

**Environmental Assessment for the 2024 Rule to Amend The Endangered
Species Act Section 7 Implementing Regulations (50 Code of Federal
Regulations 402)**

FINDING OF NO SIGNIFICANT IMPACT

I. Purpose of Finding of No Significant Impact (FONSI): The National Environmental Policy Act (NEPA) requires the preparation of an Environmental Impact Statement (EIS) for any proposal for a major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(C). The Council on Environmental Quality (CEQ) Regulations direct agencies to prepare a Finding of No Significant Impact (FONSI) when an action not otherwise excluded will not have a significant impact on the human environment. 40 CFR §§ 1500.4(b), 1500.5(b), & 1501.6. To evaluate whether a significant impact on the human environment is likely, the CEQ regulations direct agencies to analyze the potentially affected environment and the degree of the effects of the proposed action. 40 CFR § 1501.3(b). In doing so, agencies should consider the geographic extent of the affected area (i.e., national, regional, or local), the resources located in the affected area (40 CFR § 1501.3(b)(1)), and whether the project is considered minor or small-scale (NAO 216-6A CM, Appendix A-2). In considering the degree of effect on these resources, agencies should examine, as appropriate, short- and long-term effects, beneficial and adverse effects, and effects on public health and safety, as well as effects that would violate laws for the protection of the environment (40 CFR § 1501.3(b)(2)(i)-(iv); NAO 216-6A CM Appendix A-2 - A-3). CEQ identifies specific criteria for consideration. 40 CFR § 1501.3(b)(2)(i)-(iv). Each criterion is discussed below with respect to the proposed action and considered individually as well as in combination with the others.

In preparing this FONSI, we reviewed the Environmental Assessment (EA) for the 2024 rule to amend the Endangered Species Act Section 7 Implementing Regulations (50 CFR 402) which evaluates the affected area, the scale and geographic extent of the proposed action, and the degree of effects on those resources (including the duration of impact, and whether the impacts were adverse and/or beneficial and their magnitude). The EA is hereby incorporated by reference per 40 CFR § 1501.6(b).

II. Approach to Analysis:

As described in the EA, the Services are promulgating amended regulations governing Federal interagency cooperation pursuant to section 7 of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), which requires Federal agencies, in consultation with and with the assistance of the Secretaries of the Interior and Commerce, to insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat. The revisions to the regulations clarify, interpret, and implement portions of the ESA concerning the interagency cooperation procedures.

Adoption of the proposed action would improve and provide clarification concerning the Services' interpretation of consultation pursuant to section 7(a)(2). The 2023 proposed rule includes: revision to the definitions of "environmental baseline" and "effects of the action" at 50

CFR 402.02; revision to the reinitiation of consultation provisions at § 402.16; elimination of section § 402.17; and revisions to regulations at § 402.02 and § 402.14 regarding the scope of reasonable and prudent measures (RPMs) in an incidental take statement (ITS).

III. Geographic Extent and Scale of the Proposed Action:

The EA describes the affected areas as the United States, its territories, state and U.S. waters, the high seas, and other areas subject to ESA jurisdictions. The environmental effects analyzed are analyzed as originating from the individualized discrete implementation of the rule changes, and thus, the environmental effects analyzed in the EA occur at a relatively small scale.

IV. Degree of Effect:

- A. The potential for the proposed action to threaten a violation of Federal, state, or local law or requirements imposed for environmental protection.*

This proposed action would not threaten a violation of any Federal, state, or local law, or requirement imposed to protect the environment because the proposed action improves and clarifies the regulations governing the ESA section 7 consultation process. The modifications relating to the scope of RPMs in an ITS, expand the opportunity and possibilities for mitigation; thus, they increase conservation and benefits to species and natural resources. The proposed action is designed to be consistent with Federal law.

- B. The degree to which the proposed action is expected to affect public health or safety.*

This proposed action will not have a significant impact on public health or safety because the proposed action is primarily administrative in nature, with any on the ground impacts restricted to increase natural resource conservation. Any mitigation or monitoring measures that are the outcome of ESA section 7 consultations under the new proposed regulations will be required to conform to Federal, state, and local laws regarding public health and safety.

- C. The degree to which the proposed actions is expected to affect a sensitive biological resource, including:*

- a. Federal threatened or endangered species and critical habitat;*

The proposed action improves and clarifies the regulations governing the ESA section 7 consultation process. Under section 7(a)(2), each Federal agency is required to insure, in consultation with and with the assistance of the Services as appropriate, that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered species or threatened species or destroy or adversely modify critical habitat. The proposed action may result in increased mitigation and monitoring measures that would increase the conservation and recovery of sensitive biological resources. Therefore, the proposed regulatory clarifications and improvements cannot reasonably be expected to have a significant impact on endangered or threatened species and their designated critical habitat.

- b. *stocks of marine mammals as defined in the Marine Mammal Protection Act;*
The proposed action improves and clarifies the regulations governing the ESA section 7 consultation process. Under section 7(a)(2), each Federal agency is required to insure, in consultation with and with the assistance of the Services as appropriate, that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered species or threatened species or destroy or adversely modify critical habitat. The proposed action does not alter the responsibilities of an action agency to comply with the substantive duties under section 7(a)(2). The proposed changes and clarifications are primarily administrative and procedural in nature. The modifications relating to mitigation expand the opportunity and possibilities for mitigation; thus, they increase conservation and benefits to species and natural resources. Therefore, the proposed regulatory clarifications and improvements cannot reasonably be expected to have a significant impact on marine mammals.
- c. *essential fish habitat identified under the Magnuson–Stevens Fishery Conservation and Management Act;*
The proposed action improves and clarifies the regulations governing the ESA section 7 consultation process. Under section 7(a)(2), each Federal agency is required to insure, in consultation with and with the assistance of the Services as appropriate, that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered species or threatened species or destroy or adversely modify critical habitat. The proposed action does not alter the responsibilities of an action agency to comply with the substantive duties under section 7(a)(2). The proposed changes and clarifications are primarily administrative and procedural in nature. The modifications relating to the scope of RPMs in an ITS expand the opportunity and possibilities for mitigation; thus, they increase conservation and benefits to species and natural resources. Therefore, the proposed regulatory clarifications and improvements cannot reasonably be expected to have a significant impact to essential fish habitat.
- d. *bird species protected under the Migratory Bird Treaty Act (MBTA);*
The proposed action improves and clarifies the regulations governing the ESA section 7 consultation process. Under section 7(a)(2), each Federal agency is required to insure, in consultation with and with the assistance of the Services as appropriate, that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered species or threatened species or destroy or adversely modify critical habitat. The proposed action does not alter the responsibilities of an action agency to comply with the substantive duties under section 7(a)(2). The proposed changes and clarifications are primarily administrative and procedural in nature. The modifications relating to the scope of RPMs in an ITS expand the opportunity and possibilities for mitigation; thus, they increase conservation and benefits to species and natural resources. Therefore, the proposed regulatory clarifications and improvements

cannot reasonably be expected to have significant impacts on bird species protected under the MBTA.

e. national marine sanctuaries or monuments;

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f. vulnerable marine or coastal ecosystems, including, but not limited to, shallow or deep coral ecosystems;

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g. biodiversity or ecosystem functioning (e.g., benthic productivity, predator-prey relationships, etc.)

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primarily administrative and procedural in nature. The modifications relating to the scope of RPMs in an ITS expand the opportunity and possibilities for mitigation; thus, they increase conservation and benefits to species and natural resources. Therefore, the proposed regulatory clarifications and improvements cannot reasonably be expected to result in significant impacts to biodiversity and or ecosystem function within the action area.

- D. The degree to which the proposed action is reasonably expected to affect a cultural resource: properties listed or eligible for listing on the National Register of Historic Places; archeological resources (including underwater resources); and resources important to traditional cultural and religious tribal practice.*

The proposed action improves and clarifies the regulations governing the ESA section 7 consultation process. Under section 7(a)(2), each Federal agency is required to insure, in consultation with and with the assistance of the Services as appropriate, that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered species or threatened species or destroy or adversely modify critical habitat. The proposed action does not alter the responsibilities of an action agency to comply with the substantive duties under section 7(a)(2). No project or action that may directly impact cultural resources is being authorized in the proposed regulation changes. Any actions resulting from a future ESA section 7 consultation under the proposed regulations would still be required to comply with all Federal, state, and local laws governing cultural resources. Therefore, the proposed regulatory improvement and clarifications cannot reasonably be expected to have significant impacts to properties listed or eligible for listing on the National Register of Historic Places, cultural or historic resources, or resources important to traditional cultural and religious tribal practice.

- E. The degree to which the proposed action has the potential to have a disproportionately high and adverse effect on the health or the environment of minority or low-income communities, compared to the impacts on other communities (EO 12898).*

This proposed action will not have a significant impact on the health or the environment of minority or low-income communities. The proposed action would not change any of the substantive protections provided by the ESA. Section 7(a)(2) requires that Federal action agencies and the Services use the best scientific and commercial data available and nothing in the proposed action affects or modifies that standard. No project or action that may directly impact low-income communities is being authorized in the proposed regulation changes. The proposed changes and clarifications are primarily administrative and procedural in nature. The modifications relating to the scope of RPMs in an ITS expand the opportunity and possibilities for mitigation thus increase conservation and benefits to natural resources.

- F. The degree to which the proposed action is likely to result in effects that contribute to the introduction, continued existence, or spread of noxious weeds or nonnative invasive*

species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of the species.

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- G. The potential for the proposed action to cause an effect to any other physical or biological resources where the impact is considered substantial in magnitude (e.g., irreversible loss of coastal resource such as marshland or seagrass) or over which there is substantial uncertainty or scientific disagreement.*

The proposed action improves and clarifies the regulations governing the ESA section 7 consultation process. Under section 7(a)(2), each Federal agency is required to insure, in consultation with and with the assistance of the Services as appropriate, that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered species or threatened species or destroy or adversely modify critical habitat. The proposed action does not alter the responsibilities of an action agency to comply with the substantive duties under section 7(a)(2). The proposed action would not change any of the substantive protections provided by the ESA. Section 7(a)(2) requires that Federal action agencies and the Services use the best scientific and commercial data available and nothing in the proposed action affects or modifies that standard. The proposed changes and clarifications are primarily administrative and procedural in nature. The modifications relating to the scope of RPMs in an ITS expand the opportunity and possibilities for mitigation; thus, they increase conservation and benefits to natural resources. Therefore, the proposed regulatory improvements and clarifications cannot reasonably be expected to have a significant impact on the physical or biological resources described above.

V. Other Actions Including Connected Actions:


The proposed action is limited to the implementation of the interagency consultation process pursuant to section 7(a)(2) of the ESA. The clarifications and amendments to the regulations do not authorize any of the Federal actions being consulted on under section 7 of the ESA. There are no interrelated or interconnected actions associated with this administrative change.

VI. Mitigation and Monitoring:

NMFS is not authorizing any Federal actions by promulgating these regulations. Any future Federal actions consulted on under the ESA would result in their own independent set of mitigation and monitoring requirements as required and reasonable under the ESA and regulations. The proposed regulations do increase the flexibility and availability of certain types of mitigation for some effects to certain species and critical habitats, but this does not preclude or limit the prescription or recommendation of mitigation or monitoring measures under the ESA.

DETERMINATION

The CEQ NEPA regulations, 40 CFR § 1501.6, direct an agency to prepare a FONSI when the agency, based on the EA for the proposed action, determines not to prepare an EIS because the action will not have significant effects. In view of the information presented in this document and the analysis contained in the supporting EA prepared for the 2024 rule to amend the Endangered Species Act Section 7 Implementing Regulations (50 CFR 402), it is hereby determined that the revisions to portions of the ESA regulations concerning interagency cooperation procedures will not significantly impact the quality of the human environment. The EA for the 2024 rule to amend the Endangered Species Act Section 7 Implementing Regulations (50 CFR 402) is hereby incorporated by reference. In addition, all beneficial and adverse impacts of the proposed action as well as mitigation measures have been evaluated to reach the conclusion of no significant impacts. Accordingly, preparation of an EIS for this action is not necessary.



Dr. Richard W. Spinrad
Under Secretary of Commerce
for Oceans and Atmosphere
and NOAA Administrator

3/22/2024

Date