Environmental Assessment for Revisions to the Endangered Species Act Section 7 Implementing Regulations (50 Code of Federal Regulations 402)

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Acronyms and Abbreviations

BLM	Bureau of Land Management
DOI	U.S. Department of the Interior
CEQ	Council on Environmental Quality
CFR	Code of Federal Regulations
DOI	Department of the Interior
EA	Environmental Assessment
ECOS	Environmental Conservation Online System
EPA	U.S. Environmental Protection Agency
ESA	Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*)
et seq.	"et sequentes" meaning "and the following"
FLPMA	Federal Land Policy and Management Act of 1976, as amended (43 U.S.C. 1701 *et seq.*)
FR	*Federal Register*
FWS	U.S. Fish and Wildlife Service
ITS	Incidental Take Statement
NEPA	National Environmental Policy act of 1969, as amended (42 U.S.C. 4321 *et seq.*
NAAQS	National Ambient Air Quality Standard
NAO	National Oceanographic and Atmospheric Administration Administrative Order
NOAA	National Oceanographic and Atmospheric Administration
NMFS	National Marine Fisheries Service
RIBITS	Regulatory In-Lieu Fee and Bank Information Tracking System
ROI	Region of Influence
RPM	Reasonable and Prudent Measure
SIP	State Implementation Plan
USFS	U.S. Forest Service
U.S.	United States
U.S.C.	United States Code

Executive Summary

The U.S. Department of the Interior (DOI), Fish and Wildlife Service (FWS) and U.S. Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS; together the Services) prepared an Environmental Assessment (EA) pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality (CEQ) NEPA regulations (40 Code of Federal Regulations (CFR) 1500-1508), the DOI NEPA regulations (43 CFR 46), the DOI Departmental Manual part 516 chapters 1-4 and 8 and the NOAA Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities (NOAA Administrative Order [NAO] 216-6A and Companion Manual for NAO 216-6A).

The Services are proposing revisions to the 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 ensure 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 proposed revisions to the regulations clarify, interpret, and implement portions of the ESA concerning the interagency cooperation procedures. The proposed revisions to the 50 CFR 402 regulations include: revision to the definitions of "environmental baseline" and "effects of the action" at § 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). The Services prepared this EA in an abundance of caution only, as we maintain that one or more categorical exclusions apply. Although one or more existing categorical exclusions apply to the proposed revisions to the 50 CFR 402 regulations, the Services have prepared this EA to provide a more comprehensive assessment of the preferred alternative and the reasonable range of alternatives.

On June 22, 2023, a proposed rule was noticed in the *Federal Register* (88 *Federal Register* (FR) 40753) to revise portions of the regulations that implement section 7 of the ESA with a 60-day public review and comment period. As part of the public review process, the Services also sought specific comments on the NEPA compliance, including comments detailing the extent to which the proposal may have a significant impact on the quality of the human environment or falls within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. Public input provided during the comment period was considered in the development of this EA.

The focused array of alternatives analyzed in detail in this EA are: the No Action Alternative, consisting of baseline conditions that include the 2019 ESA section 7 regulations currently in effect (Alternative 1); an alternative that includes minor changes to aspects of the section 7 regulation at § 402.02, § 402.16, and § 402.17 that clarifies, but does not alter, the existing practice of the Services in conducting ESA section 7 consultations (Alternative 2); an alternative that includes only the regulation revisions at § 402.02 and § 402.14 regarding the scope of RPMs in an ITS (Alternative 3); Preferred Alternative (Alternative 4), which is a

combination alternative that includes the regulation revisions addressed in Alternatives 2 and 3; and an alternative that only includes the ESA Section 7 regulations in effect prior to the 2019 rule (Alternative 5). These regulations include all revisions published before August 27, 2019.

The 2019 ESA section 7 regulations incorporated a 60-day deadline for the Services to respond to requests for concurrence with a "may affect, not likely to adversely affect" determination and an exemption to the requirement to reinitiate consultation for newly listed species or critical habitat designations with respect to certain Bureau of Land Management (BLM) and U.S. Forest Service (USFS) land and resource management plans that were enacted by Congress in the 2018 Consolidated Appropriations Act. Although the 2019 60-day deadline provided clarity and regulatory certainty for Federal agencies and applicants regarding the informal consultation process, it is not substantially different from the Services' practice prior to the 2019 rule. The Services always worked with the action agency to ensure adequate information was provided to informally consult and once complete information was received the Services would respond within 60 days to the best of their ability. In addition, this change is merely a process framework change and does not affect the biological determinations or outcomes of the consultation process And although the exemption to the requirement to reinitiate consultation for newly listed species or critical habitat designations with respect to certain BLM and USFS land and resource management plans resulted in a change in practice by Federal action agencies and the Services, a separate consultation must still occur for any actions implemented under the plan that may affect the newly listed species or designated critical habitat, for new land use plans, or for the revision or significant change to an existing land use plan. Thus, consultation under section 7 will continue for those actions that "may affect" a newly listed species or newly designated critical habitat; including a jeopardy analysis for newly listed species and an analysis of destruction or adverse modification for newly designated critical habitat for actions that "may affect, and are likely to adversely affect" the newly listed species or newly designated critical habitat. As a result, there is functionally no difference between the ESA section 7 regulations in place prior to August 27, 2019 and the 2019 regulations to the affected environment and environmental consequences. Therefore, Alternatives 1 and 5 would be functionally equivalent in terms of their potential impacts to the human environment.

The Services concluded, based on the impact analysis, that the revisions for clarification included in Alternatives 2 and 4 would not be anticipated to impact the environment, as the revisions would not change the existing practice of the Services in implementing section 7(a)(2) of the ESA; instead, we concluded that the revisions for clarification may potentially lead to improved section 7 consultation initiation packages and biological assessments submitted by Federal agencies. Improved consultation initiation packages and biological assessments would potentially result in reduced consultation timelines and therefore, would potentially result in long-term economic benefits and reduced administrative burden to the Services, Federal agencies, and applicants.

The Services anticipate only a limited subset of section 7 consultations would be affected by the changes to the scope of RPMs in Alternatives 3 and 4 because most consultations are completed informally. This change would apply only to formal consultations that result in a

biological opinion accompanied by an ITS that includes RPMs. In other words, the change would not apply in situations such as formal consultations for which the biological opinion only addresses listed plants (RPMs do not apply to plants) or framework programmatic consultations (do not include an ITS). In addition, the use of offsetting measures in RPMs would not be required in every formal consultation that requires an ITS containing RPMs. Some of these consultations would include offsetting measures proposed by the action agency as part of the proposed action; others would be able to minimize impacts of incidental take adequately through measures that avoid or reduce incidental take within the action area. As with all RPMs, these offsetting measures would be required to be commensurate with the scale of the impact, subject to the existing "minor change rule" (50 CFR 402.14(i)), be reasonable and prudent, and be necessary or appropriate to avoid or minimize the impact of the incidental taking on the species (Endangered Species Consultation Handbook Services 1998). None of these changes would be expected to result in delays to completing consultations in a timely manner or within the statutory or regulatory timeframes.

Although uncertain, the proposed inclusion of offsets as RPMs could potentially result in future additional ESA conservation banks, in-lieu fee programs, and Federal agency-responsible offsetting measures. The ability of the Services to include offsetting measures as RPMs for Alternatives 3 or 4 would be anticipated to result in minor, long-term benefits to listed fish and wildlife and associated habitats that could include critical habitat. Habitat enhancements and restoration at conservation banks and in-lieu fee sites would potentially result in additional and improved habitats such as foraging sites, breeding sites, migratory stop over sites, or resting sites for Federally listed and non-listed species. It could also potentially serve to increase local species diversity at the offsetting sites as well. Construction related activities would also have some minor, negative short-term effects to listed and non-listed species and surrounding communities due to disturbance related impacts, however, the overall net benefit to the ecosystem and local communities, that could potentially include communities with environmental justice concerns, would be minor, long-term beneficial impacts. Additional offsetting measures would potentially result in the following benefits to the community including communities with environmental justice concerns: additional and improved ecosystem services such as improvements in air and water quality, climate regulation, and potentially recreational opportunities.

The potential for increased conservation banking resulting from offsets as RPMs with Alternatives 3 and 4 could potentially result in minor, long-term economic benefits to the conservation banking industry and associated local economies. The proposed RPM revisions could also potentially increase employment rates and benefits to local economies. Although the ability for the Services to include offsetting measures as RPMs would potentially result in minor, short-term to long-term costs for Federal agencies, these costs would be limited as these measures would be constrained by the statutory and regulatory requirements of RPMs. While construction of conservation banking, in-lieu fee sites, and Federal agency-responsible offsetting sites would potentially result in some minor, short-term increases in greenhouse gas emissions, any habitat enhancements and restored vegetated habitats because of those construction activities could also result in long-term air quality benefits via carbon

sequestration. Additional fish and wildlife conservation banks and in-lieu fee programs would potentially shift some existing land uses to a conservation land use function.

Based on the impact analysis, Alternative 4 was identified as the Preferred Alternative as it best meets the purpose and need, provides regulatory clarifications to reduce consultation burdens of both the Services and other Federal agencies, and also maximizes potential conservation benefits to threatened and endangered species and associated habitats as well as to local economies and communities as compared to the other alternatives.

1 Background

1.1 Regulatory Authority

1.1.1 National Environmental Policy Act Compliance

The U.S. Department of the Interior (DOI), Fish and Wildlife Service (FWS) and U.S. Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS; together the Services) prepared an Environmental Assessment (EA) pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality (CEQ) NEPA regulations (40 Code of Federal Regulations (CFR) 1500-1508)[1], the DOI NEPA regulations (43 CFR 46), the DOI Departmental Manual part 516 chapters 1-4 and 8 and the NOAA Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities (NOAA Administrative Order [NAO] 216-6A and Companion Manual for NAO 216-6A).

1.1.2 Endangered Species Act Regulatory Background

The purposes of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*) are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions. Moreover, the ESA states that it is the policy of Congress that the Federal government will seek to conserve threatened and endangered species and use its authorities in furtherance of the purposes of the ESA.

The Secretaries of the Interior and Commerce share responsibilities for implementing the provisions of the ESA. Generally, marine and anadromous (adult fish spend most of their lives at sea but return to freshwater to spawn) species are under the jurisdiction of the Secretary of Commerce, and all other listed species are under the jurisdiction of the Secretary of the Interior. Authority to administer the ESA has been delegated by the Secretary of the DOI to the Director of the FWS and by the Secretary of Commerce to the NMFS Assistant Administrator. Title 50 part 402 of the CFR establishes the procedural regulations governing interagency cooperation under section 7(a)(2) of the ESA, which requires Federal agencies, in consultation with and with the assistance of the Secretaries of the DOI and Commerce, to ensure that any action authorized, funded, or carried out by Federal agencies is not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species.

In 2019, the Services issued a final rule that revised several aspects of the ESA section 7 regulations to clarify and improve the interagency consultation process (84 *Federal*

[1] Refers to the CEQ NEPA regulations in effect at the time of the preparation of the NEPA that were amended in 2022.

Register (FR) 44976, August 27, 2019). Those revised regulations became effective on October 28, 2019 (84 FR 50333).

Executive Order 13990 (‘‘*Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis’’*), issued on January 20, 2021 (86 FR 7037), directed all departments and agencies to immediately review agency actions taken between January 20, 2017, and January 20, 2021, and, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding agency actions that conflict with important national objectives, including promoting and protecting public health and the environment, and to immediately commence work to confront the climate crisis. A ‘‘Fact Sheet’’ that accompanied Executive Order 13990 identified a non-exhaustive list of regulations requiring such a review and included the 2019 ESA section 7 regulations.

The 2019 ESA section regulations, along with other revisions to the ESA regulations finalized in 2019, were subject to litigation in the U.S. District Court for the Northern District of California. On July 5, 2022, the court issued a decision vacating the 2019 ESA section 7 regulations, while sending the regulations back to the Services for revision without reaching the merits of the case. On September 21, 2022, the U.S. Court of Appeals for the Ninth Circuit temporarily stayed the district court’s vacatur of pending resolution of motions seeking to alter or amend that decision. On October 14, 2022, the Services notified the district court that they anticipated proceeding with a rulemaking process to revise the 2019 ESA section 7 regulations. Subsequently, on November 14 and 16, 2022, the district court granted the Services’ motion to remand the 2019 regulations to the Services without vacating them. Therefore, the regulations the Services finalized in 2019 are the ESA section 7 regulations that are currently in effect.

1.2 Agency, Public, and Tribal Coordination

On June 22, 2023, the Services proposed revisions to the regulations to clarify, interpret, and implement portions of the ESA concerning the interagency cooperation procedures. The proposed revisions to the 50 CFR 402 regulations included: revision to the definitions of “environmental baseline” and “effects of the action” at § 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). The proposed revisions was noticed in the FR (88 FR 40753) with a 60-day public review and comment period. As part of the public review process, the Services also sought specific comments on the NEPA compliance, including comments detailing the extent to which the proposed revisions to the regulations may have a significant impact on the quality of the human environment or falls within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. Public input provided during the comment period was considered in the development of this EA.

The Services also conducted outreach to Federal and state agencies, industries regularly involved in Section 7(a)(2) consultation, Tribes, nongovernmental organizations, and other interested parties and invited their comment on the proposed revisions to the regulations. In addition, the Services held three informational webinars for Federally recognized Tribes in January 2023, before the proposed rule was published to provide a general overview and information on how to provide input on, a series of rulemakings related to implementation of the ESA that the Services were developing, including the proposed rule to revise the regulations at 50 CFR part 402. In July 2023, six informational webinars were held after the proposed rule was published to provide additional information to interested parties, including Tribes, industry groups, and environmental organizations. Over 500 attendees, including representatives from Federally recognized Tribes and Alaska Native Corporations, participated in these webinars, and the Services addressed questions from the participants as part of the webinars. The Services received written comments from Tribal organizations; however, no requests for coordination or government-to-government consultation from any Federally recognized Tribe were received.

A summary of the response to the substantive comments collected during the public comment period for the proposed rule is provided in Appendix B – *Proposed Action – (draft) Final Rule – Endangered Species Act, section 7 Regulations 50 CFR 402*.

2 Purpose and Need

The purpose of the proposed action is to further improve and clarify section 7(a)(2) interagency cooperation procedures by revising portions of the ESA implementing regulations at 50 CFR Part 402. The need for this action is to fulfill the objectives of Executive Order 13990, improve interagency cooperation procedures to meet statutory timelines and requirements, and address certain issues raised in litigation.

3 Alternatives

This section provides an explanation of how the Services formulated the reasonable range of alternatives, how screening criteria were used to evaluate which alternatives would be carried forward for detailed analysis, and the focused array of alternatives that were carried forward for detailed analysis in the EA. It also contains a summary of the more substantive differences among the alternatives. A more detailed comparison and analysis of the impacts of the alternatives, is provided in *chapter 4, Affected Environment and Environmental Consequences.*

3.1 Reasonable Range of Alternatives

For the purposes of this EA, the ESA section 7 regulations (50 CFR 402) issued in 2019 and that are currently in effect, represent the baseline conditions and constitute the No Action Alternative (Alternative 1). In addition to the No Action Alternative, the Services formulated four action alternatives discussed in more detail below.

Alternative 2 – This alternative would clarify the interagency consultation process by revising the following portions of the ESA section 7 regulations: the definitions of "effects of the action" and "environmental baseline," the responsibilities of the Federal agency and the Services regarding the requirement to reinitiate consultation, and removing § 402.17 "Other provisions." These revisions would improve the clarity of the regulations without causing any change in the existing practice of the Services in implementing section 7(a)(2) of the ESA.

Alternative 3 – This alternative would improve the interagency consultation process by revising portions of the ESA section 7 regulations at § 402.02 and § 402.14 regarding the scope of reasonable and prudent measures (RPMs) in an incidental take statement (ITS). These proposed revisions, allowing for the use of offsetting measures as RPMs, would represent a change to the Services' practice. However, the Services believe that these proposed revisions may contribute to the conservation goals of the ESA by addressing impacts of incidental take not minimized through measures confined to avoiding or reducing incidental take. Some impacts from incidental take may be more adequately addressed through offsetting measures.

Alternative 4 – (Proposed Action and Preferred Alternative) – Alternative 4 would be a combination alternative that would include all the proposed ESA, section 7 regulation revisions as described in Alternatives 2 and 3 as provided in *Appendix B, (draft) Final Rule for the Endangered Species Act, section 7 Regulations 50 CFR 402*.

Alternative 4 would be the Preferred Alternative because the proposed revisions to the regulations would be beneficial to further improve and clarify interagency ESA section 7 consultation, while also maximizing the conservation of listed species and associated habitats through inclusion of offsetting measures in some RPMs as compared to the other alternatives.

Alternative 5 – This alternative includes only the ESA section 7 regulations in effect prior to the 2019 rule. Thus, they include all revisions published prior to August 27, 2019.

The alternatives are summarized in Table 1.

Table 1. Summary of Alternatives

	2019 ESA section 7(a)(2) regulations with no changes	2019 ESA section 7(a)(2) regulations with proposed clarifications[2]	Offsets proposed as part of the Federal Action	2019 ESA section 7(a)(2) regulations with proposed revised scope of Reasonable and Prudent Measures (Including Offsets)
Alternative 1 – No Action Alternative	X		X	
Alternative 2 – 2019 ESA section 7 regulations with proposed clarifications		X	X	
Alternative 3 – ESA 2019 section 7 regulations with revised scope of RPMs			X	X
Alternative 4 (Preferred Alternative) – ESA 2019 section 7 regulations with clarifications and revised scope of RPMs		X	X	X
Alternative 5 – Pre ESA 2019 section 7 regulations			X	

3.2 Screening Criteria

Pursuant to the NEPA and the CEQ NEPA regulations, the Services considered a reasonable range of alternatives to the proposed action as well as the No Action Alternative. "Reasonable alternatives" means a reasonable range of alternatives that are technically and economically feasible and meet the purpose and need for the proposed action" (40 CFR 1508.1(z)).

The following screening criteria were utilized to evaluate the formulated range of alternatives and determine which alternatives would be carried forward for detailed

[2] The proposed clarifications are all clarifications provided in the June 22, 2023 proposed rule, except for change associated with the scope of RPMs.

analysis in the NEPA review. For alternatives to be carried forward for detailed analysis, they were required to meet the following screening criteria:

- Comply with the mandates of the ESA;
- Improve and clarify interagency ESA section 7 cooperation procedures;
- Comply with Executive Order 13990; and
- Comply with all other Federal laws and regulations.

Based on our review of the formulated range of reasonable alternatives (Table 1), all of the alternatives met the screening criteria and were therefore, carried forward for detailed analysis in the EA.

3.3 Final Array of Alternatives

This section contains a more detailed description of the alternatives carried forward for detailed analysis.

Alternative 1 – No Action Alternative – Retain the 2019 ESA section 7(a)(2) Regulations

With the No Action Alternative, the existing ESA section 7 regulations which include the 2019 revisions to the regulations, would be retained with no revisions. In large part, the 2019 rule codified agency practice that has been used for decades in administering ESA section 7 and included revisions for clarification purposes. However, the 2019 revisions incorporated a 60-day deadline for the Services to respond to requests for concurrence with a "may affect, not likely to adversely affect" determination and an exemption to the requirement to reinitiate consultation for newly listed species or critical habitat designations with respect to certain Bureau of Land Management (BLM) and U.S. Forest Service (USFS) land and resource management plans that were enacted by Congress in the 2018 Consolidated Appropriations Act.

A 60-day deadline, subject to extension by mutual consent, for informal consultations was established in the 2019 regulations by adding the following language to § 402.13(c), "(2) Upon receipt of a written request consistent with paragraph (c)(1) of this section, the Service shall provide written concurrence or non-concurrence with the Federal agency's determination within 60 days. The 60-day timeframe may be extended upon mutual consent of the Service, the Federal agency, and the applicant (if involved), but shall not exceed 120 days total from the date of receipt of the Federal agency's written request consistent with paragraph (c)(1) of this section." This change to the informal consultation process is limited to only the written request for concurrence and the Service's response. It did not affect the flexibility in discussions and timing inherent in the portion of the informal consultation process that is intended to assist the Federal agency in determining whether formal consultation is required. The changes at § 402.13(c) do not alter or apply to the Services' review of and response to biological assessments prepared for major construction activities, as outlined at § 402.12.

Although the 2019 ESA section 7 regulations provided clarity and regulatory certainty for Federal agencies and applicants regarding the informal consultation process, it is not substantially different from the Services' practice prior to the 2019 rule. The Services always worked with the action agency to ensure adequate information was provided to informally consult and once complete information was received, the Services would respond within 60 days to the best of their ability. In addition, this change is merely a process framework change and does not affect the biological determinations or outcomes of the consultation process. As a result, there would be no anticipated differences in effects to the human environment between the ESA section 7 regulations in place prior to August 27, 2019, and the 2019 regulations.

An exemption to the requirement to reinitiate consultation for newly listed species or newly designated critical habitat with respect to certain BLM and USFS land and resource management plans was established in the 2019 ESA section 7 regulations to address issues arising under the Ninth Circuit's decision in Cottonwood Environmental Law Center v. U.S. Forest Service, 789 F.3^{d} 1075 (9th Cir. 2015), cert. denied, 137 S. Ct. 293 (2016) and to align with language in the 2018 Consolidated Appropriations Act enacted by Congress. With the 2019 rule, the Services extended the Congressional exemption to all eligible BLM lands under the Federal Land Policy and Management Act of 1976, as amended ((43 U.S.C. 1701 *et seq.;* FLPMA). This revision added the following new paragraph in § 402.16: "(b) An agency shall not be required to reinitiate consultation after the approval of a land management plan prepared pursuant to 43 U.S.C. 1712 or 16 U.S.C. 1604 upon listing of a new species or designation of new critical habitat if the land management plan has been adopted by the agency as of the date of listing or designation, provided that any authorized actions that may affect the newly listed species or designated critical habitat will be addressed through a separate action-specific consultation. This exception to reinitiation of consultation shall not apply to those land management plans prepared pursuant to 16 U.S.C. 1604 if: (1) Fifteen years have passed since the date the agency adopted the land management plan prepared pursuant to 16 U.S.C. 1604; and (2) Five years have passed since the enactment of Pub. L. 115-141 [March 23, 2018] or the date of the listing of a species or the designation of critical habitat, whichever is later."

Although this revision resulted in a change in practice by Federal action agencies and the Services for programmatic consultations on land management plans for which the above language applies, a separate consultation must still occur for any actions implemented under the plan that may affect the newly listed species or designated critical habitat, for new land use plans, or for the revision or significant change to an existing land use plan. Thus, consultation under section 7 will continue for those actions that "may affect" a newly listed species or newly designated critical habitat; including a jeopardy analysis for newly listed species and an analysis of destruction or adverse modification for newly designated critical habitat for actions that "may affect, and are likely to adversely affect" the newly listed species or newly designated critical habitat.

A copy of the current 2019 ESA, section 7 regulations is provided in Appendix A.

Alternative 2 –Procedural Clarifications to the 2019 ESA Section 7 Regulations.

With this alternative, proposed revisions to the 2019 ESA section 7 regulations would retain the intent of the current 2019 ESA section 7 regulations while providing clarifications on the consultation procedures and process. The proposed revisions would not alter the existing practice in conducting ESA section 7(a)(2) consultations.

The proposed text clarifications to the ESA section 7 regulations are summarized in Table 2 and are not anticipated to result in any change in the Services' determinations as to whether actions are likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. For a more detailed explanation of the reasoning for the regulatory amendments for Alternative 2, please refer to the rule preamble provided in *Appendix B, Proposed Action – (draft) Final Rule - Endangered Species Act, section 7 Regulations 50 CFR 402.*

Table 2. Procedural Revisions to Clarify Endangered Species Act, Section 7 Regulations

Section of 2019 ESA section 7 Regulation (50 CFR 402)	**Proposed Regulation Revisions**
§ 402.17 Other Provisions	§ 402.17 would be removed in its entirety
§ 402.02 Definition of "Effects of the Action"	The phrase "but that are not part of the action" from § 402.17 would be moved to the end of the first sentence in the definition of "effects of the action" in § 402.02 and the parenthetical reference to § 402.17 would be removed.
§ 402.02 Definition of "Environmental Baseline"	The definition of environmental baseline would be clarified. The term "consequences" would be replaced with the term "impacts." We would remove the term "ongoing" and add the term "Federal" in two locations.
§ 402.16 (a) Reinitiation of Consultation	The words "or by the Service" would be removed.

Alternative 3 – 2019 ESA Section 7 Regulations with Revised Scope of Reasonable and Prudent Measures

With this alternative, the 2019 ESA section 7 regulations would be retained, but would include only the proposed rule revision to expand the scope of RPMs to include offsetting in an ITS. The revisions included in Alternative 2 (Table 2) would not be included in this alternative.

The regulatory revisions in this alternative, would clarify that, after considering measures that avoid or reduce incidental take within the action area, the Services may consider measures that offset any remaining impacts of incidental take that cannot be avoided as RPMs in an ITS. Mechanisms could be used as offsetting measures included in RPMs and their implementing terms and conditions, such as conservation

banks[3], in-lieu fee programs[4], and other kinds of mitigation devices established previously by project proponents. The current availability of third-party offset mechanisms (i.e., conservation banks, in-lieu fee programs, etc.) varies greatly across the country and by fish and wildlife species, and this availability would be an important factor the Services will consider when determining whether measures are necessary or appropriate to minimize the impact of incidental take.

The Services would place a priority on measures that avoid or reduce incidental take over offsetting measures. If impacts from incidental take cannot be feasibly minimized through measures that avoid or reduce incidental take, the Services would then consider offsetting measures to minimize the residual impacts of incidental take in the action area. After considering whether offsetting measures can feasibly be applied within the action area, the Services may then consider specifying offsets outside of the action area to minimize the impacts of incidental take caused by the action subject to consultation. In summary, the steps would be as follows:

1. Avoid or reduce, within the action area, the impact of incidental taking on the species.
2. Offset, within the action area, the impact of incidental taking on the species.
3. Offset, outside the action area, the impact of incidental taking on the species.

There are several statutory and regulatory standards that would govern the application of offsetting measures. First, only after fully considering measures that would avoid or reduce incidental take would the Services consider specifying measures that offset the residual impacts of incidental take that cannot feasibly be avoided. The Services expect that in many circumstances, measures that avoid or reduce incidental take within the action area would be all that is necessary or appropriate to minimize the impacts of incidental take.

Second, the Services would coordinate with the action agency and applicant, if any, as appropriate, on the development of offsetting measures. This coordination is essential to ensure that RPMs are within a Federal action agency's and applicant's authority or discretion to implement. All RPMs, including offsetting measures, must be reasonable and prudent; any RPMs, including those consisting of offsetting measures, that are not within a Federal action agency's (or applicant's) authority or discretion to implement would not be reasonable and prudent. Measures that are not economically or

[3] Conservation bank is defined as a site, or suite of sites, that is conserved and managed in perpetuity and provides ecological functions and services expressed as credits for specified species that are later used to compensate for impacts occurring elsewhere to the same species.

[4] In-lieu fee program defined as a program involving the restoration, establishment, enhancement, and/or preservation of habitat through funds paid to a governmental or nonprofit natural resources management entity to satisfy compensatory mitigation requirements for impacts to specified species or habitat (modified from 33 CFR 332.2).

technologically feasible may also not be reasonable and prudent to minimize the impacts of incidental take.

Third, the impact of the incidental take on the species caused by the action would provide the upper limit on the scale of any offsetting measures. Only offsetting measures that are necessary or appropriate to minimize the impacts of incidental take would be specified as RPMs. Thus, RPMs, including those consisting of offsetting measures, would be proportional to the impacts of incidental take caused by the action and not be required to provide a net benefit to the species.

Fourth, as with all RPMs, monitoring and reporting requirements would be required as part of the terms and conditions to implement the RPMs included in the ITS.

Lastly, the proposed revision to the scope of RPMs does not change the Services' long-standing practice of working with Federal action agencies and applicants in developing "conservation measures," as defined in the Services 1998 Endangered Species Consultation Handbook, that may be voluntarily incorporated as part of the "action" to minimize adverse effects. In fact, the Services have a long history of working with Federal action agencies and applicants (if any) to develop these voluntary measures, some of which include offsets, to produce strong conservation outcomes. The Services' expertise gained in developing offsetting measures that may be incorporated as part of the action will be used in the development of offsets included as RPMs.

These revisions are in alignment with the Services' initiatives to develop efficiencies and holistic approaches to conserving and recovering Federally listed species. The regulatory changes were developed in consideration of existing regulatory frameworks (e.g., Clean Water Act Section 404(b)(1) Guidelines) used by permitting agencies with whom the Services have routinely worked in the conservation of listed species. As part of the Services' initiatives aimed at leveraging other conservation efforts and building consistency and efficiencies in planning and implementing resource offsets, this regulatory revision promotes conservation at a landscape scale to help achieve the conservation purposes of the ESA. In promoting these purposes, the revision would provide flexibility to the Services to specify measures to address impacts from incidental take that cannot be feasibly addressed through measures that avoid or reduce incidental take. To the extent that RPMs may not be feasible within the action area, the revision provides the flexibility to specify offsets within locations outside of the action area that serve as areas for species' survival, reproduction, or distribution, providing benefits to the species on a landscape scale.

The proposed revisions are not anticipated to result in any change in the Services' determinations as to whether actions are likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. Furthermore, the proposed revisions do not change the statutory or regulatory timeframes. The proposed revisions to the 2019 ESA section 7 regulations are summarized in Table 3.

For a more detailed explanation of the reasoning for the regulatory amendments for Alternative 3, please refer to the rule preamble provided in *Appendix B, Proposed Action – (draft) Final Rule - Endangered Species Act, section 7 Regulations 50 CFR 402.*

Table 3. Proposed Revisions to ESA Section 7 Regulations Regarding the Scope of RPMs

Section of 2019 ESA, section 7 regulation	**Proposed Regulation Revision**
§ 402.02 Definition of "Reasonable and Prudent Measures"	The term "believes" would be replaced with the term "considers." The clause "impacts, i.e., amount or extent of incidental take" would be replaced with "impact of the incidental take on the species."
§ 402.14 Formal Consultation	Text would indicate the RPMs are not limited solely to reducing incidental take and may occur outside the action area. A new paragraph would be added that clarifies that offsets within or outside the action area can be required to minimize the impact of incidental taking on the species without violating the minor change rule.

Alternative 4 (Action and Preferred Alternative) – 2019 ESA Section 7 Regulations with Clarifications and Revisions to the Scope of Reasonable and Prudent Measures

Alternative 4 is a combination that would contain the proposed revisions to the ESA section 7 regulations described in Alternative 2 and Alternative 3 and as provided in *Appendix B, Proposed Action – (draft) Final Rule - Endangered Species Act, section 7 Regulations 50 CFR 402.*

Alternative 4 is the Services' Preferred Alternative. The revisions to the implementing regulations improve and clarify the section 7 consultation process to ensure that any action authorized, funded, or carried out by Federal agencies, in whole or in part, is not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat.

These revisions would not be anticipated to result in any change in the Services' determinations as to whether actions are likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. For a more detailed explanation of the reasoning for the regulatory amendments for Alternative 4, please refer to the rule preamble provided in *Appendix B, Proposed Action – (draft) Final Rule - Endangered Species Act, section 7 Regulations 50 CFR 402.*

Alternative 5 - Pre ESA 2019 Section 7(a)(2) Regulations

This alternative would only include the ESA section 7 regulations that were in effect prior to the 2019 rule. Thus, they include all revisions published prior to August 27, 2019.

This alternative does not include the 2019 revisions, most of which were merely codifying existing practice of the Services. However, the 60-day deadline for informal consultation and the exemption to the requirement to reinitiate consultation for newly listed species or critical habitat designations for certain BLM and USFS land and resource management plans were changes to the Services practice, and as such are not included in this alternative.

A copy of the ESA section 7 regulations in effect prior to the 2019 rule is provided in *Appendix C, Pre-2019 Endangered Species Act section 7 Regulations 50 CFR 402.*

3.4 Comparison of Alternatives

Pursuant to the CEQ NEPA regulations (40 CFR 1502.14), this section, as provided in Table 4, summarizes the anticipated impacts of the proposed action and the reasonable range of alternatives to the human environment in comparative form based on the information and analysis presented in *chapter 4, affected environment and environmental consequences*. For a more thorough discussion of anticipated impacts of each of the alternatives to the human environment, please refer to *chapter 4, affected environment and environmental consequences*.

The following terminology is used throughout this section and the EA to help describe the anticipated intensity of effects of the proposed action and the reasonable range of alternatives:

- Beneficial effects – those impacts to the human environment that provide desirable situations or outcomes
- Negative impacts – those impacts to the human environment that provide an undesirable situation or outcome
- Negligible effects – slight impacts that would not typically be detectable and in some instances, may also not be observable.
- Minor– effects - impacts that are detectable, and in some instances, observable, but that would not approach a threshold of significance as defined in the NEPA section 102(2)(C), CEQ NEPA regulations (40 CFR 1501.3(b)), or FWS Policy (550 FW 3).

The duration of the potential impact can be defined as either short-term or long-term and indicates the anticipated period of time during which the resource would be impacted. Duration takes into account the permanence of an effect or the potential for natural attenuation of an effect. For the purposes of this analysis, the duration of each potential impact is defined as follows:

- Short-Term effect: A known or potential effect of limited duration, relative to the proposed alternative and the resource impacted. For the purposes of this analysis, these impacts may be instantaneous or may last approximately minutes, hours, or days.
- Long-Term effect: A known or potential effect of extended duration, relative to the proposed alternative and the resource impacted. For the purposes of this analysis, these improvements or disruptions to a given resource would last approximately a year or longer.

Table 4. Comparison of Alternatives

	Threatened and Endangered Species and Associated Habitats	Non-Listed Species	Economics	Communities and Environmental Justice Communities	Air Quality and Greenhouse Gas Emissions	Land cover and Land Use
Alternative 1 – No Action Alternative	Federal agencies would continue to include (voluntary) offsetting in proposed actions serving to provide minor, long-term benefits. Continued construction, maintenance, and operation of conservation banks, in-lieu fee sites, and Federal action agency-responsible offsetting sites and restoration projects may result in some temporary, negative, negligible to minor effects. Following construction they would provide minor, long-term benefits.	Federal agencies would continue to include (voluntary) offsetting in proposed actions serving to provide minor, long-term benefits. Construction, operation, and maintenance of offsetting sites may result in minor, negative effects that would be temporary in duration. The beneficial and negative effect of the conservation banks, in-lieu fee funds, and Federal agency-responsible offsetting impacts to non-listed species would be similar to those described for threatened and	Labor expenditures resulting from ESA section 7 consultations would continue in response to Federal project needs. Federal agencies would be anticipated to fund expenditures to continue voluntary offsetting of fish and wildlife incidental take in proposed actions. Offsetting resulting from state regulatory requirements and local practices would continue. Federal agencies and nongovernmental agencies and entities, and	Existing and continued creation of conservation banks, in-lieu fee programs, and (voluntary) Federal agency-responsible offsetting could result in limited air, noise, and traffic-related impacts to communities which could potentially include communities with environmental justice concerns. Impacts would be short-term and would largely be mitigated by adhering to Federal, state, and local regulatory requirements. Existing and continued creation of conservation banks, in-lieu fee programs, and Federal agency-	Effects to air quality resulting from (voluntary) offsetting activities included in a proposed Federal action would continue. Temporary impacts from conservation banks, in-lieu fee program sites, and Federal action agency-responsible offsetting sites would potentially result in negative, minor, short-term greenhouse gas emissions. However, for offsetting that creates or enhances vegetated habitat, there would also be anticipated, long-term net	Voluntary offsetting measures included in the proposed action in some instances could potentially result in changes in a land use from a non-conservation land use to a conservation land use. Offsetting measures included in the proposed action could potentially also result in changes to land cover. Land cover and land use in the U.S. would continue to flux over time from development and urbanization, wildfires and fires, changes in agricultural lands and practices, restoration projects, land

	Threatened and Endangered Species and Associated Habitats	Non-Listed Species	Economics	Communities and Environmental Justice Communities	Air Quality and Greenhouse Gas Emissions	Land cover and Land Use
	Threats to threatened and endangered species would be anticipated to continue. Effects would range from negligible to minor, short-term, negative effects to minor, long-term, beneficial effects.	endangered species. Biodiversity of non-listed species may also increase at the offsetting sites. Threats to non-listed species would be anticipated to continue. Effects, including cumulative effects, would range from negligible to minor, short-term, negative effects to minor, long-term, beneficial effects.	private individuals would continue to expend labor and purchase conservation banking and in-lieu fee program funds and fund compensatory mitigation projects for threatened and endangered species. Effects, including cumulative impacts, to the species conservation banking/in-lieu market industry and related labor rates would be anticipated to result in minor, long-term benefits. Labor and other Federal agencies' cost expenditures, including cumulative impacts, would be minor and range in duration from	responsible offsetting results would also potentially result in benefits to ecosystem services for air quality, water quality, and recreation. Effects of implementation of Alternative 1 to communities, that could potentially include those with environmental justice concerns, including potential cumulative effects, would be anticipated to be minor and range from short-term, negative effects to long-term, beneficial effects.	beneficial effects to air quality. Effects, including potential cumulative effects, would be anticipated to be minor and range from short-term, negative effects to long-term, beneficial effects.	changes and loss due to climate effects, and other natural and land management practices. Effects, including cumulative impacts, would be anticipated to be minor, beneficial to negative, and range from short-term to long-term effects.

	Threatened and Endangered Species and Associated Habitats	Non-Listed Species	Economics	Communities and Environmental Justice Communities	Air Quality and Greenhouse Gas Emissions	Land cover and Land Use
			short-term to long-term effects.			
Alternative 2 – 2019 ESA section 7 regulations with proposed clarifications	The regulatory text clarifications would not result in any effects to threatened and endangered species. Effects, including cumulative effects, would be as those described for Alternative 1.	The regulatory text clarifications would not result in any effects to non-listed species. Effects, including cumulative effects, would be as those described for Alternative 1.	The proposed revisions to further clarify the consultation process, provided in Alternative 2, may lead to improved consultation packages and biological assessments. Improved consultation packages and biological assessments would potentially result in a reduction in consultation timelines and labor expenditures. This would potentially result in long-term economic improvements and reduced administrative burden to both the	Effects to communities, that could potentially with those with environmental justice concerns, including cumulative effects, for Alternative 2 would be as those described for Alternative 1.	Effects to air quality, including cumulative effects, for Alternative 2 would be as those as described for Alternative 1.	Effects to land use for Alternative 2, including cumulative impacts, would be as those as described for Alternative 1.

	Threatened and Endangered Species and Associated Habitats	Non-Listed Species	Economics	Communities and Environmental Justice Communities	Air Quality and Greenhouse Gas Emissions	Land cover and Land Use
			Services and other Federal agencies. Effects of Alternative 2, including cumulative impacts, to the species conservation banking/in-lieu market industry and related labor rates would be anticipated to result in minor, long-term benefits. Labor and other Federal agencies' cost expenditures, including cumulative impacts, would be minor and range in duration from short-term to long-term effects.			
Alternative 3 – ESA 2019 section 7 regulations with revised scope of RPMs	Alternative 3 would increase conservation of the listed species for those formal consultations where offsetting	Alternative 3 would increase conservation of some non-listed species for those formal consultations	This alternative includes the 2019 regulations and as such, the impacts would be a combination of those described for	Although uncertain, creation of additional conserved habitat through offsetting measures has the potential to benefit	Effects to air quality would be similar to those as described for Alternative 1 and Alternative 2 but the impacts would	Voluntary offsetting measures included in the proposed action by a Federal agency and offsetting

	Threatened and Endangered Species and Associated Habitats	Non-Listed Species	Economics	Communities and Environmental Justice Communities	Air Quality and Greenhouse Gas Emissions	Land cover and Land Use
	RPMs are included which would be anticipated to result in additional conservation areas that benefit threatened and endangered fish and wildlife species and associated habitats. Construction, operation, and maintenance of offsetting sites would be anticipated to result in minor, negative effects that would be temporary in duration. Alternatives 3 and 4 would maximize long-term benefits to threatened and endangered species as compared to Alternatives 1,2, or 5.	where offsetting RPMs are included which would be anticipated to result in additional conservation areas that benefit associated non-listed species and habitats. Construction, operation, and maintenance of offsetting sites would be anticipated to result in minor, negative effects that would be temporary in duration. Alternatives 3 and 4 maximize long-term benefits to non-listed species as compared to Alternatives 1,2, or 5. Effects of implementation of Alternative 3, including potential	Alternative 1, including cumulative impacts, in addition to those below. Although uncertain, the inclusion of additional RPMs to offset impacts from incidental take, as applicable, may result in additional market demand and creation of additional ESA conservation banks and in-lieu fee programs by private enterprises or other entities. Federal agencies could experience increased expenditures from offsetting RPMs for applicable consultations, although some Federal projects and programs already commonly	communities potentially including those with environmental justice concerns. Existing and continued creation of conservation banks, in-lieu fee programs, and Federal agency-responsible offsetting results in benefits to ecosystem services such as improvements in air and water quality, climate regulation, and potentially recreation (where recreation is allowed) that benefit the public. The benefits to ecosystem services may result in community level benefits that may potentially benefit communities	be anticipated to be increased for Alternatives 3 and 4 as compared to Alternative 1, 2, or 5 because Alternatives 3 and 4 would potentially include offsetting RPMs included by the Services for applicable consultations. Although uncertain, we would anticipate that Alternatives 3 and 4 would have the most beneficial, long-term effects to air quality because RPMs with offsetting that may include habitat restoration or land conservation would maximize long-term carbon sequestration benefits as compared to Alternatives 1, 2, or 5.	measures included by the Services in RPMs could potentially result in changes in a land use from a non-conservation land use to a conservation land use. We would anticipate more land use changes resulting in additional conservation lands with Alternatives 3 and 4 as compared to Alternatives 1, 2, or 5. Effects, including cumulative impacts, would be anticipated to be minor, beneficial to negative, and range from short-term to long-term effects.

	Threatened and Endangered Species and Associated Habitats	Non-Listed Species	Economics	Communities and Environmental Justice Communities	Air Quality and Greenhouse Gas Emissions	Land cover and Land Use
	Effects of, including potential cumulative effects, would be anticipated to be minor and anticipated to range from short-term, negative effects to long-term, beneficial effects.	cumulative effects, would be anticipated to be minor and anticipated to range from short-term, negative effects to long-term, beneficial effects.	include offsetting measures in their proposed actions for ESA section 7 consultations. Additional offsetting sites could potentially result in more cost-efficient offsetting options. Effects of Alternative 3, including cumulative impacts, to the species conservation banking/in-lieu market industry and related labor rates would be anticipated to result in minor, long-term benefits. Labor and other Federal agencies' cost expenditures, including cumulative impacts, would be minor and range in duration from	including those with environmental justice concerns. Overall, the net effect to communities some of which may include those with environmental justice concerns would be long-term, beneficial impacts. Alternatives 3 and 4 provide the most benefits to communities, potentially including those with environmental justice concerns, as compared to Alternatives 1, 2, or 4. Effects, including potential cumulative effects, would be anticipated to be minor and range from short-term, negative effects to	Effects, including potential cumulative effects, would be anticipated to be minor and range from short-term, negative effects to long-term, beneficial effects.	

	Threatened and Endangered Species and Associated Habitats	Non-Listed Species	Economics	Communities and Environmental Justice Communities	Air Quality and Greenhouse Gas Emissions	Land cover and Land Use
			short-term to long-term effects.	long-term, beneficial effects.		
Alternative 4 (Preferred Alternative) – ESA 2019 section 7 regulations with clarifications and revised scope of RPMs	The effects of Alternative 4 to threatened and endangered species and associated habitats, including cumulative effects, would be as those described for Alternative 3.	Effects of Alternative 4 to non-listed species and associated habitats, including cumulative effects, would be as those described for Alternative 3.	Effects would be a combination of those described for Alternative 2 and Alternative 3 including cumulative effects. We anticipate this alternative would have the most substantial beneficial and negative economic impacts as it would maximize labor efficiencies with the regulatory text clarifications but also potentially affect Federal agencies with additional costs from offsetting. Similar to Alternative 3, this alternative would maximize benefits to landowners and private enterprises that may benefit from increased demand and	The effects of Alternative 4 would be as those described for Alternative 3. Effects of Alternative 4 to communities and potentially those with environmental justice concerns, including potential cumulative effects, would be anticipated to be minor and range from short-term, negative effects to long-term, beneficial effects.	Effects to air quality and greenhouse gas emissions of Alternative 4 would be as those described for Alternative 3. Effects, including potential cumulative effects, would be anticipated to be minor and range from short-term, negative effects to long-term, beneficial effects.	Effects would be as those described for Alternative 3, including cumulative effects. Effects, including cumulative impacts, would be anticipated to be minor, beneficial to negative, and range from short-term to long-term effects.

	Threatened and Endangered Species and Associated Habitats	Non-Listed Species	Economics	Communities and Environmental Justice Communities	Air Quality and Greenhouse Gas Emissions	Land cover and Land Use
			expenditures for conservation banks. Effects of Alternative 4, including cumulative impacts, to the species conservation banking/in-lieu market industry and related labor rates would be anticipated to result in minor, long-term benefits. Labor and other Federal agencies' cost expenditures, including cumulative impacts, would be minor and range in duration from short-term to long-term effects.			
Alternative 5 - Pre ESA 2019 section 7 regulations	Effects to threatened and endangered species and associated habitats for Alternative 5,	Effects, including cumulative effects, would be as those described for Alternative 1.	Effects, including cumulative effects, would be as those described for Alternative 1.	Effects to communities, including those potentially with environmental justice concerns, for Alternative 5,	Effects to air quality for Alternative 5, including potential cumulative effects, would be as those	Effects to land use for Alternative 5, including cumulative effects, would be as those described for Alternative 1.

	Threatened and Endangered Species and Associated Habitats	Non-Listed Species	Economics	Communities and Environmental Justice Communities	Air Quality and Greenhouse Gas Emissions	Land cover and Land Use
	including cumulative effects, would be as those described for Alternative 1.			including potential cumulative effects, would be as those described for Alternative 1.	described for Alternative 1.	

4 Affected Environment and Environmental Consequences

This section describes the existing human environment found within the Region of Influence (ROI), which is the area of potential impact of the project alternatives. This section summarizes the existing (baseline) conditions of the No Action Alternative to provide a sound basis for alternatives formulation as described in chapter 3 and the impact analysis. This section also describes the anticipated impacts to the human environment of the focused array of project alternatives, which consists of the proposed action and the reasonable range of alternatives. Potential cumulative effects to each resource are also considered in this chapter. Cumulative effects are those potential effects that result from the incremental impact of the action when added to other past, present, and reasonably foreseeable actions.

4.1 Threatened and Endangered Species

4.1.1 Threatened and Endangered Species and Associated Habitats Affected Environment

Federally listed species are those plant or animal species listed by the Services as threatened or endangered pursuant to section 4 of the ESA and its implementing regulations, 50 CFR 424. Critical habitat is designated per 50 CFR parts 17 or 226 and defines those habitats that are essential for the conservation of a Federally threatened or endangered species and that may require special management and protection.

According to the ESA, an “endangered species” is defined as any plant or animal species in danger of extinction throughout all or a substantial portion of its range. A “threatened species” is any species likely to become an endangered species in the foreseeable future throughout all or a substantial part of its range. “Proposed Species” are animal or plant species proposed in the FR to be listed in the ESA. “Candidate species” are species for which the Services have sufficient information on their biological status and threats to propose them as endangered or threatened pursuant to the ESA.

Based on data provided in the Environmental Conservation Online System (ECOS), as of March 15, 2024, the FWS has jurisdiction over 2,367 Federally listed endangered and threatened species including 1,668 in the U.S. (1,251 endangered; 417 threatened) and 699 foreign species (601 endangered; 98 threatened) in habitats such as terrestrial, freshwater, and estuarine habitats (FWS 2024). Twenty-four animal species (16 in the U.S. and eight foreign) are counted more than once primarily because these animals have distinct population segments (each with its own individual listing status). As of March 15, 2024, the NMFS has jurisdiction over 165 Federally listed endangered and threatened marine species (80 endangered; 85 threatened), including 66 foreign species (40 endangered; 26 threatened) (NMFS 2024).

Approved, operational conservation banks with available credits for Federally listed threatened and endangered fish and wildlife species are extremely limited based on available data in the Regulatory In-Lieu Fee and Bank Information Tracking System

(RIBITS; U.S. Army Corps of Engineers 2024). As of March 20, 2024, we estimate there are a total of 111 available, operational conservation banks for Federally listed fish and wildlife species located in 15 states and one U.S. territory (RIBITS 2024). Most banks are for Federally listed fish and wildlife species under the jurisdiction of the FWS (estimated total of 110 banks) as compared to those under the jurisdiction of the NMFS (estimated two banks with species both under the jurisdiction of the FWS and one bank solely with species under the jurisdiction of the NMFS).

Based on the RIBITS (2024) data, conservation banks under the jurisdiction of the FWS are estimated to cover 35 different species of amphibians, birds, fishes, invertebrates, reptiles, and mammals. The conservation banks under the jurisdiction of the NMFS are limited to a limited number of fish species: steelhead (rainbow trout) and salmonid species (RIBITS did not detail which salmonid species but based on the bank location, we anticipate these banks likely cover chinook salmon and potentially coho salmon) (RIBITS 2024). Estimated approved, operational conservation banks for Federally listed fish and wildlife species cover less than approximately 10% of listed fish and wildlife species (ECOS 2024; RIBITS 2024). The estimated majority of the banks and in-lieu fee programs for Federally listed fish and wildlife species are heavily concentrated in California (68%), followed by Florida (10%), and Texas (5%) (RIBITS 2024). As of March 20, 2024, the RIBITS showed no in-lieu fee sites available for Federally listed fish and wildlife species. It is uncertain if all conservation banks and in-lieu fee programs for Federally listed fish and wildlife species are adequately documented and contain up-to-date information in RIBITS.

The following information is provided to give the reader a background on the regulations at 50 CFR 402 to better understand the effects analysis that follows.

Section 7 of the ESA requires Federal agencies, in consultation with and with the assistance of the Services to ensure any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Federal agencies must consult with the Services when the Federal agency determines their project may affect a listed species or designated critical habitat. As part of that process, the Services work with the Federal agency and applicants to initiate and complete ESA section 7 consultation.

Informal consultation includes all discussions, correspondence, etc., between the Services and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation is required. If at any point the Federal agency determines that their action has no effect on listed species or critical habitat, no further consultation with the Services is necessary. Furthermore, at the conclusion of informal consultation, if the Federal agency determines their action may affect, but is not likely to adversely affect, listed species or designated critical habitat, and the Service(s) concurs in writing, then the consultation process concludes. However, if the Federal agency determines their action is likely to adversely affect listed species or designated critical habitat, or the Service(s) does not

concur with the Federal agency's determination the action is not likely to adversely affect listed species or designated critical habitat, formal consultation is required.

Formal consultation is defined in § 402.02 as a process between the Services and the Federal agency that commences with the Federal agency's written request for consultation and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the ESA. The functions of a biological opinion include, but are not limited to, the following: (1) providing a detailed discussion of the nature and extent of the effects of Federal actions on listed species and designated critical habitat, and (2) providing the Services' opinion as to whether the Federal agency has ensured the proposed action is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of designated critical habitat and, if so, proposing reasonable and prudent alternatives to avoid jeopardy or destruction/adverse modification of critical habitat. The functions of an ITS in a biological opinion include, but is not limited to, the following: (1) specifying the amount or extent of anticipated incidental take caused by the action, or reasonable and prudent alternative, and providing an exemption from liability for "incidental take" otherwise prohibited by the ESA, and (2) providing RPMs (and terms and conditions to implement them) that minimize the impacts of the anticipated incidental take to listed species.

Federal agencies commonly include avoidance and minimization measures, including offsetting measures, as part of their proposed action to help ensure their actions are not likely to result in jeopardy or destruction or adverse modification. Specifically, regarding offsetting measures, several different action agencies in various locations throughout the country already readily include offsetting measures as part of their project descriptions. This practice of including offsets as part of the proposed action being evaluated in a consultation is not uncommon. Examples of these types of consultations that incorporate offsetting measures into the proposed action include programmatic consultations, intra-service consultations on ESA section 10(a)(1)(B) permits that require non-Federal applicants to minimize and mitigate impacts of incidental take through habitat conservation plans, and certain consultations regarding transportation projects.

Offsetting measures may also be included as part of the proposed action when offsetting is already planned pursuant to other state or Federal regulatory requirements (e.g., California Environmental Quality Act and the Clean Water Act section 404 permitting requirements) or local requirements. For example, NEPA implementing regulations require lead agencies to consider feasible mitigation measures to avoid, reduce, or compensate for an action's environmental impacts. Credit stacking which allows a single unit of a mitigation site to provide compensation for two or more spatially overlapping ecosystem functions or services that are grouped together into a single credit type and used as a single commodity to compensate for a single permitted action, is sometimes permissible which allows a single unit of a mitigation site to provide compensation for two or more spatially overlapping ecosystem functions or services that

are grouped together into a single credit type and used as a single commodity to compensate for a single permitted action. Conservation banks, in-lieu fee programs, and other Federal action agency-responsible offsetting mechanisms would still be used to offset the impacts to natural resources, including ESA-listed species.

4.1.2 Threatened and Endangered Species and Associated Habitats Environmental Consequences

Alternative 1 – No Action Alternative

With the No Action Alternative, ESA section 7 consultations for Federally listed species and critical habitat would continue pursuant to the ESA and the 2019 ESA section 7 regulations. The exemption to the requirement to reinitiate consultation for newly listed species or newly designated critical habitat with respect to certain BLM and USFS land and resource management plans would continue to not effect threatened and endangered species because the effects to listed species and critical habitat would have been addressed through the consultation process at the time the plans were adopted, land and resource management plans would have no immediate-on-the-ground effects, and a separate consultation would still occur for implementation of any actions under the plans that may affect the newly listed species or designated critical habitat pursuant to the plan.

BLM and USFS have specific requirements regarding revising their land and resource management plans. The BLM is required to periodically evaluate and revise its Resource Management Plans (43 CFR part 1610), and reevaluation periods should not exceed five years (see BLM Handbook H-1601-1 at p. 34). The USFS is required to revise their land management plans at least every 15 years (see 36 CFR 219.7). Congress, in the Wildfire Suppression Funding and Forest Management Activities Act, limited the relief from reinitiation with respect to plans prepared pursuant to NFMA to only those plans that are up to date per requirements of BLM or USFS for timing of reevaluation and revisions to their plans.

Land and resource management plans may have long-lasting effects; however, those effects would have been addressed in a consultation when the plan was adopted. BLM and USFS land and resource management plans often consider how to manage for healthy ecosystems in development of the plans prior to adoption. This direction shifts management away from a species-by-species focus and towards healthy landscapes and habitats. If USFS or BLM amend or revise their land management plan for any reason, including due to a new listing or new critical habitat designation, those changes in the amended or revised land management plan would continue to be subject to consultation, if it may affect listed species or critical habitat.

Voluntary offsetting measures included in the project description of the proposed actions by some Federal agencies would continue, and conservation banks, in-lieu fee programs, and Federal action agency-responsible mechanisms that offset impacts

would continue to be used. Offsets provided in compliance with other Federal and state-driven regulatory requirements and local requirements may also continue.

Construction, maintenance, and operation of Federally listed species' conservation banks, in-lieu fee sites, and sites and restoration projects may result in some temporary, negative impacts to threatened and endangered species and associated habitats during construction and maintenance of the sites. Construction, maintenance, and monitoring activities associated with offsetting sites (both terrestrial and aquatic) may cause increased noise, sedimentation, light, and temporary discharge of pollutants during and after activities each day of construction. Noise and light are known stressors to some listed species and can cause avoidance behavior, thus displacing species for approximately minutes to hours during and after activities have ceased. Sedimentation, presence of crews and machinery, and the discharge of pollutants in the air and water may reduce the quality and suitability of habitats at a small scale while the pollutant and/or nuisance is present. This could cause species to avoid the area until the habitat has returned to a desirable quality and void of stressors. These avoidance and potential startle stressors would be short-term and the habitat and species function are expected to recover rapidly.

Continued construction, maintenance, and operation of Federally listed species' conservation banks, in-lieu fee sites, and Federal action agency-responsible offsetting sites and restoration projects may result in some temporary, negative, negligible to minor effects to Federally listed species and associated habitats. Noise and disturbance effects from temporary activities may result in some temporary species displacements and disruption of behaviors. Likewise, habitats may be temporarily disturbed by construction, maintenance and monitoring activities. For example, grading, soil displacement, and plantings and other construction and operational activities may temporarily cause negative, minor impacts to threatened and endangered species habitat including critical habitat. Existing Federally listed species' conservation banks, in-lieu fee programs, and Federal action agency-responsible voluntary offsetting sites, most of which would be conserved in perpetuity, would continue to provide long-term conservation benefits to threatened and endangered fish and wildlife species and associated habitats and thus aid in the recovery of listed species. Likewise, some restoration projects may also provide some minor, short-term negative impacts but would provide minor, long-term conservation benefits to threatened and endangered species and associated habitats.

Past, present, and future threats to endangered and threatened species and associated habitats resulting from impacts such as habitat loss and degradation, pollution effects, climate effects, and disease depending on the particular species at risk would continue. Threats would potentially be exacerbated for some species and associated habitats resulting from climate change and other threats in the future.

In summary, effects of implementation of Alternative 1 to threatened and endangered species and associated habitats, including potential cumulative effects, would range

from negligible to minor, short-term, negative effects to minor, long-term, beneficial effects.

Alternative 2 - 2019 ESA Section 7 Regulations with Clarifications

The clarifications addressed in Alternative 2 do not change the longstanding practice of the Services in implementing the regulations from that as considered in Alternative 1 above. Thus, these differences are not expected to result in any additional or different impacts to threatened and endangered species or associated habitats including critical habitats as described for Alternative 1. Effects of implementation of Alternative 2, including cumulative effects, would be as those described for Alternative 1.

Alternative 3 – 2019 ESA Section 7 Regulations with Revised Scope of Reasonable and Prudent Measures

Minimizing impacts of incidental take on the species through offsetting measures would be anticipated to result in improved conservation outcomes for species incidentally taken due to agency actions, reduce the accumulation of adverse impacts, and help the Services focus conservation efforts where they would be most beneficial to the species. Nonetheless, the offsetting measures would only apply to a limited subset of ESA section 7 consultations because they would only apply to formal consultations and historically most consultations are completed informally.

The Services would anticipate applying RPMs with offsetting measures to a limited number of formal consultations for which the biological opinion includes an ITS. The opportunities to use offsets would be limited to formal consultations that contain both an ITS and associated RPMs. Many formal consultations do not include an ITS such as: formal consultations on plants and/or critical habitat; framework programmatic consultations (where sufficient detail does not exist to include an ITS); and formal consultations where take is not reasonably certain to occur. Among the formal consultations that would include an ITS, not all contain RPMs for the following reasons: 1) No additional measures that would avoid or reduce incidental take are needed due to the sufficiency of the conservation measures included in the project description; or 2) No measures can be identified that do not conflict with the statutory and regulatory requirements of RPMs. By regulation, the RPM must be within the authority and discretion of the action agency or applicant to carry out, reasonable and prudent, at a scale that is necessary or appropriate, and consistent with the “minor change rule” (50 CFR 402.14(i))[5].

Even in the limited number of formal consultations that include an ITS and associated RPMs, the Services would not always include additional offsetting measures because they are restricted by the same statutory and regulatory requirements for RPMs described above. Also, some consultations would be able to address all impacts of

[5] 402.14(i): Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

incidental take to the species within the action area via a combination of conservation measures that are part of the proposed action and RPMs that avoid or reduce the impact of incidental take without offsets.

While we anticipate that offsetting measures would be used under limited circumstances, it is uncertain how many formal consultations would include offsetting measures as RPMs due to the tremendous variation in Federal actions subject to formal consultation, the specific impacts from these actions, the affected species that may be analyzed, and the uncertainty of future listings and status of existing listed species.

We anticipate there would be limited opportunities for Federal agencies to offset incidental take impacts with existing offsetting mechanisms because there would be limited existing banks and in-lieu fee programs available for individual fish and wildlife species and of the limited geographic extent of existing banks and in-lieu fee programs. The Services ability to identify available offsetting measures that are feasible and commensurate with the residual impacts of incidental take caused by the action may be limited based on information extracted from RIBITS. Other mechanisms for providing offsetting RPMs would also be limited based on availability of suitable habitat, cost feasibility, and Federal agency authorities.

Existing conservation banks and in-lieu fee programs would continue to be available to provide for offsetting of impacts to some threatened and endangered species in Federal proposed actions for ESA section 7 consultations, and as part of Habitat Conservation Plans under ESA section 10(a)(1)(B), as well as to meet state regulatory requirements, and local requirements. Although the revision to include offsetting RPMs may potentially result in some increase in credit purchases from existing listed species conservation banks and in-lieu fee programs, such increases would be uncertain. Although uncertain, expanding the scope of RPMs to include offsets would potentially increase demand for conservation banking credits and in-lieu fee programs by private, state, and other entities.

To the extent that some formal consultations would potentially include offsetting measures in RPMs in the form of purchasing credits at a mitigation bank or participating in in-lieu fee programs, any future additional banks and in-lieu fee programs would potentially provide ecosystem value and functions in larger tracts of permanently conserved habitat due to the Services' mitigation standards and general considerations. Larger tracts of conserved habitat would help preserve biodiversity and landscape features as well as would reduce habitat fragmentation and edge effects that can negatively impact smaller compensatory offsetting sites. However, we received no comments or information through the public comment process on the 2023 proposed rule suggesting the proposed revisions to the ESA section 7 regulations would increase the number of ESA conservation banks and in-lieu fee programs implemented and managed by private enterprises.

Alternative 3 would increase conservation of the listed species for those formal consultations where offsetting RPMs are included which would be anticipated to result in additional conservation areas that benefit threatened and endangered fish and wildlife species and associated habitats. Existing Federally listed species' conservation banks, in-lieu fee programs, and Federal action agency-responsible voluntary offsetting sites, most of which would be conserved in perpetuity, would continue to provide long-term conservation benefits to some Federally listed species and associated habitats and thus aid in the recovery of listed species. Conservation banks, in-lieu fee programs, and Federal action agency-responsible offsetting sites, most of which would be conserved in perpetuity, would provide minor, long-term conservation benefits to threatened and endangered fish and wildlife species and associated habitats and thus aid recovery of listed species.

The creation, enhancement, and preservation of habitat could potentially lead to additional habitat such as increased foraging and breeding sites for threatened and endangered fish and wildlife species. This could potentially help lead to threatened and endangered fish and wildlife recovery in a shorter period of time as compared to Alternative 1, 2 or 5. Thus, the inclusion of offsetting RPMs would have the potential, in some instances, to lead to a faster rate of listed species recovery.

The long-term monitoring and management that would occur at the offsetting sites would help assess and potentially address species and associated habitat needs in response to threats such as climate effects, pollution, and other changes over time. Thus, the increased management of species habitats over time would also serve to help benefit the fish and wildlife species and associated habitat over time. Benefits to threatened species and associated habitats would be anticipated to be minor and long-term in duration. However, such benefits are uncertain because, as stated before, it is not possible to know how many formal consultations would include offsetting measures as RPMs due to the tremendous variation in Federal actions subject to formal consultation, the specific impacts from these actions, and the affected species that may be analyzed. Moreover, although it is uncertain how many ESA, section 7 consultations would be affected, we anticipate that offsets would be used under limited circumstances. In addition, under the proposed revisions to the regulations, priority would be given to measures that reduce the impacts of incidental take on listed species through avoidance measures within the action area, thus, we anticipate that measures that avoid or reduce incidental take would often be all that are necessary or appropriate to minimize the impacts of incidental take. The requirement that RPMs be reasonable and prudent based on economic and technological feasibility would also constrain the number of consultations affected by this proposed revision.

Construction, maintenance, and operation of Federally listed species' conservation banks, in-lieu fee sites, and Federal action agency-responsible offsetting sites and restoration projects may result in some temporary, negative impacts to threatened and endangered species and associated habitats during construction and maintenance of

the sites. Construction, maintenance and monitoring activities associated with offsetting sites (both terrestrial and aquatic) may cause increased noise, sedimentation, light, and temporary discharge of pollutants during and after activities each day of construction. Noise and light are known stressors to some listed species and can cause avoidance behavior, thus displacing species for approximately minutes to hours during and after activities have ceased. Sedimentation, presence of crews and machinery, and the discharge of pollutants in the air and water may reduce the quality and suitability of habitats at a small scale while the pollutant and/or nuisance is present. This could cause species to avoid the area until the habitat has returned to a desirable quality and void of stressors. These avoidance and potential startle stressors would be temporary and the habitat and species function are expected to recover rapidly.

The effects to threatened and endangered species and associated habitats resulting from construction, operation, and maintenance of offsetting sites would be anticipated to be minor, negative effects that would be short-term in duration. Existing and potential future Federally listed species' conservation banks, in-lieu fee programs, and Federal action agency-responsible voluntary offsetting sites, most of which would be conserved in perpetuity, would continue to provide long-term conservation benefits to threatened and endangered fish and wildlife species and associated habitats and thus aid in the recovery of listed species.

Past, present, and future threats to Federally listed species and associated habitats resulting from impacts such as habitat loss and degradation, pollution effects, climate effects, and disease depending on the particular species at risk would continue. Threats would potentially be exacerbated for some species and associated habitats resulting from climate change and other threats in the future. Offsets provided through compliance with other Federal and state-driven regulatory requirements and local requirements would likely continue and provide minor, long-term beneficial impacts to listed species and habitats. Current and potential future Federal and non-Federal restoration projects may also provide minor, long-term beneficial impacts to threatened and endangered species and associated habitats.

In summary, effects of implementation of Alternative 3 to threatened and endangered species and associated habitats, including potential cumulative effects, would be anticipated to be minor and anticipated to range from short-term, negative effects to long-term, beneficial effects.

Alternative 4 (Preferred Alternative) – 2019 ESA Section 7 Regulations with Proposed Clarifications and Revised Scope of Reasonable and Prudent Measures

Alternative 4 represents a combination of Alternative 2, clarifications to the 2019 ESA section 7 regulations, and Alternative 3, revised scope of RPMs. Thus, the effects of Alternative 4 to threatened and endangered species and associated habitats would be similar to those described in Alternative 3 above.

In summary, effects of implementation of Alternative 4 to threatened and endangered species and associated habitats, including potential cumulative effects, would be anticipated to be minor and anticipated to range from short-term, negative effects to long-term, beneficial effects.

Alternative 5 – Pre 2019 ESA Section 7(a)(2) Regulations

Effects to threatened and endangered species and associated habitats for Alternative 5 would be as those described for Alternative 1. This is because Alternative 5 is functionally equivalent to Alternative 1.

4.2 Non-listed Species and Associated Habitats

4.2.1 Non-listed Species and Associated Habitats Affected Environment

Non-listed species would consist of any plant or animal that is not Federally listed as a threatened or endangered species pursuant to section 4 of the ESA that would occur within the area of potential effect of an ESA, section 7 consultation or that could potentially be affected by construction, operation, maintenance, or monitoring activities at a threatened or endangered species conservation bank, in-lieu fee site, or Federal agency-responsible offsetting site.

Non-listed species could potentially include a variety of species of amphibians, fish, birds, invertebrates, mammals, and reptiles. Non-listed species could potentially include ESA candidate and proposed species, state-listed species, migratory birds, and species of concern. Various non-listed species have the potential to utilize existing and potential future offsetting sites as foraging, breeding, migratory stop over or resting sites.

4.2.2 Non-listed Species and Associated Habitats Environmental Consequences

Alternative 1 – No Action Alternative

Voluntary offsetting measures included in the project description of the proposed actions by some Federal agencies would continue, and conservation banks, in-lieu fee programs, and Federal action agency-responsible mechanisms that offset impacts would continue to be used. Offsets provided in compliance with other Federal and state-driven regulatory requirements and local requirements would also be anticipated to continue.

Construction, maintenance, and operation of Federally listed species' conservation banks, in-lieu fee sites, and Federal action agency-responsible offsetting sites and restoration projects may result in some temporary, negative impacts to non-listed species and associated habitats during construction and maintenance of the sites. Construction, maintenance and monitoring activities associated with offsetting sites (both terrestrial and aquatic) may cause increased noise, sedimentation, light, and temporary discharge of pollutants during and after activities each day of construction. Noise and light are known stressors to some listed species and can cause avoidance

behavior, thus displacing species for approximately minutes to hours during and after activities have ceased. Sedimentation, presence of crews and machinery, and the discharge of pollutants in the air and water may reduce the quality and suitability of habitats at a small scale while the pollutant and/or nuisance is present. This could cause species to avoid the area until the habitat has returned to a desirable quality and void of stressors. These avoidance and potential startle stressors would be temporary and the habitat and species function are expected to recover rapidly.

Continued construction, maintenance, and operation of Federally listed species' conservation banks, in-lieu fee sites, and Federal action agency-responsible offsetting sites and restoration projects would result in some temporary, negative, negligible to minor effects to non-listed species and associated habitats. Noise and disturbance effects from temporary activities may result in some temporary species displacements and disruption of behaviors. Likewise, habitats would be temporarily disturbed by construction, maintenance and operation activities. For example, grading, soil displacement, and plantings and other construction and operational activities would temporarily cause negative, minor impacts to non-listed species and their associated habitat. Existing species' conservation banks, in-lieu fee programs, and Federal action agency-responsible voluntary offsetting sites, most of which would be conserved in perpetuity, would continue to provide long-term conservation benefits to some non-listed species and associated habitats. Additional and enhanced habitats may result in additional biodiversity (abundance and types of species) of non-listed species in local offsetting sites. Likewise, some restoration projects may also provide long-term conservation benefits to some non-listed species and associated habitats.

Past, present, and future threats to non-listed species and associated habitats resulting from impacts such as habitat loss and degradation, pollution effects, climate effects, and disease depending on the particular species at risk would continue. Threats would potentially be exacerbated for some species and associated habitats resulting from climate change and other threats in the future.

In summary, effects of implementation of Alternative 1 to non-listed species, including potential cumulative effects, would range from negligible to minor, short-term, negative effects to minor, long-term, beneficial effects.

Alternative 2 – 2019 ESA Section 7 Regulations with Clarifications

The clarifications addressed in alternative 2 do not change the longstanding practice of the Services in implementing the regulations from that as considered in Alternative 1 above.

Impacts for Alternative 2 would be as those described for Alternative 1.

Alternative 3 – 2019 ESA Section 7 Regulations with revised scope of Reasonable and Prudent Measures

The anticipated additional offsetting measures included in RPMs, as applicable, may result in some incidental impacts as well as benefits to non-listed fish and wildlife species and associated habitats. In some instances, habitat management practices for a threatened or endangered species could potentially result in negative impacts to other non-listed species or habitat. For example, removal of specific plant species to allow native host plant species to increase in cover to increase feeding, sheltering or breeding of listed species. Because habitats would typically be managed at the landscape level, we would anticipate that the offsetting proposed by action agencies in their proposed action would provide benefits to other fish and wildlife species with similar habitat requirements and opportunistic species that can readily adapt to changes in habitats. Negative impacts and benefits to fish and wildlife species and habitats resulting from offsetting RPMs would be similar to those described for threatened and endangered species and associated habitats including critical habitat.

Alternative 3 would increase conservation of the listed species for those formal consultations where offsetting RPMs are included which would be anticipated to result in additional conservation areas that would also potentially benefit some non-listed species.

Additional construction, maintenance, and operation of Federally threatened species' conservation banks, in-lieu fee sites, and Federal action agency-responsible offsetting sites may result in some temporary, negative impacts to non-listed species and associated habitats. Noise and disturbance effects from temporary activities may result in some temporary species displacements and disruption of behaviors. Likewise, habitats may be temporarily disturbed by construction, maintenance and operation activities. For example, grading, soil displacement, and plantings and other construction and operational activities may temporarily cause negative impacts to non-listed species habitat. The creation, enhancement, and preservation of habitat could potentially lead to additional habitat such as increased foraging and breeding sites for non-listed species. This would potentially result in more long-term benefits to non-listed species than either Alternative 1, 2, or 5.

Existing Federally listed species' conservation banks, in-lieu fee programs, and Federal action agency-responsible voluntary offsetting sites, most of which would be conserved in perpetuity, would continue to provide minor, long-term conservation benefits to some non-listed species and associated habitats.

The long-term monitoring and management that would occur at the offsetting sites would help assess and potentially address species and associated habitat needs in response to threats such as climate effects, pollution, and other changes over time. Thus, the increased management of species habitats over time would also serve to help benefit the fish and wildlife species and associated habitat over time.

However, such benefits are uncertain because it is uncertain how many formal consultations would include offsetting measures as RPMs due to the tremendous variation in Federal actions subject to formal consultation, the specific impacts from these actions, and the affected species that may be analyzed. We anticipate that offsets would be used under limited circumstances. Current offset mechanisms are limited to certain areas in the country and confined to certain species. In addition, under the new revision, priority would be given to measures that reduce the impacts of incidental take on listed species through avoidance measures within the action area, thus, we anticipate that measures that avoid or reduce incidental take would often be all that are necessary or appropriate to minimize the impacts of incidental take. The requirement that RPMs be reasonable and prudent based on economic and technological feasibility would also constrain the number of consultations affected by this revision.

Construction, maintenance, and operation of Federally listed species' conservation banks, in-lieu fee sites, and Federal action agency-responsible offsetting sites and restoration projects may result in some temporary, negative impacts to non-listed species and associated habitats during construction and maintenance of the sites. Additional and enhanced habitats may result in additional biodiversity (abundance and types of species) of non-listed species in local offsetting sites. Construction, maintenance and monitoring activities associated with offsetting sites (both terrestrial and aquatic) may cause increased noise, sedimentation, light, and temporary discharge of pollutants during and after activities each day of construction. Noise and light are known stressors to some non-listed species and can cause avoidance behavior, thus displacing species for approximately minutes to hours during and after activities have ceased. Sedimentation, presence of crews and machinery, and the discharge of pollutants in the air and water may reduce the quality and suitability of habitats at a small scale while the pollutant and/or nuisance is present. This could cause species to avoid the area until the habitat has returned to a desirable quality and void of stressors. These avoidance and potential startle stressors would be temporary and the habitat and species function are expected to recover rapidly.

Continued construction, maintenance, and operation of Federally listed species' conservation banks, in-lieu fee sites, and Federal action agency-responsible offsetting sites and restoration projects may result in some minor, temporary, negative impacts to non-listed species and associated habitats. Noise and disturbance effects from temporary activities may result in some temporary species displacements and disruption of behaviors. Likewise, habitats may be temporarily disturbed by construction, maintenance and operation activities. For example, grading, soil displacement, and plantings and other construction and operational activities may temporarily cause negative impacts to non-listed species habitat. Existing Federally listed species' conservation banks, in-lieu fee programs, and Federal action agency-responsible voluntary offsetting sites, most of which would be conserved in perpetuity, would continue to provide minor, long-term conservation benefits to some non-listed species

and associated habitats. Likewise, some restoration projects may also provide long-term conservation benefits to some non-listed species and associated habitats.

Past, present, and future threats non-listed listed species and associated habitats resulting from impacts such as habitat loss and degradation, pollution effects, climate effects, and disease depending on the particular species at risk would continue. Threats would potentially be exacerbated for some species and associated habitats resulting from climate change and other threats in the future.

In summary, effects of implementation of Alternative 3 to non-listed species, including potential cumulative effects, would be anticipated to be minor and anticipated to range from short-term, negative effects to long-term, beneficial effects.

Alternative 4 (Preferred Alternative) – 2019 ESA Section 7 Regulations with Clarifications and Revised scope of Reasonable and Prudent Measures

Alternative 4 represents a combination of Alternative 2, proposed clarifications to the 2019 ESA section 7 regulations, and Alternative 3, revised scope of RPMs. Thus, the effects of Alternative 4 to threatened and endangered species and associated habitats would be as those described for Alternative 3.

In summary, effects of implementation of Alternative 4 to non-listed species, including potential cumulative effects, would be anticipated to be minor and anticipated to range from short-term, negative effects to long-term, beneficial effects.

Alternative 5 – Pre 2019 ESA Section 7(a)(2) Regulations

Effects to non-listed species and associated habitats for Alternative 5 would be as those described for Alternative 1. This is because Alternative 5 is functionally equivalent to Alternative 1.

4.3 Socioeconomics

4.3.1 Economics Affected Environment

Regarding costs associated with offsetting measures, there is a pre-existing market for conservation banks and in-lieu fee programs servicing impacts to imperiled species, including some Federally threatened and endangered species and associated habitats. Federal agencies (and applicants, as appropriate) may purchase conservation bank credits for general mitigation needs including offsetting as part of their proposed action in an ESA section 7 consultation process, Non-Federal entities may purchase credits as part of the ESA section 10(a)(1)(B) incidental take permit process or to meet state or local requirements. The costs of individual credits are considered proprietary data and are not publicly available in the RIBITS.

Based on information extracted from the RIBITS (as of March 16, 2024), the availability of banks and in-lieu fee programs to offset impacts to listed species is limited based on the small number of threatened and endangered fish and wildlife species addressed in

existing banks and in-lieu fee funds and on the geographic extent of available banks and in-lieu fee programs. Offsetting opportunities and associated expenditures would also be expected to be limited based on availability of suitable habitat, cost and technological feasibility, and potential limitations of some Federal agency authorities.

Regarding costs associated with addressing offsetting measures within the consultation process, the Services and other Federal agencies expend labor funds for coordination and preparation of ESA section 7 consultation initiation packages and biological assessments. Labor expenditures for ESA section 7 consultations vary depending on current project needs, complexities of various consultations, and potential inflation-related costs. It is uncertain how many consultations would be required by Federal agencies and the Services. In addition, the Services and other Federal agency labor and offsetting expenditures would potentially consist of purchases of conservation bank and in-lieu fee credit purchases or costs to conduct Federal agency-responsible offsetting.

Expenditures from construction, operations, and maintenance of Federally listed species' conservation banks, in-lieu fee sites, and Federal action agency-responsible offsetting mechanisms would be anticipated to continue in the future. Prices in mitigation credits would flux in response to market demand and potentially inflation. Labor expenditures resulting from Federal agencies preparing ESA section 7 consultation packages and biological assessments and for the Services to conduct ESA section 7 consultations with Federal agencies would continue and would vary in response to Federal project needs.

4.3.2 Economics Environmental Consequences

Alternative 1 – No Action Alternative

With the No Action Alternative, ESA section 7 consultations for Federally listed species and critical habitat would continue pursuant to the 2019 ESA, section 7 regulations. Labor expenditures resulting from Federal agencies preparing ESA, section 7 consultation packages and biological assessments and for the Services to conduct ESA, section 7 consultations with Federal agencies would continue and would flux in response to Federal project needs.

Federal agencies would be anticipated to fund expenditures to continue voluntary offsetting of fish and wildlife incidental take in proposed actions for ESA, section 7 consultations pursuant to ESA, section 7(a)(1) and other applicable authorities. In addition to ESA authorities, offsetting resulting from state regulatory requirements and local practices would continue. Federal agencies and nongovernmental agencies and entities, and private individuals would continue to expend labor and purchase conservation banking and in-lieu fee program funds and fund compensatory mitigation projects for Federally threatened and endangered species. Federal agency expenditures would be anticipated to continue to remain minor and could range from

short-term (for purchases at conservation banks or in-lieu fee sites) to long-term in duration (where Federal action agency-responsible mitigation is conducted and there is long-term monitoring and management planned).

Conservation banking and in-lieu fee programs would continue to operate and potentially expand or decline in response to fluxing market demands and regulatory needs and practices. Prices in mitigation credits would flux in response to market demand and potentially inflation. Use and continued development of threatened and endangered species banks would result in minor, long-term, beneficial effects to the conservation banking industry and employment rates.

Impacts of Alternative 1, including cumulative impacts, to the species conservation banking/in-lieu market industry and related labor rates would be anticipated to result in minor, long-term benefits. Labor and other Federal agencies' cost expenditures, including cumulative impacts, would be minor and range in duration from short-term to long-term effects.

Alternative 2 - 2019 ESA Section 7 Regulations with Proposed Clarifications

Labor expenditures resulting from Federal agencies preparing ESA, section 7 consultation packages and biological assessments and for the Services to conduct ESA, section 7 consultations with Federal agencies would continue and would flux in response to Federal project needs.

Federal agencies would be anticipated fund expenditures to continue voluntary offsetting of fish and wildlife incidental take in proposed actions for ESA, section 7 consultations pursuant to ESA, section 7(a)(1) and other applicable authorities. In addition to ESA authorities, offsetting resulting from state regulatory requirements and local practices would continue. Federal agencies and nongovernmental agencies and entities, and private individuals would continue to expend labor and purchase conservation banking and in-lieu fee program funds and fund compensatory mitigation projects for threatened and endangered species.

The proposed revisions to further clarify the consultation process, provided in Alternative 2, may lead to improved consultation packages and biological assessments submitted by Federal agencies by clarifying the meaning and application of key consultation terms. Improved consultation packages and biological assessments would potentially result in a reduction in consultation timelines and reduced labor expenditures. This would potentially result in long-term economic improvements and reduced administrative burden to both the Services and other Federal agencies. The associated cost savings from the potential benefits described above are uncertain. However, these benefits would be anticipated to minor because the changes represent current practice by the Service and many Federal action agencies are familiar with the current consultation practices of the Service. Federal agency expenditures would be anticipated to continue to remain minor and could range from short-term (for purchases at conservation banks or in-lieu fee sites) to long-term in duration (where Federal action

agency-responsible mitigation is conducted and there is long-term monitoring and management planned).

Conservation banking and in-lieu fee programs would continue to operate and potentially expand or decline in response to fluxing market demands and regulatory needs and practices. Prices in mitigation credits would flux in response to market demand and potentially inflation. Use and continued development of threatened and endangered species banks would result in minor, long-term, beneficial effects to the conservation banking industry and employment rates.

Impacts of Alternative 2, including cumulative impacts, to the species conservation banking/in-lieu market industry and related labor rates would be anticipated to result in minor, long-term benefits. Labor and other Federal agencies' cost expenditures, including cumulative impacts, would be minor and range in duration from short-term to long-term effects.

Alternative 3 – 2019 ESA Section 7 Regulations with Revised scope of Reasonable and Prudent Measures

Although uncertain, the inclusion of additional RPMs to offset impacts from incidental take, as applicable, may result in additional market demand and creation of additional ESA conservation banks and in-lieu fee programs by private enterprises or other entities. There may be increased interest for conservation banking credits and in-lieu fee programs as a result of broadening the scope of RPMs to include offsetting measures. This increase would be in addition to the level of uses for these mechanisms to deliver offsets as part of a proposed action subject to ESA section 7 as well as part of a Habitat Conservation Plan to receive an incidental take permit under ESA Section 10(a)(1)B).

Although the Services could incur additional labor expenditures for ESA section 7 consultations resulting from additional time to prepare offsetting RPMs for applicable consultations, as well as from additional time required to review monitoring management reports associated with new offsetting measures, the Services do not anticipate it will delay completing consultations in a timely manner, as we anticipate that offset delivery mechanisms that are already in place during the relevant consultation will be used primarily and the use of existing mechanisms provide efficiency in the process.

Federal agencies could experience increased expenditures from offsetting RPMs for applicable consultations, although some Federal projects and programs already commonly include offsetting measures in their proposed actions for ESA section 7 consultations. If there is an increase in the number of conservation banks and in-lieu fee programs, Federal agencies that already include offsetting measures in their proposed action may potentially experience economic efficiencies by having more conservation banks and in-lieu fee programs available, because it could potentially result in more cost-efficient offsetting options. This is a potential effect because conservation banks and in-lieu fee sites could potentially be constructed at economies of a larger scale,

resulting in potential cost efficiencies as compared to multiple, smaller offsetting sites that are established in a piecemeal fashion. Landowners and other private enterprises that provide new conservation banks and in-lieu fee programs could potentially benefit from selling habitat or species credits to compensate for loss of resources and associated habitats. Additional conservation banks, in-lieu fee programs, and Federal agency-responsible offsets could result in additional employment opportunities and corresponding benefits to local economies. However, because the Services anticipate offsetting measures would be used under limited circumstances, the Services find that any potential negative or beneficial effects would likely be minor.

Although highly uncertain and not directly quantifiable, we anticipate that the additional market demand and response for conservation banks and in-lieu fee programs for ESA Section 7 consultations would be fairly limited due to: the limited number of ESA section 7 consultations where offsetting RPMs would be considered (please refer to *Section 4.1.2, Threatened and Endangered Species and Associated Habitats Environmental Consequences,* for a more through discussion); the fish and wildlife species-specific nature of the enterprise market; the limited availability of technically and economically feasible offsetting measures; the continuing practice of including voluntary offsetting measures as part of the proposed action; and the reliance of the banks and in-lieu fee programs on future funding.

Effects of Alternative 3, including cumulative impacts, to the species conservation banking/in-lieu market industry and related labor rates would be anticipated to result in minor, long-term benefits. Labor and other Federal agencies' cost expenditures, including cumulative impacts, would be minor and range in duration from short-term to long-term effects.

Alternative 4 (Preferred Alternative) – 2019 ESA Section 7 Regulations with Clarifications and Revised Scope of Reasonable and Prudent Measures

Impacts would be a combination of those described for Alternative 2 and Alternative 3 including cumulative effects. We anticipate this alternative would have the most substantial economic impacts as compared to the other alternatives – both beneficial and negative as it would maximize labor efficiencies with the regulatory text clarifications but also potentially affect Federal agencies with additional costs from offsetting RPMs for applicable consultations. Similar to Alternative 3, this alternative would maximize benefits to landowners and private enterprises that may benefit from increased demand and expenditures for conservation banks and in-lieu fee programs. However, we would not anticipate that effects would range higher than a minor effect.

Effects of Alternative 4, including cumulative impacts, to the species conservation banking/in-lieu market industry and related labor rates would be anticipated to result in minor, long-term benefits. Labor and other Federal agencies' cost expenditures, including cumulative impacts, would be minor and range in duration from short-term to long-term effects.

Alternative 5 – Pre ESA 2019 Section 7(a)(2) Regulations

Effects to economics for Alternative 5 would be as those described for Alternative 1. This is because Alternative 5 is functionally equivalent to Alternative 1.

4.3.3 Environmental Justice Affected Environment

Environmental justice as defined by the Executive Order 14096 "*Revitalizing Our Nation's Commitment to Environmental Justice for All",* "means the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision-making and other Federal activities that affect human health and the environment so that people:

> (i) are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and
>
> (ii) have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices."

The Executive Order *14096 "Revitalizing Our Nation's Commitment to Environmental Justice for All*" builds upon the Executive Order 12898 Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations and strengthens the nation's commitment to environmental justice. Consistent with NEPA, NEPA implementing regulations, and Executive Orders 12898 and 14096, Federal agencies consider the potential effects of their actions on communities with environmental justice concerns in the Federal decision-making process.

The ROI would include communities that may potentially include communities with environmental justice concerns affected by implementation of any of the alternatives.

4.3.4 Environmental Justice Environmental Consequences

Alternative 1 – No Action Alternative

With the No Action Alternative, ESA section 7 consultations for Federally listed species and critical habitat would continue pursuant to the 2019 ESA section 7 regulations.

We anticipate no change to Federal agencies' offsetting fish and wildlife incidental take as part of their proposed action subject to ESA section 7 consultations. In addition to ESA authorities, offsetting resulting from state regulatory requirements and local requirements would continue. Federal agencies, non-governmental organizations, and private individuals would continue to expend labor and purchase conservation banking and in-lieu fee program funds and fund compensatory mitigation projects for threatened

and endangered species. Existing and continued creation of conservation banks, in-lieu fee programs, and Federal agency-responsible offsetting could result in limited air, noise, and traffic-related impacts to communities which could potentially include communities with environmental justice concerns. However, impacts would be short-term and would largely be mitigated by adhering to Federal, state, and local regulatory requirements.

Existing and continued creation of conservation banks, in-lieu fee programs, and Federal agency-responsible offsetting results would also potentially result in long-term benefits to ecosystem services by improving air and water quality, regulating activities that affect the climate, and potentially creating additional recreation opportunities (where recreation is allowed) for the public. The benefits to ecosystem services may potentially benefit communities with environmental justice concerns. Overall, any net effects to communities with environmental justice concerns would be anticipated to be long-term, beneficial impacts.

In summary, effects of implementation of Alternative 3 to communities that could potentially include those with environmental justice concerns, including potential cumulative effects, would be anticipated to be minor effects that range from short-term, negative effects to long-term, beneficial effects.

Alternative 2 – 2019 ESA Section 7 Regulations with Clarifications

Effects to communities that could potentially include those with environmental justice concerns for Alternative 2 would be as those described for Alternative 1.

Alternative 3 – 2019 ESA Section 7 Regulations with Revised scope of Reasonable and Prudent Measures

Potential creation of additional conservation banks, in-lieu fee programs, and Federal agency-responsible offsetting measures would potentially result in some limited air and noise negative impacts to communities that could potentially include communities with environmental justice concerns. However, impacts would be short-term and would largely be mitigated by adhering to other Federal, state, and local regulatory requirements.

Although uncertain, creation of additional conserved habitat through offsetting measures has the potential to benefit communities potentially including those with environmental justice concerns. Existing and continued creation of conservation banks, in-lieu fee programs, and Federal agency-responsible offsetting results in benefits to ecosystem services such as improvements in air and water quality, climate regulation, and potentially recreation (where recreation is allowed) benefit the public. The benefits to ecosystem services may result in community level benefits that may potentially benefit communities potentially including those with environmental justice concerns. Overall, the net effect to communities some of which may include those with environmental justice concerns would be minor, long-term, beneficial impacts.

Overall, we would anticipate more potential benefits to communities and potentially communities with environmental justice concerns with Alternative 3 or Alternative 4 than with Alternative 1 or Alternative 2, or 5 because Alternative 3 and Alternative 4 would potentially include more ecosystem services with the potential additional offsetting as compared to Alternatives 1, 2, or 5. Although uncertain, overall net effects to communities, potentially including those with environmental justice concerns, would be long-term, beneficial impacts.

In summary, effects of implementation of Alternative 3 to communities and potentially to communities with environmental justice concerns, including potential cumulative effects, would be anticipated to be minor effects that would range from short-term, negative effects to long-term, beneficial effects.

Alternative 4 (Preferred Alternative) – 2019 ESA Section 7 Regulations with Clarifications and Revised Scope of Reasonable and Prudent Measures

Alternative 4 represents a combination of Alternative 2, as the clarifications to the 2019 ESA section 7 regulations, and Alternative 3, revised scope of RPMs. As a result, the environmental justice effects of Alternative 4 would be as those described for Alternatives 2 and 3 above.

In summary, effects of implementation of Alternative 4 to communities and potentially those with environmental justice concerns, including potential cumulative effects, would be anticipated to be minor and range from short-term, negative effects to long-term, beneficial effects.

Alternative 5 – Pre ESA 2019 Section 7(a)(2) Regulations

Impacts to environmental justice for Alternative 5 would be as those described for Alternative 1 including cumulative effects. This is because Alternative 5 is functionally equivalent to Alternative 1.

4.4 Air Quality and Greenhouse Gas Emissions

4.4.1 Air Quality and Greenhouse Gas Emissions and Affected Environment

National Ambient Air Quality Standards

The Region of Influence for air quality is defined by the U.S. Environmental Protection Agency's (EPA's) regulatory boundary of air quality control regions.

The EPA Office of Air Quality Planning and Standards designates National Ambient Air Quality Standards (NAAQS) for "criteria" air pollutants: carbon monoxide, nitrogen dioxide, ozone, lead, particulate matter (less than 10 microns and less than 2.5 microns), and sulfur dioxide.

The EPA designates NAAQS for each respective criteria pollutant, which represents the maximum allowable atmospheric concentrations allowed to ensure protection of public

health and welfare. The Clean Air Act section 176(c)(4) established the General Conformity Rule which implements the Clean Air Act's requirement that Federal Actions occurring in nonattainment and maintenance areas shall not hinder local efforts to address air pollution. Nonattainment areas are Air Quality Control Regions that are in violation of one or more of the NAAQS. Maintenance areas are Air Quality Control Regions that EPA previously designated as nonattainment area but have been subsequently designated as attainment and require a maintenance plan. Federal agencies must demonstrate that their actions "conform with" (i.e., do not violate) the approved State Implementation Plan (SIP) for their project's geographic area.

The purpose of conformity is to (1) ensure Federal actions do not interfere with air quality budgets in the SIPs; (2) ensure actions do not result in or contribute to new violations; and (3) ensure attainment and maintenance of the NAAQS.

Greenhouse Gas Emissions

The CEQ issued interim guidance on consideration of greenhouse gas emissions and climate change (CEQ 2023; 88 FR 1196) to assist Federal agencies in their consideration of the effects of greenhouse gas (GHG) emissions and climate change when evaluating proposed major Federal actions in accordance with the NEPA and CEQ NEPA regulations.

Air emissions from combustion of fossil fuels can lead to greenhouse gas emissions that can contribute to global climatic change of the earth's atmosphere. Conservation banks, in-lieu fee program sites, and Federal action agency-responsible offsetting sites can act as a source of greenhouse gas emissions or a sink absorbing carbon dioxide from the atmosphere. Greenhouse gas emissions occur from combustion of fossil fuels during construction, maintenance, and monitoring of offsetting sites.

However, for offsetting that creates or enhances vegetated habitat, there would also be anticipated, long-term beneficial effects to air quality. For example, trees and other vegetation sequester carbon and help remove ozone from the air. Carbon sequestration refers to capturing, removing, and storing carbon dioxide from the atmosphere. Carbon sequestration can prevent further emissions from contributing to global warming. Managed forests and other lands are typically a net sink, meaning they typically absorb more carbon dioxide from the atmosphere than they emit.

4.4.2 Air Quality and Greenhouse Gas Emissions Environmental Consequences

Alternative 1 – No Action Alternative

With the No Action Alternative, ESA section 7 consultations for Federally listed species and critical habitat would continue pursuant to the 2019 ESA section 7 regulations.

We anticipate impacts to air quality resulting from offsetting activities included in a proposed Federal action would continue. Temporary impacts from conservation banks, in-lieu fee program sites, and Federal action agency-responsible offsetting sites would

potentially include the combustion of fossil fuels resulting from construction, operation, maintenance, and monitoring activities. Air emissions from combustion of fossil fuels can lead to negative, minor, short-term greenhouse gas emissions.

However, for offsetting that creates or enhances vegetated habitat, there would also be anticipated, long-term net beneficial effects to air quality. For example, trees and other vegetation sequester carbon and help remove ozone from the air. Carbon sequestration refers to capturing, removing, and storing carbon dioxide from the atmosphere. Carbon sequestration removes carbon from the atmosphere. Carbon sequestration can prevent further emissions from contributing to global warming. Managed forests and other lands are typically a net sink, meaning they typically absorb more carbon dioxide from the atmosphere than they emit. Therefore, we anticipate that under most conditions the impacts to air quality from offsetting activities would typically result in minor, long-term, net beneficial impacts to air quality.

Air emissions resulting from other Federal and non-Federal sources in affected air quality control regions would continue to generate emissions and negatively impact air quality including greenhouse gas emissions. Beneficial effects to air quality resulting from other Federal and non-Federal restoration projects and projects intended to reduce air emissions would also continue resulting in beneficial effects to air quality.

Should Federal agency offsetting activities trigger the need for an air conformity analysis, the conformity analysis would be conducted pursuant to state and EPA requirements and if required, air quality mitigation (in terms of avoidance, minimization, and/or offsetting) would be conducted.

In summary, effects of implementation of Alternative 1 to air quality including potential cumulative effects, would be anticipated to be minor and range from short-term, negative effects to long-term, beneficial effects.

Alternative 2 - 2019 ESA Section 7 Regulations with Proposed Clarifications

Impacts to air quality for Alternative 2 would be as those as described for Alternative 1.

Alternative 3 – 2019 ESA Section 7 Regulations with revised scope of Reasonable and Prudent Measures

We anticipate impacts to air quality would be similar to those as described for Alternatives 1, 2, or 5 but the impacts would be anticipated to be increased for Alternative 3 as compared to Alternatives 1, 2, or 5 because Alternative 3 would include both offsetting measures included in the proposed action by Federal agencies and offsetting RPMs included by the Services for applicable consultations.

As described in more detail in *Section 4.1.2 Threatened and Endangered Species and Associated Habitats Environmental Consequences Section*, there would be limited opportunities to include RPMs with required offsetting measures because Federal agencies often already include offsetting measures in their proposed action, availability

of conservation banks and in-lieu fee programs is limited, and potential constraints exist associated with Federal agency-responsible offsetting (such as technical feasibility and potential limitations in agency authority).

Although uncertain, the inclusion of offsetting RPMs may result in additional creation of ESA conservation banks, in-lieu fee programs, and Federal agency-responsible offsetting sites which may result in additional associated air quality impacts. There may be increased interest for conservation banking credits and in-lieu fee programs in response to the Services' expanded scope of RPMs to include offsetting measures in addition to the already existing Federal action agency offsetting measures included in their proposed action as well as offsetting needs of the ESA, section 10(a)(1)(B) Program. This could potentially result in additional negative impacts to air quality resulting from temporary construction, maintenance, and monitoring of conservation banks, in-lieu fee programs, and Federal action agency-responsible offsetting sites. However, for offsetting that creates or enhances vegetated habitat, there would also be anticipated, long-term net beneficial effects to air quality resulting from carbon sequestration.

We anticipate impacts to air quality resulting from offsetting activities included in a proposed Federal action would continue. Temporary impacts from conservation banks, in-lieu fee program sites, and sites, as well as offsetting sites within the proposed Federal action, could potentially include the combustion of fossil fuels resulting from construction, operation, maintenance, monitoring, and management activities. Air emissions from combustion of fossil fuels can lead to negative, minor, short-term greenhouse gas emissions.

However, for offsetting that creates or enhances vegetated habitat, there would also be anticipated, long-term net beneficial effects to air quality. For example, trees and other vegetation sequester carbon and help remove ozone from the air. Carbon sequestration refers to capturing, removing, and storing carbon dioxide from the atmosphere. Carbon sequestration removes carbon from the atmosphere. Carbon sequestration can prevent further emissions from contributing to global warming. Managed forests and other lands are typically a net sink, meaning they typically absorb more carbon dioxide from the atmosphere than they emit. Therefore, we would anticipate that under most conditions the impacts to air quality from offsetting activities would typically result in minor, long-term, net beneficial impacts to air quality.

Air emissions resulting from other Federal and non-Federal sources in affected air quality control regions would continue to generate emissions and negatively impact air quality including greenhouse gas emissions. Beneficial effects to air quality resulting from other Federal and non-Federal restoration projects and projects intended to reduce air emissions would also continue resulting in beneficial effects to air quality.

Although uncertain, we would anticipate that Alternatives 3 and 4 would have the most beneficial, long-term impacts to air quality because ESA section 7 consultations may

have RPMs with offsetting that may include habitat restoration or land conservation that would maximize long-term carbon sequestration benefits as compared to Alternatives 1, 2, or 5.

Effects to air quality, including potential cumulative effects, would still be anticipated to be minor and range from short-term, negative effects to long-term, beneficial effects.

Alternative 4 (Preferred Alternative) – 2019 ESA Section 7 Regulations with Proposed Clarifications and Revised scope of Reasonable and Prudent Measures

Effects to air quality and greenhouse gas emissions of Alternative 4 would be as those described for Alternative 3.

Effects to air quality, including potential cumulative effects, would still be anticipated to be minor and range from short-term, negative effects to long-term, beneficial effects.

Alternative 5 – Pre ESA 2019 Section 7(a)(2) Regulations

Effects to air quality for Alternative 5 would be as those described for Alternative 1. This is because Alternative 5 is functionally equivalent to Alternative 1.

4.5 Land Cover and Land Use

4.5.1 Land Cover and Land Use Affected Environment

Land cover refers to vegetative characteristics or human-made constructions in the land surface and land use refers to human activities conducted on the land surface. The ROI for land cover and land use would include any lands potentially affected by any of the alternatives resulting from an ESA section 7 consultation. Figure 1 depicts land cover in the conterminous U.S. (lower 48 states) in 2021 as reported in the National Land Cover Database by the U.S. Geological Survey (2021). However, the actual affected land cover and land use would extend beyond the 48 contiguous U.S., but there are limited data available.

Land cover types have shifted over time in the U.S. in response to environmental changes as well as human-induced changes and synergistic effects such as those with climate effects. Some of the more substantive recent shifts reported in land use have included land cover changes in forest lands resulting from forest harvest and regrowth in the southeastern U.S., fire, pests, and harvest in the western U.S. Other broad scale changes in land cover have resulted from shrub lost in the west from fire events, cultivated crop expansion into grasslands in the northern prairies and broadscale urbanization across the U.S. The geospatial extent and magnitude of land cover change in the U.S. from 2001-2016 are illustrated in Figure 2 (USGS 2019).

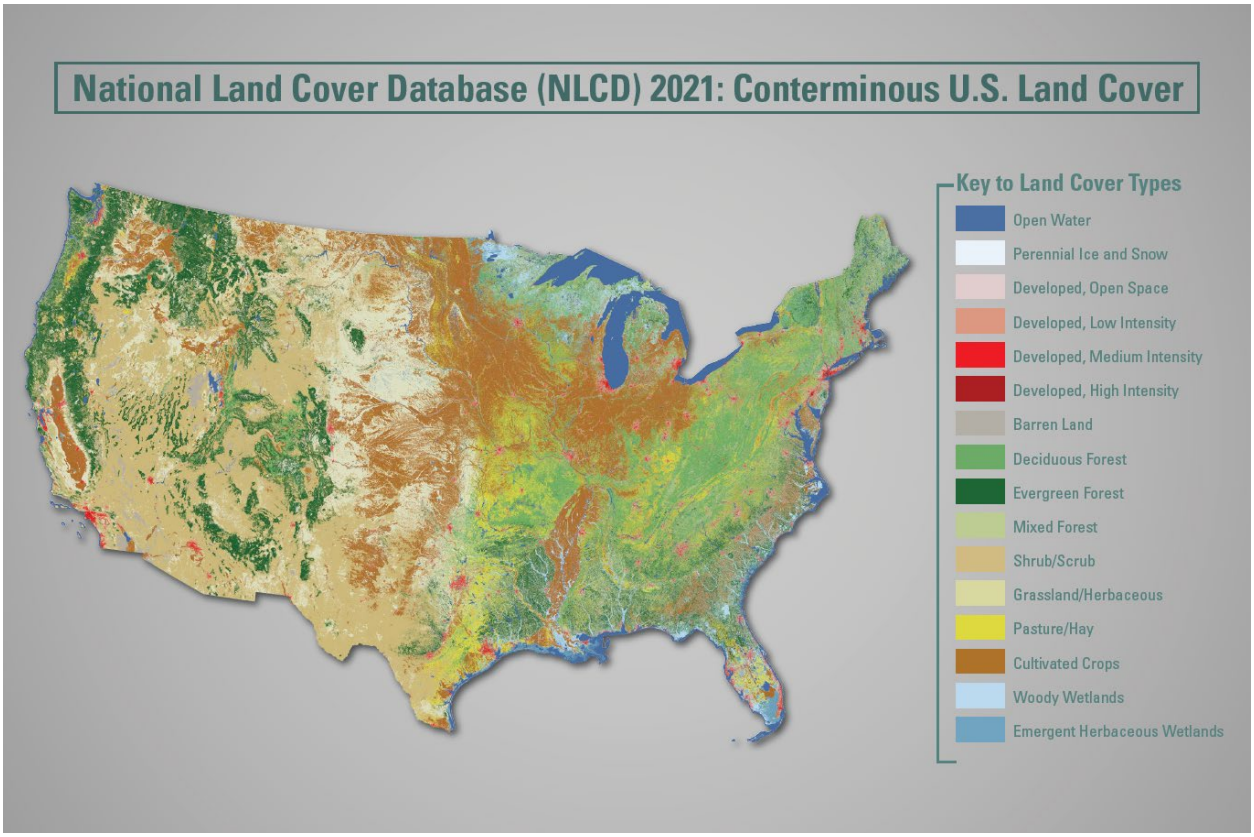

Figure 1. Land cover in the conterminous U.S. Source: National Land Cover Database (USGS 2021)

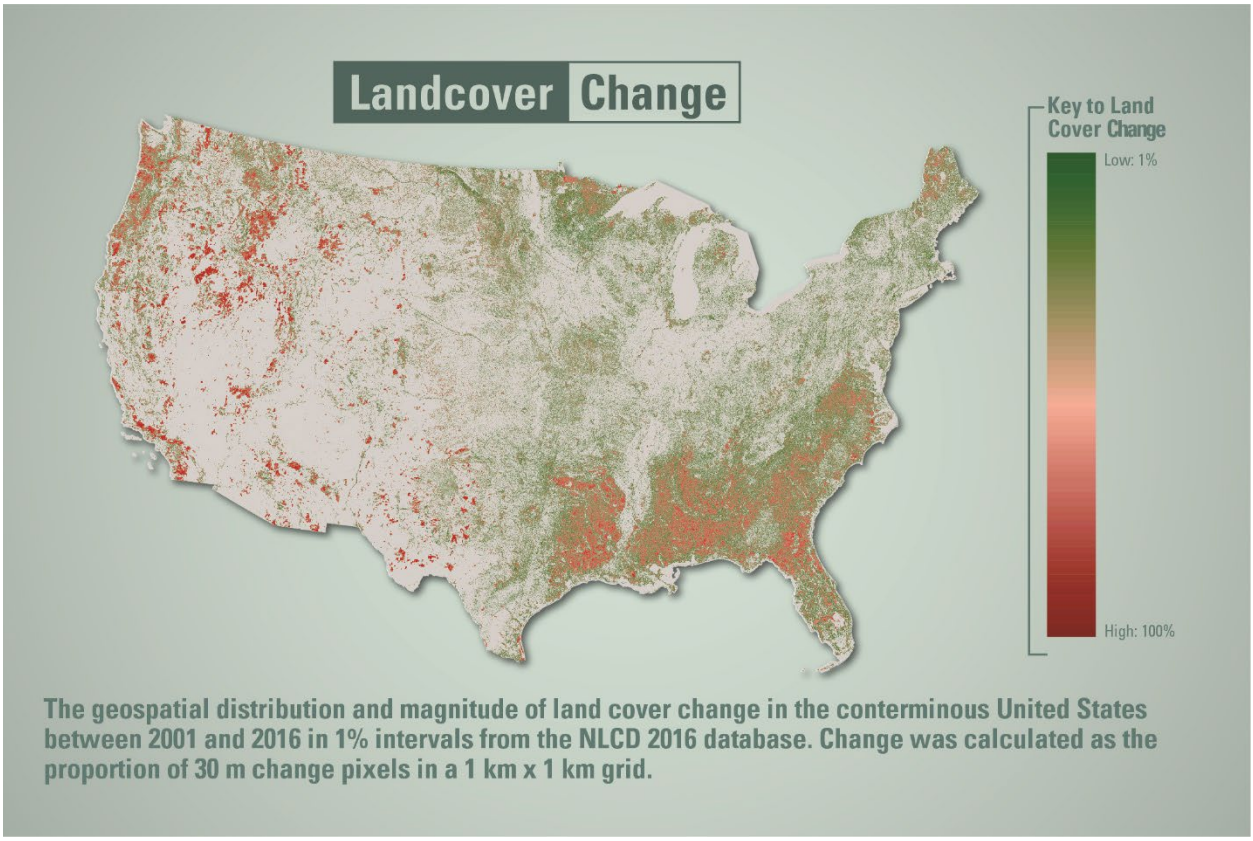

Figure 2. Land cover change in the conterminous U.S. between 2001 and 2016 (USGS 2019)

Land cover and land use in the U.S. would continue to change over time resulting from development and urbanization, responses to wildlife and fires, changes in agricultural lands and practices, restoration projects, land changes and loss due to climate effects, and other natural and land management practices.

4.5.2 Land Cover and Land Use Environmental Consequences

Alternative 1 – No Action Alternative

With the No Action Alternative, ESA section 7 consultations for Federally listed species and critical habitat would continue pursuant to existing practices for conducting ESA section 7 consultations. Offsetting of residual incidental take impacts of threatened and endangered fish and wildlife species impacts from Federal activities included in the proposed action would continue. Offsetting measures included in the proposed action in some instances could potentially result in changes in a land use from a non-conservation land use to a conservation land use. Offsetting measures included in the proposed action could potentially also result in changes to land cover. With offsetting measures included in the proposed action, there could be increases of or changes to the habitat characteristics including the predominant vegetation type, which could result in potential changes to land cover.

Land cover and land use in the U.S. would continue to flux over time from development and urbanization, wildfires and fires, changes in agricultural lands and practices, restoration projects, land changes and loss due to climate effects, and other natural and land management practices.

Impacts, to land use and land cover, including cumulative impacts, would be anticipated to be minor, beneficial to negative, and range from short-term to long-term effects.

Alternative 2 – 2019 ESA Section 7 Regulations with Clarifications

Impacts to land use and land cover for Alternative 2, including cumulative impacts, would be identical to those as described in Alternative 1, as these revisions clarify existing practices for conducting ESA section 7 consultation.

Alternative 3 – 2019 ESA Section 7 Regulations with Revised Scope of Reasonable and Prudent Measures

Offsetting measures included in the proposed action by a Federal agency and offsetting measures included by the Services in RPMs could potentially result in changes in a land use from a non-conservation land use to a conservation land use. Offsetting measures could potentially result in changes to land cover as well from changes to the habitat characteristics including the predominant vegetation type. Although the amount of additional offsetting sites are uncertain under Alternatives 3 and 4, we would anticipate more land use changes resulting in additional conservation lands with Alternatives 3 and 4 as compared to Alternatives 1, 2, or 5.

Although offsetting measures could potentially result in greater changes from a non-conservation land use to a conservation land use and a change in habitat characteristics, including the predominant vegetation type, to land cover, we would anticipate that offsets would be used under limited circumstances.

Land cover and land use in the U.S. would continue to change over time resulting from urbanization, responses to wildfires and fires, changes in agricultural lands and practices, restoration projects, land changes and loss due to climate effects, and other natural and land management practices.

Impacts, to land use and land cover, including cumulative impacts, would be anticipated to be minor, beneficial to negative, and range from short-term to long-term effects.

Alternative 4 (Preferred Alternative) – 2019 ESA Section 7 Regulations with Clarifications and Revised scope of Reasonable and Prudent Measures

Effects to land use and land cover from Alternative 4 would be as those described for Alternative 3, including cumulative effects.

Impacts, including cumulative impacts, would be anticipated to be minor, beneficial to negative, and range from short-term to long-term effects.

Alternative 5 – Pre ESA 2019 Section 7(a)(2) Regulations

Effects to land use for Alternative 5 would be as those described for Alternative 1. This is because Alternative 5 is functionally equivalent to Alternative 1.

5 Listing of Persons and Agencies Consulted

Federal agencies were invited to participate in the Federal interagency review process of the final ESA section 7 regulations guided by the Office of Management and Budget, Office of Information and Regulatory Affairs. Federal agencies, Tribes, and the public were invited to comment on the draft ESA section 7 regulations as part of the 60-day public review and commenting period noticed in the for the proposed rule. A summary of the responses to the substantive comments are provided in *Appendix B – Proposed Action – (draft) Final Rule - Endangered Species Act, section 7 Regulations 50 CFR 402*.

6 References

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Appendix

Appendix A – 2019 Endangered Species Act, section 7 Regulations 50 CFR 402

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 402

[Docket No. FWS–HQ–ES–2018–0009; FXES11140900000–189–FF09E300000; Docket No. 180207140–8140–01; 4500090023]

RIN 1018–BC87; 0648–BH41

Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation

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

ACTION: Final rule.

SUMMARY: FWS and NMFS (collectively referred to as the ''Services'' or ''we'') revise portions of our regulations that implement section 7 of the Endangered Species Act of 1973, as amended (''Act''). The revisions to the regulations clarify, interpret, and implement portions of the Act concerning the interagency cooperation procedures.

DATES: This final rule is effective on September 26, 2019.

ADDRESSES: This final rule is available on the internet at *http://www.regulations.gov* at Docket No. FWS–HQ–ES–2018–0009. Comments and materials we received on the proposed rule, as well as supporting documentation we used in preparing this rule, are available for public inspection at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Gary Frazer, U.S. Fish and Wildlife Service, Department of the Interior, Washington, DC 20240, telephone 202/208–4646; or Samuel D. Rauch, III, National Marine Fisheries Service, Department of Commerce, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301/427–8000. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Title 50, part 402, of the Code of Federal Regulations establishes the procedural regulations governing interagency cooperation under section 7 of the Act, which requires Federal agencies, in consultation with and with the assistance of the Secretaries of the Interior and Commerce (the ''Secretaries''), to insure that any action authorized, funded, or carried out by such agencies is not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species.

On July 25, 2018, the Services published a proposed rule to amend our regulations that implement section 7 of the Act (83 FR 35178). The proposed rule addressed alternative consultation mechanisms; the definitions of ''destruction or adverse modification'' and ''effects of the action''; certainty of measures proposed by action agencies to avoid, minimize, or offset adverse effects; and other improvements to the consultation process. The proposed rule also sought comment on: The advisability of addressing several other issues related to implementing section 7 of the Act; the extent to which the proposed changes outlined would affect timeframes and resources needed to conduct consultation; anticipated cost savings resulting from the proposed changes; and any other specific changes to any provisions in part 402 of the regulations. The proposed rule requested that all interested parties submit written comments on the proposal by September 24, 2018. The Services also contacted Federal and State agencies, certain industries regularly involved in Act section 7(a)(2) consultation, Tribes, nongovernmental organizations, and other interested parties and invited them to comment on the proposal.

In this final rule, we focus our discussion on changes from the proposed regulation revisions, including changes based on comments we received during the comment period. For background relevant to these regulations, we refer the reader to the proposed rule (83 FR 35178, July 25, 2018).

This final rule is one of three related final rules that the agencies are publishing in this issue of the **Federal Register.** All of these documents finalize revisions to various regulations that implement the Act. The revisions to the regulations in this rule are prospective; they are not intended to require that any previous consultations under section 7(a)(2) of the Act be reevaluated at the time this final rule becomes effective (see **DATES**, above).

Final Regulatory Revisions

Discussion of Changes From Proposed Rule

Below, we discuss the changes between the proposed regulatory text and regulatory text that we are finalizing with this rule. We did not revise the regulatory text between the proposed and final rules for the definitions of ''Destruction or adverse modification,'' ''Director,'' and ''Programmatic consultation''. Therefore, we do not address those definitions within this portion of the preamble.

Section 402.02—Definitions

Definition of ''Effects of the Action''

The Services proposed to revise the definition of ''effects of the action'' in a manner that simplified the definition by collapsing the terms ''direct, ''indirect,'' interrelated,'' and ''interdependent'' and by applying a two-part test of ''but for'' and ''reasonably certain to occur.''

Effects of the action was proposed to be defined as all effects on the listed species or critical habitat that are caused by the proposed action, including the effects of other activities that are caused by the proposed action. An effect or activity is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include effects occurring outside the immediate area involved in the action.

The Services requested comments on (1) the extent to which the proposed revised definition simplified and clarified the definition of ''effects of the action''; (2) whether the proposed definition altered the scope of effects considered by the Services; (3) the extent to which the scope of the proposed revised definition was appropriate for the purposes of the Act; and (4) how the proposed revised definition may be improved. We received numerous comments regarding the proposed revision to the definition of ''effects of the action,'' including the two-part test, and the scope of the definition as proposed. Some commenters felt that the proposed two-part test for both effects and activities caused by the proposed action was either inappropriate or still subject to misapplication and misinterpretation. Others were concerned that the changed definition would narrow the scope of effects of the action, resulting in unaddressed negative effects to listed species and critical habitat. As stated in the proposed rule, the Services' intended purpose of the revised definition of effects of the action was to

simplify the definition while still retaining the scope of the assessment required to ensure a complete analysis of the effects of proposed actions. Further, we stated that by revising the definition, consultations between the Services and action agencies, including consultations involving applicants, can focus on identifying the effects and not on categorizing them. The two-part test was included to provide a transparent description of how the Services identify effects of the proposed action. A summary of the comments and our responses are below at Summary of Comments and Recommendations.

In response to comments and upon further consideration, the Services are adopting a revised, final definition of ''effects of the action'' to further clarify that effects of the action include all consequences of a proposed action, including consequences of any activities caused by the proposed action. We revised the definition to read as set out in the regulatory text at the end of the document.

The principal changes we have made in this final rule include: (1) Introducing the term ''consequences'' to help define what we mean by an effect; and (2) emphasizing that to be considered the effect of the action under consultation, the consequences caused by the action would not occur but for the proposed action and must be reasonably certain to occur.

The Services believe that the definition of ''effects of the action'' contained in this final rule will reduce confusion and streamline the process by which the Services identify the relevant effects caused by a proposed action. The Services do not intend for these regulatory changes to alter how we analyze the effects of a proposed action. We will continue to review all relevant effects of a proposed action as we have in past decades, but we determined it was not necessary to attach labels to various types of effects through regulatory text. That is, we intend to capture those effects (consequences) previously listed in the regulatory definition of effects of the action—direct, indirect, and the effects from interrelated and interdependent activities—in the new definition. These effects are captured in the new regulatory definition by the term ''all consequences'' to listed species and critical habitat.

We introduced the term ''consequences,'' in part, to avoid using the term ''effects'' to define ''effects of the action''. Consequences are a result or effect of an action, and we apply the two-part test to determine whether a given consequence should be considered an effect of the proposed action that is under consultation. Requiring evaluation of all consequences caused by the proposed action allows the Services to focus on the impact of the proposed action to the listed species and critical habitat, while being less concerned about parsing what label to apply to each effect (*e.g.,* direct or indirect effect, or interdependent or interrelated activity).

As discussed in the proposed rule, the Services have applied the ''but for'' test to determine causation for decades. That is, we have looked at the consequences of an action and used the causation standard of ''but for'' plus an element of foreseeability (*i.e.,* reasonably certain to occur) to determine whether the consequence was caused by the action under consultation. In this final rule, we have added regulatory text to confirm that, by definition, ''but for'' causation means that the consequence in question would not occur if the proposed action did not go forward. This added regulatory language does not add a more stringent standard than what was applied already under our current ''but for'' causation, but is meant to clarify and reinforce the standard we currently implement and will do so in the future. Additionally, there are several relevant considerations where the proposed action is not the ''but for'' cause of another activity (not included in the proposed action) because the other activity would proceed in the absence of the proposed action due to the prospect of an alternative approach (*e.g.,* if a Federal right-of-way (proposed action) is not granted, a private wind farm on non-federal lands (other activity) would still be developed through the building of a road on private lands (alternative approach)). In particular, the Services consider case-specific information including, but not limited to, the independent utility of the other activity and proposed action, the feasibility of the alternative approach and likelihood the alternative approach would be undertaken, the existence of plans relating to the activity and whether the plans indicate that an activity will move forward irrespective of the action agency's proposed action, and whether the same effects would occur as a result of the other activity in the absence of the proposed action. In other words, if the agency fails to take the proposed action and the activity would still occur, there is no ''but for'' causation. In that event, the activity would not be considered an effect of the action under consultation.

Consequences to the species or critical habitat caused by the proposed action must also be reasonably certain to occur. The term ''reasonably certain to occur'' is not a new or heightened standard, but it was not clearly defined or given any parameters in previous regulations. Experience has taught us that the failure to provide a definition and any parameters to the term ''reasonably certain to occur'' left the concept vague and occasionally produced determinations that were inconsistent or had the appearance of being too subjective. As such, there were sometimes disagreements between the Services and action agencies as to what constituted ''reasonably certain to occur.'' Our intention in these regulations is to provide a solid framework, with specific factors for both action agencies and the Services to evaluate, in order to determine whether a consequence is ''reasonably certain to occur.'' In addition, we added a regulatory requirement that this framework be reviewed and followed by both the action agency and the Services. See § 402.17(c). When the Services write an incidental take statement for a biological opinion, under section 7(b)(4)(iv) of the Act they can assign responsibility of specific terms and conditions of the incidental take statement to the Federal action agency, the applicant, or both taking into account their respective roles, authorities, and responsibilities. The Services have worked with Federal action agencies in the past, and will continue to do so into the future, to ensure that a reasonable and prudent measure assigned to a Federal action agency does not exceed the scope of a Federal action agency's authority.

As discussed below in our discussion of changes to § 402.17, we have clarified that for a consequence or an activity to be considered reasonably certain to occur, the determination must be based on clear and substantial information. The term ''clear and substantial'' is used to describe the nature of information needed to determine that a consequence or activity is reasonably certain to occur. By clear and substantial, we mean that there must be a firm basis to support a conclusion that a consequence of an action is reasonably certain to occur. The determination of a consequence to be reasonably certain to occur must be based on solid information and should not be based on speculation or conjecture. This added term also does not mean the nature of the information must support that a consequence must be guaranteed to occur, but rather, that it must have a degree of certitude.

We revised § 402.17 to help guide the determination of ''reasonably certain to occur.'' The ''reasonably certain to occur'' determination applies to other

activities caused by (but not part of) the proposed action, activities considered under cumulative effects (as defined at § 402.02), and to the consequences caused by the proposed action. However, it does not apply to the proposed action itself, which is presumed to occur as described. First, in § 402.17(a), we discuss factors to consider when determining whether an activity is reasonably certain to occur for purposes of determining the effects of the action or which activities to include under Cumulative Effects. Second, we describe considerations for evaluating whether a consequence is reasonably certain to occur in § 402.17(b). For further explanation, please see our discussion of § 402.17, below.

We also continue to emphasize that effects may occur beyond the proposed action's footprint. This concept was reflected in the proposed rule and the final definition states that effects may include consequences occurring outside the immediate area involved in the action.

As discussed above, we articulated a two-part test for effects of the action that is consistent with our existing practice and prior interpretations. This test for determining effects includes effects resulting from actions previously referred to as ''interrelated or interdependent'' activities. In order for consequences of other activities caused by the proposed action to be considered effects of the action, both those activities and the consequences of those activities must satisfy the two-part test: They would not occur but for the proposed action and are reasonably certain to occur. As a result, when we discuss effects or effects of the action throughout the rest of this rule, we are referring only to those effects that satisfy the two-part test. For further discussion of the application of the ''reasonably certain to occur'' test to activities included within the definition of *effects of the action,* see our discussion of changes to proposed § 402.17, below.

Definition of Environmental Baseline

We proposed a stand-alone definition for ''environmental baseline'' as referenced in the discussion above in the proposed revised definition for *effects of the action.*

Environmental baseline was proposed to be defined to include the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process.

In the proposed rule, we also sought comment on potential revisions to the definition of ''environmental baseline'' as it relates to ongoing Federal actions. The Services received numerous comments regarding the proposed definition of ''environmental baseline'' and the consideration of ongoing Federal actions.

In response to these comments and upon further consideration, through this final rule, we are revising the definition of ''environmental baseline'' to read as set out in the regulatory text at the end of this document.

We revised the definition of environmental baseline to make it clear that ''environmental baseline'' is a separate consideration from the effects of the action. In practice, the environmental baseline should be used to compare the condition of the species and the designated critical habitat in the action area with and without the effects of the proposed action, which can inform the detailed evaluation of the effects of the action described in § 402.14(g)(3) upon which the Services formulate their biological opinion.

In addition, we added a sentence to clarify that the consequences of ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are included in the environmental baseline. This third sentence is specifically intended to help clarify environmental baseline issues that have caused confusion in the past, particularly with regard to impacts from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify.

We added this third sentence because we concluded that it was necessary to explicitly answer the question as to whether ongoing consequences of past or ongoing activities or facilities should be attributed to the environmental baseline or to the effects of the action under consultation when the agency has no discretion to modify either those activities or facilities. The Courts and the Services have concluded that, in general, ongoing consequences attributable to ongoing activities and the existence of agency facilities are part of the environmental baseline when the action agency has no discretion to modify them. With respect to existing facilities, such as a dam, courts have recognized that effects from the existence of the dam can properly be considered a past and present impact included in the environmental baseline, particularly when the Federal agency lacks discretion to modify the dam. See, *e.g., Friends of River* v. *Nat'l Marine Fisheries Serv.,* 293 F. Supp. 3d 1151, 1166 (E.D. Cal. 2018). Having the environmental baseline include the consequences from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify is supported by the Supreme Court's conclusion in *National Ass'n of Home Builders* v. *Defenders of Wildlife,* 551 U.S. 644, 667–71 (U.S. 2007) (''Home Builders''). In that case, the Court held that it was reasonable for the Services to narrow the application of section 7 to a Federal agency's discretionary actions because it made no sense to consult on actions over which the Federal agency has no discretionary involvement or control. It follows, then, that when a Federal agency has authority for managing or operating a dam, but lacks discretion to remove or modify the physical structure of the dam, the consequences from the physical presence of the dam in the river are appropriately placed in the environmental baseline and are not considered an effect of the action under consultation.

We distinguish here between activities and facilities where the Federal agency has no discretion to modify and those discretionary activities, operations, or facilities that are part of the proposed action but for which no change is proposed. For example, a Federal agency in their proposed action may modify some of their ongoing, discretionary operations of a water project and keep other ongoing, discretionary operations the same. The resulting consultation on future operations analyzes the effects of all of the discretionary operations of the water project on the species and designated critical habitat as part of the effects of the action, even those operations that the Federal agency proposes to keep the same. We also note that the obligation is on the Federal action agency to propose actions for consultation and while they should not improperly piecemeal or segment portions of related actions, a request for consultation on one aspect of a Federal agency's exercise of discretion does not de facto pull in all of the possible discretionary actions or authorities of the Federal agency. This is a case-by-case specific analysis undertaken by the Services and the Federal action agency as needed during consultation.

Attributing to the environmental baseline the ongoing consequences from activities or facilities that are not within the agency's discretion to modify does not mean that those consequences are ignored. As discussed in more detail below, the environmental baseline is a

description of the condition of the species or the designated critical habitat in the action area. To the extent ongoing consequences are beneficial or adverse to a species, the environmental baseline evaluations of the species or designated critical habitat will reflect the impact of those consequences and the effects of the action must be added to those impacts in the Services' jeopardy and adverse modification analysis.

Section 402.13—Deadline for Informal Consultation

The Services sought comment on potentially establishing a 60-day deadline, subject to extension by mutual consent, for informal consultations. More specifically, we sought comment on (1) whether a deadline would be helpful in improving the timeliness of review; (2) the appropriate length for a deadline (if not 60 days); and (3) how to appropriately implement a deadline (*e.g.,* to which portions of informal consultation the deadline should apply [*e.g.,* technical assistance, response to requests for concurrence, etc.], when informal consultation begins, the ability to extend or ''pause the clock'' in certain circumstances, etc.).

The Services received numerous comments regarding the establishment of a deadline for informal consultation. A summary of those comments and our responses are below at Summary of Comments and Recommendations. In response to these comments and upon further consideration, through this final rule, we are revising § 402.13, Informal consultation, to read as set out in the regulatory text at the end of this document.

These changes institute a new § 402.13(c), which is a process framework for the Federal agency's written request for concurrence and the Service's response. The changes to the informal consultation process are limited to only the written request for concurrence and the Service's response. This preserves the flexibility in discussions and timing inherent in the portion of the informal consultation process that is intended to assist the Federal agency in determining whether formal consultation is required. In the new framework, we require in § 402.13(c)(1) that the written request for our concurrence should contain information similar to that required in § 402.14(c)(1) for formal consultation, but only at a level of detail sufficient for the Services to determine whether or not it concurs. Consistent with past practice, the Services determine whether the information provided by the Federal agency provides sufficient information upon which to make its determination whether to concur with Federal agency's request for concurrence. We anticipate that this level of detail will often be less than that required for the initiation of formal consultation and the evaluation of adverse effects to species and designated critical habitat. Second, we establish in § 402.13(c)(2) a timeline for the written request and concurrence process. As stated in the new § 402.13(c)(2), upon receipt of an adequate request for concurrence from a Federal agency, the Services shall provide their written response within 60 days. The 60-day response period may be extended, with the mutual consent of the Federal agency (or its designated representative) and any applicant, for up to an additional 60 days, bringing the total potential timeframe for this written request and response process to 120 days. The intent of the 60-day, and no more than 120-day, deadline is to increase regulatory certainty and timeliness for Federal agencies and applicants.

The changes at § 402.13(c) do not alter or apply to the Services' review of and response to biological assessments prepared for major construction activities, as outlined at § 402.12. For those consultations, the response would be required within 30 days, as outlined at § 402.12(j) and (k).

Section 402.14—Formal Consultation

The Services proposed several amendments to § 402.14. Consistent with the Services' existing practice, we proposed to revise § 402.14(c) to clarify what is necessary to initiate formal consultation and to allow the Services to consider documents such as those prepared pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) to be considered as initiation packages, as long as they meet the requirements for initiating consultation. We also proposed to: (1) Revise portions of § 402.14(g) that describe the Services' responsibilities during formal consultation; (2) revise § 402.14(h) to allow the Services to adopt all or part of a Federal agency's initiation package, or all or part of the Services' own analyses and findings that are required to issue a permit under section 10(a) of the Act, in its biological opinion; and (3) add a new provision titled ''Expedited consultations'' at § 402.14(l) to offer opportunities to streamline consultation, particularly for actions that have minimal adverse effects or predictable effects based on previous consultation experience.

The Services received numerous comments related to our proposed amendments to § 402.14, Formal consultation, as set forth at 83 FR 35192, July 25, 2018. A summary of those comments and our responses are below at Summary of Comments and Recommendations.

In response to these comments and upon further consideration, in this final rule, we are finalizing the proposed revisions to § 402.14(g)(2) and (4) and (l), and we are amending § 402.14(c), (g)(8), and (h) to read as set out in the regulatory text at the end of this document.

The Services are making a non-substantive edit to the proposed regulatory text at § 402.14(c)(1)(iii). This non-substantive edit clarifies that the Services are referring to information about both the species and its habitat, including any designated critical habitat.

The Services are also making edits to the proposed regulatory text at § 402.14(g)(8) to simplify the text while maintaining the intent of the proposed regulatory revisions. More specifically, we are striking the proposed text that referenced ''specific'' plans and ''a clear, definite commitment of resources'' with respect to measures intended to avoid, minimize or, or offset the effects of an action. Instead, the Services are simplifying the regulatory text to indicate that such measures are considered like other portions of the action and do not require any additional demonstration of binding plans.

The simplified regulatory text avoids potential confusion between the need to sufficiently describe measures a Federal agency is committing to implement as part of a proposed action to avoid, minimize, or offset effects pursuant to § 402.14(c)(1), and how those measures are taken into consideration after consultation is initiated. Any type of action proposed by a Federal agency receives a presumption that it will occur, but it must also be described in sufficient detail that the Services can both understand the action and evaluate its adverse and beneficial effects. By eliminating the word ''specific'' in § 402.14(g)(8), we reinforce that an appropriate level of specificity regarding the description of measures included in the proposed action may be necessary to provide sufficient detail to assess the effects of the action on listed species and critical habitat. However, inclusion of measures to avoid, minimize, or offset adverse effects as part of the proposed action does not result in a requirement for an additional demonstration of binding plans. To simplify the regulatory text and improve clarity, we also eliminated the reference to ''a clear, definite commitment of resources.'' That change is not meant to imply that an

additional demonstration of a clear and definite commitment of resources, beyond the commitment to implement such measures as part of the proposed action, is required before the Services can take them into consideration. Rather, we intend the phrase ''do not require any additional demonstration of binding plans'' that is retained in § 402.14(g)(8) to reflect that demonstrations of resource commitments and other elements are not required before allowing the Services to take into account measures included in a proposed action to avoid, minimize, or offset adverse effects. Therefore, this final rule maintains the intent of the proposed revisions to § 402.14(g)(8).

The Services are also revising the proposed regulatory text at § 402.14(h) by adding a new paragraph (h)(1)(ii); redesignating the existing (h)(1)(ii) and (iii) as (h)(1)(iii) and (iv), respectively; and making a non-substantive edit at § 402.14(h)(4). New § 402.14(h)(1)(ii) clarifies that the biological opinion will also include a detailed discussion of the environmental baseline because a proper understanding of the environmental baseline is critical to our analysis of the effects of the action, as well as our determination as to whether a proposed action is likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat. Inclusion of a detailed description of the environmental baseline is consistent with existing practice (see Services' 1998 Consultation Handbook at pp. 4–13 and 4–15) and, therefore, this requirement will not change how the Services prepare biological opinions.

Section 402.16—Reinitiation of Consultation

We proposed two changes to this section. First, we proposed to remove the term ''formal'' from the title and text of this section to acknowledge that the requirement to reinitiate consultation applies to all section 7(a)(2) consultations. Second, we proposed to amend this section to address issues arising under the Ninth Circuit's decision in *Cottonwood Environmental Law Center* v. *U.S. Forest Service,* 789 F.3d 1075 (9th Cir. 2015), *cert. denied,* 137 S. Ct. 293 (2016), by making non-substantive redesignations and then revising § 402.16 by adding a new paragraph (b) to clarify that the duty to reinitiate does not apply to an existing programmatic land management plan prepared pursuant to the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1701 *et seq.,* or the National Forest Management Act (NFMA), 16 U.S.C. 1600 *et seq.,* when a new species is listed or new critical habitat is designated. In addition to seeking comment on the proposed revision to 50 CFR 402.16, we sought comment on whether to exempt other types of programmatic land or water management plans in addition to those prepared pursuant to FLPMA and NFMA, and on the proposed revision in light of the recently enacted Wildfire Suppression Funding and Forest Management Activities Act, H.R. 1625, Division O, which was included in the Omnibus Appropriations bill for fiscal year 2018 (''2018 Omnibus Act'').

In the proposed revisions to § 402.16, reinitiation of consultation would be required and would need to be requested by the Federal agency or by the Service. Moreover, an agency would not be required to reinitiate consultation after the approval of a land management plan prepared pursuant to 43 U.S.C. 1712 or 16 U.S.C. 1604 upon listing of a new species or designation of new critical habitat, provided that any authorized actions that may affect the newly listed species or designated critical habitat will be addressed through a separate action-specific consultation.

The Services received numerous comments related to our proposed amendments to this section. Comments were generally evenly divided in support of and in opposition to the proposed § 402.16(b), including whether we are precluded from expanding relief from reinitiation due to the 2018 Omnibus Act as well as to whether to extend the exemption to other types of plans. A summary of those comments and our responses are below at Summary of Comments and Recommendations.

In response to these comments and upon further consideration, we revised § 402.16, Reinitiation of consultation, to read as set out in the regulatory text at the end of this document.

We modified the language at § 402.16(a)(3) to correct the inadvertent failure of our proposed rule to reference the written concurrence process in this criterion for reinitiation of consultation. This criterion references the information and analysis the Services considered, including information submitted by the Federal agency and applicant, in the development of our biological opinion or written concurrence and not just the information contained within the biological opinion or written concurrence documents. The remaining three reinitiation criteria at § 402.16(a)(1), (2), and (4) were unchanged. We also took this opportunity to clarify the meaning of the reference to the Service in the current and adopted, final version of § 402.16(a) that reads, ''Reinitiation of consultation is required and shall be requested by the Federal agency or by the Service, . . .''. The reference to the Service in this language does not impose an affirmative obligation on the Service to reinitiate consultation if any of the criteria have been met. Rather, the reference here has always been interpreted by the Services to allow us to recommend reinitiation of consultation to the relevant Federal action agency if we have information that indicates reinitiation is warranted. It is ultimately the responsibility of the Federal action agency to reinitiate consultation with the relevant Service when warranted. The same holds true for initiation of consultation in the first instance. While the Services may recommend consultation, it is the Federal agency that must request initiation of consultation. See 50 CFR 402.14(a).

In addition, we clarified that initiation of consultation shall not be required for land management plans prepared pursuant to 43 U.S.C. 1712 or 16 U.S.C. 1604, upon listing of a new species or designation of new critical habitat, in certain specific circumstances, provided that any authorized actions that may affect the newly listed species or designated critical habitat will be addressed through a separate action-specific consultation. This exception to reinitiation of consultation shall not apply to those land management plans prepared pursuant to 16 U.S.C. 1604 if 15 years have passed since the date the agency adopted the land management plan and 5 years have passed since the enactment of Public Law 115–141 [March 23, 2018], or the date of the listing of a species or the designation of critical habitat, whichever is later.

The language at § 402.16(b) is revised from the proposed amendment to follow the time limitations imposed by Congress for the relief from reinitiation when a new species is listed or critical habitat designated for forest management plans prepared pursuant to NFMA. Because Congress did not address land management plans prepared pursuant to FLPMA in the 2018 Omnibus Act, the Services have determined that we may exempt any land management plan prepared pursuant to FLPMA from reinitiation when a new species is listed or critical habitat is designated as long as any action taken pursuant to the plan will be subject to its own section 7 consultation.

Section 402.17—Other Provisions

We proposed to add a new § 402.17 titled ''Other provisions.'' Within this new section, we proposed a new provision titled ''Activities that are reasonably certain to occur,'' in order to clarify the application of the ''reasonably certain to occur'' standard referenced in § 402.02 (defining effects of the action and cumulative effects). The proposed revisions are set out at 83 FR 35193, July 25, 2018.

The Services received numerous comments related to the proposed provision, many of which stated the Services should further clarify the language of the provision. In response to these comments and upon further consideration, we revised § 402.17 to read as set out in the regulatory text at the end of this document.

The revisions to the language in § 402.17 are intended to clarify several aspects of the process of determining whether an activity or consequence is ''reasonably certain to occur.''

First, we clarified that for a consequence or an activity to be considered reasonably certain to occur, the determination must be based on clear and substantial information. The term ''clear and substantial'' is used to describe the nature of information needed to determine that a consequence or activity is reasonably certain to occur. We do not intend to change the statutory requirement that determinations under the Act are made based on ''best scientific and commercial data available.'' By clear and substantial, we mean that there must be a firm basis to support a conclusion that a consequence of an action is reasonably certain to occur. This term is not intended to require a certain numerical amount of data; rather, it is simply to illustrate that the determination of a consequence to be reasonably certain to occur must be based on solid information. This added term also does not mean the nature of the information must support that a consequence is guaranteed to occur, but must have a degree of certitude.

To be clear, these regulations do not amend a Federal agency's obligation under the Act's section 7(a)(2); nor do they change the regulatory standard that action agencies must ''insure'' that their actions are not likely to jeopardize listed species or destroy or adversely modify critical habitat. See H.R. Conference Report 96–697 (1979) (confirming section 7(a)(2) requires all federal agencies to ensure that their actions are not likely to jeopardize endangered or threatened species or result in the adverse modification of critical habitat).

Second, in response to requests made in public comments for clarification of the factors to consider, we revised § 402.17(a)(1) and (2) to further elaborate what we meant in the original proposed versions of those factors. In particular, we revised § 402.17(a)(1) to describe that the Services would include past experience with ''activities that have resulted from actions that are similar in scope, nature, and magnitude to the proposed action'' when considering whether an activity might be reasonably certain to occur as a result of the proposed action under consultation. This is intended to capture the important knowledge developed by the action agencies and Services over their decades of consultation experience. We also made minor revisions to clarify § 402.17(a)(2). The proposed language used the phrase ''any existing relevant plans'' but did not reference to the activity itself. We recognize that this language may have been confusing and vague for readers and therefore have modified the text to clarify that we are referencing plans specific to that activity, not general plans that may contemplate a variety of activities or uses in an area.

Finally, we added a new paragraph to § 402.17 to emphasize other considerations that are important and relevant when reviewing whether a consequence is also reasonably certain to occur. These are not exhaustive, new, or more stringent factors than what we have used in the past to determine the likelihood of a consequence occurring nor are they meant to imply that time, distance, or multiple steps inherently make a consequence not reasonably certain to occur. See *Riverside Irrigation* v. *Andrews,* 758 F2d 508 (10th Cir. 1985) (upholding the U.S. Army Corps of Engineers' determination that it properly reviewed an effect downstream from the footprint of the action).

Each consultation will have its own set of evaluations and will depend on the underlying factors unique to that consultation. For example, a Federal agency is consulting on the permitting of installation of an outfall pipe. A secondary, connecting pipe owned by a third party is to be installed and would not occur ''but for'' the proposed outfall pipe, and existing plans for the connecting pipe make it reasonably certain to occur. Under our revised definition for effects of the action, any consequences to listed species or critical habitat caused by the secondary pipe would be considered to fall within the effects of the agency action. As the rule recognizes, however, there are situations, such as when consequences are so remote in time or location, or are only reached following a lengthy causal chain of events, that the consequences would not be considered reasonably certain to occur.

Summary of Comments and Recommendations

Section 402.02—Definitions

Definition of Destruction or Adverse Modification

We revised the definition of ''destruction or adverse modification'' by adding the phrase ''as a whole'' to the first sentence and removing the second sentence of the prior definition. The Act requires Federal agencies, in consultation with and with the assistance of the Secretaries, to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. In 1986, the Services established a definition for ''destruction or adverse modification'' (51 FR 19926, June 3, 1986, codified at 50 CFR 402.02) that was found to be invalid by the U.S. Court of Appeals for the Fifth (2001) and Ninth (2004) Circuits. In 2016, we revised the definition, in part in response to these court rulings (81 FR 7214; February 11, 2016).

In this final rule, we have further clarified the definition. The addition of the phrase ''as a whole'' to the first sentence reflects existing practice and the Services' longstanding interpretation that the final destruction or adverse modification determination is made at the scale of the entire critical habitat designation. The deletion of the second sentence removes language that is redundant and has caused confusion about the meaning of the regulation. These revisions are unchanged from the proposed rule, and further explanation of their background and rationale is provided in the preamble text of the proposed rule.

Comments on the Destruction and Adverse Modification Definition

Comment: Several commenters disagreed with defining ''destruction or adverse modification'' at all, saying that such a definition was unnecessary and that we should rely only on the statutory language. Others suggested creating separate definitions for ''destruction'' and ''adverse modification,'' and suggested that not doing so is an impermissible interpretation of the Act.

Response: The term ''destruction or adverse modification'' has been defined by regulation since 1978. We continue to believe it is appropriate and within

the Services' authority to define this term and believe that this revision to that definition will improve the clarity and consistency in the application of these concepts. Furthermore, the Services have discretion to issue a regulatory interpretation of the statutory phrase ''destruction or adverse modification'' and are not required to break such a phrase into separate definitions of its individual words. The Services believe that the inquiry is most usefully and appropriately defined by the general standard in our definition, and that ultimately the determination focuses on how the agency action affects the value of the critical habitat for the conservation of the species, regardless of whether the contemplated effects constitute ''destruction'' or ''adverse modification'' of critical habitat.

Comment: One commenter asserted that the definition should not include the phrase ''or indirect'' because it would allow for ''speculative actions to be used as determining factors.''

Response: The final rule does not alter the use of the phrase ''or indirect'' which has been in all prior versions of this definition. In addition, we note that the phrase has long been included in, and continues to be used in, the definitions of ''jeopardize the continued existence of'' and ''action area.'' We continue to believe its inclusion is appropriate in this context and takes into account that some actions may affect critical habitat indirectly. The Services use the best scientific and commercial data available and do not rely upon speculation in determining the effects of a proposed action or in section 7(a)(2) ''destruction or adverse modification'' determinations. The standards for determining effects of a proposed action are further discussed above under Definition of ''Effects of the Action''.

Comment: One commenter said that a lead agency should defer to cooperating agencies in evaluating potential impacts on critical habitat when the cooperating agencies have jurisdiction over the area being analyzed.

Response: The term ''cooperating agency'' arises in the NEPA context. Generally speaking, the lead agency under NEPA may also be a section 7 action agency under the Act. Cooperating agencies can be a valuable source of scientific and other information relevant to a consultation and may play a role in section 7 consultation. The Federal action agency, however, remains ultimately responsible for its action under section 7. Under 50 CFR 402.07, where there are multiple Federal agencies involved in a particular action, a lead agency may be designated to fulfill the consultation and conference responsibilities. The other Federal agencies can assist the lead Federal agency in gathering relevant information and analyzing effects. The determination of the appropriate lead agency can take into account factors including their relative expertise with respect to the environmental effects of the action.

Comment: Some commenters said that the revised definition creates uncertainty and potential lack of consistency regarding when formal or informal consultation is required, or that it revised the triggers for initiating consultation.

Response: The revisions to this definition should not create any additional uncertainty about when formal or informal consultation is required, because these revisions do not change the obligations of action agencies to consult or the circumstances in which consultation must be initiated.

Comment: Several commenters offered their own, alternative re-definitions of the phrase ''destruction or adverse modification.'' For example, one commenter suggested the phrase should be defined to mean ''a direct or indirect alteration caused by the proposed action that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.''

Response: We recognize that there could be more than one permissible, reasonable interpretation of this phrase. The definition we have adopted is an incremental change that incorporates longstanding approaches, modified from the 2016 definition (81 FR 7214; February 11, 2016) to improve clarity and consistency of application. Our adopted definition also has the value of being succinct. We do not view the proposed alternative definitions as improving upon clarity, and they may also contain unnecessary provisions or incorporate additional terminology that could itself be subject to multiple or inappropriate meanings.

Comment: Several commenters suggested that the definition should clarify that the only valid consideration in making a ''destruction or adverse modification'' determination is the impact of an action on the continued survival of the species, and that it should not take into consideration the ability of the species to recover. Conversely, some commenters said the definition improperly devalues or neglects recovery.

Response: Our definition focuses on the value of the affected habitat for ''conservation,'' a term that is defined by statute as implicating recovery (see 16 U.S.C. 1532(3)). ''Conservation'' is the appropriate focus because critical habitat designations are focused by statute on areas or features ''essential to the conservation of the species'' (16 U.S.C. 1532(5); see also 50 CFR 402.02 (defining ''recovery'')).

Comment: Several commenters said that the Services should do more to identify how they assess the value of critical habitat for the conservation of a species. They recommend measures such as identifying specific metrics of conservation value, providing guidance on the use of recovery or planning tools to identify targets for preservation or restoration, and defining de minimis thresholds or standardized project modifications that could be applied to recurring categories of projects in order to avoid triggering a ''destruction or adverse modification'' determination.

Response: As noted in the proposed rule preamble, the value of critical habitat for the conservation of a listed species is described primarily through the critical habitat designation itself. That designation itself will identify and describe, in occupied habitat, ''physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection'' (16 U.S.C. 1532(5)(A)(i)). Similarly, designations of any unoccupied habitat will describe the reasons that such areas have been determined to be ''essential for the conservation of the species'' (16 U.S.C. 1532(5)(A)(ii)). Critical habitat designations, recovery plans, and related information often provide additional and specific discussions regarding the role and quality of the physical or biological features and their distribution across the critical habitat in supporting the recovery of the listed species.

Regarding concepts such as defining metrics of value or pre-defined de minimis standards, the Services often assist action agencies in developing conservation measures during consultation that would work to reduce or minimize project impacts to critical habitat. The final rule contains provisions on programmatic consultations that could facilitate establishing and applying broadly applicable standards or guidelines based on recurring categories of actions whose effects can be understood and anticipated in advance. However, predefined metrics, standards, and thresholds for categories of action in many instances are not feasible, given variations in the actions, their circumstances and setting, and evolving scientific knowledge.

Comments on the Addition of the Phrase ''As a Whole''

Comment: Some comments supported the change, saying that the addition of this phrase was consistent with existing Services practice and guidance, or said the addition improved the definition and clarified the appropriate scale at which the ''destruction or adverse modification'' determination applies. Some commenters noted that the addition helps place the inquiry in its proper functional context and observed that alteration of critical habitat is not necessarily a per se adverse modification.

Response: We agree that the addition of ''as a whole'' helps clarify the application of the definition, without changing its meaning or altering current policy and practice.

Comment: One commenter said that the addition of ''as a whole'' could cause confusion as to whether it referred to the critical habitat or the species.

Response: The phrase ''as a whole'' is intended to apply to the critical habitat designation, not to the phrase ''a species.''

Comment: Some commenters asserted that adding ''as a whole'' to the definition meant that small losses would no longer be considered ''destruction or adverse modification'' because they would be viewed as small compared to the ''whole'' designation. Some of these comments asserted that under this definition, ''destruction or adverse modification'' would only be found if an action impacted the entire critical habitat designation or a large area of it. Some also noted that effects in small areas can have biological significance (*e.g.,* a migration corridor), and that impacts in a small area could be significant to a small, local population or important local habitat features.

Response: The addition of ''as a whole'' clarifies but does not change the Services' approach to assessing critical habitat impacts, as explained in the preamble to the proposed rule and in the 2016 final rule on destruction and adverse modification (81 FR 7214; February 11, 2016). In that 2016 rule, we elected not to add this phrase, but made clear that the phrase did describe and reflect the appropriate scale of ''destruction or adverse modification'' determinations. Consistent with longstanding practice and guidance, the Services must place impacts to critical habitat into the context of the overall designation to determine if the overall value of the critical habitat is likely to be appreciably reduced. The Services agree that it would not be appropriate to mask the significance of localized effects of the action by only considering the larger scale of the whole designation and not considering the significance of any effects that are occurring at smaller scales (see, *e.g., Gifford Pinchot,* 378 F.3d at 1075). The revision to the definition does not imply, require, or recommend discounting or ignoring the potential significance of more local impacts. Such local impacts could be significant, for instance, where a smaller affected area of the overall habitat is important in its ability to support the conservation of a species (*e.g.,* a primary breeding site). Thus, the size or proportion of the affected area is not determinative; impacts to a smaller area may in some cases result in a determination of destruction or adverse modification, while impacts to a large geographic area will not always result in such a finding.

Comment: Some comments expressed concern that the ''as a whole'' language, along with the preamble interpretation of ''appreciably diminish,'' undermined conservation because it would allow more piecemeal, incremental losses that over time would add up cumulatively to significant losses or fragmentation (referred to by many comments as ''death by a thousand cuts''). One commenter further expressed concern that such accumulated losses would add to the regulatory burden faced by private landowners with habitat on their lands. Some commenters asserted that the ''as a whole'' language would be difficult or burdensome to implement, because the Services lacked sufficient capacity to track or aggregate losses over time and space.

Response: As already noted, the revisions to the definition will not reduce or alter how the Services consider the aggregated effects of smaller changes to critical habitat. It should be emphasized that the revisions to this definition also do not alter or impose any additional burdens on action agencies or applicants to provide information on the nature of the proposed action or that action's effects on critical habitat or listed species. The regulations require the Services' biological opinion to assess the status of the critical habitat (including threats and trends), the environmental baseline of the action area, and cumulative effects. The Services' summary of the status of the affected species or critical habitat considers the historical and past impacts of activities across time and space. The effects of any particular action are thus evaluated in the context of this assessment, which incorporates the effects of all current and previous actions. This avoids situations where each individual action is viewed as causing only relatively minor adverse effects but, over time, the aggregated effects of these actions would erode the conservation value of the critical habitat.

In this final rule, we are also clarifying the text at § 402.14(g)(4) regarding status of the species and critical habitat to better articulate how the Services formulate their opinion as to whether an action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. This clarification will help ensure the ''incremental losses'' described by the commenters are appropriately considered in our jeopardy and destruction or adverse modification determinations.

The Services also make use of tracking mechanisms and tools to help track the effects of multiple agency actions. The Services have long recognized that tracking the effects of successive activities and projects is a significant challenge and continue to prioritize improvement of the methods for doing so. We also note that the use of programmatic consultations, as addressed elsewhere in this rule, can help with this challenge by encouraging consultation at a broad scale across geographic regions and programs encompassing multiple activities and actions. Finally, in response to concerns that this change would impose additional burdens on private landowners, the Services remind the public that critical habitat designation creates no responsibilities for the landowner unless the landowner proposes an activity that includes Federal funding or authorization of a type that triggers consultation. Otherwise, the designation of critical habitat requires no changes to the landowner's use or management of their land.

Comment: Some commenters said that adding the phrase ''as a whole'' would make application of the definition more subjective and less consistent.

Response: The comment appears to be motivated by the belief that any adverse effect to critical habitat should be considered, per se, ''destruction or adverse modification,'' and that the change introduces a new element of subjectivity. We do not agree. As with under the prior definition, the Services are always required to exercise judgment and apply scientific expertise when making the ultimate determination as to whether adverse effects rise to the level of ''destruction or adverse modification.''

Comment: Some commenters said that this change would impermissibly render the definition of ''destruction or adverse modification'' too similar or the same as the definition of ''jeopardize the continued existence of,'' while the statute intends them to have different meanings. Some also said that this addition conflicted with case law stating that the two phrases have distinct meanings.

Response: The Services do not agree that the addition of ''as a whole'' leads to improper conflation of the meanings of ''jeopardize the continued existence of'' and ''destruction or adverse modification.'' The terms ''destruction or adverse modification'' and ''jeopardize the continued existence of'' have long been recognized to have distinct meanings yet implicate overlapping considerations in their application. See, *e.g., Sierra Club* v. *U.S. Fish & Wildlife Service,* 245 F.3d 434, 441 (5th Cir. 2001); *Greenpeace* v. *National Marine Fisheries Serv.,* 55 F.Supp.2d 1248, 1265 (W.D. Wash.1999); *Conservation Council for Hawai'i* v. *Babbitt,* 2 F.Supp.2d 1280, 1287 (D. Haw. 1998). The phrase ''jeopardize the continued existence of'' focuses directly on the species' survival and recovery, while the definition of ''destruction or adverse modification'' is focused first on the critical habitat itself, and then considers how alteration of that habitat affects the ''conservation'' value of critical habitat. Thus, the terms ''jeopardize the continued existence of'' and ''destruction or adverse modification'' involve overlapping but distinct considerations. See *Sierra Club* v. *U.S. Fish & Wildlife Serv.,* 245 F.3d 434, 441 (5th Cir. 2001) (noting that the critical habitat analysis is more directly focused on the effects on the designated habitat and has a ''more attenuated'' relationship to the survival and recovery of the species than the ''jeopardize'' analysis).

Comment: Several commenters provided arguments or recommendations regarding the geographic scale at which ''destruction or adverse modification'' determinations should focus and asserted that the ''as a whole'' was not necessarily the right scale. One commenter said the appropriate scale was the critical habitat unit or larger, especially for wide-ranging species. Some commenters said that the ''as a whole'' language was inappropriate because the appropriate geographic scale for assessing ''destruction or adverse modification'' was a scientific question. Similarly, one comment asserted the Services must use a ''biologically meaningful'' scale. A group of State governors questioned how scale would be treated when there was a portion of critical habitat in one State that was geographically unconnected to critical habitat in other States.

Response: The use of the phrase ''as a whole'' is not solely meant to establish a geographic scale for ''destruction or adverse modification'' determinations. The phrase applies to assessing the value of the whole designation for conservation of the species. Effects at a smaller scale that could be significant to the value of the critical habitat designation will be considered. As the preamble to the proposed rule notes, ''the Services must [then] place those impacts in context of the designation to determine if the overall value of the critical habitat is likely to be reduced'' (83 FR 35178, July 25, 2018, p. 83 FR 35180). Thus, while the destruction or adverse modification analysis will consider the nature and significance of effects that occur at a smaller scale than the whole designation, the ultimate determination applies to the value of the critical habitat designation as a whole.

Comment: One commenter said that the addition of ''as a whole'' was inconsistent with the following language in the 1998 Consultation Handbook: ''The consultation or conference focuses on the entire critical habitat area designated unless the critical habitat rule identifies another basis for analysis, such as discrete units and/or groups of units necessary for different life cycle phases, units representing distinctive habitat characteristics or gene pools, or units fulfilling essential geographic distribution requirements.'' See 1998 Consultation Handbook at p. 4–42.

Response: The revised definition is not inconsistent with the quoted 1998 Consultation Handbook guidance. As we stated in our preamble to the proposed rule, under the revised definition, ''if a particular project would cause adverse effects to a portion of critical habitat, the Services must place those impacts in context of the designation to determine if the overall value of the critical habitat is likely to be reduced. This could occur where, for example, a smaller affected area of habitat is particularly important in its ability to support the conservation of a species (*e.g.,* a primary breeding site). Thus, the size or proportion of the affected area is not determinative; impacts to a smaller area may in some cases result in a determination of destruction or adverse modification, while impacts to a large geographic area will not always result in such a finding'' (83 FR 35178, July 25, 2018, p. 83 FR 35180). In other words, it may be appropriate to focus on a unit of analysis that is smaller than the entire designation, but it would not be appropriate to conclude the analysis without relating the result of the alterations at that scale back to the listed entity, which is the designation ''as a whole,'' in order to assess whether the value of that designation to the conservation of a listed species is appreciably diminished.

Comment: Some commenters disagreed with the addition of ''as a whole'' because they said it conflicted with the plain language of the statute. In particular, some asserted that, by statute, critical habitat is ''essential to the conservation of the species.'' They reason that, accordingly, any adverse effect is therefore per se ''destruction or adverse modification'' since it is the loss or reduction of something that is ''essential.'' Some of these commenters also focused similar criticism on the preamble discussion of the phrase ''appreciably diminish,'' as discussed further below.

Response: The Services do not agree that any adverse effect to critical habitat is per se ''destruction or adverse modification,'' a subject further discussed in the discussion of ''appreciably diminish'' in the preamble to the proposed rule and the discussion of comments on that preamble provided below. Nor do the Services agree that the use of the term ''essential to the conservation of the species'' in the Act's definition of critical habitat requires such an interpretation. The phrase ''essential to the conservation of the species'' guides which areas will be designated but does not require that every alteration of the designated critical habitat is prohibited by the statute. Just as the determination of jeopardy under section 7(a)(2) of the Act is made at the scale of the entire listed entity, a determination of destruction or adverse modification must ultimately consider the diminishment to the value for conservation at the scale of the entire critical habitat designation. As the 1998 Consultation Handbook states, adverse effects on elements or segments of critical habitat ''generally do not result in jeopardy or adverse modification determinations unless that loss, when added to the environmental baseline, is likely to result in significant adverse effects throughout the species' range, or appreciably diminish the ability of the critical habitat to satisfy essential requirements of the species.'' See 1998 Consultation Handbook at p. 4–36. Accordingly, the Ninth Circuit Court of Appeals has held that ''a determination that critical habitat would be destroyed was thus not inconsistent with [a]

finding of no 'adverse modification.' '' See also *Butte Envir. Council* v. *U.S. Army Corps of Eng'rs,* 620 F.3d 936, 947–48 (9th Cir. 2010).

Deletion of the Second Sentence

Comment: Some commenters claimed that removal of the sentence was unnecessary, and that doing so would eliminate important guidance embedded in the definition for appropriate factors to consider in the destruction or adverse modification analysis. Some suggested removing the provision about ''preclusion or delay'' of features, while keeping the remainder. One commenter suggested keeping the second sentence and expanding it to include additional language about cumulative loss of habitat required for recruitment. However, other commenters agreed with removing the second sentence, saying it was duplicative of the content of the first sentence, was vague and confusing, or that it contained provisions that overstepped the Services' authority. One commenter stated that removal of the second sentence will help place the focus on whether or not a project would ''appreciably diminish'' the value of critical habitat as a whole for the conservation of the species.

Response: This revision was made because the second sentence of the definition adopted in the 2016 final rule (81 FR 7214; February 11, 2016) has caused controversy among the public and many stakeholders. The revised definition streamlines and simplifies the definition. We agree with the commenters who stated that the second sentence was unnecessary—it had attempted to elaborate upon meanings that are already included within the first sentence. We also agree with the commenters who said that removing the second sentence will appropriately focus attention on the operative first sentence, which states that in all cases, the analysis of destruction or adverse modification must address whether the proposed action will result in an ''alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.''

Comment: Some commenters were concerned that removal of the second sentence meant that the Services were stating that a destruction or adverse modification determination must always focus only on existing features, or that the Services intended to downplay the fact that some designated habitat may be governed by dynamic natural processes or be degraded and in need of improvement or restoration to recover a species. Such commenters also pointed out that species' habitat use and distribution can also be dynamic and change over time. Some commenters similarly asserted that this change improperly downgraded the importance of unoccupied critical habitat for recovery or asserted that the revision showed the Services were lessening their commitment to habitat improvement and recovery efforts.

Response: As already noted, the deletion of the second sentence was meant to clarify and simplify the definition, but not to change the Services' current practice and interpretation regarding the applicability of the definition. Nor does the change mean that the recovery role of unoccupied critical habitat will not be considered in destruction or adverse modification determinations. As noted in the preamble to the proposed rule, the intended purpose of the language about precluding or delaying ''development of such features'' was to acknowledge ''that some important physical or biological features may not be present or are present in a sub-optimal quantity or quality. This could occur where, for example, the habitat has been degraded by human activity or is part of an ecosystem adapted to a particular natural disturbance (*e.g.,* fire or flooding), which does not constantly occur but is likely to recur.'' See also 79 FR 27060, May 12, 2014, p. 27061. Nor do the revisions mean that the Services are lessening their commitment to programs and efforts designed to bring about improvements to critical habitat.

Comment: In contrast to commenters who opposed removing the second sentence, some commenters favored the removal of the second sentence because it would remove the phrase ''preclude or significantly delay development of such features.'' Some asserted this phrase was confusing or could lead to inconsistent or speculative application of the definition; others said that this phrase overstepped the Services' statutory authority and that ''destruction or adverse modification'' had to focus on existing features and could not be based on the conclusion that an action would ''preclude or significantly delay'' the development of such features. Some of these commenters also disputed language in the preamble of the proposed rule that they said indicated that the Services would improperly consider potential changes to critical habitat in making ''destruction or adverse modification'' determinations, rather than focusing solely on existing features.

Response: The Services agree that the second sentence was unnecessary and that its removal will simplify and clarify the definition. The Services agree that it is important in any destruction or adverse modification assessment to focus on adverse effects to features that are currently present in the habitat, particularly where those features were the basis for its designation. However, as noted in the preamble to the proposed rule, there may also be circumstances where, within some areas of designated critical habitat at the time of consultation, ''some important physical or biological features may not be present or are present in a sub-optimal quantity or quality. This could occur when, for example, the habitat has been degraded by human activity or is part of an ecosystem adapted to a particular natural disturbance (*e.g.,* fire or flooding), which does not constantly occur but is likely to recur'' (79 FR 27060, May 12, 2014, p. 27061). The extent to which the proposed action is anticipated to impact the development of such features is a relevant consideration for the Services' critical habitat analysis. The Services reaffirm their longstanding practice that any destruction or adverse modification determination must be grounded in the best scientific and commercial data available and should not be based upon speculation.

Appreciably Diminish

In order to further clarify application of the definition of ''destruction or adverse modification,'' the preamble to the proposed rule discussed the term ''appreciably diminish.'' The proposed rule did not contain any revisions to regulatory text defining this phrase or changing how it is used in the regulations. The preamble discussion was thus not intended to provide a new or changed interpretation of the Act's requirements, but instead was intended to help clarify how the Services apply the term ''appreciably diminish'' and to discuss some alternative interpretations that the Services do not believe correctly reflect the requirements of the statute or the Services' regulations. Below is discussion of comments received on this proposed rule preamble discussion of ''appreciably diminish,'' as well as related comments on the preamble discussion of associated topics of ''baseline jeopardy'' and ''tipping point.''

Comment: A number of commenters expressed agreement with this section of the preamble, and the Services' interpretation that not every adverse effect to critical habitat constitutes ''destruction or adverse modification'' (and relatedly, that not every adverse effect to a species ''jeopardizes the continued existence of'' a listed species). Some commenters noted that this interpretation comports with case

law holding that a finding of adverse effects on critical habitat do not automatically require a determination of ''destruction or adverse modification,'' such as *Butte Env. Council,* 620 F.3d 936, 948 (9th Cir. 2010).

Response: We appreciate that these commenters found this preamble discussion helpful.

Comment: Some commenters criticized the preamble language as creating too broad of a standard. Those commenters asserted that the preamble language implied that any effect, as long as it could be measured, could trigger an adverse modification opinion. For example, one commenter asserted that the Services were lowering the standard so that ''any measurable or recognizable effect'' on critical habitat would be considered destruction or adverse modification.

Response: It was not our intention to imply, or state in any manner, that any effect on critical habitat that can be measured would amount to adverse modification of critical habitat. To the contrary, our experience with consultations has demonstrated that the vast majority of consultations that involved an action with adverse effects do not amount to a determination of adverse modification of critical habitat.

We believe some of the confusion expressed by these comments can be alleviated by providing more explanation of where in the consultation process the ''appreciably diminish'' concept comes into play. The consultation process sets up a multiple-stage evaluation process of effects to critical habitat. The first inquiry—even before consultation begins—is whether any effect of an action ''may affect'' critical habitat. In order to determine if there is an effect, of course, it would have to be something that can be described or detected. The second consideration, then, would be whether that effect has an adverse effect on the critical habitat within the action area. To make that determination, the effect would need to be capable of being evaluated, in addition to being detected or described (see 1998 Consultation Handbook at pp. 3–12–3–13 (noting that ''insignificant'' effects will not even trigger formal consultation, and that at this step, the evaluation is made of whether a person would ''be able to meaningfully measure, detect, or evaluate'' the effects)). The finding that an effect is adverse at the action-area scale does not mean that it has met the section 7(a)(2) threshold of ''destruction or adverse modification''; rather, that is a determination that simply informs whether formal consultation is required at all. Therefore, an adverse effect is not, by definition, the equivalent of ''destruction or adverse modification,'' and further examination of the effect is necessary. As noted above, courts have also endorsed this view; see, *e.g., Butte Envtl. Council* v. *U.S. Army Corps of Eng'rs,* 620 F.3d 936, 947–48 (9th Cir. 2010) (holding that ''a determination that critical habitat would be destroyed was thus not inconsistent with [a] finding of no 'adverse modification' '').

After effects are determined to be adverse at the action-area scale, they are analyzed with regard to the critical habitat as a whole. That is, the Services look at the adverse effects and evaluate their impacts when added to the environmental baseline and cumulative effects on the value of the critical habitat for the conservation of the species, taking into account the total and full extent as described in the designation, not just in the action area. It is at this point that the Services look to whether the effects diminish the role of the entire critical habitat designation. As discussed further above in our discussion of the phrase ''as a whole,'' the Services must place impacts to critical habitat into the context of the overall designation to determine if the overall value of the critical habitat is likely to be reduced.

Even if it is determined that the effects appear likely to diminish the value of the critical habitat, a determination of ''destruction or adverse modification'' requires more than adverse effects that can be measured and described. At this stage in the consultation's multi-staged evaluations, the Services will need to evaluate the adverse effects to determine if the adverse effects when added to the environmental baseline and cumulative effects will diminish the conservation value of the critical habitat in such a considerable way that the overall value of the entire critical habitat designation to the conservation of the species is appreciably diminished. It is only when adverse effects from a proposed action rise to this considerable level that the ultimate conclusion of ''destruction or adverse modification'' of critical habitat can be reached.

Comment: Several commenters suggest that in addition to defining ''destruction or adverse modification,'' the Services should adopt a new regulatory definition of ''appreciably diminish.'' For example, one comment suggests the definition should read ''means to cause a reasonably certain reduction or diminishment, beyond baseline conditions, that constitutes a considerable or material reduction in the likelihood of survival and recovery.''

Response: The Services believe our revised definition of ''destruction or adverse modification'' will be clearer than before, while retaining continuity by keeping important language from prior versions of the definition. We do not think the various proposed definitions for ''appreciably diminish'' would improve upon the ''destruction or adverse modification'' definition, and we conclude they would themselves introduce additional undefined, ambiguous terminology that would not likely improve the clarity of the definition or the consistency of its application.

Comment: Some commenters suggest the Services state in rule text or preamble that ''appreciably diminish'' should be defined as it was in the 1998 Consultation Handbook: ''to considerably reduce the capability of designated or proposed critical habitat to satisfy requirements essential to both the survival and recovery of a listed species.'' Some commenters further assert that the Services should disavow language in the 2016 final rule preamble (81 FR 7214; February 11, 2016) to the effect that ''considerably'' means ''worthy of consideration'' and that it applies where the Services ''can recognize or grasp the quality, significance, magnitude, or worth of the reduction in the value of'' critical habitat. They assert this language is too broad and gives the Services too much discretion or will cause the Services to find ''destruction or adverse modification'' in inappropriate circumstances. One commenter notes that some courts have affirmed the 1998 Consultation Handbook definition and held the term ''appreciably'' means ''considerable'' or ''material.'' See, *e.g., Pac. Coast Feds. of Fishermen's Assn's* v. *Gutierrez,* 606 F. Supp. 2d 1195, 1209 (E.D. Cal. 2008); *Forest Guardians* v. *Veneman,* 392 F. Supp. 2d 1082, 1092 (D. Ariz. 2005).

Response: We believe the interpretation provided in our proposed rule preamble and as described above in detail is consistent with the guidance provided in the 1998 Consultation Handbook and the language used in the 2016 final rule (81 FR 7214; February 11, 2016). The preamble language in the draft rule did not seek to raise or lower the bar for making a finding of destruction or adverse modification. As with the 2016 definition and prior practice on the part of the Services, and as discussed above, destruction or adverse modification is more than a noticeable or measurable change. As we have detailed above, in order to trigger adverse modification, there must be an alteration that appreciably diminishes

the value of critical habitat as a whole for the conservation of a listed species.

Comment: Some comments sought for the Services to develop a more exact or quantifiable method of determining destruction or adverse modification. One commenter requested that the Services develop regulations setting forth quantifiable ''statistical tools appropriate for the attribute of interest'' to guide such determinations, based on ''defensible science that leads to reliable knowledge in quantifying the impacts of proposed or extant alterations related to habitat or populations of listed species.''

Response: Where appropriate, the Services use statistical and quantifiable methods to support determinations of ''destruction or adverse modification'' under the ''appreciably diminish'' standard, but the best scientific and commercial data available often does not support this degree of precision. As such, the Services are required to apply the statute and regulations, and reach a conclusion even where such data and methods are not available.

Comment: Some commenters asserted that the preamble discussion of ''appreciably diminish'' stated an interpretation that was inconsistent with the statute, insufficiently protective of critical habitat, and would make the bar too high for making findings of ''destruction or adverse modification.'' Many of these comments linked the ''appreciably diminish'' language in the preamble with the ''as a whole'' change to the first sentence of the definition and concluded that these operated together to raise the tolerance for incremental and cumulative losses that would over time degrade critical habitat and undermine conservation. Thus, some of these comments are also addressed above in the discussion of ''as a whole.'' These comments often also raise issues about the concepts of ''tipping point'' and ''baseline jeopardy'' addressed further below.

Response: Our preamble discussion does not raise or lower the bar for finding ''destruction or adverse modification.'' The Services believe that this discussion of ''appreciably diminish'' comports with prior guidance and with the statute.

Baseline Jeopardy and Tipping Point

As discussed in our proposed rule's preamble, the definitions of ''destruction or adverse modification'' and ''jeopardize the continued existence of'' both use the term ''appreciably,'' and the analysis must always consider whether impacts are ''appreciable,'' even where critical habitat or a species already faces severe threats prior to the action. We thus noted that the statute and regulations do not contain any provisions under which a species should be found to be already (pre-action) in an existing status of being ''in jeopardy'' ''in peril,'' or ''jeopardized'' by baseline conditions, such that any additional adverse impacts must be found to meet the regulatory standards for ''jeopardize the continued existence of'' or ''destruction or adverse modification.'' As we explained, the terms ''jeopardize the continued existence of'' and ''destruction or adverse modification'' are, in the plain language of section 7(a)(2), determinations that are made about the effects of Federal actions. They are not determinations made about the environmental baseline for the proposed action or about the pre-action condition of the species.

The proposed rule's preamble also explains the Services' view that, contrary to the implications of some court opinions and commenters, they are not, in making section 7(a)(2) determinations, required to identify a ''tipping point'' beyond which the species cannot recover from any additional adverse effect. Neither the Act nor our regulations state any requirement for the Services to identify a ''tipping point'' or recovery benchmark for making section 7(a)(2) determinations. Section 7(a)(2) provides the Services with discretion as to how it will determine whether the statutory prohibition on jeopardy or destruction or adverse modification is exceeded. We also noted that the state of science often does not allow the Services to identify a ''tipping point'' for many species.

Comment: Some commenters stated opposition to the Services' interpretation and said it would undermine conservation. In particular, many commenters asserted that some species are so imperiled or rare that they are in fact in a state of ''baseline jeopardy'' and cannot sustain any additional adverse effects. Such species, they asserted, should be considered to be in a state of ''baseline jeopardy'' or ''baseline peril.''

Response: The Services do not dispute that some listed species are more imperiled than others, and that for some very rare or very imperiled species, the amount of adverse effects to critical habitat or to the species itself that can occur without triggering a ''jeopardize'' or ''destruction or adverse modification'' determination may be small. However, the statute and regulations do not contain the phrase ''baseline jeopardy.'' Nor does the statute or its regulations recognize any state or status of ''baseline jeopardy.'' While the term ''jeopardy'' is sometimes used as a shorthand, the statutory language is ''jeopardize the continued existence,'' and it applies prospectively to the effects of Federal actions, not to the pre-action status of the species. As we stated in our proposed rule preamble, ''[t]he terms 'jeopardize the continued existence of' and 'destruction or adverse modification' are, in the plain language of section 7(a)(2), determinations that are made about the effects of Federal agency actions. They are not determinations made about the environmental baseline or about the pre-action condition of the species. Under the [Act], a listed species will have the status of 'threatened' or 'endangered,' and all threatened and endangered species by definition face threats to their continued existence'' (83 FR 35178, July 25, 2018, p. 83 FR at 35182). For the ''jeopardize'' determinations, as with the ''destruction or adverse modification'' determinations, a determination that there are likely to be adverse effects of a Federal action is the starting point of formal consultation. The Services are then obliged to consider the magnitude and significance of the effects they cause, when added to the environmental baseline and cumulative effects, and the status of the species or critical habitat, before making our section 7(a)(2) determination.

Comment: Some commenters asserted that it is not possible to rationally analyze whether an action jeopardizes a species without identifying a ''tipping point.''

Response: Different commenters, as well as prior court opinions, have offered varying interpretations of what the term ''tipping point'' means. For example, one commenter on the proposed rule says that ''[t]ipping points for species are when the environment degrades itself to where the population growth is too low to support a viable population.'' The Ninth Circuit Court of Appeals has described the concept as ''a tipping point beyond which the species cannot recover.'' See *Oceana, Inc.* v. *Nat'l Marine Fisheries Serv.,* 705 F. App'x 577, 580 (9th Cir. 2017); see also *Wild Fish Conservancy* v. *Salazar,* 628 F.3d 513, 527 (9th Cir. 2010) (referring to a ''tipping point precluding recovery''). Another Ninth Circuit case described the issue as one of determining ''at what point survival and recovery will be placed at risk'' (*Nat'l Wildlife Fed'n* v. *Nat'l Marine Fisheries Serv.,* 524 F.3d 917, 936 (9th Cir. 2008)), in order to avoid ''tipping a listed species too far into danger.'' *Id.* We disagree that a rational analysis of whether an action is likely to jeopardize a species necessarily requires identification of such a ''tipping point.''

The state of the science regarding the trends and population dynamics of a species may often not be robust enough to establish such tipping points with sufficient certainty or confidence, and the Services have successfully increased the abundance of some species from a very small population size (*e.g.,* California condor). In addition, there are myriad variables that affect species viability, and it would not likely be the case that one could reduce the inquiry to a single ''tipping point.'' For example, species viability may be closely tied to abundance, reproductive rate or success, genetic diversity, immunity, food availability or food web changes, competition, habitat quality or quantity, mate availability, etc. In those cases, the attempt to define a tipping point could undermine the rationality of the determination, bind the Services to base their judgment on overly rigid criteria that give a misleading sense of exactitude, and unduly limit the ability to exercise best professional judgment and factor in the actual scientific uncertainties. The Services do not dispute that, in some cases, there could be a species that is so rare or imperiled that it reaches a point where there is little if any room left for it to tolerate additional adverse effects without being jeopardized by the action. But even in those cases, the Services would apply the necessary ''reduce appreciably'' standard to the ''jeopardize'' determination. The Services' final determination should be judged according to whether it reasonably applied the governing statutory and regulatory standards and used the best scientific and commercial data available. There is no de facto or automatic requirement that a reasonable conclusion must include an artificial requirement, ungrounded in the statute, to identify a ''tipping point.''

Comment: Some commenters asserted that the preamble, particularly with respect to ''tipping point'' and ''baseline jeopardy,'' was inconsistent with the interpretation stated in a 1981 ''Solicitor's opinion'' referenced as Appendix D to the 1998 Consultation Handbook. The commenters call attention to a statement in that memorandum describing how, when a succession of Federal actions may affect a species, ''the authorization of Federal projects may proceed until it is determined that further actions are likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat.'' That memo further states that ''[i]t is this 'cushion' of natural resources which is available for allocation to [Federal] projects until the utilization is such that any future use may be likely to jeopardize a listed species or adversely modify or destroy its critical habitat. At this point, any additional Federal activity in the area requiring a further consumption of resources would be precluded under section 7.'' Commenters assert that this language recognizes the existence of ''baseline jeopardy'' and/or recognizes that the Services must utilize the tipping point concept in performing a section 7(a)(2) analysis.

Response: The subject matter of the referenced memorandum was the treatment of cumulative effects. In any case, the guidance provided in that memorandum is not in conflict with the preamble discussion provided in the proposed rule on ''appreciably diminish,'' ''tipping point,'' and ''baseline jeopardy,'' or in conflict with the Services' long-standing interpretations stated in the recent proposed rule's preamble. The position of the Services is that there is nothing in the Act or its regulations, or necessitated under the standards of the Administrative Procedure Act, requiring that a section 7(a)(2) analysis quantify or identify a ''tipping point.''

Definition of Director

Comment: Some commenters agreed with the proposed revised definition. One commenter expressed concern that revising the definition would require consultations to be finalized at the Services' Headquarters offices and result in delays. Another commenter suggested the definition make clear that any ''authorized representative'' of the Director meet the respective eligibility requirements for political appointment to the position of Assistant Administrator for Fisheries for NMFS and Director of FWS.

Response: While we understand the commenter's observation regarding occasional lapses in Senate-confirmed agency leadership, we are unaware of any actual issues related to either the existing or revised definition; therefore, we decline to make any additional changes. As stated in the proposed rule, the purpose of revising the definition is to clarify and simplify it, in accordance with the Act and the Services' current practice. The revised definition designates the head of both FWS and NMFS as the definitional Director under the Act section 7 interagency cooperation regulations. The change does not revise the current signature delegations of the Services in place that allow for signature of specified section 7 documents (*e.g.,* biological opinions and concurrence letters) at the regional and field levels and will not increase the completion time for consultation.

Definition of Effects of the Action

The Services proposed to revise the definition of ''effects of the action'' in a manner that simplified the definition by collapsing the terms ''direct, ''indirect,'' interrelated,'' and ''interdependent'' and by applying a two-part test of ''but for'' and ''reasonably certain to occur.'' Related to this revised definition, we also proposed to make the definition of environmental baseline a stand-alone definition within § 402.02 and moved the instruction that the effects of the proposed action shall be added to the environmental baseline into the regulations guiding the Services' responsibilities in formal consultation in § 402.14(g). In addition, we proposed to add a new § 402.17 titled ''Other provisions'' and, within that new section, add a new provision titled ''Activities that are reasonably certain to occur'' in order to clarify the application of the ''reasonably certain to occur'' standard referenced in two specific contexts: activities caused by but not included as part of the proposed action, and activities under ''cumulative effects.'' As discussed above under Discussion of Changes from Proposed Rule, the Services received numerous comments on the proposed definition of ''effects of the action'' and the new provision at § 402.17(a) ''Activities that are reasonably certain to occur.'' We have adopted a final, revised definition of ''effects of the action'' and revised text at § 402.17(a) in response to those comments. Below, we summarize other comments received on the scope of the ''effects of the action'' and the proposed two-part test for effects of the action of ''but for'' and ''reasonably certain to occur'' and present our responses. We address changes to the environmental baseline definition in a separate discussion below.

Scope of Effects of the Action

Comment: Some commenters were concerned that removal of the terms ''direct,'' ''indirect,'' ''interrelated,'' and ''interdependent'' would hamper discussions because those terms could no longer be used.

Response: The terms are not prohibited from use in discussion, as they can be useful when discussing the mode or pathway of the effects of an action or activity. However, as discussed above, elimination of these terms simplifies the definition of ''effects of the action'' and causes fewer concerns about parsing what label applies to each consequence. Now consequences caused by the proposed

action encompass all effects of the proposed action, including effects from what used to be referred to as ''direct'' and ''indirect'' effects and ''interrelated'' or ''interdependent'' activities.

Comment: A commenter questioned the ability of the proposed two-part test to capture the risks of low probability but high consequence impacts such as an oil spill and welcomed an explanation of this scenario.

Response: As discussed throughout this rule and in the proposed rule, the Service's overall approach to ''effects of the action'' has been retained. During consultation, the consequences of the Federal agency action are reviewed in light of specific facts and circumstances related to the proposed action. If appropriate, those effects are then considered in the effects of the action analysis. Therefore, the Services expect that scenarios such as that mentioned by the commenter will be subject to review just as they have been in current consultation practice.

Comment: One commenter believed that it is critical to clarify that consultation is focused on the actual effects of the agency action on listed species and designated critical habitat, and that those effects are to be differentiated from the environmental baseline. They recommended adding ''[e]ffects of the action shall be clearly differentiated from the environmental baseline'' to the definition of ''effects of the action.''

Response: The Services decline to make the suggested addition to the definition of ''effects of the action.'' In the proposed rule, the Services made clear that the ''environmental baseline'' is a separate consideration from the effects of the proposed Federal action by both proposing to separate the definition of the term into a standalone definition and by clarifying the instruction to add the effects of the action to the environmental baseline as part of amendments to the language at § 402.14(g). As discussed above, the Services also have added an additional sentence to the definition of environmental baseline to help further clarify when the consequences of certain ongoing agency facilities and activities fall within the environmental baseline and would therefore not be considered in ''effects of the action.''

Comment: A few commenters requested that if the distinction between non-Federal ''activities'' and ''effects'' is maintained, the background to the final rule should more clearly explain the purpose and meaning of the distinction, and that the Services should clarify that discretionary Federal actions currently characterized as ''interrelated and interdependent'' remain subject to the consultation requirement.

Response: The Services are adopting a revised definition of effects of the action, as described above. The distinction between activities and effects (now ''consequences'') in this definition is intended to capture two aspects of the analysis of the ''effects of the action.'' First, a proposed Federal action may cause other associated or connected actions, which are referred to as other activities caused by the proposed action in the definition to differentiate them from the proposed Federal ''action.'' These activities would have been called ''interrelated'' or ''interdependent'' actions or ''indirect effects'' under the prior definition codified at § 402.02. In large part due to the three possible categories these activities could have fallen into, and the debates that regularly ensued while attempting to categorize them, we chose to collapse those three possible categories and ''direct effects'' into ''all consequences'' caused by the proposed action. Second, both the proposed action and the other activities caused by the proposed action may have physical, chemical, or biotic consequences on the listed species and critical habitat. Both the proposed action and other activities caused by the proposed action must be investigated to determine the physical, chemical, and biotic consequences. In the case of an activity that is caused by (but not part of) the proposed action, the two-part test must be examined twice—once for the activity and then again for the consequences of that activity. Additionally, if Federal activities caused by the Federal agency action under consultation are identified, those additional activities should be ''combined in the consultation and a lead agency . . . determined for the overall consultation'' (1998 Consultation Handbook at p. 4–28).

Comment: One commenter argued that, by eliminating the language directing the Services to consider direct and indirect effects together with interrelated or interdependent actions, the Services have revised the language to account only for direct effects. They argue that this proposed revision is inconsistent with the intent of the Act and its scientific underpinnings, as it ignores the fact that many imperiled species face multiple threats that compound one another.

Response: The proposed definition of ''effects of the action'' neither ignored the multiple threats facing listed species and critical habitats nor did it reduce all effects analysis only to the consideration of direct effects. The Services have adopted a revised, final definition of ''effects of the action'' that clarifies that all of the consequences of a proposed action must be evaluated, and that the causation tests are applied to all effects of the proposed action. Contrary to the commenter's assertion, a complete assessment of the ''effects of the action'' would require, where appropriate, the consideration of multiple stressors and consequences resulting from any synergistic, or compounding factors. These consequences would then be added to the environmental baseline and cumulative effects per the provisions now found at § 402.14(g)(4).

Comment: One commenter suggested the final regulations explicitly recognize an obligation to consider ''spillover effects'': ''In some contexts, efforts to modify or condition an action in order to reduce the impacts of the activity may result in 'spillover effects' that, ultimately, result in more adverse impacts to the species. A 'spillover effect' is the unintended consequence that occurs when an action in one market results in a corollary effect in another market. For example, a closure of the Hawaii-based shallow-set longline fishery in the early 2000s was demonstrated to result in thousands of additional sea turtle interactions due to the replacement of market share by foreign fisheries that do not implement the same protected species measures as the U.S. fishery and consequently interact with many more turtles.''

Response: The purpose and obligation of section 7(a)(2) of the Act is that Federal agencies are required to insure their proposed actions are not likely to jeopardize listed species or destroy or adversely modify critical habitat. This obligation is directed solely at the Federal action and may not be abrogated because of the potential response of other agencies or entities engaged in the same or similar actions. In the case of proposed Federal actions, the consequences of the proposed action, such as the incidental capture of sea turtles in Hawaii-based longline fishing gear from the commenter's example, must be evaluated. Other consequences could possibly include such ''spillover effects'' if they meet the ''but for'' and ''reasonably certain to occur'' causation tests applied to consequences caused by the proposed action under the revised, final definition of effects of the action, but this would have to be determined on a case-by-case basis. Further, the effects of other actions such as those described in the example may already be included in the overall jeopardy analysis as part of the status of the species, environmental baseline, and/or cumulative effects.

Comment: A few commenters were concerned that we were proposing a different standard when evaluating the effects of ''harmful'' or ''beneficial'' actions or activities, or conversely, that we were not proposing a different standard when we should hold ''beneficial actions'' to a higher certainty standard given their importance in minimizing or offsetting the adverse effects of proposed actions.

Response: Commenters pointed to examples in case law or past projects where actions or measures to avoid, minimize, or offset the effects of agency actions were held to an expectation of ''specific or binding plans.'' While the Services appreciate the concern raised, the Services do not intend to hold beneficial activities or measures offsetting adverse effects to either a higher or lower standard than any other type of action or measure proposed by a Federal agency. Any type of action proposed by a Federal agency first receives a presumption that it will occur, but it must also be described in sufficient detail that FWS or NMFS can both understand the action and evaluate the effects of the action. Similarly, whether considered beneficial or adverse, the consequences of the various components of the Federal agency's action are governed by the same causation standard set forth in the definition of ''effects of the action.''

Comment: A few commenters suggested that the ''effects'' of the action should not include ''effects'' that an agency lacks the legal authority to lessen, offset, or prevent in taking the action.

Response: As we further discuss below under § 402.03, Applicability, the Services decline to limit the ''effects of the action'' to only those effects or activities over which the Federal agency exerts legal authority or control. As an initial matter, section 7 applies to actions in which there is discretionary Federal involvement or control (50 CFR 402.03). Once in consultation, all consequences caused by the proposed action, including the consequences of activities caused by the proposed action, must be considered under the Services' definition of ''effects of the action.'' These may include the consequences to the listed species or designated critical habitat from the activities of some party other than the Federal agency seeking consultation, provided those activities would not occur but for the proposed action under consultation, and both the activities and the consequences to the listed species or designated critical habitat are reasonably certain to occur. Where this causation standard is met, the action agency has a substantive duty under the statute to ensure the effects of its discretionary action are not likely to jeopardize a listed species or destroy or adversely modify its critical habitat. We recognize that the Services and action agencies sometimes struggle with the concept of reviewing the consequences from other activities not under the action agency's control in a consultation. However, including all relevant consequences is not a fault assessment procedure; rather, it is the required analysis necessary for a Federal agency to comply with its substantive duties under section 7(a)(2). When the Services write an incidental take statement for a biological opinion, under section 7(b)(4)(iv) of the Act they can assign responsibility of specific terms and conditions of the incidental take statement to the federal agency, the applicant, or both. As the Supreme Court noted in *Home Builders,* ''*TVA* v. *Hill* thus supports the position . . . that the [Act]'s no-jeopardy mandate applies to *every* discretionary agency action—*regardless* of the expense or burden its application might impose'' (551 U.S. at 671 [emphasis added]).

The legislative history of section 7 of the Act confirms the Services' position. In particular, *National Wildlife Federation* v. *Coleman,* 529 F.2d 359 (1976) is a case often cited to support the proposition that indirect effects outside the authority and jurisdiction of an action agency are a relevant consideration in determining if the agency action is likely to jeopardize a listed species or destroy or adversely modify its critical habitat. The Act's legislative history from 1979 indicates that Congress was fully aware of the *Coleman* decision when they changed the definition from ''does not jeopardize'' to ''is not likely to jeopardize.'' In fact, the House Conference Report 96–697 to the 1979 amendments specifically references the case. In referencing the relevant amendments to section 7, the Conference Report says, ''The conference report adopts the language of the house amendment to section 7(a) pertaining to consultation by federal agencies with the Fish and Wildlife Service and the National Marine Fisheries Service. The amendment, which would require all federal agencies to ensure that their actions are not likely to jeopardize endangered or threatened species or result in the adverse modification of critical habitat, brings the language of the statute into conformity with existing agency practice, and judicial decisions, such as the opinion in *National Wildlife Federation* v. *Coleman.* H.R. Conference Report 96–697 (1979).''

''But for'' Causation

Comment: Several commenters expressed concern that the proposed application of the ''but for'' test to the effects of the proposed action would result in a simplistic evaluation of effects that would miss important considerations of the consequences of multiple effects, synergistic effects, or other more complex pathways by which an action may affect listed species or critical habitat.

Response: As noted elsewhere, the Services have revised the definition of ''effects of the action'' to indicate that all consequences of the proposed action must be considered and to apply the two-part test of ''but for'' and ''reasonably certain to occur'' to all effects. This approach is, in application, consistent with the prior regulatory definition, and the Services accordingly anticipate the scope of their effects analyses will stay the same.

As with current practice, the Services intend to evaluate the appropriate pathways of causation specific to the action and its effects for the purposes of the assessment of impacts to the species and critical habitat. This is not a liability test but an assessment of the expected consequences of an action using, for example, well-founded, physical, chemical, and biotic principles that are relevant to Act consultations. For a consequence to be considered an effect of the action, it must have a causal relationship with the action or activity. ''But for'' causation does not impair the Services' inquiry into other complex scenarios. As we noted above, a complete assessment of the ''effects of the action'' would require, where appropriate, the consideration of multiple stressors and overlapping, synergistic, or contributing factors. All of these considerations are important in ecology, sufficiently captured in the application of the ''but for'' test, and routinely serve as the foundation for section 7(a)(2) analyses. In addition, these consequences would then be added to the environmental baseline, which along with cumulative effects, status of the species and critical habitat, are used to complete our section 7(a)(2) assessment.

Comment: A few commenters urged the Services to adopt a ''proximate cause'' standard as the appropriate standard for determining the effects of the action.

Response: Although the term ''proximate cause'' was used by several commenters, the term itself and its application to the determination of the

effects of the action in the context of the Act generally was not defined by the commenters. There is no Federal standard definition for ''proximate cause,'' a term that developed through judicial decisions. Further, proximate cause can differ if used for assigning liability in criminal action as compared to civil tort matters, neither of which consideration is directly relevant in the section 7(a)(2) context of evaluating the anticipated effects of proposed Federal actions on listed species and critical habitat. With regard to use of proximate cause in an environmental context, in *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon,* 515 U.S. 687 (1995), Justice O'Connor described proximate cause as ''introducing notions of foreseeability.'' Id. at 709. As set out below, the ''reasonably certain to occur'' test in our definition of ''effects of the action'' imparts similar limitations on causation as an explicit foreseeability test. Additionally, the ''but for'' causation standard is in essence a factual causation standard. The Services' test to determine the effects of the action, therefore, adopts analogous principles to those identified by courts for proximate causation.

Comment: Several commenters cited to National Environmental Policy Act (NEPA) case law, such as *Department of Transp.* v. *Public Citizen,* 541 U.S. 752 (2004) (''*Public Citizen*'') in support of their view of the proper scope of the analysis of the effects of the action and the use of proximate causation to determine those effects.

Response: The Services decline to adopt the sort of ''proximate cause'' standard in the context of section 7 of the Act that has been applied by courts in the NEPA context. A ''proximate cause'' standard has been invoked by courts in the NEPA context (for example, see *Public Citizen,* 541 U.S. at 767). We reviewed the relevant NEPA case law, including *Public Citizen,* and do not think it is determinative in the context of section 7(a)(2) of the Act. The Services concluded that the cases cited were focused on a different issue than what is required when determining the ''effects of the action.'' As the Eleventh Circuit noted in *Florida Key Deer* v. *Paulison,* 522 F.3d 1133 (11th Cir. 2008), *Public Citizen* ''stands for nothing more than the intuitive proposition that an agency cannot be held accountable for the effects of actions it has no discretion not to take.'' *Id.* at 1144. In addition, many of these cases emphasized that the NEPA and Act are not similar statutes and have different underlying policies and purposes. For example, in *Public Citizen,* the Supreme Court emphasized that NEPA's two purposes (to inform the decision-maker and engage the public) would not be served by analyzing those actions over which the action agency had no discretion. *Id.* at 767–68. We agree that the same is true for actions under the Act; that is, by regulation, the Act only applies to actions in which there is ''discretionary Federal involvement or control'' (50 CFR 402.03). See *National Ass'n of Home Builders* v. *Defenders of Wildlife,* 551 U.S. 644, 667 (U.S. 2007) (holding section 7(a)(2) applies to only discretionary Federal actions but distinguishing *Public Citizen* on the grounds that Act ''imposes a substantive (and not just a procedural) statutory requirement'').

With regard to that distinction, the cited cases point to the underlying policy differences between NEPA and the Act, with an emphasis on the affirmative burden on Federal action agencies with regard to endangered species. This is a significant distinction as the Supreme Court noted in *Metro. Edison Co.* v. *People Against Nuclear Energy,* 460 U.S. 766 (1983), ''courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.'' *Id.* at 774 n. 7. The underlying policy of a statute and legislative intent must shape the causation nexus. In that regard, section 7(a)(2) of the Act imposes an affirmative and substantive duty on Federal agencies to avoid actions that are likely to jeopardize listed species or adversely modify/destroy critical habitat. See *Home Builders,* 551 U.S. at 671 (''the [Act]'s no-jeopardy mandate applies to every discretionary agency action—regardless of the expense or burden its application might impose''). In light of the above, and the related reasons the Services discussed in rejecting a ''jurisdiction or control'' limit to the effects of discretionary agency actions, the Services decline to impose an additional proximate causation requirement applicable in the NEPA context for effects of the action under section 7(a)(2).

Comment: One commenter requested that the Services explain how the ''effects of the action'' assessment changes the consideration of ''indirect effects,'' which does not currently use ''but for'' causation.

Response: The original definition of ''indirect effects'' in regulation at § 402.02 refers to effects that are ''caused by'' the proposed action whereas the Services' 1998 Consultation Handbook includes the phrase ''caused by or results from,'' both of which require an assessment of a causal connection between an action and an effect. The ''but for'' causation test in the revised, final definition of ''effects of the action'' is similar to ''caused by'' or ''caused by or results from'' in that both tests speak to a connection between the proposed action and the consequent results of that action, whether they be physical, chemical, or biotic consequences to the environment, the species, or critical habitat, or activities that would not occur but for the proposed action. Both tests require a determination of factual causation, and we do not anticipate a change in the Services' practice in applying ''but for'' causation to consequences once termed ''indirect effects'' compared to the regulatory term ''caused by.'' As we noted in the preamble of the proposed rule, ''[i]t has long been our practice that identification of direct and indirect effects as well as interrelated and interdependent activities is governed by the 'but for' standard of causation. Our [1998] Consultation Handbook states . . . 'In determining whether the proposed action is reasonably likely to be the direct or indirect cause of incidental take, the Services use the simple causation principle: *i.e.,* 'but for' the implementation of the proposed action. . . .' ([1998] Consultation Handbook, page 4–47)'' (83 FR 35178, July 25, 2018, p. 83 FR 35183).

Comment: One commenter expressed concerns that the use of the ''but for'' test could result in a determination of ''effects'' that is over inclusive. They supported the retention of the current rules governing the ''effects of the action'' and advocated their application in conjunction with the multi-factor test for effects described in the 1998 Consultation Handbook. Conversely, one other commenter felt that the test was narrowing the scope and we should retain the term originally used in ''indirect effects,'' ''or result from'' in our 1998 Consultation Handbook definition—in other words ''effects or activities that are caused by or result from.''

Response: The Services requested comment whether the proposed definition altered the scope of the effects of the action. With the revisions we are making in this final rule and as discussed elsewhere in this rule, there will not be a shift in the scope of the effects we consider under our new definition of ''effects of the action,'' and, therefore, our analyses will be neither over nor under inclusive. Some of the commenters expressing concerns about over-inclusivity refer to a multi-factor

test (pages 4–23 through 4–26 of the 1998 Consultation Handbook) for determining the effects of the action, but those factors are important to the consideration of the impact those effects will have on the species or critical habitat and not whether the effects or activity will occur. Those remain important considerations for the analysis of the effects of the action on listed species and critical habitat. Section 7(a)(2) consultation is required for all Federal actions with discretionary involvement or control that may affect listed species or critical habitat. Our assessment of the proposed and revised, final definition of ''effects of the action'' is that, generally, all of the effects previously considered will still be included in the scope of the ''effects of the action'' and that no other effects or activities not a direct or indirect effect of the proposed Federal action will be included. The improvements to the definition of ''effects of the action,'' including the explicit establishment of the two-part test for effects, is that the underlying support for the consequences and activities considered by the Services in the analysis will be guided by a clearer standard and, therefore, be more consistent and transparent. Nor do the Services find that the proposed or revised, final definition of ''effects of the action'' narrows the scope of the effects that would be considered. We have explicitly retained the same full range of effects to listed species or critical habitat from the proposed action as under our prior definition through the inclusion of ''all consequences'' of the proposed action in the revised, final definition.

''Reasonably Certain to Occur''

Comment: Several commenters requested that we articulate a set of factors to apply in determining what effects are reasonably certain to occur from a proposed action.

Response: We agree with the commenters' suggestion. Please see our discussion of changes to § 402.17 under *Section 402.17—Other Provisions,* above.

Comment: Some commenters suggested that the test for effects of the action should also include ''reasonably foreseeable'' as a means of further avoiding speculation or over inflation of the effects of an action or activities.

Response: The Services responded to similar comments in the preambles to the 1986 regulation (51 FR 19926, June 3, 1986, p. 51 FR 19932) and the 2008 regulation (73 FR 76272, December 16, 2008, p. 73 FR 76277). Again in this rule, we decline to make this change. The Services view ''reasonably certain to occur'' to be a higher threshold than ''reasonably foreseeable,'' a term that is more in line with the scope of effects analysis under NEPA. As stated in the 1986 preamble, ''NEPA is procedural in nature, rather than substantive, which would warrant a more expanded review of . . . effects'' than the Act, which imposes ''a substantive prohibition'' (51 FR 19926, June 3, 1986, p. 51 FR 19933). The Act's prohibitions against Federal actions that are likely to jeopardize the continued existence of listed species or destroy or adversely modify critical habitat calls for a stricter standard than ''reasonably foreseeable.''

Comment: Some commenters requested that the Services elaborate on the factors to consider when determining whether an activity is reasonably certain to occur as part of the two-part test for effects of the action. Others provided proposals of appropriate factors or specificity that should be contained in such an assessment. These included: (1) The extent to which a prior action that is similar in scope, nature, magnitude, and location has caused a consequent action or activity to occur; (2) any existing plans for the initiation of an action or activity by the consulting action agency, the permit or license applicant or another related entity that is directly connected to, and dependent upon, implementation of the proposed action; and (3) the extent to which a potential action or activity has intervening or necessary economic, administrative, and legal requirements that are prerequisites for the action to be initiated and the level of certainty that can be attributed to the completion of such intervening or necessary steps. A few commenters suggested that the only factor should be whether the activity was ''definitely planned and concretely identifiable,'' while others suggested the only factor should be the use of the best scientific and commercial data available.

Response: Identifying activities that are ''reasonably certain to occur'' is one part of the two-part test when evaluating the consequences of a proposed Federal action. As discussed in the proposed rule, this two-part test identifies activities previously captured under ''indirect effects'' and ''interrelated and interdependent actions'' that are now included within ''all consequences'' caused by the proposed action. ''Reasonably certain to occur'' is also the current test in the identification of non-Federal activities that should be included as cumulative effects. Our intent with the proposed factors to consider was to provide a general, but not limiting, guideline to inform the assessment. However, upon consideration of the comments and suggestions, the Services have revised the factors under § 402.17(a) to further elaborate on the factors related to the Service's past experience with identifying activities that are reasonably certain to occur as a result of a proposed action and the type of plans that would be indicative of an activity that is reasonably certain to occur. Suggestions to limit the consideration of activities that are reasonably certain to occur to only those that are ''definitely planned and concretely identifiable'' would inappropriately narrow the scope of our consideration of the effects of a proposed Federal action. For the factors we have identified, we also note that this list of factors is neither exhaustive nor a required minimum set of considerations.

Additionally, the Services have specified that the conclusion that an activity is reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. We believe these revisions help clarify the potentially relevant factors and the standard the Services will apply to such queries, leading to more consistent and predictable administration of the Services' section 7(a)(2) responsibilities.

Further, nothing in the language of the § 402.17(a) provision conflicts with or prevents the Services from using the best scientific and commercial data available as we are required to do for section 7(a)(2) analyses. This information is quite relevant to our consideration of the factors as both scientific and commercial information can be the sources we draw upon for ''past experience,'' ''existing plans for that activity,'' and ''any remaining . . . requirements.'' In all instances, we will draw upon the best scientific and commercial data available to determine if, in light of the relevant factors and based on clear and substantial information, an activity is reasonably certain to occur.

Comment: A few commenters questioned how ''activities that are reasonably certain to occur'' are defined when the consultation is on national or large regional programs.

Response: Oftentimes, when a section 7(a)(2) consultation is performed at the level of a regional or national program, it is referred to as a programmatic consultation, as defined by the Services in the proposed rule, and the proposed action is referred to as a framework programmatic action from our 2015 rule revising incidental take statement regulations (80 FR 26832, May 11, 2015). In these instances, the ''but for''

and ''reasonably certain to occur'' parts of the test extend to the consequences that would be expected to occur under the program generally, but not to the specifics of actual projects that may receive future authorization under the program. Effects analyses at this more generalized level are necessary because the Federal agency often does not have specific information about the number, location, timing, frequency, precise methods, and intensity of the site-specific actions or activities for their program.

We can expect that a program that authorizes bank stabilization, for example, will result in actions that stabilize riverbanks, streambanks, or even the banks of lakes and estuaries. However, we cannot, within those same bounds, reasonably describe the exact nature of the yet-to-be-permitted bank stabilization, its location, or timing. We are able to provide an informed effects analysis at the more generalized level, however, by analyzing the project design criteria, best management practices, standards and guidelines, and other provisions the program adopts to minimize the impact of future actions under the program. For example, best management practices such as required sediment control methods or stabilization material requirements provide the Services with an understanding of the possible scope of materials and methods that would be expected in any given project even if the specific timing, location, or extent of future unauthorized projects is unknown.

Alternatively, some Federal agencies may be able to provide somewhat more specific information on the numbers, timing, and location of activities under their plan or program. In those instances, we may have sufficient information not only to address the generalized nature of the program's effects but also the specific anticipated consequences that are reasonably certain to occur from specific actions that will be subsequently authorized under the program.

Comment: Several commenters questioned how ''reasonably certain to occur'' relates to the direct effects of a proposed action.

Response: As discussed above, we have revised the definition of ''effects of the action'' so that the reasonably certain to occur standard applies to all consequences caused by the proposed action, which include the effects formerly captured by ''direct'' and ''indirect'' effects and ''interrelated'' and ''interdependent'' activities.

Comment: Several commenters offered suggestions about the ''not speculative but does not have to be guaranteed'' range described by the Services when discussing the range of probability that could encompass ''reasonably certain to occur.'' Some suggested that the determination should settle on whether the effect or activity is ''probable'' or ''likely'' rather than merely ''possible,'' or whether there was ''clear and convincing evidence.'' However, other commenters felt the spectrum was not broad enough because we should consider effects or activities that were possible even if not likely in order to give the benefit of the doubt to the species.

Response: As discussed above, we have revised the regulatory text related to ''reasonably certain to occur'' in the definition of ''effects of the action'' and at § 402.17(a) and (b). Both for activities caused by the action under consultation and cumulative effects, the ''reasonably certain to occur'' determination must be based on clear and substantial information, using the best scientific and commercial data available. The information need not be dispositive, free from all uncertainty, or immune from disagreement to meet this standard. By clear and substantial, we mean that there must be a firm basis to support a conclusion that a consequence of an action is reasonably certain to occur. This term is not intended to require a certain numerical amount of data; rather, it is simply to illustrate that the determination of a consequence or activity to be reasonably certain to occur must be based on solid information and should not be based on speculation or conjecture. This added term also does not mean the nature of the information must support that a consequence or activity is guaranteed to occur.

The Services expect adopting this standard will allow for more predictable and consistent identification of activities that are considered reasonably certain and is consistent with the Act generally and section 7(a)(2) in particular. For similar reasons to those discussed below, we do not read the legislative history from the 1979 amendments to section 7 that included the phrase ''benefit of the doubt to the species'' to require a different outcome.

Definition of Environmental Baseline

The Services proposed to create a standalone definition of ''environmental baseline'' and move the instruction that the ''effects of the action'' are added to the ''environmental baseline'' into the regulations guiding the Services' responsibilities in formal consultation in § 402.14(g). In addition, we requested comment on potential revisions to the definition of ''environmental baseline'' as it relates to ongoing Federal actions, including a suggested revised definition of ''environmental baseline.''

As discussed above in Discussion of Changes from Proposed Rule, the Services received numerous comments on ''environmental baseline'' as it relates to the suggested definition and the treatment of ongoing Federal actions. As a result of the comments received and after further consideration, we have adopted a final, revised definition of ''environmental baseline.'' Below, we summarize the comments received on the definition of ''environmental baseline'' and the revisions to § 402.14(g), and we present our responses.

Comments on the Environmental Baseline Definition

Comment: Many commenters supported the proposal to retain the existing wording of the definition of the environmental baseline, establishing it as a standalone definition under § 402.02, and including the instruction to add the effects of the action and the cumulative effects to the baseline in § 402.14(g)(4). They noted that this would preserve the environmental baseline as a separate and important consideration in the overall section 7(a)(2) analysis. A few commenters felt that this should result in less confusion about what aspects of an ongoing action or a continuation of what could be considered an ongoing action should be in the baseline or the effects of the action.

Response: The Services agree that these proposals would preserve the environmental baseline as a separate and important consideration in the overall section 7(a)(2) analysis and have adopted these proposals in the final rule. Further, although many commenters supported adoption of the existing language, other comments and the Services' experience with implementing the environmental baseline led us to add language to the final, adopted definition to clarify that the focus of the environmental baseline is on the condition of the species and critical habitat in the action area absent the consequences of the action under consultation. In addition, the adopted final, revised definition of the ''environmental baseline'' includes the following clarifying sentence: ''The consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline.''

Comment: Several commenters provided their views on the role the

separate assessments of the environmental baseline and the status of the species and critical habitat play in the overall jeopardy and adverse modification analysis and thereby argued that the environmental baseline was too narrow a construct. For example, one commenter suggested the Services eliminate the references to ''action area'' in the definitions of ''environmental baseline'' and ''cumulative effects.'' They stated that, by continuing to limit these definitions to effects in the action area, the Services call into question the validity of their jeopardy and destruction or adverse modification findings.

Response: The commenters appear to misunderstand how the various regulatory provisions (*e.g.,* environmental baseline, status of the species and critical habitat, etc.) guide the Services' section 7(a)(2) analyses. The purpose of our section 7(a)(2) analyses is to determine if the action proposed to be authorized, funded, or carried out by a Federal agency is not likely to jeopardize the listed species and also not likely to destroy or adversely modify critical habitat designated for the conservation of listed species. In section 7(a)(2) analyses, we first consider the status of the species and critical habitat in order to describe the antecedent or preceding likelihood of survival and recovery of the listed species and value of critical habitat that may be affected by the proposed action. For a listed species, for example, this may be expressed in terms of the species' chances of survival and recovery or through discussion of the species' abundance, distribution, diversity, productivity, and factors influencing those characteristics. Following on the status assessment, the purpose of the environmental baseline is to describe, for the action area of the consultation, the condition of the portion of the listed species and critical habitat that will be exposed to the effects of the action. A significant body of scientific literature has established that, without understanding this antecedent condition, we cannot predict the expected responses of the species (at the individual or population level) or critical habitat (at the feature or area level) to the proposed action.

Ultimately, the environmental baseline is used to understand the consequences of an action by providing the context or background against which the action's effects will occur. Comparing alternative courses of action is not the purpose of the environmental baseline—the task is to determine only what is anticipated to occur as a result of what has been proposed. When establishing the environmental baseline, the focus is on the past and present impacts that human activities and other factors (*e.g.,* environmental conditions, predators, prey availability) have had on the fitness of individuals and populations of the species and features or areas of critical habitat in the action area. For example, if we were to consult on pile-driving activities (*e.g.,* the installation of piles or poles into a substrate to support a structure such as a dock by hammering or vibrating the piles into place), the baseline is intended to describe the physiological and behavioral condition of an animal that will be exposed to the sound waves produced by pile driving. This condition is the product of that animal's life history, physiology, and environment and which predisposes the animal to a set reaction or range of reactions to the sound and pressure waves. Animals in good physiological condition may not be perturbed by the action, whereas animals in poor health or stressed by other natural or anthropogenic factors, may leave the area, stop feeding, or fail to reproduce. Numerous case studies in the scientific literature have examined the varying physiological and behavioral responses of individuals to perturbations given the animal's antecedent condition. Similarly, populations of animals respond differently given their abundance, distribution, productivity, and diversity in the action area. The effects of the action and cumulative effects are added to the environmental baseline to determine how (or if) the proposed action affects the fitness of individuals and populations or the function, quantity, or quality of critical habitat features and areas that are exposed to the action given that antecedent condition. Because action areas are often just a small portion of the overall critical habitat designation or contain only some of the individuals or populations that comprise the listed species, the Services must then evaluate whether these action area effects translate into meaningful changes in the numbers, reproduction, or distribution of the listed species or reductions in the functional value or role the affected critical habitat plays in the overall designated critical habitat. This information is then considered with the overall viability of the listed species and value of designated critical habitat to determine if the consequences of the proposed action are likely to appreciably reduce the species' likelihood of survival and recovery and appreciably diminish the value of critical habitat for the conservation of the species. As we noted in the responses to comments on the revised definition of ''destruction or adverse modification,'' the size or proportion of the affected area of critical habitat is not determinative; impacts to a smaller area may in some cases result in a determination of destruction or adverse modification, while impacts to a large geographic area will not always result in such a finding. Similarly, when considering the effects of the action on the likelihood of survival and recovery of listed species, the key consideration is the antecedent status of the species and its vulnerability to further perturbation, not simply a measure of whether the number of individuals affected by the proposed action is ''small'' or ''large.''

Comment: Several commenters requested clarification of the term ''aggregate effects'' and how the Services conduct this analysis, given the proposal to revise ''effects of the action'' and § 402.14(g)(2) and (4) and existing language in the 1998 Consultation Handbook at p. 4–33. This language states, ''The conclusion section presents the Services' opinion regarding whether the aggregate effects of the factors analyzed under 'environmental baseline,' 'effects of the action,' and 'cumulative effects' in the action area—when viewed against the status of the species or critical habitat as listed or designated—are likely to jeopardize the continued existence of the species or result in destruction or adverse modification of critical habitat.'' Commenters were concerned that our proposed revisions would result in only assessing the additional effects of the proposed action and not the ''aggregate effects'' as they are presented in the 1998 Consultation Handbook.

Response: As we noted in the preamble to the proposed rule, our proposed revisions to § 402.14(g)(2) and (4) are intended to clarify the analytical steps the Services undertake in formulating its biological opinion: ''In summary, these analytical steps are: (1) Review all relevant information, (2) evaluate current status of the species and critical habitat and environmental baseline, (3) evaluate effects of the proposed action and cumulative effects, (4) add effects of the action and cumulative effects to the environmental baseline, and, in light of the status of the species and critical habitat, determine if the proposed action is likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat'' (83 FR 35178, July 25, 2018, p. 83 FR 35186). These steps encompass the ''aggregate effects'' of adding the effects of the action to the

environmental baseline, and then taken together with cumulative effects, considering those results in light of the status of the species and critical habitat. There is no change from current Service practice or the ''aggregate effects'' guidance in the 1998 Consultation Handbook.

Comment: One commenter noted that often there is not enough information available to quantify impacts in the baseline and that sometimes that quantification is needed to do the effects analysis. Another commenter argued for a scientific defensibility standard before putting effects into the environmental baseline for a species to avoid speculation about past impacts.

Response: The Services acknowledge that sometimes information about the impacts of the environmental baseline in a particular action area is sparse or lacking and that this can complicate our ability to analyze the effects of a proposed Federal action. Nevertheless, we are required to use the best scientific and commercial data available, or that can be obtained during consultation, in our assessments. The use of the ''best scientific and commercial data available'' is the required standard which both the Services and the Federal agency must meet.

Comment: Tribal commenters suggested adding the concept of tribal water rights to the definition of environmental baseline to ensure that effects are added to the Tribe's existing right rather than the other way around and also suggested that the baseline should be set to describe the time when the species and habitat were abundant to provide the context of the harms humans have caused and also include an assessment of the coming harms of climate change.

Response: Tribal water rights are important and may be relevant in determination of the environmental baseline. We are not changing the basic concept of the environmental baseline—it will continue to be used as a tool to determine whether the effects of an action under consultation are or are not likely to jeopardize the continued existence of a species or destroy or adversely modify designated critical habitat. We will determine the appropriate baseline at the time of consultation and include those factors relevant to that particular consultation.

Comment: A few commenters questioned whether natural factors would be considered in the environmental baseline as those may also play a role in the status of the species and critical habitat, and also whether impacts to species and habitat due to climate change within and outside of the action area would be considered.

Response: Although the definition of ''environmental baseline'' captures the impacts of anthropogenic activities in the past, the present, and future Federal projects that have already undergone consultation, a true discussion of the environmental baseline would be incomplete without a discussion of relevant natural factors or processes that inform the condition of the species or critical habitat in the action area. For example, natural processes such as fire and flood, or the natural erosion of sediments may play a key role in species productivity, or certain geographic features in an action area may affect the viability and connectedness of the individuals, populations, or habitat features.

Nothing in these regulations changes the manner in which the Services may consider climate change in our consultations. The depth of consideration of the effects of climate change on the species and critical habitat will vary from consultation to consultation based on the best scientific and commercial data available. The effects of climate change on the species or critical habitat (not related to effects of the action) within and outside the action area will be addressed, as appropriate, in the environmental baseline or status of the species, respectively.

Comment: Some commenters supported the suggested revised definition of ''environmental baseline'' that was presented in the preamble of the proposed rule. Those in support agreed with different treatment for ongoing (or pre-existing) actions or effects and felt that this would avoid overstatement or analysis of the effects of ongoing actions under consultation.

Response: As discussed above, the Services have revised the definition of environmental baseline, emphasizing that the baseline is the condition of the species and critical habitat in the action area without the consequences of the proposed action and adding a third sentence to explain that the consequences from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify will be included in the environmental baseline. The Services believe these revisions address the comments received and are consistent with the existing case law and the Services' current approach to this issue.

Comment: Some commenters suggested adopting the NEPA ''cumulative effects'' approach to capture the baseline instead of either the current definition or the proposed revision.

Response: The Services decline to adopt the NEPA definition because the NEPA term captures a different set of concepts.

Comment: Most commenters opposed to the alternative definition described in the preamble of the proposed rule were opposed on three bases: (1) That the ''state of the world'' is overly broad and ambiguous and should be replaced by ''action area'' or similar; (2) that the proposed approach was unlawful and contrary to established case law, and invites speculation about the conditions that would exist absent an action; and (3) that the proposed treatment of ''ongoing activities'' could have the effect of narrowing the appropriate scope of the effects analysis (and contrary to case law) while also ''grandfathering'' in harmful operations or activities that should be subject to section 7 analysis (for example, the U.S. Supreme Court has held that ''it is clear Congress foresaw that [section] 7 would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the Act'' (*Tennessee Valley Authority* v. *Hill,* 437 U.S. 153, 186 (1978))).

Response: The Services agree that the phrase ''state of the world'' is broad. As discussed above, the Services have declined to include that wording, and we confirm that the scale of the environmental baseline is the action area. The concern by one commenter that harmful impacts would be grandfathered into the environmental baseline is addressed by clarification in the third sentence. That sentence clarifies that in circumstances where there are consequences to listed species or critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify, those would be included and considered in the environmental baseline and as part of the overall aggregation of effects described in § 402.14(g). Regarding the reference to *TVA* v. *Hill,* the ongoing project in question was within the discretion of the action agency to modify, and thus our definition is consistent with the court's holding.

Comment: Several commenters suggested that creation of specific language or guidance in regulation to address those complex cases of ongoing actions would be a better approach rather than trying to apply one definition to all actions that undergo consultation.

Response: We have revised the definition of environmental baseline to address ongoing actions. Additionally,

the Services provide some basic discussion of the treatment of this issue earlier in this rule. In most instances, the resolution of ongoing agency activities or existing agency facilities will be a fact-based inquiry that turns on the circumstances of a particular consultation.

Comment: Some commenters argued against viewing any improvements in ongoing activities as ''beneficial'' and that they should be evaluated appropriately as ongoing adverse (albeit reduced) effects of an action and not through improper comparative or incremental analyses.

Response: The definition of environmental baseline does not alter the manner in which the effects of the action are characterized. As discussed earlier, per § 402.03, all discretionary actions are examined against the section 7(a)(2) standard, including beneficial and adverse effects. Consultation under the Act is conducted on the effects of the entire proposed action (all consequences caused by the proposed action). To further clarify, proposed actions for ongoing activities that incrementally improve conditions but still have adverse effects (*i.e.,* are not wholly beneficial) require formal consultation. As noted in the preceding response, the analysis of an action's effects is a fact-based, consultation-specific analysis.

Comment: Some commenters argued that ongoing operations or infrastructure should not be considered as part of the effects of the action even in the case of a new license or permit if those operations or infrastructure are unchanged and that only changes in operations or infrastructure would undergo effects analysis. In contrast, other commenters noted that operations are only considered ''ongoing'' until the valid permit period terminates.

Response: As discussed earlier, the new definition clarifies how to correctly differentiate between consequences belonging in the environmental baseline and of those of the proposed action in effects of the action for the situations described by the commenters.

Comment: A few commenters noted that the purpose of the environmental baseline is not to create a hypothetical environment in which certain features, projects, or events have, or have not, occurred. Those commenters assert that, in establishing the environmental baseline, the action agency and the Services are not picking and choosing facts, they are observing and recording data on the present conditions. They further assert that the environmental baseline should include both past and present effects of existing structures that the Federal action agency has no discretion to modify and any impacts from their continued physical existence are not part of the proposed action, which is properly focused on future project operations.

Response: As discussed earlier, there are certain consequences from ongoing activities or existing facilities that, in and of themselves, would not be subject to the consultation on a particular proposed action. They are not ignored, however, as they may appropriately be included in discussions of baseline or status of the species or critical habitat. The Services' definition gives appropriate direction on recognizing those circumstances and identifying their consequences.

Comment: Several commenters expressed concern that it was difficult to provide informed public input absent any examples of the types of ongoing actions that the Services were intending to address with the suggested definition or the accompanying questions posed regarding the treatment of these challenging cases.

Response: As discussed earlier, the Services have added a third sentence to better clarify the issue of capturing the consequences of ongoing activities in the environmental baseline. This third sentence and our supporting example of the Federal dam and water operations provides the type of ''challenging case'' to which we referred in the preamble of the proposed rule.

Definition of Programmatic Consultation

We proposed to add a definition for the term ''programmatic consultation'' to codify a consultation technique that is being used with increasing frequency and to promote the use of programmatic consultations as effective tools that can improve both process efficiency and conservation in consultations. We received numerous comments on the proposed definition, several of which requested further clarification of the definition terms, scope, and geographic extent of activities and process for programmatic consultations. The discussion below contains the Services' responses to these comments.

Comment: Some commenters recommended the Services clarify the scope of activities, geographic extent, and coverage for multiple species that can be addressed in a programmatic consultation. Other commenters requested clarification that programmatic consultations are optional processes that can undergo both formal and informal consultations. A few commenters also provided suggestions regarding participation of applicants, multiple Federal agencies, and information that can be used in the development of the program.

Response: Section 7 of the Act provides significant flexibility for Federal agency compliance with the Act, and various forms of programmatic consultations have been successfully implemented for many years now. This final regulation codifies that general practice and provides a definition that is not intended to identify every type of program or set of activities that may be consulted on programmatically. The programmatic consultation process offers great flexibility and can be strategically developed to address multiple listed species and multiple Federal agencies, including applicants as appropriate, for both informal and formal consultations.

While action agencies do have a duty to consult on programs that are considered agency actions that may affect a listed species or critical habitat, many types of programmatic consultation would be considered an optional form of section 7 compliance to, for example, address a collection of agency actions that would otherwise be subject to individual consultation. These optional types of programmatic consultation may be appropriate for a wide range of activities or a suite of programs.

Comment: Several commenters expressed concern about the scale at which programmatic consultations would occur. Some wanted to clarify that site-specific ''tiered'' evaluations were required to insure the same level of review for standard consultations, while another was concerned that only site-specific consultations would be completed without an overall ''holistic'' evaluation at the program level.

Response: As described in the proposed rule, and in the 2015 incidental take statement final rule (80 FR 26832, May 11, 2015), programmatic consultations may require section 7(a)(2) analyses at both the program level as well as at the tiered or step-down, site-specific level to insure compliance with section 7(a)(2) of the Act. Regardless of the exact process required to complete the consultation for the proposed program activities, all consultations are required to fully satisfy section 7(a)(2) of the Act. Programmatic consultations can be used to assess the effects of a program, plan, or set of activities as a whole. Depending on the type of programmatic consultation, site-specific consultations would be completed using the overarching analysis provided for in the programmatic consultation.

Comment: One commenter suggested the Services more clearly explain in the

preamble to the final rule how the terms ''framework programmatic action'' and ''mixed programmatic action'' relate to ''programmatic consultation.''

Response: As defined at § 402.02, ''framework programmatic action'' and ''mixed programmatic action'' refer to the way in which an agency's programmatic actions are structured. These definitions are applied specifically in the context of incidental take statements. The definition of ''programmatic consultation'' refers to a consultation addressing an action agency's multiple actions carried out through a program, region, or other basis. A consultation on either a mixed or framework programmatic action would be characterized as a programmatic consultation. As explained in the 2015 incidental take statement final rule (80 FR 26832, May 11, 2015), a framework programmatic action establishes a framework for the development of specific future actions but does not authorize any future actions and often does not have sufficient site-specific information relating to the project-specific actions that will proceed under the program, but still requires a programmatic consultation to meet the requirements of section 7(a)(2). As specific projects are developed in the future, they are subject to site-specific stepped-down, or tiered consultations where incidental take is addressed. Mixed programmatic actions generally are actions that have a mix of both a framework-level proposed action as well as site-specific proposed actions. Again, the entire mixed programmatic action requires a programmatic consultation, but in this situation, incidental take is addressed ''up front'' for the parts of those site-specific actions that are authorized in the mixed programmatic consultation, and stepped-down or tiered consultations are required for the future projects that are under the framework part of the proposed action.

Section 402.13—Deadline for Informal Consultation

In the proposed rule, we requested public comment on several questions related to the need for and imposition of a deadline on the informal consultation process described within § 402.13. Specifically we asked: (1) Whether a deadline would be helpful in improving the timeliness of review; (2) the appropriate length for a deadline (if not 60 days); and (3) how to appropriately implement a deadline (*e.g.,* which portions of informal consultation the deadline should apply to [*e.g.,* technical assistance, response to requests for concurrence, etc.], when informal consultation begins, and the ability to extend or ''pause the clock'' in certain circumstances, etc.).

Based upon the comments received and upon further consideration, the Services have revised the language within § 402.13 to provide a framework and timeline on a portion of informal consultation. The revised regulatory text for § 402.13 is described earlier in this final rule. Here we provide a summary of the comments we received and our responses.

Comment: Those commenters who supported the imposition of a deadline generally supported: (1) That the deadline applies to the concurrence request and response aspect of informal consultation, (2) that 60 days seems reasonable (and some suggested an internal or prior time period of 15–30 days for sufficiency review), and (3) that the deadline should be extendable by mutual agreement with the Federal agency and applicant (as appropriate). One commenter was concerned that a 60-day deadline would have the adverse consequence of making 60 days the new norm for concurrence responses rather than the current condition of generally 30 to 45 days.

Response: As described at § 402.13, informal consultation is an optional process that includes all discussions, correspondence, etc., between the Services and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. One aspect of the informal consultation process is the further option that, if a Federal agency has determined that their proposed action is not likely to adversely affect listed species or critical habitat, they may conclude their section 7(a)(2) consultation responsibility for that action with the written concurrence of the Services. It is this final aspect of the informal consultation process that has received the most scrutiny and concerns about timeliness and the ability of Federal agencies to proceed with actions that are not likely to adversely affect listed species or critical habitat. The Services specifically requested comment on this issue in the proposed rule, including whether to add a 60-day deadline, subject to extension by mutual consent, for informal consultations.

The Services have considered the comments provided on all sides of this issue. We have developed regulatory text that addresses many of the recommendations; others are addressed in these responses to comments but not within the regulatory text. In summary, the regulatory text applies a 60-day deadline to the ''request for concurrence and Service's written response'' aspect of the overall informal consultation process originally described at § 402.13(a) and now moved to § 402.13(c). This new section has been revised to include the deadline for the concurrence process and the requirement on the Federal agency to provide sufficient information in their request for concurrence to support their determination of ''may affect, not likely to adversely affect'' for listed species and critical habitat in order to start the 60-day clock on the Service's written response. The new § 402.13(c)(2) also provides for the Service's ability to extend the timeline upon mutual agreement with the Federal agency and any applicant for up to an additional 60 days. As a result, the entire written request and concurrence process is allowed a total of 120 days from the Service's receipt of an adequate request for concurrence as described in § 402.13(c)(1).

The Services note that our ability to provide a written response is hampered if we do not receive an adequate request for concurrence. Ideally, the Services should be able to concur in the Federal action agency's well-supported conclusion without having to create unique supplemental substantive analyses. The more that the Services have to supplement the Federal action agencies' own analyses, the more time it will take the Services to determine whether they concur.

The revised regulation points to the types of information required to initiate formal consultation under § 402.14(c)(1) as indicative of the type of information that should be included in a request for concurrence. We also note in the preamble that the level of detail is likely less than that required to initiate formal consultation. Federal agencies, designated non-Federal representatives, and applicants preparing the request for concurrence should draw upon any technical assistance provided by the Services during informal consultation and provide the amount and type of information that is commensurate with the scope, scale, and complexity of the proposed action and its potential effects on listed species and critical habitat. The Services hope to gain efficiencies in avoiding unnecessary back and forth between the Services and Federal agency by describing the information required to obtain the Services' concurrence in the revised regulation. Federal agencies submitting requests for concurrence that contain this information allow the Services to adequately evaluate whether the

concurrence is appropriate and readily meet the 60-day deadline.

Comments regarding a time period for ''sufficiency review'' are referring to the Service's review of the request for concurrence. This review is to determine if the information provided is sufficient for the Services to understand the Federal agency's action and analysis and to evaluate whether we can prepare a written response. Consistent with the approach for initiation of formal consultation, the Services have not included a specific regulatory timeline on any sufficiency review of the request for concurrence. Similar to some formal consultation initiation packages, some requests for concurrence may not initially meet the requirements. The Services are committed to providing review of these requests in a timely fashion to alert the Federal agency if more information is required to constitute an adequate request for concurrence. For formal consultations, the Services typically provide this type of sufficiency review within 30 days of receipt of the request for formal consultation and an accompanying initiation package. A similar timeframe will guide the Services' review of requests for concurrence as well.

Finally, while the revised regulation includes a 60-day deadline for the Service's written response to a request for concurrence, we allow this much time (and the option to extend) to accommodate the wide range in the type of Federal actions for which we receive requests for concurrence. We anticipate that those actions that can be responded to in less time than 60 days will still receive those quicker concurrence responses. We do not expect the revised regulation to result in an increase in numbers of concurrence requests such that our ability to respond within 60 days will be hindered. In those limited instances in which the Services need to extend the deadline for up to 60 additional days, the regulation requires the mutual consent of the Federal agency and any applicant involved in the consultation.

Comment: Those commenters opposed to the imposition of a deadline generally did so on one of two bases: (1) The data we present indicates that we generally complete concurrence requests in a timely fashion and so no deadline was necessary, or (2) a deadline could have the effect of truncating or hampering the ability of Federal agencies and the Services to conduct effective informal consultations generally.

Response: We have applied the timeline only to the request for concurrence aspect of the informal consultation process. This preserves the ability of Federal agencies, applicants, non-Federal representatives, and the Services to conduct those discussions that form the heart of this optional process without a time constraint. Although the Services generally provide our response to requests for concurrence in a timely fashion, it seems prudent to include both a general timeline for concurrence request responses and an option for extending that timeline to provide certainty and consistency for Federal agencies and applicants planning and proposing actions. Additionally, as discussed above, by specifying the information to be included in a concurrence request, the Services also anticipate gaining additional efficiencies in the informal consultation process.

Comment: A few commenters were concerned that failure to achieve mutual consent for time extensions could force the Services to complete their response to a request for concurrence with limited or poor information on the action and its effects.

Response: The Services do not believe this concern will result in the outcome predicted by the commenters. Under the new § 402.13(c)(1), the timeframe for the Services' concurrence response only commences once the Services have the information necessary to evaluate the Federal agency's request for concurrence.

Comment: A few commenters advocated that a failure by the Services to respond to a request for concurrence within the established deadline should result in an assumed concurrence, so the Federal agency may proceed with their action.

Response: The Services decline to make this change. As adopted, the regulation requires the Services to provide their response within the specified timeframe. Additionally, the concurrence of the Services assures the Federal agency that it has appropriately complied with its responsibilities under section 7(a)(2).

Comment: Some commenters questioned the consequence of a non-concurrence response from the Service—would formal consultation be automatically initiated? Others proposed that automatic initiation of formal consultation would be the preferred outcome.

Response: Formal consultation would not automatically be initiated. Typically, the next step if the Service does not concur with the Federal agency's determination of ''may affect, not likely to adversely affect'' would be either the Federal agency requesting formal consultation or the continuation of informal consultation. Upon receipt of the Service's non-concurrence, there is still an opportunity for the Federal agency to further modify either their action or their supporting analysis in response to information outlined in the Service's response. Such modification could then result in a written concurrence from the Service. Further, the Services cannot automatically initiate formal consultation if we have not already received the information required at § 402.14(c)(1) in the Federal agency's request for concurrence at the level of detail necessary to initiate formal consultation. While the information provided by the Federal agency will have satisfied the requirements of § 402.13(c)(1) for informal consultation, which generally requires the same types of information as § 402.14(c)(1) for formal consultation, the Services decline to require that formal consultation be automatically initiated upon our non-concurrence, since we cannot assume that the information required to initiate formal consultation will have been received or even that formal consultation will be necessary.

Comment: A few commenters stated that imposition of a deadline for any aspect of informal consultation would increase the workload and time constraints on Service staff and that any imposed deadline should come with a commensurate increase in Service staff resources to meet such obligations.

Response: The Services do not anticipate either an increase in requests for concurrence or time constraints on staff. Currently, the Services are generally delivering concurrence request responses in a timely fashion, and the adopted regulation would allow for time extension requests for actions that require more time to review and respond.

Section 402.14—Formal Consultation—General—Including What Information is Needed To Initiate Formal Consultation and Considering Other Documents as Initiation Packages

We proposed to revise § 402.14(c) to clarify what is necessary to initiate formal consultation. We also proposed to allow the Services to consider other documents as initiation packages, when they meet the requirements for initiating consultation. It is important to note the Services did not propose to require more information than existing practice; instead, we clarify in the regulations what is needed to initiate consultation in order to improve the consultation process. The Services adopt these proposed changes, and one non-substantive edit, in this final rule. We

summarize the comments received on these topics and our responses below.

Comment: Some commenters supported clarifying what is necessary to initiate the formal consultation process and the description of what is required in the initiation package. Those commenters said the proposed revisions, if implemented, could streamline the consultation process and reduce the need for extensive communications between the Federal agency and the Services to start the consultation process.

Response: The Services agree that clarifying what is necessary to initiate the formal consultation process and the description of what is required in the initiation package will help create efficiencies in the section 7 consultation process.

Comment: Commenters suggested clarifying the information to be submitted by an applicant to initiate formal consultation (*e.g.,* listing the categories of information required, increasing the use of data sources like GIS that meet appropriate standards, NEPA analyses, conservation work by landowners and agencies, Natural Resource Damage Assessment and Restoration Plans to support the initiation package).

Response: Applicants and designated non-Federal representatives may prepare or supply information required as part of the initiation package outlined at § 402.14(c)(1). These are the required elements necessary to initiate consultation. To be clear, this package is submitted to the Services by the Federal agency proposing the action and should also include the Federal agency's information and supporting analyses for the initiation package. As the Services stated in the proposed rule's preamble, in order to initiate formal consultation we will consider whatever appropriate information is provided as long as the information satisfies the requirements set forth in § 402.14(c)(1), including the types of information described by the commenters.

Comment: One commenter also suggested that the Services should include language in the final rule specifying that we can request additional information or documentation if an agency's initial submission is deemed inadequate.

Response: This proposed change is unnecessary. The Services already request Federal agencies and applicants provide information necessary to initiate consultation when it has not been provided or is unclear in the original initiation package. As discussed for informal consultation above, the Services typically provide this type of sufficiency review within 30 days of receipt of the request for formal consultation and an accompanying initiation package. No further regulatory language is required to specify that we can request this information because initiation of formal consultation is predicated on provision of the required information as per § 402.14(c)(1). Further, as already provided by § 402.14(d) and (f), additional information may be needed or requested by the Services during the formal consultation, once it is initiated.

Comment: One commenter suggested that the Federal Energy Regulatory Commission's decision not to require a study under the Federal Power Act should not be construed as a failure to meet the information requirements to initiate consultation under the Act.

Response: In general, 50 CFR 402.14(d) provides that the Federal agency requesting formal consultation is required to provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. The Federal Energy Regulatory Commission's decision whether or not to require a study under the Federal Power Act will generally occur before that Federal agency would request initiation of formal consultation. The requirements for information that the Federal agency must submit to the Service to initiate formal consultation are described at § 402.14(c)(1). The Service's determination of whether or not the Federal agency has provided sufficient information to meet the requirements to initiate formal consultation under § 402.14(c)(1) will depend on the specific information that the Federal agency submits and the specific circumstances for each request.

After formal consultation has been initiated, § 402.14(f) provides that the Service may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. The Service's request for additional data after initiation of formal consultation is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act (or § 402.14(c)(1)). If the Federal agency does not agree to the request for extension of formal consultation, the Service will issue a biological opinion using the best scientific and commercial data available.

Comment: Commenters suggested that the Services should clarify that, upon the submittal of such information, formal consultation is initiated for purposes of starting the clock by which the deadline for completing consultation will be measured.

Response: The prior regulations at § 402.14(c) and (d), and the revision to § 402.14(c) in this rule, are clear that a request to initiate consultation shall include the list of information provided at § 402.14(c)(1) and use the best scientific and commercial data available. Requests received that meet these criteria constitute an ''initiation package'' and thus start the consultation ''clock.'' Incomplete requests do not constitute an ''initiation package'' and therefore the consultation ''clock'' does not begin until the information is received. No further regulatory language is needed.

Comment: One commenter suggested striking language implying that an additional information request by the Service under § 402.14(f) may impose a study-funding mandate or obligation upon an applicant or non-Federal party.

Response: The Services decline to change the language in § 402.14(f). This language provides that the Service may request additional information necessary to formulate the Service's biological opinion once formal consultation has been initiated. Section 402.14(f) further states that the responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. Because the ultimate responsibility to comply with section 7(a)(2) lies with the Federal agency and not the Service, this language clarifies that the Service is not responsible for conducting or funding the requested studies.

Comment: One commenter stated that the contents of recovery plans do not dictate the outcome of the section 7 consultation process.

Response: We agree that recovery plans do not dictate the outcome of a section 7 consultation. However, the Services believe it is appropriate to use relevant information and recommended actions and strategies found in recovery plans along with other identified best scientific and commercial data available as we consult with Federal agencies and applicants. We encourage Federal agencies and applicants to become familiar with recovery plans for species they may affect, as this can assist them in developing proposed actions that avoid, reduce, or offset adverse effects or propose actions that address recommended recovery actions.

Comment: One commenter suggested support for the proposed definition of programmatic consultation and the use of programmatic consultations and the addition to § 402.14(c)(4).

Response: As discussed above, the Services agree that increasing the use of programmatic consultations will increase efficiency, reduce costs, and still fulfill section 7(a)(2) responsibilities.

Comment: One commenter suggested that the Services should commit to a set timeframe for notifying the Federal agencies if the initiation package is complete for non-major construction activities (*e.g.,* 30 to 45 days should be sufficient).

Response: The 1998 Consultation Handbook already specifies that for formal consultation leading to the development of a biological opinion the Services should, within 30 days, acknowledge the receipt of the consultation package and advise if additional information necessary to initiate consultation is required. This is the same timeframe for the Services to respond to a Federal agency's biological assessment prepared for a major construction activity under § 402.12(j). For biological assessments, § 402.12(f) provides that ''the contents of a biological assessment are at the discretion of the Federal agency.'' This regulation continues to govern the Federal agency's responsibilities for the contents of a biological assessment; however, for purposes of initiation of formal consultation under § 402.14(c)(1), the Federal agency also is required to provide the specified information in § 402.14(c)(1) consistent with the nature and scope of the action. Although § 402.12(j) allows that ''at the option of the Federal agency, formal consultation may be initiated under § 402.14(c) concurrently with the submission of the assessment,'' this language does not relieve the Federal agency of the requirement to submit a complete initiation package per § 402.14(c)(1), but does give the Federal agency the option to include such information along with the contents of their biological assessment.

Comment: One commenter stated that the Services have proposed a massive rewrite of § 402.14(c) without explaining to the public the underlying rationale for any of the changes in any detail. Thus, the proposal fails to meet the basic requirements of the Administrative Procedure Act, is not rational, and is arbitrary and capricious.

Response: The Services disagree that the revisions to § 402.14(c) are a massive rewrite of the section. As discussed in the preamble to the proposed rule, the Services are not requiring more information than existing practice. The Services adopt the changes to § 402.14(c) based on years of experience implementing section 7 of the Act and believe that the revisions will provide clarity to the consultation process, increase efficiencies in the process, and meet Administrative Procedure Act requirements. The revisions to the language are based on the experiences of the Services and are intended to better describe the types of information required and the level of detail sufficient to initiate formal consultation. This rationale is explained in the preamble to the proposed regulations at 83 FR at 35186 (July 25, 2018).

Comment: One commenter suggested the Services not include § 402.14(c)(1)(i)(A) (the purpose of the action) because they do not believe the purpose of the action is relevant to the consultation.

Response: The Services decline to remove the requirement for a description of the purpose of the action from the initiation package at § 402.14(c)(1). The purpose of the action is important for the Services to understand and most effectively consult with Federal agencies and applicants in a variety of ways. During consultation, an understanding of the intended purpose of the action assists the Services in shaping recommendations they may make to avoid, minimize, or offset the adverse effects of proposed actions. Further, the purpose of the action is an important consideration when determining what activities may be caused by the proposed Federal actions and for determining what effects may result in take of listed species that is incidental to the purpose of the proposed action. Finally, the definition of reasonable and prudent alternative at § 402.02 includes the requirement that the alternative ''can be implemented in a manner consistent with the intended purpose of the action.''

Section 402.14—Service Responsibilities—General

We proposed to revise portions of § 402.14(g) that describe the Services' responsibilities during formal consultation. We proposed to clarify the analytical steps the Services undertake in formulating a biological opinion. In § 402.14(g)(4), we proposed to move the instruction that the effects of the action shall be added to the environmental baseline from the current definition of ''effects of the action'' to where this provision more logically fits with the rest of the analytical process. We have adopted these proposed changes in this final rule and provide the comments received on these changes and our responses below.

Comment: One commenter requested that the Services revise § 402.14(g)(4) to add text to reiterate the appropriate test for jeopardy as follows: ''Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species by appreciably reducing the likelihood of both survival and recovery of the species, and not recovery alone, or result in the destruction or adverse modification of critical habitat.''

Response: The term ''jeopardize the continued existence'' is already defined in regulations at § 402.02. All subsequent uses of this terminology are referenced to that definition and thus no further clarification is needed in § 402.14(g)(4).

Comment: A couple of commenters suggested the Services clarify that nothing in the Act requires Service staff to utilize worst-case scenarios or unduly conservative modeling or assumptions.

Response: The commenters are correct that nothing in the Act specifically requires the Services to utilize a ''worst-case scenario'' or make unduly conservative modeling assumptions. The Act does require the use of the best scientific and commercial data available by all parties and obligates Federal agencies to insure their actions are not likely to jeopardize listed species or adversely modify critical habitat. The best scientific and commercial data available is not limited to peer-reviewed, empirical, or quantitative data but may include the knowledge and expertise of Service staff, Federal action agency staff, applicants, and other experts, as appropriate, applied to the questions posed by the section 7(a)(2) analysis when information specific to an action's consequences or specific to species response or extinction risk is unavailable. Methods such as conceptual or quantitative models informed by the best available information and appropriate assumptions may be required to bridge information gaps in order to render the Services' opinion regarding the likelihood of jeopardy or adverse modification. Expert elicitation and structured decision-making approaches are other examples of approaches that may also be appropriate to address information gaps. In all instances, chosen scenarios or assumptions should be appropriate to assist the Federal agency in their obligation to insure their action is not likely to jeopardize listed species or adversely modify critical habitat.

Comment: Commenters support expanded opportunities for participation by States, applicants, and designated non-Federal representatives in the section 7(a)(2) consultation process, including the review of the underlying data and scientific analyses being considered and greater input into any potential jeopardy or adverse modification finding, the development of reasonable and prudent alternatives and minimization measures, and all parts of the draft biological opinion.

Response: The Services already involve designated non-Federal representatives and applicants during key points of the consultation development process and will continue to do so as appropriate. Federal action agencies are best positioned to engage and encourage the involvement of applicants and designated non-Federal representatives in the review of draft biological opinions. The consultation process is intended to assist the Federal action agency in meeting its section 7(a)(2) obligations under the Act. Applicants and designated non-Federal representatives play an important role in this process. States may be engaged by Federal action agencies and applicants during the development of the proposed actions and supporting analyses.

Comment: One commenter suggested that the Federal agency or applicants be involved in the development of ''Reasonable Prudent Measures'' and/or ''Terms and Conditions'' as needed to ensure they are implementable and do not require major alterations of the proposed action of a plan or project in terms of design, location, scope, and results.

Response: The Services already involve Federal action agencies and applicants during key points of the consultation development process and will continue to do so as appropriate. Federal action agencies are best positioned to engage and encourage the involvement of applicants and designated non-Federal representatives in the review of draft biological opinions, including draft incidental take statements.

Comment: One commenter requested that when proposed actions have the potential to affect tribal rights or interests, formal consultation section pursuant to § 402.14(l)(3) should require disclosure of all information to affected tribes, adherence to policies regarding consultation with Native American governments, and an analysis of how the action or reasonable and prudent alternatives comport with the conservation necessity standards embodied in Secretarial Order 3206, NOAA Procedures for Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations, and the FWS Native American Policy.

Response: As discussed above, the Services will continue to comply with Secretarial Order 3206, NOAA Procedures, and the FWS Native American Policy and other applicable tribal policies as we implement our section 7 responsibilities.

Comment: One commenter supports the codification that the Services will give ''appropriate consideration to any beneficial actions as proposed or taken by the Federal agency or applicant, including any actions taken prior to the initiation of the consultation.''

Response: Most of the quoted language, with the exception of ''as proposed,'' is already included in § 402.14(g)(8) and has been retained in the revisions to that provision. This final rule codifies the language the commenter supported.

Comment: One commenter suggested that the definition of a programmatic consultation should be modified to ''clarify that the Services may utilize programmatic consultations and initiate concurrent consultations for multiple similar agency actions.''

Response: The adopted definition of programmatic consultation already encompasses the commenters' request, making the proposed change unnecessary. As discussed above, programmatic consultations are flexible consultation tools that may be developed based on the circumstances of the proposed action and the Federal agency(ies) involved.

Comment: One commenter suggested that the consultation ''clock'' should start at the point the submission of a written request for formal consultation is transmitted to the Service with a certification that it has transmitted to the Service all of the relevant and available information upon which the action agency's request for consultation and opinion has been made.

Response: The Federal agency is obligated to provide the information necessary to initiate formal consultation. It is the Services' responsibility to determine that we have sufficient information to initiate formal consultation. The adopted language at § 402.14(c)(1) defines the information necessary to initiate formal consultation. We adopt this list to clarify and reduce confusion about the necessary information and create greater efficiencies in the section 7 consultation process. Starting the ''clock'' at the point suggested by the commenter truncates the time necessary to obtain needed information if it was not in fact provided, reduces the ability of the Services to adequately coordinate with the Federal agency, non-Federal representative and/or applicant, and could actually lengthen the consultation process because of the need on the part of the Services to request additional information during consultation.

Comment: One commenter suggested that the Services have not clarified the language pursuant to formal consultations (§ 402.14) and that measures intended to avoid, minimize, or offset effects of an action are not required elements of an ''initiation package'' submitted by a Federal agency for the consultation.

Response: Consistent with the Services' existing consultation approaches, we are adopting revisions to § 402.14(c) to ensure that a Federal agency submits an adequate description of the proposed action, including available information about any measures intended to avoid, minimize, or offset effects of the proposed action. The request for a description of measures to avoid, minimize, or offset project impacts applies in those cases where these types of measures are included by the Federal agency or applicant as part of the proposed action and is not intended to require these types of measures for all proposed actions. Provided the Federal agency submits the information required by § 402.14(c)(1), the Services will take into consideration the effects of the action as proposed, both beneficial and adverse.

Section 402.14(g)(4)—Service Responsibilities—Clarifying the Analytical Steps by Which the Services Integrate and Synthesize Their Analyses To Reach Jeopardy and Adverse Modification Determinations

In § 402.14(g)(4), we proposed revisions to better reflect the manner in which the Services integrate and synthesize their analyses of effects of the action with cumulative effects, the environmental baseline, and status of the species and critical habitat to reach our jeopardy and adverse modification determinations. This proposed change reflects the Services' existing approach, and we adopt those proposed changes in this final rule. The comments and our responses on those changes are below.

Comment: Some commenters supported the proposed language at § 402.14(g)(4) because it allows other agencies and the public to understand the process, and the expectations, when biological opinions are being developed.

Response: The Services agree that the proposed language at § 402.14(g)(4) will

clarify and support gains in efficiencies in the section 7 consultation process.

Comment: Commenters stated that § 402.14(g) does not explain the meaning of the phrase ''current status of the listed species or critical habitat'' in relationship to how we assess jeopardy and destruction/adverse modification of critical habitat.

Response: The adopted regulations are not intended to change the manner in which the Services use the status of the listed species or critical habitat when completing its jeopardy and destruction/adverse modification analyses. Further discussion on how we use the current status of listed species and critical habitat can be found in the Services' 1998 Consultation Handbook, especially Chapter 4—Formal Consultation.

Comment: One commenter urges the Services to clarify that the final rule does not require any increase in the level of detail provided in the initiation package.

Response: The Services' adopted regulatory text at § 402.14(c)(1) clarifies what type of information is necessary to initiate the formal consultation process. Although we have added language to describe the level of detail needed to initiate consultation, this level of detail has not changed from the expectations of the preceding § 402.14(c) regulations and should be commensurate with the scope of the proposed action and the effects of the action.

Comment: One commenter suggested that § 402.14(g) should include consideration and deference to tribal management plans to protect listed species.

Response: Consistent with Secretarial Order 3206, including Appendix Section 3(c), the Services provide timely notification to affected tribes when the Services are aware that a proposed Federal agency action subject to formal consultation may affect tribal interests. Among other things, the Services facilitate the use of the best scientific and commercial data available by soliciting information, traditional knowledge, and comments from, and utilize the expertise of, affected Tribes. The Services also encourage the Federal agency to involve affected Tribes in the consultation process, which may involve consideration of tribal management plans to protect listed species and to consider such plans in the formulation of reasonable and prudent alternatives.

Comment: One commenter believed that § 402.14(g)(4) should be clarified to reflect that it is the responsibility of a project proponent under section 7(a)(2) of the Act to avoid or offset prohibited effects associated with the incremental impact of the proposed action that is the subject of consultation.

Response: Section 402.14(g)(4) describes the final step in the Services' analytical approach in evaluating a proposed action. Requiring every proposed action to avoid or offset the incremental impact of the proposed action would be inconsistent with the applicable standards for determining jeopardy and destruction or adverse modification under the Act.

Clarifications to § 402.14(g)(8) Regarding Whether and How the Service Should Consider Measures Included in a Proposed Action That Are Intended To Avoid, Minimize, or Offset Adverse Effects to Listed Species or Critical Habitat

We proposed clarifications to § 402.14(g)(8) regarding whether and how the Services should consider measures included in a proposed action that are intended to avoid, minimize, or offset adverse effects to listed species or critical habitat. Federal agencies often include these types of measures as part of the proposed action. However, the Services' reliance on a Federal agency's commitment that the measures will actually occur as proposed has been repeatedly questioned in court. The resulting judicial decisions have created confusion regarding what level of certainty is required to demonstrate that a measure will in fact be implemented before the Services can consider it in a biological opinion. In particular, the Ninth Circuit has held that even an expressed sincere commitment by a Federal agency or applicant to implement future improvements to benefit a species must be rejected absent ''specific and binding plans'' with ''a clear, definite commitment of resources for future improvements.'' *Nat'l Wildlife Fed'n* v. *Nat'l Marine Fisheries Serv.,* 524 F.3d 917, 935–36 (9th Cir. 2008). To address this issue, we are proceeding with the revisions to § 402.14(g)(8), including the changes described in Discussion of Changes from Proposed Rule, above. We summarize the comments and provide our responses on the changes to § 402.14(g)(8) below.

Comment: Some commenters opposed the changes and recommended that the text be modified in the final rule to specify that the action agency and/or applicant must establish specific plans and/or resource commitments to ensure that the conservation measures are implemented. In their view, if the proponent agency expects credit for proposing beneficial actions, then there must be additional assurance that those actions will take place. Some commenters stated the proposal was irrational and inconsistent with case law, including Ninth Circuit precedent in *Nat'l Wildlife Fed'n* v. *Nat'l Marine Fisheries Serv.,* 524 F.3d 917 (9th Cir. 2008), and will add further confusion to the case law on the issue.

Response: We disagree with the commenters' recommendation to create a heightened standard of documentation, such as requiring binding plans or clear resource commitments, before the Services can consider the effects of measures included in a proposed action to avoid, minimize, or offset adverse effects. The revisions to § 402.14(g)(8) are intended to address situations where a Federal agency includes measures to avoid, minimize, or offset adverse effects to species and/or critical habitat as part of the proposed action they submit to the Services for consultation, or where such measures are included as part of a reasonable and prudent alternative.

Section 7 of the Act places obligations on Federal agencies to insure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. A Federal agency fulfils this substantive obligation ''in consultation with'' and ''with the assistance of'' the Services. In situations where an adverse effect to listed species or critical habitat is likely, the consultation with the Services results in a biological opinion that sets forth the Services' opinion detailing how the agency action affects the species or its critical habitat. Ultimately, after the Services render an opinion, the Federal agency must still determine how to proceed with its action in a manner that is consistent with avoiding jeopardy and destruction or adverse modification. Thus, the Act leaves the final responsibility for compliance with section 7(a)(2)'s substantive requirements with the Federal action agencies, not the Services.

Our regulatory revisions are consistent with the statutory scheme by recognizing that the Federal agencies authorizing, funding, and carrying out the action are in the best position to determine whether measures they propose to undertake, or adopt as part of a reasonable and prudent alternative, are sufficiently certain to occur. Put simply, if the commitment to implement a measure is clearly presented to the Services as part of the proposed action consistent with § 402.14(c)(1), then the Services will provide our opinion on the effects of the action if implemented as proposed.

We do not interpret the statutory phrases ''in consultation with'' and ''with the assistance of'' to require the Services to ignore beneficial effects of measures included in the proposed action to avoid, minimize, or offset adverse effects unless action agencies meet some heightened bar of documentation regarding their commitment. To the contrary, we interpret the Act as requiring the Services to consider the effects of the proposed action in its entirety, including aspects of the proposed action with adverse or beneficial effects.

Some courts have inappropriately conflated the Services' role with that of the action agency by concluding the Services cannot lawfully consider measures proposed to avoid, minimize, or offset adverse effects unless we second guess the intent and veracity of an action agency's commitments. The resulting case law has led to confusion. For instance, the Ninth Circuit has held that even an expressed sincere commitment by a Federal agency or applicant to implement future improvements to benefit a species must be rejected absent ''specific and binding plans'' with ''a clear, definite commitment of resources for future improvements.'' *Nat'l Wildlife Fed'n* v. *Nat'l Marine Fisheries Serv.,* 524 F.3d 917, 935–36 (9th Cir. 2008). More recently the Ninth Circuit held that its ''precedents require an agency to identify and guarantee'' measures to avoid, minimize, or offset adverse effects only to the extent the measures ''target certain or existing negative effects'' of the proposed action. *Defs. of Wildlife* v. *Zinke,* 856 F.3d 1248, 1258 (9th Cir. 2017). In some cases, courts have also stated that ''mitigation measures supporting a biological opinion's no-jeopardy conclusion must be 'reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards.' *Ctr. for Biological Diversity* v. *Rumsfeld,* 198 F.Supp.2d 1139, 1152 (D.Ariz. 2002) (citing *Sierra Club* v. *Marsh,* 816 F.2d 1376 (9th Cir. 1987)).'' *Klamath-Siskiyou Wildlands Ctr.* v. *Nat'l Oceanic & Atmospheric Admin.,* 99 F. Supp. 3d 1033, 1055 (N.D. Cal. 2015). However, the Ninth Circuit has also indicated that the question of whether measures to avoid, minimize, or offset adverse effects are sufficiently enforceable turns on whether or not the measures are included in the proposed action, concluding that ''[i]f [the measures] are part of the project design, the [Act]'s sequential, interlocking procedural provisions ensure recourse if the parties do not honor or enforce the agreement, and so ensure the protection of listed species.'' *Ctr. for Biological Diversity* v. *U.S. Bureau of Land Mgmt.,* 698 F.3d 1101, 1115 (9th Cir. 2012). We disagree with the commenter that the regulatory revisions to § 402.14(g)(8) will add to the confusion of the current case law on the subject. Instead, we believe it will resolve confusion by explaining our interpretation of the statute.

The regulatory change to § 402.14(g)(8) is to make it clear that, just like aspects of the proposed action with adverse effects, the Services are not required to obtain binding plans or other such documentation prior to being able to lawfully evaluate the effects of an action as proposed, including any measures included in the proposed action that would avoid, minimize, or offset adverse effects. However, the Services are also moving forward with revisions to § 402.14(c)(1). Those revisions require a Federal agency seeking to initiate formal consultation to provide a description of the proposed action, including any measures intended to avoid, minimize, or offset effects of the proposed action. If the description of proposed measures fails to include the level of detail necessary for the Services to understand the action and evaluate its effects to listed species or critical habitat, then the Services will be unable to take into account those effects when developing our biological opinion. To avoid confusion and reinforce that an appropriate level of specificity regarding the description of measures included in the proposed action may be necessary to provide sufficient detail to assess the effects of the action on listed species and critical habitat, the Services eliminated the reference to ''specific'' plans in our final revisions to § 402.14(g)(8). The Services do not intend to hold these actions to either a higher or lower standard than any other type of action or measure proposed by a Federal agency. Any type of action proposed by a Federal agency receives a presumption that it will occur, but it must also be described in sufficient detail that the Services can both understand the action and evaluate its adverse effects and beneficial effects.

The Services also retain the discretion to advise Federal agencies about all aspects of measures proposed to avoid, minimize, or offset adverse effects to assist them in making an informed determination regarding compliance with section 7 and to assist in achieving the greatest conservation benefit. Moreover, the Services retain the discretion to develop reasonable and prudent measures and associated terms and conditions related to implementation of the proposed action, including the proposed conservation measures, if appropriate (*e.g.,* minimizes the impact of the incidental take and is consistent with § 402.14(i)(2)). Therefore, the revisions to § 402.14(g)(8) in this final rule do not undermine the Services' ability to provide consultation and assistance to Federal agencies related to measures proposed to avoid, minimize, or offset adverse effects. Rather, the revisions merely clarify that Federal agencies seeking to engage in section 7 consultation with the Services are in the best position to define the action being proposed and ultimately comply with section 7's substantive mandate to avoid jeopardy and destruction or adverse modification.

Comment: Some commenters stated that there are examples of projects where resource impacts occurred, but that years later, measures to offset those adverse effects had not been implemented. According to some commenters, history provides numerous examples of action agencies (or the Services themselves in the development of reasonable and prudent alternatives): (1) Promising more than they could deliver in order to alleviate the harmful effects of a proposed action; and/or (2) making optimistic assumptions about the efficacy of the measures that fall far short of what's needed to avoid jeopardy. Therefore, some commenters believed the Services should require that all measures proposed to avoid, minimize, or offset adverse effects demonstrate clear and binding plans with financial assurances.

Response: As described above, the regulatory revisions in § 402.14(g)(8) are consistent with the statutory text and retain the Federal action agencies' substantive duty to insure that their actions are not likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of designated critical habitat. An action agency that fails to implement the measures proposed to avoid, minimize, or offset adverse effects risks violating the substantive provisions of the Act, engaging in conduct prohibited by section 9, and increasing its vulnerability to enforcement action by the Services or citizen suits under section 11(g) of the Act. This is particularly true if reinitiation of consultation was required based on the failure to implement a proposed measure and the Federal agency fails to reinitiate consultation. For instance, our regulations at § 402.16

require reinitiation of consultation if the amount or extent of take specified in the incidental take statement is exceeded, if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered, and if the action is subsequently modified in a manner that causes an effect to listed species or critical habitat that was not considered in the biological opinion. Failure to implement a measure proposed to avoid, minimize, or offset adverse effects could implicate those reinitiation triggers. Accordingly, we do not believe the revisions will encourage promises of implementing measures to avoid, minimize, or offset adverse effects that are unrealistic or unachievable.

Regarding the potential for overly optimistic assumptions about the efficacy of measures included in the proposed action to avoid, minimize, or offset adverse effects, nothing in this rule alters the requirement under the Act to use the best scientific and commercial data available when the Services evaluate the effects of a proposed action, including measures proposed to avoid, minimize, or offset adverse effects. This rule also requires Federal agencies to submit information about the measures being proposed to avoid, minimize, or offset adverse effects (§ 402.14(c)(1)) at a level of detail sufficient for the Services to understand the action and evaluate the effects of the action. Thus, we anticipate that, if anything, this rule will improve the availability and quality of information that the Services can use to evaluate the efficacy of proposed actions, including measures proposed to avoid, minimize, or offset adverse effects.

Comment: Some commenters stated support for the proposed changes and said the proposed text would incentivize Federal agencies and project proponents to develop measures to avoid, minimize, or offset adverse effects and may result in greater conservation. Other commenters noted that the applicant and Federal action agency are in the best position to determine the scope of the proposed action and what avoidance, minimization, or other measures can be implemented during the duration of the project, and those measures will be supported by the ''best scientific and commercial data available.'' Some commenters agreed that the proposed changes help to clarify that the Services are not required seek ''binding'' plans or a clear and definite commitment of resources before measures included in a proposed action can be considered by the Services.

Response: The Services appreciate the comments. We believe the regulatory changes will, under certain circumstances, encourage Federal agencies and applicants to commit to implementing measures intended to avoid, minimize, or offset adverse effects. We also agree that the applicant and Federal action agency are in the best position to evaluate what commitments can be made as part of the proposed action. Section 7 consultations will continue to be based upon the best scientific and commercial data available.

Comment: Some commenters asserted that the Services should require specific steps of Federal agencies before considering the effects of measures proposed to avoid, minimize, or offset adverse effects, including: (1) Having those actions included in the actual project description in NEPA documents or the biological assessment; (2) having the Federal agency determine the actions are within their authority; (3) requiring signed agreements between the agency and other cooperators if there is off-site restoration; and (4) having a reinitiation of consultation clause if the actions are not implemented. Other commenters felt that the Services should determine that the plan to avoid, minimize or offset the effects of a proposed action is credible, that the plan for funding such measures is reasonable, and that there are no known obstacles that may keep the measures from being carried out. Some stated that measures to offset adverse effects should outline the amount and type of measures that will be carried out and what mechanism will be used to satisfy the commitment (*e.g.,* conservation bank). If applicants will be undertaking the measure directly, one commenter believed the Services should approve the final plan, and it should be attached or included by reference. One commenter also stated that all plans should take into account established agency guidance on the use of conservation banks and offsetting losses of aquatic resources.

Response: We decline to alter our proposed regulatory text in the manner suggested on these issues for a variety of reasons. First, this rule modifies § 402.14(c) to require information about measures included in a proposed action to avoid, minimize, or offset adverse effects as a prerequisite to initiating formal consultation. Therefore, there is no need to specify that the description of those measures also be included in the project design description in a NEPA document or biological assessment, although we anticipate such measures would also be described in those documents. Similarly, the information required by § 402.14(c) will be sufficient to address the commenter's point about needing information about the type, amount, and mechanisms by which measures will be carried out. In our experience, a Federal agency also would not include a measure as part of its proposed action if it lacked authority to do so, and we do not need additional regulatory provisions to address that concern. Regarding signed agreements with cooperators if off-site measures are involved, the Federal agency proposing the action is responsible for determining the appropriate nature and timing of agreements with cooperators. Finally, our regulations already specify the triggers for reinitiation. Those triggers are adequate to require reinitiation in circumstances where measures are not implemented as proposed and where the failure to implement would alter the effects to listed species or critical habitat. As described elsewhere in our responses to comments, the Services decline to add additional steps, such as the need for a Service-approved plan or additional documentation prior to the Services' evaluation of the action as proposed. We acknowledge agency guidance on measures intended to avoid, minimize, or offset adverse effects can be useful for numerous reasons and could help inform a Federal agency or applicant regarding best practices for ensuring the success of proposed measures, but we decline to require the use of specific agency guidance on measures to avoid, minimize, or offset adverse effects, which can vary over time.

Comment: Some commenters were concerned that the Services have few resources dedicated to compliance monitoring and that a Federal agency's failure to complete the action as proposed cannot adequately be considered through reinitiation of consultation. Reinitiation would not ensure that implementation of the action up until the point at which the agency determines it will not implement a measure avoids jeopardy. The second option mentioned, complying with an incidental take statement, would provide no assurance that the measure is implemented, unless it is actually included as a reasonable and prudent measure as part of the incidental take statement. Another commenter stated the proposal in essence means the Services are not required to police the Federal agency, which could provoke conflict among and between the Services and agencies and require the expenditure of additional resources by agencies apart from the Service.

Response: Nothing in this final rule reduces the Services' resources available for compliance monitoring or reduces the Services' ability to require monitoring and reporting requirements as part of an incidental take statement. The Services regularly impose monitoring and implementation reporting requirements to validate that the effects of a proposed action are consistent with what was analyzed in the biological opinion, and we intend for that practice to continue. Therefore, the final rule will not interject new elements that might provoke conflict among and between the Services and Federal agencies.

As described above, an action agency that fails to implement the measures proposed to avoid, minimize, or offset adverse effects risks violating the substantive provisions of the Act, engaging in conduct prohibited by section 9, and increasing its vulnerability to enforcement action by the Services or citizen suits under section 11(g) of the Act. This is particularly true if reinitiation of consultation was required based on the failure to implement a proposed measure and the Federal agency fails to reinitiate consultation.

We disagree with the commenter that reinitiation of consultation fails to ensure that implementation of the action avoids jeopardy up until the point at which the agency determines it will be unable to implement a measure intended to avoid, minimize, or offset adverse effects. When the Services consider the effects of proposed actions on listed species and critical habitat, that process includes a consideration of the timing and scope of activities that will be implemented. If a proposed action later changes due to measures not being carried out, the adverse effects up until that point must still avoid jeopardy and destruction or adverse modification. Therefore, we believe reinitiation is an appropriate response in the event an action is subsequently modified in a manner that has effects to species or critical habitat that were not previously considered. Once consultation is reinitiated, an action agency must not make irreversible or irretrievable commitments of resources that will foreclose the formulation of reasonable and prudent alternatives, and the substantive duty to avoid jeopardizing listed species and destroying or adversely modifying critical habitat remains. If adverse effects have occurred, those will be taken into account in the reinitiated consultation and the formulation of reasonable and prudent alternatives if necessary. Given the action agencies' substantive obligations under section 7, we do not anticipate our proposed changes to § 402.14(g)(8) will result in measures intended to avoid, minimize, or offset adverse effects being proposed with deceptive intentions.

With regard to the incidental take statement, the Services must make a determination on what reasonable and prudent measures are necessary or appropriate to minimize the impact of take on a case-by-case basis. It would be inappropriate to determine what reasonable and prudent measures and implementing terms and conditions are necessary or appropriate, including reporting requirements to monitor progress, before the Services evaluate the effects of a particular proposed action.

Comment: One commenter stated that if the Services are not required to obtain proof of ''specific and binding plans'' for implementation of minimization measures it would undermine the credibility of effects determinations and complicate the identification of the environmental baseline in future consultations, to the potential disadvantage of future project proponents. Other commenters felt that as a result of this proposed change, there will likely be situations in which the Services make decisions about the adverse impacts of an agency action based on incomplete information with no assurance the beneficial action will occur or create any benefit to species or habitat to offset adverse impacts.

Response: We disagree that the regulatory revisions will undermine the credibility of effects determinations. These regulations do not alter the requirement for Federal agencies and the Services to use the best scientific and commercial data available. As described above, the information needed to initiate consultation now includes a requirement to describe any measures included to avoid, minimize, or offset adverse effects. Thus, the Services will not be evaluating the effects of proposed actions with insufficient information. We do not interpret the Act as requiring a heightened standard of assurances, beyond a sincere commitment and inclusion of a proposed measure as part of the action under consultation, before the Services can lawfully evaluate the effects of the action.

The revisions to § 402.14(g)(8) also will not complicate the identification of the environmental baseline to the disadvantage of future project proponents. The relevant portions of the environmental baseline definition are unchanged in this final rule and will continue to take into account the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions that are contemporaneous with the consultation in process. In any circumstance where a proposed action is subsequently modified and results in effects not previously considered, reinitiation of consultation would likely be required and would be accounted for in the environmental baseline of future consultations as appropriate.

Comment: One commenter remained concerned that, even with the proposed clarification, the Services may continue to exclude from consideration conservation measures that are funded by the applicant but undertaken by another entity or conducted by a related party. The commenter therefore requested that the proposed regulatory text in 50 CFR 402.14(g)(8) be further modified to state that ''. . . the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions as proposed, or taken, funded or otherwise sponsored by the Federal agency, applicant, or related party, including any actions taken prior to the initiation of consultation. Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action regardless of their geographic proximity to the proposed action, and do not require any additional demonstration of specific binding plans or a clear, definite commitment of resources.''

Response: We appreciate the comment but decline to adopt regulatory language that would categorically expand the scope of beneficial actions due ''appropriate consideration'' under § 402.14(g)(8) to include actions by ''related parties.'' Such a regulatory change is unnecessary. Beneficial actions taken or proposed in consultation by any entity are considered by the Services when developing its biological opinion by being included in the environmental baseline, cumulative effects, or the effects of the action under consultation, as appropriate.

We also decline to categorically include revisions that would expand the scope of measures that would be ''considered like other portions of the action'' to include those actions ''regardless of their geographic

proximity to the proposed action.'' If a proposed measure is not within the geographic proximity of the other components of the proposed action, but would nonetheless have effects to listed species or critical habitat, then the action area would include the area affected by the proposed offsite measures and the effects to listed species and critical habitat would be considered during consultation to the extent they are relevant. No regulatory change is needed for that to occur.

In addition, from a critical habitat perspective, insertion of the phrase ''regardless of their geographic proximity to the proposed action'' would be inappropriate because measures implemented outside critical habitat would often not offset the effects of the Federal action on that critical habitat. This is because critical habitat is a specifically designated area that identifies those areas of habitat believed to be essential to the species' conservation.

Comment: One commenter stated concerns about requiring the information necessary to initiate formal consultation to include ''the specific components of the action and how they will be carried out.'' With respect to beneficial actions, this provision is likely too restrictive.

Response: We appreciate the commenter's concern but decline to alter the scope of information necessary to initial formal consultation pursuant to § 402.14(c)(1). We continue to acknowledge, like we stated in the proposed rule, that there may be situations where a Federal agency may propose a suite or program of measures that will be implemented over time. The future components of the proposed action often have some uncertainty with regard to the specific details of projects that will be implemented. Nevertheless, a Federal agency or applicant may be fully capable of committing to specific levels and types of actions (*e.g.,* habitat restoration) and specific populations or species that will be the focus of the effort. If the Federal agency provides information in sufficient detail for the Services to meaningfully evaluate the effects of measures proposed to avoid, minimize, or offset adverse effects, the Services will consider the effects of the proposed measures as part of the action during a consultation. We believe the information requirements contained in § 402.14(c)(1) will help provide the necessary detail to evaluate the effects of measures proposed to avoid, minimize, or offset adverse effects.

Comment: Some commenters stated that the Act requires all Federal agencies to ''insure'' their actions will avoid jeopardy and destruction or adverse modification of critical habitat. Mere promises of future benefits to species and their habitat in order to offset present adverse impacts does not meet this ''insure'' standard, which Congress characterized as the ''institutionalization of caution.''

Response: As described in the responses to comments above, this final rule does not alter the obligation for Federal agencies to ''insure'' their actions are not likely to jeopardize listed species or destroy or adversely modify critical habitat. The Services will continue to consult with, and provide assistance to, Federal agencies in their compliance with their requirements under section 7, but the Services are not required by the Act to obtain a specific demonstration of the binding nature of a Federal agencies' commitments prior to evaluating the effect of those commitments and providing our biological opinion. If a measure proposed to avoid, minimize, or offset adverse effects is essential for avoiding jeopardy or destruction or adverse modification, then implementation of that measure must occur at a time when the biological benefits to the species and/or habitat are occurring in a temporal sequence such that adverse effects cannot first result in jeopardy, but then subsequently be remediated to avoid jeopardy. Accordingly, the Services do not rely on promises of future actions to offset present adverse effects in a manner that would be inconsistent with Federal agencies ensuring that their actions are consistent with the substantive requirements of section 7.

Comment: One commenter stated the proposed change is a confusing false equivalency that reduces the ability of the Services to evaluate the likely impact of the action by obscuring whether measures will in fact take place. A preferable alternative would be to clarify, when some action ambiguity is warranted, that consultation can still be completed as long as avoidance, minimization, and offsetting commitments are made for each contingency.

Response: We disagree that allowing for ambiguity and creating alternative contingency requirements is a preferable way for the Services to evaluate the effects of a proposed action. We consult on the action as proposed by the Federal agency and will only consider the effects of measures intended to avoid, minimize, or offset adverse effects if presented with sufficient information to meaningfully evaluate the effects of the action.

Comment: One commenter stated that measures to avoid, minimize, or offset adverse effects impose additional costs and burdens on an agency or applicant undertaking a project. Whereas the project proponent wants to engage in the main action, it is undertaking the other measures only to avoid a jeopardy conclusion for the main action. In the commenter's view, the Services cannot rationally ignore this plain difference in the motivations for the main action and those intended to offset the harms of that action.

Response: If a Federal agency or applicant proposes measures to avoid, minimize, or offset adverse effects as part of its proposed action because it is necessary to avoid jeopardy, we believe the motivations for undertaking the measure, such as the need to avoid violations of the Act, are clear. We decline to probe the subjective motivations and second guess the commitments contained in an action under consultation, because doing so is unnecessary to fulfill the Services' role under the Act.

Comment: One commenter stated the Services' proposed changes would render the Services unable to even raise concerns about the likelihood of implementation of beneficial effects of measures proposed to avoid, minimize, or offset adverse effects when they evaluate a proposed action to determine whether it will jeopardize the continued existence of a species or destroy or adversely modify critical habitat. Some commenters asserted the proposed rule provides the ''benefit of the doubt'' to Federal action agencies' promises to implement beneficial measures as part of the action and creates an irrational double standard for evaluating the effects of the action such that Federal beneficial proposals enjoy a favorable presumption in the Services' analysis, but harmful effects and activities must meet a more rigorous test before they will be considered.

Response: We disagree that the changes would render the Services unable to raise concerns with Federal agencies with respect to measures proposed to avoid, minimize, or offset adverse effects. As described above, the Services retain the discretion to advise Federal agencies about all aspects of their proposed action to assist them in making an informed determination regarding compliance with section 7 and in achieving the greatest conservation benefit. However, the Federal agency is ultimately responsible for describing its proposed action and providing the information required by § 402.14(c)(1). If the Federal agency provides information in sufficient detail

for the Services to meaningfully evaluate the effects of measures proposed to avoid, minimize, or offset adverse effects, the Services will consider the effects of the proposed measures during a consultation. Once consultation is initiated, the Services apply the same definition of ''effects of the action'' adopted in this final rule both to the portions of the action with adverse effects and those portions of the proposed action intended to avoid, minimize, or offset adverse effects. Accordingly, the Services will evaluate all consequences of all portions of the proposed action that would not occur ''but for'' the proposed action and are reasonably certain to occur as effects of the action. Therefore, the changes to § 402.14(g)(8) do not create an irrational double standard. To the contrary, the changes eliminate a double standard such that all aspects of the proposed action are treated the same by assuming the action will be implemented as proposed in its entirety. In other words, the proposed avoidance, minimization or offsetting measures will not be forced to meet a heightened threshold but will instead be held to the same standard as the portions of the proposed action likely to result in adverse effects.

We disagree that the changes adopted in this final rule are inconsistent with the Act because they fail to provide the ''benefit of the doubt to the species.'' That phrase originated in a Conference Report that accompanied the 1979 amendments to the Act. Relevant to section 7, those amendments changed the statutory text at section 7(a)(2) from ''will not jeopardize'' to the current wording of ''is not likely to jeopardize.'' The Conference Report explained that the change in the statutory language was necessary to prevent the Services from having to issue jeopardy determinations whenever an action agency could not ''guarantee with certainty'' that their action would not jeopardize listed species. The Conference Report sought to explain that this change in language would not have a negative impact on species: ''This language continues to give the benefit of the doubt to the species, and it would continue to place the burden on the action agency to demonstrate to the consulting agency that its action will not violate Section 7(a)(2).'' H. Conf. Rep. No. 96–697, 96th Cong., 1st. Sess. 12, reprinted in [1979] U.S. Code Cong. & Ad. News, 2572, 2576. The use of the words ''benefit of the doubt to the species'' in the Conference Report appears intended to provide reassurance that the statutory language, as amended, would remain protective of the species. At most, the language seems to indicate that the statutory language ''is not likely to jeopardize'' continues to provide protections to listed species by requiring action agencies to insure that their actions are not likely to jeopardize listed species. We do not believe that the Conference Report language or the Act requires the Services to establish a more demanding standard of documentation to demonstrate that measures included in a proposed action to avoid, minimize, or offset adverse effects will in fact be implemented. This rule does not change any statutory requirements found in section 7(a)(2) of the Act, and the Services will continue to utilize the best scientific and commercial data available when evaluating the efficacy of measures proposed to avoid, minimize, or offset adverse effects.

Comment: One commenter stated that, if the determination that an action's impacts will not jeopardize a species relies on the implementation of conservation measures, those measures must be planned and funded.

Response: We agree that if the Services determine that a measure intended to avoid, minimize, or offset adverse effects is necessary to avoid jeopardy, then it is critical for the measure to be achievable and be carried out if the adverse effects of the action are also occurring. Ultimately, however, the Federal agency proposing to take the action is in the best position to determine what planning and funding is necessary to ensure that their substantive duties under section 7 are satisfied. As discussed above, the Services retain the discretion during consultation to assist the action agencies in developing or improving the effectiveness of measures proposed to avoid, minimize, or offset adverse effects and ensuring the greatest chance of success. Moreover, the Services retain the discretion to develop reasonable and prudent alternatives or reasonable and prudent measures and associated terms and conditions if doing so would be appropriate.

Section 402.14(h)—Biological Opinions

We proposed to add new paragraphs (h)(3) and (4) to the current § 402.14(h) to allow the Services to adopt all or part of a Federal agency's initiation package in its biological opinion. Additionally, we proposed to allow the Services to adopt all or part of their own analyses and findings that are required to issue a permit under section 10(a) of the Act in its biological opinion. We are proceeding with those proposed changes, as well as the changes described under Discussion of Changes from Proposed Rule above. We summarize the comments and provide our responses on this topic below related to revisions to § 402.14(h) below.

Comment: We received numerous comments supporting the ability of the Services to adopt various internal or other Federal agency documents including their initiation package or the documents associated with the Services' section 10 documents because they believe this proposal would avoid unnecessary duplication of documents, streamline the consultation process, and codify existing practice. Other commenters were supportive but also recommended that an applicant's documents prepared pursuant to section 10 of the Act and tribal documents should be able to be adopted in the Service's biological opinion.

Response: We believe that this proposal will codify existing practice and further encourage a collaborative process between the Services, Federal agencies, and applicants that will streamline the consultation process by eliminating duplication of analyses or documents whenever appropriate. We agree with commenters that appropriate analyses and documents from both tribes (*e.g.,* tribal wildlife management plans or resource management plan) and applicants' section 10 Habitat Conservation Plans are eligible for adoption by the Services into their biological opinion.

Comment: Some commenters raised concern that adopting section 10 Habitat Conservation Plan analyses or documents was inappropriate because there are different standards in the two sections of the Act.

Response: The intent of the proposed rule is to provide flexibility to adopt in a biological opinion, after appropriate review, relevant parts of internal analyses or documents prepared to support issuance of a section 10 permit. This could include the project description, site-specific species information and environmental baseline data, proposed conservation measures, analyses of effects, etc., all of which may be appropriate for use in Service determinations pursuant to both sections 7 and 10 of the Act.

Comment: Several commenters were critical of the proposed rule, asserting that adoption of non-Service analyses or documents in a biological opinion would be an abdication of our responsibilities to conduct independent, science-based analyses and that only the Services possessed the requisite expertise to perform these analyses.

Response: The Services' proposal is not to indiscriminately adopt analyses or documents from non-Service sources, but to adopt these analyses only after

our independent, science-based evaluation of existing analyses or documents that meet our regulatory and scientific standards. The intent is to avoid needless duplication of analyses and documents that meet our standards, including the use of the best scientific and commercial data available. In some situations, the analyses or documents may need to be revised to merit inclusion in our biological opinions, but even those situations will make the consultation process more efficient and streamlined. For example, it is a common practice for the Services to adopt portions of biological assessments and initiation packages in their biological opinions. The codification of this practice creates a more collaborative process and incentive for Federal agencies and section 10 applicants to produce high-quality analyses and documents that are suitable for inclusion in biological opinions, which streamlines the timeframe for completion of the consultation process.

Comment: One commenter expressed concern that the proposed adoption process might shift the burden to the Federal agency and extend the timeline for completion of consultation.

Response: The Services disagree. Federal agencies currently have the responsibility under § 402.14(c) to provide the information required to initiate consultation and to use the best scientific and commercial data available. The adoption process does not affect that responsibility. The Services' adoption of internal and non-Service analyses and documents is intended to streamline and reduce the overall consultation timeline.

Section 402.14(l)—Expedited Consultation

We proposed to add a new provision titled ''Expedited consultations'' at § 402.14(l) to offer opportunities to streamline consultation, particularly for actions that have minimal adverse effects or predictable effects based on previous consultation experience. We adopt the new § 402.14(l) in this final rule and summarize the comments received and our responses below.

Comment: Several commenters supported the proposed process for expedited consultations as it would promote conservation and recovery, increase efficiencies, reduce permitting delays, and generally streamline the consultation process.

Response: The Services agree with these comments that the proposed expedited consultation provision will benefit species and habitats by promoting conservation and recovery through improved efficiencies in the section 7 consultation process.

Comment: Several commenters were concerned that consultations undergoing the expedited process would have reduced oversight and not allow for a thorough analysis of the potential effects of a Federal agency's proposed action and therefore may not meet the standards required under section 7(a)(2) of the Act. Another commenter indicated that the proposed expedited consultation process could provide some benefits. However, the commenter raised concerns that the ability to evaluate a project on a specific basis would be missed, and this provision would open the door for blanket permissions to proceed on particular projects that could be detrimental to species, especially if there are new or specific impacts to species in time and place despite the project being similar to others.

Response: The expedited consultation provision is an optional process that is intended to streamline the consultation process for those projects that have minimal adverse impact but still require a biological opinion and incidental take statement and for projects where the effects are either known or are predictable and unlikely to cause jeopardy or destruction or adverse modification. Many of these projects historically have been completed under the routine formal consultation process and statutory timeframes. This provision is intended to expedite the timelines of the formal consultation process for Federal actions while still requiring the same information and analysis standards as the normal process. Based upon the nature and scope of the projects expected to undergo this expedited process, expedited timelines will still allow for the appropriate level of review and oversight by the Services that meet the standards and requirements of the section 7 consultation process under the Act.

Comment: Several commenters indicated they support this provision for an expedited consultation process. However, they requested additional clarification on when this type of consultation would be appropriate or examples of specific parameters such as time required for a proposed Federal action to undergo this expedited consultation process. A few commenters also asked for clarification on how this process differs from the programmatic consultation process.

Response: A key element for successful implementation of this process is mutual agreement between the Service and Federal agency (and applicant when applicable). The mutual agreement will contain the specific parameters necessary to complete each step of the process, such as the completion of a biological opinion. Discussions between the Service and Federal agency (and applicant when applicable) will identify what projects could undergo this process. An example of an expedited consultation process that has been utilized by Services and land management agencies for many years is the streamlining agreement for western Federal lands (*https://www.fs.fed.us/r6/icbemp/esa/TrainingTools.htm*). The streamlining agreement adopts an interagency team process that frontloads much of the consultation and leads to the issuance of biological opinions within 60 days. The streamlining agreement illustrates the types of efficiencies the Services hope to gain with the adoption of the expedited consultation provision. The expedited consultation provision is an optional process that is intended to streamline the consultation process, similar to other mechanisms such as programmatic consultations. However, this process differs from programmatic consultations primarily because it is expected to be completed entirely in an expedited timeframe resulting from familiarity with the type of project being proposed and its known or predictable effects on species. Additionally, this process may differ from a programmatic consultation in that many programmatic consultations often require lengthy time for technical assistance, agreements on conservation measures, and completion of the biological opinion in the initial phases of the consultation process, with efficiencies and streamlining achieved later on once individual projects are reviewed and appended or covered under the completed programmatic biological opinion. The Services nevertheless anticipate that, if appropriate, a programmatic consultation could proceed under the expedited consultation process.

Comment: A few commenters indicated the proposed revisions for an expedited consultation approach may be unnecessary and unrealistic given current staffing and funding constraints of the Service(s), reducing their ability to meet expedited timelines. Additionally, one of these commenters also was concerned that the proposed changes to the definition of Director could cause additional delays if these types of consultations would all have to be signed at the U.S. Fish and Wildlife Service headquarters in Washington, DC, defeating the purpose of completion

of formal consultation under an expedited timeline.

Response: The Services do not anticipate an increase in constraints on staff or resources. The expedited consultation provision is anticipated to improve efficiencies by reducing the amount of time staff would need to spend completing consultations for projects undergoing this process. By decreasing the amount of time spent on these types of consultations, it is anticipated more staff time and resources would be available for completion of projects undergoing more complex or lengthy consultation processes.

As discussed above, the revision to the definition for Director is intended to designate the head of both FWS and NMFS as the definitional Director under the section 7(a)(2) interagency cooperation regulations. The change does not revise the current signature delegations of the Services in place that allow for signature of specified section 7 documents (*e.g.,* biological opinions and concurrence letters) at the regional level and will not increase the completion time for consultation.

Comment: One commenter recommended that this expedited consultation process only be undertaken for projects that are entirely beneficial to species and habitats.

Response: The Services agree that many projects that are beneficial for species and habitats could undergo an expedited consultation process. Such projects may have some anticipated temporary adverse effects to listed species and their habitat, but often are predictable, and, therefore, these projects could be good candidates for the expedited consultation process. However, the Services do not agree that the expedited consultation provision should be limited to only these types of beneficial actions. Other actions that meet the requirements of the provision could also benefit from an expedited process while still ensuring full compliance with the Act.

Comment: A few commenters opposed the proposed provision for expedited consultations since the Services generally complete consultations within the established statutory deadlines.

Response: The Services strive to complete consultations within the established statutory deadlines, but continue to identify ways to improve efficiencies. The proposed new provision for expedited consultations is another streamlining mechanism intended to improve efficiencies in the section 7(a)(2) consultation process for the Services, Federal agencies, and their applicants while ensuring full compliance with the responsibilities of section 7.

Section 402.16—Reinitiation of Consultation

The Services proposed to revise the title of section 402.16 to remove the term ''formal'' in order to recognize long standing practice between the Services and Federal agencies that reinitiation of section 7(a)(2) consultation also applies to the written concurrences that complete the section 7(a)(2) process under § 402.13 *Informal Consultation.* We are proceeding with that revision to § 402.16 and also further revising the text at § 402.16(c) to clarify the connection of the reinitiation criteria to the written concurrence process. This latter revision is described above in this final rule. We received several comments on this section, and those comments and our responses to the public comment received on the proposal to codify that reinitiation of consultation applies to the informal consultation written concurrence process are here provided.

The Services also proposed to amend § 402.16 to address issues arising under the Ninth Circuit's decision in *Cottonwood Environmental Law Center* v. *U.S. Forest Service,* 789 F.3d 1075 (9th Cir. 20016) *cert. denied,* 137 S. Ct. 293 (2016). We proposed to add a new paragraph (b) to clarify that the duty to reinitiate consultation does not apply to an existing programmatic land plan prepared pursuant to FLPMA, 43 U.S.C. 1701 *et seq.,* or NFMA, 16 U.S.C. 1600 *et seq.,* when a new species is listed or new critical habitat is designated. We proposed to narrow § 402.16 to exclude those two types of plans that have no immediate on-the-ground effects. This exclusion is in contrast to specific on-the-ground actions that implement the plan and that are subject to their own section 7 consultations if those actions may affect listed species or critical habitat. Thus, the proposed regulation also restated our position that, while a completed land management plan prepared pursuant to FLPMA or NFMA does not require reinitiation upon the listing of new species or critical habitat, any on-the-ground subsequent actions taken pursuant to the plan must be subject to a separate section 7 consultation if those actions may affect the newly listed species or newly designated critical habitat.

In addition to seeking comment on the proposed revision to § 402.16, we sought comments on whether to exempt other types of programmatic land or water management plans in addition to those prepared pursuant to FLPMA and NFMA from the requirement to reinitiate consultation when a new species is listed or critical habitat designated. We also requested comment on the proposed revision in light of the recently enacted Wildfire Suppression Funding and Forest Management Activities Act, H.R. 1625, Division O, which was included in the Omnibus Appropriations bill for fiscal year 2018.

Comment: Some commenters agreed that the proposed changes would align our regulations with current practice and court decisions. Some commenters expressed concern that we were expanding the requirements for reinitiation or expanding the circumstances in which reinitiation is required. One commenter suggested we clarify when reinitiation is needed by establishing ''clear standards for determining what project changes warrant a re-evaluation of previously approved environmental documentation (*i.e.,* what constitutes a material change).''

Response: The proposed changes do not alter the requirement that the Federal agency retain discretionary involvement and control for reinitiation to apply. Nor does the proposal change or expand the scope of reinitiation triggers for section 7(a)(2) consultation. A material change relevant to section 7(a)(2) consultations on an action is captured in the reinitiation trigger at § 402.16(c): ''[i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered. . . .'' These standards for reinitiation of consultation are straightforward, and the Services do not plan further clarification in the regulatory text on this point. However, the Services are further revising § 402.16(c) to make clear that this trigger for reinitiation of consultation applies to the written request for concurrence and our response.

Informal consultation is an optional process in which a Federal agency may determine, with the Services' concurrence, that formal consultation is not necessary because the action is not likely to adversely affect listed species and critical habitat. In these cases, the relevant reinitiation triggers still apply to the action as long as the agency retains discretionary involvement or control over the action. For example, if the action is changed or new information reveals effects to listed species or critical habitat may occur in a manner not previously considered, then reinitiation of consultation is warranted. This could occur where a permitted activity proceeds in a manner different than originally proposed, or if

new scientific or commercial information indicates that the permitted activities or effects flowing from those activities have different or greater impacts on the critical habitat or species than originally evaluated during the informal consultation process.

Comment: Several commenters urged the Services to extend the exemption from reinitiation when a new species is listed or critical habitat designated to all programmatic plans, including water management plans, other types of programmatic land management plans such as comprehensive conservation plans prepared for National Wildlife Refuges, and other types of integrated activity plans.

Response: At this time, we have decided to limit only those approved land management plans prepared pursuant to FLPMA or NFMA from reinitiation when a new species is listed or critical habitat designated.

Comment: One commenter was concerned the reinitiation exemption would apply to other U.S. Forest Service (USFS) plans, such as travel management plans.

Response: Only approved USFS programmatic land management plans prepared pursuant to NFMA are temporarily relieved from the reinitiation of consultation when a new species is listed or critical habitat designated. Other types of plans are still subject to reinitiation if one of the triggers is met under § 402.16(a) and the agency retains discretionary authorization or control over the plan.

Comment: Many commenters believed that our proposed regulation is in contravention to controlling case law, including *Cottonwood, Forest Guardians* v. *Forsgren,* 478 F.3d 1149 (10th Cir. 2007), and *Pacific Rivers Council* v. *Thomas,* 30 F. 3d 1050 (9th Cir. 1994). Likewise, a few comments criticized the proposed regulation because the duty to reinitiate derives from the action agency's substantive and procedural duties under section 7, which would be undermined.

Response: We agree that Congress intended to enact a broad definition of ''action'' in the Act. We also agree that management plans may have long-lasting effects; however, those effects were addressed in a consultation when the plan was adopted. Any effects that were not considered in the original consultation may still be subject to reinitiation if certain triggers are met, including whether the agency retains discretionary authorization or control over the action. Any actions taken pursuant to the plan will be subject to its own consultation if it may affect listed species or critical habitat. We disagree with *Cottonwood's* holding that the mere existence of a land management plan is an affirmative discretionary action subject to reinitiation. *See generally Southern Utah Wilderness Alliance* v. *Norton,* 542 U.S. 55 (2004); *see also National Ass'n of Homebuilders* v. *Defenders of Wildlife,* 551 U.S. 644 (2007). This amendment to § 402.16 reaffirms that only affirmative discretionary actions are subject to reinitiation under our regulations when any of the triggers at § 402.16(a)(1) through (4) are met.

Comment: Several commenters believed that the proposed § 402.16(b) violated the Wildlife Suppression Funding and Forest Management Activities Act, H.R. 1625, Division O, which was included in the Omnibus Appropriations bill for fiscal year 2018.

Response: After further review, the Services have revised the final regulation to include timeframes for forest land management plans prepared pursuant to NFMA to align with the temporary relief from reinitiation when a new species is listed or critical habitat designated set forth by Congress in section 208 of the Wildfire Suppression Funding and Forest Management Activities Act included in the 2018 Omnibus bill. In addition, in section 209, Congress excluded those grant lands under the Oregon and California Revested Lands Act, 39 Stat. 218, and the Coos Bay Wagon Road Reconveyed Lands Act, 40 Stat. 1179, from reinitiation of consultation when a new species is listed or critical habitat designated. Congress set no time limit for this exemption. However, a separate consultation must still occur for these particular Bureau of Land Management (BLM) lands for any actions taken pursuant to the plan, with respect to the development of a new land use plan, or the revision or significant change to an existing land use plan. *See* Wildfire Suppression Funding and Forest Management Activities Act at section 209(b).

Congress did not address in the Wildfire Suppression Funding and Forest Management Activities Act other BLM land managed pursuant to FLPMA. Thus, we are exercising our discretion and excluding from reinitiation those programmatic land management plans prepared pursuant to FLPMA when a new species is listed or critical habitat designated, provided that any specific action taken pursuant to the plan is subject to a separate section 7 consultation if the action may affect listed species or critical habitat.

Comment: A few commenters did not want a regulation relieving BLM and the USFS from reinitiation on its land management plans if a new species is listed or critical habitat designated. They believed a case-by-case approach would make more sense, especially when a new listing under the Act might call for significant changes to the plan.

Response: If a new listing or new critical habitat designation would require significant changes to a land management plan, those changes would have to be accomplished through a plan amendment or plan revision. A plan amendment or revision would be a separate action subject to consultation if it may affect listed species or critical habitat.

Comment: Some commenters argued that BLM and the USFS retain sufficient discretionary involvement or control over their land management plans to require reinitiation if certain triggers are met.

Response: The Services may recommend reinitiation of consultation, but it is within the action agency's purview, and not the Services', to determine whether it retains discretionary involvement or control over their plans for purposes of reinitiation.

Comment: A few commenters supported § 406.16(b) because developers of a land management plan should have considered how to manage for healthy ecosystems when the plan was adopted and thus should not always be required to reinitiate consultation. This direction shifts management away from a species-by-species focus and towards healthy landscapes and habitats.

Response: We agree with this approach and note this type of focus is best achieved through a section 7(a)(1) conservation program in consultation with the Services when a new species is listed or critical habitat designated. As we noted in the proposed rule's preamble, this proactive, conservation planning process will enable an action agency to better synchronize its actions and programs with the conservation and recovery needs of listed and proposed species. Such planning can help Federal agencies develop specific, pre-approved design criteria to ensure their actions are consistent with the conservation and recovery needs of the species. Additionally, these section 7(a)(1) programs will facilitate efficient development of the next programmatic section 7(a)(2) consultations when the land management plan is renewed.

Comment: Many commenters expressed concern with the relief from reinitiation provision applying to a forest or land management plan that is out of date. A few suggested that we revise the regulation to require only up-

to-date land management plans be subject to the exemption provided in § 402.16(b) so as to ensure the science and public input are not stale.

Response: As noted in the proposed rule preamble, BLM and the USFS are required to periodically update their land management plans, at which time they would consult on any newly listed species or critical habitat. BLM is required to periodically evaluate and revise its Resource Management Plans (43 CFR part 1610), and reevaluations should not exceed 5 years (*see* BLM Handbook H–1601–1 at p. 34). Our proposed rule anticipated that BLM Resource Management Plans will be kept up to date in accordance with this agency directive and so did not place any limitation on the relief from reinitiation. Our final rule also does not place any limitation on the relief from reinitiation for approved BLM plans. For any BLM land management plan, we note that any separate action taken pursuant to such plans will be subject to a separate consultation, which will take into account effects upon newly listed species and designated critical habitat.

USFS is required to revise their land management plans at least every 15 years (*see* 36 CFR 219.7). Congress, in the Wildfire Suppression Funding and Forest Management Activities Act, limited the relief from reinitiation with respect to plans prepared pursuant to NFMA to only those plans that are up to date, and that Congressional limitation is now also reflected in our revised final regulation.

Comment: A few comments suggested adding text to the regulation not to require reinitiation on the approval of a land management plan when a new species is listed or critical habitat designated ''provided that any authorized actions that may affect the newly listed species or designated critical habitat will be addressed through a separate action-specific consultation *limited in scope to the specific action*.'' (emphasis added).

Response: We respectfully decline to add this text because we do not think it is necessary.

Comment: A few commented that § 404.16(b) violates the Services' duty to consider cumulative effects.

Response: We respectfully disagree. Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation. In other words, a land management plan's effects within the action area does not include cumulative effects, but cumulative effects within the action area are taken into account when determining jeopardy or adverse modification.

Comment: One commenter believed the final regulation violates section 7(d) of the Act because failure to reinitiate on a completed land management plan results in the irretrievable commitment of resources in a manner that forecloses reasonable and prudent alternatives to the plan that could avoid jeopardy.

Response: Programmatic land management plans have no immediate-on-the-ground effects. Thus, making a section 7(d) determination on the mere existence of a completed land management plan that is subject to step-down, action-specific consultations does little to further the conservation goals of the Act.

Comment: One comment suggested that ''reinitiation'' does not require the completion of consultation and may not require a ''full-blown'' consultation.

Response: The Services agree that the scope and requirements of a reinitiation of consultation and documents for completion will depend on the particular facts of a given situation. We decline to issue regulations addressing this issue at this time, however. This comment also requested adding text that is already addressed under existing reinitiation triggers.

Comment: One comment suggested that, if the species proposed for listing were already included in the consultation on the programmatic land management plan, such plans should not have to be reinitiated when the species becomes listed.

Response: We agree with this comment. Also, this type of situation also lends itself well to a section 7(a)(1) program. Please see our response above.

Section 402.17—Other Provisions

For responses related to this section, please see response to comments for ''effects of the action'' above.

Miscellaneous

This section captures comments received and our responses for other aspects of the Services' proposed rule.

Comment: In our proposed rule, the Services sought comment regarding revising § 402.03 (applicability) to potentially preclude the need to consult under certain circumstances. We described this as ''. . . when the Federal agency does not anticipate take and the proposed action will: (1) Not affect listed species or critical habitat; or (2) have effects that are manifested through global processes and (i) cannot be reliably predicted or measured at the scale of a listed species' current range, or (ii) would result at most in an extremely small and insignificant impact on a listed species or critical habitat, or (iii) are such that the potential risk of harm to a listed species or critical habitat is remote, or (3) result in effects to listed species or critical habitat that are either wholly beneficial or are not capable of being measured or detected in a manner that permits meaningful evaluation.''

Response: The Services appreciate the wide variety of thoughtful comments and suggestions we received on these concepts. While many commenters supported the potential revisions, many did not. Though not an exhaustive list, the majority of the comments covered topics such as a belief that the concepts would streamline the consultation process and allow more time for consultation on projects with greater harm and risk to listed species, potential legal risks to action agencies if we were to revise the regulations to address these circumstances, unclear legal authority to adopt such regulations, concern regarding reduced opportunity for cooperation between the Services and Federal agencies, lack of adequate expertise in Federal agencies to correctly make the needed determinations, delays in consultation completion, complication of the consultation process, and failure to examine larger environmental phenomena. While such input may inform the future development of additional regulatory amendments, policies, or guidance, we have determined at this time, in the interests of efficiency, to defer action on this issue, which we may address at a later time. Because the Services are required only to respond to those ''comments which, if true, . . . would require a change in [the] proposed rule,'' *Am. Mining Cong.* v. *United States EPA,* 907 F.2d 1179, 1188 (D.C. Cir. 1990) (quoting *ACLU* v. *FCC,* 823 F.2d 1554, 1581 (D.C. Cir. 1987)), those that were not specifically addressed in our proposed regulatory amendments are not ''significant'' in context of the proposed rule. *See also Home Box Office, Inc.* v. *FCC,* 567 F.2d 9, 35 n. 58 (D.C. Cir. 1977), *cert. denied,* 485 U.S. 959, 108 S.Ct. 1220, 99 L.Ed.2d 421 (1988). Therefore, we will not respond further to these comments at this time.

Comment: We received many comments related to topics that were not specifically addressed in our proposed regulatory amendments, such as defining or revising definitions, clarifying emergency consultation, including economic considerations into the consultation process, revising the 1998 Consultation Handbook, and

revising the regulations implementing other sections of the Act.

Response: The Services appreciate the many insightful comments and suggestions we received on section 7 and the consultation process. While such input may inform the future development of additional regulatory amendments, policies, or guidance, we have determined at this time, in the interests of efficiency, to go forward with the scope of the originally proposed regulatory revisions and defer action on other issues until a later time. Because the Services are required only to respond to those ''comments which, if true, . . . would require a change in [the] proposed rule,'' *Am. Mining Cong.* v. *United States EPA,* 907 F.2d 1179, 1188 (D.C. Cir. 1990) (quoting *ACLU* v. *FCC,* 823 F.2d 1554, 1581 (D.C. Cir. 1987)), those that were not specifically addressed in our proposed regulatory amendments are not ''significant'' in context of the proposed rule. *See also Home Box Office, Inc.* v. *FCC,* 567 F.2d 9, 35 n. 58 (D.C. Cir. 1977), *cert. denied,* 485 U.S. 959, 108 S.Ct. 1220, 99 L.Ed.2d 421 (1988). Therefore, we will not respond to these ''miscellaneous'' comments at this time.

Comment: Several commenters were concerned that the Services effectively failed to provide adequate notice and opportunity for public comment, particularly because the three draft rules were posted simultaneously. Several commenters requested additional time for review, while others asserted we should withdraw our proposal, republish it with a more accurate and clear summary of the changes to the regulations and their implications, and provide further opportunity for public comment.

Response: We provided a 60-day public comment period on the proposed rule. Following publication of our proposed rule, we held numerous webinars providing an opportunity for States, tribes, non-governmental organizations, and industry groups to ask questions and provide input directly to the Services. This satisfies the Services' obligation to provide notice and comment under the Act and the Administrative Procedure Act (APA).

Comment: The Services received several comments that raised concern over whether we would finalize a rule without the opportunity for additional public notice and comment based upon our representation that the rulemaking should be considered as applying to all of part 402 and that we would consider whether additional modifications to the interagency cooperation regulations would improve, clarify, or streamline the administration of the Act.

Response: We did seek public comments recommending, opposing, or providing feedback on specific changes to any provision in part 402. Based upon comments received and our experience in administering the Act, we represented that a final rule may include revisions that are a logical outgrowth of the proposed rule, consistent with the APA. Some believed that these representations would allow us to amend any of part 402 without sufficient public notice in violation of the APA. We reiterate that any final changes to part 402 not specifically proposed would have to be a logical outgrowth of the proposal and fairly apprise interested persons of the issues. The Services have satisfied that standard here with regard to the changes adopted in this final rule compared to the proposed rule. As such, there are no substantial additional revisions that were not part of the proposed rule which would not be considered a logical outgrowth of the proposed rule.

Comment: Some commenters requested a hearing on the proposed rule.

Response: As this is an informal rulemaking under APA section 553, a hearing is not required.

Comment: Several Tribes commented they should have greater involvement in consultations affecting their resources and that traditional ecological knowledge should constitute the best scientific and commercial data available and be used by the Services.

Response: Tribes provide significant benefits to the consultation process. The Services will continue to work with tribes to meet our trust responsibilities and to comply with applicable tribal engagement policies, including Executive Order 13175, Secretarial Order 3206, NOAA Procedures for Government-to-Government Consultation With Federally Recognized Indian Tribes and Alaska Native Corporations, and the FWS Native American Policy, as part of the formal consultation process.

Traditional ecological knowledge (TEK) is important and useful information that can inform us as to the status of a species, historical and current trends, and threats that may be acting on it or its habitat. The Act requires that we use the best scientific and commercial data available to inform the section 7(a)(2) consultation process. Although in some cases TEK may be the best data available, the Services cannot determine, as a general rule, that TEK will be the best available data in every circumstance. However, we will consider TEK along with other available data, weighing all data appropriately during our section 7(a)(2) analysis.

National Environmental Policy Act

In the proposed regulation's Required Determinations section, we represented that the Services would analyze the proposed regulation in accordance with criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on implementation of NEPA (43 CFR 46.10–46.450), the Department of the Interior Manual (516 DM 8), the NOAA Administrative Order 216–6A, and the NOAA Companion Manual, ''Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities,'' which became effective January 13, 2017. We requested public comment on the extent to which the proposed regulation may have a significant impact on the human environment or fall within one of the categorical exclusions for action that have no individual or cumulative effect on the quality of the human environment.

Comment: We received comments arguing that these proposed amendments to the section 7 regulations are significant under NEPA and thus require the preparation of an environmental impact statement or, at least, an environmental analysis. Other commenters believed these amendments qualify for a categorical exclusion (CE) under NEPA.

Response: The Services believe that these rules will improve and clarify interagency consultation without compromising the conservation of listed species. We have not raised or lowered the bar for what is required under the regulations. For the reasons stated in the Required Determinations section of this final rule, we have determined that these amendments, to the extent they would result in foreseeable environmental effects, qualify for a CE from further NEPA review and that no extraordinary circumstances apply.

Comment: Other commenters remarked upon inadequate funding for the Council on Environmental Quality and inefficiencies surrounding the implementation of NEPA.

Response: These comments are outside the scope of these regulations.

Merit, Authority, and Means for the Services To Conduct a Single Consultation, Resulting in a Single Biological Opinion, for Federal Agency Actions Affecting Species That Are Under the Jurisdiction of Both FWS and NMFS

In the proposed rule, we sought comment on ''the merit, authority, and

means for the Services to conduct a single consultation, resulting in a single biological opinion, for Federal agency actions affecting species that are under the jurisdiction of both FWS and NMFS.'' We received a variety of comments in response to our request. Some of them interpreted the Services' request to mean that we were requesting comment on our ability to conduct a joint consultation, resulting in a single biological opinion, when both Services have species that require consultation (*e.g.,* both Services participate in the consultation and then prepare a single biological opinion in which each agency addresses the species for which it has responsibility). One commenter interpreted our request to be that one Service could conduct a consultation and prepare a biological opinion for a species for which the other agency has responsibility (*e.g.,* FWS could consult and prepare a biological opinion for a listed chinook salmon, which is listed under NMFS' authority).

Comment: Some commenters supported the Services conducting a single consultation, resulting in a single biological opinion. Examples of supporting comments include, but are not limited to: Joint consultations and biological opinions could improve the Services' process and outcomes through early collaboration on species under joint jurisdiction; there would be better alignment with the 1998 Consultation Handbook's language regarding coordination, and more consistent interpretation and application of information between the Services. Concerns raised focused on issues such as: The potential for significant delays due to the additional coordination required between the Federal agency and the Services; and the potential for an increased burden on the Federal agency to negotiate consultation schedules with the Services to accommodate a joint consultation, especially when the proposed action is time sensitive. A few commenters proposed process improvements, such as the development of guidance, for when and how the Services conduct joint consultations and prepare joint biological opinions.

Response: The Services acknowledge that there can be challenges with completing joint biological opinions in cases where the Services have joint jurisdiction (*e.g.,* sea turtles), as well as in cases where the species addressed by the two agencies are different but both Services are engaged in consultation on the same project. Joint consultations require additional coordination, which often adds to complexity in scheduling meetings, preparing the biological opinion, etc. However, in some circumstances (*e.g.,* where the Services' respective reasonable and prudent measures and terms and conditions have the potential to contradict one another), the additional coordination can be beneficial. Joint biological opinions are often the most efficient way to implement the Services' authorities and provide clarity to the action agencies and applicants. For these reasons, the decision to conduct a joint biological opinion is best made on a case-by-case basis.

In this rule, we are not proposing any changes to how we conduct joint consultations or prepare joint biological opinions. In a few circumstances (*e.g.,* listed sea turtles), the Services will continue to implement existing Memoranda of Understanding (MOUs) that help define our respective responsibilities. Otherwise, in accordance with our current practices, we will continue to involve the Federal agency and the applicant (working through the Federal agency) in the decision-making process on the need for, and means to, conduct joint consultations and prepare joint biological opinions.

Comment: One commenter suggested that it would be illegal for one Service to conduct a consultation and prepare a biological opinion evaluating effects to a species for which the other agency has responsibility.

Response: The Secretary of the Interior and Secretary of Commerce have specific jurisdictional authority for species listed under the Act that have been assigned to them by Congress. The Act defines ''Secretary'' as ''the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provision of Reorganization Plan Numbered 4 of 1970.''

Reorganization Plan Number 4 (Title 5. Appendix Reorganization Plan No. 4 of 1970, page 208) established the National Oceanic and Atmospheric Administration and Assistant Administrator for Fisheries and transferred certain responsibilities from the Secretary of the Interior to the Secretary of Commerce. Reorganization Plan Number 4 was amended in 1977 to state, ''The Assistant Administrator for Fisheries shall be responsible for all matters related to living marine resources which may arise in connection with the conduct of the functions of the Administration. [As amended Pub. L. 95–219, 3(a)(1), Dec. 28, 1977, 91 Stat. 1613.].''

These regulations do not address the underlying particular circumstance raised by this comment; therefore, we decline to respond to the legal question posed by the commenter.

Role of Applicants and Designated Non-Federal Representatives in Section 7(a)(2) Consultations

Comment: The Services received many comments regarding the role of applicants in the consultation process, including those encouraging an active role for applicants during consultation.

Response: The Services appreciate these comments and agree that applicants play a significant role in the consultation process. The Act, the regulations, and the 1998 Consultation Handbook all provide for a role of an applicant in several stages of the consultation process. With regard to informal consultation, an applicant can act as the non-Federal representative and, under the guidance of the action agency, write any biological evaluations or assessments. With regard to formal consultation, as delineated in the regulations and 1998 Consultation Handbook, an applicant: (1) Is provided an opportunity to submit information through the action agency; (2) must be informed by the action agency of the estimated length of time for an extension for preparing a biological assessment beyond the 180-day timeframe and the reason for the extension; (3) must be provided an explanation if the formal consultation timeframe is extended and must consent to any extension of more than 60 days; (4) may request to review a final draft biological opinion through the Federal agency and provide comments through the Federal agency; (5) have discussions with the Services for the basis of their biological determinations and provide input to the Services for any reasonable and prudent alternatives if necessary; and (6) be provided a copy of the final biological opinion.

Our implementing regulations and 1998 Consultation Handbook assign to the Federal agency the responsibility for determining whether and how an applicant will be engaged in a consultation along with that agency. In order to facilitate involvement from applicants, if any applicant reaches out to the Service, we will notify the Federal agency immediately, advise the Federal agency of the opportunities for applicant involvement in the consultation process provided by the Act, the regulations, and the 1998 Consultation Handbook, and encourage the Federal agency to afford those opportunities to the applicant throughout the consultation process.

Comment: Some commenters requested full participation by

designated non-Federal representatives in the consultation process.

Response: Participation by designated non-Federal representatives is addressed at § 402.08. This includes allowing the designated non-Federal representative to conduct the informal consultation and prepare biological assessments for formal consultations. The ultimate responsibility for complying with section 7(a)(2) of the Act lies with the consulting agency and, as such, they are best situated to determine when to designate non-Federal representatives, consistent with the regulations. As such, further regulation regarding non-Federal representatives in the consultation process is unnecessary.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is significant.

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

Executive Order 13771

This rule is an Executive Order 13771 deregulatory action.

Regulatory Flexibility Act

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

This rulemaking revises and clarifies existing requirements for Federal agencies under the Act. It will primarily affect the Federal agencies that carry out the section 7 consultation process. To the extent the rule may affect applicants, this rulemaking is intended to make the interagency consultation process more efficient and consistent, without substantively altering applicants' obligations. Moreover, this final rule is not a major rule under SBREFA.

This final rule will determine whether a Federal agency has insured, in consultation with the Services, that any action it would authorize, fund, or carry out is not likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. This rule is substantially unlikely to affect our determinations as to whether or not proposed actions are likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. The rule serves to provide clarity to the standards with which we will evaluate agency actions pursuant to section 7 of the Act.

Unfunded Mandates Reform Act

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

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

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

Takings (E.O. 12630)

In accordance with Executive Order 12630, this final rule will not have significant takings implications. This rule will not pertain to ''taking'' of private property interests, nor will it directly affect private property. A takings implication assessment is not required because this final rule (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. This final rule will substantially advance a legitimate government interest (conservation and recovery of endangered species and threatened species) and will not present a barrier to all reasonable and expected beneficial use of private property.

Federalism

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

Civil Justice Reform (E.O. 12988)

This final rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. This final rule will clarify the interagency consultation processes under the Act.

Government-to-Government Relationship With Tribes

In accordance with Executive Order 13175 ''Consultation and Coordination with Indian Tribal Governments,'' the Department of the Interior's manual at 512 DM 2, and the Department of Commerce (DOC) Tribal Consultation and Coordination Policy (May 21, 2013), DOC Departmental Administrative Order (DAO) 218–8, and NOAA Administrative Order (NAO) 218–8 (April 2012), we have considered possible effects of this final rule on federally recognized Indian Tribes. Two informational webinars were held on July 31 and August 7, 2018, to provide additional information to interested Tribes regarding the proposed regulations. After the opening of the public comment period, we received multiple requests for coordination or government-to-government consultation from multiple tribes: Cowlitz Indian Tribe; Swinomish Indian Tribal Community; The Confederated Tribes of the Grand Ronde Community of Oregon; Confederated Tribes of Warm Springs, Oregon; Quinault Indian Nation; Makah Tribe; Confederated Tribes of the Umatilla Indian Reservation; and the Suquamish Tribe. We subsequently hosted a conference call on November 15, 2018, to listen to Tribal concerns and answer questions about the proposed regulations. On March 6, 2019, FWS representatives attended the Natural Resources Committee Meeting of the United and South and Eastern Tribes' Impact Week conference in Arlington (Crystal City), VA. At this meeting, we presented information, answered questions, and held discussion regarding the regulatory changes.

The Services conclude that this rule makes general changes the Act's implementing regulations and does not directly affect specific species or Tribal lands or interests. The primary purpose of the rule is to streamline and clarify the steps the Services undertake in completing section 7 consultations with Federal agencies. Therefore, the Departments of the Interior and Commerce conclude that these regulations do not have ''tribal implications'' under section 1(a) of E.O. 13175 and that formal government-to-government consultation is not required by E.O. 13175 and related polices of the Departments. We will continue to collaborate with Tribes on issues related to federally listed species and work with them as we implement the provisions of the Act. See Joint Secretarial Order 3206 (''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,'' June 5, 1997).

Paperwork Reduction Act

This final rule does not contain any new collections of information other than those already approved under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). We may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We analyzed this final rule in accordance with the criteria of NEPA, the Department of the Interior regulations on implementation of NEPA (43 CFR 46.10–46.450), the Department of the Interior Manual (516 DM 8), the NOAA Administrative Order 216–6A, and its Companion Manual, ''Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities,'' which became effective January 13, 2017. We have determined that, to the extent that the proposed action would result in reasonably foreseeable effects to the human environment, the final regulation is categorically excluded from further NEPA review and that no extraordinary circumstances are present. The rule qualifies for the substantially similar categorical exclusions set forth at 43 CFR 46.210(i) and NOAA Administrative Order 216–6A and Companion Manual at Appendix E (Exclusion G7). The amendments are of a legal, technical, or procedural nature. The rule only serves to clarify and streamline existing interagency consultation practices.

This final rule does not lower or raise the bar on section 7 consultations, and it does not alter what is required or analyzed during a consultation. Instead, it improves clarity and consistency, streamlines consultations, and codifies existing practice. For example, the change in the definition of ''effects of the action'' simplifies the definition while still retaining the scope of the assessment required to ensure a complete analysis of the effects of the proposed Federal action. The two-part test articulates the practice by which the Services identify effects of the proposed action. Likewise, the causation standard to analyze effects provides additional explanation on how we analyze activities that are reasonably certain to occur.

Other changes to 50 CFR part 402 are to aid in clarity and consistency. For example, we have separated out the definition of ''environmental baseline'' from effects of the action and added a second sentence to the definition to avoid confusion over ''ongoing actions.'' A regulatory deadline for informal consultation, as well as requiring reinitiation of informal consultation when certain triggers are met, are legal and procedural in nature. Our additional changes to 50 CFR 402.16 governing reinitiation of land management plans are also legal in nature and do not alter the review process for actions that cause ground-disturbing activities, and thus do not reduce procedural protection for listed species.

We also considered whether any ''extraordinary circumstances'' apply to this situation, such that the DOI and NOAA categorical exclusions would not apply. *See* 43 CFR 42.215 (DOI regulations on ''extraordinary circumstances''); NOAA Companion Manual to NAO 216–6, Section 4.A.

FWS completed an environmental action statement, which NOAA adopts, explaining the basis for invoking the agencies' substantially similar categorical exclusions for the revised regulations.

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

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The final revised regulations are not expected to affect energy supplies, distribution, or use. Therefore, this action is a not a significant energy action, and no Statement of Energy Effects is required.

References Cited

A complete list of all references cited in this document is available on the internet at *http://www.regulations.gov* in Docket No. FWS–HQ–ES–2018–0009 or upon request from the U.S. Fish and Wildlife Service (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this final rule are the staff members of the Ecological Services Program, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, Falls Church, VA 22041–3803, and the National Marine Fisheries Service's Endangered Species Division, 1335 East-West Highway, Silver Spring, MD 20910.

Authority

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

List of Subjects in 50 CFR Part 402

Endangered and threatened species.

Regulation Promulgation

Accordingly, we amend subparts A and B of part 402, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as set forth below:

PART 402—INTERAGENCY COOPERATION—ENDANGERED SPECIES ACT OF 1973, AS AMENDED

■ 1. The authority citation for part 402 continues to read as follows:

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

■ 2. Amend § 402.02 by revising the definitions of ''Destruction or adverse modification,'' ''Director,'' and ''Effects of the action'' and adding definitions for ''Environmental baseline'' and ''Programmatic consultation'' in alphabetic order to read as follows:

§ 402.02 Definitions.

* * * * *

Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species. *Director* refers to the Assistant Administrator for Fisheries for the National Marine Fisheries Service, or his or her authorized representative; or the Director of the U.S. Fish and Wildlife Service, or his or her authorized representative.

* * * * *

Effects of the action are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action. (See § 402.17).

Environmental baseline refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. The consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline.

* * * * *

Programmatic consultation is a consultation addressing an agency's multiple actions on a program, region, or other basis. Programmatic consultations allow the Services to consult on the effects of programmatic actions such as:

(1) Multiple similar, frequently occurring, or routine actions expected to be implemented in particular geographic areas; and

(2) A proposed program, plan, policy, or regulation providing a framework for future proposed actions.

* * * * *

■ 3. Amend § 402.13 by revising paragraph (a) and adding paragraph (c) to read as follows:

§ 402.13 Informal consultation.

(a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required.

* * * * *

(c) If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

(1) A written request for concurrence with a Federal agency's not likely to adversely affect determination shall include information similar to the types of information described for formal consultation at § 402.14(c)(1) sufficient for the Service to determine if it concurs.

(2) Upon receipt of a written request consistent with paragraph (c)(1) of this section, the Service shall provide written concurrence or non-concurrence with the Federal agency's determination within 60 days. The 60-day timeframe may be extended upon mutual consent of the Service, the Federal agency, and the applicant (if involved), but shall not exceed 120 days total from the date of receipt of the Federal agency's written request consistent with paragraph (c)(1) of this section.

■ 4. Amend § 402.14 by:

■ a. Revising paragraph (c);

■ b. Removing the undesignated paragraph following paragraph (c);

■ c. Revising paragraphs (g)(2), (4), and (8) and (h);

■ d. Redesignating paragraph (l) as paragraph (m); and

■ e. Adding a new paragraph (l).

The revisions and addition read as follows:

§ 402.14 Formal consultation.

* * * * *

(c) *Initiation of formal consultation.* (1) A written request to initiate formal consultation shall be submitted to the Director and shall include:

(i) A description of the proposed action, including any measures intended to avoid, minimize, or offset effects of the action. Consistent with the nature and scope of the proposed action, the description shall provide sufficient detail to assess the effects of the action on listed species and critical habitat, including:

(A) The purpose of the action;

(B) The duration and timing of the action;

(C) The location of the action;

(D) The specific components of the action and how they will be carried out;

(E) Maps, drawings, blueprints, or similar schematics of the action; and

(F) Any other available information related to the nature and scope of the proposed action relevant to its effects on listed species or designated critical habitat.

(ii) A map or description of all areas to be affected directly or indirectly by the Federal action, and not merely the immediate area involved in the action (*i.e.,* the action area as defined at § 402.02).

(iii) Information obtained by or in the possession of the Federal agency and any applicant on the listed species and designated critical habitat in the action area (as required by paragraph (c)(1)(ii) of this section), including available information such as the presence, abundance, density, or periodic occurrence of listed species and the condition and location of the species' habitat, including any critical habitat.

(iv) A description of the effects of the action and an analysis of any cumulative effects.

(v) A summary of any relevant information provided by the applicant, if available.

(vi) Any other relevant available information on the effects of the proposed action on listed species or designated critical habitat, including any relevant reports such as environmental impact statements and environmental assessments.

(2) A Federal agency may submit existing documents prepared for the

proposed action such as NEPA analyses or other reports in substitution for the initiation package outlined in this paragraph (c). However, any such substitution shall be accompanied by a written summary specifying the location of the information that satisfies the elements above in the submitted document(s).

(3) Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12.

(4) Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area, a programmatic consultation, or a segment of a comprehensive plan. The provision in this paragraph (c)(4) does not relieve the Federal agency of the requirements for considering the effects of the action or actions as a whole.

* * * * *

(g) * * *

(2) Evaluate the current status and environmental baseline of the listed species or critical habitat.

* * * * *

(4) Add the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate the Service's opinion as to whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

* * * * *

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions as proposed or taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation. Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action and do not require any additional demonstration of binding plans.

(h) *Biological opinions.* (1) The biological opinion shall include:

(i) A summary of the information on which the opinion is based;

(ii) A detailed discussion of the environmental baseline of the listed species and critical habitat;

(iii) A detailed discussion of the effects of the action on listed species or critical habitat; and

(iv) The Service's opinion on whether the action is:

(A) Likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a ''jeopardy'' biological opinion); or

(B) Not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a ''no jeopardy'' biological opinion).

(2) A ''jeopardy'' biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, the Service will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(3) The Service may adopt all or part of:

(i) A Federal agency's initiation package; or

(ii) The Service's analysis required to issue a permit under section 10(a) of the Act in its biological opinion.

(4) A Federal agency and the Service may agree to follow an optional collaborative process that would further the ability of the Service to adopt the information and analysis provided by the Federal agency during consultation in the development of the Service's biological opinion to improve efficiency in the consultation process and reduce duplicative efforts. The Federal agency and the Service shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat, and other relevant factors to determine whether an action or a class of actions is appropriate for this process. The Federal agency and the Service may develop coordination procedures that would facilitate adoption of the initiation package with any necessary supplementary analyses and incidental take statement to be added by the Service, if appropriate, as the Service's biological opinion in fulfillment of section 7(b) of the Act.

* * * * *

(l) *Expedited consultations.* Expedited consultation is an optional formal consultation process that a Federal agency and the Service may enter into upon mutual agreement. To determine whether an action or a class of actions is appropriate for this type of consultation, the Federal agency and the Service shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat and other relevant factors. Conservation actions whose primary purpose is to have beneficial effects on listed species will likely be considered appropriate for expedited consultation.

(1) *Expedited timelines.* Upon agreement to use this expedited consultation process, the Federal agency and the Service shall establish the expedited timelines for the completion of this consultation process.

(2) *Federal agency responsibilities.* To request initiation of expedited consultation, the Federal agency shall provide all the information required to initiate consultation under paragraph (c) of this section. To maximize efficiency and ensure that it develops the appropriate level of information, the Federal agency is encouraged to develop its initiation package in coordination with the Service.

(3) *Service responsibilities.* In addition to the Service's responsibilities under the provisions of this section, the Service will:

(i) Provide relevant species information to the Federal agency and guidance to assist the Federal agency in completing its effects analysis in the initiation package; and

(ii) Conclude the consultation and issue a biological opinion within the agreed-upon timeframes.

* * * * *

■ 5. Amend § 402.16 by:

■ a. Revising the section heading;

■ b. Redesignating paragraphs (a) through (d) as paragraphs (a)(1) through (4);

■ c. Designating the introductory text as paragraph (a);

■ d. Revising the newly designated paragraphs (a) introductory text and (a)(3); and

■ e. Adding a new paragraph (b).

The revisions and addition read as follows:

§ 402.16 Reinitiation of consultation.

(a) Reinitiation of consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

* * * * *

(3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or

* * * * *

(b) An agency shall not be required to reinitiate consultation after the approval of a land management plan prepared pursuant to 43 U.S.C. 1712 or 16 U.S.C. 1604 upon listing of a new species or designation of new critical habitat if the land management plan has been adopted by the agency as of the date of listing or designation, provided that any

authorized actions that may affect the newly listed species or designated critical habitat will be addressed through a separate action-specific consultation. This exception to reinitiation of consultation shall not apply to those land management plans prepared pursuant to 16 U.S.C. 1604 if:

(1) Fifteen years have passed since the date the agency adopted the land management plan prepared pursuant to 16 U.S.C. 1604; and

(2) Five years have passed since the enactment of Public Law 115–141 [March 23, 2018] or the date of the listing of a species or the designation of critical habitat, whichever is later.

■ 6. Add § 402.17 to read as follows:

§ 402.17 Other provisions.

(a) *Activities that are reasonably certain to occur.* A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Factors to consider when evaluating whether activities caused by the proposed action (but not part of the proposed action) or activities reviewed under cumulative effects are reasonably certain to occur include, but are not limited to:

(1) Past experiences with activities that have resulted from actions that are similar in scope, nature, and magnitude to the proposed action;

(2) Existing plans for the activity; and

(3) Any remaining economic, administrative, and legal requirements necessary for the activity to go forward.

(b) *Consequences caused by the proposed action.* To be considered an effect of a proposed action, a consequence must be caused by the proposed action (*i.e.,* the consequence would not occur but for the proposed action and is reasonably certain to occur). A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Considerations for determining that a consequence to the species or critical habitat is not caused by the proposed action include, but are not limited to:

(1) The consequence is so remote in time from the action under consultation that it is not reasonably certain to occur; or

(2) The consequence is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur; or

(3) The consequence is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur.

(c) *Required consideration.* The provisions in paragraphs (a) and (b) of this section must be considered by the action agency and the Services.

§ 402.40 [Amended]

■ 7. Amend § 402.40, in paragraph (b), by removing ''§ 402.14(c)(1)–(6)'' and in its place adding ''§ 402.14(c)''.

Dated: August 12, 2019.

David L. Bernhardt,

Secretary, Department of the Interior.

Dated: August 9, 2019.

Wilbur Ross,

Secretary, Department of Commerce.

[FR Doc. 2019–17517 Filed 8–26–19; 8:45 am]

BILLING CODE 4333–15–P 3510–22–P

Appendix B

Appendix B - Proposed Action – (draft) Final Rule – Endangered Species Act, section 7 Regulations 50 CFR 402

Billing Code 4333-15

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 402

[Docket No. FWS-HQ-ES-2021-0104; FXES1114090FEDR-245-FF09E300000;

Docket No. NMFS-XXXXXX-XXXX

RIN 1018–BF96; 0648–BK48

Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation

AGENCY: U.S. Fish and Wildlife Service (FWS), Interior; National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: FWS and NMFS (collectively referred to as the "Services" or "we") finalize revisions to portions of our regulations that implement section 7 of the Endangered Species Act of 1973, as amended ("Act"). The revisions to the regulations clarify, interpret, and implement portions of the Act concerning the interagency cooperation procedures.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Public comments and materials received, as well as supporting documentation used in the preparation of this final rule, are available online at *https://www.regulations.gov* at Docket No. FWS-HQ-ES-2021-0104.

FOR FURTHER INFORMATION CONTACT: Craig Aubrey, Ecological Services, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, Falls Church, VA 22041–3803; telephone 703/358–2442; or Tanya Dobrzynski, Chief, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301/427–8400. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

The Secretaries of the Interior and Commerce (the "Secretaries") share responsibilities for implementing most of the provisions of the Endangered Species Act, as amended (hereafter referred to as "ESA" or "the Act;" 16 U.S.C. 1531 *et seq.*), and authority to administer the Act has been delegated by the respective Secretaries to the Director of FWS and the Assistant

Administrator for NMFS. Together, the Services have promulgated procedural regulations governing interagency cooperation under section 7 of the Act, which requires Federal agencies, in consultation with and with the assistance of the Secretaries of the Interior and Commerce, to ensure that any action authorized, funded, or carried out by such agencies is not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. These joint regulations, which are codified in the Code of Federal Regulations at 50 CFR part 402, were most recently revised in 2019 (84 FR 44976, August 27, 2019; hereafter referred to as "the 2019 rule"). Those revised regulations became effective October 28, 2019 (84 FR 50333, September 25, 2019).

Executive Order 13990 (hereafter, "E.O. 13990"), which was entitled "Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis," was issued January 20, 2021, and directed all departments and agencies to immediately review agency actions taken between January 20, 2017, and January 20, 2021, and, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding agency actions that conflict with important national objectives, including promoting and protecting our public health and the environment, and to immediately commence work to confront the climate crisis. A "Fact Sheet" that accompanied E.O. 13990 identified a non-exhaustive list of particular regulations requiring such a review and included the 2019 rule (see *www.whitehouse.gov/briefing-room/statements releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/*). In response to E.O. 13990 and in light of litigation over the 2019 rule, the Services proposed revisions to portions of the ESA implementing regulations at 50 CFR part 402.

On June 22, 2023, we published in the *Federal Register* (88 FR 40753) a proposed rule to amend portions of our regulations that implement section 7 of the Act. We accepted public

comments on the June 22, 2023, proposed rule for 60 days, ending August 21, 2023. The proposed rule included clarifying the definitions of "effects of the action," "environmental baseline," and "reasonable and prudent measures"; removing § 402.17, "Other provisions," which had been promulgated with the intent of clarifying several aspects of the process of determining whether an activity or consequence is reasonably certain to occur; clarifying the responsibilities of the Federal agency and the Services regarding the requirement to reinitiate consultation; and revising the regulations at 50 CFR 402.02 and 402.14 regarding the scope of reasonable and prudent measures (RPMs) in an incidental take statement (ITS). The proposed rule also sought comment on all aspects of the 2019 rule, including whether any of those provisions should be rescinded in their entirety (restoring the prior regulatory provision) or revised in a different way. The Services also conducted outreach to Federal and State agencies, industries regularly involved in section 7(a)(2) consultation, Tribes, nongovernmental organizations, and other interested parties and invited their comment on the proposal.

Following consideration of all public comments received in response to our proposed rule, we are proceeding to finalize revisions to our implementing regulations at 50 CFR part 402 as proposed, with no changes. The basis and purpose for this final rule are reflected in our explanation in the proposed rule (88 FR 40753, June 22, 2023), the responses to comments below, as well as the 2019 final rule (84 FR 44976, August 27, 2019) for those aspects of the 2019 final rule we are not changing here. These revisions will further improve and clarify interagency consultation. With the exception of the revisions at 50 CFR 402.02 and 402.14 regarding the RPMs in an incidental take statement (ITS), the revisions do not make any changes to existing practice of the Services in implementing section 7(a)(2) of the Act.

In the event any provision is invalidated or held to be impermissible as a result of a legal challenge, the "remainder of the regulations could function sensibly without the stricken provision." *Belmont Mun. Light Dep't v. F*ERC, 38 F.4th 173, 187 (D.C. Cir. 2022) (quoting *MD/DC/DE Broad. Ass'n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001)). Because each of the revisions stands on its own, the Services view each revision as operating independently from the other revisions. Should a reviewing court invalidate any particular revision(s) of this rulemaking, the remaining portions would still allow the Services to issue biological opinions and incidental take statements that comprehensively evaluate the effects of Federal actions on listed species and critical habitat and adequately address the impacts of incidental take that are reasonably certain to occur. Specifically, these distinct provisions include: (1) revisions to the definition of "environmental baseline," (2) removal of § 402.17 and conforming revisions to the definition of "effects of the action," (3) revisions to § 402.16, and (4) revisions to the regulatory provisions regarding the scope of reasonable and prudent measures in incidental take statements (§§ 402.02 and 402.14(i)). To illustrate this with one possible example, in the event that a reviewing court were to find the revision adopted in 2019 that described expedited consultations at § 402.14(l) is invalid, that finding would not affect the current revisions to the provisions for reinitiation of consultation at § 402.16.

The revisions to the regulations in this final rule are prospective; they are not intended to require that any previous consultations under section 7(a)(2) of the Act be reevaluated at the time this final rule becomes effective (see **DATES**, above).

This rule is one of three rules publishing in today's *Federal Register* that make changes to the regulations that implement the ESA. Two of these final rules, including this one, are joint between the Services, and one final rule is specific to FWS.

Summary of Comments and Responses

In our June 22, 2023, proposed rule (88 FR 40753), we requested public comments by August 21, 2023. We received more than 140,000 comments by that date from individual members of the public, States, Tribes, industry organizations, legal foundations and firms, and environmental organizations. We received several requests for extensions of the public comment period. However, we elected not to extend the public comment period because we found the 60-day comment period provided sufficient time for a thorough review of the proposed revisions. The majority of the proposed revisions are to portions of the regulations that were previously revised in 2019, and we jointly announced in a public press release and on a Service website our intention to revise these regulations in June of 2021. The number of comments received indicated that members of the public were aware of the proposed rule and had adequate time to review it. In addition, we provided six informational sessions for a wide variety of audiences. Over 500 attendees participated in these sessions, and we addressed questions from the participants during each session. Finally, on our website, we provided additional information about the proposed regulations, such as frequently asked questions and a prerecorded presentation on the proposed revisions.

Most of the comments we received were non-substantive, expressing either general support for, or opposition to, the proposed rule with no supporting information or analysis. Other comments expressed opinions beyond the scope of this rulemaking. We do not, however, respond to comments that are beyond the scope of this rulemaking action or that were not related to the 2019 rule. The vast majority of the comments received were nearly identical statements from individuals indicating their general support for the proposed revisions to the 2019 rule and concern for not including more revisions to the 2019 rule, but not containing substantive content.

We also received approximately 95 letters with detailed substantive comments with specific rationales for support of or opposition to specific portions of the proposed rule.

Before addressing each of the comments, we reiterate the Services' intention to provide additional guidance in an updated ESA Section 7 Consultation Handbook (Consultation Handbook) that we anticipate making available for public comment after the publication of this final rule. Related to topics addressed in this final rule, the additional guidance will address application of the definition of "effects of the action" and "environmental baseline," examples for defining when an activity is reasonably certain to occur and guidance on application of the two-part causation test, additional information on consulting programmatically, guidance on implementation of section 7(a)(1) of the Act, and implementation of the expanded scope of RPMs.

Recognizing that the revisions to the regulatory provisions expanding the scope of RPMs represent a change to the Services' practice, we would also like to highlight some of the key aspects of that amendment, which are discussed in more detail in the response to comments below. First, the Services find that the revision allowing for the use of offsets as RPMs will more fully effectuate the conservation goals of the ESA by addressing impacts of incidental take that may not have been sufficiently minimized through measures confined to avoiding or reducing incidental take levels. In that regard, our prior approach, which restricted RPMs to measures that avoid or reduce incidental take, has led to the continued deterioration of the condition of listed species and their critical habitat through the accumulation of impacts from incidental take over time. Further, those impacts from incidental take may have been more adequately addressed through offsetting measures.

Second, as explained in our response to comments below, the respective revisions to § 402.02 and § 402.14(i), which recognize the use of offsets as RPMs, are supported by the plain language of the ESA. The relevant language at ESA section 7(b)(4)(C)(ii) plainly states that RPMs are to include measures that minimize the "impacts" of incidental take, not just incidental take itself. Like measures that avoid or reduce incidental take, offsetting measures also "minimize" the impacts of incidental take on the species. The legislative history of the 1982 amendments of the ESA also confirms that Congress did not intend to preclude the Services from specifying offsets as RPMs that minimize the impacts of incidental take. Lastly, the Services do not expect offsetting measures that occur outside the action area to violate the "minor change rule." In most instances, offsetting measures operate as additional measures to minimize impacts of incidental take that would not prevent the action subject to consultation from proceeding essentially as proposed. Accordingly, text was added at 50 CFR 402.14(i)(2) to expressly recognize that offsets may occur within or outside the action area, consistent with the "minor change rule" (i.e., the requirement that RPMs specify only minor changes that do not alter the basic design, location, duration, or timing of the action).

In addition, the Services would like to address a particular issue at the outset of this portion of the preamble. Several commenters asserted that a recent decision from the D.C. Circuit Court of Appeals, *Maine Lobstermen's Association* v. *NMFS*, 70 F.4th 582 (D.C. Cir. 2023) ("*MLA*"), weighs against the Services removing § 402.17 from the section 7 regulations, especially the "clear and substantial information" standard that applies in determining if a consequence is reasonably certain to occur. We explain here our understanding of the decision and why it does not undermine our regulatory revision to remove § 402.17. Because the subject consultation in the *MLA* litigation required NMFS to grapple with scientific uncertainties, we

also offer additional explanation of how the Services address such uncertainties, in general, consistent with the holding in *MLA* and section 7(a)(2) of the Act. We respond to some of the more specific comments in the responses section below.

In *MLA*, lobster fishermen challenged a NMFS no-jeopardy biological opinion that analyzed the effects of authorizing the Federal lobster and Jonah crab fisheries in the Northeast on the highly endangered North Atlantic right whale. In developing the biological opinion, NMFS faced uncertainties in determining the anticipated level of right whale entanglements and any subsequent deaths the fishery was anticipated to cause over the next 50 years. The D.C. Circuit Court of Appeals found that NMFS impermissibly resolved these uncertainties by asserting the legislative history of the ESA required NMFS to apply worst-case scenarios. See 70 F.4th at 597 ("When answering public comments the Service blamed the Congress, insisting that . . . the legislative history required it to deal in worst-case scenarios because 'we need to give the benefit of the doubt to the species.'"). The *MLA* court held that legislative history cannot "compel a presumption in favor of the species not required by the statute" and that, under the ESA, the Services facing scientific uncertainty may not simply resort to "worst-case scenarios or pessimistic assumptions," but must instead "strive to resolve or characterize the uncertainty through accepted scientific techniques." *Id.* at 586, 598, 600.

That decision does not address the Services' discretion to resolve ambiguities in the best available scientific data generally, or the Services' decision to remove § 402.17 from the section 7 regulations. First, the court invalidated only the particular way in which NMFS resolved uncertainties in *MLA*—namely that the agency, in the court's view, made a legal determination that it had to give the benefit of the doubt to an endangered species, rather than making a scientific judgment based on the best available scientific data. The court stated, for example, that

agencies may not "jump to a substantive presumption [in favor of the endangered species] that distorts the analysis of effects and creates false positives." *MLA*, 70 F.4th at 600. But the court also made clear that when agencies make "a scientifically defensible decision" by, for instance, "striv[ing] to resolve or characterize the uncertainty through accepted scientific techniques," their "predictions will be entitled to deference." *Id*. The court further anticipated that NMFS "will be able to make" such scientifically defensible decisions "[i]n most realistic cases" and thereby avoid the specific issues the court found problematic in *MLA*. *Id*. The Services historically have resolved ambiguities or uncertainties in the data based on such "accepted scientific techniques." As a result, the Services anticipate that the *MLA* decision will have limited implications for the Services' overall implementation of section 7(a)(2).

Second, *MLA* does not constrain the Services' decision to remove § 402.17, contrary to some commenters' assertions. As discussed more fully below, the Services are removing the "clear and substantial information" requirement because it could be read as inappropriately restricting the scope of "the best available scientific and commercial data" by demanding a degree of certitude and quantification. The best available data are not always free of ambiguities and thus "clear," nor are they invariably quantifiable or "substantial" in quantity. As the Services explained in the 2019 section 7 final rule:

> The best scientific and commercial data available is not limited to peer-reviewed, empirical, or quantitative data but may include the knowledge and expertise of Service staff, Federal action agency staff, applicants, and other experts, as appropriate, applied to the questions posed by the section 7(a)(2) analysis when information specific to an action's consequences or specific to species response or extinction risk is unavailable. Methods such as conceptual or quantitative models informed by the best available information and appropriate assumptions may be required to bridge information gaps in order to render the Services' opinion regarding the likelihood of jeopardy or adverse modification. Expert elicitation and structured decision-making approaches are other examples of approaches that may also be appropriate to address information gaps.

84 FR 44976 at 45000 (Aug. 27, 2019).

MLA does not require a different view. In interpreting section 7(a) of the ESA, the court held that agencies must use "the best available scientific data, not the most pessimistic." *MLA*, 70 F.4th at 599. The court did not hold that, within the best available scientific data, the statute permits reliance only on clear data that lack uncertainties or a substantial amount of such data. And while the court made a passing reference to § 402.17, it did so to support the proposition that, even under the Services' own "interpretive rules," NMFS's approach in that case fell short because, in the court's view, it lacked a clear and substantial basis for predicting reasonably certain effects. The court did not indicate the *statute* demands "clear and substantial information."

That understanding is consistent with the statutory text, which provides that each Federal agency shall "*insure* that any action authorized, funded, or carried out by such agency … is *not* likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2) (emphases added). As the Supreme Court has explained, "insure" in section 7(a)(2) means "[t]o make certain, to secure, to guarantee." *National Association of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 667 (2008) (quotation marks omitted). Thus, agencies do not determine the effects of an action using "the best scientific and commercial data available" in a vacuum. Rather, the ESA envisions that agencies would make any such scientific judgments in service of their overarching responsibility to "make certain" their actions are "not likely" to jeopardize protected species. Accordingly, a regulation that impairs agencies' ability to carry out that duty by requiring them to disregard any reasonably certain effects that have ambiguities in the underlying information or that may be based on less than substantial information could be inconsistent with the statute.

We note that even with the removal of § 402.17, the two-part causation test (i.e., the "but for" and "reasonably certain to occur" standards) for determining whether a particular activity or consequence falls under the definition of "effects of the action" remains in place. As the Services explained in the 2019 rule, the "reasonably certain to occur" standard adds an element of foreseeability and a limitation to our causation standard for determining "effects of the action." 84 FR 44976 at 44991, August 27, 2019. That standard prevents the Services from engaging in speculative analyses, though it does not require a guarantee that an effect will occur. See 51 FR 19926 at 19932–19933, June 3, 1986 (1986 section 7 regulations final rule); 80 FR 26832 at 26837, May 11, 2015 (incidental take statement final rule); 83 FR 35178 at 35183, July 25, 2018 (2018 proposed rule to update section 7 regulations). These safeguards ensure that when faced with scientific uncertainties, the Services will not automatically rely on "worst-case scenarios." See 84 FR 44976 at 45000; August 27, 2019. Instead, consistent with the statute and our regulations, the Services will continue to evaluate the best available evidence to arrive at principled scientific determinations in rendering our opinion under section 7 of the Act. Similarly, in rendering our opinion and resolving uncertainties, we will continue to be mindful of the fundamental duty—required by the text of section 7(a)(2)—to "insure" the agency action is not likely to jeopardize species protected under the Act.

Below, we summarize and respond to substantive and other relevant comments we received during the public comment period; we combined similar comments where appropriate.

Section 402.02—Definitions

Definition of "Effects of the Action"

As proposed, we are revising the definition of "effects of the action" by adding "but that are not part of the action" to the end of the first sentence and removing the parenthetical

reference to § 402.17. The first sentence now reads: Effects of the action are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action but that are not part of the action. The Services received a wide variety of comments on our proposed revisions to the definition of "effects of the action." These comments ranged from support of the proposed revisions, requests to revert to the pre-2019 definition, and recommendations for modifications to the proposed definition, largely to incorporate portions of § 402.17 in the "effects of the action" definition if that section is removed as had been proposed. Commenters in support of the revisions to the 2019 definition generally agreed with the reasoning of the Services but many requested additional guidance on the application of the definition. The Services intend to provide additional guidance in an updated Consultation Handbook, which we anticipate publishing in the *Federal Register* for public comment after issuance of this final rule.

Commenters who requested the Services return to the pre-2019 definition of "effects of the action" generally pointed to the removal of the terms "direct," "indirect," interrelated," and "interdependent" and the use of the terms "consequences" and "other activities," as well as the two-part causation test as being a change in practice that narrows the scope of the "effects of the action." The Services respectfully decline to return to the pre-2019 definition of "effects of the action." We reassert our position that the retained changes in the 2019 rule and the revisions adopted from the 2023 proposed rule maintain the pre-2019 scope of the effects analysis. These changes provide further clarity in the application of the longstanding practice of determining the full range of effects of a proposed action under consultation, including those that result from other activities that would not occur but for the proposed action. Under the pre-2019 definition, there was undue focus on categorizing the specific type of effect analyzed as part of the "effects

of the action" (i.e., assigning effects to the categories of direct, indirect, interrelated, or interdependent). The changes promulgated in 2019 to the definition avoided that exercise of categorizing the effects, but all these effects are, nevertheless, still analyzed as part of the "effects of the action." Many commenters requested the Services retain the reference to § 402.17 in the "effects of the action" definition and the content of § 402.17. The comments related to § 402.17 and the "effects of the action" definition centered on the two-part causation test, particularly the framework provided for determining whether an activity or consequence is reasonably certain to occur. Those comments that focused on § 402.17 are addressed below in the preamble to this final rule.

Comment 1: One commenter recommended adding the word "likely" to the definition of "effects of the action" to assist in distinguishing that consequences of the action must be likely to occur in order to result in effects.

Response: The current definition and the "but for" and "reasonably certain to occur" causation provide a clear test of what constitutes an effect of the action, including for other activities caused by the action. Adding the term "likely" would add ambiguity rather than clarifying the test for an effect of the action. The Services respectfully decline this requested change to the definition of "effects of the action."

Comment 2: Several commenters proposed incorporating the statutory requirement to use the best available scientific and commercial data into the "effects of the action" definition to support the two-part causation test.

Response: The last sentence of section 7(a)(2) of the Act requires both the Federal action agencies and the Services to use "the best scientific and commercial data available." This requirement applies to all aspects of the Services' application of section 7(a)(2) consultation,

including determining what activities or consequences are considered reasonably certain to occur when analyzing the "effects of the action" and any "cumulative effects." Therefore, we respectfully decline the suggestion to add "using the best scientific and commercial data available" to the "effects of the action" definition because using the best scientific and commercial data available is already an explicit requirement of the Act for agencies and incorporated into our formulation of the biological opinion under the regulations. See 16 U.S.C. 1536(a)(2), 50 CFR 402.14(g)(8).

Comment 3: Commenters recommended modifications to the definition of "effects of the action" to distinguish "activities" from the proposed action in order to apply the two-part causation test to both "activities" and "consequences."

Response: The modification of the definition in the 2023 proposed rule to add "but that are not part of the action" addresses this recommendation so the Services did not further modify the "effects of the action" definition. The reference to "activities" in the first sentence of the 2019 "effects of the action" definition and in the revised version of the definition in this final rule is to those activities that are caused by, but are not part of, the proposed action. Under the pre-2019 definition, as described in the 2018 preamble for the proposed rule to the 2019 rule, the intent in changing the definition to "other activities" that would have been considered "indirect effects" or "interrelated" or "interdependent" actions was for consultations to focus on identifying the full range of the consequences rather than categorizing them (84 FR 44976–44977, August 27, 2019; 83 FR 35178 at 35183, July 25, 2018). The two-part causation test is used to determine when a consequence of these other activities is caused by the proposed action because the other activities (and the consequences of them) would not occur "but for" the proposed action and are "reasonably certain to occur."

Comment 4: Several commenters suggested returning to the 1986 "effects of the action" definition to use the terms "direct," "indirect," "interrelated," and "interdependent." They believe the 2019 definition narrows the scope of "effects of the action" and argue that collapsing direct and indirect effects into a single "consequences" requirement changes past practice because indirect effects did not require "but for" causation prior to 2019. Commenters noted that the 1998 Consultation Handbook required "but for" only in analyzing "take" resulting from the action, as well as interrelated and interdependent actions.

Response: The 1986 definition of "indirect effects" referred to effects that are "caused by" the proposed action whereas the Services' 1998 Consultation Handbook includes the phrase "caused by or results from," both of which require an assessment of a causal connection between an action and an effect. The "but for" causation test in the 2019 revised definition of "effects of the action" and as modified in this final rule is similar to "caused by" or "caused by or results from" in that both tests speak to a connection between the proposed action and the consequent results of that action, whether they be (1) physical, chemical, or biotic consequences to the environment, the species, or critical habitat, or (2) activities that would not occur but for the proposed action. Both tests require a determination of factual causation, and since 2019 we have not observed a change in the Services' practice in applying "but for" causation to consequences once termed "indirect effects" compared to the regulatory term "caused by." As we noted in the preamble of the 2018 proposed rule, "[i]t has long been our practice that identification of direct and indirect effects as well as interrelated and interdependent actions is governed by the 'but for' standard of causation." Similarly, as defined in § 402.02, "incidental take refers to takings that *result from* ... an otherwise lawful activity." 50 CFR 402.02 (emphasis added). Moreover, our 1998 Consultation Handbook states: "In determining whether the proposed action is reasonably

likely to be the direct or indirect cause of incidental take, the Services use the simple causation principle: i.e., 'but for' the implementation of the proposed action...." (1998 Consultation Handbook, page 4–47). For these reasons, the Services continue to maintain that the "but for" test reflects the Services' long-standing practice and has not changed the scope of our analyses. Therefore, we decline the commenters' request.

Comment 5: Commenters recommended that consideration of effects of ongoing agency actions not be moved to the "environmental baseline." They argued that, if ongoing agency actions are moved to the "environmental baseline," it will be difficult for the Services to determine whether a species already exists in a state of baseline jeopardy because of these previously authorized ongoing Federal actions.

Response: The concept of "baseline jeopardy" originates from cases like *Nat'l Wildlife Fed.* v. *NMFS*, 524 F.3d 917, 930 (9th Cir. 2008) ("[l]ikewise, even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm"). As we noted in our responses to comments in the 2019 rule and reaffirm here, the Services' position on "baseline jeopardy" remains that the statute and regulations do not contain any provisions under which a species should be found to be already (pre-action) in an existing status of "baseline jeopardy," such that any additional adverse impacts must be found automatically to meet the regulatory standards for "jeopardize the continued existence of" or "destruction or adverse modification." See 84 FR 44976 at 44987; August 27, 2019. Please see the responses to comments on the definition of "environmental baseline" below for more details.

Comment 6: Commenters noted that, while the 2019 definition may reflect the Services' longstanding practice, codifying the two-pronged test affects agencies' ability to fulfill their duties under section 7. Many commenters reiterated concerns raised during rulemaking on the

2019 rule that moving ongoing actions and their effects from the "effects of the action" to the "environmental baseline" undermines the Services' ability to conduct a thorough jeopardy analysis. Commenters argue that moving ongoing activities to the "environmental baseline" will exclude them from the jeopardy analysis.

Response: The Services respectfully disagree with the comments that use of the two-part causation test affects the ability of agencies to fulfill their section 7(a)(2) responsibilities. As we stated in 2019 and in the preamble to the 2023 proposed rule, the use of the two-part causation test has been part of our practice since the 1986 final rule on interagency cooperation (51 FR 19926 at 19933; June 3, 1986) (the Services did not define "effects of the action" in the original 1978 section 7 regulations (43 FR 870; January 4, 1978)). Consultation under the Act is conducted on the effects of the entire proposed action (all consequences caused by the proposed action). To further clarify, proposed actions for ongoing activities, even those that incrementally improve conditions may still have adverse effects (i.e., are not wholly beneficial), and require formal consultation. The analysis of an action's effects is fact-based and consultation-specific. In terms of the jeopardy and destruction-or-adverse-modification analyses, the Services consider the effects of the action added to the "environmental baseline" and cumulative effects in light of the status of the species and critical habitat. Therefore, removing the "environmental baseline" definition from the definition of "effects of the action" does not affect either jeopardy or destruction-or-adverse-modification analyses, and the Services decline the suggestion to retain "environmental baseline" in the "effects of the action" definition. We provide additional discussion of how "ongoing activities" are considered for purposes of the "environmental baseline" in the "environmental baseline" section of this preamble below.

Comment 7: Other commenters asserted that the "effects of the action" definition is overly broad and will unnecessarily restrict future projects requiring section 7 consultation because of the need for the Services and Federal action agencies to analyze an array of effects that are unrelated or only tangentially related to the proposed action. Conversely, several commenters asserted the proposed changes to the definition specific to the two-part causation test raise the bar for any future review of the effects of a proposed action without supporting rationale as to why a higher bar is needed. These commenters argue that the "but for" and "reasonably certain to occur" requirements of the two-part causation test are too high given that "may affect" is the trigger for consultation.

Response: The revisions made in the 2019 rule and the further minor revisions in this final rule will not shift the scope of effects we consider under our revised definition of "effects of the action." Therefore, as explained in the 2019 rule, our analyses will neither raise nor lower the bar for the scope of analysis of effects that has been in place since 1986. All the effects of the action considered since the 1986 revisions to the definition are still included in the scope of "effects of the action," and no other effects or activities that are not caused by the proposed Federal action will be included. To the extent that commenters are asserting we should further restrict the definition of "effects of the action" to only those effects within the jurisdiction or control of the Federal agency, we decline this request for the same reasons discussed in 2019. See 84 FR 44976 at 44990-44991, August 27, 2019. The revisions to the definition and the changes made in 2019 did not change existing practice in determining the effects of the action, which includes what were referred to as direct, indirect, interrelated, and interdependent in the 1986 definition of "effects of the action." The improvements to the definition in the 2019 rule and in this revision include the explicit establishment of the two-part test for effects, which

codifies the Services' longstanding analysis in a clear standard in order to be more consistent and transparent. The Services do not find that the 2019 definition or the revised definition in this rule narrows or broadens the scope of the effects that would be considered in a section 7(a)(2) consultation. Similar comments were made relating to § 402.17; please see our responses pertaining to comments on that section of the proposed rule below in this preamble.

Comment 8: One commenter argued that removing the definition of "reasonably certain to occur" while leaving in the concept that effects are not bound by time or space will create an unworkable burden on the consulting agency because an agency will not be able to evaluate all possible effects. Eliminating the definition of "reasonably certain" removes the two-tier system for identifying effects.

Response: The Services are retaining "reasonably certain to occur" in the revisions to the "effects of the action" definition as part of the two-part causation test. As discussed above, the revisions to the definition in this final rule will not shift the scope of effects we consider in section 7(a)(2) consultations. In addition, while we provided guidance on the factors to consider when determining whether other activities are "reasonably certain to occur," the Services did not define the term and do not intend to define it because we are not setting limits on the types of activities that are reasonably certain to occur. We intend to provide further guidance in an updated Consultation Handbook. See also our response to comments related to § 402.17.

Comment 9: Several commenters recommended retaining § 402.17 and the reference to it in the "effects of the action" definition or incorporating the content of § 402.17 in the definition if the section is removed from the regulations. Commenters also recommended examples for defining when an activity is reasonably certain to occur and guidance for action agencies and the Services to ensure consistency in the application of the test. In addition, commenters suggested

regulatory language that considers additional factors such as the proximity of the action in relation to the effect, geographical distribution of effects, timing of the effect in relation to sensitive periods of a species' life cycle, the nature and duration of the effect, and disturbance frequency as described in the 1998 Consultation Handbook discussion on the multi-factor tests to analyze the effects of a proposed action and related activities on species and critical habitat. Conversely, another commenter supported the removal of § 402.17 but encouraged the Services to work towards a stricter, quantifiable definition of "reasonably certain to occur."

Response: The Services support the recommendation to provide examples for defining when an activity is reasonably certain to occur and guidance on application of the two-part causation test. We believe this information is more appropriately addressed in an update to the Consultation Handbook rather than regulatory text. The Services' update to the Consultation Handbook will incorporate changes to the regulations since the handbook was issued in 1998. For comments related to § 402.17, please see that section of the preamble below.

Comment 10: Some commenters indicated that the proposed changes to the "effects of the action" definition will cause greater uncertainty in terms of what to include in the effects of the action. Several also noted that the addition of the phrase "but that are not part of the action" to the definition is unclear and recommended that guidance be created by the Services to ensure the interpretation of "not part of the action" is consistent across offices and to clarify the scope or extent of activities outside the proposed action that will be analyzed. Conversely, other commenters believe the addition of "but that are not part of the action" is a helpful clarification and recommend further modification of the definition to clarify that the two-part causation test does not apply to the proposed action itself (as opposed to other activities caused by, but that are not part of, the proposed action).

Response: As discussed previously, the Services believe the minor revisions to the definition in this final rule will not shift the scope of effects considered in section 7(a)(2) consultations. The addition of "but that are not part of the action" to the definition is meant to maintain the scope of the analysis of the effects by clarifying that it includes other activities caused by the proposed action that are reasonably certain to occur. The Services respectfully decline the suggestion to further refine the definition to explicitly state that the two-part causation test does not apply to the proposed action itself but agree that guidance on the application of the two-part causation test is warranted and anticipate including this information in the updated Consultation Handbook.

Comment 11: One commenter argued that the "but for" causation standard casts a wider net than a "proximate cause" standard. The commenter maintains that a proximate cause is a cause that directly produces an event and without which the event would not have occurred. "But for" causation treats the effects of an action as a series of events and circumstances that can be traced to a particular action but without regard to whether either the agency action is responsible for or the agency has jurisdiction or authority to control those events and circumstances. The Services should revise the proposed "effects of the action" definition to eliminate the "but for" causation language and adopt a proximate cause standard.

Response: There is no Federal standard definition for "proximate cause," a term that developed through judicial decisions. Proximate cause can differ if used for assigning liability in criminal action as compared to civil matters, neither of which is directly relevant in the section 7(a)(2) context of evaluating the anticipated effects of proposed Federal actions on listed species and critical habitat. We declined to include a proximate cause element in our definition of "effects of the action" in 2019 and do so again here. See 84 FR 44976 at 44990–44991, August

27, 2019. As discussed above, the "but for" causation standard is, in essence, a factual causation standard. As part of regular practice in conducting a complete analysis of the effects of proposed Federal actions, the Services' practice is to apply the concepts of "but for" causation and "reasonably certain to occur" when identifying the effects of the action. The changes to the "effects of the action" definition in our 2019 rule merely made them explicit. The Services' scope of the effects analysis did not change with the 2019 change to the "effects of the action" definition, and we do not anticipate a change in scope because of the minor changes to the "effects of the action" in this final rule.

Comment 12: Several commenters stated that the "reasonably certain to occur" limitation applied only to "indirect effects" and "cumulative effects" prior to the 2019 rule's "effects of the action" definition. They noted that this situation leads to exclusion of effects, but that uncertainty or data gaps should not be used to limit consideration of effects of a proposed agency action. They further argue that the reasonable certainty standard could conflict with the requirement to use the best available scientific and commercial data, particularly where there may be incomplete information or emerging science.

Response: We reaffirm what we stated in the 2019 rule, that the two-part effects test adopted at that time does not alter the scope of the Services' analysis. The Services also agree that, in applying our two-part effects test, we must use the best available scientific and commercial data, which is expressly required by the statute and as part of our regulations at 50 CFR 402.14(g)(8). Consistent with considering the best available information, we will necessarily be required to exercise scientific judgment to resolve uncertainties and information gaps in applying our effects test. This process does not ignore effects but instead ensures that we

adequately consider the range of effects caused by the proposed action. For further discussion relevant to this comment, please see the responses to comments regarding § 402.17.

Comment 13: Several commenters noted that the proposed change to the "effects of the action" definition will remove the framework for determining whether an activity or consequence is "reasonably certain to occur" that is critical for determining what to include in an agency's effects analysis, including when applying the standard to larger scales such as a program.

Response: The Services respectfully disagree with these comments; the definition and current practice adequately capture the "reasonably certain to occur" standard. As described in the 2019 rule, a section 7(a)(2) consultation performed at the level of a regional or national program is often referred to as a programmatic consultation, and often the proposed action falls into the category referred to as a framework programmatic action described in our 2015 rule revising incidental take statement regulations (80 FR 26832, May 11, 2015). In these instances, the "but for" and "reasonably certain to occur" parts of the test extend to the consequences that would be expected to occur under the program generally, but not to the specifics of actual projects that may receive future authorization under the program. Effects analyses at this more generalized level are necessary because the Federal agency often does not have specific information about the number, location, timing, frequency, precise methods, and intensity of the site-specific actions or activities for their program. We are able to provide an informed effects analysis at a more generalized level by analyzing the project design criteria, best management practices, standards and guidelines, and other provisions the program adopts to minimize the impact of future actions under the program.

Alternatively, some Federal agencies may be able to provide somewhat more specific information on, e.g., the numbers, timing, and location of activities under their plan or program. In those instances, we may have sufficient information to address not only the generalized nature of the program's effects but also the specific anticipated consequences that are reasonably certain to occur from specific actions that will be subsequently authorized under the program. Additional guidance regarding application of the two-part causation test ("but for" and "reasonably certain to occur") and programmatic consultation will be included in the updated Consultation Handbook. For more general discussion of the removal of the "reasonably certain to occur" framework provided by § 402.17, please see the responses to comments on that section in the preamble below.

Comment 14: Several commenters noted that the requirement that a "reasonably certain to occur" finding be based on "clear and substantial information" has created confusion and conflicts with the statutory requirement to use the "best scientific and commercial data available" and agreed with the removal of § 402.17 in its entirety. Another commenter supported retaining all of § 402.17, including the requirement to use "clear and substantial information," noting that this language supports the requirement to use the "best scientific and commercial data available."

Response: The Services are removing § 402.17 via this final rule. The use of the terms "clear and substantial information" creates confusion with the statutory requirement to use the "best scientific and commercial data available." We disagree with the comment that retaining the "clear and substantial" language in § 402.17 supports the required use of the "best scientific and commercial data available." Please see the discussion of the term "clear and substantial" provided in response to comments on § 402.17.

Definition of "Environmental Baseline"

As proposed, we are revising the third sentence of the definition of "environmental baseline" by replacing the term "consequences" with the word "impacts," removing the term "ongoing," and adding the term "Federal" in two locations. The third sentence now reads: The impacts to listed species or designated critical habitat from Federal agency activities or existing Federal agency facilities that are not within the agency's discretion to modify are part of the environmental baseline. The changes to the definition of "environmental baseline" in this rule are narrow and serve to clarify the intended application and scope of the final sentence that was added in 2019. The Services received a wide variety of comments on our proposed revisions to the definition of "environmental baseline," most of which were focused on the original change in the 2019 rule. These comments ranged from support of the 2023 proposed revisions, requests to retain the original final sentence of the 2019 definition, and requests to remove the entire 2019 definition and revert to the definition as it stood prior to the 2019 rule. Commenters in support of the proposed revisions to the 2019 definition generally agreed with the reasoning of the Services and in some cases requested additional guidance on the application of the definition. The comments in opposition to the proposed revisions to the 2019 definition generally fell under two main themes of comments—both generally focused on the final sentence of the 2019 definition. One group focused specifically on the Services' revisions to the final sentence of the 2019 definition and whether and how the role of Federal agency discretion should be considered during a section 7 consultation. The second group focused on the proposed language changes to the final sentence, with most attention on opposition to the removal of the word "ongoing." With regard to the request for additional guidance, the Services intend to provide additional guidance and examples in an updated Consultation Handbook.

Comment 1: Several commenters requested the Services revert entirely to the definition of "environmental baseline" as it stood prior to the 2019 regulations by either (1) pointing to other issues as described in other comments below or (2) attributing the entire definition to an earlier Presidential administration despite much of the text of the definition stemming from the pre-2019 regulations.

Response: The Services decline to return to the pre-2019 "environmental baseline" definition for several reasons. First, the 2019 definition retained much of the language of the pre-2019 definition, while also making the definition a stand-alone definition within the § 402.02 regulations. This regulatory change did not change the role of the "environmental baseline" in the section 7 consultation analysis, and the Services also reaffirmed in § 402.14(g)(4) that the analysis presented in the biological opinion must add the "effects of the action" to the "environmental baseline" and "cumulative effects." This regulatory revision also removed a circular reference that occurred when the "environmental baseline" definition was previously embedded within the "effects of the action" definition. By creating two separate definitions of "effects of the action" and "environmental baseline," we are underscoring the separate nature of the analyses which are then to be combined into an aggregate assessment.

Second, by clarifying that those portions of a Federal activity or facility that are outside the control of the Federal agency to modify are included in the "environmental baseline," the Services highlighted that the effects of discretionary activities or facilities contained in the proposed action would be evaluated within the context of (added to) the baseline and "cumulative effects" in order to determine whether those added effects were or were not "likely to jeopardize" a species. Third, in the 2019 "environmental baseline" definition, the Services clarified that the primary purpose of the "environmental baseline" is to present the condition of

the listed species and critical habitat in the action area as impacted by the various factors of the "environmental baseline." Prior interpretations of the pre-2019 definition could indicate that the baseline was simply a description of the impacts of those factors on the action area—missing the important connection to the condition of the species and critical habitat that may be further affected by the effects of a Federal action. With the 2019 rule, the Services highlighted two important elements: (1) That the purpose of the baseline was to assess the condition of the species and critical habitat and (2) that this condition assessment was taken into consideration prior to adding the consequences of the proposed action (which in some instances might be the future continued, discretionary operations of a facility such as a dam). These two elements provide the foundation to which the Services add the effects of the proposed action.

Comment 2: Some commenters reiterated their 2019 comments that the 2019 revised definition of "environmental baseline" hides or ignores the significant impacts of past and present activities and facilities, some of which may have played a significant role in the present status of the species and its critical habitat, asserting that the species is thus in "baseline jeopardy." Further, commenters seem to imply that only large actions could then likely jeopardize listed species or destroy or adversely modify critical habitat.

Response: The Services disagree and have revised the definition's final sentence to clarify those aspects of a Federal action involving Federal facilities and activities that are in the "environmental baseline" and those that will be considered as "effects of the action." As required by the regulations, the "effects of the action" will be added to the "environmental baseline," thus the effects to a listed species or critical habitat already impacted by the "environmental baseline" will be considered in full light of the condition of that species and critical habitat. In addition to the overall status of the species, the relative health and viability of the species absent the

proposed action in the action area is the starting point for the assessment and that condition informs the ability of the species to withstand further perturbations to its numbers, reproduction, and distribution. As we noted in our responses to comments in the 2019 rule and reaffirm here, the statute and regulations do not contain any provisions under which a species should be found to be already (pre-action) "in baseline jeopardy," such that any additional adverse impacts must be found to meet the regulatory standards for "jeopardize the continued existence of" or "destruction or adverse modification." As we further noted in 2019, and reaffirm here, the Services do not dispute that some listed species are more imperiled than others, and that for some very rare or very imperiled species, the amount of adverse effects to the species or its critical habitat that can occur without triggering a jeopardy or "destruction or adverse modification" determination may be small. See 84 FR 44976 at 44987, August 27, 2019.

Comment 3: A few commenters focused on the issue of Federal agency discretion and whether it was appropriate to further consider whether a Federal agency had discretion over some or all of its proposed action once consultation was initiated.

Response: Consultation under section 7(a)(2) is required when a discretionary Federal action may affect a listed species or designated critical habitat. As part of that process, it is important that the Federal action agency and the Services correctly identify the Federal action. Following this step, it is then also important to assess the "effects of the action," which include the activities caused by (but are not part of) the proposed action and the effects of those activities. As the Services noted in the 2019 rule, and reaffirm here, the courts and the Services have concluded that, in general, the effects on listed species and critical habitat attributable to Federal agency activities and existing Federal agency facilities are part of the "environmental baseline" when the action agency has no discretion to modify them. For example, with respect to

existing Federal facilities, such as a dam, courts have recognized that effects from the existence of the dam can properly be considered a past and present impact included in the "environmental baseline" when the Federal agency lacks discretion to modify the dam. *See, e.g., Friends of River* v. *NMFS*, 293 F. Supp. 3d 1151, 1166 (E.D. Cal. 2018). Under these lines of cases involving dams, when a Federal agency has authority for managing or operating a dam, but lacks discretion to remove or modify the physical structure of the dam, any impacts from the physical presence of the dam in the river are appropriately placed in the "environmental baseline" and are not considered an "effect of the action" under consultation. Thus, it is important to note that the above analytical process for determining the "effects of the action" does not include consideration of the discretion of the Federal action agency over the activities or facilities of another Federal agency or any other third party. To the extent that any effects are caused by the proposed Federal action, per the "but for" and "reasonably certain to occur" standards of the "effects of the action" definition, they would be considered as "effects of the action" in the consultation analyses. Those effects that are not caused by the Federal action would be included in the "environmental baseline" or "cumulative effects" as appropriate.

Comment 4: Several commenters advocated that the question of discretion should also apply to third party actions or the activities or facilities that are the subject of a Federal action, such as permitting or funding, with some commenters providing site-specific examples.

Response: As we noted above in this preamble and in the proposed rule, this determination is made on a case-by-case basis as determined by discussions between the Services and the appropriate Federal agency on the basis of the information and evidence available at the time. In most section 7 consultations, the question of discretion is not a factor and, indeed, several examples raised by commenters were on large-scale Federal activities such

as water operations or land management, which make up a relatively small portion of ESA section 7 consultations. Many of the location-, activity-, or facility-specific concerns raised by some commenters are beyond the scope of this rule and best handled through site-specific consultations.

To answer some of the general questions or points of confusion, the Services note that the current revisions are minor in scope to further clarify the intent of the final sentence added to the "environmental baseline" definition in 2019 and retained in this rule. These revisions do not modify current practice related to how past and present non-Federal actions are represented in the summary of impacts of the "environmental baseline" on the condition of listed species and critical habitat. In addition, the revisions do not alter current practice related to the analysis of the effects of a proposed discretionary Federal action that involves the authorization or funding of an action taken by a non-Federal entity such as a private landowner. The Services decline to speculate or generalize in a response to public comments as to the breadth of scope of agency discretion in all of these actions as these are case-specific determinations.

Comment 5: Some commenters requested additional discussion or guidance on how the determination of discretion would proceed. Another commenter argued that if discretion continues to be a factor when determining the "environmental baseline" the Services should retain the authority to make the determination on their own.

Response: As we noted in the proposed rule, we will work closely with the Federal action agency to understand the scope of their discretion in a particular case to inform those aspects of a Federal agency activity or facility that are a part of the "environmental baseline." See 88 FR 40753 at 40756, June 22, 2023. Typically, Federal discretion over an action or facility is defined within all the laws and regulations under which the action will be taken. Where questions

regarding discretion arise during a consultation, the supporting record of the consultation should include the documentation upon which the separation between discretionary Federal agency action and those non-discretionary activities or facilities was made. While the Services ultimately determine the content and scope of the analyses in our biological opinions, generally we would defer to the Federal action agency's supported interpretation of their authorities for purposes of identifying what non-discretionary Federal facilities and activities are included in the "environmental baseline." See id. As a general matter, the Services and an action agency can come to a specific understanding about the nature of an action agency's discretion and how to treat both effects of past and future actions stemming from the action agency's decisions.

Comment 6: One commenter objected to the definitions of "environmental baseline" and "effects of the action" because the commenter asserts that the effects of the action would include even those consequences of the Federal action that have occurred in the past and that the action agency and any proponent do not intend to change going forward and that the approach does not allow for adaptation due to climate change. The commenter also requested that the Services define the parameters of actions and effects for ongoing Federal project operations such that: (1) the proposed action should be the future discretionary actions related to the operation of the existing facilities in the existing environment; (2) the effects of the action should focus on the manner in which the current status of the species and existing condition of its habitat will be affected by the proposed future discretionary actions; and (3) the examination of effects of the discretionary proposed action does not include the baseline effects of or from the original construction of the facilities or the past operations and maintenance activities that have occurred.

Response: The Services decline to define the parameters of the "environmental baseline" and "effects of the action" as the commenter requests. The Services' definitions of "effects of the

action" and "environmental baseline" are crafted to distinguish between those impacts that are properly considered as the "environmental baseline" and those consequences of a proposed discretionary Federal action that would be considered the "effects of the action." Further, the baseline includes the original construction of facilities and past operations and maintenance that have occurred. However, the proposed future discretionary actions are all of the discretionary actions that will occur—even those ongoing discretionary actions for which no changes are envisioned. As we noted in the proposed rule, "the Federal agency may propose to continue the operations of the dam's flow regime with no changes from past practices, or with only minor changes. Regardless of their "ongoing" nature, all the consequences of the proposed discretionary operations of the structure are "effects of the action" (88 FR 40753 at 40756, June 22, 2023). In other words, those future consequences of discretionary operations are properly considered "effects of the action" even if those similar operations that occurred in the past are included in the "environmental baseline." A full assessment of the proposed Federal action will ultimately include the "effects of the action" added to the "environmental baseline" and any anticipated "cumulative effects." Regarding the comment about consideration of climate change and the consideration of action effects and the "environmental baseline," the Services note that climate change is considered as appropriate in all ESA section 7 consultations, including how past, present, and future conditions are impacted and the resulting "effects of the action" in context with those impacts.

Comment 7: One commenter requested information regarding future planned revisions to the "environmental baseline" definition.

Response: The Services note that the commenter may have misread the proposed rule. We do not anticipate further refining the definition of "environmental baseline."

Comment 8: Several commenters raised the issue of existing structures and how they would be considered under these regulations. Commenters inquired whether the 2019 regulations and the regulations in this rule allow for all existing structures to be included in the "environmental baseline." Some commenters requested that the Services explicitly include that direction in the regulations. In other instances, commenters were concerned that the definition allows for past harms to the species and habitat to be ignored.

Response: The Services note that neither the 2019 definition of "environmental baseline," nor the minor revisions adopted in this final rule, change current or past practice and thus do not treat existing structures differently than under the prior regulations. The final sentence of the definition in the 2019 rule was intended to clarify current practice and how the discretionary and non-discretionary portions of a Federal activity or facility are considered in the baseline and "effects of the action." The Services decline to state that all existing structures are included in the "environmental baseline"; existing structures may be included in the analysis of the "effects of the action" depending on the Federal action under consultation. Whether an existing structure is in the baseline is a case-specific determination that includes discretion, prior consultations, and temporal considerations.

Regarding concerns that the current definition allows for past impacts to be ignored by residing in the baseline, the Services restate that the 2019 baseline definition revision, which primarily made the definition a stand-alone definition versus an embedded definition within the "effects of the action," along with current regulations as amended, clarifies longstanding past and current practice in the treatment of those impacts that are a part of the "environmental baseline." Importantly, by accounting for these past and present impacts in the baseline and then adding the effects of the proposed action to the "environmental baseline," the Services do not "let Federal

agencies off the hook," as suggested by some commenters, but instead consider the consequences of a Federal action in the context of the past and present impacts to listed species and critical habitat in the action area.

The ESA section 7(a)(2) consultation process applies only when a Federal agency proposes to authorize, fund, or carry out a discretionary action that may affect a listed species or designated critical habitat. At that time, the effects of the proposed Federal action are analyzed and added to the impacts of the "environmental baseline," which includes the past impacts raised by commenters. However, the section 7(a)(2) consultation process is not intended to "right the wrongs of the past" but to ensure that proposed Federal actions are "not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat." As noted elsewhere, the health and viability of the species absent the proposed action is the starting point for the assessment and that condition informs the ability of the species to withstand further perturbations to its numbers, reproduction, or distribution. Thus, past impacts and the resulting condition of the listed species and critical habitat are crucial to the overall analysis in the section 7 consultation.

Comment 9: A few commenters requested deletion of the final sentence of the "environmental baseline" definition given the purported confusion it creates or perceived inappropriate narrowing or expansion of the scope of the definition. Others suggested different revisions from the Services' proposed minor amendments to the language.

Response: As noted previously, the sentence was added to distinguish those cases where an existing Federal facility or activity must be considered as part of the "effects of the action" versus past argued interpretations or confusion that all existing facilities and activities were de facto in the baseline. By evaluating the effects of discretionary actions against the backdrop of

the "environmental baseline" and "cumulative effects" (future non-Federal activities that are reasonably certain to occur), the Services are able to assess whether the proposed action is "likely to jeopardize a listed species" or destroy or adversely modify critical habitat. This evaluation applies whether the proposed action is a novel action upon the landscape or a proposed action that includes another 10 years of the same types of consequences that have already led to species declines and habitat degradation.

The Services appreciate the suggested revisions to the final sentence of the "environmental baseline" definition, which some commenters offered in the event that their requests to delete the sentence were declined. However, the suggested revisions unintentionally resulted in the very concerns raised by the commenters, and in one case, would have inappropriately narrowed the scope of the "environmental baseline." In that case, a commenter suggested not including in the "environmental baseline" past or completed Federal actions that have not undergone and completed section 7 consultation. The Services decline to accept this proposed revision, as it could have an unintended and significant negative effect on listed species and critical habitat. By removing from the "environmental baseline" the impacts of those past or completed Federal actions (some of which pre-date the ESA itself and have no discretionary Federal action to trigger consultation), the Services would be restricted to looking at an incomplete "environmental baseline," and thus an incomplete jeopardy analysis.

Comment 10: The Services have revised the final sentence of the "environmental baseline" definition to replace the term "consequences" with "impacts." We received comments both supporting and opposing this revision. While most understood the Services' intent to distinguish between those two terms, further explanation of the revision and the terms was requested.

Response: The Services appreciate the support for this revision to the final sentence of the "environmental baseline" definition. The Services understand the concern about the initial confusion with use of the term "consequences" to refer to those effects of a Federal action that were caused by the Federal action. The Services proposed to change the word "consequences" to "impacts" in the final sentence of the "environmental baseline" definition to address this confusion. More specifically, the "environmental baseline" and the "effects of the action" are two distinct assessments. Both are ultimately aggregated when the "effects of the action" are added to the "environmental baseline." However, the Services sought to reduce confusion and overlap between the two definitions by retaining the use of "consequences" when discussing the effects of the proposed Federal action and using "impacts" when discussing the "environmental baseline," even though we consider "consequences," "impacts," and "effects" to be equivalent terms.

Comment 11: One commenter requested that the "environmental baseline" not be limited to Federal projects, but instead include all projects that pre-date the ESA and all projects that have previously undergone ESA section 7 consultation. Further, the commenter requested clarification regarding the treatment of existing non-Federal projects (e.g., residential or commercial piers and floats and private bulkheads), including the concept of "useful life" for both Federal and non-Federal actions.

Response: The Services affirm that the current definition of "environmental baseline" is not limited to just Federal projects, but we decline to state that "all projects" are automatically included in the "environmental baseline." The definition includes (in relevant part) "the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already

undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation process" (50 CFR 402.02). The "Federal projects" in this excerpt refers to all actions proposed to be authorized, funded, or carried out by a Federal agency that have undergone consultation, which includes Federal permits for private or commercial actions. Because the definition of "environmental baseline," including the minor revisions in this rule, does not change current practice, existing structures would be treated the same as they are under both current and prior practice (i.e., before the 2019 regulation revisions). The Services decline to speak to the "useful life" of structures and how that issue would be treated nationwide as both are beyond the scope of this rule and would be addressed on a case-specific basis.

Comment 12: The Services received a wide range of comments on the proposed revision to the final sentence of "environmental baseline" to remove the word "ongoing" and to insert the word "Federal" in two places. Some commenters opposed the revision because they opposed application of the standard to only Federal activities or facilities. A few commenters requested that "ongoing" be retained because they assert that all activities or facilities that are "ongoing" should be included in the "environmental baseline." Some commenters opposed the revision because the result would be either that more activities and facilities would be "hidden" in the "environmental baseline" and not in the "effects of the action" or fewer would be in the "environmental baseline" and included within the "effects of the action."

Response: Both the 2019 regulations and the regulations in this rule clarify existing practice related to the "environmental baseline." While we cannot comment on the fact or site-specific circumstances that some commenters raise, every ESA section 7(a)(2) consultation is unique and based on what has been proposed by a Federal agency to authorize, fund, or carry out

and the nature of the Federal agency's discretion and authority. Some of the examples raised may have included consultations that appropriately identified the Federal action and "effects of the action" based upon specific facts, applicable laws or other authorities, and prior consultation history. Thus, the conclusions in those examples do not necessarily apply in other instances, and it is incumbent on the Services and the Federal action agency to carefully describe and discuss what the Federal action may be in any particular case.

Several commenters were focused on the "ongoing" nature of an activity for determining whether that activity is evaluated in the environmental baseline. The Services proposed to remove the term "ongoing" and insert the term "Federal" because our experience implementing the 2019 rule echoes this same unintended focus on "ongoing" and not on the relevant portions of the sentence (i.e., the scope of the Federal agency's discretion). As explained in our proposed rulemaking, we found that removal of the term "ongoing" from the relevant portion of the regulatory definition of "environmental baseline" would, instead, shift the focus to the appropriate factor for determining whether an activity is part of the "environmental baseline"—whether or not the action agency has discretion to modify that activity. The Services decline to reinstate the term "ongoing" or remove the term "Federal" to avoid this improper focus in the future.

The Services also reaffirm that the pre-2019 definition, the 2019 definition, and the minor revisions in this rule maintain the same standards for the Federal, State, private, and other human activities that are considered in the "environmental baseline" and the scope of the effects of proposed Federal actions that will be analyzed as "effects of the action." Existing non-Federal structures and activities occurring within an "action area" are a part of the "environmental baseline," unless a Federal agency proposes to authorize, fund, or carry out an action related to

the structure or activity. At that time, the non-Federal structure or activity may be subject to an ESA consultation if the proposed Federal action "may affect" listed species or designated critical habitat. Nothing in the revised "environmental baseline" definition changes this requirement of the statute. Despite the assertion of some commenters, if a Federal agency is proposing to authorize, fund, or carry out a repair or modification to a non-Federal structure, the consultation must evaluate the effects of the action, including all consequences to listed species or critical habitat caused by the proposed action.

Although commenters cite an example from the 1998 Consultation Handbook, that example fails to account for the wide variety of Federal actions that may occur related to an existing Federal facility, and thus one approach does not fit all situations. The Services again decline to universally state that all "ongoing" facilities or activities are in the "environmental baseline." First, the term "ongoing" itself creates confusion when a longstanding operation that is within the discretionary authority of a Federal agency is being proposed for renewal. The prior operations are within the "environmental baseline," but the future operations, which are part of the discretionary proposed action, are properly considered as effects of the action. In addition, the Services and Federal action agencies should work closely to examine and understand the consequences of a proposed Federal action. In some instances, the nature of the action may indeed result in a similar finding as the turbine example cited from the 1998 Consultation Handbook (See 1998 ESA Consultation Handbook, Chapter 4, Interrelated and Interdependent Actions p. 4-27). In other instances, the nature of the action may encompass more of the operations or even structure of the facility itself. It is beyond the scope of this rule to provide examples that cover all such possibilities. Case-specific circumstances must be considered and

should be done in collaboration between the Services and the Federal action agency as discussed in the 2019 rule and the 2023 proposed rule.

The Services also clarify that the 2019 regulatory amendments, and the minor revisions in this final rule, do not remove existing structures and operations from the baseline as some commenters suggested. Similarly, the 2019 and 2023 revisions do not move most structures and operations to the proposed action if they are not either the proposed action itself or activities caused by the proposed action. The full definition of the "environmental baseline" includes those past impacts or Federal, State, and private actions in the action area. The final sentence is intended to address questions that have arisen regarding the consideration of the non-discretionary aspects of Federal facilities or activities. In general, Federal permitting and authorization of existing non-Federal facilities and activities is a discretionary action and requires section 7(a)(2) consultation if the proposed action may affect listed species or critical habitat. The past impacts of non-Federal facilities or non-Federal activities would be included in the "environmental baseline" whereas future consequences of the proposed Federal authorization action for that facility or activity would be the subject of the consultation and "effects of the action" analysis. In some instances, an effects analysis may need to assess the future and extended life of a structure, yet the past existence and impacts of the structure are included in the "environmental baseline."

The 2019 and current revisions to the "environmental baseline" definition do not prescribe particular assumptions that would be applied to all repair, maintenance, or modification activities proposed for authorization, funding, or implementation by a Federal agency. The consequences of such activities, including whether a proposed action extends the life of a structure or operation, would be reviewed per the standards of the "effects of the action"

definition and may differ significantly from case to case. Further, what was or was not considered in prior consultations, if any, may also vary. The definition also does not prescribe how the effects of structures past their useful life would be analyzed as part of the "environmental baseline." If those structures are not the subject of the consultation and are causing impacts to the condition of listed species and critical habitat in the action area, they would be included in the baseline, but it is beyond the scope of this rule to further describe or prescribe how that analysis would be done.

Comment 13: The Services received several comments specific to consultations on projects in the Salish Sea of Washington, an existing programmatic consultation, a NMFS 2018 internal guidance document, and the Puget Sound Nearshore Habitat Conservation Calculator.

Response: Generally, these comments are outside the scope of this rulemaking action, and given that the regulations do not alter current practice, the regulations are not expected to alter the consultations and tools raised by the commenters. Regarding the National Marine Fisheries Service, West Coast Region, Internal Guidance on Assessing the Effects of Structures in Endangered Species Act Section 7 Consultation (April 18, 2018), NMFS withdrew this guidance after issuance of the January 2022, Department of the Army (Civil Works) and the National Oceanic and Atmospheric Administration Memorandum. The 2022 Memorandum, which is based on existing legal requirements, is national in scope and clarifies potential differences between the U.S. Army Corps of Engineers Civil Works projects and Regulatory Program projects based on agency discretion. The 2022 memorandum is fully consistent with the Services' section 7 regulations, including the definitions of "effects of the action" and "environmental baseline" as revised in this final rule. The memorandum does not impose any new or additional requirements on action agencies, applicants, or NMFS, and does not alter the

existing requirements relative to section 7 consultations. Commenters are correct that future Federal actions related to Federal or non-Federal facilities may trigger an ESA consultation on the proposed Federal action, but it is beyond the scope of this rule to speculate whether that consultation would require mitigation under existing programmatic consultations or RPM offsetting measures, costly or otherwise.

Comment 14: One commenter questioned whether the modification to the final sentence of the "environmental baseline" definition forecloses the consideration of what used to be considered "interrelated" and "interdependent" actions as "effects of the action."

Response: The Services appreciate the commenter's perspective on the possible interpretation of the revised sentence. If the activities of other Federal agencies would be caused by the proposed Federal action that is subject to consultation, then they would properly be considered as "effects of the action" and those Federal agencies should be action agencies in the section 7(a)(2) consultation. Further, in situations where there are multiple Federal agencies taking actions (authorizing and funding, for example) on the same non-Federal action, an efficient consultation process could include all of these agencies (even if one is designated as the lead agency). Our interpretation and application of the "environmental baseline" and "effects of the action" definitions would not be a change in practice. In most cases, other Federal agency activities or facilities that are not caused by the proposed Federal action would be included within the "environmental baseline" (or subject to their own ESA consultation as needed). The Services decline to further revise the final sentence but note the commenter's concern for potential inclusion in further guidance.

Comment 15: One commenter was concerned that the addition of "Federal" in the final sentence of the "environmental baseline" definition restricted the "effects of the action" to only

the consequences where the Federal action agency has the discretion to modify the activity or facility.

Response: Commenters misconstrue the effect of this revision. The Services are clarifying that the scope of application in the final sentence of "environmental baseline" is to Federal action agency (or agencies) activities and facilities. The inclusion of the word "Federal" does not alter the scope of the definition of "effects of the action." As discussed in the "effects of the action" section above, if an activity or consequence meets the two-part test for an effect, then it is considered an "effect of the action" regardless of whether that activity or consequence is within the control of the Federal agency.

Comment 16: One commenter was concerned that the revision to the final sentence of "environmental baseline" implies that facilities such as irrigation, diking, and drainage infrastructure are not within the "environmental baseline," and any future Federal permitting, even for maintenance and repair of existing infrastructure, would require costly mitigation.

Response: Existing Federal and non-Federal facilities and their operations are a part of the "environmental baseline,' as described in the definition (in relevant part): "The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area" (50 CFR 402.02). Commenters are correct that future Federal actions related to Federal or non-Federal facilities may require consultation under section 7(a)(2) of the ESA on the proposed Federal action, including a full analysis of the consequences of the Federal actions and activities caused by the Federal action. If consultation is required under section 7(a)(2) of the Act, it would be subject to the revisions of the implementing regulations at 50 CFR part 402 by this final rule, including revisions to the scope

of RPMs. However, it is beyond the scope of this rule to speculate whether that consultation would require RPMs with offsetting measures that are costly or otherwise.

Comment 17: One commenter suggested a revision to the final sentence for "environmental baseline." The commenter recommended changing "The impacts to listed species or designated critical habitat from Federal agency activities or existing Federal agency facilities that are not within the agency's discretion to modify are part of the environmental baseline." to "The ongoing impacts to listed species or designated critical habitat from existing facilities or activities that are not caused by the proposed action or that are not within the Federal action agency's discretion to modify are part of the environmental baseline."

Response: The Services decline to accept the suggested edits to the third sentence of the "environmental baseline" definition. As we described in the proposed rule, the original sentence inadvertently caused confusion and a focus on the term "ongoing" instead of the Federal agency's discretion to modify their own facilities and activities. However, the commenter's suggested language would inadvertently include in the "environmental baseline" those facilities and activities that are caused by the proposed action if the Federal agency has no discretion to modify them. Further, the language suggested by the commenter could be read also to include all or portions of the very activities or facilities that are the subject of the proposed Federal action of funding or permitting. Both results would improperly limit the scope of the jeopardy or adverse modification analysis. The Services' definition clarifies that the past and present impacts of existing activities and facilities entirely unrelated to the Federal action in the action area would be in the "environmental baseline" whether they are Federal, State, private, or other human activities.

Section 402.16—Reinitiation of Consultation

As proposed, we are revising the text at § 402.16(a) by deleting the words "or by the Service" to clarify that the responsibility and obligation to reinitiate consultation lies with the Federal agency that retains discretionary involvement or control over its action. The text at § 402.16(a) now reads: Reinitiation of consultation is required and shall be requested by the Federal agency, where discretionary Federal involvement or control over the action has been retained or is authorized by law and.... This revision will not prevent the Services from notifying the Federal agency if we conclude that circumstances appear to warrant a reinitiation of consultation.

Comment 1: Multiple commenters opposed the deletion of the phrase "or by the Service"; multiple other commenters supported the removal of "or by the Service"; and others noted that the Services are able to provide technical assistance to Federal action agencies when reinitiation is appropriate and requested that the regulations clarify the roles of the Services and action agencies in the "Reinitiation of Consultation" section (50 CFR 402.16(a)).

Response: We are removing the language "or by the Service" because the sentence as written creates confusion as to the scope of the authorities and roles of the Services relative to the Federal action agency. As explained in our 2019 rule and 2023 proposed rule, only the Federal action agency has the authority and responsibility to initiate or reinitiate consultation when warranted. The Services do not have the power to order other agencies to initiate or reinitiate consultation (*Sierra Club* v. *Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987); *Defs. of Wildlife* v. *Flowers*, 414 F.3d 1066, 1070 (9th Cir. 2005); 51 FR 19949, June 3, 1986); instead, we are able to recommend that the Federal action agency reinitiate consultation. Because the act of reinitiating consultation is solely the responsibility of the Federal action agency, removing "or

by the Service" in this portion of the regulations clarifies that responsibility. As noted in the 2023 proposed rule, the Services may still notify the Federal agency if circumstances warrant a reinitiation of consultation. The Services conclude that no additional regulatory language is needed to address this ability.

Comment 2: Two commenters suggested that it would be appropriate to delete § 402.16(b): One believes that the regulations in that paragraph exceed the Services' authority to choose when to reinitiate, and the other believes that identifying only these exceptions is arbitrary. Both stated that § 402.16(b) is "bad conservation policy."

Response: Section 402.16(b) was added in the 2019 rule to address issues arising under *Cottonwood Environmental Law Center* v. *U.S. Forest Service*, 789 F.3d 1075 (9th Cir. 2015), and to comport with the Wildfire Suppression Funding and Forest Management Activities Act, H.R. 1625, Division O, which was included in the Omnibus Appropriations bill for fiscal year 2018. The 2018 statute exempted land management plans prepared pursuant to the Federal Land Policy Management Act (FLPMA), 43 U.S.C. 1701 *et seq.*, and the National Forest Management Act (NFMA), 16 U.S.C. 1600 *et seq*., from reinitiation of consultation when a new species is listed or new critical habitat is designated provided that any authorized actions under the plan that may affect listed species or critical habitat are subject to their own site-specific consultations. We respectfully disagree that § 402.16(b) is "bad conservation policy" because the regulations in that paragraph allow the Services to focus our limited resources on those site-specific actions that may cause effects to listed species and designated critical habitat. As we noted in the 2019 rule, the Bureau of Land Management and the U.S. Forest Service (USFS) are required to periodically update their land management plans, at which time they would consult on any newly listed species or critical habitat.

Comment 3: One commenter recommended that reinitiation of consultation because of a new species listing or critical habitat designation be limited to that species or critical habitat, unless one of the other conditions for triggering reinitiation has been met.

Response: Informal or formal consultations that are reinitiated on the basis that the action may affect newly listed species or newly designated critical habitat are, in fact, limited to evaluating the effects of the action on that species or critical habitat, unless another regulatory condition requiring reinitiation applies.

Comment 4: The Services received several comments urging us to make changes to the 2019 regulatory revision clarifying that the duty to reinitiate consultation does not apply to certain existing programmatic land management plans prepared pursuant to the FLPMA or the NFMA when a new species is listed or new critical habitat is designated that may be affected by the plan. Some of the comments maintained that the revision exceeded our authority under the Act and did not support the conservation purposes of the Act.

Response: The Services decline to make changes to the 2019 regulatory revision exempting certain land management plans from the requirement to reinitiate consultation. The 2019 regulatory revision essentially incorporates the exemption (and the statutory conditions for applying that exemption) enacted by Congress in the 2018 Wildfire Suppression Funding and Forest Management Activities Act as part of the 2018 Omnibus Appropriations Act. Although the 2019 regulatory revision extended the exemption to land management plans issued under FLPMA, which were not addressed in the 2018 Omnibus Appropriations Act, the Services disagree that we lack authority to exempt these plans from the reinitiation requirement established by our regulations, not by statute. Because our regulations clarify that the exemption applies only if any action taken under a FLPMA or NFMA land management plan that may

affect a newly listed species or newly designated critical habitat can be evaluated in a separate section 7 consultation, we find that this regulatory provision is consistent with ESA section 7 and the overarching conservation purposes of the ESA.

Section 402.17—Other Provisions

As proposed, in this final rule, we are removing § 402.17 in its entirety. This regulatory revision simplifies the regulations and eliminates the need for any reader to consult multiple sections of the regulations to discern what is considered an "effect of the action." The previously articulated basis for § 402.17 will be addressed in an updated Consultation Handbook.

Comment 1: Several commenters disagreed with removal of § 402.17. They supported retaining the requirement that for an activity or consequence to be considered reasonably certain to occur it "must be based on clear and substantial information." The commenters asserted that removing § 402.17 would lead to less clarity and more confusion.

Response: In the proposed rule, the Services articulated several reasons why removing § 402.17 is preferable, including unnecessary confusion and regulatory complexity and potential inconsistency with the statutory requirement to use "the best scientific and commercial data available." These reasons adequately explain why removal of § 402.17 is warranted. First, removing § 402.17 simplifies the structural complexity of the "effects of the action" definition. Currently, the term "effects of action" is defined in § 402.02, but that definition cross-references § 402.17. Removing § 402.17 would make the "effects of the action" definition self-contained within § 402.02 without requiring reference to a separate regulatory provision.

Second, section 7(a)(2) of the Act requires both the Federal action agencies and the Services to use "the best scientific and commercial data available." This requirement applies to all aspects of section 7(a)(2), including determining what activities or consequences are

considered reasonably certain to occur when analyzing the "effects of the action" and any "cumulative effects." The requirement that such analysis must also be based on "clear and substantial information" creates an additional standard that could be read to limit what "best scientific and commercial data available" the Services may consider. Rather than focusing on the "best available" data, the "clear and substantial information" requirement would appear to circumscribe that data to only that which meets those heightened requirements.

Third, when read in combination with the preamble discussion in the 2019 final rule that emphasized a need for a "degree of certitude" in determining effects of the action that are reasonably certain to occur, § 402.17 could be construed as narrowing the scope of what constitutes the "best available scientific and commercial data." In other words, in light of the "degree of certitude" discussion in the preamble of the 2019 rule, § 402.17's "clear and substantial information" standard could be read to suggest that even if particular data were considered the best available, they potentially should not be relied upon if they lacked a heightened degree of certitude. The best available data will not always be free of uncertainty and often may be qualitative in nature, and, under the requirements of section 7(a)(2), are to be used by the Services in fulfilling their consultative role under the Act. For these reasons and also as discussed further below, we are removing 50 CFR 402.17 from the section 7 regulations.

Comment 2: Some commenters supported removing § 402.17, particularly the "clear and substantial information" standard, asserting that it conflicts with the statute, including the "best scientific and commercial data available" requirement, and inappropriately limits the effects analysis.

Response: The Services agree that removing § 402.17 is appropriate for the reasons discussed in this final rule.

Comment 3: Some commenters asserted the Services had not adequately explained how § 402.17 creates the potential for confusion.

Response: The Services' response above and in the preamble of our proposed rule (88 FR 40753, June 22, 2023) explains why § 402.17 has the potential to create confusion. As explained, § 402.17 creates potentially competing requirements between its "clear and substantial information" standard and the statutory requirement to use the best scientific and commercial data available. Such competing mandates necessarily contribute to confusion on the part of agencies and applicants who are forced to reconcile them in carrying out their obligations under section 7(a)(2). Additionally, as discussed more fully below, the factors identified in § 402.17, particularly § 402.17(b), are circular in nature, making them potentially unhelpful or confusing as to when an activity is or is not reasonably certain to occur.

Comment 4: As mentioned above, several commenters asserted that the recent *MLA* decision weighs against the Services removing § 402.17 from the section 7 regulations. They contend that the decision supports the following: the notion that effects must be "likely" to occur, the requirement of "clear and substantial information," and limitations on engaging in speculation. They also asserted that the Services should look to the *MLA* decision for direction in any guidance documents the Services develop.

Response: For the reasons discussed above, the *MLA* decision does not undermine the Services' decision to remove § 402.17. To the extent the *MLA* decision raises questions about how the Services resolve uncertainty, the Services reiterate that we will continue to follow accepted scientific methods and evaluate all lines of best available evidence to arrive at principled scientific determinations, including as to what consequences are or are not reasonably certain to occur. This is our longstanding approach to performing the section 7(a)(2) inquiry, and

the *MLA* court did not reject this approach. The narrow adverse holding of *MLA* did not speak to the Services' ability to remove § 402.17 from the section 7 regulations for all the reasons stated in the preamble. As with other court decisions, the Services will give appropriate consideration to *MLA* as applicable when developing future guidance.

Comment 5: Some commenters asserted that removing § 402.17 and the requirement of "clear and substantial information" is inconsistent with the Act and the best available science standard and would be problematic for consultations that involve assumptions and projections in areas of scientific uncertainty.

Response: As stated above, removing § 402.17 and the "clear and substantial information" standard does not change the fundamental "reasonably certain to occur" test, which will continue to be applied by the Services in our analyses, including those involving scientific uncertainty. Moreover, the 2019 rule specifically stated that the regulatory changes made in that rule were clarifications and did not "lower or raise the bar on section 7 consultations" and did not "alter what is required or analyzed during a consultation." 84 FR 44976 at 45015, August 27, 2019. While that was the intent of the 2019 rule, for the reasons discussed above, there are concerns that the "clear and substantial information" standard itself can cause confusion and could be read to be in tension with the Act's "best available scientific and commercial data" requirement. For all these reasons and as discussed throughout, removing § 402.17 is consistent with the Act.

Comment 6: Some commenters urged the Services to retain the factors set forth in § 402.17(a) and (b), rather than address them in a future guidance document.

Response: As stated in the proposed rule, the § 402.17(a) and (b) factors are a non-exclusive list of relevant considerations for determining whether an activity (§ 402.17(a)) or a

consequence (§ 402.17(b)) is reasonably certain to occur. Because they are non-exclusive, general in nature, and read more as suggestions than regulatory requirements, they are more appropriately addressed in an update to the Services' Consultation Handbook than in regulatory text. A discussion in the updated Consultation Handbook will lend itself to a more appropriate treatment of these factors and their relevance to identifying activities and consequences that are reasonably certain to occur. Moreover, factors similar to those in § 402.17(a) are already set forth in the Services' original 1998 Consultation Handbook. See Services' 1998 Consultation Handbook at 4-32. And while the § 402.17(b) factors (remoteness in time, remoteness in geographic location, and lengthy causal chain) were not specifically discussed in the 1998 Consultation Handbook, the factors themselves are tautological or circular in nature, i.e., each falls back on the concept of what is not reasonably certain to occur to satisfy the factor (e.g., a consequence is too remote in time if it is not reasonably certain to occur). At the same time, this portion of § 402.17 has the potential to create the misperception that the presence of any of the factors alone indicate that a consequence is not reasonably certain to occur, but the fact that a consequence may be remote in time, for instance, is not dispositive of whether it is not reasonably certain to occur. These potential problems with § 402.17(b) raise the question of whether the factors, in fact, provide much in the way of effective guidance. A more detailed discussion in the updated Consultation Handbook can remedy this potential deficiency.

An additional reason to remove the identified factors is how each set of factors is introduced in the regulatory text. For both § 402.17(a) and (b), they are described as factors to evaluate whether "activities" or "consequences" are "caused by the proposed action," which is governed by the two-part test of "but for" causation and reasonably certain to occur. Yet the factors themselves speak only to what may be considered reasonably certain and ignore what

may be relevant for evaluating the "but for" prong of the test. While this potential shortcoming might be addressed through further regulatory revision, we believe removal of § 402.17 is the preferred solution for all the reasons stated.

Comment 7: Some commenters supported removing the factors set forth in § 402.17. They asserted that the factors like those found in § 402.17(b) are one-sided and lean only toward negating consideration of certain effects as opposed to also including factors that weigh in favor of considering effects. They assert that such an approach risks inappropriately limiting the effects analysis and species protections, which they consider at odds with the purpose of the ESA. They also question the utility of guidance that might repeat the identified deficiencies.

Response: The Services agree that the removal of § 402.17 is advisable for the reasons stated elsewhere in this final rule. We will take into consideration the commenter's suggestion to potentially broaden the scope of any guidance on factors relevant to what activities or consequences are considered "reasonably certain to occur" in developing our updated Consultation Handbook.

Comment 8: Some commenters recommended adding the factors listed in § 402.17(b) as part of the definition of "effects of the action."

Response: The Services respectfully decline this suggestion. For the reasons discussed above, we are removing the non-exclusive list of factors in § 402.17(b) from the regulations. Additionally, including these non-exclusive, general factors in the definition of "effects of the action" would add unnecessary complexity to the definition.

Comment 9: Some commenters asserted that removing § 402.17 will lead to delays, increased costs for stakeholders, less efficient consultation processes, increased regulatory

burdens, and inconsistent outcomes. They also assert that, without § 402.17, the Services would be free to presume consequences regardless of their likelihood or "degree of certitude."

Response: We respectfully disagree with the commenters. For the various reasons discussed in this preamble, the Services conclude that removing § 402.17 overall will be more consistent with the Act, resolve potential confusion, and remove regulatory text that is better addressed in an updated Consultation Handbook. As referenced in the preamble of the 2019 rule, the 2019 regulatory changes to the section 7 regulations did not lower or raise the bar on section 7 consultations or alter the scope of analysis. The fundamental test of "reasonably certain to occur" remains, which places limitations on the scope of our causation analysis and avoids speculation. To the extent that some commenters are suggesting that one may read § 402.17 to heighten the requirements for determining what activities or consequences are reasonably certain to occur, such heightened requirements (as discussed above) may well be inconsistent with the statutory mandate to use the "best scientific and commercial data available." In particular, the agencies have a fundamental duty to "insure that any action authorized, funded, or carried out by [an action] agency is not likely to jeopardize the continued existence of a list species." 16 U.S.C. 1536(a)(2). Unduly limiting the scope of "the best scientific and commercial data available" that an agency may consider could undermine the agency's duty to "insure"—i.e., "to make certain," *Home Builders*, 551 U.S. at 667—that an action is not likely to jeopardize. Because the fundamental causation test remains, removal of the "clear and substantial information" standard will reduce, not increase, confusion. And, we expect the non-exclusive factors set forth in § 402.17 will be addressed and expanded upon in the updated Consultation Handbook. As a result, we do not anticipate removal of § 402.17 will lead to delays, increased costs or regulatory burdens for stakeholders, or less consistent outcomes.

Comment 10: Some commenters expressed a preference for the factors identified in § 402.17(a) and (b) to be addressed in rulemaking rather than guidance. These commenters claimed that rulemaking affords the public with opportunities to comment and requires additional process to revise the regulatory text compared to non-binding guidance. One commenter also asserted the Services should not remove § 402.17 until after public comment on any updated draft Consultation Handbook. Commenters also expressed a concern about how long it will take the Services to issue any updated guidance.

Response: The Services intend to provide an opportunity for public comment on any updated Consultation Handbook, which we anticipate making available after this final rule. Therefore, the public will have an opportunity to review and comment on guidance developed based on the factors identified in § 402.17. While any future Consultation Handbook is not expected to be binding, the non-exclusive, general nature of the factors found in § 402.17 make their regulatory effect to be of, at most, limited import. As for timing, the reasons discussed above explain why it is appropriate to remove § 402.17 now, including the factors of § 402.17(a) and (b). The Services therefore respectfully decline the request to delay their removal.

Comment 11: One commenter opposed the 2019 rule's expansion of the "reasonably certain to occur" standard beyond indirect effects and relatedly urged the Services not to adopt guidance perpetuating the expansion. If guidance is necessary on an analytical framework for how to reasonably predict future effects, the commenter urged the Services to adopt an approach similar to the Department of the Interior Solicitor's M-Opinion (Department of the Interior, Office of the Solicitor, Opinion M–37021 (Jan. 16, 2009)) regarding the term "foreseeable future" in the context of species listing.

Response: For the reasons discussed in the 2019 rule and elsewhere in this rule, we choose to keep our two-part causation test including "reasonably certain to occur" (which collapsed the concepts of direct effects, indirect effects, and interrelated and interdependent activities). Because we are keeping our two-part test, we expect to provide guidance in an updated Consultation Handbook on appropriate considerations. We will consider all credible sources, including the 2009 Solicitor M-Opinion, as we prepare helpful guidance on what is "reasonably certain to occur."

Sections 402.02 and 402.14—Scope of RPMs

As proposed, we are revising the definition of "reasonable and prudent measures" to adhere more closely to the statute by replacing the term "believes" with "considers" and replacing the clause "impacts, i.e., amount or extent, of incidental take" with "impact of the incidental take on the species." The definition now reads: Reasonable and prudent measures refer to those actions the Director considers necessary or appropriate to minimize the impact of the incidental take on the species. We are also revising § 402.14(i)(1)(i) and (ii) to reflect the above change. To recognize that RPMs are not limited solely to reducing incidental take and may occur outside of the action area, we are also adding the following language to the end of § 402.14(i)(2): "and may include measures implemented inside or outside of the action area that avoid, reduce, or offset the impact of incidental take." Further, we are adding to § 402.14 a new paragraph at (i)(3) to clarify that offsets within or outside the action area can be required to minimize the impact of incidental taking on the species: Priority should be given to developing reasonable and prudent measures and terms and conditions that avoid or reduce the amount or extent of incidental taking anticipated to occur within the action area. To the extent it is anticipated that the action will cause incidental take that cannot feasibly be avoided or reduced in the action area,

the Services may set forth additional reasonable and prudent measures and terms and conditions that serve to minimize the impact of such taking on the species inside or outside the action area.

Comments were received on a variety of aspects of the above changes that expand the scope of RPMs but can be grouped under the following two general categories: authority and application.

Authority

Comment 1: Some commenters contended that the Services' proposal allowing for the use of offsets as RPMs conflicts with the plain language of ESA section 7(b)(4)(C)(ii). Specifically, these commenters asserted that ESA section 7(b)(4)(C)(ii) requires RPMs to "minimize" the impacts of incidental take rather than to compensate for or eliminate those impacts through offsetting measures.

Response: The Services disagree that the RPM regulatory revision conflicts with the plain language of ESA section 7(b)(4)(C)(ii), and, in fact, assert the opposite. As discussed more fully below, the plain language of section 7(b)(4)(C)(ii) supports the use of offsets as RPMs. The relevant language plainly states that RPMs are to include measures that minimize the impacts of incidental take, not incidental take itself. Like measures that avoid or reduce incidental take, offsetting measures also minimize the impacts of incidental take on the species.

Regarding these commenters' specific assertion that ESA section 7(b)(4)(C)(ii) used the term "minimize" rather than "eliminate" or "compensate for," these commenters appear to view the use of "minimize" as reflecting congressional intent to preclude the Services from using offsets that minimize the impact of incidental taking to the degree that it is eliminated or compensated for. We note, however, that the ordinary meaning of "minimize" found in dictionary definitions does not refer to any specific quantum that may be reduced. Some

definitions, in fact, indicate that the term means "[t]o reduce (esp. something unwanted or unpleasant) to the smallest possible amount, extent, or degree." *Minimize*, Oxford English Dictionary, *https://www.oed.com/search/dictionary/?scope=Entries&q=minimize* (last accessed on October 26, 2023). The ESA, similarly, does not specify the extent to which impacts are to be minimized. Accordingly, offsets may minimize the impacts of incidental take on the species through measures that counterbalance the loss of individuals taken as a result of the action subject to consultation (e.g., through restoration of habitat anticipated to result in the replacement of the individuals that were taken). Such offsetting measures must be proportional to the impact of incidental take that cannot be avoided or reduced, with the amount or extent of the taking (as described in the incidental take statement) representing the upper limit on the scale of any offsetting measures.

Comment 2: Many commenters maintained that Congress intended offsetting measures to address impacts from incidental take under ESA section 10, not ESA section 7. ESA section 10(a)(2)(B)(ii) authorizes the Services to issue incidental take permits if, among other things, applicants' conservation plans "minimize and mitigate" impacts from incidental take. Because ESA section 7(b)(4)(C)(ii), unlike ESA section 10(a)(2)(B)(ii), specifies that RPMs are to "minimize" impacts of incidental take, these commenters asserted that Congress did not intend for RPMs to also "mitigate" impacts through offsetting measures. These commenters further argued that the proposal allowing for the use of offsets under ESA section 7 impermissibly conflated "minimize" with "mitigate."

Response: The Services disagree that the statutory criteria for issuing incidental take permits under ESA section 10 indicates that Congress intended to require mitigation from private applicants in the context of section 10, but specifically limited the use of such measures when

addressing the *same* impacts in the context of section 7. The plain language of the ESA indicates that Congress considered the terms "minimize" and "mitigate" to have overlapping meaning when those terms were added as part of the 1982 ESA amendments.

In 1982, when Congress added the provisions for reasonable and prudent measures and ESA section 10 incidental take permits, Congress also revised the process by which a Federal agency, State, or applicant may seek an exemption from the requirement in ESA section 7(a)(2) to ensure against the likelihood of jeopardy or adverse modification. See H.R. Rep. No. 97-56, at 28 (May 17, 1982) and S. Rep. No. 97-418, at 19 (May 26, 1982). Included in the amendments adopted by Congress were additional criteria to be considered by the Endangered Species Committee in granting an exemption. See 16 U.S.C. 1536(h)(1) (ESA section 7(h)(1)). Specifically, these amendments provided that the Endangered Species Committee can issue an exemption if, among other things, it "establishes such reasonable *mitigation* and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to *minimize* the adverse effects of the agency action." 16 U.S.C. 1536(h)(1)(B) (ESA section 7(h)(1)) (emphasis added). Thus, in the same section of the Act as the RPMs provision, Congress specifically described mitigation measures that offset adverse effects as measures that *minimize* such effects. This provision provides strong support that Congress considered the terms "minimize" and "mitigate" to have overlapping meaning and that mitigative measures also encompass measures that minimize the impacts of incidental take and vice versa.

This reading of the 1982 ESA amendments is also supported by the ordinary meaning of the terms "minimize" and "mitigate," which have a substantial degree of overlap. For example, as mentioned above, the Oxford English Dictionary defines the term "minimize" as "[t]o reduce

(esp. something unwanted or unpleasant) to the smallest possible amount, extent, or degree." *Minimize*, Oxford English Dictionary, *https://www.oed.com/search/dictionary/?scope=Entries&q=minimize* (last accessed on October 26, 2023). Similarly, the term "mitigate" means "[t]o alleviate or give relief from (an illness or symptom, pain, suffering, sorrow, etc.); to lessen the trouble caused by (an evil or difficulty)." *Mitigate*, Oxford English Dictionary, *https://www.oed.com/dictionary/mitigate_v?tab=meaning_and_use#36427497* (last accessed on October 26, 2023).

The Services' view of the proper interpretation of section 10 and section 7 is longstanding. For instance, the Services' position that Congress did not intend for section 10 to establish more rigorous criteria for addressing the same impacts of incidental take than section 7 is found in the preamble to the 1989 rule that finalized revisions to the implementing regulations for addressing incidental take of marine mammals under the Marine Mammal Protection Act and the ESA. See Incidental Take of Endangered, Threatened, or Other Depleted Marine Mammals, final rule, 54 FR 40338 at 40346, September 29, 1989. In the response to public comments, the Services specifically rejected a comment suggesting that ESA section 10(a)(1)(B) provided for heightened requirements over section 7(a)(2). See id. The Services stated the two sections were intended to provide "the same level of protection for endangered and threatened species." Id. According to the Services, these comments "misconstrued the purpose and effect of section 10 provisions relating to private actions" because they implied that "private activities are subject to stricter protection standards than activities with Federal involvement." Id. As the Services further explained, there was "no indication in the ESA or its legislative history that Congress intended to

set up substantially different or stricter protection standards for private activities by requiring a conservation plan." Id.

For these reasons, section 10's reference to measures that "minimize and mitigate" impacts from incidental take should not be read to limit the Services' ability to specify offsets as RPMs to minimize the same impacts in the context of section 7.

Comment 3: We received some comments indicating the Services' current approach that confines RPMs to measures that avoid and reduce incidental take levels is consistent with the legislative history of the 1982 amendments to the ESA.

Response: The Services disagree with these comments. Review of the legislative history of the 1982 ESA amendments demonstrates that Congress considered, but rejected, competing bill language to amend the ESA that would have required reasonable and prudent measures under section 7 and habitat conservation plans under section 10 to minimize "incidental take," rather than minimize the "impacts" from incidental take. S. 2309, 97th Cong. section 6(2) (May 26, 1982). As alluded to above, the 1982 ESA amendments changed section 7(b) to include provisions concerning incidental taking of listed species. The new provisions included in sections 7(b)(4) and 7(o)(2) were aimed at addressing a situation in which the Service's biological opinion advises a Federal agency and an applicant (if any) that the proposed action, or the adoption of reasonable and prudent alternatives, will not violate ESA section 7(a)(2), but is still likely to result in taking individuals in violation of ESA section 9. See H.R. Conf. Rep. No. 97-835, (1982), reprinted in 1982 U.S.C.C.A.N. 2860, 2868 (Federal agencies receiving a favorable biological opinion still may be subjected to citizen suits or civil or criminal penalties for violating section 9 of the Act). To remedy this potential conflict, the 1982 ESA amendments contained an exemption to the ESA's prohibition on "take" of listed species for takings that

comply with any terms and conditions specified in the incidental take statement to carry out the reasonable and prudent measures required by the Service. See 16 U.S.C. 1536(b)(4) (ESA section 7(b)(4)) and 16 U.S.C. 1536(o)(2) (ESA section 7(o)(2)).

The two bills under consideration by Congress in reauthorizing and amending the ESA in 1982 were H.R. 6133 and S. 2309. Both bills were reported out of the respective committees to the full House and Senate with important differences in defining the scope of reasonable and prudent measures. See H.R. Rep. No. 97-567 (May 17, 1982) and S. Rep. No. 97-418 (May 26, 1982). As reported out of the House Committee on Merchant Marine and Fisheries, H.R. 6133 contained the language that Congress ultimately adopted in the ESA to describe the scope of reasonable and prudent measures intended to address the impact of the taking on the species: "those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such *impact*." H.R. 6133, 97th Cong. section 3(2) (May 17, 1982) (emphasis added).

In contrast, S. 2309, as reported out of the Committee on the Environment and Public Works, explicitly directed that these measures be confined to reducing incidental take. S. 2309, in relevant part, provided "those reasonable and prudent measures that must be followed to minimize *such takings of such species*." S. 2309, 97th Cong. section 6(2) (May 26, 1982) (emphasis added). Unlike H.R. 6133, this Senate bill was explicitly directed at the incidental take itself, rather than the impacts on the species.

In resolving the differences between the House and Senate, the Conference Committee chose the House provisions requiring reasonable and prudent measures to minimize *the impact of the take* on the species, rather than the Senate amendments that restricted the measures to minimizing *the levels of take*. See H.R. Conf. Rep. No. 97-835, (1982), reprinted in 1982 U.S.C.C.A.N. 2860, 2868. On September 20, 1982, and September 30, 1982, the Senate and

House, respectively, agreed to the Conference Report on H.R. 6133. See 128 Cong. Rec. S 11822-24 (September 20, 1982) and 128 Cong. Rec. H 8040-42 (September 30, 1982). H.R. 6133 was subsequently signed by the President and became law on October 13, 1982. See Endangered Species Act Amendments of 1982, P.L. 97-307, 96 Stat, 1411 (October 13, 1982).

Given that Congress considered and rejected specific language that would have restricted reasonable and prudent measures to activities aimed at reducing incidental take, the legislative history reveals a purposeful choice of Congress in favor of the authority of the Services to select measures that address "impacts to the species" from incidental take, rather than confining these measures to reducing incidental take levels *only*. Consistent with this legislative history, all incidental take statements will continue to retain the requirement to describe the amount or extent of incidental take for the purpose of establishing a clear and transparent measure for reinitiating consultation. Thus, impacts on the species, expressed in terms of the amount or extent of incidental take, may be minimized by measures that not only avoid or reduce incidental take levels, but that also offset any residual impacts that cannot be feasibly avoided or reduced. For example, if an incidental take statement quantified the amount or extent of take as the death of 10 individuals of the species and the take of those individuals cannot be avoided or reduced, the Services may minimize the loss of those individuals by specifying offsetting RPMs such as habitat improvements that would result in the anticipated addition of up to 10 individuals (provided other regulatory requirements are satisfied).

Comment 4: Some commenters questioned why the Services were proposing to change their long-established position that section 7 requires minimization of the level of incidental take and that it is not appropriate to require mitigation for impacts from incidental take. Other

commenters noted, however, that no rationale has previously been provided to support restricting RPMs to measures that solely avoid or reduce incidental take levels.

Response: We agree with the comments that observed the sparse rationale underpinning our prior approach in restricting RPMs to avoiding or reducing incidental take within the action area. With this rulemaking, however, the Services take this opportunity to explain why a change is justified.

In over 30 years of practice, we have found that there have been instances in which impacts from incidental take could not be feasibly minimized through measures that avoid or reduce impacts within the action area. In some of those instances, the impacts potentially could have been minimized through offsetting measures, providing a better conservation outcome for the species. Overall, our prior approach of focusing solely on reducing the amount or extent of incidental take within the action area has led to the continued deterioration of the condition of listed species and their habitats and has not sufficiently minimized the impact of incidental take. In recognition that our prior approach was unnecessarily restrictive in carrying out ESA section 7(b)(4)(ii)'s direction to specify those measures that are "necessary or appropriate" to minimize the impacts of incidental take on the species, the Services are, therefore, revising the section 7 implementing regulations to expand the scope of RPMs to allow for the use of offsetting measures. These measures will further minimize the impacts of incidental take caused by the action that cannot be feasibly avoided or reduced. Under this regulatory change, the amount or extent of take described in the incidental take statement will be the maximum level of impacts to minimize.

As explained above, this regulatory revision is based upon a careful review of the Act's text, the purposes and policies of the ESA, and the 1982 ESA legislative history. Based upon that

review, we find that this change more fully effectuates the intent of Congress and better serves the conservation goals of the ESA. See, e.g., 16 U.S.C. 1531(b) (describing the conservation purposes of the Act). This regulatory revision will allow the Services to specify measures to offset residual impacts of incidental take that cannot otherwise be feasibly addressed through avoidance and reduction measures. In allowing for residual impacts to be addressed, this revision may reduce the accumulation of adverse impacts to the species that is often referred to as "death by a thousand cuts," which can undermine the Act's overarching goal of providing for the conservation of listed species.

As explained in the proposed rule, this approach for identifying RPMs will also allow the Services to adhere more effectively to the preferred sequence or hierarchy in the development of mitigation. That preferred sequence or hierarchy aims to avoid or reduce impacts to the species first, and then potentially minimize residual impact to the species through offsets.

Comment 5: Several commenters maintained that the proposal allowing for use of offsetting measures as RPMs violates the "minor change rule," which requires RPMs to specify only minor changes that do not alter the basic design, location, duration, or timing of the action. For example, some noted that offsets occurring outside of the action area would necessarily violate the "minor change rule."

Response: The Services disagree that the revision allowing for RPMs to consist of offsets violates the "minor change rule." Because, in most instances, they operate as additional measures to minimize impacts of incidental take that cannot be avoided, offsets (regardless of whether they occur within or outside of the action area) would not be expected to result in any modifications that would prevent the action subject to consultation from proceeding as essentially proposed. For example, a consultation on a residential development may include RPMs that offset the take

of members of a listed species through contributions to a conservation bank established to repair habitat for that species outside of the action area. In this example, the offset would not result in any changes to the development, including its location, and the development would be able to proceed as planned. On the other hand, RPMs that include measures designed to avoid and reduce incidental take may result in direct changes to the subject action. In the example involving the residential development, for instance, RPMs that specify rerouting an access road to skirt the edge of wetland habitat for a listed species would result in less incidental take. Because the measure directly modifies the design of the residential development, the Services would need to consider whether this change would be "minor," in compliance with the "minor change rule." If the measure would not alter the fundamental design of the development project, the action would go forward as essentially planned, and the change in design would not violate the "minor change rule."

Because we do not expect offsetting measures that occur outside of the action area to violate the "minor change rule," we are adopting clarifying language at 50 CFR 402.14(i)(2), which expressly recognizes that offsets may occur within or outside of the action area.

Comment 6: The Services received comments asserting that the proposal relating to RPMs should be carried out under section 7(a)(1), not section 7(a)(2), of the Act. Additionally, one commenter sought specific regulatory changes withholding issuance of an incidental take statement unless the relevant action agency has an ESA section 7(a)(1) conservation program in place for species covered under the subject incidental take statement.

Response: Although section 7(a)(1) and section 7(a)(2) have complementary roles in fulfilling the ESA's conservation goal (see ESA section 2(b)), section 7(a)(1) is not the preferred

statutory mechanism to carry out the Services' revision relating to the use of offsets to minimize impacts of incidental take.

The regulatory changes we are adopting in this final rule relating to offsetting RPMs are based on statutory language arising from the process set forth in section 7 for the issuance of biological opinions and incidental take statements, especially section 7(b). Section 7(a)(1) provides separate authority not directly related to these changes. We, therefore, decline the commenters' request.

In addition, the ESA provides no authority for the Services to require Federal action agencies to have a conservation program under ESA section 7(a)(1) as a condition of an incidental take statement. See 16 U.S.C. 1536(b)(4) (setting forth the conditions for issuance of incidental take statements). Therefore, we decline to adopt the commenter's recommendation, as it conflicts with the plain language of section 7(b)(4) of the Act.

Comment 7: The Services received comments that claimed the proposal recognizing the use of offsets as RPMs could violate the Takings Clause of the Fifth Amendment of the United States Constitution. Some of these comments urged the Services to withdraw the proposal based upon the same concerns raised in the 2018 notice announcing the withdrawal of the 2016 FWS Endangered Species Act Compensatory Mitigation Policy (83 FR 36469, July 30, 2018).

Response: In light of the statutory and regulatory requirements in place for issuing RPMs, the concerns that the use of offsets as RPMs may lead to unconstitutional takings are misplaced. The grounds for withdrawing the 2016 FWS Endangered Species Act Compensatory Mitigation Policy centered on the notion that offsite mitigation raises concerns of whether a sufficient "nexus" exists establishing that the relevant impact caused by the specific project proponent (rather than some other actor) is being addressed through the requested mitigation. See 83 FR

36469, July 30, 2018. In addition, according to the withdrawal notice, mitigation that adhered to the FWS's policy goal of achieving a "net conservation benefit" (which is no longer in effect) could potentially run afoul of Supreme Court precedent requiring "rough proportionality" between the government's requested mitigation and the impact being remedied.

Under this revision, however, any offsetting measures, regardless of whether they are applied within or outside of the action area, must be "necessary or appropriate" to minimize the impacts of incidental take on the species caused by the action that is subject to consultation. To be in accordance with this statutory requirement, all RPMs (including offsets) must have the requisite nexus between the impacts of incidental take caused by the action and measures that minimize those impacts. In other words, any offsetting measures that are "necessary or appropriate" would necessarily target the impacts of incidental take caused by the proposed Federal action, though such offsets may occur in locations that have been subject to impacts from other activities. As previously explained, the Services may minimize the impacts of incidental take by specifying offsetting measures (such as habitat improvements) that would result in the anticipated addition of individuals estimated in the incidental take statement to be taken by the proposed action.

With regard to the concern that mitigation (particularly mitigation with the goal of achieving a "net conservation gain") will fail to be proportional to the harm, offsets specified as RPMs must be commensurate with the impact of the incidental taking caused by the action. As explained in the preamble of the proposed rule (88 FR 40753, June 22, 2023), the scale of the impacts from incidental take will serve as the upper limit for the scale of the offset. Importantly, the Services are not specifying RPMs with the goal of achieving "net conservation gain," which

was the planning goal referenced in the 2016 FWS Endangered Species Act Compensatory Mitigation Policy but is no longer the goal used by FWS.

Comment 8: Some commenters suggested that the proposal to consider offsetting measures to minimize the impacts of incidental take exceeds the agencies' authority under the ESA. Quoting the decision in *Maine Lobstermen's Association* v. *NMFS*, 70 F.4th 582, 596 (D.C. Cir. 2023), these commenters maintain that Congress intended the Services to have a more limited role under section 7 that involves providing expert assistance to the Federal action agency, rendering an opinion, and if the conclusion is no jeopardy, issuing the incidental take statement.

Response: The Services disagree that the revision recognizing that RPMs may include offsetting measures to minimize impacts of incidental take caused by the action subject to consultation represents a broad expansion of power in contravention of the ESA. The Act plainly authorizes the Services to issue measures that are necessary or appropriate to "minimize" the impacts of incidental take. As explained above, offsetting measures, like measures that avoid and reduce incidental take, also minimize the impacts of incidental take on the species.

Under many circumstances, measures that avoid and reduce incidental take will be all that is necessary or appropriate to minimize the impacts of incidental take. However, in those circumstances when impacts from incidental take cannot feasibly be minimized through measures that avoid and reduce incidental take, this revision would allow the Services to consider offsetting measures for inclusion as RPMs. This approach is fully consistent with the Services' statutory authority, and the *MLA* case (which did not address the Services' authority with regard to RPMs) does not stand for a contrary position. For additional discussion of the *MLA* case and the requirements of section 7, please see the discussion of the case at the

beginning of the "Summary of Comments and Responses" section and the specific discussion relating to the removal of § 402.17 above.

For all the reasons mentioned above, we find that the revision recognizing the use of offsets as RPMs is consistent with the plain language of the Act, a better reflection of Congressional intent, and better serves the conservation goals of the Act.

Comment 9: We received several comments questioning the relationship between the "minor change rule," the Services' mitigation policies, and costs of offsets as RPMs.

Response: Please see our response to comment 5 above regarding the relationship between the "minor change rule" and the use of offsets as RPMs. As a matter of practice, when offsetting measures are applicable to a specific formal consultation, the Services will identify potential offsetting measures and work with the action agency (and applicant, if applicable) when developing RPMs (including offsets) to determine, among things, the economic feasibility of these measures. Thus, any costs associated with the offsetting measures would be considered during development of the measure, in coordination with the Federal action agency (and applicant, if applicable), to ensure that the offsetting measure is reasonable and prudent. Measures that are cost-prohibitive in view of the nature of the action may not be considered reasonable and prudent.

With respect to the Services' consideration of their respective mitigation policies, these policies will help inform the development of offsetting measures but will not change the statutory or regulatory requirements that apply to all RPMs. Offsetting measures will be proportionate to the impact of the taking. In addition, monitoring and reporting requirements, as part of the terms and conditions, will continue to be used to verify implementation and efficacy of RPMs, including offsets.

Application

Comment 1: Several commenters questioned how offsets would be developed and stated that the relationship of habitat and critical habitat to offsetting measures is unclear. Some commenters asked whether the Services would use habitat types and ratios to determine appropriate offsets.

Response: RPMs that include offsetting measures will be species-specific and will depend upon the factual circumstances surrounding the consultation. Implementing the offsets specified by the Services would be the responsibility of the action agency or applicant. In specifying offsetting measures to minimize the impacts of incidental take, the Services may identify offsetting measures that are implemented through various types of mechanisms such as conservation banks, in-lieu fee programs, and other kinds of mitigation devices established previously by project proponents. However, any offsetting measures included as RPMs would be designed to minimize the impact of the incidental take resulting from the proposed action to the subject species, and there are scientifically recognized techniques and methodologies that have been used to determine the appropriate level of offsets for species commensurate with the impact of the take to the species. Offsetting measures may consist of purchasing, preserving, or restoring the habitat of the applicable species impacted by incidental take caused by the action. However, offsets do not necessarily have to be applied within critical habitat designated for the relevant species. In addition, RPMs that include offsetting measures may be directed at improving the habitat of the relevant species, regardless of whether the proposed action resulted in impacts to that species' habitat. Offsets may be based on habitat ratios, equivalency modeling, or one-to-one replacement, for example. Consistent with the ESA and its implementing regulations, offsets will be necessary or appropriate for minimizing the impacts of incidental take. In all cases, the impact

of the take caused by the action, as expressed in the ITS as the amount or extent of incidental take, would provide an upper limit on the scale of any offsetting measures.

Comment 2: Several comments requested information on what specific mechanisms may be used to deliver offsets, and whether these mechanisms may be sponsored by third parties or undertaken by the project proponent.

Response: Some potential mechanisms that could be used to deliver offsets include conservation banks, in-lieu fee programs, and restoration programs. Other mechanisms that may be considered are described in the Services' mitigation policies. Mechanisms that may be considered by the Services could be sponsored by third parties or be the responsibility of the project-proponent. In addition to the Services' mitigation policies that provide guidance in the selection of mechanisms to deliver offsets, the FWS, pursuant to the 2021 National Defense Authorization Act (Pub. L. 116-283), is preparing a rule regarding conservation banking and other mechanisms that, if finalized, will address specific criteria and requirements of those mechanisms to receive FWS approval.

Comment 3: Several commenters expressed concern regarding the lack of existing mitigation banks or in-lieu fee programs for various species or parts of the country, which they contend may result in a delay in completing consultation and implementing their project.

Response: The Services do not anticipate that the lack of available offsetting mechanisms would result in delays to completing consultations in a timely manner or within the statutory or regulatory timeframes. The Services understand the current availability of third-party offset mechanisms (e.g., conservation banks and in lieu fee programs) varies greatly across the country and by species, and we will consider the availability of these mechanisms when identifying RPMs. If these mechanisms to deliver offsets are not available, the Services anticipate that such

measures would generally not be identified as an RPM. However, more banks and in-lieu fee programs are being established each year as identified in the Regulatory In-lieu Fee and Bank Information Tracking System (U.S. Army Corps of Engineers, *RIBITS: Regulatory In-lieu Fee and Bank Information Tracking System*, last accessed November 8, 2023. *https://ribits.ops.usace.army.mil/ords/f?p=107:2:5966340072209*). Again, the availability of existing mechanisms is one important factor the Services will consider when determining whether measures are necessary or appropriate to minimize the impact of incidental take.

Comment 4: Some commenters recommended avoiding redundant, additional layers of regulation and multiple mitigation mandates.

Response: The Services disagree that the regulatory change to the scope of RPMs will create redundant regulation and additional mitigation mandates. On the contrary, this regulatory change is in alignment with our initiatives to develop efficiencies and holistic approaches to conserving federally listed species. This regulatory change was developed in consideration of existing regulatory frameworks (e.g., Clean Water Act section 404(b)(1) guidelines) used by permitting agencies with whom the Services have routinely worked in the conservation of listed species. Mitigation associated with other existing regulatory frameworks is often included in the proposed action by the action agency requesting consultation. The effect of these mitigation measures is considered in the jeopardy analysis and can also minimize the impacts of incidental take caused by the proposed action. When the proposed action includes mitigation measures, there may be no need to include additional offsets as RPMs. As part of the Services' initiatives aimed at leveraging other conservation efforts and building consistency and efficiencies in planning and implementing resource offsets, this regulatory revision promotes conservation at a landscape scale to help achieve the conservation purposes of the ESA. In promoting these

purposes, the revision would provide flexibility to the Services to specify measures to address impacts from incidental take that cannot be feasibly addressed through measures that avoid or reduce incidental take. As mentioned in the preamble of the proposed rule (88 FR 40753, June 22, 2023), impacts from incidental take that are not addressed can accumulate over time, potentially leading to more severe impacts on the species (sometimes referenced as "death by a thousand cuts"). In addition, to the extent that RPMs may not be feasible within the action area, this revision provides the flexibility to specify measures within locations outside of the action area that serve as important corridors for species survival, reproduction, or distribution, providing benefits to the species on a landscape scale.

Comment 5: A few commenters asked for clarification or a definition of the term "feasibly" proposed in the RPM regulatory revisions at 50 CFR 402.14(i)(3): To the extent it is anticipated that the action will cause incidental take that cannot feasibly be avoided or reduced in the action area, the Services may set forth additional reasonable and prudent measures and terms and conditions that serve to minimize the impact of such taking on the species inside or outside the action area.

These commenters requested the Services describe the circumstances under which the Services will determine that the impacts of the agency action "cannot feasibly" be "avoided or reduced" within the action area.

Response: The term "feasibly" should be understood to have the same ordinary meaning found in the dictionary definition of that term. For instance, "feasibly" is the adverb form of the term "feasible," which means "[o]f a design, project, etc.: [c]apable of being done, accomplished or carried out; possible, practicable". *Feasible*, Oxford English Dictionary, *https://www.oed.com/search/dictionary/?scope=Entries&q=feasible* (last accessed on November

5, 2023). We, therefore, do not find that a regulatory definition is needed. The Services may find measures that avoid or reduce incidental take cannot feasibly minimize the impacts of incidental take when such measures would violate the "minor change rule." Or, in some cases, the Services may determine that specifying measures that avoid or reduce incidental take within the action area as RPMs would not be feasible because the degraded condition of the area would require cost-prohibitive measures that are not reasonable and prudent. Under these types of limited circumstances, the Services may consider minimizing the impacts from incidental take caused by the proposed action through offsetting measures that occur within or outside of the action area.

Comment 6: We received several comments related to the preferred order of RPMs and a request for clarification of the term "priority." Many commenters supported a preferred order/hierarchy, while others wanted more flexibility.

Response: Under this regulatory change expanding the scope of RPMs, the Services will place a priority on measures that avoid or reduce incidental take over offsetting measures. In recognition of the Services' preference to specify measures that prevent incidental take from occurring in the first instance, we will first consider measures that avoid or reduce incidental take in the action area. See 88 FR 40753, June 22, 2023. If impacts from incidental take cannot be feasibly minimized through measures that avoid or reduce incidental take, the Services will then consider offsetting measures to minimize the residual impacts of incidental take in the action area. After considering whether offsetting measures can feasibly be applied within the action area, the Services may then consider specifying offsets outside of the action area to minimize the impacts of incidental take caused by the action subject to consultation. In summary, the steps are as follows:

1. Avoid or reduce, within the action area, the impact of incidental taking on the species.

2. Offset, within the action area, the impact of incidental taking on the species.

3. Offset, outside the action area, the impact of incidental taking on the species.

Comment 7: One commenter stated that the determination of whether offsetting RPMs are or are not reasonably available in the action area may depend in part on whether the action area is broadly or narrowly defined and how well the site-specific effects of the proposed Federal action are identified and analyzed in the biological opinion. The commenter asked the Services to clarify how they will ensure that an action area is properly drawn and keyed to the actual impacts of the agency action and that the effects of the action are properly analyzed at a site-specific level, to minimize the potential for arbitrary determinations that offsite mitigation is necessary.

Response: The Services do not define the action area broadly or narrowly for the purpose of ensuring that RPMs are available in the action area. In accordance with the regulatory definition of "action area," the action area must be based upon the specific action subject to the consultation and must consist of "all areas to be affected directly or indirectly by the Federal action and are not merely the immediate area involved in the action." 50 CFR 402.02. The Services did not propose any changes to the definition of "action area" or the process of defining it. Thus, the Services will continue to ensure that an action area is properly drawn and keyed to the actual impacts of the agency action and that the effects of the action are properly analyzed within the defined action area. Regarding application of offsetting measures, the Services clarify that offsetting measures could be included as RPMs inside and outside the action area. As previously explained in comment 6 above, the Services will follow a preferred sequence for developing RPMs that is set forth in § 402.14(i)(3) of the implementing regulations. Under this preferred order for specifying RPMs, we anticipate that offsetting measures outside of the action

area will be specified under limited circumstances when, for instance, RPMs within the action area would violate the "minor change rule" or would not be economically or technologically feasible.

Comment 8: Several commenters requested additional detailed information on the specific timing for implementing offsetting measures to minimize the impacts of incidental take.

Response: Ideally, offsetting measures would be implemented in advance of the impact from the action occurring in order to reduce risk and uncertainty and reduce the temporal impacts from incidental take. However, the timing of implementation will be determined on a case-by-case basis and will depend upon various factors such as the availability of existing mechanisms to offset impacts from incidental take (e.g., conservation banks) and the best scientific and commercial data available.

Comment 9: Several commenters requested additional detailed information on the location of offsetting measures outside of the action area.

Response: As stated above, the specific location of offsetting measures will be determined on a case-by-case basis and will depend upon various factors such as the availability of existing mechanisms to offset impacts from incidental take and the best scientific and commercial data available.

Comment 10: Many commenters supported the application of RPMs outside the action area when such application would create efficiencies and be beneficial.

Response: The Services appreciate the commenters' support, and we agree that the regulatory change allowing for the application of RPMs outside the action area will provide additional conservation benefits to affected species and create efficiencies in extending these benefits. For example, additional benefits would be provided to the affected species when

measures that avoid or reduce incidental take could not feasibly be applied. The regulation can also create efficiencies by using established mechanisms to deliver offsets, such as specifying the purchase of an offsetting credit from a conservation bank already established and approved in connection with a habitat conservation plan (HCP).

Comment 11: One commenter expressed concern that allowing RPMs to go outside the action area may be in conflict with County, State, and Tribal mitigation programs that require offsets to be implemented locally.

Response: As stated previously, all RPMs must be reasonable and prudent and within the authority of the action agency to implement. If there are laws that apply to the proposed action that require all mitigative measures to be located within a specific geographic area (locally) and offsetting measures outside of that area would violate those legal restrictions, then the offsets would not be within the action agency's (or applicant's) authority to implement.

Comment 12: One commenter contends that offsetting measures should not be required for biological opinions that use surrogates to express the amount or extent of anticipated take because it is hard to determine if take even occurs since the "reasonable certainty" standard does not require a guarantee that take will occur.

Response: The Services decline to adopt the commenter's suggestion to exclude the use of offsetting measures when a surrogate is used to express the amount or extent of the taking caused by the action. This suggestion conflicts with the ESA's requirement to specify RPMs that are necessary or appropriate to minimize the impacts of incidental take on the species. The implementing regulations governing the use of surrogates in estimating the amount or extent of incidental take is found at § 402.14(i)(1)(i). When using surrogates, the Services are required to ensure they establish a clear standard for determining when the level of anticipated take has been

exceeded. Because many offsetting measures are likely to be habitat-based and the Services often use impacts to habitat as a surrogate for estimating the amount or extent of incidental take, the metrics used to identify a surrogate can be useful and appropriate for establishing offsetting measures as RPMs. For example, if a surrogate for take of a cryptic listed insect is identified by the number of lost host trees that the species uses for reproduction and survival, offsetting RPMs could include activities that replace the amount of host trees lost due to the action.

Comment 13: Some commenters stated that monitoring and reporting on the implementation of the offsetting measures is needed.

Response: As with all incidental take statements, monitoring and reporting are required parts of the terms and conditions to implement RPMs, pursuant to ESA section 7(b)(4)(iv) and its implementing regulations. This statutory and regulatory requirement would still apply to the terms and conditions to carry out offsetting measures, and this rulemaking does not make any changes to that requirement. Regardless of whether third-party mitigation arrangements or project proponent mitigation is used, these mechanisms for delivering offsets must satisfy any monitoring and reporting requirements contained in the terms and conditions of the incidental take statement.

Comment 14: Some commenters requested that specific actions be excluded from the Services' ability to impose additional RPMs that offset impacts. One example mentioned by commenters as warranting exclusion from imposition of additional RPMs involves consultations on habitat restoration projects that have net benefits to habitat functions or services.

Response: Identifying specific types of actions for exclusion in this rulemaking may be in conflict with the requirements of section 7 and cannot be predicted in advance. Thus, we decline to specify such actions. However, in practice, the Services have found that project proponents of

these types of specific actions often voluntarily include measures that minimize the impacts of incidental take, potentially eliminating the need for additional RPMs.

Comment 15: One commenter stated they "oppose perpetual offsets in situations where a species is not meeting recovery goals and there is not a clear or quantifiable link to pesticides as a stressor."

Response: We interpret that this commenter intended to oppose offsets that are perpetual in nature for species in decline and offsets that are not directly linked to the amount or extent of incidental take identified in the incidental take statement. However, it is important to note that RPMs are required to be "necessary or appropriate" to minimize the impacts of incidental take that is reasonably likely to occur from the proposed action. To be in accordance with these statutory and regulatory requirements, all RPMs (including offsets) must have the requisite nexus between the impacts of incidental take caused by the action and the measures that minimize those impacts. Thus, offsetting measures, as with all RPMs, would not address impacts caused by other activities that are not the subject of the consultation. RPMs, including offsets (if appropriate), whether perpetual or not, will be determined on a case-by-case basis.

Comment 16: Several commenters asked for sideboards that limit the extent of offsetting measures and how the Services will minimize uncertainty, prevent inconsistency, and ensure that offsetting RPMs are not arbitrary. Other commenters stated that offsets should achieve a "no net loss," or even a net gain, with no upper limit.

Response: As explained in the preamble of the proposed rule (88 FR 40753, June 22, 2023) and elsewhere in this final rulemaking, there are several statutory and regulatory standards that will govern the application of offsetting measures. First, only after fully considering measures that will avoid or reduce incidental take would the Services consider specifying

measures that offset the residual impacts of incidental take that cannot feasibly be avoided. In most cases, measures that avoid or reduce incidental take within the action area will be preferred in minimizing the impacts of incidental take, consistent with the preferred sequence at 50 CFR 402.14(i)(3) and as further described in the response to comment number 6 above.

Second, the Services will coordinate as appropriate with the action agency and applicant, if any, on development of offsetting measures. As always, this coordination is essential to ensure that RPMs are within a Federal action agency's, and applicant's (if any), authority or discretion to implement. All RPMs, including offsetting measures, must be reasonable and prudent; any RPMs, including those consisting of offsetting measures, that are not within a Federal action agency's, and applicant's (if any), authority or discretion to implement would not be reasonable and prudent. Measures that are cost-prohibitive may also not be reasonable and prudent to minimize the impacts of incidental take.

Third, the impact of the incidental take on the species caused by the action will provide the upper limit on the scale of any offsetting measures. Only offsetting measures that are necessary or appropriate to minimize the impacts of incidental take will be specified as RPMs. Thus, RPMs, including those consisting of offsetting measures, will be proportional to the impacts of incidental take caused by the action and not be required to provide a net benefit to the species.

Fourth, as with all RPMs, monitoring and reporting requirements will be required as part of the terms and conditions of the ITS.

Lastly, this revision to the scope of RPMs does not change the Services' longstanding practice of working with Federal action agencies and applicants in developing "conservation measures," as defined in the 1998 Consultation Handbook, that may be voluntarily incorporated

as part of the "action" to minimize adverse effects. In fact, the Services have a long history of working with Federal action agencies and applicants to develop these voluntary measures, some of which include offsets, to produce strong conservation outcomes. The Services' expertise gained in developing offsetting measures that may be incorporated as part of the action will be used in the development of offsets included as RPMs.

Comment 17: We received comments questioning whether offsetting RPMs would be applied to consultations on listed plant species and critical habitat.

Response: As with all RPMs, RPMs that consist of offsets, are specified to minimize the impacts of incidental take of wildlife (not plants or critical habitat) caused by the action. Because incidental take statements are issued only for incidental take of wildlife, this regulatory revision allowing for offsetting measures as RPMs would not apply to plants or critical habitat.

Comment 18: Several commenters shared concerns regarding the costs of offsetting measures. Some stated the costs would be significant to the regulated community and some stated the cost is unpredictable, but the range of potential costs is substantial.

Response: Offsetting measures, as with all RPMs, do have an associated cost. However, we anticipate offsetting measures will be used in limited circumstances. For example, most consultations are completed informally, and this regulation would apply only to formal consultations that require an ITS containing RPMs. Even among formal consultations that require an ITS containing RPMs, some of these consultations will be able to address impacts of incidental take through measures that avoid or reduce incidental take within the action area, and offsets would be considered only if measures that avoid or reduce incidental take cannot feasibly minimize the impacts of incidental take caused by the proposed action. Although we anticipate that offsetting measures will be used under limited circumstances when measures that avoid or

reduce incidental take cannot feasibly be applied, it is not possible to know how many formal consultations will include offsetting measures as RPMs due to the tremendous variation in Federal actions subject to formal consultation, the specific impacts from these actions, and the affected species that may be analyzed.

Although we cannot predict the costs of the RPM proposal due to these variable factors associated with formal consultations, any costs would be constrained by the statutory and regulatory requirements that RPMs are "necessary or appropriate," commensurate with the residual impacts of incidental take caused by the proposed action. In addition, as previously mentioned, the Services consider the economic feasibility of any RPMs.

All Other Aspects of the 2019 Rule

As stated earlier, the proposed rule also sought comment on all aspects of the 2019 rule. Although the vast majority of the comments received on all other aspects of the 2019 rule were non-substantive, we did receive substantive comments and other relevant comments warranting response on the topics of the definition of "destruction or adverse modification," programmatic consultations, non-Federal representatives, § 402.13(c)(2) informal consultation timelines, § 402.14(h)(3) and (4) adoption of analysis, section 7(a)(1) (programs for the conservation of listed species), project modifications, the geographic scope of section 7(a)(2), and "small Federal handle." Our responses to the comments on these topics and others are provided below.

Destruction or Adverse Modification

Comment 1: Commenters request the removal of the phrase "as a whole" from the definition of destruction or adverse modification. These commenters assert that the phrase undermines conservation and recovery of species because it would allow more piecemeal, incremental losses of critical habitat over time that would add up cumulatively to significant

losses or fragmentation (referred to by many comments as "death by a thousand cuts"). Furthermore, they contend the phrase "as a whole" limits the Services' ability to analyze impacts and lacks scientific justification.

Response: As discussed in the 2019 rule (see 84 FR 44976 at 44983–44985, August 27, 2019), the Services again decline to remove the phrase "as a whole" from the definition of destruction or adverse modification. The definition of "destruction or adverse modification" is focused first on the critical habitat itself, and then considers how alteration of that habitat affects the "conservation" value of critical habitat. The phrase "as a whole" will not reduce or alter how the Services consider the effects of small changes to critical habitat. This approach is fully consistent with the nature of critical habitat and the duty to avoid destruction or adverse modification of critical habitat under the Act, as well as the scientific principles underlying those provisions.

Additionally, this approach does not limit our ability to analyze impacts to critical habitat using the best available scientific and commercial information. As discussed in the 2019 rule, consistent with longstanding practice and guidance, the Services must place impacts to critical habitat into the context of the entire designation to determine if the overall value of the critical habitat is likely to be appreciably reduced, but this consideration does not mean that the entirety of the designated critical habitat must be affected by the proposed action. This situation could occur where, for example, a smaller affected area of habitat is particularly important for the conservation of a species (e.g., a primary breeding site). Thus, the size or proportion of the affected area is not determinative; impacts to a smaller area may in some cases result in a determination of destruction or adverse modification, while impacts to a large geographic area will not always result in such a finding.

Moreover, with regard to concerns of "death by a thousand cuts," the regulations require the Services' biological opinion to assess the status of the critical habitat (including threats and trends), the "environmental baseline" of the action area, and cumulative effects. The Services' summary of the status of the affected species or critical habitat considers the historical and past impacts of activities across time and space for the entire listed entity and critical habitat designation. In this context, the effects of any particular action and "cumulative effects" are added to those impacts identified in the "environmental baseline." This analytical process avoids situations where each individual action, when viewed in isolation, may cause only relatively minor adverse effects, but, over time, accumulated effects of these actions would erode the conservation value of the critical habitat. In the 2019 rule, we clarified the text in § 402.14(g)(4) regarding status of the species and critical habitat to better articulate the analytical process used to determine whether an action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. The clarification helped to ensure the "incremental losses" described by the commenters are appropriately considered in our jeopardy and "destruction or adverse modification" determinations.

Comment 2: Some commenters asserted that inclusion of "as a whole" in the definition of destruction or adverse modification is inconsistent with case law.

Response: None of the cases cited favorably by commenters directly address the issue of the appropriate scale of the "destruction or adverse modification" analysis. And while commenters may disagree with the holding, the Ninth Circuit Court of Appeals has specifically endorsed the approach of analyzing the impacts to critical habitat at the scale of the entire designation. *See Butte Envtl Council* v. *U.S. Army Corps of Eng'rs*, 620 F.3d 936, 947-48 (9th Cir. 2010) (citing the Services' 1998 Consultation Handbook at 4-34).

Comment 3: Some commenters asserted that inclusion of "as a whole" does not adequately afford protection to critical habitat of species that are wide-ranging and migratory.

Response: As discussed above, the Services' approach to analyzing impacts to portions of a critical habitat provides a full assessment of individual actions by relying on the jeopardy and destruction/adverse modification framework. That framework considers the overall status of the critical habitat, and in that context, adds the effects of any particular action and any "cumulative effects" to those impacts identified in the "environmental baseline." Thus, under this analytical framework, incremental impacts from prior actions are not ignored, and the overall conservation value of critical habitat is appropriately preserved for the benefit of the listed species. This same framework applies to species with expansive critical habitat designations and ensures any impacts to particular areas are appropriately considered within the context of the respective critical habitat designation as a whole.

Programmatic Consultation

Comment 1: One commenter requested revision of the definition of "programmatic action" to clarify whether programmatic consultations are required, how programmatic consultations can be used, and the roles of multiple Federal agencies, and of non-Federal applicants.

Response: Given the nature of programmatic consultation and the significant flexibilities provided by section 7 of the ESA, additional details regarding the specifics and scope of programmatic consultation are better addressed through updates to the Consultation Handbook rather than additional regulatory text. The current definition of "programmatic consultation" is quite broad and covers a broad suite of actions that could constitute a program, plan, policy, or regulation providing a framework for future proposed actions. See 50 CFR 402.02. Although

broad, the examples of actions included in the definition are not intended to identify every type of program or set of activities that may be consulted on programmatically. The programmatic consultation process offers great flexibility and can be strategically developed to address multiple listed species and multiple Federal agencies, including applicants as appropriate, for both informal and formal consultations. We encourage Federal agencies and applicants to reach out to the Services to discuss the potential ways to structure a consultation (such as the use of programmatic consultations) to streamline the consultation process.

Non-Federal Representative

Comment 1: One commenter suggested agencies allow the developer to be designated as a "non-federal representative" for purposes of consultation to prepare the biological assessment and hold pre-application meetings. The commenter also suggested that NMFS help with communication and resolving fundamental questions.

Response: Regulations at 50 CFR 402.08 allow a Federal agency to designate a non-Federal representative for conducting informal consultation or preparing a biological assessment. The Services may provide technical assistance to the non-Federal representative, in coordination with the Federal action agency, to address questions regarding the consultation process, but the section 7(a)(2) consultation responsibility ultimately lies with the Federal action agency.

Section 402.13(c)(2)—Informal Consultation Timelines

Comment 1: Some commenters advocated for the removal of the 60-day timeline in § 402.13(c)(2). Those commenters stated that according to information included in the preamble to the 2018 draft revisions, only 3 percent of informal consultations take more than 3 months to complete, and therefore there is no rational justification to adopt a timeline to address this low number of informal consultations, nor is there reason to believe that this small number of

informal consultations lasting longer than 3 months causes a problem for action agencies. The commenters ask the Services to focus on addressing the small number of lengthier informal consultations rather than imposing an across-the-board timeline.

Response: The Services are retaining the 60-day timeline for issuing a concurrence or non-concurrence for informal consultations. The Services' intention with this timeline is to increase regulatory certainty and timeliness for Federal agencies and applicants. Based upon more than 3 years of implementing this provision, the Services find that the 60-day timeline is justified to promote the goals of increasing regulatory certainty and timeliness. As stated in the preamble and response to comments in the 2019 rule, the 60-day timeline begins only after receipt of information sufficient for the Services to determine whether to concur. See § 402.13(c)(2) (requiring information similar to the types of information needed to initiate formal consultation). The Services typically review all initiation request packages within 30 days. In addition, should more time be required for the Services' determination, § 402.13(c)(2) provides for a 60-day extension upon mutual consent. We anticipate that this provision will continue to provide greater certainty for Federal agencies and applicants, while ensuring that the Services have sufficient information and time to reach an informed decision. Finally, we have not experienced problems in practice with § 402.13(c)(2) under the 2019 rule; this provision's assurances for regulatory certainty and timeliness outweigh any concerns with implementation.

Section 402.14(h) —Adoption of Analysis

Comment 1: Some commenters expressed concern that the 2023 proposed regulations make no change to the 2019 revisions at 50 CFR 402.14(h)(3)(i) allowing the Services to adopt, as part of their biological opinions, all or part of a Federal action agency's consultation initiation package. These commenters claim that in doing so the Services abdicate their

statutory consultation duty in violation of ESA section 7(b)(3)(A) (requiring the Services to issue an opinion to the action agency).

Response: The Services disagree that adoption of part or all of the information in an action agency's initiation package, including biological analyses, violates the ESA. Furthermore, under the provision, the Services will not indiscriminately adopt analyses or documents from non-Service sources. Rather, the Services perform their statutory consultative function, adopting analyses provided in the initiation package only after we have conducted an independent evaluation to determine whether the analyses meet statutory and regulatory requirements, including the requirement to use the best scientific and commercial data available. As we expressed in our response to comments on the proposed rule to the 2019 rule, the intent of this provision is to avoid needless duplication of analyses and documents that already meet applicable statutory and regulatory standards. In some situations, the Services may supplement or revise these analyses or documents to merit inclusion in our letters of concurrence or biological opinions, but even in those situations, adopting useful existing information makes the consultation process more efficient and streamlined.

In the 2019 rule, we explained that it was already common practice for the Services to adopt portions of biological analyses and initiation packages in our biological opinions. The codification of that practice created a more collaborative process and incentive for Federal agencies to produce high-quality analyses and documents suitable for inclusion in biological opinions, which streamlines the timeframe for completion of the consultation. The Services continue to exercise their independent judgment and biological expertise in reaching conclusions under the ESA.

Comment 2: Commenters representing the pesticide manufacturing and end user

communities remained supportive of those provisions of § 402.14(h)(3) and (4) allowing for a collaborative process and the adoption of biological analyses provided by action agencies, explaining that adoption of such analyses produced by the Environmental Protection Agency (EPA) would further increase collaboration between the Services and Federal action agencies, consistent with the commenters' longstanding advocacy for greater coordination in this vein.

Response: We agree that § 402.14(h)(3) and (4) continue to add value by promoting increased collaboration and allowing for the adoption of biological analyses provided by a Federal agency, where appropriate and in line with the Services' scientific standards. The Services are maintaining these provisions, as they further expediency, collaboration, and the use of sound science.

Section 402.14(l) —Expedited Consultation

Comment 1: Some commenters advocated for the removal of 50 CFR 402.14(l), which provides for the Services to enter into expedited consultation upon mutual agreement with a Federal agency. Commenters argued that the Services provided no evidence to support the claim in the 2019 rule that the new expedited process "will benefit species and habitats by promoting conservation and recovery through improved efficiencies in the section 7 consultation process," or "will still allow for the appropriate level of review." 84 FR 44976 at 45008, August 27, 2019. Commenters noted that the Services provided only one example of an action that could benefit from expedited consultation and included no qualifying criteria for such projects. The commenters express concern that a lack of guidelines on when to apply this provision will cause confusion and arbitrary application of the regulation.

Response: The Services' intention in retaining § 402.14(l) is to allow for an optional process that is intended to streamline the consultation process for those projects that have

minimal adverse impact but still require a biological opinion and incidental take statement and for projects where the effects are either known or are predictable and unlikely to cause jeopardy or destruction or adverse modification. As we explained in our response to comments in the 2019 rule, many of these projects historically have been completed under the routine formal consultation process and statutory timeframes, and this provision will expedite the timelines of the formal consultation process for Federal actions while still requiring the same information and analysis standards. While less time may be necessary to analyze projects that fit under the provision due to their primarily beneficial nature or their known and predictable effects, the Services must still apply all required analysis to the actions under consideration. We simply expect that given the nature of the actions, a streamlined process would allow for a better use of our limited resources, yet still be consistent with section 7 of the ESA.

The Services have not included specific qualifying criteria for expedited consultations because there is a range of different actions or classes of actions that may qualify. Acceptance into expedited consultation will require the exercise of independent judgment and discretion on the part of the Services for each such request. We also note, as we expressed in our response to comments on the 2019 rule, that a key element for successful implementation of this process is mutual agreement between the Services and Federal agency (and applicant when applicable). The mutual agreement will contain the specific parameters necessary to complete each step of the process, such as the completion of a biological opinion.

The Services strive to complete consultations within the established regulatory deadlines and continue to identify ways to improve efficiencies. Section 402.14(l) provides one such streamlining mechanism intended to improve efficiencies in the section 7(a)(2) consultation process for the Services, Federal agencies, and their applicants while ensuring full compliance

with the responsibilities of section 7. One example of an expedited formal consultation process agreed to by the FWS and the USFS is the programmatic consultation for the Rangewide Conservation Activities Supporting Whitebark Pine Recovery Project (Project). The Project includes ongoing and future activities proposed by the USFS to support the conservation of federally threatened whitebark pine (*Pinus albicaulis*) across its range, specifically cone collection, scion collection, pollen collection, operational seedling production, genetic white pine blister rust screening, planting, insect prevention and control, selection and care of mature trees with white pine blister rust resistance, protection of healthy and unsuppressed regenerating stands, clone banks, seed and breeding orchards, genetic evaluation plantations, development of seed production areas, surveys, and research, monitoring, and education. While these activities are intended to be beneficial to whitebark pine, some adverse effects are anticipated to occur because of the Project. This expedited consultation process reduced the consultation timeline allowing beneficial actions to move forward more quickly.

Comment 2: Commenters representing the pesticide manufacturing and end user communities remained supportive of those provisions of § 402.14(l) allowing for expedited consultation and encourage the Services to work with Federal agencies to streamline initiation packages by using templates and guidance. Commenters also requested the Services reconsider and re-promulgate 50 CFR part 402, subpart D, regarding pesticide consultations, following adverse litigation.

Response: The Services agree that the expedited consultation provisions of § 402.14(l) are a potentially valuable tool for creating efficiency in the consultation process, including efficiencies that could potentially be applied in pesticide consultations. We will continue to work with Federal action agencies and applicants to help them develop strong biological analyses that

can allow for expedited consultation. We acknowledge the commenters' request for reconsideration of subpart D, which was not the subject of any regulatory changes in the 2019 rule and thus outside the scope of this rulemaking. Any such changes would require a separate rulemaking process, which would first require careful consideration and consultation with the EPA and others.

Section 7(a)(1) of the ESA

Comment 1: Some commenters requested that the Services develop and finalize implementing regulations for section 7(a)(1), which requires Federal agencies in consultation with the Services to utilize their authorities to establish programs for the conservation of listed species.

Response: At this time, because there are no implementing regulations for section 7(a)(1), the Services expect to include guidance on section 7(a)(1) in an updated Consultation Handbook and develop additional guidance as necessary. We recognize there are opportunities for Federal action agencies to proactively support species conservation, consistent with their authorities, and we anticipate that providing additional guidance regarding section 7(a)(1) will help further those efforts.

Project Modifications

Comment 1: One commenter raised issues related to project modifications that happen during a consultation, as well as once consultation has been completed and a biological opinion or letter of concurrence has been issued. The commenter requested that consultation continue even if a proposed action has been modified and that changes in the action could be reflected in future consultations as part of the "environmental baseline." The commenter also requested that

the Services indicate that no further consultation would be needed if an action was subsequently modified in such a way that does not increase the amount or extent of incidental take.

Response: The Services note that the commenter's request relates to the existing regulations regarding reinitiation of consultation at § 402.16. As the commenter noted, criteria exist for the reinitiation of completed consultations with issued biological opinions or letters of concurrence: These include whether incidental take is exceeded; if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or if a new species is listed or critical habitat designated that may be affected by the identified action.

These criteria are independent of one another; thus, modification of the action may trigger reinitiation of an already completed consultation if the manner of effects changes, even when the extent of those effects is not greater. This determination is case-specific, and it is beyond the scope of this rule to state that only those cases where anticipated incidental take is exceeded would trigger reinitiation.

The commenters also provide an example of a consultation that was restarted due to modification of the proposed action as a result of "new" information. With regard to changes to the action or new information that arises during a pending consultation, the Services typically coordinate with the action agency and any applicant to determine the significance of any change or new information and the needed response. Although case specific, the responses range from minor supplements to the existing initiation package to withdrawal and resubmittal of the entire

package. This practice ensures the final concurrence letter or biological opinion is based on up-to-date information, including a correct description of the proposed action.

Geographic Scope of Section 7(a)(2)

Comment 1: One commenter suggested the Services revise 50 CFR part 402 to restore the full geographic scope of the Services' implementation of the ESA with respect to consultations under section 7 of the Act.

Response: This request is beyond the scope of the proposed rule and would require a new rulemaking process. The current geographic scope of the section 7 regulations as reflected in the definition of "action" is appropriate, and the Services do not anticipate revisiting this issue. See 50 CFR 402.02; 51 FR 19926 at 19930–31, June 3, 1986 (discussing geographic scope of section 7 of the ESA).

Small Federal Handle

Comment 1: One commenter suggested that the Services promulgate regulations clarifying the scope of "small Federal handle" projects affording project proponents input into whether to become part of a consultation where the Federal agency has only limited authority over significant aspects of a larger project.

Response: The Services decline to adopt regulations clarifying the scope of "small Federal handle" projects. As discussed in the 2019 rule, when the Services write an incidental take statement for a biological opinion under section 7(b)(4)(iv) of the Act, they can assign responsibility for specific terms and conditions of the incidental take statement to the Federal action agency, the applicant, or both, taking into account their respective roles, authorities, and responsibilities. The Services have worked with Federal action agencies in the past, and will

continue to do so into the future, to ensure that a reasonable and prudent measure assigned to a Federal action agency does not exceed the scope of a Federal action agency's authority.

Other Comments

Comment 1: One commenter suggested changing the regulatory threshold for consulting on federally listed plant species to only situations where the project is likely to jeopardize the listed plant.

Response: The commenter misconstrues the consultation regulations, and no regulatory change is needed. The purpose of consultation is for the Services to assist the Federal agency in meeting their obligation to ensure their action is not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat. Consultation is the process by which the Services determine whether the action is likely to jeopardize the listed plant.

Comment 2: One commenter suggested revisions that would allow applicants to choose their method of ESA compliance through a programmatic HCP to take advantage of the streamlining opportunity it provides rather than being directed into programmatic consultations.

Response: The Services' existing regulations and practice allow for this approach and, in many situations, an applicant's compliance with ESA section 7(a)(2) requirements through an existing incidental take permit under an ESA section 10 HCP can be achieved. In these cases, Federal agencies can meet their separate section 7(a)(2) responsibilities using a simple expedited process. Thus, no regulatory changes are necessary.

Comment 3: One commenter suggested that the Services align ESA terms similar to terminology in the National Environmental Policy Act (NEPA), e.g., "mitigation," and that we use consistent language in regulations and not switch between the terms "effects" and "impacts."

Response: The Services decline to undertake the action recommended by this commenter. ESA section 7(a)(2) and its implementing regulations include specific terms of art that are not interchangeable with terms used in other statutory contexts such as NEPA. See above in the "environmental baseline" section for discussion of the Services' use of the terms "effects" and "impacts."

Comment 4: A couple of commenters stated the ESA Compensatory Mitigation Policy was issued without opportunity for public notice and comment.

Response: The FWS ESA Compensatory Mitigation Policy (Appendix 1, 501 FW 3 *https://www.fws.gov/policy-library/a1501fw3*) provides internal, non-binding guidance and does not establish legally binding rules. Because the policy is guidance rather than a rule, there are no requirements for public review and comment. Nonetheless, the FWS solicited public comment during three separate public comment periods related to the 2016 FWS mitigation policies. The initial public comment periods solicited input on the proposed revisions to the Mitigation Policy (81 FR 12380, March 8, 2016), and on the draft ESA Compensatory Mitigation Policy (81 FR 61031, September 2, 2016). The FWS later requested additional public comment on the mitigation planning goal within both mitigation policies that had already been finalized (82 FR 51382, November 6, 2017). The documents, comments, and process related to prior revisions may be viewed within docket number FWS–HQ–ES–2015–0126 (mitigation) and docket number FWS–HQ–ES–2015–0165 (compensatory mitigation) on *https://www.regulations.gov*. The final ESA Compensatory Mitigation Policy is substantively similar to the 2016 policy and reflects input from those previous public-comment opportunities.

Comments on Determinations

Comment 1: One commenter asserted the need to complete intra-service consultation pursuant to section 7 of the Act on the issuance of the final regulations.

Response: We have addressed this issue in our Required Determinations section of the preamble to this final rule.

Comment 2: Several commenters requested additional economic analyses pursuant to Executive Order (E.O.) 12866 and related E.O.s. Some commenters suggested that the Services characterize the rulemaking as a "significant regulatory action" and that we must include an economic analysis as specified in Office of Management and Budget (OMB) Circular A–4. Several commenters expressed concern with potential costs associated with the RPM revisions.

Response: Although OMB determined that the proposed revisions to 50 CFR part 402 were a significant regulatory action pursuant to E.O. 12866, OMB agreed with the Services' assessment that the expected effects of the proposed rule did not fall within the scope of E.O. 12866 section 3(f)(1) and did not warrant an analysis as specified in OMB Circular A–4. We do not anticipate the revisions to result in any substantial change in our determinations as to whether proposed actions are likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. None of these changes are expected to result in delays to completing consultations in a timely manner or within the statutory or regulatory timeframes. And, although offsetting measures as RPMs can be associated with costs, those measures must be constrained by the statutory and regulatory requirements of RPMs, as we have noted in response to previous comments. It is worth noting that any economic analysis of the revisions to RPMs would be limited by substantial uncertainty about how many formal consultations will include offsetting measures as RPMs due to the tremendous variation in Federal actions subject to formal consultation, the specific impacts from these actions, and the affected species that may

be analyzed. Although we cannot predict the costs of the RPM proposal due to these variable factors associated with formal consultations, any costs would be constrained by the statutory and regulatory requirements of RPMs as described above and in the proposed rule. Thus, because consultations under section 7(a)(2) are so highly fact-specific, it is also not possible to specify future benefits or costs stemming from this rulemaking.

Comment 3: Several commenters believed the Services' findings under the Regulatory Flexibility Act (RFA) and consideration of responsibilities under Executive Order (E.O.) 13132 (Federalism) and E.O. 13211 (Effects on the Energy Supply) were insufficient or incorrect. Commenters claimed that modifying existing consultation requirements will likely result in increased compliance costs and delays for projects involving small entities. The commenters also disagreed with our finding for E.O. 12630 (Takings) that the proposed rule would not have significant takings implications and that a takings implication assessment is not warranted. They urged us to conduct additional assessments before finalizing the rule.

Response: Regarding all required determinations for the rulemaking, all the revisions provide transparency and clarity to the consultation process under section 7(a)(2) of the Act and align the regulations with the plain language of the statute. As a result, we do not anticipate any substantial change in our determinations as to whether proposed actions are likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat.
Regarding the revisions to RPMs, most consultations under section 7(a)(2) will not be affected since most consultations are completed informally, and this change would apply only to formal consultations that require an ITS containing RPMs. Even among formal consultations that require an ITS containing RPMs, some of these consultations will be able to address impacts of

incidental take through measures that avoid or reduce incidental take within the action area, and the change would not apply to those consultations.

Regarding the RFA and E.O. 13211, this final rule, which contains revisions that provide transparency, clarity, and more closely comport with the text of the ESA, will not have a significant economic impact on a substantial number of small entities or any other entities and is unlikely to cause any adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increased use of foreign supplies). An analysis of small entity impacts is required when a rule directly affects small entities. However, Federal agencies are the only entities directly affected by this rule, and they are not considered to be small entities under SBA's size standards. No other entities will be directly affected by this rulemaking action. While some commenters suggested that the rule may impact small entities indirectly as applicants to Federal actions subject to ESA section 7(a)(2), we are unaware of any significant economic effect on a substantial number of small entities. Although we received comments raising generalized concerns about alleged potential effects on small entities, none of these comments described direct, concrete economic effects on small entities, much less "significant" economic effects on a "substantial" number of small entities.

Regarding E.O. 13132, "Policies that have federalism implications," that Executive order includes federalism implications from regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This rulemaking has no such federalism implications. Federal agencies are the only entities that are directly affected by this rule, as a Federal nexus is necessary for requiring consultation under section 7(a)(2) of the ESA. In

addition, as stated for E.O. 13132 in the Required Determinations section of this preamble, this rule pertains only to improving and clarifying the interagency consultation processes under the ESA and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Regarding E.O. 12630, as discussed in the proposed rule, this rulemaking will not directly affect private property, nor will it cause a physical or regulatory taking. It will not result in a physical taking because it will not effectively compel a property owner to suffer a physical invasion of property. Further, the rulemaking will not result in a regulatory taking because it will not deny all economically beneficial or productive use of the land or aquatic resources. This rule will substantially advance a legitimate government interest (conservation and recovery of endangered species and threatened species) and will not present a barrier to all reasonable and expected beneficial use of private property.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866, 13563, and 14094

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) will review all significant rules. OIRA has determined that this rule is significant.

Executive Order 14094 amends E.O. 12866 and reaffirms the principles of E.O. 12866 and E.O 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and be consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing

Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this final rule in a manner consistent with these requirements.

Revisions to 50 CFR part 402. Specifically, the Services are revising the implementing regulations at: (1) § 402.02, definitions; (2) § 402.16, reinitiation of consultation; (3) § 402.17, other provisions; and (4) § 402.14(i)(1), formal consultation. The preamble to the proposed rule explains in detail why we anticipate that the regulatory changes we are proposing will improve the implementation of the Act (88 FR 40753, June 22, 2023).

When we made changes to §§ 402.02, 402.16, and 402.17 in 2019, we compiled historical data for a variety of metrics associated with the consultation process in an effort to describe for OMB and the public the effects of those regulations (on *https://www.regulations.gov*, see Supporting Document No. FWS-HQ-ES-2018-0009-64309 of Docket No. FWS-HQ-ES-2018-0009; Docket No. 180207140-8140-01). We presented various metrics related to the regulation revisions, as well as historical data supporting the metrics.

For the 2019 regulations, we concluded that because those revisions served to clarify rather than alter the standards for consultation under section 7(a)(2) of the Act, the 2019 regulation revisions were substantially unlikely to affect our determinations as to whether proposed Federal actions are likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat.

As with the 2019 regulations, the revisions in this rule, as described above, are intended to provide transparency and clarity and align more closely with the statute. As a result, we do

not anticipate any substantial change in our determinations as to whether proposed actions are likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat.

Similarly, although the revisions to the regulatory provisions relating to RPMs in this final rule are amendments that were not considered in the 2019 rulemaking, this final rule will align the regulations with the plain language of the statute. These changes will not affect most consultations under section 7(a)(2) of the Act because most consultations are completed informally, and this regulation will apply only to formal consultations that require an ITS containing RPMs. Even among formal consultations that require an ITS containing RPMs, some of these consultations will be able to address impacts of incidental take through measures that avoid or reduce incidental take within the action area, and offsets would be considered only if measures that avoid or reduce incidental take cannot feasibly minimize the impacts of incidental take caused by the proposed action. As explained in the preamble language above, the use of offsetting measures in RPMs will not be required in every consultation. As with all RPMs, these offsetting measures must be commensurate with the scale of the impact, subject to the existing "minor change rule," be reasonable and prudent, and be necessary or appropriate to minimize the impact of the incidental taking on the species.

Lastly, several different action agencies in various locations throughout the country readily include offsetting measures as part of their project descriptions. This practice of including offsets as part of the proposed action being evaluated in a consultation is not uncommon. The Services may find that offsets included in the proposed action adequately minimize impacts of incidental take, thus obviating the need to specify additional offsets as RPMs. Examples of these types of consultations that incorporate offsetting measures into the

proposed action include programmatic consultations, certain consultations regarding transportation projects, and activities authorized by the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act (33 U.S.C. 1344).

It is not possible to know how many formal consultations will include offsetting measures as RPMs due to the tremendous variation in Federal actions subject to formal consultation, the specific impacts from these actions, and the affected species that may be analyzed. Although we cannot predict the costs of the RPM regulation due to these variable factors associated with formal consultations, any costs would be constrained by the statutory and regulatory requirements that RPMs are "reasonable and prudent," commensurate with the residual impacts of incidental take caused by the proposed action, and subject to the "minor change rule."

Similarly, while we cannot quantify the benefits from this rule, some of the benefits include further minimization of the impacts of incidental take caused by the proposed action, which, in turn, further mitigates some of the environmental "costs" associated with that action. In allowing for residual impacts to be addressed, the rule may also reduce the accumulation of adverse impacts to the species that is often referred to as "death by a thousand cuts." Sources of offsetting measures, such as conservation banks and in-lieu fee programs, have proven in other analogous contexts to be a cost-effective means of mitigating environmental impacts and may have the potential to enhance mitigative measures directed at the loss of endangered and threatened species when they are applied strategically. See, e.g., U.S. Fish and Wildlife Service Mitigation Policy and Endangered Species Act Compensatory Mitigation Policy, Appendix 1, 501 FW 3 (May 15, 2023) or NOAA Mitigation Policy for Trust Resources, NOA 216–123 (July 22, 2022).

The regulatory changes in this rule provide transparency, clarity, and more closely comport with the text of the ESA. We, therefore, do not anticipate any material effects such that the rule would have an annual effect that would reach or exceed $200 million or would adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or Tribal governments or communities.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions) directly affected by the rule. However, no regulatory flexibility analysis is required if the head of an agency, or that person's designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We certified at the proposed rule stage that this rule would not have a significant economic impact on a substantial number of small entities (88 FR 40753 at 40761, June 22, 2023). We received no information that changes the factual basis of this certification.

This rulemaking revises and clarifies existing requirements for Federal agencies, including the Services, under section 7 of the ESA. Federal agencies are the only entities directly affected by this rule, and they are not considered to be small entities under SBA's size standards.

No other entities would be directly affected by this rulemaking action. While some commenters suggested that the rule may impact small entities indirectly as applicants to Federal actions subject to ESA section 7(a)(2), we are unaware of any significant economic effect on a substantial number of small entities. Although we received comments raising generalized concerns about alleged potential effects on small entities, none of these comments described direct, concrete economic effects on small entities, much less "significant" economic effects on a "substantial" number of small entities.

This rulemaking applies to determining whether a Federal agency has ensured, in consultation with the Services, that any action it would authorize, fund, or carry out is not likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. This rulemaking will not result in any additional change in our determination as to whether proposed actions are likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. This rulemaking serves to provide clarity to the standards with which we will evaluate agency actions pursuant to section 7 of the ESA.

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

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

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

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

Takings (E.O. 12630)

In accordance with E.O. 12630, this rule will not have significant takings implications. This rule will not directly affect private property, nor will it cause a physical or regulatory taking. It will not result in a physical taking because it will not effectively compel a property owner to suffer a physical invasion of property. Further, the rule will not result in a regulatory taking because it will not deny all economically beneficial or productive use of the land or aquatic resources, and it will substantially advance a legitimate government interest (conservation and recovery of endangered species and threatened species) and will not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with E.O. 13132, we have considered whether this rule will have significant federalism effects and have determined that a federalism summary impact statement is not required. This rule pertains only to improving and clarifying the interagency consultation processes under the ESA and will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

This rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of E.O. 12988. This rule revises the Service's regulations

for protecting species pursuant to the Act.

Government-to-Government Relationship with Tribes

In accordance with E.O. 13175, "Consultation and Coordination with Indian Tribal Governments," and the Department of the Interior's manual at 512 DM 2, we have considered possible effects of this rule on federally recognized Indian Tribes and Alaska Native Corporations. We held three informational webinars for federally recognized Tribes in January 2023, before the June 22, 2023, proposed rule published, to provide a general overview of, and information on how to provide input on, a series of rulemakings related to implementation of the Act that the Services were developing, including the June 22, 2023, proposed rule to revise our regulations at 50 CFR part 402. In July 2023, we also held six informational webinars after the proposed rule published, to provide additional information to interested parties, including Tribes, regarding the proposed regulations. Over 500 attendees, including representatives from federally recognized Tribes and Alaska Native Corporations, participated in these sessions, and we addressed questions from the participants as part of the sessions. We received written comments from Tribal organizations; however, we did not receive any requests for coordination or government-to-government consultation from any federally recognized Tribes.

This rule is general in nature and does not directly affect any specific Tribal lands, treaty rights, or Tribal trust resources. Therefore, we conclude that this rule does not have Tribal implications under section 1(a) of E.O. 13175. Thus, formal government-to-government consultation is not required by E.O. 13175 and related DOI policies. This rule revises regulations for protecting endangered and threatened species pursuant to the Act. These regulations will not have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities

between the Federal Government and Indian Tribes.

We will continue to collaborate with Tribes and Alaska Native Corporations on issues related to federally listed species and their habitats and work with them as we implement the provisions of the Act. See Secretaries' Order 3206 ("American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act," June 5, 1997) and Secretaries' Order 3225 ("Endangered Species Act and Subsistence Uses in Alaska (Supplement to Secretarial Order 3206)," January 19, 2001).

Paperwork Reduction Act

This rule does not contain any new collection of information that requires approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

In the proposed rule we invited the public to comment on whether and how the regulation may have a significant impact on the human environment, including any effects identified as extraordinary circumstances at 43 CFR 46.25 or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. After considering the comments received, the Services analyzed this rule in accordance with the criteria of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality NEPA regulations (40 CFR parts 1500–1508), the Department of the Interior (DOI) NEPA regulations (43 CFR part 46), the DOI 516 Departmental Manual Chapters 1–4 and 8, and the National Oceanic and Atmospheric Administration (NOAA) Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities

(NOAA Administrative Order (NAO) 216-6A and Companion Manual for NAO 216-6A. This analysis was undertaken in an abundance of caution only, as we maintain that one or more categorical exclusions apply to this rule. Documentation of our compliance under NEPA is available online at *https://www.regulations.gov* at Docket No. FWS-HQ-ES-2021-0104.

Endangered Species Act

In developing this final rule, the Services are acting in their unique statutory role as administrators of the Act and are engaged in a legal exercise of interpreting the standards of the Act. The Services' promulgation of interpretive rules that govern their implementation of the Act is not an action that is in itself subject to the Act's provisions, including section 7(a)(2). The Services have a historical practice of issuing their general implementing regulations under the ESA without undertaking section 7 consultation. Given the plain language, structure, and purposes of the ESA, we find that Congress never intended to place a consultation obligation on the Services' promulgation of implementing regulations under the Act. In contrast to actions in which we have acted principally as an "action agency" in implementing the Act to propose or take a specific action (e.g., issuance of section 10 permits and actions under statutory authorities other than the ESA), with this document, the Services are carrying out an action that is at the very core of their unique statutory role as administrators—promulgating general implementing regulations or revisions to those regulations that interpret the terms and standards of the statute.

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

Executive Order 13211 requires agencies to prepare statements of energy effects when undertaking certain actions. The revised regulations are not expected to affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no statement of

energy effects is required.

Authority

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

List of Subjects in 50 CFR Part 402

Endangered and threatened species.

Regulation Promulgation

Accordingly, we amend subparts A and B of part 402, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as set forth below:

PART 402—INTERAGENCY COOPERATION—ENDANGERED SPECIES ACT OF 1973, AS AMENDED

1. The authority citation for part 402 continues to read as follows:

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

Subpart A—General

2. Amend § 402.02 by revising the definitions of "Effects of the action", "Environmental baseline", and "Reasonable and prudent measures" to read as follows:

§ 402.02 Definitions.

* * * * *

Effects of the action are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action but that are not part of the action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur.

Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action.

Environmental baseline refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. The impacts to listed species or designated critical habitat from Federal agency activities or existing Federal agency facilities that are not within the agency's discretion to modify are part of the environmental baseline.

* * * * *

Reasonable and prudent measures refer to those actions the Director considers necessary or appropriate to minimize the impact of the incidental take on the species.

* * * * *

Subpart B—Consultation Procedures

3. Amend § 402.14 by revising paragraph (i) to read as follows:

§ 402.14 Formal consultation.

* * * * *

(i) *Incidental take*. (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the

taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact of incidental taking as the amount or extent of such taking. A surrogate (e.g., similarly affected species or habitat or ecological conditions) may be used to express the amount or extent of anticipated take, provided that the biological opinion or incidental take statement: Describes the causal link between the surrogate and take of the listed species, explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded;

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact of incidental taking on the species;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action, may involve only minor changes, and may include measures implemented inside or outside of the action area that avoid, reduce, or offset the impact of incidental take.

(3) Priority should be given to developing reasonable and prudent measures and terms and conditions that avoid or reduce the amount or extent of incidental taking anticipated to occur within the action area. To the extent it is anticipated that the action will cause incidental take that cannot feasibly be avoided or reduced in the action area, the Services may set forth additional reasonable and prudent measures and terms and conditions that serve to minimize the impact of such taking on the species inside or outside the action area.

(4) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 216.105 and 222.301(h) for NMFS.

(5) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this section, is exceeded, the Federal agency must reinitiate consultation immediately.

(6) Any taking that is subject to a statement as specified in paragraph (i)(1) of this section and that is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(7) For a framework programmatic action, an incidental take statement is not required at the programmatic level; any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate. For a mixed programmatic action, an incidental take statement is required at the programmatic level only for those program actions that are reasonably certain to cause take and are not subject to further section 7 consultation.

* * * * *

4. Amend § 402.16 by revising the introductory text of paragraph (a) to read as follows:

§ 402.16 Reinitiation of consultation.

(a) Reinitiation of consultation is required and shall be requested by the Federal agency, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

* * * * *

§ 402.17 [Removed]

5. Remove § 402.17

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks,

Department of the Interior.

Richard Spinrad,

Under Secretary of Commerce for Oceans and Atmosphere,

NOAA Administrator,

National Oceanic and Atmospheric Administration.

Appendix

Appendix C – Pre-2019 Endangered Species Act, section 7 Regulations

50 CFR 402

§ 401.21 Patents and inventions.

Determination of the patent rights in any inventions or discoveries resulting from work under project agreements entered into pursuant to the Act shall be consistent with the ''Government Patent Policy'' (President's memorandum for Heads of Executive Departments and Agencies, August 23, 1971, and statement of Government Patent Policy as printed in 36 FR 16889).

§ 401.22 Civil rights.

Each application for Federal assistance, grant-in-aid award, or project agreement shall be supported by a statement of assurances executed by the Cooperator providing that the project will be carried out in accordance with title VI, Nondiscrimination in federally Assisted Programs of the Civil Rights Act of 1964 and with the Secretary's regulations promulgated thereunder.

§ 401.23 Audits.

The State is required to conduct an audit at least every two years in accordance with the provisions of Attachment P OMB Circular A–102. Failure to conduct audits as required may result in withholding of grant payments or such other sanctions as the Secretary may deem appropriate.

[49 FR 30074, July 26, 1984]

PART 402—INTERAGENCY COOPERATION—ENDANGERED SPECIES ACT OF 1973, AS AMENDED

Subpart A—General

Sec.

Subpart B—Consultation Procedures

Subpart C—Counterpart Regulations For Implementing the National Fire Plan

Subpart D—Counterpart Regulations Governing Actions by the U.S. Environmental Protection Agency Under the Federal Insecticide, Fungicide and Rodenticide Act

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

SOURCE: 51 FR 19957, June 3, 1986, unless otherwise noted.

Subpart A—General

§ 402.01 Scope.

(a) This part interprets and implements sections 7(a)–(d) [16 U.S.C. 1536(a)–(d)] of the Endangered Species Act of 1973, as amended (''Act''). Section 7(a) grants authority to and imposes requirements upon Federal agencies regarding endangered or threatened species of fish, wildlife, or plants (''listed species'') and habitat of such species that has been designated as critical (''critical habitat''). Section

7(a)(1) of the Act directs Federal agencies, in consultation with and with the assistance of the Secretary of the Interior or of Commerce, as appropriate, to utilize their authorities to further the purposes of the Act by carrying out conservation programs for listed species. Such affirmative conservation programs must comply with applicable permit requirements (50 CFR parts 17, 220, 222, and 227) for listed species and should be coordinated with the appropriate Secretary. Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species or results in the destruction or adverse modification of critical habitat. Section 7(a)(3) of the Act authorizes a prospective permit or license applicant to request the issuing Federal agency to enter into early consultation with the Service on a proposed action to determine whether such action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Section 7(a)(4) of the Act requires Federal agencies to confer with the Secretary on any action that is likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat. Section 7(b) of the Act requires the Secretary, after the conclusion of early or formal consultation, to issue a written statement setting forth the Secretary's opinion detailing how the agency action affects listed species or critical habitat Biological assessments are required under section 7(c) of the Act if listed species or critical habitat may be present in the area affected by any major construction activity as defined in § 404.02. Section 7(d) of the Act prohibits Federal agencies and applicants from making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of reasonable and prudent alternatives which would avoid jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat. Section 7(e)–(o)(1) of the Act provide procedures for granting exemptions from the requirements of section 7(a)(2). Regulations governing the submission of exemption applications are found at 50 CFR part 451, and regulations governing the exemption process are found at 50 CFR parts 450, 452, and 453.

(b) The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) share responsibilities for administering the Act. The Lists of Endangered and Threatened Wildlife and Plants are found in 50 CFR 17.11 and 17.12 and the designated critical habitats are found in 50 CFR 17.95 and 17.96 and 50 CFR part 226. Endangered or threatened species under the jurisdiction of the NMFS are located in 50 CFR 222.23(a) and 227.4. If the subject species is cited in 50 CFR 222.23(a) or 227.4, the Federal agency shall contact the NMFS. For all other listed species the Federal Agency shall contact the FWS.

§ 402.02 Definitions.

Act means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq*.

Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to:

(a) actions intended to conserve listed species or their habitat;

(b) the promulgation of regulations;

(c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or

(d) actions directly or indirectly causing modifications to the land, water, or air.

Action area means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

Applicant refers to any person, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action.

Biological assessment refers to the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation potential effects of the action on such species and habitat.

Biological opinion is the document that states the opinion of the Service as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Conference is a process which involves informal discussions between a Federal agency and the Service under section 7(a)(4) of the Act regarding the impact of an action on proposed species or proposed critical habitat and recommendations to minimize or avoid the adverse effects.

Conservation recommendations are suggestions of the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information.

Critical habitat refers to an area designated as critical habitat listed in 50 CFR parts 17 or 226.

Cumulative effects are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.

Designated non-Federal representative refers to a person designated by the Federal agency as its representative to conduct informal consultation and/or to prepare any biological assessment.

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 a species or that preclude or significantly delay development of such features.

Director refers to the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration, or his authorized representative; or the Fish and Wildlife Service regional director, or his authorized representative, for the region where the action would be carried out.

Early consultation is a process requested by a Federal agency on behalf of a prospective applicant under section 7(a)(3) of the Act.

Effects of the action refers to the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

Formal consultation is a process between the Service and the Federal agency that commences with the Federal agency's written request for consultation under section 7(a)(2) of the Act and concludes with the Service's issuance of the biological opinion under section 7(b)(3) of the Act.

Framework programmatic action means, for purposes of an incidental take statement, a Federal action that approves a framework for the development of future action(s) that are authorized, funded, or carried out at a later time, and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation.

Incidental take refers to takings that result from, but are not the purpose of,

carrying out an otherwise lawful activity conducted by the Federal agency or applicant.

Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative prior to formal consultation, if required.

Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

Listed species means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11–17.12.

Major construction activity is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C. 4332(2)(C)].

Mixed programmatic action means, for purposes of an incidental take statement, a Federal action that approves action(s) that will not be subject to further section 7 consultation, and also approves a framework for the development of future action(s) that are authorized, funded, or carried out at a later time and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation.

Preliminary biological opinion refers to an opinion issued as a result of early consultation.

Proposed critical habitat means habitat proposed in the FEDERAL REGISTER to be designated or revised as critical habitat under section 4 of the Act for any listed or proposed species.

Proposed species means any species of fish, wildlife, or plant that is proposed in the FEDERAL REGISTER to be listed under section 4 of the Act.

Reasonable and prudent alternatives refer to alternative actions identified during formal consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction, that is economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

Reasonable and prudent measures refer to those actions the Director believes necessary or appropriate to minimize the impacts, *i.e.*, amount or extent, of incidental take.

Recovery means improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.

Service means the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.

[51 FR 19957, June 3, 1986, as amended at 73 FR 76286, Dec. 16, 2008; 74 FR 20422, May 4, 2009; 80 FR 26844, May 11, 2015; 81 FR 7225, Feb. 11, 2016]

§ 402.03 Applicability.

Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.

[74 FR 20423, May 4, 2009]

§ 402.04 Counterpart regulations.

The consultation procedures set forth in this part may be superseded for a particular Federal agency by joint counterpart regulations among that agency, the Fish and Wildlife Service, and the National Marine Fisheries Service. Such counterpart regulations shall be published in the FEDERAL REGISTER in proposed form and shall be subject to public comment for at least 60 days before final rules are published.

§ 402.05 Emergencies.

(a) Where emergency circumstances mandate the need to consult in an expedited manner, consultation may be conducted informally through alternative procedures that the Director determines to be consistent with the requirements of sections 7(a)–(d) of the

Act. This provision applies to situations involving acts of God, disasters, casualties, national defense or security emergencies, etc.

(b) Formal consultation shall be initiated as soon as practicable after the emergency is under control. The Federal agency shall submit information on the nature of the emergency action(s), the justification for the expedited consultation, and the impacts to endangered or threatened species and their habitats. The Service will evaluate such information and issue a biological opinion including the information and recommendations given during the emergency consultation.

§ 402.06 Coordination with other environmental reviews.

(a) Consultation, conference, and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required by other statutes, such as the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 *et seq.*, implemented at 40 CFR parts 1500–1508) or the Fish and Wildlife Coordination Act (FWCA) (16 U.S.C. 661 *et seq.*). Satisfying the requirements of these other statutes, however, does not in itself relieve a Federal agency of its obligations to comply with the procedures set forth in this part or the substantive requirements of section 7. The Service will attempt to provide a coordinated review and analysis of all environmental requirements.

(b) Where the consultation or conference has been consolidated with the interagency cooperation procedures required by other statutes such as NEPA or FWCA, the results should be included in the documents required by those statutes.

§ 402.07 Designation of lead agency.

When a particular action involves more than one Federal agency, the consultation and conference responsibilities may be fulfilled through a lead agency. Factors relevant in determining an appropriate lead agency include the time sequence in which the agencies would become involved, the magnitude of their respective involvement, and their relative expertise with respect to the environmental effects of the action. The Director shall be notified of the designation in writing by the lead agency.

§ 402.08 Designation of non-Federal representative.

A Federal agency may designate a non-Federal representative to conduct informal consultation or prepare a biological assessment by giving written notice to the Director of such designation. If a permit or license applicant is involved and is not the designated non-Federal representative, then the applicant and Federal agency must agree on the choice of the designated non-Federal representative. If a biological assessment is prepared by the designated non-Federal representative, the Federal agency shall furnish guidance and supervision and shall independently review and evaluate the scope and contents of the biological assessment. The ultimate responsibility for compliance with section 7 remains with the Federal agency.

§ 402.09 Irreversible or irretrievable commitment of resources.

After initiation or reinitiation of consultation required under section 7(a)(2) of the Act, the Federal agency and any applicant shall make no irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives which would avoid violating section 7(a)(2). This prohibition is in force during the consultation process and continues until the requirements of section 7(a)(2) are satisfied. This provision does not apply to the conference requirement for proposed species or proposed critical habitat under section 7(a)(4) of the Act.

Subpart B—Consultation Procedures

§ 402.10 Conference on proposed species or proposed critical habitat.

(a) Each Federal agency shall confer with the Service on any action which is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse

modification of proposed critical habitat. The conference is designed to assist the Federal agency and any applicant in identifying and resolving potential conflicts at an early stage in the planning process.

(b) The Federal agency shall initiate the conference with the Director. The Service may request a conference if, after a review of available information, it determines that a conference is required for a particular action.

(c) A conference between a Federal agency and the Service shall consist of informal discussions concerning an action that is likely to jeopardize the continued existence of the proposed species or result in the destruction or adverse modification of the proposed critical habitat at issue. Applicants may be involved in these informal discussions to the greatest extent practicable. During the conference, the Service will make advisory recommendations, if any, on ways to minimize or avoid adverse effects. If the proposed species is subsequently listed or the proposed critical habitat is designated prior to completion of the action, the Federal agency must review the action to determine whether formal consultation is required.

(d) If requested by the Federal agency and deemed appropriate by the Service, the conference may be conducted in accordance with the procedures for formal consultation in § 402.14. An opinion issued at the conclusion of the conference may be adopted as the biological opinion when the species is listed or critical habitat is designated, but only if no significant new information is developed (including that developed during the rulemaking process on the proposed listing or critical habitat designation) and no significant changes to the Federal action are made that would alter the content of the opinion. An incidental take statement provided with a conference opinion does not become effective unless the Service adopts the opinion once the listing is final.

(e) The conclusions reached during a conference and any recommendations shall be documented by the Service and provided to the Federal agency and to any applicant. The style and magnitude of this document will vary with the complexity of the conference. If formal consultation also is required for a particular action, then the Service will provide the results of the conference with the biological opinion.

§ 402.11 Early consultation.

(a) *Purpose.* Early consultation is designed to reduce the likelihood of conflicts between listed species or critical habitat and proposed actions and occurs prior to the filing of an application for a Federal permit or license. Although early consultation is conducted between the Service and the Federal agency, the prospective applicant should be involved throughout the consultation process.

(b) *Request by prospective applicant.* If a prospective applicant has reason to believe that the prospective action may affect listed species or critical habitat, it may request the Federal agency to enter into early consultation with the Service. The prospective applicant must certify in writing to the Federal agency that (1) it has a definitive proposal outlining the action and its effects and (2) it intends to implement its proposal, if authorized.

(c) *Initiation of early consultation.* If the Federal agency receives the prospective applicant's certification in paragraph (b) of this section, then the Federal agency shall initiate early consultation with the Service. This request shall be in writing and contain the information outlined in § 402.14(c) and, if the action is a major construction activity, the biological assessment as outlined in § 402.12.

(d) *Procedures and responsibilities.* The procedures and responsibilities for early consultation are the same as outlined in § 402.14(c)–(j) for formal consultation, except that all references to the ''applicant'' shall be treated as the ''prospective applicant'' and all references to the ''biological opinion'' or the ''opinion'' shall be treated as the ''preliminary biological opinion'' for the purpose of this section.

(e) *Preliminary biological opinion.* The contents and conclusions of a preliminary biological opinion are the same as for a biological opinion issued after formal consultation except that the incidental take statement provided with a preliminary biological opinion does

not constitute authority to take listed species.

(f) *Confirmation of preliminary biological opinion as final biological opinion.* A preliminary biological opinion may be confirmed as a biological opinion issued after formal consultation if the Service reviews the proposed action and finds that there have been no significant changes in the action as planned or in the information used during the early consultation. A written request for confirmation of the preliminary biological opinion should be submitted after the prospective applicant applies to the Federal agency for a permit or license but prior to the issuance of such permit or license. Within 45 days of receipt of the Federal agency's request, the Service shall either:

(1) Confirm that the preliminary biological opinion stands as a final biological opinion; or

(2) If the findings noted above cannot be made, request that the Federal agency initiate formal consultation.

§ 402.12 Biological assessments.

(a) *Purpose.* A biological assessment shall evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action and is used in determining whether formal consultation or a conference is necessary.

(b) *Preparation requirement.* (1) The procedures of this section are required for Federal actions that are ''major construction activities''; provided that a contract for construction was not entered into or actual construction was not begun on or before November 10, 1978. Any person, including those who may wish to apply for an exemption from section 7(a)(2) of the Act, may prepare a biological assessment under the supervision of the Federal agency and in cooperation with the Service consistent with the procedures and requirements of this section. An exemption from the requirements of section 7(a)(2) is not permanent unless a biological assessment has been prepared.

(2) The biological assessment shall be completed before any contract for construction is entered into and before construction is begun.

(c) *Request for information.* The Federal agency or the designated non-Federal representative shall convey to the Director either (1) a written request for a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area; or (2) a written notification of the species and critical habitat that are being included in the biological assessment.

(d) *Director's response.* Within 30 days of receipt of the notification of, or the request for, a species list, the Director shall either concur with or revise the list or, in those cases where no list has been provided, advise the Federal agency or the designated non-Federal representative in writing whether, based on the best scientific and commercial data available, any listed or proposed species or designated or proposed critical habitat may be present in the action area. In addition to listed and proposed species, the Director will provide a list of candidate species that may be present in the action area. Candidate species refers to any species being considered by the Service for listing as endangered or threatened species but not yet the subject of a proposed rule. Although candidate species have no legal status and are accorded no protection under the Act, their inclusion will alert the Federal agency of potential proposals or listings.

(1) If the Director advises that no listed species or critical habitat may be present, the Federal agency need not prepare a biological assessment and further consultation is not required. If only proposed species or proposed critical habitat may be present in the action area, then the Federal agency must confer with the Service if required under § 402.10, but preparation of a biological assessment is not required unless the proposed listing and/or designation becomes final.

(2) If a listed species or critical habitat may be present in the action area, the Director will provide a species list or concur with the species list provided. The Director also will provide available information (or references thereto) regarding these species and critical habitat, and may recommend

discretionary studies or surveys that may provide a better information base for the preparation of an assessment. Any recommendation for studies or surveys is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act.

(e) *Verification of current accuracy of species list.* If the Federal agency or the designated non-Federal representative does not begin preparation of the biological assessment within 90 days of receipt of (or concurrence with) the species list, the Federal agency or the designated non-Federal representative must verify (formally or informally) with the Service the current accuracy of the species list at the time the preparation of the assessment is begun.

(f) *Contents.* The contents of a biological assessment are at the discretion of the Federal agency and will depend on the nature of the Federal action. The following may be considered for inclusion:

(1) The results of an on-site inspection of the area affected by the action to determine if listed or proposed species are present or occur seasonally.

(2) The views of recognized experts on the species at issue.

(3) A review of the literature and other information.

(4) An analysis of the effects of the action on the species and habitat, including consideration of cumulative effects, and the results of any related studies.

(5) An analysis of alternate actions considered by the Federal agency for the proposed action.

(g) *Incorporation by reference.* If a proposed action requiring the preparation of a biological assessment is identical, or very similar, to a previous action for which a biological assessment was prepared, the Federal agency may fulfill the biological assessment requirement for the proposed action by incorporating by reference the earlier biological assessment, plus any supporting data from other documents that are pertinent to the consultation, into a written certification that:

(1) The proposed action involves similar impacts to the same species in the same geographic area;

(2) No new species have been listed or proposed or no new critical habitat designated or proposed for the action area; and

(3) The biological assessment has been supplemented with any relevant changes in information.

(h) *Permit requirements.* If conducting a biological assessment will involve the taking of a listed species, a permit under section 10 of the Act (16 U.S.C. 1539) and part 17 of this title (with respect to species under the jurisdiction of the FWS) or parts 220, 222, and 227 of this title (with respect to species under the jurisdiction of the NMFS) is required.

(i) *Completion time.* The Federal agency or the designated non- Federal representative shall complete the biological assessment within 180 days after its initiation (receipt of or concurrence with the species list) unless a different period of time is agreed to by the Director and the Federal agency. If a permit or license applicant is involved, the 180-day period may not be extended unless the agency provides the applicant, before the close of the 180-day period, with a written statement setting forth the estimated length of the proposed extension and the reasons why such an extension is necessary.

(j) *Submission of biological assessment.* The Federal agency shall submit the completed biological assessment to the Director for review. The Director will respond in writing within 30 days as to whether or not he concurs with the findings of the biological assessment. At the option of the Federal agency, formal consultation may be initiated under § 402.14(c) concurrently with the submission of the assessment.

(k) *Use of the biological assessment.* (1) The Federal agency shall use the biological assessment in determining whether formal consultation or a conference is required under § 402.14 or § 402.10, respectively. If the biological assessment indicates that there are no listed species or critical habitat present that are likely to be adversely affected by the action and the Director concurs as specified in paragraph (j) of this section, then formal consultation is not required. If the biological assessment indicates that the action is not

likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat, and the Director concurs, then a conference is not required.

(2) The Director may use the results of the biological assessment in (i) determining whether to request the Federal agency to initiate formal consultation or a conference, (ii) formulating a biological opinion, or (iii) formulating a preliminary biological opinion.

§ 402.13 Informal consultation.

(a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

(b) During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat.

[74 FR 20423, May 4, 2009]

§ 402.14 Formal consultation.

(a) Requirement for formal consultation. Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under § 402.11, is confirmed as the final biological opinion.

(c) *Initiation of formal consultation.* A written request to initiate formal consultation shall be submitted to the Director and shall include:

(1) A description of the action to be considered;

(2) A description of the specific area that may be affected by the action;

(3) A description of any listed species or critical habitat that may be affected by the action;

(4) A description of the manner in which the action may affect any listed species or critical habitat and an analysis of any cumulative effects;

(5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and

(6) Any other relevant available information on the action, the affected listed species, or critical habitat.

Formal consultation shall not be initiated by the Federal agency until any required biological assessment has been completed and submitted to the Director in accordance with § 402.12. Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area or a segment of a comprehensive plan. This does not relieve the Federal agency of the requirements for considering the effects of the action as a whole.

(d) *Responsibility to provide best scientific and commercial data available.* The Federal agency requesting formal consultation shall provide the Service

with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation.

(e) *Duration and extension of formal consultation.* Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant cannot be extended for more than 60 days without the consent of the applicant. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant.

(f) *Additional data.* When the Service determines that additional data would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to § 402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting and funding any studies belongs to the Federal agency and the applicant, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) *Service responsibilities.* Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant the Service's review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant in identifying these alternatives. If requested, the Service shall make available to the Federal agency the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant to an extension to a specific date. The applicant may request a copy of the draft opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although

the applicant may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take is reasonably certain to occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) *Biological opinions.* The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a ''jeopardy biological opinion''); or, the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a ''no jeopardy'' biological opinion). A ''jeopardy'' biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

(i) *Incidental take.* (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, *i.e.*, the amount or extent, of such incidental taking on the species (A surrogate (*e.g.*, similarly affected species or habitat or ecological conditions) may be used to express the amount or extent of anticipated take provided that the biological opinion or incidental take statement: Describes the causal link between the surrogate and take of the listed species, explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded.);

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the

incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 216.105 and 222.301(h) for NMFS.

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinitiate consultation immediately.

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(6) For a framework programmatic action, an incidental take statement is not required at the programmatic level; any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate. For a mixed programmatic action, an incidental take statement is required at the programmatic level only for those program actions that are reasonably certain to cause take and are not subject to further section 7 consultation.

(j) *Conservation recommendations.* The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force.

(k) *Incremental steps.* When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

(1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);

(2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;

(3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;

(4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(5) There is a reasonable likelihood that the entire action will not violate section 7(a)(2) of the Act.

(l) *Termination of consultation.* (1) Formal consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

[51 FR 19957, June 3, 1986, as amended at 54 FR 40350, Sept. 29, 1989; 73 FR 76287, Dec. 16, 2008; 74 FR 20423, May 4, 2009; 80 FR 26844, May 11, 2015]

§ 402.15 Responsibilities of Federal agency following issuance of a biological opinion.

(a) Following the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion.

(b) If a jeopardy biological opinion is issued, the Federal agency shall notify the Service of its final decision on the action.

(c) If the Federal agency determines that it cannot comply with the requirements of section 7(a)(2) after consultation with the Service, it may apply for an exemption. Procedures for exemption applications by Federal agencies and others are found in 50 CFR part 451.

§ 402.16 Reinitiation of formal consultation.

Reinitiation of formal consultation is required and shall be requested by the Federal agency or by the Service,

where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

(a) If the amount or extent of taking specified in the incidental take statement is exceeded;

(b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;

(c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may be affected by the identified action.

Subpart C—Counterpart Regulations for Implementing the National Fire Plan

SOURCE: 68 FR 68264, Dec. 8, 2003, unless otherwise noted.

§ 402.30 Definitions.

The definitions in § 402.02 are applicable to this subpart. In addition, the following definitions are applicable only to this subpart.

Action Agency refers to the Department of Agriculture Forest Service (FS) or the Department of the Interior Bureau of Indian Affairs (BIA), Bureau of Land Management (BLM), Fish and Wildlife Service (FWS), or National Park Service (NPS).

Alternative Consultation Agreement (ACA) is the agreement described in § 402.33 of this subpart.

Fire Plan Project is an action determined by the Action Agency to be within the scope of the NFP as defined in this section.

National Fire Plan (NFP) is the September 8, 2000, report to the President from the Departments of the Interior and Agriculture entitled ''Managing the Impact of Wildfire on Communities and the Environment'' outlining a new approach to managing fires, together with the accompanying budget requests, strategies, plans, and direction, or any amendments thereto.

Service Director refers to the FWS Director or the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration.

§ 402.31 Purpose.

The purpose of these counterpart regulations is to enhance the efficiency and effectiveness of the consultation process under section 7 of the ESA for Fire Plan Projects by providing an optional alternative to the procedures found in §§ 402.13 and 402.14(b) of this part. These regulations permit an Action Agency to enter into an Alternative Consultation Agreement (ACA) with the Service, as described in § 402.33, which will allow the Action Agency to determine that a Fire Plan Project is ''not likely to adversely affect'' (NLAA) a listed species or designated critical habitat without formal or informal consultation with the Service or written concurrence from the Service. An NLAA determination for a Fire Plan Project made under an ACA, as described in § 402.33, completes the Action Agency's statutory obligation to consult with the Service for that Project. In situations where the Action Agency does not make an NLAA determination under the ACA, the Action Agency would still be required to conduct formal consultation with the Service when required by § 402.14. This process will be as protective to listed species and designated critical habitat as the process established in subpart B of this part. The standards and requirements for formal consultation under subpart B for Fire Plan Projects that do not receive an NLAA determination are unchanged.

§ 402.32 Scope.

(a) Section 402.33 establishes a process by which an Action Agency may determine that a proposed Fire Plan Project is not likely to adversely affect any listed species or designated critical habitat without conducting formal or informal consultation or obtaining written concurrence from the Service.

(b) Section 402.34 establishes the Service's oversight responsibility and the standard for review under this subpart.

(c) Nothing in this subpart C precludes an Action Agency at its discretion from initiating early, informal, or

formal consultation as described in §§ 402.11, 402.13, and 402.14, respectively.

(d) The authority granted in this subpart is applicable to an Action Agency only where the Action Agency has entered into an ACA with the Service. An ACA entered into with one Service is valid with regard to listed species and designated critical habitat under the jurisdiction of that Service whether or not the Action Agency has entered into an ACA with the other Service.

§ 402.33 Procedures.

(a) The Action Agency may make an NLAA determination for a Fire Plan Project without informal consultation or written concurrence from the Director if the Action Agency has entered into and implemented an ACA. The Action Agency need not initiate formal consultation on a Fire Plan Project if the Action Agency has made an NLAA determination for the Project under this subpart. The Action Agency and the Service will use the following procedures in establishing an ACA.

(1) *Initiation:* The Action Agency submits a written notification to the Service Director of its intent to enter into an ACA.

(2) *Development and Adoption of the Alternative Consultation Agreement:* The Action Agency enters into an ACA with the Service Director. The ACA will, at a minimum, include the following components:

(i) A list or description of the staff positions within the Action Agency that will have authority to make NLAA determinations under this subpart C.

(ii) Procedures for developing and maintaining the skills necessary within the Action Agency to make NLAA determinations, including a jointly developed training program based on the needs of the Action Agency.

(iii) A description of the standards the Action Agency will apply in assessing the effects of the action, including direct and indirect effects of the action and effects of any actions that are interrelated or interdependent with the proposed action.

(iv) Provisions for incorporating new information and newly listed species or designated critical habitat into the Action Agency's effects analysis of proposed actions.

(v) A mutually agreed upon program for monitoring and periodic program evaluation to occur at the end of the first year following signature of the ACA and periodically thereafter.

(vi) Provisions for the Action Agency to maintain a list of Fire Plan Projects for which the Action Agency has made NLAA determinations. The Action Agency will also maintain the necessary records to allow the Service to complete the periodic program evaluations.

(3) *Training:* Upon completion of the ACA, the Action Agency and the Service will implement the training program outlined in the ACA to the mutual satisfaction of the Action Agency and the Service.

(b) The Action Agency may, at its discretion, allow any subunit of the Action Agency to implement this subpart as soon as the subunit has fulfilled the training requirements of the ACA, upon written notification to the Service. The Action Agency shall at all times have responsibility for the adequacy of all NLAA determinations it makes under this subpart.

(c) The ACA and any related oversight or monitoring reports shall be made available to the public through a notice of availability in the FEDERAL REGISTER.

§ 402.34 Oversight.

(a) Through the periodic program evaluation set forth in the ACA, the Service will determine whether the implementation of this subpart by the Action Agency is consistent with the best available scientific and commercial information, the ESA, and section 7 regulations.

(b) The Service Director may use the results of the periodic program evaluation described in the ACA to recommend changes to the Action Agency's implementation of the ACA. If and as appropriate, the Service Director may suspend any subunit participating in the ACA or exclude any subunit from the ACA.

(c) The Service Director retains discretion to terminate the ACA if the Action Agency fails to comply with the requirements of this subpart, section 7

of the ESA, or the terms of the ACA. Termination, suspension, or modification of an ACA does not affect the validity of any NLAA determinations made previously under the authority of this subpart.

Subpart D—Counterpart Regulations Governing Actions by the U.S. Environmental Protection Agency Under the Federal Insecticide, Fungicide and Rodenticide Act

SOURCE: 69 FR 47759, Aug. 5, 2004, unless otherwise noted.

§ 402.40 Definitions.

The definitions in § 402.02 are applicable to this subpart. In addition, the following definitions are applicable only to this subpart.

(a) *Alternative consultation agreement* is the agreement described in § 402.45.

(b) *Effects determination* is a written determination by the U.S. Environmental Protection Agency (EPA) addressing the effects of a FIFRA action on listed species or critical habitat. The contents of an effects determination will depend on the nature of the action. An effects determination submitted under § 402.46 or § 402.47 shall contain the information described in § 402.14(c)(1)–(6) and a summary of the information on which the determination is based, detailing how the FIFRA action affects the listed species or critical habitat. EPA may consider the following additional sections for inclusion in an effects determination:

(1) A conclusion whether or not the FIFRA action is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat and a description of any reasonable and prudent alternatives that may be available;

(2) A description of the impact of any anticipated incidental taking of such listed species resulting from the FIFRA action, reasonable and prudent measures considered necessary or appropriate to minimize such impact, and terms and conditions necessary to implement such measures; and

(3) A summary of any information or recommendations from an applicant. An effects determination shall be based on the best scientific and commercial data available.

(c) *FIFRA action* is an action by EPA to approve, permit or authorize the sale, distribution or use of a pesticide under sections 136–136y of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136 *et seq.* (FIFRA). In any consultation under this subpart, EPA shall determine the nature and scope of a FIFRA action.

(d) *Listed species* is a species listed as endangered or threatened under section 4 of the Act.

(e) *Partial biological opinion* is the document provided under § 402.47(a), pending the conclusion of consultation under § 402.47(b), stating the opinion of the Service as to whether or not a FIFRA action is likely to jeopardize the continued existence of one or more listed species or result in the destruction or adverse modification of one or more critical habitats, and describing the impact of any anticipated incidental taking of such listed species resulting from the FIFRA action, reasonable and prudent measures considered necessary or appropriate to minimize such impact, and terms and conditions necessary to implement such measures.

(f) *Service Director* refers to the Director of the U.S. Fish and Wildlife Service or the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration.

(g) *Service Representative* is the person or persons designated to participate in advance coordination as provided in this subpart.

§ 402.41 Purpose.

The purpose of these counterpart regulations is to enhance the efficiency and effectiveness of the existing consultation process under section 7 of the Endangered Species Act (Act), 16 U.S.C. 1531 *et seq.*, by providing Fish and Wildlife Service and the National Marine Fisheries Service (referred to jointly as ''Services'' and individually as ''Service'') and EPA with additional means to satisfy the requirements of section 7(a)(2) of the Act for certain regulatory actions under FIFRA. These additional means will permit the Services and

EPA to more effectively use the scientific and commercial data generated through the FIFRA regulatory process as part of the best scientific and commercial data available to protect listed species and critical habitat. The procedures authorized by these counterpart regulations will be as protective of listed species and critical habitat as the process established in subpart B of this part.

§ 402.42 Scope and applicability.

(a) *Available consultation procedures.* This subpart describes consultation procedures available to EPA to satisfy the obligations of section 7(a)(2) of the Act in addition to those in subpart B of this part for FIFRA actions authorized, funded, or carried out by EPA in which EPA has discretionary Federal involvement or control. EPA retains discretion to initiate early, informal, or formal consultation as described in §§ 402.11, 402.13, and 402.14 for any FIFRA action. The procedures in this subpart may be employed for FIFRA actions as follows:

(1) Interagency exchanges of information under § 402.43 and advance coordination under § 402.44 are available for any FIFRA action.

(2) Alternative consultation under § 402.45 is available for a listed species or critical habitat if EPA determines the FIFRA action is not likely to adversely affect the listed species or critical habitat.

(3) Optional formal consultation under § 402.46 is available for any FIFRA action with respect to any listed species or critical habitat.

(4) The special procedures in § 402.47 are available for consultations on FIFRA actions that will be unusually complex due to factors such as the geographic area or number of species that may be affected by the action.

(5) EPA shall engage in consultation as to all listed species and critical habitat that may be affected by a FIFRA action, and may in its discretion employ more than one of the available consultation procedures for a FIFRA action that may affect more than one listed species or critical habitat.

(6) EPA shall engage in consultation on actions involving requests for emergency exemptions under section 18 of FIFRA that may affect listed species or critical habitat, and may choose to do so under § 402.05 or other provisions of this subpart or subpart B of this part. Any required formal consultation shall be initiated as soon as practicable after the emergency is under control. For the purposes of § 402.05(b) the definition of formal consultation in § 402.02 includes the procedures in § 402.46.

(7) EPA must prepare a biological assessment for a FIFRA action to the extent required by § 402.12.

(8) EPA must comply with § 402.15 for all FIFRA actions.

(9) After a consultation under this subpart has been concluded, EPA shall reinitiate consultation as required by § 402.16 as soon as practicable after a circumstance requiring reinitiation occurs, and may employ the procedures in this subpart or subpart B of this part in any reinitiated consultation.

(b) *Exchanges of scientific information.* As part of any of the additional consultation procedures provided in this subpart, EPA and the Services shall establish mutually-agreeable procedures for regular and timely exchanges of scientific information to achieve accurate and informed decision-making under this subpart and to ensure that the FIFRA process considers the best scientific and commercial data available on listed species and critical habitat in a manner consistent with the requirements of FIFRA and ESA.

§ 402.43 Interagency exchanges of information.

EPA may convey to the Service a written request for a list of any listed species or critical habitat that may be present in any area that may be affected by a FIFRA action. Within 30 days of receipt of such a request the Service shall advise EPA in writing whether, based on the best scientific and commercial data available, any listed species or critical habitat may be present in any such area. EPA may thereafter request the Service to provide available information (or references thereto) describing the applicable environmental baseline for each species or habitat that EPA determines may be affected by a FIFRA action,

and the Service shall provide such information within 30 days of the request.

§ 402.44 Advance coordination for FIFRA actions.

(a) *Advance coordination.* EPA may request the Service to designate a Service Representative to work with EPA in the development of an effects determination for one or more listed species or critical habitat. EPA shall make such a request in writing and shall provide sufficient detail as to a FIFRA action planned for consultation to enable the Service to designate a representative with appropriate training and experience who shall normally be available to complete advance coordination with EPA within 60 days of the date of designation. Within 14 days of receiving such a request, the Service shall advise EPA of the designated Service Representative.

(b) *Participation of Service Representative in preparation of effects determination.* The Service Representative designated under paragraph (a) of this section shall participate with EPA staff in the preparation of the effects determination identified under paragraph (a) of this section. EPA shall use its best efforts to include the designated Service Representative in all relevant discussions on the effects determination, to provide the designated Service Representative with access to all documentation used to prepare the effects determination, and to provide the designated Service Representative office and staff support sufficient to allow the Service Representative to participate meaningfully in the preparation of the effects determination. EPA shall consider all information timely identified by the designated Service Representative during the preparation of the effects determination.

§ 402.45 Alternative consultation on FIFRA actions that are not likely to adversely affect listed species or critical habitat.

(a) *Consultation obligations for FIFRA actions that are not likely to adversely affect listed species or critical habitat when alternative consultation agreement is in effect.* If EPA and the Service have entered into an alternative consultation agreement as provided below, EPA may make a determination that a FIFRA action is not likely to adversely affect a listed species or critical habitat without informal consultation or written concurrence from the Director, and upon making such a determination for a listed species or critical habitat, EPA need not initiate any additional consultation on that FIFRA action as to that listed species or critical habitat. As part of any subsequent request for formal consultation on that FIFRA action under this subpart or subpart B of this part, EPA shall include a list of all listed species and critical habitat for which EPA has concluded consultation under this section.

(b) *Procedures for adopting and implementing an alternative consultation agreement.* EPA and the Service may enter into an alternative consultation agreement using the following procedures:

(1) *Initiation.* EPA submits a written notification to the Service Director of its intent to enter into an alternative consultation agreement.

(2) *Required contents of the alternative consultation agreement.* The alternative consultation agreement will, at a minimum, include the following components:

(i) *Adequacy of EPA Determinations under the ESA.* The alternative consultation agreement shall describe actions that EPA and the Service have taken to ensure that EPA's determinations regarding the effects of its actions on listed species or critical habitat are consistent with the ESA and applicable implementing regulations.

(ii) *Training.* The alternative consultation agreement shall describe actions that EPA and the Service intend to take to ensure that EPA and Service personnel are adequately trained to carry out their respective roles under the alternative consultation agreement. The alternative consultation agreement shall provide that all effects determinations made by EPA under this subpart have been reviewed and concurred on by an EPA staff member who holds a current certification as having received appropriate training under the alternative consultation agreement.

(iii) *Incorporation of new information.* The alternative consultation agreement shall describe processes that EPA and the Service intend to use to ensure that new information relevant to EPA's effects determinations is timely and appropriately considered.

(iv) *Incorporation of scientific advances.* The alternative consultation agreement shall describe processes that EPA and the Service intend to use to ensure that the ecological risk assessment methodologies supporting EPA's effects determinations incorporate relevant scientific advances.

(v) *Oversight.* The alternative consultation agreement shall describe the program and associated record keeping procedures that the Service and EPA intend to use to evaluate EPA's processes for making effects determinations consistent with these regulations and the alternative consultation agreement. The alternative consultation agreement shall provide that the Service's oversight will be based on periodic evaluation of EPA's program for making effects determinations under this subpart. Periodic program evaluation will occur at the end of the first year following signature of the alternative consultation agreement and should normally occur at least every five years thereafter.

(vi) *Records.* The alternative consultation agreement shall include a provision for EPA to maintain a list of FIFRA actions for which EPA has made determinations under this section and to provide the list to the Services on request. EPA will also maintain the necessary records to allow the Service to complete program evaluations.

(vii) *Review of Alternative Consultation Agreement.* The alternative consultation agreement shall include provisions for regular review and, as appropriate, modification of the agreement by EPA and the Service, and for departure from its terms in a particular case to the extent deemed necessary by both EPA and the Service.

(3) *Training.* After EPA and the Service enter into the alternative consultation agreement, EPA and the Service will implement the training program outlined in the alternative consultation agreement to the mutual satisfaction of EPA and the Service.

(4) *Public availability.* The alternative consultation agreement and any related oversight or monitoring reports shall be made available to the public to the extent provided by law.

(c) *Oversight of alternative consultation agreement implementation.* Through the program evaluations set forth in the alternative consultation agreement, the Service will determine whether the implementation of this section by EPA is consistent with the best scientific and commercial information available, the ESA, and applicable implementing regulations. The Service Director may use the results of the program evaluations described in the alternative consultation agreement to recommend changes to EPA's implementation of the alternative consultation agreement. The Service Director retains discretion to terminate or suspend the alternative consultation agreement if, in using the procedures in this subpart, EPA fails to comply with the requirements of this subpart, section 7 of the ESA, or the terms of the alternative consultation agreement. Termination, suspension, or modification of an alternative consultation agreement does not affect the validity of any NLAA determinations made previously under the authority of this subpart.

§ 402.46 Optional formal consultation procedure for FIFRA actions.

(a) *Initiation of consultation.* EPA may initiate consultation on a FIFRA action under this section by delivering to the Service a written request for consultation. The written request shall be accompanied by an effects determination as defined in § 402.40(b) and a list or summary of all references and data relied upon in the determination. All such references and data shall be made available to the Service on request and shall constitute part of the Service's administrative record for the consultation. The time for conclusion of the consultation under section 7(b)(1) of the Act is calculated from the date the Service receives the written request from EPA. Any subsequent interchanges regarding EPA's submission, including interchanges about the completeness of the effects determination,

shall occur during consultation and do not extend the time for conclusion of the consultation unless EPA withdraws the request for consultation.

(b) *Additional information determination.* For an effects determination prepared without advance coordination under § 402.44, the Service may determine that additional available information would provide a better information base for the effects determination, in which case the Service Director shall notify the EPA Administrator within 45 days of the date the Service receives the effects determination. The notification shall describe such additional information in detail, and shall identify a means for obtaining that information within the time period available for consultation. EPA shall provide a copy of the Service Director's notification to any applicant. EPA may thereafter revise its effects determination, and may resubmit the revised effects determination to the Service. If EPA advises the Service it will not resubmit a revised effects determination to the Service, its initiation of consultation on the effects determination is deemed withdrawn.

(c) *Service responsibilities.* (1) Within the later of 90 days of the date the Service receives EPA's written request for consultation or 45 days of the date the Service receives an effects determination resubmitted under paragraph (b) of this section, and consistent with section 7(b)(1) of the Act, the Service shall take one of the following actions:

(i) If the Service finds that the effects determination contains the information required by § 402.40(b) and satisfies the requirements of section 7(b)(4) of the Act, and the Service concludes that the FIFRA action that is the subject of the consultation complies with section 7(a)(2) of the Act, the Service will issue a written statement adopting the effects determination; or

(ii) The Service will provide EPA a draft of a written statement modifying the effects determination, which shall meet the requirements of § 402.14(i), and as modified adopting the effects determination, and shall provide a detailed explanation of the scientific and commercial data and rationale supporting any modification it makes; or

(iii) The Service will provide EPA a draft of a biological opinion finding that the FIFRA action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat, and describing any reasonable and prudent alternatives if available.

(2) If the Service acts under paragraphs (c)(1)(ii) or (c)(1)(iii) of this section, EPA shall, on request from an applicant, provide the applicant a copy of the draft written statement or draft biological opinion received from the Service. The Service shall at the request of EPA or an applicant discuss with EPA and the applicant the Service's review and evaluation under this section, and the basis for its findings. EPA and any applicant may submit written comments to the Service within 30 days after EPA receives the draft written statement or opinion from the Service unless the Service, EPA and any applicant agree to an extended deadline consistent with section 7(b)(1) of the Act.

(3) The Service will issue a final written statement or final biological opinion within 45 days after EPA receives the draft statement or opinion from the Service unless the deadline is extended under section 7(b)(1) of the Act.

(d) *Opinion of the Secretary.* The written statement or opinion by the Service under paragraphs (c)(1) or (c)(3) of this section shall constitute the opinion of the Secretary and the incidental take statement, reasonable and prudent measures, and terms and conditions under section 7(b) of the Act.

(e) *Delegation of Authority for Service decisions.* Any written statement modifying an effects determination or any biological opinion issued under this section shall be signed by the Service Director and such authority may not be delegated below the level of Assistant Director for Endangered Species (FWS) or Director of Office of Protected Resources (NOAA Fisheries).

§ 402.47 Special consultation procedures for complex FIFRA actions.

(a) *Successive effects determinations.* If EPA determines after conferring with the Service that consultation on a

FIFRA action will be unusually complex due to factors such as the geographic area or number of species that may be affected by the action, EPA may address the effects of the action through successive effects determinations under this subpart addressing groupings or categories of species or habitats as established by EPA. EPA may initiate consultation based upon each such effects determination using the procedure in § 402.46(a), and the provisions of § 402.46(b) and (c) shall apply to any such consultation. When consultation is conducted under this section, the written statement or opinion provided by the Service under § 402.46(c) constitutes a partial biological opinion as to the species or habitats that are the subject of the consultation. While not constituting completion of consultation under section 7(a)(2), EPA retains authority to use such a partial biological opinion along with other available information in making a finding under section 7(d) of the Act.

(b) *Opinion of the Secretary.* After conclusion of all consultation on the FIFRA action, the partial biological opinions issued under paragraph (a) of this section shall then collectively constitute the opinion of the Secretary and the incidental take statement, reasonable and prudent measures, and terms and conditions under section 7(b) of the Act except to the extent a partial biological opinion is modified by the Service in accordance with the procedures in § 402.46(c). The Service shall so advise EPA in writing upon issuance of the last partial biological opinion for the consultation.

§ 402.48 Conference on proposed species or proposed critical habitat.

EPA may employ the procedures described in § 402.10 to confer on any species proposed for listing or any habitat proposed for designation as critical habitat. For the purposes of § 402.10(d), the procedures in § 402.46 are a permissible form of formal consultation.

PART 403—TRANSFER OF MARINE MAMMAL MANAGEMENT AUTHORITY TO STATES

Sec.

AUTHORITY: 16 U.S.C. 1361 *et seq.*, as amended by Pub. L. 97–58.

SOURCE: 48 FR 22456, May 18, 1983, unless otherwise noted.

§ 403.01 Purpose and scope of regulations.

The regulations contained in this part implement section 109 of the Act which, upon a finding by the Secretary of compliance with certain requirements, provides for the transfer of marine mammal management authority to the states.

(a) The regulations of this part apply the procedures for the transfer of marine mammal management authority to a state, the form and minimum requirements of a state application for the transfer of management authority, the relationship between Federal and state wildlife agencies both prior and subsequent to the transfer of management authority, and the revocation and return of management authority to the Federal Government.

(b) Nothing in this part shall prevent:

(1) The taking of a marine mammal by or on behalf of a Federal, state or local government official, in accordance with § 18.22 or § 216.22 of this Title and section 109(h) of the Act, or (2) the adoption or enforcement of any state law or regulation relating to any marine mammal taken before December 21, 1972.

(c) The information collection requirements contained in §§ 403.03, 403.06, and 403.07 of this part do not require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*, because there are fewer than 10 respondents annually.

§ 403.02 Definitions.

The following definitions apply to this part: