

**NOTE TO FILE: West Virginia Spring Salamander Proposed Listing and Proposed Critical Habitat Rule: Comparison of the Analysis Under the Current Regulations to the Analysis Under the 2023 Proposed Regulation Revisions**  
**Prepared by the Species Assessment Team**  
**12/11/2023**

**Introduction**

Section 4 of the Act (16 U.S.C. 1533) and the implementing regulations in title 50 of the Code of Federal Regulations set forth the procedures for determining whether a species is an endangered species or a threatened species, issuing protective regulations for threatened species, and designating critical habitat for threatened and endangered species. In 2019, jointly with the National Marine Fisheries Service, the US Fish and Wildlife Service (collectively the Services) issued final rules that revised the regulations in 50 CFR part and 424 regarding how we add, remove, and reclassify threatened and endangered species and the criteria for designating listed species’ critical habitat. On June 22, 2023, the Services proposed to revise portions of the listing and critical habitat regulations (88 FR 40764; 2023 proposed regulation revisions) that had been last revised in 2019.

Our analysis for this decision applied the regulations that are currently in effect, which include the 2019 revisions. However, in case the 2023 proposed regulation revisions are finalized before we make a final status determination for the WV spring salamander, we have also undertaken an analysis of whether the decision would be different if we were to apply the 2023 proposed regulation revisions.

That analysis, which we describe in this memo, concluded that we would have reached the same conclusions for the WV spring salamander if we had applied the 2023 proposed regulation revisions.

After evaluating each of the four components of the 2023 proposed regulation revisions to determine if the revision affected any aspect of the analysis for the WV spring salamander, we determined that only two of the components could apply to this decision: the revisions related to consideration of economics language and to designation of unoccupied critical habitat.

<b>2023 Proposed Regulatory Provision</b>	<b>50 CFR citation (2019)</b>	<b>Applies to this rulemaking?</b>
Economics language	424.11(b)	Yes
Foreseeable future framework	424.11(d)	No
Not-prudent considerations	424.12(a)(1)	No
Designation of unoccupied critical habitat	424.12(b)(2)	Yes

**50 CFR 424.11 Factors for Listing, Delisting, or Reclassifying Species**

#### **424.11(b)— Basis for species classification, Economics Language**

2019

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

*Proposed 2023*

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

#### *Discussion of difference between the 2019 and 2023 proposed regulation revisions*

In 2019 we concluded that removing the phrase “without reference to possible economic or other impacts of such determination” made no change to the applicable standards for making classification determinations. Similarly, reinserting the phrase into the regulations does not change the applicable standards for making classification determinations. We must continue to make listing, delisting, and reclassification determinations based solely on the best scientific and commercial data available as mandated by the Act. Therefore, as we did both before and after the 2019 regulations went into effect, we would not consider any possible economic or other impacts of listing the WV spring salamander even if we applied the proposed 2023 regulations. There is no functional or operational difference in application or outcome. Analysis under both the 2019 and 2023 proposed regulation provisions is identical.

#### **424.11(d)—“Foreseeable Future” Framework**

*2019 Framework*

(d) In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species’ responses to those threats are likely. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species’ life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time.

*2023 Proposed Rule Language*

(d) In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The term foreseeable future extends as only so far into the future as the Services can reasonably rely on information about ~~determine that both~~ the future threats to the species and the species’ responses

to those threats ~~are likely~~. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time.

Discussion of difference between the 2019 regulation text and 2023 proposed regulation revisions

Because we have determined that the WV spring salamander is in danger of extinction throughout all or a significant portion of its range (an endangered species), the proposed revisions to the implementing regulation regarding the “foreseeable future” do not apply to or affect the listing decision for the WV spring salamander. Therefore, no analysis is necessary for this regulatory provision.

## **50 CFR 424.12 Criteria for Designating Critical Habitat**

### **Not-Prudent Considerations**

#### *2019*

(a)(1) The Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances:

(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;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;

(iv) No areas meet the definition of critical habitat; or

(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

#### *2023 Proposed Rule Language*

(1) Designation of critical habitat ~~The Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances~~ such as, but not limited to, the following:

(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;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, ~~or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;~~

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States; or

(iv) No areas meet the definition of critical habitat; ~~or~~

~~(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.~~

#### *Discussion of difference between the 2019 and 2023 proposed regulation revisions*

Because designation of critical habitat was determined to be prudent and determinable for the WV spring salamander, the proposed revisions to the implementing regulation regarding when designation of critical habitat may be not prudent do not apply to or affect the listing decision for the WV spring salamander. Therefore, no analysis is necessary for this regulatory provision.

### **Designation of Unoccupied Critical Habitat**

#### *2019*

(b)(2) The Secretary will designate as critical habitat, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species only upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

#### *2023 Proposed Rule Language*

(b)(2) After identifying areas occupied by the species at the time of listing, the ~~The~~ Secretary will identify ~~designate as critical habitat~~, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species at the time of listing only upon a determination that the Secretary determines such areas are essential for the conservation of the species. Such a determination ~~When designating~~ critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must be based on ~~determine that there is a reasonable certainty~~ both that the area will contribute to the best scientific data available ~~conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.~~

*Discussion of difference between the 2019 and 2023 proposed regulation revisions*

We are not currently proposing to designate any areas outside the geographical area occupied by the species because the West Virginia spring salamander is endemic to one cave. We determined that the designation of occupied critical habitat, General Davis Cave, is sufficient for the conservation of the West Virginia spring salamander and, therefore, we are not proposing to designate any unoccupied areas as critical habitat for the species. If we were to apply the 2023 proposed revised regulations we would reach the same outcome. We would propose to designate General Davis Cave as occupied critical habitat because the species is endemic to that cave and no other areas are known to be, or have been, occupied by the species. In addition, because designation of that cave would be sufficient for protecting the species, we would conclude that no unoccupied areas are essential for the conservation of the species. Therefore, there would be no difference in outcome between applying the 2019 and 2023 regulations.