

Section 4 Changes to 50 CFR:

**Sec. 17.81 Listing.**

(a) The Secretary may designate as an experimental population a population of endangered or threatened species that has been or will be released into suitable natural habitat outside the species' current natural range (but within its probable historic range, absent a finding by the Director in the extreme case that the primary habitat of the species has been unsuitably and irreversibly altered or destroyed), subject to the further conditions specified in this section; provided, that all designations of experimental populations must proceed by regulation adopted in accordance with 5 U.S.C. 553 and the requirements of this subpart.

(b) Before authorizing the release as an experimental population of any population (including eggs, propagules, or individuals) of an endangered or threatened species, and before authorizing any necessary transportation to conduct the release, the Secretary must find by regulation that such release will further the conservation of the species. In making such a finding the Secretary shall utilize the best scientific and commercial data available to consider:

(1) Any possible adverse effects on extant populations of a species as a result of removal of individuals, eggs, or propagules for introduction elsewhere;

(2) The likelihood that any such experimental population will become established and survive in the foreseeable future;

(3) The relative effects that establishment of an experimental population will have on the recovery of the species; and

(4) The extent to which the introduced population may be affected by existing or anticipated Federal or state actions or private activities within or adjacent to the experimental population area. The Secretary may issue a permit under section 10(a)(1)(A) of the Act, if appropriate under the standards set out in subsections 10(d) and (j) of the Act, to allow acts necessary for the establishment and maintenance of an experimental population.

(c) Any regulation promulgated under paragraph (a) of this section shall provide:

(1) Appropriate means to identify the experimental population, including, but not limited to, its actual or proposed location, actual or anticipated migration,

number of specimens released or to be released, and other criteria appropriate to identify the experimental population(s);

(2) A finding, based solely on the best scientific and commercial data available, and the supporting factual basis, on whether the experimental population is, or is not, essential to the continued existence of the species in the wild;

(3) Management restrictions, protective measures, or other special management concerns of that population, which may include but are not limited to, measures to isolate and/or contain the experimental population designated in the regulation from natural populations; and

(4) A process for periodic review and evaluation of the success or failure of the release and the effect of the release on the conservation and recovery of the species.

(d) The Fish and Wildlife Service shall consult with appropriate state fish and wildlife agencies, local governmental entities, affected Federal agencies, and affected private landowners in developing and implementing experimental population rules. When appropriate, a public meeting will be conducted with interested members of the public. Any regulation promulgated pursuant to this section shall, to the maximum extent practicable, represent an agreement between the Fish and Wildlife Service, the affected state and Federal agencies and persons holding any interest in land which may be affected by the establishment of an experimental population.

(e) The Director shall not establish an experimental population or part thereof in any state without the concurrence of the Governor of the state. Failing such concurrence, the Secretary may establish such a population if the Secretary finds that it is essential to the continued existence of the species in the wild.

(f) Any population of an endangered species or a threatened species determined by the Secretary to be an experimental population in accordance with this subpart shall be identified by special rule in §§17.84—17.86 as appropriate and separately listed in §17.11(h) (wildlife) or §17.12(h) (plants) as appropriate.

(g) The Secretary may designate critical habitat as defined in section (3)(5)(A) of the Act for an essential experimental population as determined pursuant to paragraph (c)(2) of this section. Any designation of critical habitat for an essential experimental population will be made in accordance with section 4 of the Act. No designation of critical habitat will be made for nonessential populations. In those situations where a portion or all of an essential experimental population overlaps with a natural population of the species during certain periods of the year, no

critical habitat shall be designated for the area of overlap unless implemented as a revision to critical habitat of the natural population for reasons unrelated to the overlap itself.

**Sec. 17.94 Critical habitats.**

(a) The areas listed in Sec. 17.95 (fish and wildlife) and Sec. 17.96 (plants) and referred to in the lists at Sec. Sec. 17.11 and 17.12 have been determined by the Director to be Critical Habitat. All Federal agencies must insure that any action authorized, funded, or carried out by them is not likely to result in the destruction or adverse modification of the constituent elements essential to the conservation of the listed species within these defined Critical Habitats. (See part 402 for rules concerning this prohibition; see also part 424 for rules concerning the determination of Critical Habitat).

(b) The sequence of species within each list of Critical Habitats in Sec. 17.95 and 17.96 will follow the sequences in the lists of Endangered and Threatened wildlife (Sec. 17.11) and plants (Sec. 17.12). Multiple entries for each species will be alphabetic by State.

**Sec. 17.95 Descriptions of critical habitats**

No changes

Part 424 is revised to read as follows.

**§ 424.01 Scope and purpose.**

(a) Part 424 provides rules for revising the Lists of Endangered and Threatened Wildlife and Plants and, where appropriate, designating or revising their critical habitats. Criteria are provided for determining species to be endangered or threatened and for designating critical habitats. Procedures for receiving and considering petitions to revise the lists and for conducting periodic reviews of listed species also are established.

(b) The purpose of these rules is to interpret and implement those portions of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.), that pertain to the classification of species as threatened or endangered and the designation of critical habitat.

**§ 424.02 Definitions.**

Unless otherwise noted, the definitions of terms in 50 CFR 402.02 shall apply to this part. In addition, the following definitions are applicable only to this part:

“Candidate” means any species being considered by the Secretary for listing as an endangered or a threatened species, but not yet the subject of a proposed rule.

“Conservation,” “conserve,” and “conserving” mean to use and the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary, ie. the species is recovered. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking

A “conservation effort” means a specific action, activity, or program designed to eliminate or reduce threats or otherwise improve the status of a listed species. A conservation effort may involve restoration, enhancement, maintenance, or protection of habitat; reduction of mortality or injury; or other beneficial action.

“Critical habitat” means (1) the specific areas within the geographical area currently occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (i) essential to the conservation of the species and (ii) that may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by a species at the time it is listed in accordance with the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

“Endangered species” means a species that is in danger of extinction throughout all or a significant portion of its range.

“Foreseeable future” means the greater of 5 generations or 20 years, but no longer than 100 years, unless specified otherwise in a determination made pursuant to Section 4 of the Act.

“Formalized conservation effort” is a conservation effort identified in a conservation agreement, conservation plan, management plan, or similar document. An agreement or plan may contain more than one conservation effort.

“List” or “lists” means the Lists of Endangered and Threatened Wildlife and Plants found at 50 CFR 17.11(h) or 17.12(h).

“Listing” means the process of making a determination that a species should be included on the List.

“Physical or biological features essential to the conservation of the species” means the primary constituent elements arranged in the quantity, spatial and temporal characteristics necessary to bring the species to the point where it is recovered.

“Plant” means any member of the plant kingdom, including, without limitation, seeds, roots, and other parts thereof.

“Primary constituent elements” generally include, but are not limited to, elements that define breeding grounds, seed dispersal and germination mechanisms, feeding, spawning and roosting sites, cover and shelter. Specific elements may include water quality, temperature, flow, depth and tides; host species, or plant pollinators; geological formations; vegetation types; and specific soil types. For species whose necessary biological functions require ephemeral habitat conditions (such as early successional habitats or sand bars), PCEs may include those elements that allow for the required conditions to occur periodically over time.

“Range” means the geographical area currently occupied by the species.

“Recovered” means the point at which listing is no longer appropriate under the criteria under Section 4(a)(1) of the Act.

“Secretary” means the Secretary of the Interior or the Secretary of Commerce, as appropriate, or their authorized representatives.

“Special management considerations or protection” means management measures that maintain primary constituent elements.

**Comment [CN1]:** Do we want to use special management for exclusions (non-inclusions?)

“Species” includes any species or subspecies of fish, wildlife or plant, and any distinct population segment of any vertebrate species that interbreeds when mature. Excluded is any species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of the Act would present an overwhelming and overriding risk to man.

“State agency” means any state agency, department, board, commission, or other governmental entity that is responsible for the management and conservation of fish, plant or wildlife resources within a state.

“Threatened species” means any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

“Wildlife” or “fish and wildlife” means any member of the animal kingdom including, without limitation, any vertebrate, mollusk, crustacean, arthropod or other invertebrate whether or not bred, hatched or born in captivity, and includes any part, product, egg or offspring thereof, or the dead body or parts thereof.

**§ 424.10 General.**

(a) The Secretary may add a species to the lists or designate critical habitat, delete a species or critical habitat, change the listed status of a species, revise the boundary of an area designated as critical habitat, or adopt or modify special rules (see 50 CFR 17.40–17.48 and parts 222 and 227) applied to a threatened species only in accordance with the procedures of this part.

(b) The Secretary may list a species as follows:

1. Endangered, in which case, the full protections of the Act apply;
2. Threatened, in which case the Secretary shall determine whether regulations pursuant to Section 4(d) of the Act are necessary and advisable;
3. With respect to any threatened species over which program responsibility has been vested with the Secretary of the Interior, the Secretary will determine whether to apply Section 17.31.

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

(a) Any species or taxonomic group of species (e.g., genus, subgenus) as defined in Sec. 424.02 is eligible for listing under the Act. A taxon of higher rank than species may be listed only if all included species are individually found to be endangered or threatened. In determining whether a particular taxon or population is a species for the purposes of the Act, the Secretary shall rely on standard taxonomic distinctions and the biological expertise of the Department and the scientific community concerning the relevant taxonomic group.

(b) The Secretary shall make any determination required by paragraphs (c) and (d) of this section *solely* on the basis of the best scientific and commercial data available regarding a species' status, without reference to possible economic or other impacts of such determination.

(c) A species shall be listed or its listing revised if the Secretary determines, on the basis of the best scientific and commercial data available after conducting a review of the species' status, that the species is endangered or threatened because of any one or a combination of the following factors:

- (1) The present or threatened destruction, modification, or curtailment of its habitat or range;

- (2) Overutilization for commercial, recreational, scientific, or educational purposes;
- (3) Disease or predation;
- (4) The inadequacy of existing regulatory mechanisms; or
- (5) Other natural or manmade factors, including non-native species or competition, affecting its continued existence. The factors considered under this heading may not be already considered in (1) through (4).

Comment [CN2]: Per S. 1180

The Secretary must identify the factors and provide data to support the finding.

(d) The Secretary shall delist a species if one of the following is found based on the best scientific and commercial data available:

- (1) Extinction. Unless all individuals of the listed species had been previously identified and located, and were later found to be extirpated from their previous range, a sufficient period of time must be allowed before delisting to indicate clearly that a species is extinct.
- (2) Is not threatened or endangered.. The Service determines that a species no longer meets the definition of threatened or endangered based on an evaluation of the species' status relative to the factors in section 4(a)(1);

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(e) In making a determination under this section, the Secretary will take into account any conservation effort by any state, tribe, federal agency, local government, private entity or individual, to protect such species, if;

- (i) The effort has already been implemented and been determined to be effective; or
- (ii) An effort that has not yet been implemented or has been implemented but not yet demonstrated to be effective if the Secretary finds such effort is sufficiently certain to be implemented and effective so as to have contributed to the elimination or adequate reduction of the threats to the species identified through the section 4(a)(1) analysis.

A. In making the finding for certainty of implementation, the Secretary may consider, among other things:

- 1. Whether resources (e.g. Personnel, voluntary participation, funding) for its implementation are adequate;

2. Whether the legal authority, regulatory mechanisms, and necessary authorizations to implement the effort have been or are likely to be obtained;
3. Whether an appropriate implementation schedule has been established.

B. In making the finding for certainty of effectiveness, the Secretary may consider, among other things:

1. How the conservation effort removes or reduces threats.
2. Whether explicit objectives for the conservation effort, the steps necessary to implement them and the dates for achieving them are known.
3. Whether there is information that supports the expectation that the conservation effort will achieve its objectives.
4. Whether there are appropriate provisions for monitoring and reporting progress on implementation and effectiveness of the conservation effort.
5. Whether there is a commitment to adaptive management.

**Comment [CN3]:** Need preamble language to explain relationship with PECE, need to say that if conservation efforts not achieved, will be back in the listing arena.

(f) The fact that a species of fish, wildlife, or plant is protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (see part 23 of this title 50) or a similar international agreement on such species, or has been identified as requiring protection from unrestricted commerce by any foreign nation, or to be in danger of extinction or likely to become so within the foreseeable future by any state agency or by any agency of a foreign nation that is responsible for the conservation of fish, wildlife or plants, may constitute evidence that the species is endangered or threatened. The weight given such evidence will vary depending on the international agreement in question, the criteria pursuant to which the species is eligible for protection under such authorities, and the degree of protection afforded the species. The Secretary shall give consideration to any species protected under such an international agreement, or by any state or foreign nation, to determine whether the species is endangered or threatened.

(g) The Secretary shall take into account, in making determinations under paragraph (c) or (d) of this section, those efforts, if any, being made by any state or foreign nation, or any political subdivision of a state or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas. The Secretary also shall solicit and consider information and analysis from the state or states where a species is resident.

**§ 424.12 Criteria for designating critical habitat.**

(a) Critical habitat shall be designated to the maximum extent prudent and determinable at the time a species is proposed for listing. If designation of critical habitat is not prudent or if critical habitat is not determinable, the reasons for not designating critical habitat shall be stated in the publication of proposed and final rules listing a species. A final designation of critical habitat shall be made on the basis of the best scientific data available, after taking into consideration the economic impact, national security impacts, and other relevant impacts of making such a designation in accordance with § 424.19.

(1) Pursuant to § 4(a)(3) a designation of critical habitat shall be considered not prudent when any of the following situations exist:

- (i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species; or
- (ii) Such designation of critical habitat would not be beneficial to the species because:
  - (A) Habitat is not a limiting factor; or
  - (B) Threats are not habitat-based; or
  - (C) No areas meet the definition of critical habitat

(2) Critical habitat is not determinable when one or both of the following situations exist:

- (i) Data sufficient to perform required analyses are lacking; or
- (ii) The biological needs of the species are not sufficiently well known to identify any area as critical habitat.

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(b) For specific areas within the geographical area occupied by the species, the Secretary must:

(1) Identify those necessary biological functions that are affected by habitat considerations;

(2) Identify the physical or biological features essential to the conservation of the species that support such necessary biological functions of the species;

(3) Identify the primary constituent elements that constitute each physical or biological feature;

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(4) Identify specific areas that currently provide a sufficient combination and level of PCEs for carrying out one or more of its necessary biological functions identified in paragraph (1) of this subsection; and

(5) Determine whether the primary constituent elements in those areas may require special management considerations or protection.

(c) The Secretary must determine if the specific areas within the geographical area occupied by the species are adequate to provide for the conservation of the species. If not, then the Secretary must identify any specific areas outside the geographical area occupied by the species that are essential for its conservation.

(d) Critical habitat designations must be defined in terms of one or more units and depicted on maps. Within the mapped areas of critical habitat, particular sites or types of land may be excluded by narrative in the text of the designation from the total area designated, if the location of the sites or types of lands excluded is readily discernable.

(e) (1) A notice of a proposed or final rule designating critical habitat must for each unit containing specific areas designated under subsection (b) of this section:

- (i) Identify the relevant PCEs found in that unit; and
- (ii) State the basis for the Secretary's determination that the PCEs in that unit may require special management considerations or protection.

(2) If any or all of a unit is designated under subsection (c) of this section, the notice must state:

- (i) the specific rationale for the determination that the specific areas within the geographical area occupied by the species are inadequate to provide for the conservation of the species; and
- (ii) the basis for the determination that the areas designated under subsection (c) of this section are essential for the conservation of the species.

**Comment [CN4]:** Put note in preamble about needing to justify why essential if no PCEs

(f) When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat.

(g) Critical habitat may be designated for those species listed as threatened or endangered but for which no critical habitat has been previously designated. For

species listed prior to 1978 the designation of critical habitat is at the discretion of the Secretary.

(h) Existing critical habitat may be revised according to procedures in this section as new data become available to the Secretary. In particular, critical habitat may be revised when a recovery plan identifies previously undesignated areas as essential for conservation, and a review of the habitat demonstrates that it meets the requirements of this Part for designation of critical habitat.

(i) Critical habitat shall not be designated within foreign countries or in other areas outside of the jurisdiction of the United States.

(j) Land or other geographic areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under Section 101 of the Sikes Act must not be designated as critical habitat if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is being designated.

Comment [CN5]: Special management exclusion section here if desired

#### § 424.13 Sources of information and relevant data.

(a) When considering any revision of the lists, the Secretary shall cooperate with affected states, and, as appropriate with interested persons and organizations, other affected Federal agencies, and, in cooperation with the Secretary of State, with the country or countries in which the species concerned are normally found or whose citizens harvest such species from the high seas. .

(b). Data and information used by the Secretary may include, but are not limited to, scientific or commercial publications, administrative reports, maps or other graphic materials, information received from experts on the subject, and comments from interested parties.

(c) Where the Act requires the Secretary to use the best scientific and commercial data or information available, the Secretary, when evaluating comparable data, shall give greater weight to scientific or commercial data that is empirical or has been peer-reviewed than information or data that is not empirical or peer-reviewed.

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#### § 424.14 Petitions.

(a) Any interested person may submit a written petition to the Secretary requesting that one of the actions described in section 424.10 be taken.

(b) The petition must clearly identify itself as such, be dated, and include a certification as to what states and agencies the petitioner provided copies of the petition and when the copies were provided.

(1) All petitions must contain the following information:

(A) The name, signature, address, telephone number, if any, and the association, institution, or business affiliation, if any, of the petitioner;

(B) The scientific and any common name of the species involved;

(C) The administrative action the petitioner seeks (e.g., listing or revision of critical habitat);

(D) A detailed narrative justification for the recommended measure, that contains an analysis of the information presented;

Comment [CN6]: Per S.1180

(E) Appropriate supporting documentation such as reprints of pertinent publications, copies of maps, reports, or letters from authorities

(2) In addition to the information above, petitions to add a species to the list of threatened or endangered species must include:

(A) Information on current population status and trends and/or estimates of present populations and distributions both in captivity and the wild;

(B) Identification of the factors under Section 4(a)(1) of the Act that threaten the species and where the threats occur;

(C) Where the petition asserts a species is threatened or endangered in a significant portion of its range, a description of the areas containing threats and an explanation of how that area represents a significant portion of the range;

(D) Whether the factors identified in section 4(a)(1) of the Act do or do not place the species in danger of extinction throughout all or a significant portion of its range, including a description of the immediacy and magnitude of the threats;

(E) Where the petitioner is requesting the action on the basis of a subspecies or distinct population segment, information demonstrating that the petitioned entity meets the appropriate definition;

(F) Information on regulatory protections and conservation activities underway.

(G) Whether a critical habitat designation for the species is prudent and determinable and why. If the petition asserts that designation is prudent and determinable, information on the habitat requirements of the species.

(3) In addition to the information in (1) above, petitions to revise critical habitat must contain:

(A) A description of the primary constituent elements of critical habitat and their present locations;

(B) An identification of specific areas meeting the definition of critical habitat.;

(C) The reasons for revision, including any benefits of designating additional areas or reasons to remove areas from existing critical habitat.

A petition must contain references specific enough for the Service to locate the information cited. Where large documents are cited, appropriate page numbers and/or chapters shall be included.

(c) The Secretary shall (may) return without review a document that does not comply with the requirements of subsection (b) of this section. The Secretary shall acknowledge in writing within 30 days receipt of a petition that complies with the requirements of subsection (b) of this section. For a petition that complies with the requirements of subsection (b) of this section, the Service will notify the relevant States.

Comment [CN7]: Discretionary?

(d)(1) To the maximum extent practicable, within 90 days of receiving a valid petition to list, delist, or reclassify a species, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. For the purposes of this section substantial information is that amount of information that would lead a reasonable person to believe that the action proposed in the petition may be warranted. The Service may consider other information that it has in its possession at the time the determination is made solely to determine the reliability of the petition (request) information. The Secretary shall promptly publish such finding in the Federal Register and so notify the petitioner.

(2) Upon making a positive finding under paragraph (b)(1) of this section, the Secretary shall commence a review of the status of the species concerned and shall cooperate with the relevant state or states. Within 12 months of receipt of such petition, the Secretary shall make one of the following findings:

(i) The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register and so notify the petitioner.

(ii) The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a proposed regulation to implement the action pursuant to Sec. 424.16 of this part, or

(iii) The petitioned action is warranted, but that—

(A) The immediate proposal and timely promulgation of a regulation to implement the petitioned action is precluded because of other pending proposals to list, delist, or reclassify species; and

(B) Expeditious progress is being made to list, delist, or reclassify qualified species,

in which case such finding shall be promptly published in the Federal Register together with a description and evaluation of the reasons and data on which the finding is based. A determination of expeditious progress is made in relation to the funds available after complying with non-discretionary duties under section 4 of the Act and court orders and court-approved settlement agreements to take actions pursuant to section 4 of the Act.

(3) If a finding is made under paragraph (d)(2)(iii) of this section with regard to any petition, the Secretary shall, within 12 months of such finding, again make one of the findings described in paragraph (d)(2) with regard to such petition.

(e)(1) To the maximum extent practicable, within 90 days of receiving a petition to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register and so notify the petitioner.

(2) In making the finding required by paragraph (e)(1) of this section, the Secretary shall consider whether a petition contains information that the current designation is inadequate or inappropriate, and

(a) Information indicating that areas petitioned to be added to critical habitat contain physical or biological features essential to, and that may require special management or protection to provide for the conservation of the species involved; or

(b) Information indicating that areas designated as critical habitat and petitioned for removal do not contain features essential to, or do not require special management or protection to provide for, the conservation of the species involved; or

(c) Information, for any areas outside the geographical area occupied by the species, that provides the basis for determining that the petitioned, unoccupied lands are essential for the conservation of the species.

(3) Within 12 months after receiving a petition found under paragraph (e)(1) of this section to present substantial information indicating that revision of a critical habitat may be warranted, the Secretary shall determine how to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

(f) Upon receiving a petition to designate critical habitat or to adopt a special rule to provide for the conservation of a species, the Secretary shall promptly conduct a review in accordance with the Administrative Procedure Act (5 U.S.C. 553) and applicable Departmental regulations, and take appropriate action.

**§ 424.15 Notices of review.**

(a) If the Secretary finds that one of the actions described in Sec. 424.10 may be warranted, but that the available evidence is not sufficiently definitive to justify proposing the action at that time, a notice of review may be published in the Federal Register. The notice will describe the measure under consideration, briefly explain the reasons for considering the action, and solicit comments and additional information on the action under consideration.

(b) The Secretary from time to time also may publish notices of review containing the names of species that are considered to be candidates for listing under the Act and indicating whether sufficient scientific or commercial information is then available to warrant proposing to list such species, the names of species no longer being considered for listing, or the names of listed species being

considered for delisting or reclassification. Before species are designated a candidate the Secretary shall coordinate with the relevant State or States. However, none of the substantive or procedural provisions of the Act apply to a species that is designated as a candidate for listing.

(c) Such notices of review will invite comment from all interested parties regarding the status of the species named. At the time of publication of such a notice, notification in writing will be sent to State agencies in any affected States, known affected Federal agencies, and, to the greatest extent practicable, through the Secretary of State, to the governments of any foreign countries in which the subject species normally occur.

**§ 424.16 Proposed rules.**

(a) General. Based on the information received through §§ 424.13, 424.14, 424.15, and 424.21, or through other available avenues, and after coordination with the relevant state or states, the Secretary may propose revising the lists as described in § 424.10.

(b) Contents. A notice of a proposed rule to carry out one of the actions described in § 424.10 shall contain:

- (1) The complete text of the proposed rule;
- (2) A summary of the data on which the proposal is based (including citation of primary sources), and shall show the relationship of such data to the rule proposed; and
- (3) Any such notice proposing the listing, reclassification, delisting of a species or the designation or revision of critical habitat shall also include a summary of factors affecting the species and/or critical habitat. A proposed rule to list a species will also include a description of recommended measures to minimize the threats causing the species to be proposed to be classified as threatened or endangered.

Add language to address data call from S1180 for recovery actions and take?

(4) If such a rule designates or revises critical habitat, such summary shall, to the maximum extent practicable, include a brief description and evaluation of those activities (whether public or private) that, in the opinion of the Secretary, if undertaken, may adversely modify such habitat, or may be affected by such designation. Any proposed rule to designate or revise

critical habitat shall contain a map of such habitat and any proposed textual exclusions made under section 424.12 (d).

(c) Procedures--(1) Notifications. In the case of any proposed rule to list, delist, or reclassify a species, or to designate or revise critical habitat, the Secretary shall--

(i) Publish notice of the proposal in the Federal Register;

(ii) Provide actual notice to any relevant State or States of a proposed regulation (including the complete text of the regulation), and to each county or equivalent jurisdiction therein in which the species is believed to occur, and invite the comment of each such agency and jurisdiction;

(iii) Give notice of the proposed regulation to any Federal agencies, local authorities, or private individuals or organizations known to be affected by the rule;

(iv) Insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to list, delist, or reclassify a species to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation;

(v) Give notice of the proposed regulation to such professional scientific organizations as the Secretary deems appropriate; and

(vi) Publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur.

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(2) Period of public comments. At least 60 days shall be allowed for public comment following publication in the Federal Register of a rule proposing the listing, delisting, or reclassification of a species, or the designation or revision of critical habitat. All other proposed rules shall be subject to a comment period of at least 30 days following publication in the Federal Register. The Secretary may extend or reopen the period for public comment on a proposed rule upon a finding that there is good cause to do so. A notice of any such extension or reopening shall be published in the Federal Register, and shall specify the basis for so doing.

(3) Public hearings. The Secretary shall promptly hold at least one public hearing if any person so requests within 45 days of publication of a proposed regulation to list, delist, or reclassify a species, or to designate or revise critical habitat. Notice of the location and time of any such hearing shall be published in the Federal Register not less than 15 days before the hearing is held.

Comment [CN8]: Put something in preamble about trying to do a hearing in each state.

**§ 424.17 Time limits and required actions.**

(a) General. (1) Within 1 year of the publication of a rule proposing to determine whether a species is an endangered or threatened species, or to designate or revise critical habitat, the Secretary shall publish one of the following in the Federal Register:

(i) A final rule to implement such determination or revision;

(ii) A finding that such revision should not be made;

(iii) A notice withdrawing the proposed rule upon a finding that the best scientific and commercial data available do not justify the action proposed by the rule; or

(iv) A notice extending such 1-year period by an additional period of not more than 6 months because there is substantial disagreement among scientists knowledgeable about the species concerned regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned.

(2) If an extension is made under paragraph (a)(1)(iv) of this section, the Secretary shall, within the extended period, take one of the actions described in paragraphs (a)(1) (i), (ii), or (iii) of this section.

(3) If a proposed rule is withdrawn under paragraph (a)(1)(iii) of this section, the notice of withdrawal shall set forth the basis upon which the proposed rule has been found not to be supported by the best available scientific or commercial data. The Secretary shall not again propose a rule withdrawn under such provision except on the basis of sufficient new information that warrants a reproposal.

(b) Critical habitat designations. A final rule designating critical habitat of an endangered or a threatened species shall to the extent permissible under Sec. 424.12 be published concurrently with the final rule listing such species, unless the Secretary deems that--

(1) It is essential to the conservation of such species that it be listed promptly;  
or

(2) Critical habitat of such species is not then determinable, in which case, the Secretary, with respect to the proposed regulation to designate such habitat, may extend the 1-year period specified in paragraph (a) of this section by not more than one additional year. Not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

**§ 424.18 Final rules--general.**

(a) Contents. A notice of a final rule to carry out one of the actions described in § 424.10 shall contain:

(1) The complete text of the final rule;

(2) A summary of the data on which the rule is based (including citation of primary sources), and shall show the relationship of such data to the rule proposed, and a summary of the comments and recommendations received in response to the proposal (including applicable public hearings); and

(3) Any such notice proposing the listing, reclassification, delisting of a species or the designation or revision of critical habitat shall also include a summary of factors affecting the species and/or critical habitat. A final rule to list a species will also include a description of recommended measures to minimize the threats causing the species to be proposed to be classified as threatened or endangered.

(4) If such a rule designates or revises critical habitat, such summary shall, to the maximum extent practicable, include a brief description and evaluation of those activities (whether public or private) that, in the opinion of the Secretary, if undertaken, may adversely modify such habitat, or may be affected by such designation. Any final rule to designate or revise critical habitat shall contain a map of such habitat and any textual exclusions made under section 424.12 (d).

(b) Effective date. A final rule shall take effect--

(1) Not less than 30 days after it is published in the Federal Register, except as otherwise provided for good cause found and published with the rule; and

(2) Not less than 90 days after (i) publication in the Federal Register of the proposed rule, and (ii) actual notification of any affected State agencies and counties or equivalent jurisdictions in accordance with § 424.16(c)(1)(ii).

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(c) Disagreement with State agency. If a State agency, given notice of a proposed rule in accordance with § 424.16(c)(1)(ii), submits comments disagreeing in whole or in part with a proposed rule, and the Secretary issues a final rule that is in conflict with such comments, or if the Secretary fails to adopt a regulation for which a State agency has made a petition in accordance with §

424.14, the Secretary shall provide such agency with a written justification for the failure to adopt a rule consistent with the agency's comments or petition.

**§ 424.19 Final rules--impact analysis of critical habitat.**

The Secretary shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, after proposing designation of such an area, consider the economic, national security and other relevant impacts of the designation upon proposed or ongoing activities. The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. The Secretary may consider management plans, and other conservation programs and partnerships in making exclusions under this section. The Secretary shall not exclude any such area if, based on the best scientific and commercial data available, the Secretary determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

Comment [CN9]: Something from S. 1180 here?

**§ 424.20 Emergency rules.**

(a) Sections 424.14, 424.16, 424.17, 424.18, and 424.19 notwithstanding, the Secretary may at any time issue a regulation implementing any action described in Sec. 424.10 in regard to any emergency posing a significant risk to the well-being of a species of fish, wildlife, or plant. Such rules shall, at the discretion of the Secretary, take effect immediately on publication in the Federal Register. In the case of any such action that applies to a resident species, the Secretary shall give actual notice of such regulation to the State agency in each State in which such species is believed to occur. Publication in the Federal Register of such an emergency rule shall provide detailed reasons why the rule is necessary. An emergency rule shall cease to have force and effect after 240 days unless the procedures described in §§ 424.16, 424.17, 424.18, and 424.19 (as appropriate) have been complied with during that period.

Comment [CN10]: Emergency rules for ch under ESA or APA?

(b) If at any time after issuing an emergency rule, the Secretary determines, on the basis of the best scientific and commercial data available, that substantial evidence does not then exist to warrant such rule, it shall be withdrawn.

**§ 424.21 Periodic review.**

At least once every 5 years, the Secretary shall conduct a review of each listed species to determine whether it should be delisted or reclassified. Each such determination shall be made in accordance with §§ 424.11, 424.16, and 424.17

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of this part, as appropriate. A notice announcing those species under active review will be published in the Federal Register. Notwithstanding this section's provisions, the Secretary may review the status of any species at any time based upon a petition (see Sec. 424.14) or upon other data available to the Service.