DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 402

[Docket No. FWS–R9–ES–2011–0080]

[FXES11120900000-134-FF09E30000]

RIN 1018–AX85; 0648-BB81

Interagency Cooperation—Endangered Species Act of 1973, as Amended; Incidental Take Statements

AGENCIES: Fish and Wildlife Service, Interior; National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the Services), propose to amend the regulations governing consultation under section 7 of the Endangered Species Act of 1973, as amended (ESA), regarding incidental take statements. The purpose of the proposed changes is to address (1) the use of surrogates to express the amount or extent of anticipated incidental take, and (2) incidental take statements for programmatic actions where implementation of the program requires later authorization, funding, or implementation of site-specific actions that will be subject to section 7 consultation and incidental take statements, as appropriate. These changes are proposed to improve the flexibility and clarify the development of incidental take statements. The Services believe these proposed regulatory changes are a reasonable exercise of their discretion in interpreting particularly challenging aspects of section 7 of the ESA related to incidental take statements.

DATES: We will accept comments received or postmarked on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments by one of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments for Docket No. FWS–R9–ES–2011–0080.

U.S. mail or hand-delivery: Public Comments Processing, Attn: Docket No. FWS–R9–ES–2011–0080; Division of Policy and Directives Management; U.S. Fish and Wildlife Service;

4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal information—may be made publicly available at any time. While you can ask in your comment to withhold your personal identifying information from public review, this cannot be guaranteed.

FOR FURTHER INFORMATION CONTACT: Rick Sayers, Chief, Division of Environmental Review, U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240 (telephone: 703-358-2171); or Kristine Petersen, Chief (Acting), Endangered Species Act Interagency Cooperation Division, Office of Protected Resources, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce, Department of Commerce, Washington, D.C. (telephone: 301-427-8453).

SUPPLEMENTARY INFORMATION:

Background

Section 9 of the ESA prohibits the take of listed animal species with certain exceptions. Under the ESA, the term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Section 7 of the ESA provides for the exemption of incidental take of listed animal species caused by, but not the purpose of, actions that the Services have found to be consistent with the provisions of section 7(a)(2).

Under those conditions, if a proposed action is anticipated to cause incidental take, the Services issue an incidental take statement under 50 CFR 402.14(i) with the biological opinion that specifies, among other requirements: the impact of such incidental taking on the listed species; measures considered necessary to minimize the impact of such take; requirements for the action agency or the applicant to monitor and report the progress of the action and its impact on the species to the Service as specified in the incidental take statement; and the procedures for handling or disposing of individuals that are taken.

The current regulations at § 402.14(i)(1)(i) require the Services to express the impact of such incidental taking of the species in terms of amount or extent. The preamble to the final rule that set forth the current regulations discusses the use of a precise number of individuals or a description of the land or marine area affected to express the amount or extent of anticipated take, respectively (51 FR 19954; June 3, 1986).

Court decisions rendered over the last decade regarding the adequacy of incidental take statements have prompted the Services to consider clarifying two aspects of incidental take statements: (1) The use of surrogates such as habitat, ecological conditions, or similar affected species, to express the amount or extent of anticipated incidental take, including circumstances where project impacts to the surrogate are coextensive with at least one aspect of the project's scope; and (2) incidental take statements for programmatic actions where implementation of the program requires later authorization, funding, or implementation of site-specific actions that will be subject to future section 7 consultation and incidental take statements, as appropriate. After careful consideration of the following and other court decisions, the Services are proposing to modify the ESA section 7 regulations to address those aspects of incidental take statements:

- *Arizona Cattle Growers' Association* v. *U.S. Fish and Wildlife Service*, 273 F.3d 1229

(9th Cir. 2001);

- *Natural Res. Def. Council, Inc.* v. *Evans*, 279 F. Supp. 2d 1129, 1184-85 (N.D. Cal. 2003);
- *Ctr. for Biological Diversity* v. *Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1137-38 (N.D. Cal. 2006);
- *Oregon Natural Resources Council* v. *Allen*, 476 F.3d 1031 (9th Cir. 2007);
- *Miccosukee Tribe of Indians of Florida* v. *U.S. Fish and Wildlife Service*, 566 F.3d 1257 (11th Cir. 2009);
- *Wild Fish Conservancy* v. *Salazar*, 628 F.3d 513 (9th Cir. 2010);
- *Center for Biological Diversity v. Salazar*, 695 F.3d 893 (9th Cir. 2012).

Through this action, the Services are proposing to establish prospective standards regarding incidental take statements. Nothing in these proposed regulations is intended to require, now or at such time as these proposed regulations become final, reevaluation of any previously completed biological opinions or incidental take statements.

Use of Surrogates

The Services acknowledge congressional preference for expressing the impacts of take in incidental take statements in terms of a numerical limitation with respect to individuals of the listed species. However, Congress also recognized that a numerical value would not always be available and intended that such numbers only be established where possible (H.R. Rep. No. 97-567, at 27). The preamble to the final rule that set forth the current regulations also acknowledges that exact numerical limits on the amount of anticipated incidental take may be

difficult to determine and the Services may instead specify the level of anticipated take in terms of the extent of the land or marine area that may be affected. In fact, as the Services explained in the preamble, the use of descriptions of extent of take can be more appropriate than the use of numerical amounts "because for some species loss of habitat resulting in death or injury to individuals may be more deleterious than the direct loss of a certain number of individuals" (51 FR 19954). Over the last 25 years of developing incidental take statements, the Services have found that in many cases the biology of the listed species or the nature of the proposed action makes it impractical to detect or monitor take of individuals. In those situations, evaluating impacts to a surrogate such as habitat, ecological conditions, or similar affected species may be the most reasonable and meaningful measure of assessing take of listed species.

The courts also have recognized that it is not always practicable to establish the precise number of individuals that will be taken and that "surrogate" measures are acceptable to establish the impact of take on the species if there is a link between the surrogate and take. *Arizona Cattle Growers' Association* v. *U.S. Fish and Wildlife Service*, 273 F.3d 1229 (9th Cir. 2001). It is often more practical and meaningful to monitor project effects upon surrogates, which can also provide a clear standard for determining when the amount or extent of anticipated take has been exceeded and consultation should be reinitiated. Accordingly, the Services have adopted the use of surrogates as part of our national policy for preparing incidental take statements:

> "Take can be expressed also as a change in habitat characteristics affecting the species (e.g., for an aquatic species, changes in water temperature or chemistry, flows, or sediment loads) where data or information exists which links such changes to the take of the listed species. In some situations, the species itself or

> the effect on the species may be difficult to detect. However, some detectable measure of effect should be provided. . . . [I]f a sufficient causal link is demonstrated (i.e., the number of burrows affected or a quantitative loss of cover, food, water quality, or symbionts), then this can establish a measure of the impact on the species or its habitat and provide the yardstick for reinitiation."
> *Endangered Species Consultation Handbook*, U.S. Fish and Wildlife Service and National Marine Fisheries Service (March 1998; p. 4-47–48).

An example of when we might use a surrogate measure for take is timber harvest activities within habitat of the threatened northern spotted owl *(Strix occidentalis caurina).* Such activities can cause take by modifying habitat conditions that significantly disrupt the spotted owl's nesting, roosting, or foraging behavior. Although the number of spotted owls likely to be taken as a result of project effects to its habitat can be estimated, detection and monitoring of the affected owls to determine when take has occurred or when the amount or extent of anticipated take has been reached is not practical for two reasons. First, there is a low likelihood of finding an injured or dead spotted owl because their home ranges are large (about 3,000 acres on average) and there is a high rate of removal of injured or dead individuals by predators and scavengers. Second, the nature of the anticipated take impact to the spotted owl is primarily in the form of reduced fitness of adult owls, leading to reduced survival and reproduction in the future. Documenting this reduction is very difficult, and doing so may take months or years at considerable expense. Using habitat metrics to express the extent of take and to evaluate the impacts of take on the species is a practical alternative because effects to habitat: are causally related to take of spotted owls; can be readily monitored; and provide a clear standard for when

the anticipated amount has been exceeded.

In some situations, the most practical surrogate for expressing the amount or extent of anticipated take of listed species is the amount of listed species' habitat impacted by the proposed action, and the expression of the habitat surrogate is fully coextensive with the project's impacts on the habitat. For example, under a proposed Clean Water Act permit issued by the Army Corps of Engineers, a quarter-acre of wetlands composed of three vernal pools occupied by the threatened vernal pool fairy shrimp (*Branchinecta lynchi*) would be filled to construct a road-crossing; no other habitat of the vernal pool fairy shrimp would be affected by this action. The wetland fill is likely to kill all of the shrimp occupying the three vernal pools. A single pool may contain thousands of individual shrimp as well as their eggs or cysts. For that reason, it is not practical to express the amount or extent of anticipated take of this species or monitor take-related impacts in terms of individual shrimp. Quantifying the area encompassing the three vernal pools supporting this species as a surrogate for incidental take would be a practical and meaningful alternative to quantifying and monitoring the anticipated incidental take in terms of individual shrimp caused by the proposed Federal permit action. In this case, the habitat surrogate for the amount or extent of anticipated take is coextensive with at least one aspect of the project's scope—the anticipated amount (i.e., a quarter of an acre) of vernal pool habitat to be affected by the project.

The Ninth Circuit Court's holding in *Oregon Natural Resources Council* v. *Allen*, 476 F.3d 1031 (9th Cir. 2007) could be read to suggest that such surrogates cannot be coextensive with the project's scope for fear that reinitiation of consultation would not be triggered until the project is complete. However, even under circumstances of a coextensive surrogate (such as in the above example), the incidental take statement will require the action agency to monitor

project impacts to the surrogate during the course of the action, which will determine whether these impacts are consistent with the analysis in the biological opinion. This assessment will ensure a trigger for reinitiation of formal consultation if the amount or extent of the anticipated taking specified in the incidental take statement is exceeded during the course of the action where discretionary Federal involvement or control over the action has been retained or is authorized by law in accordance with § 402.16. In the above example, reinitiation of formal consultation would be triggered in the event a fourth vernal pool was discovered during wetland fill or it was determined that the total amount of vernal pool habitat modified by the project exceeded the identified one-quarter of an acre of wetland habitat. Thus, although fully coextensive with the *anticipated* impacts of the project on vernal pool fairy shrimp, the surrogate nevertheless provides for a meaningful reinitiation trigger consistent with the purpose of an incidental take statement.

We propose to amend § 402.14(i)(1)(i) of the regulations to clarify that surrogates may be used to express the amount or extent of anticipated take, provided the biological opinion or the incidental take statement: (1) describes the causal link between the surrogate and take of the listed species; (2) describes 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 (3) sets a clear standard for determining when the extent of taking has been exceeded. This amendment to the regulations would clarify the Services' discretion to use surrogates to express and monitor the amount or extent of anticipated take when they determine it is the most practical means to do so. Such flexibility may be especially useful in cases where the biology of the listed species or the nature of the proposed action makes it impractical to detect or monitor take-related impacts to individual animals.

We also propose to amend the regulations at § 402.14(i)(3) to clarify that monitoring project impacts to a surrogate meets the requirement for monitoring the impacts of take on the listed species.

Incidental Take Statements for Programmatic Actions

For purposes of this proposed rule, a programmatic action means an action, as defined at 50 CFR § 402.02, that is designed to provide a framework for the development of future, site-specific Federal actions that are authorized, funded, or carried out at a later time. Such site-specific actions will be subject to separate section 7 consultation and incidental take statements, as appropriate. Examples of programmatic actions include land resource management plans established under the National Forest Management Act or the Federal Land Policy Management Act, broadly defined actions supported by programmatic Environmental Impact Statements and associated Records of Decision such as designations of certain geographic areas for a particular purpose (e.g., energy corridors), or promulgation of regulations that guide an agency's activities in general ways without authorizing specific projects. The key distinguishing characteristics of programmatic actions for purposes of this proposed rule are: (1) they provide the framework for future, site-specific actions which are subject to section 7 consultations and incidental take statements, but they do not authorize, fund, or carry out those future site-specific actions; and (2) they do not include sufficient site-specific information to inform an assessment of where, when, and how listed species are likely to be affected by the program. The Services are committed to coordinating with action agencies in deciding whether an action fits the definition of "programmatic action."

In biological opinions on programmatic actions where the Services concluded that the action is not likely to violate section 7(a)(2) and incidental take of listed species is anticipated, we have struggled with expressing the amount or extent of the anticipated take in an incidental take statement. The statutory and regulatory provisions for incidental take statements were clearly designed to address site-specific projects, not an over-arching program that is the precursor for those specific projects. The methodologies and rationale developed by the Services over many years of developing biological opinions and incidental take statements are based on a review of the impacts of a site-specific action on listed species and a determination as to whether those impacts conform to the statutory definition of take.

Addressing incidental take in the context of a programmatic action has recently become a subject of litigation. Courts have issued varied rulings on this issue of whether a biological opinion for a programmatic action can or should contain an incidental take statement. A California district court (*Ctr. for Biological Diversity* v. *U.S. Fish and Wildlife Service*, 2009 U.S. Dist. LEXIS 48376 (N.D. Cal., June 8, 2009) held that an incidental take statement should have been provided at the programmatic scale. *See also, Center for Biological Diversity v. Salazar*, 695 F.3d 893 (9th Cir. 2012); *NRDC* v. *Evans*, 279 F.Supp.2d 1129 (N.D. Cal. 2003) (each holding an incidental take statement should have been provided in the context of incidental take regulations under the Marine Mammal Protection Act). However, other courts have held that incidental take statements are not required in biological opinions addressing programmatic actions if site-specific actions under the program are subject to future consultation where an incidental take statement can be prepared, as appropriate. *Western Watersheds Project* v. *BLM*, 552 F.Supp.2d 1113 (D. Nev. 2008).

Because programmatic actions provide frameworks without details related to the where,

when, and how future site-specific actions are likely to impact a listed species, attempts to identify a specific amount or extent of incidental take that is caused by a programmatic action absent that specificity would in most instances be speculative and unlikely to provide an accurate and reliable trigger for reinitiation of consultation. To address the issue of incidental take statements for programmatic actions, the Services are proposing to revise 50 CFR § 402.14 and to promulgate new regulatory definitions of the terms "programmatic action" and "programmatic incidental take statement" in 50 CFR § 402.02. These definitions are intended to distinguish the inherent differences between a programmatic action and a typical site-specific project relative to site-specific information (or the lack thereof) that provides details on where, when, and how listed species are likely to be impacted. The definitions are promulgated to respect the purpose of the ESA relative to providing incidental take statements in biological opinions, including those for programmatic actions.

The Services intend that a "programmatic incidental take statement" for a "programmatic action" will not include a specific amount or extent of anticipated take of listed species because programmatic actions do not include sufficient site-specific information to inform an assessment of where, when, and how listed species are likely to be affected by the program. Instead, the Services will, as appropriate, develop a programmatic incidental take statement that anticipates an unquantifiable amount or extent of take at the programmatic scale in recognition that subsequent site-specific actions authorized, funded, or carried out under the programmatic action will be subject to subsequent section 7 consultation and incidental take statements, as appropriate.

Another purpose of the ESA relative to providing incidental take statements in biological opinions is to establish a trigger for reinitiation of formal consultation during the course of the

action when the amount or extent of anticipated take is exceeded. The implementing regulations for section 7 address this requirement at 50 CFR 402.16(a). Satisfying this requirement for programmatic actions that lack sufficient specificity to support quantification of an amount or extent of anticipated take is very challenging. To address the requirement for a reinitiation trigger when take is exceeded, the Services took an approach that reflects the inherent differences between a programmatic action and a typical site-specific project relative to site-specific information (or the lack thereof) that provides details on where, when, and how listed species are likely to be impacted.

Under the proposed regulatory definition of "programmatic incidental take statement" the reinitiation trigger at 402.16(a) may, as appropriate, be expressed as a reasonable and prudent measure(s) that adopts either specific provisions of the proposed programmatic action, such as spatial or timing restrictions, to limit the impacts of the program on listed species or similar types of restrictions identified by the Services that would function to minimize the impacts of anticipated take on listed species at the programmatic level. In the event the action agency proposes a site-specific action under the programmatic action that is likely to cause take of a listed species but the site-specific action does not conform to the specified provisions of the incidental take statement for the programmatic action, reinitiation of consultation on the programmatic action would be triggered.

The Services would have substantial flexibility to adopt these programmatic reinitiation triggers as reasonable and prudent measures to address the particular circumstances of the programmatic action under consultation and the manner in which the action agency is expected to carry out later site-specific actions. For example, if a proposed forest plan includes 100-foot wide riparian buffers for timber harvest actions along streams occupied by listed fish, the

incidental take statement for the plan-level biological opinion could adopt the riparian buffer as a reasonable and prudent measure and identify encroachments on the 100-foot wide riparian buffer as a reinitiation trigger for exceeding anticipated take. If a subsequent, site-specific timber harvest action developed under the programmatic action adopted more narrow riparian buffers, reinitiation of formal consultation on the programmatic action would be triggered because the take exemption provided by the programmatic incidental take statement is likely to be exceeded.

Similarly, the Services could include a reasonable and prudent measure under a programmatic incidental take statement that requires the action agency to engage in section 7(a)(2) consultation for site-specific actions that are anticipated to cause take of listed species under the programmatic action. Such a reasonable and prudent measure would be appropriate for three reasons. First, although the action agency's duty to consult already exists under the statute, imposing the requirement as a reasonable and prudent measure would require site-specific consultation in order to maintain the exemption of incidental take at the programmatic level. Second, many biological opinions for programmatic actions rely on the second look afforded by site-specific consultation to support a no-jeopardy conclusion. An action agency's failure to consult at the site-specific level would undermine that conclusion. Third, with adequate procedures for notice to the action agency provided as terms and conditions, a reinitiation trigger for a failure to consult on a site-specific project would serve as a clear standard for when reinitiation was required under the programmatic incidental take statement.

The Services also anticipate that specific provisions or restrictions proposed under a programmatic action may, in some circumstances, be included or augmented as reasonable and prudent measures in the programmatic incidental take statement, as appropriate, to minimize the impacts of anticipated take of listed species. Monitoring requirements at the programmatic

action scale would also be included as a reasonable and prudent measure in the incidental take statement for a programmatic action pursuant to the requirements of 50 CFR 402.14(i)(3).

Required Determinations

Regulatory Planning and Review (E.O. 12866)

The Office of Management and Budget (OMB) has determined that this proposed rule is significant and has reviewed this proposed rule under Executive Order 12866 (E.O. 12866). OMB bases its determination on the following four criteria:

(a) Whether the proposed rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the proposed rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the proposed rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the proposed rule raises novel legal or policy issues.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

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 (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or his 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 are certifying that this rule will not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

Incidental take statements describe the amount or extent of incidental take that is anticipated to occur when a Federal action is implemented. The incidental take statement conveys an exemption from the ESA's take prohibitions provided that the action agency (and any applicant) complies with the terms and conditions of the incidental take statement. Terms and conditions cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes (50 CFR 402.14(i)(2)). The changes embodied by this proposed regulation will neither expand nor contract the reach of terms and conditions of an incidental take statement. As such, we foresee no economic effects from implementation of this proposed rule.

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) If adopted, this proposal will not "significantly or uniquely" affect small governments. We have determined and certify under the Unfunded Mandates Reform Act, 2

U.S.C. 1502 *et seq*., that this proposed rulemaking 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 would not be affected because the proposed regulation will not place additional requirements on any city, county, or other local municipalities.

(b) This rule will not produce a Federal mandate of $100 million or greater in any year (i.e., it is not a "significant regulatory action" under the Unfunded Mandates Reform Act). This proposed regulation would not impose any additional management or protection requirements on the States or other entities.

Takings (E.O. 12630)

In accordance with Executive Order 12630, we have determined that the proposed rule does not have significant takings implications.

A takings implication assessment is not required because this 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 rule would substantially advance a legitimate government interest (conservation and recovery of listed species) and would not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether this proposed rule has significant Federalism effects and have determined that a Federalism assessment is not

required. This rule 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. No intrusion on State policy or administration is expected; roles or responsibilities of Federal or State governments would not change; and fiscal capacity would not be substantially directly affected. Therefore, this rule does not have significant Federalism effects or implications to warrant the preparation of a Federalism Assessment under the provisions of Executive Order 13132.

Civil Justice Reform (E.O. 12988)

This proposed rule will not unduly burden the judicial system and meets the applicable standards provided in sections s (3)(a) and (3)(b)(2) of Executive Order 12988.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with affected recognized Federal Tribes on a government-to-government basis. We have determined that there are no tribal lands affected by this rule and therefore, no such communications were made.

Paperwork Reduction Act

Office of Management and Budget (OMB) regulations at 5 CFR 1320, which implement provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), require that Federal

agencies obtain approval from OMB before collecting information from the public. This proposed rule does not contain any new information collections that require approval. We may not collect 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 are analyzing these proposed regulations in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10-46.450), the Department of the Interior Manual (516 DM 1-6 and 8)), and National Oceanographic and Atmospheric Administration (NOAA) Administrative Order 216-6. Our analysis includes evaluating whether the action is procedural, administrative, or legal in nature, and therefore a categorical exclusion applies. We invite the public to comment on whether, and if so, how this proposed regulation may have a significant effect upon the human environment, including any effects identified as extraordinary circumstances at 43 CFR 46.215. We will complete our analysis, in compliance with NEPA, before finalizing these proposed regulations.

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

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy supplies, distribution, and use. Because this action is not a significant energy action, no Statement of Energy Effects is required.

Clarity of This Regulation (E.O. 12866)

We are required by E.O. 12866, E.O. 12988, and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comment should be as specific as possible. For example, you should tell us the numbers of the sections and paragraphs that are unclearly written, which sections or sentences are too long, or the sections where you feel lists and tables would be useful. The Services would particularly welcome any comments that address whether it would be more appropriate to not provide programmatic incidental take statements and instead defer the exemption of incidental take for programmatic actions, as appropriate, until subsequent site-specific actions that would provide site-specific information regarding where, when, and how listed species are likely to be incidentally taken. Comments on this topic would be most helpful if they specifically address how such an approach is consistent with the Act and how such an approach could be reconciled with existing caselaw and agency practices.

Authority

We are taking this action under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.).

List of Subjects in 50 CFR Part 402

Endangered and threatened wildlife, Fish, Intergovernmental relations, Plants (agriculture).

Proposed Regulation Promulgation

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

PART 402—[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 adding the following definitions

§ 402.02 Definitions.

* * * * *

"Programmatic action" means, for purposes of an incidental take statement, an action that provides a framework for the development of future, site-specific actions occurring in the action area of the programmatic action, that are authorized, funded, or implemented at a later time and subject to section 7 consultation requirements, as appropriate, and for

which site-specific information regarding where, when, and how listed species will be affected will become available at the time of a subsequent section 7 consultation.

"Programmatic incidental take statement" means an incidental take statement prepared in those cases where the Services conclude in a biological opinion that a programmatic action will not violate section 7(a)(2) and where incidental take of listed species is reasonably certain to occur but where the amount or extent of anticipated take cannot be quantified because site-specific information regarding where, when and how listed species will be taken is not yet available.

3. Amend § 402.14 by revising paragraphs (i)(1)(i) and (i)(3), and by adding paragraph (i)(6) to read as follows:

§ 402.14 Formal consultation.

* * * * *

(i) * * *

(1) * * *

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species. A surrogate (e.g., habitat or ecological conditions or similarly affected species) may be used to express the amount or extent of anticipated take provided that the incidental take statement describes the causal link between effects to the surrogate and take of the listed species, 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;

* * * * *

(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. When the Services use a surrogate to express the amount or extent of take, the Federal agency or applicant must monitor the surrogate to ensure that the action does not exceed the anticipated amount or extent of take.

* * * * *

(6) A programmatic incidental take statement will be provided in a biological opinion for a programmatic action that is anticipated to cause incidental take. In such circumstances, the programmatic incidental take statement will include specific provisions as reasonable and prudent measures under 402.14(i)(1) to minimize the impacts of take caused by the programmatic action and to serve as a trigger to reinitiate formal consultation on the programmatic action.

August 6, 2013

/s/ Rachel Jacobson

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

U.S. Department of the Interior

~~Interagency Cooperation—Endangered Species Act of 1973, as Amended; Incidental Take Statements~~

August 21, 2013

/s/ Alan D. Risenhoover
Director, Office of Sustainable Fisheries,
performing the functions and duties of the
Deputy Assistant Administrator for Regulatory Programs

~~Interagency Cooperation—Endangered Species Act of 1973, as Amended;~~

~~Incidental Take Statements~~

Billing Code: 4310-55; 3510-22