(3) When payment is for legal or other professional services rendered in connection with the case; or

(4) When payment is expressly authorized by statute or regulation, including restitution and forfeiture.

(d) This policy applies to all civil and criminal cases litigated under the direction of the Attorney General and includes civil settlement agreements, *cy pres* agreements or provisions, plea agreements, non-prosecution agreements, and deferred prosecution agreements.

Dated: December 4, 2020.

William P. Barr,

Attorney General.

[FR Doc. 2020–27189 Filed 12–15–20; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 424

[Docket No. FWS–HQ–ES–2020–0047, FF09E23000 FXES1111090FEDR 212; Docket No. 201210–0335]

RIN 1018–BE69; 0648–BJ44

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

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

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the ''Services'' or ''we''), add a definition of ''habitat'' to our regulations that implement section 4 of the Endangered Species Act of 1973, as amended (Act). This rulemaking responds to Supreme Court case law regarding the designation of critical habitat and provides transparency, clarity, and consistency for stakeholders.

DATES:

Effective date: This final regulation is effective on January 15, 2021.

Applicability date: This revised regulation applies to critical habitat rulemakings for which a proposed rule is published after January 15, 2021.

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

FOR FURTHER INFORMATION CONTACT: Gary Frazer, U.S. Fish and Wildlife Service, Department of the Interior, Washington, DC 20240, telephone (202) 208–4646; or Samuel D. Rauch, III, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone (301) 427–8403. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service (FRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION:

Background

On August 5, 2020, the Services published a proposed regulatory definition of ''habitat'' in the **Federal Register** (85 FR 47333); the definition would be added to title 50 of the Code of Federal Regulations in part 424 (50 CFR part 424). In that proposed rule, we provided the background for our proposed definition in terms of the statute, legislative history, and case law.

In this final rule, we focus our discussion on changes from the proposed rule based on comments we received during the comment period and our further consideration of the issues raised. For background on the statutory and legislative history and case law relevant to this regulation, we refer the reader to the proposed rule (85 FR 47333, August 5, 2020).

In finalizing the specific changes to the regulation in this document and setting out the accompanying clarifying discussion in this preamble, the Services are establishing a prospective standard only. Although this regulation is effective 30 days from the date of publication as indicated in **DATES** above, it will apply only to relevant rulemakings for which the proposed rule is published after that date. Thus, the prior version of the regulations at 50 CFR part 424 will continue to apply to any rulemakings for which a proposed rule was published before the effective date of this rule. Nothing in this final revised regulation is intended to require that any previously completed critical habitat designation be reevaluated on the basis of this final regulation.

Discussion of Changes From the Proposed Rule

In this section, we discuss changes between the proposed regulatory definition and the definition we are finalizing for the term ''habitat,'' as that term is used in the context of critical habitat designations and which will be set forth in the implementing regulations at 50 CFR 424.02.

We proposed a regulatory definition of ''habitat'' as that term is used in the context of critical habitat designations under the Act. In addition to the proposed definition, we also sought comment on an alternative definition. The Act defines ''critical habitat'' in section 3(5)(A), establishing separate criteria depending on whether the relevant area is within or outside of the geographical area occupied by the species at the time of listing, but it does not define the broader term ''habitat.'' *See* 16 U.S.C. 1532(5)(A). The Services have not previously adopted a definition of the term ''habitat'' through regulations or policy; rather, we have traditionally applied the criteria from the definition of ''critical habitat'' based on the implicit premise that any specific area satisfying that definition was habitat.

However, the Supreme Court recently held that an area must logically be ''habitat'' in order for that area to meet the narrower category of ''critical habitat'' as defined in the Act *Weyerhaeuser Co.* v. *U.S. FWS,* 139 S. Ct. 361 (2018). The Court stated: ''. . . Section 4(a)(3)(A)(i) does not authorize the Secretary to designate [an] area as *critical* habitat unless it is also *habitat* for the species.'' *Id.* at 368; *see id.* at 369 n.2 (''we hold that an area is eligible for designation as critical habitat under section 4(a)(3)(A)(i) only if it is habitat for the species''). Given this holding in the Supreme Court's opinion in *Weyerhaeuser,* we are adding a regulatory definition of ''habitat.''

Under the text and logic of the statute, the definition of ''habitat'' must inherently be at least as broad as the statutory definition of ''critical habitat.'' To give effect to all of section 3(5)(A), the definition of ''habitat'' we are finalizing is broad enough to include both occupied areas and unoccupied areas, because the statute defines ''critical habitat'' to include both occupied and unoccupied areas. 139 S. Ct. at 369 (''[h]abitat can, of course, include areas where the species does not currently *live,* given that the statute defines critical habitat to include unoccupied areas'').

We received numerous comments that the proposed and alternative definitions lacked clarity, were ambiguous, and used terms that needed to be defined further. Additionally, commenters identified specific issues with some of the terms used in the proposed and alternative definitions and were

concerned overall that the definition could have unintended consequences on implementation of other parts of the Act or on other Federal programs involving habitat. In response to these comments and upon further consideration, the Services have revised the regulatory definition of ''habitat'' to be added to 50 CFR 424.02 to read as follows:

> For the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species.

By reducing the definition to a single sentence, this structure is more logical, and eliminates any apparent contradiction between the first sentence and the second sentence of both the proposed and alternative definitions on which we sought comment in the proposed rule.

We added an introductory phrase to the final definition (''For the purposes of designating critical habitat only'') that explicitly limits the scope of applicability to the designation of critical habitat. We added this explicit statement in response to public comments that raised concerns about the potential for the definition to apply to other sections of the Act or other Federal programs that use the term ''habitat'' and thus have unintended consequences on implementation of these other sections and programs. This addition provides clarity that the definition applies only to the process of designating critical habitat.

We replaced the phrase ''physical places'' with the phrase ''abiotic and biotic setting.'' Abiotic means derived from non-living sources such as soil, water, temperature, or physical processes. Biotic means derived from living sources such as a plant community type or prey species. We intend for the word ''setting'' to have its common meaning, such as the time, place, and circumstances in which something occurs or develops. The addition of this phrase responds to comments that habitat is more than simply a physical location. As we stated in the proposed rule, we intentionally chose not to use the statutory phrase ''physical or biological features'' to avoid conflating the statutory language regarding occupied critical habitat with that of the broader definition of ''habitat'' promulgated here. However, we consider ''abiotic and biotic setting'' to be inclusive of ''physical or biological features.'' Additionally, it addresses the concerns raised by commenters that natural spatial and temporal variations in habitat were not encompassed in the proposed definition. Finally, this use of the phrase ''abiotic and biotic setting'' avoids the undefined term ''attributes,'' which commenters found to be vague, poorly defined, or confusing.

We included the phrase ''resources and conditions'' to make clear that the definition of ''habitat'' is inclusive of all qualities of an area that can make that area important to the species. We intend for the word ''resources'' to describe the common ecological concept—which in general is a source or supply from which a benefit is produced and that has some utility. Likewise, we intend the word ''condition'' to describe a particular state that something is in. Examples of resources and conditions can include dynamic processes (*e.g.,* riverine sand bar formation or fire disturbance), a set of environmental conditions (*e.g.,* temperature, pH, and salinity), or any characteristics that can satisfy life-history needs (*e.g.,* food, shelter). Additionally, this plain language takes the place of the phrase ''existing attributes'' that commenters stated was vague, unclear, and confusing.

We solicited comments on whether the phrase ''depend upon'' or the word ''use'' better describes the relationship between a species and its habitat. We received many comments on these phrases. We chose to use the phrase ''necessary to support'' to replace the phrase ''depend upon to carry out'' from the proposed definition or the phrase ''use to carry out'' from the alternative definition. Many commenters stated that both ''depend upon'' and ''use'' were too broad and would encompass areas that should not be considered habitat, or were too narrow and would leave areas out that should be considered habitat. We intend that the phrase ''necessary to support'' applies to areas needed for one or more of a species' life processes. Inclusion of this phrase is plain language, and we intend for this phrase to convey its common meaning.

We adopted the phrases ''resources and conditions,'' ''necessary to support,'' and currently or periodically contains.'' As discussed in the preamble to the proposed rule, we intend the definition of ''habitat'' to include ephemeral habitats—areas that ''may be variable, both temporally and spatially, such as beach overwash areas, early-successional riparian communities, or riverine sandbars.'' 85 FR at 47335. Therefore, we included ''periodically'' to clarify that habitat includes ephemeral habitat, which are areas where the resources and conditions are not consistently present but appear at certain times.

We have retained the phrase ''one or more life processes'' from the proposed definition for similar reasons, in that we intend for habitat to include areas used during a particular season (*e.g.,* for migratory species) or at a particular phase in the species' life cycle (*e.g.,* fresh-water spawning habitat versus adult marine habitat). We intend this phrase to have the common biological meaning, that is, to include a series of functions—such as movement, respiration, growth, reproduction, excretion, and nutrition—that are essential to sustain a living being. Retaining this phrase is consistent with terms that commenters suggested should be included in the definition—such as ''reproduction,'' ''recruitment,'' or ''survival''—but avoids limiting the definition to a particular set of life-history needs that may not be applicable to all species.

We removed the second sentence of the proposed definition because we incorporated some of its concepts (*e.g.,* attributes) into the first sentence and the remainder of the sentence is now unnecessary. As discussed earlier, the addition of the phrase ''resources and conditions'' to the first sentence clarifies and takes the place of the phrase ''existing attributes,'' which commenters stated was vague, unclear, and confusing. The inclusion of ''or periodically'' addresses the clarification in the second sentence that ''habitat'' includes ephemeral habitat. In the preamble to the proposed definition, we described ephemeral habitat as habitat that ''may be variable, both temporally and spatially, such as beach overwash areas, early-successional riparian communities, or riverine sandbars. For example, the sand bars that interior least terns use in a river may develop during particular times of the year correlating to changes in flow rates of a stream or river system.'' In light of that description, defining ''habitat'' as settings that ''currently or periodically contains the resources and conditions'' includes ephemeral habitat because, although we are not able to predict exactly where within the general setting a specific attribute or feature will form, we know that the area contains the resources and conditions for the attribute or feature to form within that general setting. Similarly, as long as the area currently or periodically contains the ''resources and conditions necessary to support one or more life processes'' of the species, the term ''existing'' attributes from the second sentence does not add meaning. At the same time, notwithstanding the inclusion of ephemeral and seasonal habitat in the

definition, the definition excludes areas that do not currently or periodically contain the requisite resources and conditions, even if such areas could meet this requirement in the future after restoration activities or other changes occur.

We note that this understanding of ''habitat'' is consistent with the interpretive requirement that any conception of ''habitat'' in this context be broad enough to include currently unoccupied areas that nonetheless meet the definition of ''critical habitat.'' For example, a species may be extirpated in a particular area due to over-exploitation, disease, or a stochastic event. If that area nonetheless provides ''the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species,'' it will remain ''habitat'' for the species despite the absence of the species.

Summary of Comments and Responses

In our proposed rule published on August 5, 2020 (85 FR 47333), we requested public comments on a proposed definition of ''habitat'' and an alternative definition, with the intention of adding a definition of this term to our implementing regulations in 50 CFR part 424. In particular, we requested comment on whether either definition is too broad or narrow or otherwise proper or improper. We also sought public comment on specific terms and phrases in the proposed definition and alternative definition, such as ''depend upon'' or ''use,'' and whether the phrase ''where the necessary attributes to support the species *presently* exist'' expressly limits what could qualify as unoccupied critical habitat for a species. During the public comment period, we received several requests for public hearings. Public hearings are not required for regulation revisions of this type, and we elected not to hold public hearings. After considering several requests for extensions of the public comment period beyond the original 30-day public comment period, we also decided not to extend the public comment period.

The APA does not specify a minimum number of days for a comment period, but the comment period must be long enough to afford the public a meaningful opportunity to comment, which usually leads agencies to allow a comment period of at least 60 days. Consistent with this principle, courts give broad discretion to agencies in determining the reasonableness of a comment period. Courts have frequently upheld comment periods that were shorter than 60 days. *See, e.g., Connecticut Light & Power Co.* v. *Nuclear Regulatory Comm'n,* 673 F.2d 525, 534 (D.C. Cir. 1982) (upholding a 30-day comment period and stating that ''neither statute nor regulation mandates that the agency do more''). In addition to the length of a comment period, courts consider the number of comments received and whether comments had an effect on an agency's final rule, in assessing whether the public had a meaningful opportunity to comment. Although the comment period here was shorter than 60 days, the public had a meaningful opportunity to comment on the proposed rule. The Services received more than 48,000 public submissions representing more than 167,000 individual commenters. Among the submissions were multiple letters from organizations signed by thousands of individuals expressing general opposition to the rule. Although many of the other individual comments were non-substantive in nature, expressing either general support for, or opposition to, the proposed rule with no supporting information or analysis, we also received many detailed substantive comments with specific rationales for support of, or opposition to, specific portions of the proposed rule, and many commenters also provided unique revised definitions for our consideration in the final rule. In addition, the Services were responsive to the received comments by making revisions to the definition in the final rule to address them. Below, we summarize the significant, substantive public comments sent by the September 4, 2020, deadline and indicate where we made revisions to the definition in response to those comments.

Comment 1: The Services received comments stating that the proposed definition contradicted the intent of the Act, providing varied reasons. Many commenters cited to the purposes of the Act (16 U.S.C. 1531(b)) and provisions regarding critical habitat (*id.* §§ 1532(5), 1533) to support their views that any definition must be broad enough to serve the long-term conservation of the species. Commenters stated that the proposed and alternative definitions would significantly limit the areas eligible for critical habitat designations and, as a result, run counter to Congressional intent that critical habitat designations identify areas essential to a species' survival and recovery.

Other commenters argued that the proposed and alternative definitions were too broad and ran contrary to the spirit of the definition of ''habitat'' most widely accepted among the scientific community. Some commenters stated that the text of the Act and the *Weyerhaeuser* decision both use present tense; therefore, the definition should require all attributes to be present. Those commenters argued the proposed and alternative definitions have the potential to contradict Congress's legislative intent and engage in regulatory overreach.

Response: The Supreme Court recently held that an area must logically be ''habitat'' before that area could meet the narrower category of ''critical habitat'' as defined in the Act. *Weyerhaeuser Co.* v. *U.S. FWS,* 139 S. Ct. 361 (2018). Given the need to address this particular holding from the Supreme Court's opinion in *Weyerhaeuser,* we decided to develop a regulatory definition of ''habitat.'' Under the text and logic of the statute, the definition of ''habitat'' must inherently be at least as broad as the statutory definition of ''critical habitat.'' To give effect to all of section 3(5)(A), the definition of ''habitat'' we are finalizing today is sufficiently broad to include both the occupied areas and unoccupied areas described in the statutory definition of ''critical habitat''; therefore, it is consistent with the legislative intent and the statute regarding the role of critical habitat in achieving the Act's purpose of species conservation. Furthermore, the revised definition is consistent with the *Weyerhaeuser* opinion (*see* 139 S. Ct. at 369 (''[h]abitat can, of course, include areas where the species does not currently *live,* given that the statute defines critical habitat to include unoccupied areas'')). Finally, because the scope of the final definition is necessary to encompass the full definition of ''critical habitat'' under the statute, it is not regulatory overreach.

Comment 2: Many commenters requested the Services make clear that the definition of ''habitat'' applies only to critical habitat designations. They noted the term ''habitat'' is used multiple times in the Act and is not limited to critical habitat. Some commenters expressed concern regarding unintended consequences of applying this definition to other provisions of the Act, stating that the proposed rule did not address potential impacts of the ''habitat'' definition to other Act-based actions such as conservation planning, species and habitat restoration, permitting, mitigation, enforcement, and recovery implementation.

Commenters also expressed concern that the definition of ''habitat'' could have impacts beyond the Endangered Species Act, including a number of

other Federal and State programs to conserve and enhance wildlife habitats. One State expressed concern about the impact of this definition on their State endangered species act. Multiple commenters stated that a regulatory definition should not be used in any federal grant program to restrict the allocation, or to use federal funds, for the restoration or creation of new habitat in areas of non-habitat.

Response: Although the Services indicated in the preamble of the proposed rule that our intent was to limit the definition of ''habitat'' to the designation of critical habitat, it was not explicitly stated in the regulatory definition. Thus, we have revised the definition to explicitly limit it to the context of designating (or revising) critical habitat. We did this by adding ''For the purposes of designating critical habitat only'' to the beginning of the definition. The addition of this phrase will make clear that the definition of ''habitat'' only applies in the context of critical habitat designations and will avoid any unforeseen or unintended consequences of the definition being applied in situations where it is not appropriate.

Comment 3: Multiple commenters stated that application of this regulation should not be limited to cases in which ''genuine questions exist'' (as we stated in the proposed rule), and that this regulation should instead establish a required procedural step in which the Services first determine whether an area is habitat before proceeding to a determination that the area meets the requirements for designation as critical habitat. These commenters stated that we cannot rely on the statutory definition of ''critical habitat'' to fulfill the requirement of ensuring an area is habitat for the species, and some explained that this is a necessary step because even areas within the occupied range of the species do not all necessarily qualify as habitat. However, other commenters agreed with the position taken in the proposed rule that this regulation should not be used to create an additional regulatory procedure or step. Some commenters noted that the proposed rule's claim that this definition would apply only in limited cases was unclear because the rule would establish a regulatory definition for all habitat and would therefore apply to all cases.

Response: In response to these and other comments, we have further clarified in this final rule that the regulatory definition of ''habitat'' will not be used to create a new procedural step or regulatory process, nor will it result in any new regulatory burdens for landowners or other parties. As indicated by the revised wording of the definition, this regulatory definition is applicable only within the context of a critical habitat designation or revision, and it does not create a new category or type of regulated area. Therefore, this rule has no bearing on, and will not affect, other habitat programs or habitat-management activities.

As we discussed in the proposed rule, if an area is occupied by the listed species, then as a matter of logic and rational inference, the area must also be habitat for the species. Similarly, given the more exacting criteria set forth in the regulations for designating unoccupied areas as critical habitat (see 50 CFR 424.12(b)(2)), which were recently revised to address the Supreme Court's decision in *Weyerhaeuser,* questions regarding whether an unoccupied area qualifies as habitat are far less likely to occur. Those regulations, which were revised in 2019 (see 84 FR 54020, August 27, 2019), indicate that unoccupied critical habitat will be considered for designation only if (1) the occupied areas are not adequate to ensure the conservation of the species and (2) there is a reasonable certainty both that the unoccupied areas will contribute to the species' conservation and that the unoccupied areas contain one or more of the physical or biological features essential to the conservation of the species (50 CFR 424.12(b)(2)). This is not to say, as was asserted by some commenters, that we are using or intend to use the statutory definition of ''critical habitat'' to define what is habitat for a species. We are instead stating that an added step of first assessing whether an area meets the regulatory definition of ''habitat'' before assessing whether it meets the definition of and criteria for ''critical habitat'' will, in most cases, be an unnecessary step. Therefore, we do not agree with comments that we should use this rule to institute a new procedure or process through which all areas must first be evaluated to determine whether or not the areas are in fact habitat for a species before we determine whether they meet the narrower definition and criteria for critical habitat.

Comment 4: Commenters stated that the Services should state that any identification of ''habitat'' for a particular species will not impose additional regulatory consequences for landowners, project proponents, or other affected parties. The identification of ''habitat'' should be a purely administrative action in preparation for critical habitat designation.

Response: The Services have clarified that the revised regulatory definition of ''habitat'' will be applicable only in the context of critical habitat designation and revision. The definition does not create a new procedural or regulatory process, nor will it impose any additional regulatory consequences for landowners, project proponents, or other affected parties.

Comment 5: Multiple commenters stated we should clarify that this rule will not affect projects that are already pending approval when this rule becomes effective. Some commenters noted this rule should apply to future critical habitat designations, as well as future revisions of existing critical habitat. Several commenters had the converse view and stated that, following conclusion of this rulemaking, we should review previously designated critical habitats and revise them as appropriate to ensure that only existing habitat is designated as critical habitat.

Response: As stated in the proposed rule, the regulatory definition of ''habitat'' will apply only to critical habitat rules that are proposed after the effective date of this final rule. Thus, it does not apply to critical habitat that was designated or proposed for designation prior to the effective date of this rule. This final rule will not have a bearing on consultations under section 7 for any projects with a Federal nexus unless the project may affect areas for which a critical habitat designation or revision was proposed after the effective date of this rule. After this rule becomes effective, we do not intend to conduct a systematic review of all previous critical habitat designations. The Act provides a process by which designated critical habitat may be revised, and we will continue to employ that process. Lastly, as indicated in the proposed rule, in the vast majority of cases, we expect application of this definition of ''habitat'' to be unnecessary because most designations include occupied areas only, and we conclude that the occupancy of the species confirms that the areas constitute habitat for that species.

Comment 6: Some commenters stated that the proposed rule represents a departure from the Act's requirement to rely on the best scientific data available. Commenters stated that the concept of habitat is species-specific and should be defined based on the best available science for that species, not by a set of regulatory standards. Commenters asserted that application of a regulatory definition of ''habitat'' would unnecessarily constrain what qualifies as habitat.

Response: Section 4(b)(2) of the Act requires that we designate, and make revisions to, critical habitat on the basis of the best scientific data available and after taking into consideration the economic, national security, and other relevant impacts of specifying any particular area as critical habitat. We will continue to apply this statutory requirement when designating critical habitat, and we will also apply the best scientific data available when determining what areas meet the regulatory definition of ''habitat.'' Furthermore, because this regulatory definition of ''habitat'' is intentionally broad enough to encompass both occupied and unoccupied critical habitat as defined in section 3 of the Act and as further detailed in the implementing regulations in 50 CFR 424.12, application of this definition will not constrain the application of the best scientific data available to which areas qualify as critical habitat and are ultimately designated as critical habitat under the Act. We see no tension between the final definition and the requirements of the Act and the implementing regulations.

Comment 7: We received numerous comments that provided various alternative definitions of the term ''habitat.'' Some were wholesale re-writes of the definitions; others used many of the same terms used in the proposed and alternative definitions from the proposed rule but with slight variations; some referred to dictionary definitions or definitions in published relevant ecological or conservation-biology literature; and some used different terms and phrases from the ones used in the proposed rule. Some commenters provided multiple variations in the same comment letter.

Response: We considered the various alternative definitions provided and have revised the definition of ''habitat'' accordingly. After considering the substantive comments, we made the changes summarized in the preamble to arrive at the final definition in this rule. In short, our edits relative to the proposed and alternative definitions in the proposed rule were focused on making the final definition clearer by using more commonly understood words. We also explain certain words and phrases (*e.g.,* ''support'') later in this response-to-comments section, again to help where additional clarity was requested. We have explained more fully the relationship between our final definition and those of published definitions of ''habitat'' that we considered (see the relevant comment and response below). We determined that our final definition could not be identical to these published definitions because it has to fit within the regulatory framework of the Act. This concept is explained further in our response to the comment below regarding the relationship of our definition to those in the scientific literature.

Comment 8: Multiple commenters requested to review the scientific literature that the Services used in developing the proposed and alternate definitions of habitat. Commenters also requested that we further explain our rationale by providing an analysis of the literature relative to the final rule's definition and by describing why other existing definitions of ''habitat'' were insufficient for our regulatory framework. The commenters also provided examples of existing literature that describes definitions of ''habitat'' used within the conservation biology community, as well as a recently developed definition of ''habitat'' for use within a regulatory context (Rylander et. al 2020).

Response: In developing our final regulatory definition of ''habitat,'' we considered several published definitions from the ecological and conservation-biology literature.

Two definitions that we considered in detail were Odum's (1971) definition, ''the place where an organism lives, or the place where one would go to find it,'' and Kearney's (2006) definition, ''a description of a physical place, at a particular scale of space and time, where an organism either actually or potentially lives.'' Neither these nor other definitions in the scientific literature are well-suited to our particular purpose here, which is to define the term within the legal framework for designation of critical habitat under the Act. The Act defines ''critical habitat'' not just in terms of where a species may be found, but also in terms of which areas provide resources that further the species' conservation. Further, we find that none of the existing definitions clearly incorporate areas that are not currently occupied by the species but that may still satisfy the requirements to be considered unoccupied critical habitat. Our definition includes unoccupied areas, and therefore complies with the intent of the Act, which requires the Secretaries to designate as critical habitat not only areas that are occupied by the species, but also those areas that are ''outside the geographical area occupied by the species at the time it is listed upon a determination by the Secretary that such areas are essential for the conservation of the species'' (16 U.S.C. 1532(3)).

We also considered the definition used by Canada's Species at Risk Act (SARA; Canada § 2(1)). Under SARA, ''habitat'' is defined as ''(a) in respect of aquatic species, spawning grounds and nursery, rearing, food supply, migration and any other areas on which aquatic species depend directly or indirectly in order to carry out their life processes, or areas where aquatic species formerly occurred and have the potential to be reintroduced; and (b) in respect of other wildlife species, the area or type of site where an individual or wildlife species naturally occurs or depends on directly or indirectly in order to carry out its life processes or formerly occurred and has the potential to be reintroduced.'' Our definition has similar concepts as SARA's without differentiating between aquatic species and other wildlife. Specifically, both definitions include currently unoccupied areas along with occupied habitat, and both definitions take into account the potential for habitat to be suitable for a species only some of the time. Both definitions are also based on the ecological conditions a species needs to survive. In the case of SARA, these are described as ''the areas on which . . . species depend directly or indirectly in order to carry out its life processes.'' In our definition, it is ''the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species.'' One difference is that we altered the final definition from our proposed definition to avoid the use of the word ''depend,'' which commenters stated was vague (see specific response to these comments below).

Comment 9: Commenters stated that many of the terms used in both the proposed and alternative definition were ambiguous, unclear, and undefined. Commenters stated that the lack of clarity or of clear definitions of the terms used in both the proposed and alternative definition could lead to confusion in implementation, increased regulatory uncertainty, and increased litigation. Commenters recommended that we clearly define the terms that are used in the definition in the final rule.

Response: In response to these and other comments, we have revised the definition of ''habitat'' in this final rule. These changes are described in the preamble to this regulation and throughout this responses-to-comments section. Changes include removal of words or terms, the substitution of new wording to reduce ambiguity, and the description of intended meanings of particular words used in the final definition. For example, we removed both ''depend upon'' and ''use,'' words

which generated many comments both in favor of and opposed to their inclusion, and replaced them with ''necessary to support,'' which describes the ''resources and conditions'' in question.

We further describe (below, in another response to comment) that our intent is for the meaning of ''support'' to be consistent with the purposes of the Act to recover listed species to the point at which they no longer need the protections of the Act. The ''resources and conditions'' in question must contribute to this outcome, at least incrementally.

Other changes made to the proposed definition in light of commenters' requests for increased clarity include the deletion of the words ''attributes'' and ''physical places'' from the final definition. ''Physical places'' was removed from the definition and replaced with ''biotic and abiotic setting'' because the substituted phrase captures a broader set of characteristics, conditions, and processes and addresses the concern raised by multiple commenters that natural spatial and temporal variations in habitat were not encompassed in the proposed definition. ''Attributes'' was removed in favor of the plain-language terminology ''resources and conditions necessary to support one or more life processes of a species,'' which is further described in a separate comment below.

Wording of the Proposed Definition

Comment 10: Commenters' views on the terms ''depend upon'' and ''use'' within the definition of ''habitat'' varied greatly. Some commenters expressed support for using ''depend upon'' instead of ''use,'' whereas other commenters expressed the opposite view. Some commenters supported inclusion of both terms within the definition because this construction would capture the ideas both that the species relies on the area and that individuals are in fact using the area. Other commenters discussed how both of these closely related terms were too vague and could be interpreted in various ways, narrowly as well as broadly, with some commenters suggesting that both terms be used in the definition, and other commenters suggesting that one or both of the terms be replaced with other, clearer terminology—such as ''supports the species.''

Commenters in favor of using ''depend upon'' stated that this phrasing more accurately reflects the relationship between species and their habitat and is consistent with the well-established principle in the scientific literature that habitat is more than just areas that a species physically uses. Some commenters also asserted that ''depend upon'' is preferable to ''use'' because it is consistent with the language in section 2 of the Act stating that the purpose of the Act is to provide a means by which the ecosystems that endangered species and threatened species depend upon may be conserved. Some commenters noted that ''use'' is vague and may imply that a negligible level of reliance on an area or incidental use of an area is sufficient for the area to qualify as habitat, or it may be interpreted to refer to concepts of habitat use or resource use rather than what constitutes habitat.

In contrast, commenters in favor of the word ''use'' or ''may use'' stated that ''depend upon'' could be applied too narrowly in that it may imply obligate use (restricted to one) , and it is too similar in meaning to the word ''essential'' in the statutory definition of ''critical habitat.'' Other commenters stated that ''use'' is preferable because it more accurately describes the relationship between species and their environments. Some commenters preferred ''use'' because it acknowledges that habitat may include areas where the species does not currently exist.

Response: Given the large number of comments for and against using each of the two terms—''depend upon'' and ''use''—in the regulatory definition of ''habitat,'' we have revised the final definition to eliminate use of these terms altogether. Based on the public comments, we have replaced these terms with other, plain-language words that more clearly indicate the intended meaning of the term ''habitat'' and avoid the types of ambiguity and misinterpretations discussed by the commenters. Specifically, we have focused the definition on the abiotic and biotic setting that provides resources and conditions ''necessary to support'' one or more life processes of the species. What is considered ''necessary to support'' the species will be grounded in the best available science for the particular species and the common-sense application of ecological principles. We also find that this phrasing better demonstrates how the definition of ''habitat'' is inclusive of both areas that would qualify as occupied critical habitat and areas that would qualify as unoccupied critical habitat.

Comment 11: Commenters found the phrase ''capacity to support'' to be ambiguous and subject to misinterpretation, and requested that the Services provide a definition to clarify this ambiguity, especially with respect to how ''capacity to support'' relates to either ''depend upon'' or ''use.'' Some of their concern related to how the word ''capacity'' could be interpreted—whether narrowly, to exclude marginal-quality habitat because it refers only to areas that contain all necessary attributes to support the species, or broadly, to include areas of any quality because it includes areas that have or could develop some attributes that could support the species if restored. Commenters also expressed uncertainty as to whether ''support'' only means that the species can survive, or whether the habitat can sustain the species into the future.

Response: As discussed earlier, we have removed the second sentence from the definition because the changes to the first sentence have made it unnecessary. Therefore, the term ''capacity'' no longer appears in the definition or raises these questions. The term ''support'' remains in the definition, but now appears in the first sentence. We use that term consistent with the intent of the Act—to further the conservation of listed species. Specifically, to ''support'' a listed species' life processes, resources and conditions must contribute, at least incrementally, to bringing the species ''to the point at which the measures provided pursuant to . . . [the Act] . . . are no longer necessary'' (16 U.S.C. 1532(3)). This approach is also consistent with our recent revisions to the procedures used to designate critical habitat (50 CFR 424.12(b)(2); 84 FR 45020, August 27, 2019), which specify that the Secretary must determine, in part, that there is a reasonable certainty that the area will contribute to the conservation of the species.

Comment 12: A number of commenters expressed concern that the proposed and alternative definitions focus too narrowly on ''physical places'' and do not recognize habitat is the resources and conditions found in those physical places that provide for the needs of the species. Some suggested the definition of ''habitat'' should emphasize the biotic and abiotic components that comprise a species' habitat and noted that it is not a static location on a map. At least one commenter that supported the use of ''physical places'' suggested that we use ''types of places'' to provide a broader application that reflects habitat linkages and the principle that unoccupied areas can be habitat.

Response: We have removed the words ''physical places'' from the definition. The definition now refers to

the ''biotic and abiotic setting,'' which captures a broader set of characteristics, conditions, and processes, and accomplishes the intent that the comment sought to accomplish.

Comment 13: Commenters stated that the definition should not just consider attributes that are present. Areas where attributes are absent because a given location simply cannot support any or all of the necessary attributes needed by a species, or because human activity or a natural event has altered one or more attributes, should be considered habitat if the site is capable of providing the attributes. Commenters stated that using ''presently'' makes the definition too narrow and does not include enough areas that have the capacity to support the species. Additionally, commenters believe the terms ''existing attributes'' and ''necessary attributes'' are vague and should be clarified. Other commenters stated that the definition should include ''all necessary attributes'' and the definition should focus on attributes that can support populations rather than individuals.

Response: We have added the phrase ''resources and conditions necessary to support one or more life processes of a species'' to the definition. This revision removes the term ''existing attributes'' that commenters criticized as being vague and unclear. Resources and conditions allow for the inclusion of the aspects of habitat that are important to the species, including dynamic processes (*e.g.,* riverine sandbar formation or fire disturbance) or a set of environmental conditions (*e.g.,* temperature, pH, and salinity). By avoiding inclusion of areas that cannot currently or periodically support the species, this simplified phrasing addresses commenters' concerns that the final definition would be overly broad.

Comment 14: Commenters expressed various concerns that both the proposed and alternative definitions of habitat emphasized ''individuals of the species'' as a frame of reference and noted that it could be interpreted as something more or less than intended. Some commenters felt this phrasing could be applied to limit habitat protections in smaller areas that supported some individuals but that were not sufficiently large to support recovery of the species, whereas other commenters felt that this phrasing could be applied to include areas where only a single member of the species was present without considering the ecological relationship between the individual and the particular setting. Some commenters stated that, for an area to qualify as habitat, the species as a whole must use and need the area. These commenters stated that reference to the ''species'' is consistent with the Act, existing regulations, and the Supreme Court opinion in *Weyerhaeuser.* In contrast, some commenters stated that habitat must also include areas that support even a single individual of a listed species. These commenters stated that such an interpretation is consistent with the plain meaning and dictionary definitions of ''habitat'' in that there is no requirement that the area support an entire population or species in order to qualify as habitat. These commenters recommended that, to avoid misinterpretation and misapplication of the definition, we clarify that the term ''habitat'' encompasses all areas that support the species, populations, or individuals of the species.

Response: Both the proposed and alternative definitions provided in the proposed rule defined habitat in terms of areas that ''individuals of the species'' depend upon or use. The phrase ''individuals of the species'' was not intended to artificially restrict what qualifies as habitat to something less than what would be necessary to sustain the species, nor was it intended to artificially expand what qualifies as habitat to areas where, for example, only vagrant individuals are present. We agree that what qualifies as habitat for a given species should be based on the ecology of that species so that it reflects the specific relationship between the environment and individuals, populations, and the species as a whole. Because this phrase received extensive public comments indicating an unintended ambiguity, we have removed this phrase from the definition of ''habitat'' provided in this final rule. The final definition is instead oriented around life processes of the species and the setting that supports those life processes. We find that this revised definition removes the potential confusion identified by the commenters and is sufficiently broad to encompass what would constitute habitat at the relevant and appropriate biological scale—*i.e.,* individual members of a species, populations, and the species as a whole.

While the word ''species'' still occurs in the final definition, it is not used in a manner that constrains the definition of ''habitat'' to a single biological level, such as the whole species. Rather, this term is used as an inclusive term in the context of the definition. In other words, use of the term ''species'' does not preclude consideration of the necessary ecological linkages between individuals, populations, and metapopulations when assessing what constitutes habitat for a species.

Other Topics

Comment 15: Commenters stated that the definition should neither require occupancy nor limit critical habitat designations to occupied habitat. Some commenters noted that habitat should not be limited to occupied areas because occupancy can be difficult to determine for certain species. Other commenters stated a concern that designating habitat where a species does not exist (*i.e.,* unoccupied habitat) has significant impacts to private property rights and the ability to engage in economic activities.

Response: The revised regulatory definition of ''habitat'' must be sufficiently broad to encompass both occupied and unoccupied areas that satisfy the definition of ''critical habitat'' in section 3 of the Act. Application of this definition will not constrain what qualifies as critical habitat because it complements the existing regulations at 50 CFR 424.12, which prescribe when and how the Services will consider designating, and ultimately designate, unoccupied areas as critical habitat under the Act. The definition does not create a new procedural or regulatory process, nor will it result in any additional regulatory consequences for landowners, project proponents, or other affected parties.

Comment 16: Commenters stated that the proposed definition was too narrow, in particular that it may not account for all geographic areas that are or could be suitable across a species' entire range, or all sites that a species may use, because of the limitation of the phrase ''existing attributes.'' Conversely, other commenters stated that the proposed definition of ''habitat'' should be limited to specific geographic areas, and that the Services should clarify the relationship between the range, habitat, and critical habitat of a species.

Response: As noted in the preamble above, the text and logic of the statute inherently require that the definition of ''habitat'' must be at least as broad as the statutory definition of ''critical habitat.'' We have therefore created this definition to be sufficiently broad to include both occupied and unoccupied areas. As for the relationship between range and habitat, the current range of a species is the general geographic area within which a species can be found. Therefore, depending on the facts surrounding a given species, the areas that constitute occupied habitat for the species are a subset of, or are the same as, its current range.

Comment 17: Commenters noted that the proposed definition, including the phrase ''existing attributes,'' may preclude identifying as habitat areas that experience rapid changes in ecology driven by habitat loss and fragmentation or areas that may develop over time, as a result of changing or shifting conditions due to climate change, to the point that they can support the species. Additionally, other commenters noted that the effects of climate change may make some current habitat unsuitable for species while over time other areas that are not currently suitable habitat may become suitable. Conversely, some commenters stated that the Services must determine whether areas qualify as habitat based on current conditions, not on the expected future ability of an area to become habitat as a result of climate change.

Response: Consistent with our longstanding practice, we will consider the best scientific data available, including data regarding changing climate, in determining what areas currently or periodically contains the resources and conditions necessary to support one or more life processes of the species. We must evaluate a species' habitat use and requirements on a case-by-case and species-specific basis because we must take into account the particular species' life history and ecology, including factors such as mobility, adaptability, resilience, phenology (the timing of recurring natural events), and home-range sizes. As noted previously (see response to Comment 13), the Services have removed the words ''existing attributes'' from the final definition.

For areas that are outside the geographical area occupied by the species at the time of listing, we evaluate whether the best available scientific data indicate that an area currently or periodically contains the resources and conditions necessary to support life history needs of the particular species. We recognize that, due to varying levels of uncertainty regarding effects of climate change and the complexity of biotic and abiotic interactions within a given ecosystem, it may not always be possible to make reasonable predictions regarding how habitat is changing in response. Even if areas are initially determined not to be habitat, they may be subsequently determined to be habitat; however, there is not an automatic assumption that those areas would be considered to be critical habitat. If, in the future, conditions change or new information becomes available indicating that areas that were not previously considered to be habitat have the necessary resources and conditions at that time in the future, critical habitat can be revised.

Comment 18: Some commenters stated that restoration of marginal or degraded areas is a necessary and proven recovery strategy for many species, and because the proposed definition seemingly precludes identification of areas needing restoration, the definition of ''habitat'' is contrary to the conservation purposes of the Act. In particular, they believe this limitation would prohibit the Services from protecting areas that are currently unoccupied but may become necessary to the survival and recovery of a species. Commenters provided examples of circumstances in which currently unoccupied areas may become necessary for the conservation of the species, including: (1) The species' current habitat becomes degraded or destroyed, or is insufficient for recovery; (2) those currently unoccupied areas (including formerly occupied habitat) are restored; or (3) the areas are likely to become suitable in the future as a result of ecological processes such as succession. Other commenters stated that the definition must include areas that may require some restoration because, if remaining habitat were enough for a species, it is likely the species would not have been listed as an endangered or threatened species.

Other commenters took the opposing view, stating that any definition of ''habitat'' must not include areas that need even a de minimis amount of habitat restoration because that would stretch the scientific understanding of the definition of ''habitat'' too far. These commenters stated that, if intentional restoration is required for an area, then it should not qualify as habitat.

Response: The Services agree that some unoccupied areas may be essential to the conservation of the species; however, we disagree that the definition of ''habitat'' precludes the designation of such areas as critical habitat. However, habitat, whether occupied or unoccupied, must still have (currently or periodically) the resources and conditions necessary to support one of the life processes for the species.

As noted above, the definition of ''habitat'' we are finalizing today is consistent with the legislative intent and the statute regarding the role of critical habitat in achieving the Act's purpose of species conservation. The definition respects the statutory text by distinguishing between habitat and areas that are not habitat (but can become habitat in the future, whether by virtue of restoration activities or because of other changes). As further noted above, even if areas are initially determined not to be habitat, they may be subsequently determined to be habitat. In addition, we note that in addition to designating areas as critical habitat, other tools and mechanisms are available to the Services and our partners to identify or protect areas in need of restoration to support the conservation of a species. The Services also note, as indicated in the preamble and in responses to comments, that we have clarified that ''habitat'' is defined here for the purposes of designating critical habitat and would not be used in other contexts.

Comment 19: The Services received comments stating that the proposed definition violates the Administrative Procedure Act because it failed to provide a reasoned explanation or rational basis for the proposed definitions. Commenters stated that referring to the need to address the Supreme Court's decision in *Weyerhaeuser* is not a reasoned explanation because nothing in that decision required that the Services define ''habitat,'' encouraged the Services to adopt a restrictive definition, or even took issue with the Services' long-standing approach of defining habitat in accordance with the life history and ecology of each species.

Response: Although the Supreme Court's opinion in *Weyerhaeuser* did not require promulgation of a definition of ''habitat,'' given the Court's holding that the Act does not give the Secretaries the authority to designate an area as critical habitat unless it is also habitat for the species, we proposed to define the term to ''provide transparency, clarity, and consistency for stakeholders.'' *See* 85 FR at 47334, August 5, 2020. In the proposed rule, we identified our objectives in developing the proposed and alternative definitions (sufficient breadth to include both occupied and unoccupied areas and to accommodate the wide variety of abiotic and biotic attributes that the vast array of species need) and how we went about developing them (incorporation of useful concepts from the ecological literature while adding concepts to ensure sufficient breadth based on the statute and our experience) (*id.*). The proposed rule also sought comments from the public on specific terms and phrases in the definitions, and our comment responses above provide a detailed and reasoned explanation of why the specific terminology in the definition accomplishes the purposes of the definition and the conservation goals of the Act. Therefore, we have provided a reasoned explanation and

rational basis for our action as required by the Administrative Procedure Act.

Comment 20: The Services received comments stating that the proposal violated the Administrative Procedure Act because the absence of a rational explanation for the proposed definitions deprived the public of a meaningful opportunity to comment. In particular, commenters stated that the proposed rule did not disclose specifically what information we did consider, or provide citations to the ecological literature that formed the basis for the proposal or to studies showing how the proposed or alternative definition reflects the principle that a species' habitat is based on its ecology.

Response: Contrary to what these comments suggest, the public had a meaningful opportunity to comment on the proposed and alternative definitions. The proposed rule transparently communicated that, although concepts from ecological literature provided a starting point for the Services' definitions, ''no pre-existing definition was adequate to address the particular regulatory framework.'' As a result, the proposed rule did not provide citations to specific studies because the Services had not relied on specific studies, but instead ''incorporated useful concepts from the literature to the extent appropriate and added concepts based on our decades of expertise.'' The public thus was provided with a meaningful opportunity to comment in light of the explanation in the proposed rule, combined with the specific questions for which the proposed rule sought comment.

Comment 21: Several commenters supported invoking the NEPA categorical exclusion for ''[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature'' under the Services' NEPA implementing regulations (43 CFR 46.210(i) and NOAA NEPA Manual at Appendix E, Categorical Exclusion G7). Commenters maintained that the definition does not establish any new requirements that may change the scope of critical habitat designations, or impose any additional procedural steps for designating critical habitat, and some suggested that the fact that the Services are developing the definition in response to the Supreme Court's decision in *Weyerhaeuser* also supports the conclusion that the categorical exclusion applies. Alternatively, we also received comments opposing the invocation of a categorical exclusion for the proposed definitions of ''habitat.'' Some asserted that the definition would constitute a major substantive change in the law and would likely cause significant, negative environmental impacts to imperiled species and their habitat (for example, by undercutting both habitat and species recovery and restoration efforts). Others stated that the specific categorical exclusion that we invoked (43 CFR 46.210(i) and Categorical Exclusion G7 from NOAA NEPA Manual at Appendix E) does not apply to this rulemaking and that we did not explain why any of the Services' categorical exclusions applies to this rulemaking.

Response: We conclude that the categorical exclusion for ''[p]olicies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature'' (43 CFR 46.210(i) and NOAA NEPA Manual, Appendix E, Categorical Exclusion G7) applies to this rulemaking. As we made clear in the proposed rule, the objective of this rulemaking is to ''provide transparency, clarity, and consistency for stakeholders'' because the *Weyerhaeuser* decision may raise questions in some instances as to whether areas of unoccupied critical habitat are ''habitat.'' Adoption of the final definition would not create a new procedural step that the Services would need to undertake every time we designate critical habitat because in the vast majority of cases there is no question that the areas that qualify as critical habitat are ''habitat.'' The question of whether areas within a critical habitat definition qualify as ''habitat'' would arise only in the relatively rare situations when there is a question as to whether any of the unoccupied areas that we are considering designating as critical habitat qualifies as ''habitat.'' In such a situation, the *Weyerhaeuser* opinion would require the Services to undertake the analysis reflected in this definition, that is, to determine—based on concepts in the ecological literature, combined with the Services' regulatory and scientific experience and expertise—whether the unoccupied areas meet the definition of ''habitat.'' The result of promulgating this definition, therefore, is merely to inform the public and the Services' employees of the mechanics of how that consideration will work, so that the process of designating critical habitat is more straightforward, more efficient, and more transparent. Accordingly, this rulemaking is of a technical nature.

Comment 22: Several commenters stated that, even if the proposed definition fell within a potential categorical exclusion, it would be inappropriate to invoke the categorical exclusion because one or more ''extraordinary circumstances'' are present under FWS's NEPA regulations and NMFS's NEPA Manual. For example, commenters asserted that the definition could have significant impacts on ecologically significant or critical areas, migratory birds, species listed or proposed for listing under the Endangered Species Act, or Tribal lands; violate Tribal law requirements imposed for protection of the environment (such as by limiting ceremonial use of Indian sacred sites); be subject to public controversy; or have highly controversial effects and highly uncertain and potentially significant environmental effects. In addition, the definition could have a significant impact on areas designated as critical habitat both for future designations and for review of current designations.

Response: We conclude that none of the ''extraordinary circumstances'' apply in this situation. First, this definition is limited to the context of designating critical habitat. Second, promulgating this definition does not alter the outcomes for any species or critical habitat designations because even before we finalize this definition, the *Weyerhaeuser* decision already required the Services to ensure that areas they designate as critical habitat qualify as ''habitat.'' Moreover, this final definition incorporates concepts from ecological literature, with adaptations that the Services put in place in light of the statutory context and their regulatory and technical expertise. The adaptations we have made are designed to ensure that the definition is sufficiently broad to apply to both occupied and unoccupied areas under consideration for designation as critical habitat and to the vast array of species and their life histories that may need protection under the Act. Even without promulgating this definition, the Services would undertake this analysis and would adopt and adapt the concepts from the ecological literature in designating critical habitat. Promulgating the definition through rulemaking merely makes the analysis express and transparent, and it therefore does not have an impact upon any species, critical habitat, or area of land. Finally, because the definition is pulled from concepts in ecological literature and the Services' practical regulatory experience, promulgating this definition is technical or administrative in nature and does not have any uncertain impacts on any species, critical habitat, or area of land.

Required Determinations

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 rule is significant.

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

Executive Order 13771

This final rule is an Executive Order 13771 ''other'' action.

Regulatory Flexibility Act

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

This rulemaking responds to applicable Supreme Court case law regarding designating critical habitat under the Endangered Species Act and provides transparency, clarity, and consistency for stakeholders. The changes to these regulations do not alter the reach of designations of critical habitat.

NMFS and FWS are the only entities that are directly affected by this rule because we are the only entities that designate critical habitat under the Endangered Species Act. No external entities, including any small businesses, small organizations, or small governments, will experience any economic impacts from this rule. At the proposed rule stage, we certified that this rule would not have a significant economic effect on a substantial number of small entities. Nothing in this final rule changes that conclusion.

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

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

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

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

Takings (E.O. 12630)

In accordance with Executive Order 12630, this rule would not have significant takings implications. This rule would not directly affect private property, nor would it cause a physical or regulatory taking. It would not result in a physical taking because it would not effectively compel a property owner to suffer a physical invasion of property. Further, the rule would not result in a regulatory taking because it would not deny all economically beneficial or productive use of the land or aquatic resources and would not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether this rule would have significant federalism effects and have determined that a federalism summary impact statement is not required. This rule pertains only to designation of critical habitat under the Endangered Species Act, and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

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

Government-to-Government Relationship With Tribes

In accordance with Executive Order 13175 ''Consultation and Coordination with Indian Tribal Governments,'' the Department of the Interior's manual at 512 DM 2, and the Department of Commerce (DOC) ''Tribal Consultation and Coordination Policy'' (May 21, 2013), DOC Departmental Administrative Order (DAO) 218–8, and NOAA Administrative Order (NAO) 218–8 (April 2012), we have considered possible effects of this final rule on federally recognized Indian Tribes. The following Tribes and Tribal entities stated that Government-to-Government consultation is required or requested Government-to-Government consultation: Jamestown S'Klallam Tribe, Northwest Indian Fisheries Commission, Port Gamble S'Klallam Tribe, Skokomish Tribe, Confederated Tribes of the Chehalis Reservation, Spokane Tribe of Indians, Point No Point Treaty Council, Confederated Tribes of the Colville Reservation Fish and Wildlife, Confederated Tribes of the Colville Reservation, Yurok Tribe, Kootenai Tribe of Idaho, Miccosukee Tribe of Indians of Florida, National Congress of American Indians, Confederated Tribes of the Umatilla Indian Reservation, and the Upper Snake River Tribes Foundation, Inc. The Services have reviewed these comments

from the Tribes and conclude that the changes to these implementing regulations make general changes to the Act's implementing regulations and do not directly affect specific species or Tribal lands or interests. This regulation defines the term ''habitat'' as it is applied to designating critical habitat and directly affect only the Services. With or without these regulatory revisions, the Services would be obligated to continue to list species and to designate critical habitat based on the best available data. Therefore, we conclude that this regulation does not have ''tribal implications'' under section 1(a) of E.O. 13175, and formal government-to-government consultation is not required by the executive order and related policies of the Departments of Commerce and the Interior. We will continue to collaborate with Tribes on issues related to federally listed species and their habitats and work with them as we implement the provisions of the Act. *See* Joint Secretarial Order 3206 (''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,'' June 5, 1997).

Paperwork Reduction Act

This rule does not contain any new collections of information that require approval by the OMB under the Paperwork Reduction Act and does not alter the existing collection of information approved under OMB Control Number 1018–0165. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We analyzed this final rule in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10–46.450), the Department of the Interior Manual (516 DM 8), the NOAA Administrative Order 216–6A, and the NOAA Companion Manual (CM), ''Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities'' (effective January 13, 2017). This rulemaking responds to recent Supreme Court case law.

As a result, we conclude that the categorical exclusion found at 43 CFR 46.210(i) applies to this regulation. At 43 CFR 46.210(i), the Department of the Interior has found that the following category of actions would not have a significant effect on the human environment and, therefore, that these actions are 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's NEPA procedures include a similar categorical exclusion for ''preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature.'' (Categorical Exclusion G7, at CM Appendix E).

We have considered the extent to which this regulation has a significant impact on the human environment and determined that it falls within one of the categorical exclusions for actions that have no effect on the quality of the human environment.

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

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This regulation is not expected to have a significant adverse effect on the supply, distribution, or use of energy, and it has not been otherwise designated by the Administrator of OIRA as a significant energy action. Therefore, this action is a not a significant energy action, and no Statement of Energy Effects is required.

Authority

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

List of Subjects in 50 CFR Part 424

Administrative practice and procedure, Endangered and threatened species.

George Wallace,

Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior.

Christopher Wayne Oliver,

Assistant Administrator, National Marine Fisheries Service, National Oceanic and Atmospheric Administration.

Regulation Promulgation

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

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

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

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

■ 2. Amend § 424.02 by adding a definition for ''Habitat'' in alphabetical order to read as follows:

§ 424.02 Definitions.

* * * * *

Habitat. For the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species.

* * * * *

[FR Doc. 2020–27693 Filed 12–15–20; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 201209–0332; RTID 0648–XX064]

Fisheries of the Northeastern United States; Atlantic Bluefish Fishery; 2021 Bluefish Specifications

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

ACTION: Final rule.

SUMMARY: NMFS issues final specifications for the 2021 Atlantic bluefish fishery. This action is necessary to establish allowable harvest levels to prevent overfishing, consistent with the most recent scientific information, as required by the Magnuson-Stevens Fishery Conservation and Management Act and the Atlantic Bluefish Fishery Management Plan. This rule also informs the public of the final fishery specifications for the 2021 fishing year.

DATES: Effective on January 1, 2021.

ADDRESSES: The Mid-Atlantic Fishery Management Council prepared a Supplemental Information Report (SIR) for these specifications that describes the action and any changes from the original environmental assessment (EA) and analyses for the revised 2020 and 2021 specifications action. Copies of the SIR, original EA, and other supporting documents for this action, are available upon request from Dr. Christopher M.