Billing Codes 4333-15; 3510-22–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 402

[Docket No. FWS–R9–ES–2011–0072]

RIN 1018–AX88

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 402

[Docket No. 120106026-4999-03]

RIN 0648-BB80

Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat

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

ACTION: Final rule.

SUMMARY: The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), collectively referred to as the "Services" or "we," revise a regulatory definition that is integral to our implementation of the Endangered Species Act of 1973, as amended (Act or ESA). The Act requires Federal agencies, in consultation with and with the assistance of the Services, to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. On May 12, 2014,

we proposed to revise the definition for "destruction or adverse modification" in our regulations as this definition had been found to be invalid by two circuit courts. In response to public comments received on our proposed rule, we have made minor revisions to the definition. This rule responds to section 6 of Executive Order 13563 (January 18, 2011), which directs agencies to analyze their existing regulations and, among other things, modify or streamline them in accordance with what has been learned.

DATES: Effective [*Insert date 30 days after the date of publication in the Federal Register*].

ADDRESSES: Supplementary information used in the development of this rule, including the public comments received and the environmental assessment may be viewed online at http://www.regulations.gov at Docket No. FWS–R9–ES–2011–0072 or at Docket No. NOAA-NMFS-2014-0093**.**

FOR FURTHER INFORMATION CONTACT: Jennifer Schultz, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910; telephone 301/427–8443; facsimile 301/713–0376; or Craig Aubrey, U.S. Fish and Wildlife Service, Division of Environmental Review, 5275 Leesburg Pike, Falls Church, VA 22041; telephone 703/358–2171; facsimile 703/358–1735. Persons who use a Telecommunications Device for the Deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, and 7 days a week.

SUPPLEMENTARY INFORMATION:

Background

Section 7(a)(2) of the Act requires Federal agencies, in consultation with and with the assistance of the Secretaries of the Interior and Commerce, to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species (16 U.S.C. 1536(a)(2)). The Act defines critical habitat as 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 the Act, on which are found those physical or biological features (1) essential to the conservation of the species and (2) which may require special management considerations or protection, as well as specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species (16 U.S.C. 1532(5)(A)). Conservation means to use and the use of all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary (16 U.S.C. 1532(3)). The Act does not define "destruction or adverse modification." The Services carry out the Act via regulations in title 50 of the Code of Federal Regulations (CFR).

In 1978, the Services promulgated regulations governing interagency cooperation under section 7(a)(2) of the Act that defined "destruction or adverse modification" in part as a "direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for survival and recovery of a listed species. Such alterations include but are not limited to those diminishing the requirements for survival and recovery. . . " (43 FR 870, January 4, 1978). In 1986, the Services amended the definition to read "a

direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical" (51 FR 19926, June 3, 1986; codified at 50 CFR 402.02). In 1998, the Services provided a clarification of usage of the term "appreciably diminish the value" in the Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Act (i.e., the Handbook; http:// http://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf) as follows: "to considerably reduce the capability of designated or proposed critical habitat to satisfy requirements essential to both the survival and recovery of a listed species."

In 2001, the Fifth Circuit Court of Appeals reviewed the 1986 definition and found it exceeded the Service's discretion by requiring an action to appreciably diminish a species' survival and recovery to trigger a finding of "destruction or adverse modification." *Sierra Club* v. *U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001). As stated in the decision (*Sierra Club*, at 441-42 (citations omitted) (emphasis in original)):

> The ESA defines 'critical habitat' as areas which are 'essential to the conservation' of listed species. 'Conservation' is a much broader concept than mere survival. The ESA's definition of 'conservation' speaks to the recovery of a threatened or endangered species. Indeed, in a different section of the ESA, the statute distinguishes between 'conservation' and 'survival.' Requiring consultation only where an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits.

In 2004, the Ninth Circuit Court of Appeals also reviewed the 1986 definition and found portions of the definition to be facially invalid. *Gifford Pinchot Task Force* v. *U.S.*

Fish and Wildlife Service, 378 F.3d 1059 (9th Cir. 2004). The Ninth Circuit, following similar reasoning set out in the *Sierra Club* decision, determined that Congress viewed conservation and survival as "distinct, though complementary, goals, and the requirement to preserve critical habitat is designed to promote both conservation and survival." *Gifford Pinchot Task Force*, at 1070. Specifically, the court found that "the purpose of establishing 'critical habitat' is for the government to designate habitat that is not only necessary for the species' survival but also essential for the species' recovery." *Id.* "Congress said that 'destruction or adverse modification' could occur when sufficient critical habitat is lost so as to threaten a species' recovery even if there remains sufficient critical habitat for the species' survival." *Id.*

After the Ninth Circuit's decision, the Services each issued guidance to discontinue the use of the 1986 definition (FWS Acting Director Marshall Jones Memo to Regional Directors, "Application of the 'Destruction or Adverse Modification' Standard under Section 7(a)(2) of the Act, 2004;" NMFS Assistant Administrator William T. Hogarth Memo to Regional Administrators, "Application of the 'Destruction or Adverse Modification' Standard under Section 7(a)(2) of the Act, 2005"). Specifically, in evaluating an action's effects on critical habitat as part of interagency consultation, the Services began directly applying the definition of "conservation" as set out in the Act. The guidance instructs the Services' biologists, after examining the baseline and the effects of the action, to determine whether critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species, upon implementation of the Federal action under consultation. "Primary constituent elements" was a term

introduced in the critical habitat designation regulations (50 CFR 424.12) to describe aspects of "physical or biological features," which are referenced in the statutory definition of "critical habitat"; the Services have proposed to remove the term "primary constituent elements" and return to the statutory term "physical or biological features." See 79 FR 27066, May 12, 2014.

On May 12, 2014, the Services proposed the following regulatory definition to address the relevant case law and to formalize the Services' guidance: "*Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for listed species. Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery." See 79 FR 27060, May 12, 2014. In the preamble to the proposed rule, we explained that the proposed definition was intended to align with the conservation purposes of the Act. The first sentence captured the role that critical habitat should play for the recovery of listed species. The second sentence acknowledged that some physical or biological features may not be present or may be present in suboptimal quantity or quality at the time of designation.

We solicited comments on the proposed rule for a total of 150 days. We received 176 comments.

Summary of Changes from the Proposed Definition

This final rule aligns the regulatory definition of "destruction or adverse modification" with the conservation purposes of the Act and the Act's definition of "critical habitat." It continues to focus on the role that critical habitat plays for the

conservation of listed species and acknowledges that the development of physical and biological features may be necessary to enable the critical habitat to support the species' recovery. Though we made minor changes to clarify our intent, these changes do not alter the overall meaning of the proposed definition. We do not expect this final rule to alter the section 7(a)(2) consultation process from our current practice, and previously completed biological opinions do not need to be reevaluated in light of this rule.

In our final definition, to avoid unnecessary confusion and more closely track the statutory definition of critical habitat, we replaced two "terms of art" introduced in the proposed definition with language that explained the intended meanings. In addition, we modified the second sentence of the definition to avoid unintentionally giving the impression that the proposed definition had a narrower focus than the 1986 definition.

First, as described in detail under the **Summary of Comments** section below, many commenters suggested that we replace two terms, "conservation value" and "life-history needs," in the proposed definition with simpler language more clearly conveying their intended meanings. After reviewing the comments, we agreed that use of these terms was unnecessary and led to unintended confusion. We modified the proposed definition accordingly. Specifically, we replaced "conservation value of critical habitat for listed species" with "the value of critical habitat for the conservation of a listed species." We also replaced "physical or biological features that support life-history needs of the species for recovery" in the second sentence with "physical or biological features essential to the conservation of a listed species." These revisions avoid introducing previously undefined terms without changing the meaning of the proposed definition. Furthermore, these revisions better align with the conservation purposes of the Act, by

using language from the statutory definition of “critical habitat” (i.e., “physical or biological features essential to the conservation of the species”).

Second, commenters also expressed concern that, in their perception, the Services proposed a significant change in practice by appearing to focus the definition on the preclusion or delay of the development of physical or biological features, to the exclusion of the alteration of existing features. We did not intend the proposed definition to signal such a shift in focus. Rather, we believed the first sentence of the proposed definition captured both types of alteration: those of existing features as well as those that would preclude or delay future development of such features. We intended the second sentence of the proposed definition to merely emphasize this latter type of alteration because of its less obvious nature. Because the second sentence of the 1986 definition expressly refers to alterations adversely modifying physical or biological features and to avoid any perceived shift in focus, we revised the proposed definition to explicitly reference alterations affecting the physical or biological features essential to the conservation of a species, as well as those that preclude or significantly delay development of such features.

Final Definition

After considering public comments, Congressional intent, relevant case law, and the Services’ collective experience in applying the “destruction or adverse modification” standard over the last three decades, we finalize the following regulatory definition: *Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological

features essential to the conservation of a species or that preclude or significantly delay development of such features.

As described in the preamble to the proposed rule, the "destruction or adverse modification" definition focuses on how Federal actions affect the quantity and quality of the physical or biological features in the designated critical habitat for a listed species and, especially in the case of unoccupied habitat, on any impacts to the critical habitat itself. Specifically, the Services will generally conclude that a Federal action is likely to "destroy or adversely modify" designated critical habitat if the action results in an alteration of the quantity or quality of the essential physical or biological features of designated critical habitat, or that precludes or significantly delays the capacity of that habitat to develop those features over time, and if the effect of the alteration is to appreciably diminish the value of critical habitat for the conservation of the species. If the Services make a destruction or adverse modification determination, they will develop reasonable and prudent alternatives on a case by case basis and based on the best scientific and commercial data available.

As also described in the preamble to the proposed rule, the Services may consider other kinds of impacts to designated critical habitat. For example, some areas that are currently in a degraded condition may have been designated as critical habitat for their potential to develop or improve and eventually provide the needed ecological functions to support species' recovery. Under these circumstances, the Services generally conclude that an action is likely to "destroy or adversely modify" the designated critical habitat if the action alters it to prevent it from improving over time relative to its pre-action condition. It is important to note that the "destruction or adverse modification" definition

applies to all physical or biological features; as described in the proposed revision to the current definition of "physical or biological features" (50 CFR 424.12), "[f]eatures may include habitat characteristics that support ephemeral or dynamic habitat conditions" (79 FR 27066, May 12, 2014).

Summary of Comments

In our proposed rule (79 FR 27060, May 12, 2014), we requested written comments from the public for 60 days, ending July 11, 2014. We received several requests to extend the public comment period, and we subsequently published a notice (79 FR 36284, June 26, 2014) extending the comment period by an additional 90 days, through October 9, 2014.

During the public comment period, we received approximately 176 comments. We received comments from Tribes, State and local governments, industry, conservation organizations, private citizens, and others.

We considered all substantive information provided during the comment period and, as appropriate, incorporated suggested revisions into this final rule. Here, we summarize the comments, grouped by issue, and provide our responses.

Comment on "conservation" versus "recovery": A few commenters suggested that conservation is not recovery. One commenter suggested that Congress intended critical habitat to mean areas that are essential to the continued existence of the species, i.e., its survival.

Our Response: We disagree with the commenter that "conservation" means "survival." Instead, we agree with the courts that Congress intended critical habitat to focus on conservation, which addresses more than mere survival. While we recognize the

distinction between “conservation” and “recovery,” we also acknowledge that the courts and the Services often use the terms synonymously.

The statutory definition of critical habitat includes the phrase “essential to [or for] the conservation of the species” twice; it does not include the word “survival” or the phrase, “the continued existence of the species” (16 U.S.C. 1532(5)(A)). Conservation means to use and the use of all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary (16 U.S.C. 1532(3)). The statutory definition does not include the word “survival” or the phrase, “the continued existence of the species.” This does not appear to be an oversight. Congress used the word “survival” in other places in the Act; they also used the phrase “continued existence of a species” elsewhere and specifically in reference to the jeopardy standard under section 7(a)(2) of the Act.

In 2001, the Fifth Circuit concluded that “‘conservation’ is a much broader concept than mere survival” and “speaks to the recovery” of species: “Indeed, in a different section of the ESA, the statute distinguishes between ‘conservation’ and ‘survival.’” *Sierra Club*, at 441-42. In 2004, the Ninth Circuit added, “Congress said that ‘destruction or adverse modification’ could occur when sufficient critical habitat is lost so as to threaten a species' recovery even if there remains sufficient critical habitat for the species' survival.” Further, the Ninth Circuit indicated that the 1986 definition “fails to provide protection of habitat when necessary only for species' recovery.” *Gifford Pinchot Task Force*, at 1070. Throughout these decisions, the courts used the words “recovery” and “conservation” interchangeably.

The Services view "conservation" as the process used to achieve "recovery," that is, the improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act (50 CFR 402.02). In the proposed regulatory definition of "conserve, conserving, and conservation," the Services included the phrase "i.e., the species is recovered" to clarify the link between conservation and recovery of the species. *See* 79 FR 27066, May 12, 2014 (proposing revisions to 50 CFR 424.02). Despite the distinction between the two terms, we often use the terms interchangeably in practice. We believe that this is consistent with Congress's intent for "conservation" to encompass the procedures necessary to achieve "recovery."

Comments on "appreciably diminish": We received 63 comments regarding our use and explanation of the term "appreciably diminish." Many commenters considered the explanation of the term vague, confusing, and giving too much discretion to the Services. Some suggested that "appreciably diminish" should apply only to the reduction in quality, significance, magnitude, or worth of the physical or biological features that were the basis for determining the habitat to be critical. Others suggested alternatives to "appreciably," including significantly, measurably, and considerably. Several commenters suggested simply removing the words "both the survival and" from the clarification of usage in the Services' Handbook. Some commenters believed the Services were "lowering the bar," while others felt that the Services were "raising the bar" with the definition. Commenters disagreed on whether the Services should consider every perceptible diminishment to critical habitat to be destruction or adverse modification.

Our Response: In the proposed rule, the Services requested comments on whether the phrase "appreciably diminish" is clear and can be applied consistently across

consultations. Though this phrase has been part of the definition of "destruction or adverse modification" since 1978, we invited the public to suggest any alternative phrases that might improve clarity and consistency. Though several commenters responded that phrase is unclear or unable to be consistently applied, they did not present clearer alternatives or examples of inconsistent application.

The courts have not identified problems with the clarity or consistent application of the "appreciably diminish" standard. Though the Fifth (2001) and Ninth Circuits (2004) invalidated the existing regulatory definition because it included the phrase "both the survival and recovery," they did not comment unfavorably on the word "appreciably" or the term "appreciably diminish." In 2010, the Ninth Circuit expressly noted that its decision in *Gifford Pinchot* "did not alter the rule that an 'adverse modification' occurs only when there is 'a direct or indirect alteration that *appreciably diminishes* the value of critical habitat.'" *Butte Environmental Council* v. *U.S. Army Corps of Engineers*, 620 F.3d 936, 948 (9th Cir. 2010) (emphasis in original).

Commenters generally agreed that "diminish" means to reduce; however, several commenters disagreed with our use of the word "appreciably" and suggested we use alternative qualifiers (i.e., significantly, measurably, or considerably). In the preamble of the proposed rule, we discussed the word "appreciably," as well as the suggested alternatives, which are similar in meaning to the word "appreciably" but also have multiple possible meanings. In light of all the comments received, our review of case law, and our previous experience with the term, we have concluded that no alternative has a sufficiently clear meaning to warrant changing this longstanding term in the regulation.

Without a clearly superior alternative, the Services retain the phrase "appreciably diminish" in the definition of "destruction or adverse modification."

In the preamble to the proposed rule, we further clarified the meaning of "appreciably diminish" by explaining that the relevant question is whether the reduction has some relevance because we can recognize or grasp its quality, significance, magnitude, or worth in a way that negatively affects the value of the critical habitat as a whole for the conservation of a listed species. Some commenters objected to this clarification and advocated for the retention of the Handbook language, with edits to remove the phrase "both the survival and."

Courts have looked to the Handbook as guidance for interpreting the "appreciably diminish" standard. In 2008, the U.S. District Court for the Eastern District of California held that the Handbook's definition of "appreciably diminish" is reasonable and therefore would be applied by the court as guidance. See *Pacific Coast Federation of Fishermen's Associations* v. *Gutierrez*, 606 F. Supp. 2d 1195, 1208-09 (E.D. Cal. 2008) (according deference to the agencies' interpretation under the principles of *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139-40 (1944)). The court thus applied "appreciably diminish" as meaning "considerably reduce." Other district courts have similarly applied the "considerably reduce" language contained in the Handbook's definition of "appreciably diminish the value." See *Wild Equity Institute* v. *City and County of San Francisco*, No. C 11–00958 SI, 2011 WL 5975029, *7 (N.D. Cal. Nov. 29, 2011) (unreported) (noting that, in *Gutierrez*, "The court accepted the FWS' definition of 'appreciably diminish' to mean 'considerably reduce'"); *Forest Guardians* v. *Veneman*, 392 F.Supp.2d 1082, 1092 (D.

Ariz. 2005) (applying the handbook's definition of "appreciably diminish" as guidance for interpreting "reduce appreciably" as used in section 7(a)(2)'s jeopardy standard).

In the preamble to the proposed rule, we acknowledged that the Handbook's language referring to "both the survival and recovery" as part of its definition of "appreciably diminish the value" is no longer valid. We also indicated that the term "considerably," taken alone, may lead to disparate outcomes because it can mean "large in amount or extent," "worthy of consideration," or "significant." In light of the comments urging the Services to retain the Handbook clarification, the Services take this opportunity to clarify that the term "considerably," in this context, means "worthy of consideration" and is another way of stating that we can recognize or grasp the quality, significance, magnitude, or worth of the reduction in the value of critical habitat. We believe that this clarification will allow the Services to reach consistent outcomes, and we reiterate that the Handbook reference to "both the survival and" is no longer in effect.

We disagree with commenters who suggest that every diminishment, however small, should constitute destruction or adverse modification. We find it necessary to qualify the word "diminish" to exclude those adverse effects on critical habitat that are so minor in nature that they do not impact the conservation of a listed species. It is appropriate for the Services to consider the biological significance of a reduction when conducting a section 7(a)(2) consultation. The U.S. District Court for the Eastern District of California rejected as "overly expansive" the plaintiff's suggestion that "appreciably" means "perceptible". *Gutierrez,* 606 F.Supp.2d at 1208-09. The guidance issued by the Services in 2004 and 2005 directed the Services to discuss the "significance of anticipated effects to critical habitat," which the U.S. District Court for the Northern

District of California found appropriate and "sufficient to implement an 'appreciably diminish' standard." *In re Consolidated Salmonid Cases,* 791 F. Supp.2d 802, 872 (E.D. Cal. 2011) (applying NMFS' 2005 guidance), *affirmed in part, reversed in part on other grounds, San Luis & Delta-Mendota Water Authority* v. *Locke*, 776 F.3d 971 (9th Cir. 2014). Similarly, in the context of applying the jeopardy standard from section 7(a)(2) of the Act, which also includes the term "appreciably" (in the phrase "appreciably reduce"), the U.S. District Court for the District of Columbia rejected the argument that the Services are required to recognize every reduction in the likelihood of survival or recovery that is capable of being perceived or measured; the court instead held that the Services have discretion to evaluate a reduction to determine if it is "meaningful from a biological perspective." *Oceana, Inc.* v. *Pritzker,* F.Supp.3d, No. 08–1881, 2014 WL 7174875, *8-9 (D.D.C. December 17, 2014).

Thus, our explanation in this final rule of the meaning of "appreciably diminish" is consistent with previous usage; "the bar" for determining whether a proposed action is likely to result in destruction or adverse modification of critical habitat is neither raised nor lowered by this rule. A Federal action may adversely affect critical habitat in an action area without appreciably diminishing the value of the critical habitat for the conservation of the species. In such cases, a conclusion of destruction or adverse modification would not be appropriate. Conversely, we would conclude that a Federal action would result in destruction or adverse modification if it appreciably diminishes the value of critical habitat for the conservation of the species, even if the size of the area affected by the Federal action is small.

In summary, the Services have applied the term “appreciably diminish” from the definition of “destruction or adverse modification” for decades (43 FR 870, January 4, 1978). With the clarifications of usage in this rule, we find no basis in either the comments received or in court decisions to abandon this well-established language.

Comments on “conservation value”: We received 68 comments on the term “conservation value,” suggesting that the term was vague, unnecessary, and confusing.

Our Response: In the proposed rule, the Services requested comments on whether the phrase “conservation value” is clear and can be applied consistently across consultations. We invited the public to suggest alternatives that might improve clarity and consistency in implementing the “destruction or adverse modification” standard.

Upon reviewing the comments, we agreed that inclusion of a new, undefined term, “conservation value,” was unnecessary. We wish to clarify that by introducing the term “conservation value” in the proposed definition, we did not intend to introduce a new concept but rather to reiterate that critical habitat is designated because it has been found to contribute to the conservation of the species, in keeping with the statutory definition of critical habitat. However, to avoid any confusion, we revised the first sentence of the final definition to replace the term “conservation value” with a phrase that conveys its intended meaning, i.e., “the value of critical habitat for the conservation of a listed species.” This minor revision retains the meaning of “conservation value” without introducing a new term. Like the statutory definition of critical habitat, it emphasizes the role of critical habitat in the conservation of a species.

Comments on "survival or recovery": Several commenters suggested that the Services should simply substitute "or" for "and" in the phrase "survival and recovery" from the 1986 definition.

Our Response: The Services find that simply changing "and" to "or" in the existing regulatory definition would not go far enough to incorporate the refined understanding we now have regarding the role of critical habitat. The Services' regulations introduced the term "survival" into the 1978 definition; the statutory definition of critical habitat focuses on conservation, which the courts have explained emphasizes recovery. (See *Sierra Club*, at 441: "The ESA's definition of 'conservation' speaks to the recovery of a threatened or endangered species.") The Ninth Circuit further indicates that "Congress said that 'destruction or adverse modification' could occur when sufficient critical habitat is lost so as to threaten a species' recovery even if there remains sufficient critical habitat for the species' survival" (*Gifford Pinchot Task Force*, at 1070).

In *Gifford Pinchot*, the Ninth Circuit supported the use of "or" in place of "and"; however, this in no way limits our discretion to revise the definition to more clearly implement Congressional intent. In its definition of critical habitat, Congress uses the word "conservation" and not "survival"; therefore, it is appropriate for the Services to revise the definition to unambiguously emphasize the value of critical habitat for conservation. By doing so, we have produced a regulatory definition that is less confusing, less susceptible to misinterpretation, and more consistent with the intent of Congress than by merely substituting "or" for "and."

Comments on linking the definition to existing physical and biological features: We received a few comments requesting that the definition explicitly include alterations of existing physical and biological features.

Our Response: In the proposed definition, we did not intend to disregard the alteration of existing physical or biological features; rather, our goal was to highlight certain types of alterations that may not be as evident as direct alterations, specifically those that preclude or significantly delay development of features. We reiterate and reaffirm that the first sentence of our final definition (*Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species.) is meant to encompass all potential types of alterations if they reduce the value of the habitat for conservation, including alterations of existing features.

In response to comments and to avoid further confusion, we revise the second sentence to specifically reference alterations of existing physical and biological features (as does the 1986 definition), in addition to those that preclude or significantly delay development of essential physical or biological features, as examples of effects that may constitute destruction or adverse modification of critical habitat. We believe that the revised sentence provides clarity and transparency to the definition and its implementation while retaining the core idea of the proposed definition.

Comments on "may include, but are not limited to": We received three comments on the use of the phrase "may include, but are not limited to." Commenters found this language "overbroad" and thought the definition should be less vague or narrowed or

both. One commenter thought it allowed a “catch-all provision” too favorable to the Federal Government, against prospective good-faith challengers.

Our Response: The phrase, “may include, but are not limited to” emphasizes that the types of direct or indirect alterations that appreciably diminish the value of critical habitat for listed species include not only those that affect physical or biological features, but also those that may affect the value of critical habitat itself. The concept of non-exhaustive inclusion is not new to the regulatory definition of “destruction or adverse modification.” Both 1978 and 1986 definitions included the phrase. This language has not proven problematic in application. Indeed, this phrase is commonly used by the Services to account for the variation that occurs in biological entities and ecological systems, and to preserve the role of the inherent discretion and professional judgment the Services must use to evaluate all relevant factors when making determinations regarding such entities and systems.

We retain the phrase in our final definition, as we believe its meaning is clear and that it serves an important function in the definition. It allows that there may be impacts to an area of critical habitat itself that are not impacts to features. This is particularly important for unoccupied habitat, for which no physical or biological features may have been identified (because physical or biological features are not required to be present in order to designate such an area as critical habitat under the second part of the statutory definition of “critical habitat”). For occupied habitat, the Services must retain the flexibility to address impacts to the area itself, such as those that would impede access to or use of the habitat. As noted in the proposed rule, a destruction or adverse modification

analysis begins with impacts to the features but does not end there (79 FR 27060, May 12, 2014). For these reasons, we retain this phase in the final definition.

Comments on "life-history needs": We received 12 comments regarding the phrase "physical or biological features that support the life-history needs." The commenters considered the phrase to be vague and poorly defined. Some commenters felt that the phrase misinterpreted or "lowered the bar" from that intended by the statutory language "physical or biological features essential to the conservation of a species." Commenters recommended describing the physical and biological features as "essential" or "necessary."

Our Response: We did not intend the phrase, "physical or biological features that support the life-history needs" to "lower the bar" for identifying physical and biological features, as established in the statutory definition of critical habitat. Rather, our intent was to explain that physical or biological features provide for the life-history needs, which are essential to the conservation of the species.

However, based on review of the public comments on this issue, we recognized the confusion caused by introducing a new "term of art" in the proposed definition. To avoid confusion, we revised the second sentence of the definition to replace the phrase, "support the life-history needs," with its intended meaning, "essential to the conservation of a species." In accordance with the statutory definition of critical habitat, the revision emphasizes our focus on those physical or biological features that are essential to the conservation of the species. We believe that the revised sentence, which aligns more closely to the statutory language, provides clarity and transparency to the definition and its implementation.

Comments on "preclude or significantly delay:" We received many comments regarding the terms "preclude or significantly delay" in the proposed definition. Commenters believed these concepts are vague, undefined, and allow for arbitrary determinations. One commenter asserted that focusing on effects that preclude or significantly delay development of features was an expansion of authority that conflicted with E.O. 13604 (Improving Performance of Federal Permitting and Review of Infrastructure Projects).

Our Response: Our proposed definition of "destruction or adverse modification" expressly included effects that preclude or significantly delay the development of physical or biological features that support the life-history needs of the species for recovery. Although we have revised the definition in minor respects from the proposed rule (see **Summary of Changes from the Proposed Definition**, above), we retain its forward-looking aspect.

Our determination of "destruction or adverse modification" is based not only on the current status of the critical habitat but also, in cases where it is degraded or depends on ongoing ecological processes, on the potential for the habitat to provide further support for the conservation of the species. While occupied critical habitat would always contain at least one or more of the physical or biological features essential to the conservation of the listed species, an area of critical habitat may be in a degraded condition or less than optimal successional stage and not contain all physical or biological features at the time it is designated or those features may be present but in a degraded or less than optimal condition. The area may have been designated as critical habitat, however, because of the potential for some of the features not already present or

not yet fully functional to be developed, restored, or improved and contribute to the species' recovery. The condition of the critical habitat would be enhanced as the physical or biological features essential to the conservation of the species are developed, restored, or improved, and the area is able to provide the recovery support for the species on which the designation is based. The value of critical habitat also includes consideration of the likely capability of the critical habitat to support the species' recovery given the backdrop of past and present actions that may impede formation of the optimal successional stage or otherwise degrade the critical habitat. Therefore, a proposed action that alters habitat conditions to preclude or significantly delay the development or restoration of the physical or biological features needed to achieve that capability (relative to that which would occur without the proposed action undergoing consultation), where the change appreciably diminishes the value of critical habitat for the conservation of the species, would likely result in destruction or adverse modification.

This is not a new concept or expansion of authority. The Services have previously recognized and articulated the need for this forward-looking aspect in the analysis of destruction or adverse modification of critical habitat. As discussed in the **Background** section, each Service issued substantially identical guidance following the decisions of the Fifth and Ninth Circuits invalidating the current regulatory definition (FWS 2004; NMFS 2005). For the past 10 years, the Services have evaluated whether, with implementation of the proposed Federal action, critical habitat would remain functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species. As noted above, "primary constituent elements" was a term introduced in the critical habitat designation

regulations (50 CFR 424.12) to describe aspects of “physical or biological features.” On May 12, 2014, the Services proposed to revise these regulations to remove the use of the term “primary constituent elements” and replace it with the statutory term “physical or biological features” (79 FR 27066). However, the shift in terminology does not change the approach used in conducting a “destruction or adverse modification” analysis, which is the same regardless of whether the original designation identified primary constituent elements, physical or biological features, or both.

Several commenters asserted that assessing the projected condition of the habitat and projected development of physical and biological features would be inconsistent with the Act. The Services disagree. The Act defines critical habitat to include both areas occupied at the time of listing that contain features “essential to the conservation” of the species, as well as unoccupied areas that are “essential for the conservation” of listed species. Unoccupied habitat by definition is not required to contain essential physical or biological features to qualify for designation, and even occupied habitat is not required to contain all features throughout the area designated. Yet, the obligation to preserve the value of critical habitat for the conservation of listed species applies to all designated critical habitat. At some point in the recovery process, habitat must supply features that are essential to the conservation of the species. It is thus important to recognize not only the features that are already present in the habitat, but the potential of the habitat to naturally develop the features over time. Therefore, the Services believe it is necessary (and consistent with the Act) to examine a project’s effects on the natural development of physical and biological features essential to the conservation of a species.

"Preclusion" prevents the features from becoming established. The phrase "significantly delay" requires more explanation. We intend this phrase to encompass a delay that interrupts the likely natural trajectory of the development of physical and biological features in the designated critical habitat to support the species' recovery. That trajectory is viewed in the context of the current status of the designated critical habitat and with respect to the conservation needs of the listed species.

If the Services make a destruction or adverse modification determination, they will develop reasonable and prudent alternatives on a case by case basis and based on the best scientific and commercial data available.

Comments on "foreseeable future:" We received many comments regarding the term "foreseeable future," as used in the preamble to the proposed rule. Commenters believed this concept is vague and undefined, and requires speculation on the part of the Services.

Our Response: In the preamble to the proposed rule (79 FR 27060, May 12, 2014), we used the term "foreseeable future" to explain and provide context for the forward-looking aspect of the destruction or adverse modification analysis; we explained that the conservation value of critical habitat also includes consideration of the likely capability, in the foreseeable future, of the critical habitat to support the species' recovery given the backdrop of past and present actions that may impede formation of the optimal successional stage or otherwise degrade the critical habitat. Therefore, an action that would preclude or significantly delay the development or restoration of the physical or biological features needed to achieve that capability, to an extent that it appreciably diminishes the value of critical habitat for the conservation of the species relative to that

which would occur without the action undergoing consultation, is likely to result in destruction or adverse modification.

In the proposed rule, we used the language “foreseeable future” not as specifically used in the definition of the term "threatened species" but as a generally understood concept; that is, in regards to critical habitat, we consider its future capabilities only so far as we are able to make reliable projections with reasonable confidence. The Services do not speculate when evaluating whether a Federal action would preclude or significantly delay the development of features. As required by the Act, we rely on the best scientific and commercial data available to determine whether the action is likely to destroy or adversely modify critical habitat (16 U.S.C. 1536(a)(2)). This rule formalizes in regulation the forward-looking aspect of the destruction or adverse modification analysis adopted in the 2004 and 2005 guidance.

Additional comments relating to forward-looking aspect of definition: Several commenters felt that considerations regarding “precluding” or “significant delay” and “foreseeable future” would result in more consultations and longer review times.

Our *Response: A*s noted above and in the proposed rule, the Services have applied these concepts since the 2004 and 2005 guidance documents, and no significant increase in the number of consultations or review times has occurred as a result. The Services do not believe that adopting this approach in our regulations will result in more or lengthier consultations.

Comments on defining “destruction or adverse modification” instead of defining “destruction” and “adverse modification” separately: We received three comments requesting that we define “destruction” and “adverse modification” independently.

Our Response: "Destruction or adverse modification of critical habitat" was not defined in the statute. The Services defined the term in the 1978 regulations and amended the definition in 1986. The Services have thus applied the term as a singular concept for many years without difficulty.

Independently defining "destruction" and "adverse modification" is unnecessary and would not alter the outcome of section 7(a)(2) consultations. If, through consultation, the Services determine that a proposed Federal action likely would result in the destruction or adverse modification of critical habitat, we would, if possible, provide a reasonable and prudent alternative to the action. Such alternative must not violate section 7(a)(2) of the Act, must be economically and technologically feasible, must be capable of being implemented in a manner consistent with the intended purpose of the action, and must be capable of being implemented consistent with the scope of the Federal agency's legal authority and jurisdiction (16 U.S.C. 1536(b)(3)(A); 50 CFR 402.14(h); 50 CFR 402.02 (defining "reasonable and prudent alternatives")).

Independently defining "destruction" and "adverse modification" would unnecessarily complicate the process without improving it or changing the outcome. The key distinction is whether the action appreciably diminishes the value of critical habitat for the conservation of the species, not whether the action destroys critical habitat or adversely modifies it. The time and effort applied to determine whether the action destroyed or adversely modified critical habitat would be better spent on the identification of reasonable and prudent alternatives to the proposed action. Therefore, we do not independently define "destruction" and "adverse modification."

Comments on the need for a quantitative definition: Eight commenters suggested the need for a quantitative definition that minimizes the Services' discretion.

Our Response: We did not receive any examples of a quantitative definition. We are not able to provide such a definition because Federal actions, species, and critical habitat designations are complex and differ considerably. Our analyses of the actions and their effects on critical habitat require case-by-case consideration that does not fit neatly into a mathematical formula. Congress anticipated the need for the Services to use their professional judgment by requiring us to provide our opinion, detailing how the action affects species and critical habitat. This opinion must be based on the best available scientific and commercial information available for a particular action and species. The level of specificity and precision in available data will vary across actions and across species, and therefore a one-size-fits-all standard would not be workable.

Further, the U.S. Court of Appeals for the Ninth Circuit has specifically held that nothing in the Act or current regulations requires that the analysis of destruction or adverse modification be quantitative in nature. *Butte Environmental Council*, 620 F.3d at 948 (agency not required to calculate rate of loss of habitat). *See also San Luis & Delta-Mendota Water Authority* v. *Salazar*, 760 F.Supp.2d 855, 945 (E.D. Cal. 2010) (Services not required to set threshold for determining destruction or adverse modification), *affirmed in part, reversed in part on other grounds sub nom. San Luis & Delta-Mendota Water Auth.* v. *Jewell*, 747 F.3d 581 (9th Cir. 2014).

Therefore, we find that attempting to specify a quantitative threshold is neither feasible nor required.

Comments on the scale of analysis: Many commenters expressed confusion or concern regarding the scale at which the determination of destruction or adverse modification of critical habitat is made. Some commenters agreed with the Services' interpretation of the statute and the existing implementing regulations at 50 CFR 402.14, as described in the preamble to the proposed rule, that determinations on destruction or adverse modification are based on critical habitat as a whole, not just on the areas where the action takes place or has direct impacts. These commenters requested clarification of the process used to make such determinations or thought that the language, "critical habitat, as a whole," should be included in the rule and not just the preamble. Other commenters disagreed with the Services' interpretation that the destruction or adverse modification determination should be based on critical habitat as a whole and recommended that the Services evaluate destruction or adverse modification at the smallest scale relevant to determining whether the species has met its recovery criteria.

Our Response: As explained in the preambles to this rule and the proposed rule, the determination of "destruction or adverse modification" will be based on the effect to the value of critical habitat for the conservation of a listed species. In other words, the question is whether the action will appreciably diminish the value of the critical habitat as a whole, not just in the action area (i.e., all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action; 50 CFR 402.02).

The section 7 process involves multiple determinations, made by the action agency or the Services or both, regarding critical habitat. Where critical habitat has already been designated, section 7(a)(2) of the Act applies. Under the implementing

regulations, the Federal agency first determines if its proposed action may affect critical habitat. If such a determination is made, formal consultation is required unless the Federal agency determines, with the written concurrence of the Services, that the action is not likely to adversely affect critical habitat. In accordance with the Act, our implementing regulations at 50 CFR 402.14(g)(1) through (g)(4), and the 2004 and 2005 guidance documents issued by FWS and NMFS (see the **Background** section), the formal consultation process generally involves four components: (1) the status of critical habitat, which evaluates the condition of critical habitat that has been designated for the species in terms of physical or biological features, the factors responsible for that condition, and the intended conservation role of the critical habitat overall; (2) the environmental baseline, which evaluates the current condition of the critical habitat in the action area, the factors responsible for that condition, and the relationship of the affected critical habitat in the action area to the entire critical habitat with respect to the conservation of the listed species; (3) the effects of the action, which includes the direct and indirect effects of the action (and the effects of any interrelated or interdependent activities) and describes how those effects alter the value of critical habitat within the action area; and (4) cumulative effects (as defined at 50 CFR 402.02), which evaluates the effects of future, non-Federal activities in the action area and describes how those effects are expected to alter the value of critical habitat within the action area. After synthesizing and integrating these four components, the Services make their final determination regarding the impact of the action on the overall value of the critical habitat designation. The Services conclude whether critical habitat would remain functional (or retain the current ability for the features to be functionally established in

areas of currently unoccupied but capable habitat) to fulfill its value for the conservation of the species, or whether the action appreciably reduces the value of critical habitat for the conservation of the species.

Where critical habitat has only been proposed for designation, a distinct but related process applies under section 7(a)(4) of the Act. The action agency must initiate a conference with the Services on the effects of its proposed action when the action is likely to result in destruction or adverse modification of the proposed critical habitat (50 CFR 402.10(b)). Although a conference generally will consist of informal discussions leading to advisory recommendations, action agencies have the option of conducting the conference under the same procedures that apply to formal consultations so that a conference opinion is produced (and later adopted as a biological opinion upon finalization of the critical habitat designation, provided certain conditions are met; 50 CFR 402.10(c) and (d)). While there are important differences between the consultation and conference processes, the same analytical steps as described in the paragraph above apply in the Services' evaluation of impacts to critical habitat.

Adverse effects to critical habitat within the action area may not necessarily rise to the level of destruction or adverse modification to the designated critical habitat. The Handbook expressly provides that adverse effects to single elements or segments of critical habitat generally do not result in destruction or adverse modification unless that loss, when added to the environmental baseline, is likely to appreciably diminish the capability of the critical habitat to satisfy essential requirements of the species. Courts have concurred that a proposed action may result in destruction of some areas of critical habitat and still not necessarily result in a finding of "destruction or adverse

modification." *See Conservation Congress* v. *U.S. Forest Service*, 720 F.3d 1048, 1057 (9th Cir. 2013) ("Even completely destroying 22 acres of critical habitat does not necessarily appreciably diminish the value of the larger critical habitat area."); *Butte Environmental Council*, 620 F.3d at 948 (applying the Handbook provision to support the conclusion that "[a]n area of a species' critical habitat can be destroyed without appreciably diminishing the value of critical habitat for the species' survival or recovery.").

The analysis thus places an emphasis on the value of the designated critical habitat as a whole for the conservation of a species, in light of the role the action area serves with regard to the function of the overall designation. Just as the determination of jeopardy under section 7(a)(2) of the Act is made at the scale of the entire listed entity, a determination of destruction or adverse modification is made at the scale of the entire critical habitat designation. Even if a particular project would cause adverse effects to a portion of critical habitat, the Services must place those impacts in context of the designation to determine if the overall value of the critical habitat is likely to be reduced. This could occur where, for example, a small affected area of habitat is particularly important in its ability to support the conservation of a species (e.g., a primary breeding site). Thus, the size or proportion of the affected area is not determinative; impacts to a small area may in some cases result in a determination of destruction or adverse modification, while impacts to a large geographic area will not always result in such a finding.

Because the existing consultation process already ensures that destruction or adverse modification of critical habitat is analyzed at the appropriate scale, the Services

decline to include language referring to determinations based on critical habitat "as a whole" in the definition of "destruction or adverse modification."

Comments on aggregate effects: Several commenters expressed concern that aggregate adverse impacts to critical habitat are not adequately addressed in the Services' analyses and that the proposed rule should be revised to expressly require the evaluation of aggregate effects to critical habitat that multiple actions will have on a species' recovery. One commenter urged the Services to develop a system to track the aggregate effects that destroy or degrade critical habitat.

Our Response: The Services' biological opinion provides an assessment of the status of the critical habitat (including threats and trends), the environmental baseline of the action area (describing all past and present impacts), and cumulative effects. Under the implementing regulations of the Act, cumulative effects are defined as those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation (50 CFR 402.02). Following the definition, we only consider cumulative effects within the action area. The effects of any particular action are evaluated in the context of this assessment, which incorporates the effects of all current and previous actions. This avoids situations where each individual action is viewed as causing only insignificant adverse effects but, over time, the aggregate effects of these actions would erode the conservation value of the critical habitat.

Comments on the role of mitigation in "destruction or adverse modification" findings: Four commenters thought the "net effects" of an action, including consideration of "mitigation and offsetting beneficial" measures, should be considered in the revised

regulatory definition. One commenter suggested that the Services should develop an explicit framework for allowing project proponents to avoid a destruction or adverse modification finding by restoring the same biological or physical feature of critical habitat that they degrade, provided there is evidence the restoration is likely to succeed.

Our Response: As stated in the Services' 2004 and 2005 guidance, conservation activities (e.g., management, mitigation, etc.) outside of designated critical habitat should not be considered when evaluating effects to critical habitat. However, conservation activities within critical habitat, included as part of a proposed action to mitigate the adverse effects of the action on critical habitat, are considered by the Services' in formulating our biological opinion as to whether an action is likely to result in the destruction or adverse modification of critical habitat. This consideration of beneficial actions is consistent with the implementing regulations at 50 CFR 402.14(g)(8), which set forth that in formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation. The Services welcome the inclusion of beneficial conservation activities as part of proposed actions. However, because the question of whether beneficial actions can compensate for impacts to critical habitat is complicated and must be evaluated on a case-by-case basis, it would be advisable for Federal agencies and applicants to coordinate closely with the Services on such activities.

Comments on continuation of current uses: Two commenters discussed current land practices and other uses on areas that may be designated as critical habitat. One

commenter specifically requested that the final rule indicate that continuation of current uses does not constitute destruction or adverse modification.

Our Response: There is nothing in the Act to suggest that previously ongoing activities are or may be exempted from analysis during section 7(a)(2) consultations. Accordingly, our longstanding regulatory framework does not distinguish between ongoing and other actions. "Action" is defined broadly at 50 CFR 402.02 to include all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. The applicability provision of the regulations further explains that section 7(a)(2) obligations arise so long as there is discretionary Federal involvement or control (50 CFR 402.03). It would be unsupported and beyond the scope of the definition of "destruction or adverse modification" to change these well-established principles.

Comments regarding the use of recovery documents as a basis for a destruction or adverse modification determination: We received three comments requesting that the Services clarify that criteria, goals, or programs established in recovery plans are not enforceable and may not be used as a basis for a destruction or adverse modification decision.

Our Response: The Services agree that recovery plans convey guidance and are not regulatory documents that compel any action to occur. In addition, section 7(a)(2) of the Act describes a standard of prohibition rather than a mandate to further recovery. However, criteria, goals, and programs for recovery that are established in these plans may be used in our evaluation of whether, with implementation of the proposed action, critical habitat would retain its value for the conservation of the species. Recovery plans,

in addition to critical habitat rules, may provide the best scientific and commercial information available on the value of critical habitat to the conservation of the species, thus assisting the Services with evaluating the effects of a proposed action on critical habitat.

Comments on undue burden: We received 14 comments regarding the perceived potential for undue burden on Tribes, State and local governments, and various industries. The commenters suggested that the proposed definition would prevent the issuance of permits or impose unwarranted restrictions and requirements on permit applicants, resulting in additional costs for project redesign, reductions in productivity, and increases in the time and effort required to submit permit applications. Some commenters predicted an increase in the number of section 7(a)(2) consultations, especially formal consultations. Others predicted that the Services would conclude destruction or adverse modification of critical habitat more frequently.

Our Response: Because the final regulatory definition largely formalizes existing guidance that FWS and NMFS have implemented since 2004 and 2005, respectively, we conclude that the section 7(a)(2) consultation process will not significantly change. The final definition does not "raise the bar" in any way. We will not reinitiate consultations as a result of this rule. We will consult on ongoing actions in a similar manner as we have since the issuance of the guidance. Therefore, we do not anticipate changes in the costs related to section 7(a)(2) consultations or the frequency at which the Services conclude destruction or adverse modification of critical habitat. The decision to consult is made prior to and independent of our analysis of destruction or adverse modification of critical habitat (i.e., by a Federal agency applying the "may affect" standard of 50 CFR 402.14(a)

to determine whether their action may affect designated critical habitat). If a Federal agency determines, with the written concurrence of the Services, that the proposed action is not likely to adversely affect critical habitat, formal consultation is not required (50 CFR 402.14(b)), and the Services would not perform an analysis of destruction or adverse modification of critical habitat. Therefore, the number of section 7(a)(2) consultations, and formal consultations in particular, is not likely to be affected by this rule.

Comments on Tribe, State, and local coordination: We received five comments from Tribes, State and local governments, and industry groups indicating that we should consult or coordinate with Tribes, States, and local governments to finalize the proposed rule.

Our Response: The Services have undertaken numerous efforts to ensure that our State, Tribal, and other partners had full notice and opportunity to provide input into the development of this rule. We reached out to industry groups, environmental organizations, intergovernmental organizations, and Federal agencies. We worked with the Association of Fish and Wildlife Agencies and the Native American Fish and Wildlife Society to distribute information to Tribes, States, and local governments about the proposed rule. The Services notified their respective Tribal liaisons, who sent letters to Tribes regarding this rule. We also hosted a webinar for the States on May 23, 2014. We considered all submitted comments, which included comments from Tribes, States, and local governments, and, as warranted, applied suggestions to the final rule.

Comments on NEPA: We received 11 comments suggesting that a categorical exclusion from the NEPA was not appropriate for the proposed rule and that the Services should analyze the environmental impacts of this action.

Our Response: The Services believe this rule likely would qualify for one or more categorical exclusions adopted by the Department of the Interior and the National Oceanic and Atmospheric Administration, respectively. Nevertheless, in an abundance of caution, the Services have completed an environmental assessment, which is available at the Federal e-rulemaking portal: http://www.regulations.gov (see **ADDRESSES).**

Comments on Energy Supply, Distribution, and Use (E.O. 13211), Takings (E.O. 12630), and Economic Analyses (E.O. 12866, the Regulatory Flexibility Act, and the Unfunded Mandates Reform Act): We received comments that the Services should prepare a Statement of Energy Effects (E.O. 13211, 1 comment), a regulatory flexibility analysis (2 comments), and an economic analysis (2 comments).

Our Response: This rule clarifies existing requirements for Federal agencies under the Act. Based on procedures applied through existing agency guidance, the rule is substantially unlikely to lead to different conclusions in section 7(a)(2) consultations. The rule clarifies the standard by which we will evaluate the effect of agency actions on critical habitat pursuant to section 7(a)(2) of the Act. For further information, please see the relevant sections under **Required Determinations**, below.

Comments on extension of the comment period: Many commenters 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 36284), 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.

Comments on the proposed rule being "beyond the scope of the Act": We received 25 comments stating that the proposed definition exceeded the authority of the Act. Some commenters wrote that it was beyond the scope of the Act. Some expressed concern that the proposed definition implied an affirmative conservation requirement or mandate for recovery.

Our Response: As the agencies charged with administering the Act, it is within our authority to promulgate and amend regulations to ensure transparent and consistent implementation. Under general principles of administrative law, an agency may resolve ambiguities and define or clarify statutory language as long as the agency's interpretation is a permissible interpretation of the statute. The term "destruction or adverse modification" was not defined by Congress. Consequently, the Services first promulgated a regulatory definition in 1978, and then later in 1986. As previously mentioned, the "survival and recovery" standard of our earlier definitions was invalidated by courts. We believe that this revised definition comports with the language and purposes of the Act.

As explained in the preamble to the proposed rule, section 7(a)(2) only applies to discretionary agency actions and does not create an affirmative duty for action agencies to recover listed species (79 FR 27060, May 12, 2014). Similarly, the definition of "destruction or adverse modification" is a prohibitory standard only. The definition does

not, and is not intended to, create an affirmative conservation requirement or a mandate for recovery. Consistent with the Ninth Circuit's opinion, in the context of describing an action that "jeopardizes" a species, in *National Wildlife Federation v. NMFS*, 524 F.3d 917 (9th Cir. 2008), the Services believe that an action that "destroys" or "adversely modifies" critical habitat must cause a deterioration in the value of critical habitat, which includes its ability to provide recovery support to the species based on ongoing ecological processes. Section 7(a)(2) of the Act requires Federal agencies to insure that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. Under this section of the Act, Federal agencies are not required to recover species; however, they must insure that their actions are not likely to prevent or impede the recovery of the species through the destruction or adverse modification of critical habitat. To be clear, Federal actions are not required to improve critical habitat, but they must not reduce its existing capacity to conserve the species over time. Section 7(a)(2) and the definition of “destruction or adverse modification” are implemented independent of section 7(a)(1), which directs Federal agencies to utilize their authorities to carry out affirmative conservation programs for listed species.

Comments suggesting revision or withdrawal of the rule: We received 15 comments requesting that we revise or withdraw the proposed rule.

Our Response: In order to administer the Act, the Services need a regulatory definition of “destruction or adverse modification.” The Fifth and Ninth Circuits found the current regulatory definition to be invalid over a decade ago because it required that both the survival and the recovery of listed species be impacted. As discussed previously, in 2004 and 2005, the Services issued internal guidance instructing their biologists to

discontinue use of the regulatory definition and to instead consider whether critical habitat would continue to contribute (or have the potential to contribute) to the conservation of the species. After several years of implementation, the Services herein formalize this guidance by modifying the regulatory definition. In response to public comments, we have made minor revisions to the proposed definition; however, the meaning and implementation of the standard remains unchanged. The final definition is clear, implementable, and consistent with the Act.

Required Determinations

Regulatory Planning and Review (E.O. 12866)

The Office of Management and Budget (OMB) has determined that this final rule is a significant regulatory action and has reviewed this rule under E.O. 12866 because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

Regulatory Flexibility Act

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

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

This rule clarifies existing requirements for Federal agencies under the Act. Federal agencies are the only entities that are directly affected by this rule, and they are not considered to be small entities under SBREFA's size standards. No other entities are directly affected by this rule.

This rule will be applied in determining whether a Federal agency has ensured, in consultation with the Services, that any action it would authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. Based on procedures applied through existing agency guidance, this rule is unlikely to affect our determinations. The rule provides clarity to the standard with which we will evaluate agency actions pursuant to section 7(a)(2) of the Act.

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) This rule will not "significantly or uniquely" affect small governments. We have determined and certify under the Unfunded Mandates Reform Act (2 U.S.C. 1502 *et seq*.) that this rule will not impose a cost of $100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the regulation will not place additional requirements on any city, county, or other local municipalities.

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

Takings (E.O. 12630)

In accordance with E.O. 12630, we have determined the rule does not have significant takings implications.

A takings implication assessment is not required because this rule (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. Indeed, this regulation provides broad program direction for the Services’ application of section 7(a)(2) in consultations on future proposed Federal actions and does not itself result in any particular action concerning a specific property. Further, this rule substantially advances a legitimate government interest (conservation and recovery of listed species) and does not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with E.O. 13132, we have considered whether this rule will have significant Federalism effects and have determined that a federalism summary impact statement is not required. This rule pertains only to determinations of Federal agency compliance with section 7(a)(2) 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 (E.O. 12988)

This rule will not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of E.O. 12988. This rule clarifies how the Services will make determinations on whether a Federal agency has ensured that any action it authorizes, funds, or carries out is not likely to result in the destruction or adverse modification of critical habitat.

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 rule on Federally recognized Indian Tribes. Following an exchange of information with tribal representatives, we have determined that this rule, which modifies the general framework for conducting consultations on Federal agency actions under section 7(a)(2) of the Act, does not have tribal implications as defined in Executive Order 13175. We will continue to collaborate and coordinate with Tribes on issues related to Federally listed species and their habitats and work with them as appropriate as we engage in individual section 7(a)(2) consultations. See Joint Secretarial Order 3206 ("American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act", June 5, 1997).

Paperwork Reduction Act of 1994

This rule does not contain any collections of information that require approval by the OMB under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). This rule does not impose recordkeeping or reporting requirements on Tribes, State or local governments, individuals, businesses, or organizations. We 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)

In the proposed rule, we invited the public to comment on whether and how the regulation may have a significant effect upon the human environment, including any effects identified as extraordinary circumstances at 43 CFR 46.215. After considering the comments received and further evaluating whether there is any arguable basis to require preparation of an environmental assessment, we analyzed this rule in accordance with the criteria of the National Environmental Policy Act, the Department of the Interior regulations on Implementation of the NEPA (43 CFR 46.10–46.450), the Department of the Interior Manual (516 DM 1-6 and 8), and National Oceanographic and Atmospheric Administration Administrative Order 216-6. This analysis was undertaken in an abundance of caution only, as we believe the rule would qualify for one or more categorical exclusions. Based on a review and evaluation of the information contained in the Environmental Assessment, we made a determination that the Final Definition for the phrase “destruction or adverse modification” of critical habitat will not have a significant effect on the quality of the human environment under the meaning of section 102(2)(c) of the National Environmental Policy Act of 1969 (as amended).

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

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

References Cited

A complete list of all references cited in this document is available upon request from the U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

List of Subjects in 50 CFR Part 402

Endangered and threatened species.

Regulation Promulgation

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

PART 402— INTERAGENCY COOPERATION—ENDANGERED SPECIES ACT OF 1973, AS AMENDED

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

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

2. In § 402.02, revise the definition for "*Destruction or adverse modification*" to read as follows:

§ 402.02 Definitions.

*** * * * ***

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed

species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

* * * * *

Dated: January 29, 2018

Michael J. Bean

Michael J. Bean

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

U.S. Department of the Interior

Dated: January 29, 2016

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

~~**Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat**~~