

**Environmental Assessment for Final Changes to the  
Definition of “Destruction or Adverse Modification” of  
Critical Habitat in the Endangered Species Act Regulations  
(50 CFR 402.02)**

**August 2015**

## SUMMARY

The U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (collectively, the Services) have prepared this Environmental Assessment (EA) for their final regulation revising the definition of “destruction or adverse modification” of critical habitat in 50 CFR 402.02. Part 402 implements section 7 of the Endangered Species Act (ESA or the Act), 16 U.S.C. 1536, which governs interagency cooperation, including consultation on proposed Federal agency actions.

Section 7(a)(2) sets forth both a procedural obligation and prohibition with respect to Federal agencies. The provision precludes actions that are likely to jeopardize the continued existence of a listed species or that are likely to destroy or adversely modify “critical habitat” that has been designated for such species (unless an exemption applies, which may be sought through extraordinary procedures). The provision also sets forth a procedural obligation requiring Federal agencies to consult with the Services to ensure that their actions are not likely to violate the 7(a)(2) prohibition.

Section 3(5) of the ESA defines “critical habitat” to mean “(i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . , on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection” and “(ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species” (16 USC 1532(5)(A)). Critical habitat is designated for a particular species following the procedures of Section 4 of the ESA (16 USC 1533) and 50 CFR 424.12, which includes publication of a proposed rule, consideration of public comment, and publication of a final rule.

Under the Services’ regulations, Federal agencies must determine whether their actions “may affect” designated critical habitat, and if so, they must engage in “formal consultation” under the regulations unless, with the written concurrence of the Services, they determine that such action is not likely to adversely affect the habitat. Formal consultation results in the Service’s biological opinion on whether the action is likely to result in the destruction or adverse modification of critical habitat. If destruction or adverse modification of critical habitat is likely, the Services must include in the biological opinion “reasonable and prudent alternatives” to the action, if possible. Federal agencies determine whether and in what manner to proceed with their proposed action in light of their section 7 obligations and the biological opinion (though, if the Services conclude that the action is likely to result in destruction or adverse modification of critical habitat, agencies usually agree to implement a reasonable and prudent alternative, provided that one can be developed by the Services). Where critical habitat has been proposed but not designated, distinct procedures apply under section 7(a)(4) and the implementing regulations at 50 CFR 402.10, which provide a process for “conferences.” However, following the designation of critical habitat, a conference opinion may be adopted as a biological opinion

issued pursuant to a consultation under section 7(a)(2) , if there is no significant new information or changes to the proposed action.

In identifying areas that meet the criteria of the statute for critical habitat occupied at the time of listing, biologists must identify the “physical or biological features essential to the conservation of the species.” Regulations implementing the ESA’s critical habitat provisions that have been in place since 1984 (but which the Services have recently proposed to change (79 Fed. Reg. 27066 (May 12, 2014))) have included descriptions of aspects or components of physical or biological features termed “primary constituent elements.” Regardless of the terminology used, critical habitat designations identify those aspects or components of habitat needed for life processes and successful reproduction of the species, such as:

- space for individual and population growth and for normal behavior;
- cover or shelter;
- food, water, air, light, minerals, or other nutritional or physiological requirements;
- sites for breeding and rearing offspring; and
- habitats that are protected from disturbances or are representative of the historic geographical and ecological distributions of a species.

In 1978 and 1986, the Services promulgated regulations at Part 402 to implement the ESA’s Section 7 provisions. The 1986 regulations defined “destruction or adverse modification” of critical habitat to mean “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). The preamble to the regulations contained relatively little discussion on the concept of “destruction or adverse modification” of critical habitat.

In 2001, the Fifth Circuit Court of Appeals reviewed the 1986 regulatory definition of destruction or adverse modification of critical habitat and found portions of the definition to be invalid and inconsistent with the Act (*Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001)). The court reasoned that the regulatory definition set too high a threshold for triggering destruction or adverse modification by its requirement that both recovery and survival be diminished before “destruction or adverse modification” would be the appropriate conclusion. The court determined that the regulatory definition actually established a standard that would only trigger a “destruction or adverse modification” determination if the survival of the species was diminished. Citing legislative history and the Act itself, the court was persuaded that Congress intended the Act to “enable listed species not merely to survive, but to recover from their endangered or threatened status” (*Sierra Club* at 436). Noting that the Act defines

critical habitat as areas that are “essential to the conservation” of listed species, the court determined that “conservation” is a much “broader concept than mere survival” (*Sierra Club* at 436). The court concluded that the Act’s definition of conservation “speaks to the recovery” of listed species.

In 2004, the Ninth Circuit Court of Appeals also reviewed the 1986 regulatory definition of destruction or adverse modification (*Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004)). That court agreed with the Fifth Circuit’s determination that a portion of the regulatory definition was facially invalid. 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.” 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” (*Gifford Pinchot Task Force* at 1070).

After the Ninth Circuit’s decision, the Services each issued guidance to discontinue the use of the 1986 destruction or adverse modification 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 Endangered Species 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 Endangered Species Act” (2005); collectively, the “2004/2005 Guidance”). Specifically, in evaluating an action’s effects on critical habitat as part of interagency consultation, the Services began applying the definition of “conservation” as set out in the Act. Further, after examining the baseline and the effects of the action, the Services began analyzing whether the implementation of the Federal action under consultation, together with any cumulative effects, would result in the critical habitat remaining “functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species.”

Based on this history, the Services proposed to amend the regulations at 50 CFR 402.02 to better reflect statutory language and the circuit court opinions described above. In the proposed rule, the Services explained that we were reviewing our obligations under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.; NEPA), including whether a categorical exclusion applies in light of the procedural, legal and technical nature of the rule (79 FR 27066). We sought comment on whether and how the regulation might have a significant effect upon the environment. After consideration of several comments on the subject, we have concluded that, in an abundance of caution, although the regulation would qualify for a categorical exclusion under both DOI and NOAA procedures, an examination of the potential impacts of this action will help inform the Services’ decision on the final rule.

This environmental assessment (EA) concisely sets forth the purpose and need for this action, explains the Services' consideration of alternatives, and evaluates the potential for this action to have impacts on the human environment. To identify any environmental impacts that are likely to result from adopting the final definition, the Services compared the draft final definition, which is their Preferred Alternative (Alternative 3) with the "no-action alternative" of continuing to use the framework described in the 2004/2005 Guidance (Alternative 1), and with adopting an alternative definition of "destruction or adverse modification" (Alternative 2). As discussed below, we conclude that none of the alternatives are likely to have any foreseeable impacts on the human environment, much less significant impacts.

## **PURPOSE AND NEED FOR ACTION**

This EA complies with the NEPA, the implementing regulations of the Council on Environmental Quality (CEQ; 40 CFR Parts 1500-1508), DOI's regulations and policy for implementing NEPA (43 CFR Part 46; Part 516 of the Departmental Manual), and NOAA's Environmental Review Procedures for Implementing NEPA (NOAA Administrative Order (NAO) 216-6).

The need underlying the action (i.e., the regulatory revision) is to establish a binding regulatory definition to replace the 1986 definition of "destruction or adverse modification" that was invalidated by Federal courts. The final definition:

- must respond to the courts' direction to restore the role of conservation/recovery in consideration of "destruction or adverse modification;"
- should be consistent with the language of the Act;
- should be sufficiently clear so as to minimize inconsistencies in applying the phrase;
- should distinguish between the jeopardy standard and the destruction or adverse modification standard; and
- should promote effective and efficient implementation of the Act.

Although the 2004/2005 Guidance has provided direction to the Services over the past decade, the Services need to formalize a definition of destruction or adverse modification in regulations in order to replace the invalidated definition with a legally binding definition to which courts will defer. This will minimize uncertainty and improve predictability in the conduct and consequences of section 7 consultations.

## **SCOPING**

In 2009, the FWS Ecological Services Program and the NMFS Office of Protected Resources formed an internal working group that included representatives from both agencies and their

headquarters and regional offices. The team was charged with considering possible revisions to the definition of “destruction or adverse modification” of critical habitat and ultimately drafting proposed revisions. The team explored options and presented them to others in the Services, then incorporated internal feedback into options for further consideration. After weighing the various options under consideration, the Services published a proposed rule to revise the regulatory definition (79 FR 27060, May 12, 2014; Proposed Rule) and announced a 60-day comment period. In publishing the Proposed Rule, the Services specifically requested public comment on a number of issues, including whether the action would have significant environmental effects that should be considered under NEPA. On June 26, 2014, the Services extended the public comment period for an additional 90 days, until October 9, 2014 (79 FR 36284, June 26, 2014) for a total of 150 days. In addition, the Services held four webinars on the proposed policy for interested stakeholders, including industry groups, environmental organizations, States, and other Federal agencies.

A total of 176 comments were received. The team reviewed all public comments that the Services received on the proposed rule, determined whether any aspects of the proposed definition should be changed based on those comments, and developed responses to all substantive comments. These responses are presented in the draft final rule.

After considering the comments received, the drafting team made revisions to the definition and prepared a draft final rule to implement the revised, final definition. That definition is reflected in the current draft final rule, which constitutes the Services’ Preferred Alternative. A discussion of how comments were addressed is included in the final draft rule.

## **DESCRIPTION OF THE PROPOSED ACTION AND ALTERNATIVES**

This section describes the three alternatives under consideration. It then describes other alternatives that the Services considered, but for which the Services did not evaluate the environmental impacts, because those alternatives did not meet the purposes of and need for the action.

### **Alternative 1 – No Action Alternative**

Under the no action alternative, the Services would continue to use the analytical framework described in the 2004/2005 Guidance but would not formalize any of that guidance in binding regulations or promulgate a regulatory definition of “destruction or adverse modification.” See FWS Acting Director Marshall Jones Memo to Regional Directors, “Application of the ‘Destruction or Adverse Modification’ Standard under Section 7(a)(2) of the Endangered Species Act” (2004) and the 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 Endangered Species Act” (2005).

The 2004/2005 guidance was designed as a temporary framework until a new regulatory definition of “destruction or adverse modification” could be promulgated. Under the 2004/2005 guidance, the evaluation of effects to proposed or designated critical habitat considered the statutory concepts embodied in sections 3 (definitions of “critical habitat” and “conservation”), 4 (the procedures for delineating and adjusting areas included in a critical habitat designation), and 7 (the substantive standard in paragraph (a)(2) and the procedures in paragraph (b)) of the Act. This analytical framework guided the Services to apply these considerations in section 7(a)(2) consultations on Federal actions that may affect designated critical habitat, and to section 7(a)(4) conferences on proposed critical habitat, when conference is requested by the Federal action agency.

Under the 2004/2005 Guidance, the Services began applying the definition of “conservation” as set out in the Act to evaluate an action’s effects on critical habitat as part of interagency consultation. Further, after examining the baseline and the effects of the action, the Services began analyzing whether the implementation of the Federal action under consultation, together with any cumulative effects, would result in the critical habitat remaining “functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species.” Thus, the approach was expressly forward-looking, ensuring that habitat would retain its potential to develop into habitat that would more fully support the species’ recovery, and not just concerned with preserving the existing level of functionality of the habitat and its features.

The Services’ guidance instructed its biologists to consider the influence of the proposed action on “the function and conservation role” of affected critical habitat unit(s) when analyzing whether a federal agency action is likely to result in destruction or adverse modification of critical habitat. Specifically, the guidance instructed the Services to begin analyzing whether the implementation of the Federal action under consultation, together with any cumulative effects, would result in the critical habitat remaining “functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species.”

#### **Alternative 2 –Proposed Rule’s Definition of “Destruction or Adverse Modification”**

The Services could finalize the proposed definition (79 FR 27060, May 12, 2014) without revision. The proposed definition is: “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 physical and biological features that support the life-history needs of the species for recovery.”

This proposed definition would replace the invalidated phrase “value of critical habitat for both the survival and recovery” in the first sentence of the definition with the phrase “conservation value of critical habitat for listed species.” Conservation, as defined in section 3(3) of the Act,

means “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary.” After reviewing the court cases related to the definition of “destruction or destruction or adverse modification,” the Act’s definitions of “conservation” and “critical habitat,” and our understanding of the role habitat plays for species’ conservation, the Services determined that the phrase “conservation value of critical habitat for listed species” embodies the intended recovery role of critical habitat and, therefore, is relevant in a determination as to whether an action is likely to destroy or adversely modify that habitat. By focusing on the conservation of critical habitat, this definition is consistent with the Fifth and Ninth Circuit Court of Appeals decisions described above. In addition, the phrase is consistent with the existing 2004/2005 guidance on discontinuing the use of the 1986 destruction or adverse modification regulation.

The Services proposed to amend the second sentence of the current regulatory definition to state, “Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of physical and biological features that support the life-history needs of the species for recovery.” By removing the current regulatory definition’s reference to the “basis for determining the habitat to be critical,” this sentence acknowledged that some important physical or biological features may not be present or are present in a sub-optimal quantity or quality in particular critical habitat unit(s). This could occur when, for example, the habitat has been degraded by human activity or depends on ongoing ecological processes, such as occasional fire or flooding and a cycle of natural succession. The area may have been designated because of its potential to support the physical and biological features that are essential for the conservation of the species. The physical or biological features essential for the conservation of the species may include, but are not limited to, food, water, light, shelter from predators, competitors, weather, and physical space to carry out normal behaviors or provide dispersal or migratory corridors. While occupied critical habitat would always contain at least one or more of these physical or biological features, 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. Thus, an action that would preclude or significantly delay the development of physical and biological features, including habitat regeneration or natural successional processes, to an extent that it appreciably diminishes the value of that critical habitat for the conservation of the species, would result in destruction or adverse modification of the critical habitat.

Again, these proposed textual revisions to the second sentence of the definition are consistent with the Fifth and Ninth Circuit Court of Appeals decisions and the Service-issued guidance on discontinuing the use of the 1986 destruction or adverse modification regulation. In the 2004/2005 guidance, biologists were instructed to evaluate how “habitat qualities essential to the conservation of the species are likely to be affected and, in turn, how that will influence the function and conservation role of the affected critical habitat unit(s).”



Though the proposed definition meets the underlying need, the Services received several comments on this proposed definition which suggested ways to further refine the definition. The Services' Preferred Alternative is to adopt the definition of the draft final rule, which addresses several of these comments.

**Alternative 3 –Draft Final Rule's Definition of "Destruction or Adverse Modification" (the Preferred Alternative)**

In the draft final rule, we replaced two "terms of art" that were introduced in the proposed definition, with language explaining their intended meanings to avoid unnecessary confusion and more closely track the statutory definition of critical habitat. The second sentence of the definition was also modified to avoid unintentionally giving the impression that the proposed definition had a narrower focus than the 1986 definition. Thus, the draft final definition is, "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 the species or that preclude or significantly delay development of such features."

As in the proposed definition, this draft final definition 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 minor changes were made for clarification, these changes do not alter the overall meaning of the proposed definition.

Many commenters suggested that the terms "conservation value" and "life-history needs" be replaced with simpler language more clearly conveying their intended meanings. After reviewing the comments, the Services agreed that use of these terms was unnecessary and led to unintended confusion. The proposed definition was modified accordingly. Specifically, the term "conservation value of critical habitat for listed species" was replaced with "the value of critical habitat for the conservation of a listed species." In addition, the term "physical or biological features that support life-history needs of the species for recovery" in the second sentence was replaced with "physical or biological features essential for 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").

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. The proposed definition was not intended to signal such a shift in focus. Rather, the first sentence of the proposed definition was meant to capture both types of alteration: those of existing features as well as those that would preclude or delay future development of such features. The second sentence of the proposed definition was meant merely to 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, the draft final definition explicitly references alterations affecting the physical or biological features essential for the conservation of a species, as well as those that preclude or significantly delay development of such features.

These three alternatives are similar to one another in that each responds to Federal court direction to restore the role of conservation/recovery to its proper place in analysis of destruction or adverse modification and continue the Services' current practice under the 2004/2005 guidance to consider whether the value of critical habitat for the conservation of listed species will remain into the future. The revisions to the definition will not alter the current standards used in or the regulatory outcome of any section 7 consultation. As stated in the Summary, both Services have already modified their section 7 guidance to address court decisions rendered in 2001 and 2004 (see the 2004/2005 Guidance). The proposed regulation revisions simply formalize and provide clarity to the existing standard with which we evaluate agency actions pursuant to section 7 of the Act. The regulation revisions are, therefore, administrative, legal, technical, and procedural. There are slight differences in the relative degree to which each would further the purpose and need for this action, as we discuss later in this document.

#### **Other Alternatives Considered, but not Evaluated in this Environmental Assessment**

The Services considered other alternative definitions based on comments received on the May 2014 proposed rule that included various terms, but concluded that these definitions did not meet the purpose and need underlying the action because they were not consistent with the Act or were not sufficiently clear so as to minimize inconsistencies in application. Therefore, the Services did not assess the potential environmental impacts of those alternative definitions. Below is a summary of the two primary alternatives considered based on public comments on the draft definition, but rejected.

- a) "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 include those that alter the physical or biological features essential to the conservation of the species or preclude or significantly delay their development." This definition is insufficient because it could be incorrectly interpreted to exclude alterations to unoccupied critical habitat. Physical or biological features are not required to be present in unoccupied critical habitat.

- b) “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 include those that alter the physical or biological features essential to the recovery of the species or preclude or significantly delay their development.” This definition is not favored because it uses the word “recovery,” instead of the word “conservation,” which is the language used in the statutory definition of “critical habitat.”

In the early stages of developing a proposal to revise the 1986 definition (in 2010), the Services considered several other alternative definitions based on the analysis of the use of the 2004/2005 Guidance. These definitions were also determined not to meet the purpose and need of the action. Options that were considered included:

- a) “Destruction or adverse modification means a direct or indirect alteration of critical habitat that appreciably reduces the capability to maintain or restore the recovery (or conservation) functions of the critical habitat. Such alterations include, but are not limited to, those adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.” This definition did not meet the purpose and need because it introduces new terms that would require additional clarification (“capability,” “recovery function” or “conservation function”) and was less clear than using language that would track the statutory language. Also, the reference to “maintain or restore” was unclear and could incorrectly be read to imply that federal agencies had affirmative obligations to restore the habitat.
- b) “Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for listed species. Such alterations include, but are not limited to, alterations adversely affecting any of those physical or biological features that were the basis for determining the habitat to be critical.” This definition was ultimately rejected because it includes the term “conservation value” that would require additional clarification and does not address the forward-looking aspect of the 2004/2005 Guidance. In addition, the reference to “adversely affecting” incorrectly could be read to suggest that any adverse effect is tantamount to destruction or adverse modification.
- c) “Destruction or adverse modification means a direct or indirect alteration of critical habitat that appreciably reduces the likelihood of maintaining or restoring the recovery function of the critical habitat. Such alterations include, but are not limited to, those adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.” This definition introduces a new term that would require additional clarification (“recovery function”) and does not address the forward-looking aspect of the 2004/2005 Guidance. Also, the reference to “maintaining or restoring” was unclear and could incorrectly be read to imply that federal agencies had

affirmative obligations to restore the habitat. Finally, inclusion of the language “those adversely modifying” is unclear and creates a circular reference to the term being defined.

- d) “Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the current or potential conservation value of the designated critical habitat. Such alterations include, but are not limited to, alterations to those physical or biological features that were the basis for determining the habitat to be critical.” This definition includes the term “conservation value” that would require additional clarification. Although it does indirectly address the forward-looking aspect of the 2004/2005 Guidance through inclusion of the term “potential,” it does not provide sufficiently clear guidance.

We considered simply changing “and” to “or” in the 1986 definition; however, this solution does not track as well as the Draft Final Rule definition does to the statutory language, which uses the word “conservation.” In addition, this change would be less clear than the 2004/2005 guidance as to the importance of the forward-looking aspect of the definition. We also considered defining “destruction” separately from “adverse modification” but concluded that it 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.

In response to comments received, we also considered various suggested alternatives to the word “appreciably” in the phrase “appreciably diminish.” For example, we considered whether the terms “significantly,” “measurably,” or “considerably,” might provide clearer meaning and guidance. These terms are similar in meaning to the word “appreciably” but also have multiple possible meanings. We did not feel that these alternatives provided any more clarity than “appreciably,” which has been part of the regulatory definition from its original promulgation. It should be noted that in their comments on the proposed Rule, Defenders of Wildlife recommended either: 1) removing the words “appreciably diminish” altogether because the value of this phrase is nebulous, or 2) if the phrase is kept, then defining the phrase to indicate that adverse modification would be found if it reduced the likelihood of recovery by any extent. The Services did not assess these alternatives for environmental impacts because they would not meet the purpose and need for this action. Specifically, such a definition would fail to provide a meaningful standard for determining whether a particular reduction rises to the level of “destruction or adverse modification” of critical habitat. It would not be reasonable to interpret the statute to require that every diminishment of value, regardless how small, results in “destruction or adverse modification” of critical habitat. Furthermore, deleting the phrase altogether without an explanation as to what type of effect on critical habitat would result in destruction or adverse modification would only increase uncertainty on the part of Federal agencies and project proponents in how the Services would apply the definition. In light of our

review of case law and our previous experience with the term, we concluded that no alternative has a sufficiently clear meaning to warrant changing this longstanding term in the regulation.

## **AFFECTED ENVIRONMENT**

This section describes the environment that could potentially be affected by implementation of the alternatives described above. The aspects of the affected environment described in this section focus on relevant major resources and issues to determine if a significant impact may occur.

The geographic scope for potential environmental effects is limited to the United States and its Territories. This is because areas outside the jurisdiction of the United States are not eligible for designation as critical habitat (50 CFR 424.12(h)).

Because the proposed action would formalize the framework for future section 7 analysis with respect to impacts of agency actions on critical habitat, the resources that could potentially be affected would include any designated critical habitat in the United States and its territories. Critical habitat can vary in size and features and varies too much by species to capture all of the aspects of critical habitat in this analysis. Critical habitat boundaries and features can be found in the Federal Register and on the U.S. Fish and Wildlife Service's ECOS Database (<http://ecos.fws.gov/crithab/>).

## **ENVIRONMENTAL CONSEQUENCES**

The CEQ regulations implementing NEPA specify that agencies are to examine whether a proposed action will have direct, indirect, or cumulative effects on the quality of the human environment. The regulations define "human environment" as including "the natural and physical environment and the relationship of people with that environment" (40 C.F.R. § 1508.14). "Effects" are defined generally as including ecological, aesthetic, historic, cultural, economic, social, or health effects (40 C.F.R. § 1508.8). Effects may be beneficial or adverse. More specifically, the CEQ regulations define the three types of effects as follows:

- "Direct effects" are defined as those effects "which are caused by the action and occur at the same time and place" (40 C.F.R. § 1508.8(a)).
- "Indirect effects" are defined as those effects "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable" (40 C.F.R. § 1508.8(b)).
- "Cumulative impact" is defined as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably

foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions” (40 C.F.R. § 1508.7).

The discussion of effects in this section considers all three of the above definitions when using the term “effects” for purposes of NEPA. Note that the CEQ definitions, above, are different from the ESA definitions of these same (or similar) terms, and the CEQ definitions for NEPA are specifically applicable for the analyses in this section of this EA.

This EA examines whether the three alternatives identified by the Services (Alternative 1 – No Action; Alternative 2 – Proposed Rule Definition; and Alternative 3 –Draft Final Rule Definition), will have direct, indirect, or cumulative effects on the quality of the human environment, and assesses the significance of any such effects.

The immediate consequence of the rule would be to clarify and create a binding standard for the Services to use in evaluating potential impacts of Federal actions on critical habitat in section 7 consultations and conferences. This will provide clarity and uniformity to the Services, Federal and State agencies, and the public regarding how the Services will interpret the phrase “destruction or adverse modification” in determining whether there are effects to designated critical habitat but will not have any direct effects on the environment. Any potential effects to the human environment could occur later in time and only in the context of specific Federal actions under review pursuant to section 7 . Because any such effects would not occur in the same time and place that the rule becomes effective, only indirect and cumulative effects to the human environment could result from adopting one of the alternatives.

We have identified two general series of actions and consequences, or pathways, through which indirect and cumulative effects to the human environment could potentially occur as a result of adopting any of the three alternatives analyzed in this environmental assessment. The first pathway would be through providing clarity, predictability, and uniformity regarding the Services’ interpretation of destruction or adverse modification. The second pathway would be through changing the outcomes of future determinations; that is, changing whether the Services determine that a proposed action destroys or adversely modifies critical habitat.

For future actions or future effects to be “reasonably foreseeable,” they must be sufficiently likely to occur that a reasonable person would take them into account in reaching a decision. Although by following either of the two pathways we can anticipate potential actions or consequences that could potentially flow from pursuing each of the three alternatives that are evaluated in this EA, we quickly reach a point where we cannot conclude that those potential actions or consequences are sufficiently likely to occur that a reasonable person would take them into account in reaching a decision, because their likelihood would depend on intervening actions or circumstances that the Services cannot ascertain at this time. Any environmental consequences would be beyond that point and therefore not foreseeable, because the nature and scope of those consequences would depend upon intervening circumstances, such as, for

example: the specific actions and affected species over which such consultations and conferences would occur, the outcomes of future consultations and conferences, and what actions third parties such as Federal actors take as a result of those determinations (including whether a particular Federal agency decides to rely on its own determinations about whether their actions comply with section 7(a)(2)'s mandate). Further, the Services are not fundamentally changing the standards that are applied in section 7 analysis from that applicable under the 2004/2005 Guidance, applied in light of court decisions. Therefore, as described more fully below, we can identify no environmental consequences that we would conclude would be reasonably foreseeable as a result of pursuing any of these alternatives.

The first pathway through which effects to the human environment could potentially occur as a result of pursuing one of these alternatives would be from providing clarity, predictability, and uniformity regarding how the Services will define “destruction or adverse modification” of critical habitat (See “Clarity, Predictability, and Uniformity” for each alternative analyzed below). Adoption of a revised regulatory definition will allow the Services, various other government agencies, private individuals and organizations, and other interested or concerned parties to better predict the outcomes of consultations because the standard for “destruction or adverse modification” will be formalized and binding. However, although the Services’ decision on the definition of destruction or adverse modification of critical habitat takes into account that providing clarity and uniformity will allow parties to make more informed decisions, it would be speculative to try to predict how parties will ultimately make use of this information in the future. We therefore cannot predict how the future actions of landowners or government agencies that are informed by this increased clarity and uniformity would affect the human environment. Although we are taking into consideration that allowing government agencies and interested parties to make more informed decisions is desirable, we cannot conclude that in selecting among the three alternatives a reasonable person would take into consideration speculative environmental consequences that could result from those future decisions.

The second pathway through which effects to the human environment could potentially occur as a result of pursuing one of these alternatives would be if any of the alternatives were likely to alter the outcomes in determining destruction or adverse modification of designated critical habitat (See discussion under “Outcomes” for each alternative analyzed below). Any such change would occur when the Services determine that a particular critical habitat designation for a particular species is likely to be destroyed or adversely affected by a particular proposed action and provide a reasonable and prudent alternative to the proposed action. We cannot reasonably predict whether any determinations may change as a result of our adopting an alternative, nor can we identify with any specificity the biological resources that provide critical habitat to those species. However, we can compare the results of pursuing these three alternatives with a similar action in the past: implementing the 2004/2005 Guidance. Because the intent of the Preferred

Alternative is to continue the direction of the 2004/2005 Guidance, outcomes for a particular proposed action should be consistent with one another under any of the three alternatives.

As explained in more detail below, none of the three alternatives evaluated in this assessment is expected to result in significant effects to the human environment within the meaning of NEPA and the CEQ regulations. Although we describe potential actions and consequences that could flow from each of the alternatives, the nature and scope of environmental consequences that are likely to result from any of the alternatives will depend on a variety of intervening circumstances that are impossible to identify in this analysis. However, we find there is no basis to infer that any such effects, even viewed generously, will be significant.

#### **Alternative 1 – No Action Alternative**

Under the no action alternative, the Services would continue to use the framework described in the 2004/2005 Guidance, as described earlier.

Clarity, Predictability, and Uniformity: Although the 2004/2005 Guidance provides a consistent framework for the Services to apply in consultation, the lack of formal adoption and codification of a regulatory definition for “destruction or adverse modification” would provide less clarity and certainty than either of the other two alternatives because it is less accessible than a codified regulation, is not binding upon the Services (though the analytic framework contained in the guidance documents has been consistently followed since issuance), and is less likely to receive judicial deference. This relatively reduced certainty and predictability could affect the actions that the Services take in both section 7 consultations and other ESA-related activities, as well as actions that various other government agencies, tribal governments, private individuals and organizations, and other interested or concerned parties take in the future. For example, because the 2004/2005 Guidance is non-binding and the Services could choose to depart from it, Alternative 1 would provide less predictability in conducting Section 7 consultations.

Outcomes: The Services would continue to use the framework described in the 2004/2005 Guidance, which would preserve the standards currently used in practice by the Services and, thus, would be expected to lead to similar outcomes in any section 7(a)(2) consultation as are currently obtained.

#### **Alternative 2 – Proposed Rule’s Definition of “Destruction or Adverse Modification”**

Finalizing the proposed definition without revisions would result in the following definition: “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 physical and biological features that support the life-history needs of the species for recovery.”



As described above, the first sentence of the proposed definition introduced the terms “conservation value” and “life history needs.” The second sentence emphasized the potential to find that destruction or adverse modification would occur from effects that reduced the ability of the habitat to passively develop improvements to the quality or presence of essential features. This is a continuation of the Services’ 2004/2005 Guidance, which identified an analytical framework for destruction or adverse modification determinations that instructed Service biologists to consider during section 7(a)(2) consultations the influence of the proposed action on “the function and conservation role” of affected critical habitat unit(s). Specifically, the guidance instructed the Services to begin analyzing whether the implementation of the Federal action under consultation, together with any cumulative effects, would result in the critical habitat remaining “functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species.”

Thus, for the past 10 years, the Services have evaluated whether, with implementation of a proposed Federal action under consultation, 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. The shift in terminology from “primary constituent elements” to the statutory term “physical or biological features” (as recently proposed with respect to 50 CFR 424.12) will 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.

Clarity, Predictability, and Uniformity: The proposed rule’s definition would result in some degree of uncertainty about the meaning and use of the term “destruction or adverse modification” of critical habitat. As mentioned in several comments received on the proposed definition, there was some confusion regarding the definitions of the two newly introduced terms “conservation value” and “life history needs.” Commenters also questioned whether the Services would only consider whether an action precludes the development of features in the future. This uncertainty could affect the actions that the Services, various other government agencies, private individuals and organizations, and other interested or concerned parties take in the future. We cannot reasonably foresee what actions such parties will or will not take in the future as a result of uncertainty.

Outcomes: Because the proposed rule definition contained new terms of art and could have been perceived to signal a shift in emphasis toward the forward-looking aspects of the analysis, there is a possibility that some biologists may have applied it in such a way that resulted in slightly different outcomes as compared to outcomes under the 2004/2005 Guidance. However, with additional explanation and guidance, the alternative could have been applied consistently and with no changes in the likely outcomes of consultation.

### **Alternative 3 – Preferred Alternative**

The Services propose in the draft final rule to change the current definition of destruction or adverse modification to “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 the species or that preclude or significantly delay development of such features.” As mentioned previously, this would largely codify the direction the 2004/2005 Guidance already put in place by both Services in 2004 and 2005.

Clarity, Predictability, and Uniformity: The proposed change to the first sentence (as compared to the 1986 definition) formalizes the current way we are administering the Act in light of case law and existing guidance. It brings maximum clarity, predictability and uniformity, because it includes fewer terms of art than the proposed definition. The change to the second sentence explains that no shift away from protection of current features was intended, and provides detailed explanation of the considerations that should underlay a destruction or adverse modification analysis. Also, because the definition has been promulgated through rulemaking procedures and includes adjustments in response to public comments, it should receive deference from courts, further enhancing certainty and predictability.

However, as previously discussed, the extent to which this increased clarity and uniformity would lead to environmental consequences is not reasonably foreseeable. Although one consequence from the increased clarity would be that it would better enable the Services, various other government agencies, private individuals and organizations, and other interested or concerned parties to determine whether the critical habitat will be destroyed or adversely modified, we cannot reasonably foresee what actions, if any, such parties will or will not take in the future as a result of having greater certainty or eliminating an incongruous result, or what environmental impacts would result from those actions.

Outcomes: The draft final rule definition is very similar to the proposed definition (Alternative 2); however, it contains minor changes that clarify our intent without altering the overall meaning of the proposed definition. The draft final rule definition will not alter the section 7(a)(2) consultation process from our current practice and previously completed biological opinions do not need to be reevaluated. Further, the revisions to the definition will not fundamentally alter the standards used in or, we believe, the outcome of any section 7(a)(2) consultation. The regulation revisions largely formalize and provide clarity to the existing standard with which we evaluate agency actions pursuant to section 7 of the Act, as described in the 2004/2005 Guidance the Services currently implement.

## COMPARISON OF ALTERNATIVES

This section summarizes the impacts of implementing each alternative and the results of our decision-making process:

### First Pathway: Impacts from Clarity, Predictability and Uniformity

- We find that adopting the Preferred Alternative (Alternative 3) would bring the most clarity, predictability and uniformity to the definition. It would best improve the ability of the Services, various other government agencies, private individuals and organizations, and other interested or concerned parties to anticipate the circumstances under which an action will be found likely to “destroy or adversely modify” critical habitat. Unlike Alternative 1, it will be binding and codified. And unlike Alternative 2, it avoids terms of art and unintentional inferences regarding the Services’ focus. We anticipate that the Preferred Alternative would likely have small indirect or cumulative impacts, and that any such impacts would be primarily beneficial (i.e., greater predictability and less uncertainty). However, impacts to the human environment would flow primarily from actions that other parties would take in the future as a result of the increased clarity. We have concluded that we cannot reasonably predict what those actions will be, and therefore any impacts to the human environment are not reasonably foreseeable.

### Second Pathway: Potentially Affecting Outcomes

- Adopting a revised definition for destruction or adverse modification, either Alternative 2 (the proposed rule definition) or Alternative 3 (the draft final rule definition), will promote more effective implementation of the Act than taking no action. The Preferred Alternative (Alternative 3), will improve efficiency in administering the Act by increasing transparency in our decision-making and providing a consistent definition for the Services, and other Federal agencies, to follow. It also does not require complementary guidance to help ensure clear and consistent outcomes.

In selecting an alternative, the Services considered the extent to which the alternatives meet our primary objective in revising the definition of destruction or adverse modification--the need to establish a binding regulatory definition to replace the 1986 definition of “destruction or adverse modification,” portions of which were previously invalidated by Federal courts. The final definition must: respond to the courts’ direction to restore the role of conservation/recovery in consideration of “destruction or adverse modification;” should be consistent with the language of the Act; should be sufficiently clear so as to minimize inconsistencies in applying the phrase; should distinguish between the jeopardy standard and the destruction or adverse modification standard, and should promote effective and efficient implementation of the Act. Meeting these objectives is beneficial because it allows for more efficient implementation of the ESA overall,

and would also further the purposes of the ESA. As described earlier, we anticipate there will be at most limited environmental effects given the similarity of the draft final rule definition to the current practice using the 2004/2005 guidance. However, there are a variety of intervening circumstances that would have to occur between adopting the definition, experiencing any changes in outcomes, and tracing how those changes in the future would affect the environment, so that any such impacts are not reasonably foreseeable. Thus, any future actions or future effects stemming from any of these alternatives are not sufficiently likely to occur such that a reasonable person would take them into account in reaching a decision.

## **CONCLUSION**

We conclude that none of the three alternatives under review would cause foreseeable impacts on the human environment, much less significant impacts. As has already been described, the proposed revisions will not fundamentally alter the standards used in or the outcome of any section 7(a)(2) consultation or section 7(a)(4) conference.

We have considered these impacts on a nationwide scale, and concluded that there will be no direct effects on the human environment from adoption of any of the three alternatives, and that any indirect and cumulative effects of the definition revision are not likely to be significant within the meaning of NEPA and the CEQ regulations. This is because, although we describe potential actions and consequences that could flow from each of the alternatives, the nature and scope of environmental consequences that are likely to result from any of the alternatives will depend on a variety of intervening circumstances that they are not reasonably foreseeable and not attributable to the present action. However, we anticipate that any environmental consequences of this proposed action will be limited in nature and not significant.

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## **LITERATURE CITED**

43 CFR 46, 516 FWS Departmental Manual

50 CFR 402.02

Council on Environmental Quality. Effective Use of Programmatic NEPA Reviews. December 18, 2014

FWS Acting Director Marshall Jones Memo to Regional Directors, “Application of the ‘Destruction or Adverse Modification’ Standard under Section 7(a)(2) of the Endangered Species Act” 2004.

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**Finding of No Significant Impact for the Final Rule Revising the Regulatory Definition of  
“Destruction or Adverse Modification” of Critical Habitat under the  
Endangered Species Act**

**National Marine Fisheries Service**

**BACKGROUND**

The National Environmental Policy Act (NEPA) and implementing regulations require that Federal agencies consider the potential for a proposed Federal action to have direct, indirect, or cumulative effects on the quality of the human environment (42 U.S.C. 4321; 40 CFR 1500-1508). The Council on Environmental Quality (CEQ) regulations implementing NEPA define the “human environment” as including “the natural and physical environment and the relationship of people with that environment” (40 CFR 1508.14). “Effects” are defined generally as including ecological, aesthetic, historic, cultural, economic, social, or health effects (40 CFR 1508.8). National Oceanic and Atmospheric Administration Administrative (NOAA) Order (NAO) 216-6 (May 20, 1999) contains criteria for determining the significance of the impacts of a proposed action. In addition, CEQ regulations state that the significance of an action should be analyzed both in terms of “context” and “intensity” (40 CFR 1508.27). Each criterion listed below is relevant to making a finding of no significant impact and has been considered individually, as well as in combination with the others. The U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS; collectively, the Services) have prepared an environmental assessment (EA) for the final regulations (i.e., Final Rule) to revise the regulatory definition of “destruction or adverse modification” of critical habitat under the Endangered Species Act (ESA). The Final Rule formalizes internal FWS and NMFS guidance, which has been implemented since 2004 and 2005, respectively (i.e., 2004/2005 Guidance). It reflects the statute and relevant litigation, while fulfilling the conservation purposes of the ESA. We incorporate the EA here by reference.

The Services developed an EA that analyzed three alternatives. To identify the environmental impacts that are likely to result from implementing the Final Rule, the Services compared the Final Rule (Alternative 3) with the “no-action alternative” of continuing to implement the 2004/2005 Guidance without formalizing that guidance in binding regulations (Alternative 1) and with another definition of “destruction or adverse modification” of critical habitat (the definition from the proposed rule, also referred to as Alternative 2). Several other alternatives were considered, but rejected as not meeting the purpose and need underlying the definition.

This Final Rule is being promulgated in accordance with the rulemaking process and has been coordinated with all interested and/or affected parties. In the proposed rule, the Services requested public comment on the clarity and consistent implementation of the phrases “conservation value” and “appreciably diminish” and whether and how the regulation may have a significant effect upon the human environment. We also hosted webinars for Federal agencies, States, environmental organizations, and industry representatives. Our Tribal liaisons provided information to Tribes and encouraged feedback. After the 150-day comment period, the Services



reviewed all comments, made minor changes in response to those comments (removing the terms of art, "conservation value" and "life-history needs," and referencing the statutory language regarding physical and biological features), and developed responses to all comments. The minor changes made in the Final Rule provide clarity and consistent implementation but do not change the overall meaning of the definition from the proposed rule or the 2004/2005 guidance.

## **ANALYSIS**

The significance of this action is analyzed based on the NAO 216-6 criteria and CEQ's context and intensity criteria. These include:

**1. Can the proposed action reasonably be expected to cause substantial damage to the ocean and coastal habitats and/or essential fish habitat (EFH) as defined under the Magnuson-Stevens Act and identified in FMPs?**

Issuance of the Final Rule cannot reasonably be expected to cause substantial damage to the ocean and coastal habitats and/or EFH as defined under the Magnuson-Stevens Act and identified in FMPs. The Services' issuance of the Final Rule is intended to reduce inconsistencies in applying the definition and improve effective and efficient implementation of the Act. The only direct effect of the Final Rule will be to formalize the 2004/2005 Guidance, which replaced the court-invalidated definition of "destruction or adverse modification" of critical habitat. The revised definition will allow the Services, Federal agencies, private individuals and organizations, and other interested or concerned parties to better understand and predict the outcome of section 7(a)(2) consultations and conferences.

Application of the Final Rule at a later point in time in the context of particular proposed federal actions may result in the Services concluding destruction or adverse modification of critical habitat. Upon reaching such a conclusion, the Services would provide, if possible, a reasonable and prudent alternative to the Federal action under consultation. Such an alternative would allow the Services to prevent the destruction or adverse modification of critical habitat, thus conserving the species and the ecosystems upon which they depend. It is not possible at this time to predict the circumstances of a particular proposed federal action or consultation.

**2. Can the proposed action be expected to have a substantial impact on biodiversity and/or ecosystem function within the affected area (e.g., benthic productivity, predator-prey relationships, etc.)?**

The proposed action is not expected to have a substantial impact on biodiversity and/or ecosystem function within the affected area. The Services' issuance of the Final Rule is intended to reduce inconsistencies in applying the definition and improve effective and efficient implementation of the Act. The only direct effect of the Final Rule will be to formalize the 2004/2005 Guidance, which replaced the court-invalidated definition of "destruction or adverse modification" of critical habitat. The revised definition will allow the Services, Federal agencies, private individuals and organizations, and other interested or concerned parties to better understand and predict the outcome of section 7(a)(2) consultations and conferences.



Application of the Final Rule at a later point in time in the context of particular proposed federal actions may result in the Services concluding destruction or adverse modification of critical habitat. Upon reaching such a conclusion, the Services would provide, if possible, a reasonable and prudent alternative to the Federal action under consultation. Such an alternative would allow the Services to prevent the destruction or adverse modification of critical habitat, thus conserving the species and the ecosystems upon which they depend. It is not possible at this time to predict the circumstances of a particular proposed federal action or consultation.

**3. Can the proposed action reasonably be expected to have a substantial adverse impact on public health or safety?**

The proposed action cannot reasonably be expected to have a substantial adverse impact on public health or safety because application of the Final Rule (that is, revising the definition of "destruction or adverse modification") will not affect public health or safety.

**4. Can the proposed action reasonably be expected to adversely affect endangered or threatened species, their critical habitat, marine mammals, or other non-target species?**

Issuance of the Final Rule cannot reasonably be expected to adversely affect endangered or threatened species, their critical habitat, marine mammals, or other non-target species. The Final Rule formalizes 2004/2005 Guidance, which replaced the court-invalidated definition of "destruction or adverse modification" of critical habitat. The revised definition reduces inconsistencies in applying the definition and improves the effective and efficient implementation of the Act. It tracks more closely to statutory language, which defines critical habitat in terms of areas and physical and biological features that are essential to the conservation of threatened or endangered species. The invalidated definition set too high a bar for destruction or adverse modification of critical habitat by requiring that both survival and recovery be affected. The 2004/2005 Guidance and Final Rule correct this error by focusing the definition on conservation, not merely survival and promotes recovery of threatened and endangered species.

Application of the Final Rule at a later point in time in the context of particular proposed federal actions may result in the Services concluding destruction or adverse modification of critical habitat. Upon reaching such a conclusion, the Services would provide, if possible, a reasonable and prudent alternative to the Federal action under consultation. Such an alternative would allow the Services to prevent the destruction or adverse modification of critical habitat, thus conserving the species and the ecosystems upon which they depend (which may benefit species that are neither endangered nor threatened). It is not possible at this time to predict the circumstances of a particular proposed federal action or consultation.

**5. Are significant social or economic impacts interrelated with natural or physical environmental effects?**

There are no significant social or economic impacts interrelated with natural or physical environmental effects. Federal agencies may alter their actions, in an effort to avoid the destruction or adverse modification of critical habitat, which could have various socio-economic



or environmental impacts; however, we cannot reasonably foresee which impacts would result from this, or the scale of such impacts. Adopting the Final Rule would benefit Federal agencies, in the planning of their actions, by providing a transparent, consistently implemented definition of "destruction or adverse modification" of critical habitat. Though this may improve the efficiency of section 7(a)(2) consultations and conferences on those Federal actions, it would be speculative for the Services to predict how such efficiencies would alter Federal actions and associated social or economic effects (i.e., impacts are not reasonably foreseeable).

**6. Are the effects on the quality of the human environment likely to be highly controversial?**

The effects of the Final Rule on the quality of the human environment are not likely to be highly controversial. The Final Rule would not cause foreseeable impacts on the human environment. There would be no direct effects on the human environment, and any indirect and cumulative effects are not likely to be significant. More uniform application of the "destruction or adverse modification" will allow the Services, Federal agencies, private individuals and organizations, and other interested or concerned parties to better predict and understand the outcomes of section 7 consultations. Such effects would not be highly controversial.

**7. Can the proposed action reasonably be expected to result in substantial impacts to unique areas, such as historic or cultural resources, park land, prime farmlands, wetlands, wild and scenic rivers, essential fish habitat, or ecologically critical areas?**

Issuance of the Final Rule cannot reasonably be expected to result in substantial impacts to unique areas, such as historic or cultural resources, park land, prime farmlands, wetlands, wild and scenic rivers, essential fish habitat, or ecologically critical areas. "Critical habitat", as defined in the ESA (16 U.S.C. 1532(5)(A)) could be considered to encompass an ecologically critical area in the abstract. The Final Rule, however, cannot be reasonably expected to result in substantial impacts to any particular ecologically critical areas. It merely formalizes the 2004/2005 Guidance, which in turn instructs the Services to align their definition of "destruction or adverse modification" of critical habitat with statutory language (i.e., focusing on conservation) and court opinions (i.e., removing reference to survival). Though the Final Rule is likely to improve transparency and consistency in the application of the definition, it is not likely to result in substantial impacts such areas.

**8. Are the proposed action's effects on the human environment likely to be highly uncertain or involve unique or unknown risks?**

Issuance of the Final Rule will not have effects on the human environment that are likely to be highly uncertain or involve unique or unknown risks. Though the nature and scope of environmental consequences that are likely to result from issuance of the Final Rule are not reasonably foreseeable, we anticipate that any environmental consequences will be limited in nature and not significant. In general, the conclusions of section 7(a)(2) consultations and conferences are not likely to be highly uncertain or involve unique or unknown risks.



**9. Is the proposed action related to other actions with individually insignificant, but cumulatively significant impacts?**

Issuance of the Final Rule is not related to other actions with individual insignificant, but cumulatively significant impacts. We cannot identify any individually insignificant, but cumulatively significant impacts related to this action because it is a broad framework regulation codifying the Services' approach to section 7(a)(2) consultations and conferences, not an on-the-ground action. The issuance of the Final Rule will not result in direct effects on the human environment, and any indirect and cumulative effects of the definition revision are not likely to be significant.

**10. Is the proposed action likely to adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources?**

Issuance of the Final Rule is not likely to adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places. It would not cause loss or destruction of significant scientific, cultural, or historical resources. The Services' issuance of the Final Rule is intended to reduce inconsistencies in applying the definition and improve effective and efficient implementation of the Act. The only direct effect of the Final Rule will be to formalize the 2004/2005 Guidance, which replaced the court-invalidated definition of "destruction or adverse modification" of critical habitat. Indirect effects could occur if Federal agencies alter their actions, in an effort to avoid the destruction or adverse modification of critical habitat. However, such indirect effects are not likely to adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places, and would not cause loss or destruction of significant scientific, cultural, or historical resources.

**11. Can the proposed action reasonably be expected to result in the introduction or spread of a nonindigenous species?**

Issuance of the Final Rule cannot reasonably be expected to result in the introduction or spread of a nonindigenous species. It merely formalizes the 2004/2005 Guidance, which in turn instructs the Services to align their definition of "destruction or adverse modification" of critical habitat with statutory language (i.e., focusing on conservation) and court opinions. The Final Rule is likely to improve transparency and consistency in the application of the definition, which may result in the indirect effect of Federal agencies altering their action to avoid destruction or adverse modification of critical habitat. However, any such indirect effects cannot reasonably be expected to result in the introduction or spread of a nonindigenous species.

**12. Is the proposed action likely to establish a precedent for future actions with significant effects or represent a decision in principle about a future consideration?**

Issuance of the Final Rule is not likely to establish a precedent for future actions with significant effects or represent a decision in principle about a future consideration. Because the Final Rule formalizes the 2004/2005 Guidance, we anticipate that, under most circumstances, the outcomes



of section 7 consultations will be the same, with or without the revised definition. We have concluded not only that the environmental effects are likely to be insignificant, but also that we cannot predict at this time where, to what extent, or how any environmental effects would occur. There are so many uncertain intervening circumstances that would occur between publishing the Final Rule, experiencing any changes in outcomes or costs, and tracing how those changes in the future will affect the environment that a reasonable person would not take into account any such environmental consequences.

**13. Can the proposed action reasonably be expected to threaten a violation of Federal, State, or local law or requirements imposed for the protection of the environment?**

Issuance of the Final Rule cannot reasonably be expected to threaten a violation of Federal, State, or local law or requirements imposed for the protection of the environment. NMFS has made all appropriate determinations under other applicable statutes, and our action will not violate any laws or requirements. In fact, the Final Rule more closely aligns the definition of "destruction or adverse modification" of critical habitat with statutory language (i.e., focusing on conservation) and court opinions.

**14. Can the proposed action reasonably be expected to result in cumulative adverse effects that could have a substantial effect on the target species or non-target species?**

Issuance of the Final Rule cannot reasonably be expected to result in cumulative adverse effects that could have a substantial effect on any species. The Services' issuance of the Final Rule is intended to reduce inconsistencies in applying the definition and improve effective and efficient implementation of the Act. Implementation of the definition, in conjunction with other past, present, and reasonably foreseeable future actions, would not be expected to result in significant cumulative impacts to the environment. As such, the Final Rule will not result in cumulative adverse effects that could have a substantial effect on species.

**DETERMINATION**

Based on a review and evaluation of the information contained in the EA, it is my determination that the Final Rule defining "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 NEPA of 1969 (as amended). As shown in the EA, adoption of the Final Rule (Alternative 3) would not cause foreseeable impacts on the human environment. There would be no direct effects on the human environment, and any indirect and cumulative effects are not likely to be significant within the meaning of NEPA and the CEQ regulations. This is because, although potential actions and consequences could flow from adoption of the Final Rule, the nature and scope of environmental consequences that are likely to result will depend on a variety of intervening circumstances that are not reasonably foreseeable and not attributable to the present action. However, we anticipate that any environmental consequences of adoption of the Final Rule will be limited in nature and not significant.

In view of the information presented in this document and the analysis contained in the supporting EA prepared for issuance of the Final Rule, it is hereby determined that FWS and

NMFS' issuance of the Final Rule will not significantly impact the quality of the human environment as described above and in the supporting documents. The proposed rule was published in the Federal Register, and all public comments were considered and addressed. These public comments led to minor changes in the definition and preparation of the EA. All beneficial and adverse impacts of the Final Rule have been addressed to reach the conclusion of no significant impacts. Accordingly, preparation of an environmental impact statement for this action is not necessary.

*Perry Gayardo*

AUG 20 2015

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Donna S. Wieting, Director  
Office of Protected Resources

Date

