critical habitat. Additionally, the Services' goal is to remove any real or perceived disincentive for voluntary conservation plans and collaborative partnerships, whether permitted under section 10 of the Act or developed outside of those provisions.

Comment (38): A commenter stated that monitoring and adaptive management of conservation plans should not be used as standards for determining exclusions. The commenter noted that critical habitat designations do not have this standard, which elevates the exclusionary determination above that which the Services use in their critical habitat designations.

Our Response: In order to exclude an area from critical habitat, the benefits of exclusion must outweigh those of inclusion, and the exclusion must not result in the extinction of the

species. As the commenter correctly notes, adaptive management and monitoring are not a prescribed part of critical habitat designations and implementation. However, monitoring the implementation of conservation actions is essential to determine effectiveness of such actions, and using adaptive management is critical to the long-term success of conservation plans. Therefore, these factors are important considerations in evaluating the degree to which the existence of the conservation plan reduces the benefits of inclusion of an area in critical habitat.

Comment (39): A commenter stated that in the list of eight factors the Services say they will consider when evaluating lands for exclusion based on non-permitted conservation plans, the Services should clarify what they mean by, "The degree to which there has been agency review and required determinations." The commenter asked which agencies would review the conservation plan, agreement, or partnership—the Services, other Federal agencies, or State or local agencies? What determinations are "required determinations?"

Our Response: Should the Services choose to enter into the discretionary 4(b)(2) exclusion analysis, we would evaluate any information supplied by the requester for exclusion, including whether the plan has complied with applicable local, State, and Federal requirements, and any determinations required therein. For example, a county-level ordinance requiring habitat set-asides for development may require State environmental review and public scoping. This type of required review or determination would be taken into consideration when evaluating particular areas for exclusion. The Services are not prescribing any suite of required determinations. The burden is on the requester to provide relevant information pertaining to review of the plan by any agency. This is important information that will be used in our

evaluation of the effectiveness of a conservation plan in the discretionary 4(b)(2) exclusion analysis.

Comment (40): One commenter disagreed with the Services' proposal to consider whether a permittee "is expected to continue to [properly implement the conservation agreement] for the term of the agreement." The commenter stated the Services should rely on their authority to revoke permits and revise critical habitat rather than speculating about future implementation of conservation agreements. Accordingly, the commenter requests that the Services remove the phrase "and is expected to continue to do so for the term of the agreement" from the first condition related to the exclusion of conservation plans related to section 10 permits.

Our Response: The Services need to evaluate whether there is reasonable certainty of implementation and completion of conservation plans. Permittees are expected to fulfill the provisions of their permits for the agreed-upon time period. However, given the voluntary nature of agreements, it is possible, even in permitted plans, that permittees may not implement the plan as conditioned or may cancel an agreement at any time. Therefore, certainty of the continuance of any conservation plan is an important consideration.

Comment (41): One commenter stated that the Services should emphasize the benefits of critical habitat and expressed disappointment that the Services' draft policy attempts to minimize the actual benefits that derive from critical habitat with an extremely cursory description of critical habitat's benefits at the beginning of the preamble to the draft policy.

Our Response: The Services in no way intend to understate the important functions of critical habitat. We recognize that the primary threat faced by most endangered and threatened

species has been, and continues to be, loss and fragmentation of suitable habitat. Critical habitat designation is one conservation tool in the Act that attempts to address this situation, by identifying habitat features and areas essential to the conservation of the species. It provides educational benefits by bringing these important areas to the public's and landowners' attention, and requires consultation with the Services for proposed activities by Federal agencies, on Federal lands, or involving a Federal nexus, to ensure that such activities are not likely to cause the destruction or adverse modification of the critical habitat. These benefits are considered by the Services on a case-by-case basis in the context of the discretionary consideration of exclusions under Section 4(b)(2).

Comment (42): A commenter stated that the Services should clarify that this policy provides broad program guidance, not specific prescriptions of exclusion analysis and designation. It does not concern a specific action concerning a specific property. Also, the commenter stated the Services should point out that the 4(b)(2) policy could be used to avoid a Fifth Amendment taking if extensive property restrictions would occur due to critical habitat designation.

Our Response: We agree that the purpose of this policy is to provide guidance and clarity as to how the Services consider exclusions under section 4(b)(2) of the Act, rather than formulaic prescriptions as to how exclusion analyses are performed. As noted above, each area considered for exclusion from a particular critical habitat designation is unique, and the factors considered in such evaluation are fact-specific. Thus, there is no simple, one-size-fits-all approach; rather, the Services take a case-by-case approach in considering the factors in a weighing and balancing analysis, and the relative importance (or weight) of each of those factors.

The Services do not consider the designation of critical habitat to impose property restrictions such that a Fifth Amendment taking issue would arise.

Comment (43): One commenter noted that the Services should clarify that exclusion of private lands from critical habitat designation is not a "reward." The commenter stated the draft policy may be perceived as contradictory to key messaging being promoted through outreach efforts to landowners and that the Services' outreach messaging has been that critical habitat designation does not affect private landowners, unless their activity is authorized, funded, or carried out by a Federal agency. The commenter's opinion is that the draft policy, however, appears to "reward" landowners by excluding their land from critical habitat if their land is covered by a conservation plan.

Our Response: We agree in part with the commenter. It is true that critical habitat does not create a regulatory impact on private lands where there is no Federal nexus, and that even when there is a Federal nexus, the potential impact of a designation of critical habitat sometimes is minimal. Nevertheless, the Services are keenly aware of the significant concerns that some landowners have about critical habitat. We also recognize that landowners invest time and money for proactive conservation plans on their lands. The Services do not exclude particular areas from a designation of critical habitat as a reward to landowners for conservation actions they undertake. Rather, the existence of a conservation plan; effective, implemented conservation actions; and a demonstrated partnership are relevant factors that should be considered in any discretionary 4(b)(2) analysis. If the Services find the benefits of exclusion outweigh inclusion based on the specific facts, the particular area covered by the conservation plan may be excluded, provided the exclusion will not result in the extinction of the species.

Comment (44): A commenter asked the Services to define "partnerships" and how they will be evaluated.

Our Response: Partnerships come in many forms. Some partnerships have a long-standing track record of the partners working together for the conservation of species and their habitat, some partnerships are newly formed, and others are generally anticipated to occur in the future. We greatly appreciate and value these conservation partnerships, and will consider the specifics of what each partnership contributes to the conservation of the species when conducting discretionary 4(b)(2) exclusion analyses. We will also consider the general benefits that excluding areas will have on encouraging future partnerships. Because the specifics and context of partnerships vary so much, we conclude that it would not be useful to attempt to expressly define "partnerships," or to set out uniform guidance as to how they will be evaluated.

Comment (45): One commenter stated that the length of a conservation plan and the certainty it will continue to be implemented should be added to the criteria used to evaluate HCPs, SHAs, and CCAAs. None of the conditions account for the temporary nature of these agreements, nor is this aspect discussed elsewhere in the draft policy or preamble. A commenter recommended adding a fourth condition to address the expected longevity of the CCAA/SHA/HCP.

Our Response: We have already captured this in the first condition we evaluate, which states: "The permittee is properly implementing the CCAA/SHA/HCP and is expected to continue to do so for the term of the agreement. A CCAA/SHA/HCP is properly implemented if the permittee is and has been fully implementing the commitments and provisions in the

CCAA/SHA/HCP, Implementing Agreement, and permit." We have determined not to be more prescriptive than this, because we need to retain flexibility in our evaluations. We may use the track record of partnership in our discretionary 4(b)(2) exclusion analysis, which may include the length of the permitted plan. For example, some plans have long-term implementation schedules in which additional conservation measures are developed or phased in over time, so it would not be appropriate to expect all measures will be put into place immediately. The Services expect that plans will be fully implemented regardless of their term of agreement or operation. When issuing permits, the Services considera whether the term of any such plan is sufficient to produce meaningful conservation benefits to the species. Therefore, it is not necessary in all cases to evaluate the term of a permit as a condition for exclusion from critical habitat. However, the Services have retained their flexibility to evaluate plans on a case-by-case basis, and may consider the term of the plan if appropriate.

Comments Regarding Transportation Infrastructure

Comment (46): A commenter requested that the Services exclude transportation infrastructure from critical habitat designations. The commenter suggested that a new paragraph or policy element be added. The paragraph would state the Services will always consider in their discretionary exclusion analysis that dedicated transportation infrastructure and rights-of-way (ROWs) be excluded from critical habitat, given that transportation lands are managed primarily for the use and safety of the travelling public and usually have very little conservation value for listed species.

Our Response: The Services recognize the importance of maintaining transportation infrastructure and ROWs for the safe conveyance of people and goods. However, the Services do not agree that creating a dedicated policy element giving great weight and consideration to exclusion of transportation infrastructure and ROWs is necessary. Some areas seemingly included within the overall boundaries of critical habitat designations consist of manmade structures and impervious surfaces that do not contain the features essential to the conservation of a species. This occurs because of the scale and resolution of the maps used to depict critical habitat. To remedy this, all regulations designating critical habitat contain language stating that manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located are not included in critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to the requirement that the Federal agency insure that the action is not likely to adversely modify critical habitat, unless the specific action would affect the physical or biological features in the adjacent critical habitat.

Portions of ROWs may not contain manmade structures, and may be included in areas that otherwise meet the definition of "critical habitat." In some cases, the footprint of ROWs themselves may not have the features essential to the conservation of the species at issue. In this case, should the Services engage in a discretionary 4(b)(2) exclusion analysis, the Services may determine that that there is little or no benefit of inclusion, and that the benefits of exclusion outweigh the benefits of inclusion, and, therefore, decide to exclude the ROWs from the designation.

Comment (47): The designation of critical habitat on an airport may serve to attract wildlife to the airport environment. The Federal Aviation Administration (FAA) requests that an element be added to the policy that would convey great weight and consideration to excluding aircraft-movement areas, runway and taxi areas, object-free areas, and runway-protection zones from designations of critical habitat. Designation of critical habitat could also impair the airport owner's ability to expand facilities, and thus have economic costs. FAA requests that safety be a specific consideration in any exclusion analysis.

Our Response: The Services disagree that a dedicated policy element is needed in this particular instance. When identifying areas that meet the definition of "critical habitat," the Act does not authorize the Services to consider landownership. It is a process that relies on the best scientific data available to determine the specific occupied areas containing features essential to the conservation of a species that may require special management considerations or protection and unoccupied areas that may be essential for the conservation of the species. Active airport areas that do not meet the definition of "critical habitat" (i.e., occupied areas that do not contain the features essential to the conservation of a particular species that may require special management considerations or protection or unoccupied areas that are not essential for the conservation of the species) will not be designated critical habitat. As mentioned above, manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located are generally not included in critical habitat. Therefore, a Federal action involving these lands will not trigger section 7 consultation with respect to the requirement that the Federal agency insure that the action is not likely to destroy or adversely modify critical habitat, unless the specific action would affect the physical or biological features in the adjacent critical habitat.

In some particular instances, the Services may identify areas within airport boundaries that meet the definition of "critical habitat" as applied to a particular species. In these instances, the Services generally would consider any request for exclusion from the designation received from airport managers or FAA under the general authority of section 4(b)(2) or applicable elements of this policy, e.g., the non-permitted plans and partnerships provision of this policy. In addition, the Services encourage airport managers to consider developing HCPs that would address incidental take of listed species and conservation of their habitat.

Comments on NEPA Requirements

Comment (48): The Services have determined that a categorical exclusion (CE) from the NEPA requirements applies to the draft policy. CEs address categories of actions that do not individually or cumulatively have a significant effect on the human environment. The commenter stated that a CE is not appropriate for NEPA compliance on issuance of this draft policy, given the potential expansion in future critical habitat designations and the significant effect on environmental and economic resources in areas to be designated as a result of these initiatives.

The commenter asserted that the Services' proposed actions constitute a "major federal action significantly affecting the quality of the human environment" (42 U.S.C. part 4321, et seq.). Furthermore, the commenter noted, the Services are required to prepare a full Environmental Impact Statement (EIS), in draft and final, as part of this process and prior to any final Federal decisionmaking on the proposed rules and guidance. An EIS is justified by the sweeping geographic scope of the proposals and their potentially significant effects on

environmental resources, land-use patterns, growth and development, and regulated communities.

Our Response: Following our review of the statutory language of section 4(b)(2) and our requirements for compliance under the National Environmental Policy Act of 1969 (NEPA), we find that the categorical exclusion found at 43 CFR 46.210(i) and NOAA Administrative Order 216–6 applies to this policy. As reflected in the DOI regulatory provision, the Department of the Interior has found that the following category of actions would not individually or cumulatively have a significant effect on the human environment and is, 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 . . . ." NOAA Administrative Order 216–6 contains a substantively identical exclusion for "policy directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature." Section 6.03c.3(i). The NOAA provision also excludes "preparation of regulations, Orders, manuals or other guidance that implement, but do not substantially change these documents, or other guidance." *Id.*

At the time the DOI categorical exclusion was promulgated, there was no preamble language that would assist in interpreting what kinds of actions fall within the categorical exclusion. However, in 2008, the preamble for a language correction to the categorical exclusion provisions gave as an example of an action that would fall within the exclusion the issuance of guidance to applicants for transferring funds electronically to the Federal Government

This final policy is an action that is fundamentally administrative or procedural in nature. Although the policy addresses more than the timing of procedural requirements, it is nevertheless administrative and procedural in nature, because it goes no further than to clarify, in expressly

non-binding terms, the existing 4(b)(2) exclusion process by describing how the Services undertake discretionary exclusion analyses as a result of statutory language, legislative history, case law, or other authority. This final policy is meant to complement the revisions to 50 CFR 424.19 regarding impact analyses of critical habitat designations and provide for a more predictable and transparent critical-habitat-exclusion process. This final policy is nonbinding and does not limit Secretarial discretion because it does not mandate particular outcomes in future decisions regarding exclusions from critical habitat. As elaborated elsewhere in this final policy, the exclusion of a particular area from a particular critical habitat designation is, and remains, discretionary.

Specifically, this final policy explains how the Services consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process. The policy does not constrain the Services' discretion in making decisions with respect to exclusions from critical habitat. The considerations in this policy are consistent with the Act, its legislative history, and relevant circuit court opinions. Therefore, the policy statements are of an administrative (e.g., describing the current practices of the Service that have come about as a result of legislative history, case law, or other authority), technical (e.g., edits for plain language), and/or procedural (e.g., clarifying an existing process for a Service or NMFS activity) nature.

FWS reviewed the regulations at 43 CFR 46.215: Categorical Exclusions: Extraordinary Circumstances, and we have determined that none of the circumstances apply to this situation. Although the final policy will provide for a credible, predictable, and transparent critical-habitat-exclusion process, the effects of these changes would not "have significant impacts on species

listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species," as nothing in the policy is intended to determine or change the outcome of any critical habitat determination. Moreover, the policy would not require that any previous critical habitat designations be reevaluated on this basis. Furthermore, the 4(b)(2) policy does not "[e]stablish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects" (43 CFR 46.215(e)). None of the extraordinary circumstances in 43 CFR 46.215(a) through (l) apply to the policy on implementing section 4(b)(2) of the Act.

NMFS also reviewed its exceptions and has found that this policy does not trigger any of the exceptions that would preclude reliance on the categorical exclusion provisions. It does not involve a geographic area with unique characteristics, is not the subject of public controversy based on potential environmental consequences, will not result in uncertain environmental impacts or unique or unknown risks, does not establish a precedent or decision in principle about future proposals, will not have significant cumulative impacts, and will not have any adverse effects upon endangered or threatened species or their habitats. NOAA Administrative Order 216–6, § 5.05c.

Comment (49): A commenter stated that NEPA review should not be a standard when evaluating conservation plans and that the Services should not evaluate whether a conservation plan, agreement, or partnership was subject to NEPA review when determining whether to exclude areas from critical habitat designations. See 79 FR 27057 (May 12, 2014) (section 2.d. of the draft policy). Consideration of this factor discounts the many worthwhile conservation plans developed by private entities and State and local governments. The commenter stated that

because NEPA only requires analysis of Federal actions (see 42 U.S.C. 4332(2)(C)), conservation plans that are not approved by a Federal agency—such as those developed by citizens and State and local governments—would not undergo NEPA review. States, which are principal managers of wildlife within their borders, frequently develop conservation plans to benefit listed and non-listed species. Also, landowners can establish conservation banks or conservation easements without NEPA review or public input. Thus, the commenter stated that the application of this factor to plans and agreements for which they are often inapplicable would seem to automatically weigh against exclusion in most instances. Instead, the commenter suggests that the Services should focus on the effectiveness of the plan and its conservation value, regardless of the procedural processes used to establish the plan.

Our Response: The list of factors the Services will consider in connection with exclusion analysis of non-permitted plans seems to have been misunderstood as absolute requirements for excluding areas covered by such plans. For some plans that the Services may evaluate (those that are Federal and may have a significant impact on the environment), it would be appropriate to consider whether NEPA reviews have been completed; for other plans, it may not be. The Services are not suggesting that every plan needs to have undergone NEPA review. Not all of the items listed under paragraph 2 (described above under the heading, *Private or Other Non-Federal Conservation Plans and Partnerships, in General*) are needed to ensure the Services consider a plan. To this end, the Services have modified the language preceding the list of factors for evaluating non-permitted conservation plans, to clarify that some of the factors may not be relevant to all plans.

Specific Language Suggested by Commenters

Comment (50): Several commenters suggested specific line edits or word usage.

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

Comment (51): A commenter suggested changing the phrase "and meets the conservation needs of the species" to "and maintains the physical or biological features essential for the conservation of the species" in draft policy element 3(c), which relates to permitted plans under section 10 of the Act. This change is suggested to maintain consistency in the use of terms related to critical habitat designations and exclusions.

Our Response: The Services have elected not to make the suggested change. The language in question refers to permitted HCPs, SHAs, and CCAAs, and more specifically their underlying conservation plans. Plans developed to support these conservation vehicles are not necessarily designed using the terminology applicable to critical habitat designation. Therefore, we conclude that it is more appropriate to retain the more general language used in our proposal.

Comment (52): One commenter stated it will be very difficult for the Services to determine if excluding one piece of habitat "will result in the extinction of a species," as stated in the draft policy element 8. Therefore, the commenter recommends the language be changed to express a likelihood the action will result in the extinction of the species and stated this determination should be made according to the best available science. The commenter suggests the following as replacement language: "We must not exclude an area if the best available science indicates that failure to designate it will likely result in the extinction of the species."

Our Response: Part 8 of the policy is a restatement of the statutory provision of the Act that states the Secretary shall not exclude an area if the exclusion will result in the extinction of the species concerned. To the extent that the statutory language is ambiguous, we decline to interpret it at this time.

Comment (53): One commenter remarked there remains a fair amount of vague language in the factors that are considered during a discretionary 4(b)(2) exclusion analysis. Specifically, the commenter stated it is unclear if factors that begin with "Whether" will rank higher if the answer is affirmative. Also, factors that begin with "The degree to which," "The extent or," and "The demonstrated implementation" must be clarified and quantified before they can be appropriately and fairly assigned weight in a designation of critical habitat.

Our Response: The examples of language noted above from the draft policy were carefully chosen. As this is a policy and not a regulation, the Services chose language such as "the degree to which" to accommodate the gradations and variations in certain fact patterns relating to conservation partnerships and plans. Not all plans and partnerships are developed in the same manner, and no one set of evaluation criteria would apply. Rather, the Services' intent in drafting the language was to provide latitude in evaluating different types of plans and partnerships. Further, the commenter does not provide any examples of how to quantify measures, nor does the commenter provide alternate language or suggested revisions to this section of the policy.

Comment (54): One commenter suggested adding an additional factor under non-permitted plans and partnerships, "Plans must be reasonably expected to achieve verifiable, beneficial results to qualify for exclusion from critical habitat designation."

Our Response: We appreciate the suggestions, but we believe these factors are already captured in the factors in the policy under paragraphs 2.f. ("The degree to which the plan or agreement provides for the conservation of the essential physical or biological features for the species.") and 2.h. ("Whether the plan or agreement contains a monitoring program and adaptive management to ensure that the conservation measures are effective and can be modified in the future in response to new information.") The existence of a monitoring program and adaptive management (paragraph 2.h.) speaks to verifiable results, and the statements regarding providing for the conservation of the essential features and effective conservation measures (paragraph 2.f.) relate to beneficial results. Therefore, we did not adopt the suggested additions.

Comment (55): One commenter suggested adding a fourth condition under the permitted plans section of the policy: "If plans cannot be implemented or do not achieve the intended results, a re-evaluation of critical habitat designation may be required."

Our Response: As discussed in this final policy in the framework section, we base the exclusion not only on the plan, but on the conservation partnership. Therefore, our first step would be to work with that partner to implement the plan, bring the plan into compliance, or adjust the conservation management or objectives of the plan to be effective for the conservation of the covered species. We of course retain the authority under the Act to revise the designation, if necessary, through the rulemaking process to include these areas in critical habitat, if

appropriate. For the above reasons, while we considered the suggestion to add a policy element, we have determined that it is not necessary.

Comment (56): One commenter suggested adding the following language to the draft policy element paragraph 5: "If the agency requesting the exclusion does not provide us with a specific justification, we will contact the agency to require that it provide a specific justification. When the agency provides a specific justification, we will defer to the expert judgment of the DoD, DHS, or another Federal agency."

Our Response: The suggested text is paraphrased from the policy preamble. Therefore, the Services do not agree that this language adds substantively to the clarity of the policy, and we did not adopt this suggestion.

Comment (57): A commenter suggested we add the following language to the policy regarding private lands: "The Service recognizes that many listed species are found primarily or partially on private lands. For some endemic species, their entire range may be wholly on private lands, making partnerships with those landowners far more valuable than any expected gain that might be achieved through the incremental gains expected through a critical habitat designation and subsequent section 7 consultations. We acknowledge the potential incremental gain in conservation value from designating critical habitat on private land can be undermined if the landowner is not a partner in that designation or is opposed to that designation. Private land tracts that are proposed as critical habitat are likely to maximize their recovery value for listed species if the landowner is amenable to conservation and recovery activities on their lands. Therefore, landowners whose property has been proposed as critical habitat and wish to be

excluded from that designation will be given serious consideration for exclusion if they provide information concerning how the lands will be managed for the conservation of the species."

Our Response: The Services generally will consider exclusion of private lands from a designation of critical habitat if specifically requested. Private lands are needed for the conservation of endangered and threatened species. If a private landowner requests exclusion, and provides a reasoned rationale for such exclusion, including measures undertaken to conserve species and habitat on the land at issue (such that the benefit of inclusion is reduced), the Services would consider exclusion of those lands. However, the Services decline to include a policy element in this policy covering this particular suggestion.

Comment (58): A commenter suggested that we give great weight and consideration to exclusion of lands whose landowners allow access to their lands for purposes of surveys, monitoring, and other conservation and research activities.

Our Response: The Services would consider and give appropriate weight, on a case-by-case basis, to the benefits of the information gathered, should the Secretaries choose to enter into the discretionary 4(b)(2) exclusion analysis. If not yet established, we hope that arrangements of this sort with landowners could lead to conservation partnerships in the future. Development of those partnerships could result in furthering the conservation of the species.

Comment (59): A commenter suggested that the Services should include specific text in the policy regarding the importance of private landowner partnership and cooperation in species recovery efforts. Furthermore, the commenter suggests the Services give great weight to

excluding private lands whose owners have expressed interest in participation in voluntary recovery efforts.

Our Response: The Services agree that recovery of listed species relies on the cooperation of private landowners and managers. The commenter brings to light an inherent tension with listing and recovery under the Act. One might think that the process of listing, designating critical habitat, developing a recovery plan, carrying out recovery plan objectives, and ultimately delisting a species should be a linear process. It is not. Adding species to the Federal Lists of Endangered and Threatened Wildlife and Plants and identifying areas that meet the definition of "critical habitat" are science-based processes. Areas meeting the definition of "critical habitat" for a given species must be identified as eligible for designation as critical habitat, regardless of landownership or potential future conflict with recovery opportunities, such as mentioned by the commenter. The Secretary may, however, exclude areas based on non-biological factors. The subject of this policy is to make transparent how the Services plan to address certain fact patterns under which the Secretaries will consider excluding particular areas from a designation. The presumption of cooperation for purposes of recovery of a species is not a particular fact pattern the Services have chosen to include, but is inherently captured under the partnership element of this policy. As stated in the permitted plans section of this policy, the Services would not weigh heavily a prospective partnership in which a landowner merely may choose to cooperate with the Services. If habitat-based threats are the main driver for a species' listing, the designation of critical habitat could be an important tool for species conservation.

Comment (60): We received numerous specific comments in several categories that were not directly relevant to this final policy on exclusions from critical habitat, and, therefore, they

are not addressed in this section. While not directly relevant to this policy, we may address some of these issues in future rulemaking or policy development by the Services. These include:

- Issues regarding earlier coordination with States in the designation of critical habitat;
- Development and designation processes for critical habitat;
- Development of conservation plans;
- Relocation of existing critical habitat designations from airport lands; and
- Nonessential experimental populations.

Required Determinations

We intend to look to this policy as general non-binding guidance when we consider exclusions from critical habitat designations. The policy does not limit the Secretaries' discretion in particular designations. In each designation, we are required to comply with various Executive Orders and statutes for those individual rulemakings. Below we discuss compliance with several Executive Orders and statutes as they pertain to this final policy.

Regulatory Planning and Review (Executive Orders 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 final policy is a significant action because it may create a serious inconsistency with other agency actions.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving

regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that our regulatory system 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 policy in a manner consistent with these requirements.

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) We find this final policy will 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 policy will not impose a cost of $100 million or more in any given year on local or State governments or private entities. Small governments will not be affected because the final policy will not place additional requirements on any city, county, or other local municipalities.

(b) This final policy will 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, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. This policy will impose no obligations on State, local, or Tribal governments because this final policy is meant to complement the amendments to 50 CFR 424.19, and is intended to clarify expectations regarding critical habitat and provide for a more predictable and transparent critical-habitat-exclusion process. The only entities directly affected by this final policy are the FWS and NMFS. Therefore, a Small Government Agency Plan is not required.

Takings—Executive Order 12630

In accordance with Executive Order 12630, this final policy will not have significant takings implications. This final policy will not pertain to "taking" of private property interests, nor will it directly affect private property. A takings implication assessment is not required because this final policy (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. This final policy will substantially advance a legitimate government interest (clarify expectations regarding critical habitat and provide for a more predictable and transparent critical-habitat-exclusion process) and will not present a barrier to all reasonable and expected beneficial use of private property.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this final policy does not have Federalism implications and a Federalism summary impact statement is not required. This final policy pertains only to exclusions from designations of critical habitat under section 4 of the Act, and will 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—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), this final policy will not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of

the Order. The clarification of expectations regarding critical habitat and providing a more predictable and transparent critical-habitat-exclusion process will make it easier for the public to understand our critical-habitat-designation process, and thus should not significantly affect or burden the judicial system.

Paperwork Reduction Act of 1995

This final policy does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). This final policy will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (NEPA)

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

We have determined that this policy is categorically excluded from NEPA documentation requirements consistent with 40 CFR 1508.4 and 43 CFR 46.210(i). This categorical exclusion applies to policies, directives, regulations, and guidelines that are “of an administrative, financial, legal, technical, or procedural nature.” This action does not trigger an extraordinary

circumstance, as outlined in 43 CFR 46.215, applicable to the categorical exclusion. Therefore, this policy does not constitute a major Federal action significantly affecting the quality of the human environment.

We have also determined that this action satisfies the standards for reliance upon a categorical exclusion under NOAA Administrative Order (NAO) 216–6. Specifically, the policy fits within two categorical exclusion provisions in § 6.03c.3(i)—for "preparation of regulations, Orders, manuals, or other guidance that implement, but do not substantially change these documents, or other guidance" and for "policy directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature." NAO 216–6, § 6.03c.3(i). The policy would not trigger an exception precluding reliance on the categorical exclusions because it does not involve a geographic area with unique characteristics, is not the subject of public controversy based on potential environmental consequences, will not result in uncertain environmental impacts or unique or unknown risks, does not establish a precedent or decision in principle about future proposals, will not have significant cumulative impacts, and will not have any adverse effects upon endangered or threatened species or their habitats. *Id.* § 5.05c. As such, it is categorically excluded from the need to prepare an Environmental Assessment. Issuance of this rule does not alter the legal and regulatory status quo in such a way as to create any environmental effects.

Government-to-Government Relationship with Tribes

In accordance with Executive Order 13175 ("Consultation and Coordination with Indian Tribal Governments", November 6, 2000), the Department of the Interior Manual at 512 DM 2, 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 have considered possible effects of this final policy on federally recognized Indian Tribes. Following an exchange of information with tribal representatives, we have determined that this policy, which is general in nature, does not have tribal implications as defined in Executive Order 13175. Our intent with this policy is to provide non-binding guidance on our approach to considering exclusion of areas from critical habitat, including tribal lands. This policy does not establish a new direction. We will continue to collaborate and coordinate with Tribes on issues related to federally listed species and their habitats and work with them as we promulgate individual critical habitat designations, including consideration of potential exclusions on the basis of tribal interests. *See* Joint Secretarial Order 3206 ("American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act", June 5, 1997).

Energy Supply, Distribution, or Use

Executive Order 13211 "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This final policy is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

Policy on Implementation of Section 4(b)(2) of the Act

1. The decision to exclude any particular area from a designation of critical habitat is always discretionary, as the Act states that the Secretaries "may" exclude any area. In no circumstances

is an exclusion of any particular area required by the Act.

2. When we undertake a discretionary 4(b)(2) exclusion analysis, we will evaluate the effect of non-permitted conservation plans or agreements and their attendant partnerships on the benefits of inclusion and the benefits of exclusion of any particular area from critical habitat by considering a number of factors. The list of factors that we will consider for non-permitted conservation plans or agreements is shown below. This list is not exclusive; all items may not apply to every non-permitted conservation plan or agreement and are not requirements of plans or agreements.

a. The degree to which the record of the plan supports a conclusion that a critical habitat designation would impair the realization of benefits expected from the plan, agreement, or partnership.

b. The extent of public participation in the development of the conservation plan.

c. The degree to which there has been agency review and required determinations (e.g., State regulatory requirements), as necessary and appropriate.

d. Whether National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) compliance was required.

e. The demonstrated implementation and success of the chosen mechanism.

f. The degree to which the plan or agreement provides for the conservation of the essential physical or biological features for the species.

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

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

to new information.

3. When we undertake a discretionary 4(b)(2) exclusion analysis, we will always consider areas covered by a permitted candidate conservation agreement with assurances (CCAA), safe harbor agreement (SHA), or habitat conservation plan (HCP), and we anticipate consistently excluding such areas from a designation of critical habitat if incidental take caused by the activities in those areas is covered by the permit under section 10 of the Act and the CCAA/SHA/HCP meets all of the following conditions:

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

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

c. The CCAA/SHA/HCP specifically addresses that species' habitat and meets the conservation needs of the species in the planning area.

We generally will not rely on CCAAs/SHAs/HCPs that are still under development as the basis of exclusion of a particular area from a designation of critical habitat.

4. When we undertake a discretionary 4(b)(2) exclusion analysis, we will always consider exclusion of Tribal lands, and give great weight to Tribal concerns in analyzing the benefits of exclusion. However, Tribal concerns are not a factor in determining what areas, in the first

instance, meet the definition of “critical habitat.”

5. When we undertake a discretionary 4(b)(2) exclusion analysis, we will always consider exclusion of areas for which a Federal agency has requested exclusion based on an assertion of national-security or homeland-security concerns, and will give great weight to national-security or homeland-security concerns in analyzing the benefits of exclusion. National-security and/or homeland-security concerns are not a factor, however, in the process of determining what areas, in the first instance, meet the definition of “critical habitat.”
6. Except in the circumstances described in 5 above, we will focus our exclusions on non-Federal lands. Because the section 7(a)(2) consultation requirements apply to projects carried out on Federal lands where there is discretionary Federal involvement or control, the benefits of designating Federal lands as critical habitat are typically greater than the benefits of excluding Federal lands or of designating non-Federal lands.
7. When the Services are determining whether to undertake a discretionary 4(b)(2) exclusion analysis as a result of the probable incremental economic impacts of designating a particular area, it is the nature of those impacts, not necessarily a particular threshold level, that is relevant to the Services' determination.
8. For any area to be excluded, we must find that the benefits of excluding that area outweigh the benefits of including that area in the designation. Although we retain discretion because we cannot anticipate all fact patterns that may occur, it is the general practice of the Services to exclude an area when the benefits of exclusion outweigh the benefits of inclusion. We must not exclude an area if the failure to designate it will result in the extinction of the species.

Authors

The primary authors of this policy are the staff members of the Endangered Species Program, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, Falls Church, VA 22041–3803, and the National Marine Fisheries Service's Endangered Species Division, 1335 East–West Highway, Silver Spring, MD 20910.

Authority

The authority for this action is section 4(h) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: January 29, 2016

Signed: Michael J. Bean

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

Michael J. Bean

~~**Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act**~~

Dated: January 29, 2016.

Signed: _____

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

~~**Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act**~~