

**Billing Codes: 4333-15, 3510-22-P**

**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; FXES1114090000-189-FF09E300000; Docket No. 180207140-8140-01; 4500090023]**

**RIN 1018-BC87; 0648-BH41**

**Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation**

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

**ACTION:** Proposed rule.

**SUMMARY:** We, FWS and NMFS (collectively referred to as the “Services” or “we”), propose to amend portions of our regulations that implement section 7 of the Endangered Species Act of 1973, as amended. The Services are proposing these changes to improve and clarify the interagency consultation processes and make them more efficient and consistent.

**DATES:** We will accept comments from all interested parties until [**INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**]. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on this date.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal:

<http://www.regulations.gov>. In the Search box, enter FWS–HQ–ES–2018–0009, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on “Comment Now!”

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–HQ–ES–2018–0009; U.S. Fish and Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803 or National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910.

We request that you send comments **only** by the methods described above. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see **Request for Information** below for more information).

**FOR FURTHER INFORMATION CONTACT:** Craig Aubrey, U.S. Fish and Wildlife Service, Division of Environmental Review, 5275 Leesburg Pike, Falls Church, VA 22041–

3803, telephone 703/358-2442; or Cathy Tortorici, ESA Interagency Cooperation Division, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301/427-8495. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service at 800-877-8339.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

The purposes of the Endangered Species Act of 1973, as amended (“ESA” or “Act”; 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 Act 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 Act.

The Secretaries of the Interior and Commerce share responsibilities for implementing most of the provisions of the Act. Generally, marine species are under the jurisdiction of the Secretary of Commerce, and all other species are under the jurisdiction of the Secretary of the Interior. Authority to administer the Act has been delegated by the Secretary of the Interior to the Director of the U.S. Fish and Wildlife Service (FWS) and by the Secretary of Commerce to the Assistant Administrator for the National Marine Fisheries Service (NMFS). References in this document to “the Services” mean FWS and NMFS.

There have been no comprehensive amendments to the Act since 1988, and no comprehensive revisions to the implementing regulations since 1986. In the years since those changes took place, much has happened: the Services have gained considerable experience in

implementing the Act, as have other Federal agencies, States, and property owners; there have been numerous court decisions regarding almost every provision of the Act and its implementing regulations; the Government Accountability Office has completed reviews of the Act's implementation; there have been many scientific reviews, including review by the National Research Council; multiple administrations have adopted various policy initiatives; and non-governmental entities have issued reports and recommendations.

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. These proposed regulatory amendments are intended to address the Services' collective experience of more than 40 years implementing the Act and several court decisions.

In carrying out Executive Order 13777, "Enforcing the Regulatory Reform Agenda," the Department of the Interior (DOI) published a document with the title "Regulatory Reform" in the *Federal Register* of June 22, 2017 (82 FR 28429). The document requested public comment on how DOI can improve implementation of regulatory reform initiatives and policies and identify regulations for repeal, replacement, or modification. This proposed rule addresses some of the comments that DOI has received in response to the regulatory reform docket.

As part of implementing E.O. 13777, NOAA published a notice entitled, "Streamlining Regulatory Processes and Reducing Regulatory Burden" (82 FR 31576, July 7, 2017). The notice requested public comments on how NOAA could continue to improve the efficiency and

effectiveness of current regulations and regulatory processes. This proposed rule addresses some of the comments NOAA received from the public.

This proposed rule is one of three related proposed rules that are publishing in today's *Federal Register*. All of these documents propose revisions to various regulations that implement the Act. Beyond the specific revisions to the regulations highlighted in this proposed rule, the Services are comprehensively reconsidering the processes and interpretations of statutory language set out in part 402. Thus, this rulemaking should be considered as applying to all of part 402, and as part of the rulemaking initiated today, the Services will consider whether additional modifications to the interagency cooperation regulations would improve, clarify, or streamline the administration of the Act. We seek public comments recommending, opposing, or providing feedback on specific changes to any provisions in part 402 of the regulations, including but not limited to revising or adopting as regulations existing practices or policies, or interpreting terms or phrases from the Act. Based on comments received and on our experience in administering the Act, the final rule may include revisions to any provisions in part 402 that are a logical outgrowth of this proposed rule, consistent with the Administrative Procedure Act.

In proposing the specific changes to the regulations in this rule, and setting out the accompanying clarifying discussion in this preamble, the Services are proposing prospective standards only. Nothing in these proposed revisions to the regulations is intended to require that any previous consultations under section 7(a)(2) of the Act be reevaluated on the basis of the final rule at such time that the final rule becomes effective.

The Services anticipate that the proposed changes, if finalized, will improve and clarify interagency consultation, and make it more efficient and consistent, without compromising conservation of listed species. Many of the changes should help reduce the costs of consultation.

For example, clarifying the definition of “effects of the action” should decrease consultation timeframes (and costs) by eliminating confusion regarding application of terms in the existing definition, which has resulted in time being spent determining how to categorize an effect, rather than simply determining what the effects are regardless of category. As another example, codifying alternative consultation methods and the ability to adopt portions of Federal agencies’ documents should reduce overall consultation times and costs. Increased use of programmatic consultations will reduce the number of single, project-by-project consultations, streamline the consultation process, and increase predictability and consistency for action agencies. Eliminating the need to reinitiate consultation in certain situations will avoid impractical and disruptive burdens (and costs), without compromising conservation of listed species. We seek comment on (1) the extent to which the changes outlined in this proposed rule will affect timeframes and resources needed to conduct consultation and (2) anticipated cost savings resulting from the changes.

While not reflected in any proposed changes to our regulations at this time, we also seek 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.

## **Proposed Changes to 50 CFR Part 402**

### **Section 402.02 Definitions**

This section sets out definitions of terms that are used throughout these proposed regulations. Some of these terms are further discussed as they pertain to the consultation

procedures in appropriate, subsequent sections. Below we discuss those definitions that would be revised or added by these proposed regulations.

#### *Definition of Destruction or Adverse Modification*

We propose to revise 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 current 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” (§ 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. We now propose to further clarify the definition, removing language that is redundant and has caused confusion about the meaning of the regulation.

#### Background of the Definition of “Destruction or Adverse Modification”

In 1978, the Services promulgated regulations governing interagency cooperation under section 7 of the Act. (50 CFR part 402) (43 FR 870; Jan. 4, 1978). These regulations provided a definition for “destruction or adverse modification” of critical habitat, which was later updated in 1986 to conform with amendments made to the Act. The 1986 regulations defined “destruction or adverse modification” as: “a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological

features that were the basis for determining the habitat to be critical.” (50 CFR 402.02) (51 FR 19926; June 3, 1986). The preamble to the 1986 regulation contained relatively little discussion on the concept of “destruction or adverse modification of critical habitat.”

In 2001, the Fifth Circuit Court of Appeals reviewed the 1986 regulatory definition of destruction or adverse modification and found it exceeded the Service’s discretion. *Sierra Club v. U.S. Fish and Wildlife Service*, 245 F.3d 434 (5th Cir. 2001). Specifically, the court found the regulatory definition to be invalid on its face and inconsistent with the Act. The court reasoned that the regulatory definition set too high a threshold for triggering adverse modification by its requirement that the value of critical habitat for both survival and recovery be appreciably diminished before adverse modification would be the appropriate conclusion. The court determined that the regulatory definition actually established a standard that would only trigger an adverse modification determination if the “survival” of the species was appreciably diminished, while ignoring the role critical habitat plays in the recovery of species. Citing legislative history and the Act itself, the court was persuaded that Congress intended the Act to “enable listed species not merely to survive, but to recover from their endangered or threatened status.” *Sierra Club*, 245 F.3d at 438. Noting the Act defines critical habitat as areas that are “essential to the conservation” of listed species, the court determined that “conservation” is a “much broader concept than mere survival.” *Sierra Club*, 245 F.3d at 441. The court concluded that the Act’s definition of conservation “speaks to the recovery” of listed species.

In 2004, the Ninth Circuit Court of Appeals also reviewed the 1986 regulatory definition of destruction or adverse modification. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004). That court agreed with the Fifth Circuit’s determination that the regulation was facially invalid. The Ninth Circuit, following similar reasoning set out in

*Sierra Club*, determined that Congress viewed conservation and survival as “distinct, though complementary, goals and the requirement to preserve critical habitat is designed to promote both conservation and survival.” Specifically, the court found that “the purpose of establishing ‘critical habitat’ is for the government to [designate habitat] that is not only necessary for the species’ survival but also essential for the species’ recovery.” *Gifford Pinchot Task Force*, 378 F.3d at 1070.

After the Ninth Circuit’s decision, the Services each issued guidance to discontinue the use of the 1986 adverse modification regulation (FWS Acting Director Marshall Jones Memorandum to Regional Directors, “Application of the ‘Destruction or Adverse Modification’ Standard under Section 7(a)(2) of the Endangered Species Act 2004” (FWS 2004); NMFS Assistant Administrator William T. Hogarth Memorandum to Regional Administrators, “Application of the ‘Destruction or Adverse Modification’ Standard under Section 7(a)(2) of the Endangered Species Act, 2005” (NMFS 2005)). Specifically, in evaluating a proposed action’s effects on critical habitat as part of interagency consultation, the Services began applying the definition of “conservation” as set out in the Act, which defines conservation (and conserve and conserving) to mean “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary.” (16 U.S.C. 1532(3)) (i.e., the species is recovered). See 50 CFR 424.02. Accordingly, after examining the status of critical habitat, the environmental baseline, and the effects of the proposed action, the Services began analyzing whether the implementation of the proposed action, together with any cumulative effects, would result in the critical habitat remaining “functional (or retain the current ability for the primary

constituent elements to be functionally established) to serve the intended conservation role for the species.” *See* FWS 2004; NMFS 2005.

In 2016, we promulgated regulations to revise the regulatory definition of “destruction or adverse modification.” We adopted the following definition: “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.” (81 FR 7214, February 11, 2016).

We explained in the 2016 rule that we did not intend for it to alter the section 7(a)(2) consultation process from existing practice and noted that previously completed biological opinions did not need to be reevaluated in light of that rule. The 2016 definition, particularly the first sentence, sought to clarify and preserve the existing distinction between the definitions of “destruction or adverse modification” and “jeopardize the continued existence of” by focusing the analysis for “destruction or adverse modification” on how the effects of a proposed action affect the value of critical habitat as a whole for the conservation of threatened or endangered species. The focus of the “jeopardize the continued existence of” definition, on the other hand, is whether a proposed action appreciably reduces the likelihood of survival and recovery by reducing a species’ reproduction, numbers, and distribution.

The 2016 final rule’s definition reflected several changes from what the Services proposed in 2014. The changes to the first sentence were relatively minor. In the 2014 proposed rule, the first sentence read: “‘Destruction or adverse modification’ means a direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for listed

species.” (79 FR 27060, 27066; May 12, 2014). In the final rule, we made a minor clarification of the first sentence, by changing “conservation value of critical habitat for listed species” to “the value of critical habitat for the conservation of a listed species.” (81 FR at 7226, February 11, 2016).

Many commenters of the 2014 proposed rule expressed confusion or concern regarding the scale at which the determination of destruction or adverse modification of critical habitat is made. Some of these commenters thought that the language, “critical habitat, as a whole,” should be included in the definition and not just the preamble. While the Services declined to include the phrase “as a whole” in the 2016 final definition, we explained in the preamble that we make our determination on the value of the critical habitat and its role in the conservation of the species, and that the existing consultation process already ensures that the determination is made at the appropriate scale. We also explained that, while an action may result in adverse effects to critical habitat within the action area, those effects may not necessarily rise to the level of destruction or adverse modification to the designated critical habitat. In adding the phrase “as a whole” to the proposed revised definition, we intend to clearly indicate that the final destruction or adverse modification determination is made at the scale of the entire critical habitat designation. Smaller scales can be very important analysis tools in determining how the impacts may translate to the entire designated critical habitat, but the final determination is not made at the action area, critical habitat unit, or other less extensive scale.

The analysis thus places an emphasis on the value of the designated critical habitat as a whole for the conservation of a species, in light of the role the action area serves with regard to the function of the overall designation. 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 is made at the scale of the entire critical habitat designation. Even 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. Therefore, we are proposing to revise the first sentence of the definition by adding the phrase “as a whole” to clarify the appropriate scale of the destruction or adverse modification determination.

The second sentence proved more controversial. As proposed, the second sentence of the definition read: “Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery.” (79 FR at 27066, May 12, 2014). Many commenters argued that the proposed second sentence established a significant change in practice by appearing to focus the definition on the preclusion or delay of the development of physical or biological features, to the exclusion of the alteration of existing features. A number of commenters believed these concepts were vague, undefined, and allowed for arbitrary determinations. One commenter asserted that focusing on effects that preclude or significantly delay development of features was an expansion of authority that conflicted with E.O. 13604 (*Improving Performance of Federal Permitting and Review of Infrastructure Projects*).

In an attempt to clarify our intent, in finalizing the rule, we revised the proposed second sentence to add reference to alterations affecting the physical or biological features essential to the conservation of a species, as well as those that preclude or significantly delay development of such features: “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.” (81 FR at 7226, February 11, 2016).

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.” (79 FR at 27061, May 12, 2014). Our intent was for such determinations not to be based upon speculation.

However, the second sentence of the definition in the 2016 final rule has continued to cause controversy among the public and many stakeholders.

In this proposed rule, we seek to streamline and simplify the definition of “destruction or adverse modification” by removing the second sentence because the second sentence is unnecessary and has caused confusion. The second sentence of the definition attempted to elaborate upon meanings that are included within the first sentence, without attempting to exhaust them (hence, the use of the phrase “may include, but are not limited to”). 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.”

## Application of the Revised Definition

As with the 2016 rule, we do not intend our proposed change to alter existing section 7(a)(2) consultation practice. The bar for whether a proposed action is likely to result in destruction or adverse modification of critical habitat is neither raised nor lowered by this proposed rule, nor is the scope of analysis altered with respect to evaluating the effects of a proposed action on critical habitat. This proposed definition retains the key, operative first sentence of the 2016 regulation while adding the clarifying additional phrase of “as a whole” (as discussed above). Further guidance on how to apply the language in that sentence can be found in the 2016 rule.

It is not necessary, nor possible, for a concise regulatory definition to list every way in which alterations may affect the value of critical habitat for the conservation of a species. The value of critical habitat for the conservation of a listed species is described primarily through the critical habitat designation itself. That designation, in accordance with the Act, will identify, in occupied habitat, “the specific areas within the geographical area occupied by the species . . . on which are found those 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)). Accordingly, the Act already makes clear that, in occupied habitat, the value of critical habitat for the conservation of the species is directly associated with designated physical or biological features. Thus, destruction or adverse modification determinations may be based on alterations that affect such features, without needing to specify that fact in the regulatory definition. The Act and regulations also already state that unoccupied areas may be designated to the extent the Service determines they are “essential for the conservation of the species.” (16

U.S.C. 1532(5)(a)(ii)). Determining whether alterations in unoccupied critical habitat may constitute destruction or adverse modification will therefore need to consider the reasons for which the Service determined that such unoccupied habitat is “essential to the conservation of the species.”

The Services have not changed their underlying view that it may be necessary and consistent with the Act in some circumstances for the destruction and adverse modification analysis to consider how alterations to critical habitat could affect the ability of the habitat to develop or support features essential to the conservation of the species. For example, in some circumstances, recovery of the species may depend upon retaining the ability of a designated area to maintain or re-create the essential features, for instance through ecological succession, fluvial processes, active management, or other dynamic processes. This is a longstanding interpretation and agency practice, as reflected in the 2016 rule and in the 2004 and 2005 FWS and NMFS guidance documents regarding application of the destruction or adverse modification standard. This longstanding interpretation has never been meant to assert authority beyond that provided by the Act, nor to allow the Services to designate critical habitat or make adverse modification findings based merely on speculation or desire about future changes to the critical habitat. As required by the Act, such determinations must rely on the best scientific and commercial data available. (16 U.S.C. 1536(a)(2)).

In the proposed definition, “appreciably diminish” remains a key concept. This phrase has been part of the regulatory definition of “destruction or adverse modification” since 1978, and neither it nor its interpretation would be altered by this proposed rule. As we noted in the 2016 rule, with respect to “diminish,” the inquiry begins with whether the relevant effects will reduce, lessen, or weaken the value of the critical habitat for the conservation of the species. If

so, then the inquiry is whether that reduction or diminishment will be “appreciable” to the value of the critical habitat for the conservation of the species.

As we also noted in 2016, the determination of “appreciably diminish” is made based upon the proposed action’s effect on the value of the entire critical habitat to the conservation of the species. That is, the question is whether the “effects of the action” will appreciably diminish the value of the critical habitat as a whole to the conservation of the species, not just in the area where the proposed action takes place. In this respect, “appreciably diminish” is analogous to “appreciably reduce” in the context of determining whether an action will “jeopardize the continued existence” of a species, since that inquiry is similarly not merely addressing the effects within the action area, but rather is concerned with whether the effects “appreciably reduce” the likelihood of survival and recovery of the listed entity, the species.

The 2016 rule discussed the reasons we concluded, and here continue to conclude, that the phrase “appreciably diminish” does not need to be modified. As we noted in 2016, the Services’ joint Consultation Handbook (FWS and NMFS, March 1998) uses the word “considerably” to interpret this phrase. In the 2016 rule, we clarified that the phrase “appreciably diminish,” like the Consultation Handbook’s term “considerably,” means “‘worthy of consideration’ and is another way of stating that we can recognize or grasp the quality, significance, magnitude, or worth of the reduction in the value of critical habitat.” (81 FR 7218, February 11, 2016).

We also explained in 2016 that it is not correct to conclude that every diminishment, however small, should constitute destruction or adverse modification. It was necessary to qualify the word “diminish” to exclude those adverse effects on critical habitat that are so minor in

nature that they do not appreciably impact the value of designated critical habitat to the conservation of a listed species.

We also note that the word “appreciably” is used in both the Services’ definition of “jeopardize the continued existence of” (“appreciably reduce”) and “destruction or adverse modification” (“appreciably diminish”). The meaning of the word “appreciably” is similar in either context. In both contexts, it is appropriate for the Services to consider the biological significance of effects when conducting a section 7(a)(2) consultation. As required by the ESA, we conduct formal consultation, and evaluate in detail the potential for destruction or adverse modification of critical habitat (and/or whether a proposed action is likely to jeopardize the continued existence of a species) whenever there are likely to be adverse effects to critical habitat or a listed species. In each of these analyses, we must evaluate, based on the totality of the circumstances and the best available scientific information, the nature and magnitude of the proposed action’s effects, to determine whether such effects of the proposed action are consequential enough to rise to the level of “appreciably diminish” or “appreciably reduce.” See, e.g., *Oceana, Inc. v. Pritzker*, 75 F. Supp. 3d 469, 483 (D.D.C. 2014) (discussing and affirming a jeopardy analysis that considered whether a given reduction was “meaningful from a biological perspective”). Reductions in the reproduction, numbers, or distribution of a species that are inconsequential at the species level, or alterations to the features or the extent of designated critical habitat that constitute only an inconsequential impact on the conservation value of designated critical habitat as a whole, would not be considered to rise to the level of “reduce appreciably” or “appreciably diminish” within the meaning of the regulations. Nor do we interpret section 7(a)(2) and the regulations thereunder to require that each proposed action improve or increase the likelihood of survival and recovery of the species, or improve the

conservation value of critical habitat. Section 7(a)(2) focuses on the “continued existence” of the species and the “adverse” modification of critical habitat.

It should also be noted that the analysis must always consider whether such impacts are “appreciable,” even where a species already faces severe threats prior to the action. It is sometimes mistakenly asserted that a species may already be in a 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.” See, e.g., *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008) (asserting that “where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm”); *Turtle Island Restoration Network v. United States Dep't of Commerce*, 878 F.3d 725, 735 (9th Cir. 2017) (“Where a species is already in peril, an agency may not take an action that will cause an ‘active change of status’ for the worse.”) (quoting *Nat'l Wildlife Fed'n*, 524 F.3d at 930). That approach is inconsistent with the statute and our regulations.

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 agency actions. They are not determinations made about the environmental baseline or about the pre-action condition of the species. Under the ESA, 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. See 16 U.S.C. §§ 1532(6), (20), 1533(a). But the ESA and our regulations do not use the terms “in jeopardy,” “in peril,” or “jeopardized” to describe the environmental baseline or the pre-action condition of a species; nor do the terms “appreciably reduce” or “appreciably diminish” have a different meaning where a species

already faces very serious threats. In each biological opinion, the determination regarding destruction or adverse modification is made by evaluating the effects of the proposed action on the species in light of the overall status of the species, the baseline conditions within the action area and any cumulative effects occurring within the action area. While we acknowledge that for a species with a particularly dire status, a smaller impact could cause an alteration that appreciably diminishes the conservation value of critical habitat or appreciably reduces the likelihood of survival and recovery of the species, there is no “baseline jeopardy” status even for the most imperiled species.

A related question that has arisen is whether the Services are required to identify a “tipping point” beyond which the species cannot recover in making section 7(a)(2) determinations. For example, the Ninth Circuit Court of Appeals has said that “when a proposed action will have significant negative effects on the species’ population or habitat, the duty to consider the recovery of the species necessarily includes the calculation of the species’ approximate tipping point.” *Oceana, Inc. v. Nat’l Marine Fisheries Serv.*, 705 F. App’x 577, 580 (9th Cir. 2017) (citing *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917 (9th Cir. 2008)); *see also Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 527 (9<sup>th</sup> Cir. 2010) (overturning jeopardy analysis based on purported NMFS failure to determine “when the tipping point precluding recovery . . . is likely to be reached”). Neither the Act nor our regulations state any requirement for the Services to identify a “tipping point” as a necessary prerequisite 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 is exceeded. We have not interpreted that statutory language as requiring the identification of a tipping point. This interpretation is further supported by the fact that the state of science often does not allow the Services to identify a

“tipping point” for many species. The Services have had success in the recovery of several listed species which, despite very low abundance, did not reach a “tipping point.”

#### *Definition of Director*

We propose to amend the current definition of “Director” to clarify and simplify it, in accordance with the Act and agency practice of FWS and NMFS.

#### *Definition of Effects of the Action*

We propose to revise the definition of “effects of the action” in a manner that simplifies the definition. Confusion regarding application of terms has resulted in time being spent determining how to categorize an effect, rather than simply determining what the effects are regardless of category. By providing a simpler definition that applies to the entire range of potential effects, Federal agencies and the Services will be able to focus on better assessing the effects of the proposed action. In addition, we propose to make the definition of environmental baseline a stand-alone definition within § 402.02. Previously, this definition was articulated within the definition of effects of the proposed action. Finally, we have 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).

A few aspects of the revised definition of effects of the action bear further discussion to understand our intent in the proposed revision. We collapsed the various concepts of direct and indirect effects, and the effects of interrelated and interdependent actions, into the new definition that the effects of the action include all effects caused by the proposed action. The revised definition notes that these effects include “the effects of other activities that are caused by the

proposed action.” It includes a distinction between the word “action” which refers to the action proposed to be to be authorized, funded, or carried out, in whole or in part, by the Federal agency and brought in for consultation with the Services, and “activity” or “activities,” which refer to those activities that are caused by the proposed action but are not included in the proposed action. Under the current definition, these activities would have been considered under either “indirect effects” or “interrelated” or “interdependent” activities. An effect or activity is caused by the proposed action when two tests are satisfied: First, the effect or activity would not occur but for the proposed action, and second, the effect or activity is reasonably certain to occur.

Under the first of these two tests, if an effect or activity would occur regardless of whether the proposed action goes forward, then that effect or activity would not satisfy the “but for” test and would not be considered an effect of the action. The concepts of interrelated and interdependent actions in the existing regulations are now captured by the concept of effects of activities that are caused by the proposed action, but are not part of that proposed action. It 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 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...” (Consultation Handbook, page 4-47). A number of courts have also adopted that position. *Sierra Club v. Bureau of Land Management*, 786 F.3d 1219, 1225 (9th Cir. 2015) (“The test for interrelatedness or interdependentness is ‘but for’ causation”) citing *Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9<sup>th</sup> Cir. 1987). This standard, while applicable to analyzing the effects of the action under section 7(a)(2), is not necessarily appropriate for other provisions of the ESA; we therefore do not address in this rulemaking the

causation standards applying to other provisions of the Act, such as whether a violation of section 9(a)(1)(B) (the take prohibition) has resulted for purposes of a civil penalty or a criminal violation under the Act.

The second of the two tests speaks to the certainty of whether the effect or activity will occur. The concept of reasonable certainty already exists in our section 7 regulations and currently is explicitly applied in the context of indirect effects, cumulative effects, and incidental take. We propose to increase consistency and avoid confusion and speculation by explicitly applying the concept to all effects of the proposed action (not just indirect) and also to those other activities previously identified as interrelated and interdependent. This concept applies equally to evaluating the beneficial effects of a proposed action (e.g., effects of any components proposed by the Federal agency to avoid, minimize, or offset the effects of the agency action, for example) and adverse effects of the proposed action. Our proposed revision applies the reasonably-certain-to-occur standard to the section 7 process in a consistent manner but does not change past practice on the evaluation of direct and indirect effects of actions. In practice, the Services have evaluated the direct effects of the action using the best available scientific and commercial information about the likelihood of an effect or activity and not on speculation about what effects might occur. As a result, we do not anticipate the revised language will change what types of effects or activities will be considered within our consultations; rather, we expect it to simplify and improve consistency in our effects analyses. For example, our prior discussion in our 2015 rulemaking adopting revisions to the incidental take statement portions of our section 7 regulations is instructive in this regard:

As a practical matter, application of the “reasonable certainty” standard is done in the following sequential manner in light of the best available scientific and commercial data

to determine if incidental take is anticipated: (1) A determination is made regarding whether a listed species is present within the area affected by the proposed Federal action; (2) if so, then a determination is made regarding whether the listed species would be exposed to stressors caused by the proposed action (e.g., noise, light, ground disturbance); and (3) if so, a determination is made regarding whether the listed species' biological response to that exposure corresponds to the statutory and regulatory definitions of take (i.e., kill, wound, capture, harm, etc.). Applied in this way, the "reasonable certainty" standard does not require a guarantee that a take will result, rather, only that the Services establish a rational basis for a finding of take. While relying on the best available scientific and commercial data, the Services will necessarily apply their professional judgment in reaching these determinations and resolving uncertainties or information gaps. Application of the Services' judgment in this manner is consistent with the "reasonable certainty" standard. (80 FR 26832, 26837; May 15, 2015).

The preamble to the 1986 regulation implementing section 7 also discusses the Services' interpretation of the phrase "reasonably certain to occur." (51 FR 19926, 19932–19933; June 3, 1986—"For State and private actions to be considered in the cumulative effects analysis, there must exist more than a mere possibility that the action may proceed. On the other hand, "reasonably certain to occur" does not mean that there is a guarantee that an action will occur.")

It is important to note that both prongs of the causation standard must be met for the activity in question and the effects from that activity. So, for example, if an activity is not reasonably certain to occur, then the causation standard has not been met and neither the activity nor any effects from that activity are considered an effect of the proposed action.

In addition, for activities that are caused by the proposed action, we have established at § 402.17 a standard and set of factors to consider in determining whether activities are reasonably certain to occur. We believe that the combination of requiring that an effect be both “but for” and “reasonably certain to occur” will reasonably define the reach of the effects analysis and address concerns about extending the analysis into an unreasonably wide arena. Finally, the proposed provision includes a reminder that the effects of the action may occur throughout the action area and on an ongoing, or even delayed, timeframe after completion of the action that was the subject of consultation. Thus, under the proposed rule, there would no longer be a need for a separate definition of “indirect effects,” since the intent of the new definition is that the effects covered by that term are still included. And similarly, the new definition should not, in practice, change the determination or scope of the “action area” in a consultation.

As stated previously, the Services’ intent is to simplify and clarify the definition of effects of the action, without altering the scope of what constitutes an effect. We seek comment on (1) the extent to which the proposed revised definition simplifies and clarifies the definition of “effects of the action”; (2) whether the proposed definition alters the scope of effects considered by the Services; (3) the extent to which the scope of the proposed revised definition is appropriate for the purposes of the Act; and (4) how the proposed revised definition may be improved.

#### *Definition of Environmental Baseline*

We are proposing a stand-alone definition for “environmental baseline” as referenced in the discussion above in the proposed revised definition for “effects of the action.” The definition for environmental baseline retains its current wording. Moving it to a stand-alone definition

clarifies that the environmental baseline is a separate consideration that sets the stage for analyzing the effects of the proposed action on the listed species and critical habitat within the action area by providing the foundation upon which to build the analysis of the effects of the action under consultation. The environmental baseline does not include the effects of the action under review in the consultation (See Consultation Handbook, at 4-22).

The Services are seeking public comment on potential revisions to the definition of “environmental baseline” as it relates to ongoing Federal actions. It has sometimes been challenging for the Services and Federal agencies to determine the appropriate baseline for those consultations involving ongoing agency actions. The complexities presented in these consultations include issues such as: what constitutes an “ongoing” action; if an ongoing action is changed, is the incremental change in the ongoing action the only focus of the consultation or is the entire action or some other subset reviewed; is the effects analysis different if the ongoing action has never been the subject of consultation as compared to if there is a current biological opinion for the ongoing action; if a change is made to an ongoing action that lessens, but does not eliminate, the harmful impact to listed species or critical habitat, is that by definition a “beneficial action”; and can a “beneficial action” ever jeopardize listed species or destroy or adversely modify critical habitat. Further, the Services request comments as to whether the following language would address these issues: “*Environmental baseline is the state of the world absent the action under review and* includes the past, present **and ongoing** impacts of all **past and ongoing** 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 **in the action area** which are contemporaneous with the consultation in process. **Ongoing means**

**impacts or actions that would continue in the absence of the action under review.”**

As indicated above, we propose to move the instruction that the effects of the action shall be added to the environmental baseline from the definition of “effects of the action” into § 402.14(g) to retain this important step of the analytical process.

*Definition of Programmatic Consultation*

We propose to add a definition of “programmatic consultation.” This term is included in revised § 402.14(c)(4) to codify an optional 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. Programmatic consultations can be completed under informal and formal consultation processes. They can be used to evaluate the effects of multiple actions anticipated within a particular geographic area; or to evaluate Federal agency programs that guide implementation of the agency’s future actions by establishing standards, guidelines, or governing criteria to which future actions will adhere. By consulting on the program, plan, policy, regulation, series, or suites of activities as a whole, the Services can reduce the number of single, project-by-project consultations, streamline the consultation process, and increase predictability and consistency for action agencies. In addition, by looking across numerous individual actions at the programmatic level, the Federal action agencies and applicants can propose project design criteria, best management practices, standard operating procedures, and/or standards and guidelines that avoid, minimize, or offset the action’s effects on listed species and/or designated critical habitat. Federal agencies and applicants often propose measures to avoid, minimize, and/or offset effects to listed species and/or designated critical habitat as part of their proposed action when they consult with the Services. The Services

consider these measures as part of the proposed action when they evaluate the effects of the proposed action.

#### Types of Programmatic Consultations

1. *Programmatic consultations that address multiple similar, frequently occurring, or routine actions expected to be implemented in particular geographic areas.* These are generally categories of actions for which there is a good understanding of the likely effects on resources listed under the Act, although the categories encompass future site-specific actions of which the precise details are not yet known. Many, but not all, of these types of programmatic consultations have been referred to as “batched” consultations in the past. They do not rely on, or specifically incorporate by reference, consultations on a higher level of Federal action or plan. Examples of these types of programmatic consultations would be consultations that involve a variety of routine activities such as a regional road maintenance program by State departments of transportation, or a U.S. Army Corps of Engineers general permitting program at the regional level that covers routine construction activities for in-and-over-water structures.

2. *Programmatic consultations that address a proposed program, plan, policy, or regulation providing a framework for future actions.* These programmatic consultations cover programs, plans, governing policies, and/or regulations such as a national or regional program, plan, policy, or regulation, where the Federal agency is generally not able to provide detailed specificity about the number, location, timing, frequency, precise methods and intensity of the activities expected to be implemented, or to determine the site-specific adverse effects the activities will have on listed species or critical habitat. In these cases, the Service conducts a more generalized review of effects and provides the appropriate section 7(a)(2) determination in

a letter of concurrence or biological opinion for the programmatic consultation. In the future, when the site-specific information is known, and it is determined the project “may affect” a listed species or critical habitat, typically a subsequent consultation is completed. That subsequent consultation may, not exclusively, be referred to as a “step-down” or “tiered consultation.” The subsequent consultation commonly incorporates by reference portions of the previous consultation on the program, plan, policy, or regulations. A typical example of this type of programmatic action is a land management plan. A land management agency may have a program addressing issuance of a special use permit for various activities. The program, as a part of land management planning, has certain standards and guidelines to which each subsequent program action must adhere. A consultation on the program would examine generally what types of effects would be caused by the program and whether those effects were consistent with section 7(a)(2) of the Act. In the future, as issuance of specific permits are anticipated, the Federal agency will return to the Service later for consultation, and an additional consultation would take place on the site-specific facts of that permit issuance. However, the subsequent or “step-down” or “tiered” consultation would benefit from the initial program-level consultation, thus streamlining and reducing the amount of analysis needed for each site-specific consultation.

The Services recently promulgated changes to the section 7(a)(2) implementing regulations that define framework and mixed programmatic actions that address certain types of policies, plans, regulations, and programs (80 FR 26832, May 11, 2015). The types of programmatic consultations described above align with the suite of activities described in the 2015 rule.

The Services encourage Federal agencies to coordinate with us in order to determine what programmatic approach would be applicable and streamline the consultation process for their program or suite of actions.

### **Section 402.03—Applicability**

In order to increase efficiency in implementing section 7(a)(2) consultations and capitalize upon the considerable experience the Services have gained in implementing the Act, the Services seek comment on the advisability of clarifying the circumstances upon which Federal agencies are not required to consult. More specifically, the Services seek comment regarding revising § 402.03 to preclude the need to consult 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. The Services have learned through time that such actions are far removed from any potential for jeopardy or destruction or adverse modification of critical habitat, and that consultation on these actions does little to accomplish the intent of section 7(a)(2) of the Act—to ensure that any action authorized, funded, or carried out by a Federal agency is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

In prior consultations under section 7(a)(2), agencies with regulatory authority have

consulted on actions that include effects to listed species or designated critical habitat that occur outside of the specific area over which they have regulatory jurisdiction. We also seek comment on whether the scope of a consultation under section 7(a)(2) should be limited to only the activities, areas, and effects within the jurisdictional control and responsibility of the regulatory agency.

### **Section 402.13—Deadline for Informal Consultation**

Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency to assist the Federal agency in determining whether formal consultation or a conference is required. 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. Finally, the Services may issue a written concurrence with a Federal agency's determination that the action is not likely to adversely affect the listed species or critical habitat.

There is currently no deadline for the Services to complete an informal consultation, unlike formal consultations, which by regulation should be completed within 90 days unless extended under the terms at § 402.14(e). The Service's goal is to either complete the Letter of Concurrence for the project, or request additional information that is necessary to complete the consultation, within 30 days. NMFS completes approximately 1,200–1,500 individual informal consultations per year. Of the informal actions not under a programmatic Biological Opinion, 36 percent are within their 30-day goal, and 61 percent are within 3 months. NMFS currently has about 46 individual informal consultations that have been open for greater than 200 days as of July 31, 2017, that the agency is actively working to complete as soon as possible. Between

fiscal years 2011 and 2017, FWS completed an average of 11,344 (ranging from 9,656 to 12,793) informal consultations per year. During those years, FWS completed between 78 percent and 85 percent of the informal consultations in less than 30 days, averaging between 26 and 39 days to complete informal consultation.

The Services are considering whether to add a 60-day deadline, subject to extension by mutual consent, for informal consultations. We seek 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., 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.).

#### **Section 402.14—Formal Consultation**

Consistent with the Services’ existing practice, we propose to revise § 402.14(c) to clarify what is necessary to initiate formal consultation. Decades of experience have demonstrated valuable time is lost due to lack of clarity in what information the Services need to initiate consultation. This often results in an ongoing exchange of documents (e.g., biological assessments, biological evaluations, National Environmental Policy Act (NEPA) documents) in which the Federal agencies and Services seek to compile the necessary information, which results in significant inefficiencies and frustrations on the part of both the Federal agencies and the Services. The proposed revision is intended to eliminate the confusion and misunderstanding existing in the current regulations and significantly increase the efficiency of the process for both the Federal agencies and the Services. It is important to note the Services are not proposing to

require more information than existing practice; instead, we are proposing to clarify in the regulations what is needed to initiate consultation in order to improve the consultation process.

The proposed revisions to § 402.14(c) would further describe the information from the Federal agency necessary to initiate consultation. This set of information is commonly called the “initiation package,” and that term is also used in our proposed regulations for alternative formal consultation procedures to refer to the information required in § 402.14(c). Consistent with § 402.06 (Coordination with other environmental reviews), we also propose at § 402.14(c) to allow the Services to consider other documents as initiation packages, such as: a document prepared for the sole purpose of providing the Service with information relevant to an agency’s consultation, a document that has been prepared under NEPA or other authority that contains the necessary information to initiate consultation, or other such documents (e.g., grant application, State of Washington Joint Aquatic Resources Permit Application, California Environmental Quality Act Environmental Impact Report, etc.) that meet the requirements for initiating consultation.

When such documents consider two or more alternative actions, the request for consultation must describe the specific alternative or action proposed for consultation and the specific locations in the document where the relevant information is found. The Services evaluate only the Federal agency’s proposed alternative during the consultation process. If the Federal agency either adopts another alternative as its final agency action, or substantively modifies the proposed alternative, reinitiation of consultation may be required.

The proposed regulations describe categories of information that should be in an initiation package to initiate formal consultation. Information must be provided in a sufficient level of detail consistent with the nature and scope of the proposed action. Consistent with the

Service's existing practice, the requirement to include sufficient detail ensures the Service has enough information to understand the action as proposed and conduct an informed analysis of the effects of the action, including with regard to those measures intended to avoid, minimize, or offset effects. See Consultation Handbook, at B-54 (Description of the proposed action should be "detailed enough so that the reviewer can fully understand what the components of the action include and how the project will affect the species.") Such information should include a description of the proposed action, including any measures intended to avoid, minimize, or offset the effects of the proposed action, a description of the area affected (the action area), information about species or critical habitat in the action area, a description of potential effects of the proposed action on individuals of any listed species or critical habitat, a description of the cumulative effects, a summary of information from the applicant, if any, and any other relevant information.

### **Service Responsibilities**

We propose to revise portions of § 402.14(g) that describe the Services' responsibilities during formal consultation. We propose to clarify the analytical steps the Services undertake in formulating a biological opinion. These changes are intended to better reflect the Services' approach to analyzing jeopardy and adverse modification as well as address revisions to the definition of "effects of the action." 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. While we identify distinct steps in our analytical approach, each step is related to the others and necessarily informs and influences our analysis. For example, the condition of the environmental baseline is relevant to the nature and extent of the effects of the action. Effects of the action that in isolation would be of minor consequence may be amplified and of greater consequence when analyzed in light of the condition of the environmental baseline.

In § 402.14(g)(2), we propose to move from the current definition of “effects of the action” the instruction that the effects of the action shall be added to the environmental baseline to where this provision more logically fits with the rest of the analytical process, and we retain this important step of that process. In § 402.14(g)(4), we propose 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. Again, this proposed change reflects the Service’s existing approach. *See* Consultation Handbook, at 4-33 (“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.”)

We propose 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. Federal agencies often include these types of measures as part of the proposed action. However, the Service’s 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 Service 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).

This judicially created standard is not required by the Act or the existing regulations. The Act requires Federal agencies to consult with the Services, as appropriate, on "any action authorized, funded or carried out by such agency." When a Federal agency proposes to take an action that it has the discretion and authority to implement, and where that proposed action or parts thereof "may affect" a listed species or its critical habitat, the section 7(a)(2) consultation process is triggered. Where these conditions are met, the Service's role is to assume that the action will be implemented as proposed and proceed to analyze the effects of that proposed action on listed species and critical habitat. Just as with the components of a proposed action with adverse effects, there is no additional or heightened standard or threshold requirement necessitating the Service to independently evaluate whether the proposed measures to avoid, minimize, or offset adverse effects will be implemented.

In some situations, 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 must consider the proposed measures during a consultation, as the Act requires the Services to issue their expert opinion on “how the agency action affects the species or its critical habitat,” 16 U.S.C. 1536(b)(3)(A), and thus, are entitled to rely on that information as proposed. Therefore, we are proposing revisions to § 402.14(c)(1) with respect to the information a Federal agency must submit to initiate formal consultation. Under this proposed rule and consistent with the Service’s existing approach, a Federal agency must submit a description of the proposed action, including available information about any measures intended to avoid, minimize, or offset effects of the proposed action. As discussed above, the requirement for sufficient detail regarding all aspects of the proposed action ensures the Services have the information needed to conduct an informed analysis of the effects of all activities included in the proposed action. Provided the Federal agency submits the information required by § 402.14(c), the Services will take into consideration the effects of the action as proposed, both beneficial and adverse.

By describing what is included in the proposed action, the Federal agency has made a commitment and retains independent obligations to insure that its action is not likely to jeopardize listed species or destroy or adversely modify critical habitat. Should new information arise or our assumptions set forth in the consultation change during implementation—for instance, where the action or elements thereof are not implemented as proposed—the Federal agency must continue to ensure compliance with the Act and has several options to do so. This may include reinitiating consultation with the Service(s) to evaluate the changed circumstances.

If an incidental take statement includes reasonable and prudent measures and terms and conditions intended to minimize the impact of incidental take, the Federal agency must carry out those measures or risk losing the exemption afforded by the incidental take statement.

Ultimately, as consulting and action agencies, the Act's statutory and regulatory provisions provide distinct responsibilities such that there is no requirement for the Service to independently evaluate whether the Federal agency is likely to carry out its commitments. This is the Services' longstanding position, as reflected in other provisions of the regulations (for instance, those governing development of Reasonable and Prudent Alternatives), and is consistent with the Act. Therefore, we propose revisions to § 402.14(g)(8) to clarify there is no requirement for measures that avoid, minimize, or offset the adverse effects of an action that are included in the proposed action to be accompanied by "specific and binding plans," "a clear, definite commitment of resources", or meet other such criteria.

### **Biological Opinions**

We propose to add new paragraphs (h)(3) and (h)(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 propose 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.

The Services have more than 30 years of experience in conducting consultation pursuant to section 7(a)(2) of the Act under the existing regulations. Based upon that experience, we have determined that the current regulations would be more efficient and clear if we were to codify or create additional optional procedures within formal consultation (Service adoption of all or part

of a Federal agency's initiation package and expedited consultations) and streamline duplicative processes (consultation on permits issued under section 10 of the Act). We recognize that several factors, including the scope and complexity of the proposed action, the magnitude and extent of the effects that flow from the proposed action, and the expertise of various Federal agencies, all warrant more than the two general types of consultation provided for in the current regulations. In addition, the experience of recent decades has led to significant improvements in consultation efficiency and species conservation as a result of the effective use of streamlined or programmatic approaches. We believe that these alternative consultation procedures will promote flexibility and efficiency for the action agencies, applicants, and the Services, and can be implemented in compliance with the Act while not compromising the conservation of listed species.

We propose that the Service may adopt all or part of a Federal agency's initiation package or the Services' analyses and findings that are required to issue a permit under section 10(a) of the Act in its biological opinion. This provision would allow the Services to utilize portions of these documents in the development of our biological opinion to improve efficiency in the consultation process and reduce duplicative efforts. Adoption or incorporation by reference is typically done during consultations, and this provision codifies that approach.

Further, the provision explicitly applies this approach to the Service's issuance of permits under section 10 of the Act. The review and analyses undertaken to develop a finding that various criteria have been met for issuing a permit pursuant to section 10(a)(1)(A) or 10(a)(1)(B) contain many of the elements reviewed and analyzed in a section 7 consultation. Therefore, we propose to adopt the analyses and review that supports issuance of these permits as part of the biological opinion required to meet the applicable provisions of the part 402 consultation

regulations. As a result, the section 7 analysis and document can be streamlined to just those portions necessary to present a complete finding under section 7(a)(2) and 7(b)(3). We note also that the Service issuing the permit would have to ensure that its determination regarding jeopardy and destruction or adverse modification is not limited to the species for which the permit is authorizing take, but that it covers all listed species and all designated critical habitat under the Service's jurisdiction affected by the proposed action. In cases where issuance of a section 10 permit by one of the Services (e.g., FWS) may affect listed species or critical habitat under the jurisdiction of the other Service (e.g., NMFS), the permitting agency will still need to consult with the other Service, as well.

While it is the responsibility of the Federal agency to develop the initiation package, we propose a collaborative process to facilitate the Federal agency's development of an initiation package that could be used as all or part of the Service's biological opinion. First, the Federal agency and the Service must mutually agree that the adoption process is appropriate for the proposed action. Subsequently, the Services and the Federal agency may develop coordination procedures that would facilitate adoption. This agreement must be explained in the Federal agency's initiation package and acknowledged in the Services' biological opinion. The purpose of the collaboration is to bring the information and expertise of both the Federal agency and the Service (and any applicant) into the resulting initiation package to facilitate a more efficient and effective consultation process. The end result of the adoption consultation process is expected to be the adoption of the initiation package with any necessary supplementary analyses and incidental take statement to be added by the Service as the Secretary's biological opinion in fulfillment of section 7(b) of the Act.

## **Expedited Consultation**

We propose 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. This consultation process is proposed to provide an efficient means to complete formal consultation on projects ranging from those that have a minimal impact, to those projects with a potentially broad range of effects that are known and predictable, but that are unlikely to cause jeopardy or destruction or adverse modification. The Services have developed a vast knowledge of projects, and in the course of doing so, have concluded that some types of projects can be consulted on in a more expeditious manner without compromising the conservation of listed species or critical habitat. For example, a habitat-restoration project that results in high conservation value for the species but may have a small amount of incidental take through construction or monitoring would likely lend itself to this type of consultation (for *Streamlined Consultation Guidance for Restoration and Recovery Projects*, see <https://www.fws.gov/endangered/esa-library/index.html#consultations> under “Policies” for guidance documents for consultations with the Fish and Wildlife Service).

Two elements are important to the successful implementation of this form of consultation. First is the mutual agreement between the Service and the Federal agency that this form of consultation is appropriate for the proposed action. Informal consultation has been an available optional process for 30 years and is most often utilized to address proposed actions that are not likely to adversely affect listed species or critical habitat. In contrast, expedited consultations are a new process and likely involve proposed actions that would otherwise go through the regular formal consultation process and require an incidental take statement. We

make mutual agreement a required first step in the expedited consultation process to avoid wasted effort if Federal agencies propose actions for expedited consultation that would not be suitable for expedited analysis by the Service. The second important element is the development of a sufficient initiation package (as described in § 402.14(c) of the regulations) that provides all the information needed to allow the Service to prepare a streamlined consultation response within mutually agreed-upon expedited timeframes. We expect that a combination of one-on-one collaboration with Federal agency staff and the availability of guidance and templates will ensure the most efficient process for development of initiation packages and expedited biological opinions. For a NMFS example of a similar effort for informal consultations through the development of guidance, see

<https://www.greateratlantic.fisheries.noaa.gov/protected/section7/guidance/consultation/index.html#writing>.

In § 402.14, we propose to redesignate current paragraph (l) as paragraph (m) to accommodate the addition of the proposed new paragraph (l).

### **Section 402.16—Reinitiation of Consultation**

We propose two changes to this section. First, we propose 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. By practice, action agencies have reinitiated informal consultations when a trigger for reinitiation has been met. Courts have also held that reinitiation is required in the context of informal consultation. See *Forest Guardians v. Johanns*, 450 F.3d 455, 458 (9th Cir. 2006). Second, we propose 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). In *Cottonwood*, the court held that the Forest Service was required to reinitiate consultation on certain forest management plans due to the designation of Canada lynx critical habitat. The court held that, even if an approved land management plan is considered to be a completed action, the Forest Service nonetheless was obligated to reinitiate consultation since it retained “discretionary Federal involvement or control” over the plan. *Cottonwood*, 789 F.3d at 1084-85.

We propose to make non-substantive redesignations and then revise § 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 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.

We reaffirm that only affirmative discretionary actions are subject to reinitiation under our regulations, and the mere existence of a programmatic land management plan is not affirmative discretionary action. *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). While the Act does not expressly mandate reinitiation on discretionary affirmative actions, in 1986 we determined that the Act’s legislative history and conservation goals supported reinitiation if certain triggers are met. After decades of experience cooperating with action agencies across the Federal Government, we have gained the expertise of when reinitiation of consultation is most effective to meeting the overall goals of the Act. Reinitiating on a purely programmatic land management plan when new species are listed or critical habitat designated does little to further these goals. Both the Bureau of Land Management (BLM) and 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 designated critical habitat. BLM is required to periodically evaluate and revise Resource Management Plans (see 43 CFR 1610); the interval between reevaluations should not exceed 5 years (see BLM Handbook H-1601-1 at p. 34). USFS is required to revise their land management plans at least every 15 years (see 36 CFR 219.7). In addition to being required to periodically revise their land management plans, both BLM and USFS are required to consult on any specific on-the-ground actions that implement the land management plans if those actions may affect listed species or critical habitat. We are thus exercising our discretion and narrowing § 402.16 to exclude two types of plans that have no immediate on-the-ground effects. Requiring reinitiation on these completed plans based on newly listed species or critical habitat often results in impractical and disruptive burdens.

Moreover, reinitiating consultation on a programmatic land management plan results in little benefit to the newly listed species or critical habitat because the plan's mere existence does not result in any immediate effects upon either, thus rendering any reinitiation under these conditions inefficient and ineffective. In contrast, specific on-the-ground actions that implement the plan are subject to their own section 7 consultations if those actions may affect listed species or critical habitat. These on-the-ground, action-specific consultations allow us to direct our limited resources to those actions that actually cause effects and ensure that the USFS and the BLM fulfill their obligations under section 7. Thus, this new proposed regulation also restates our position that, while a completed programmatic land management plan 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 critical habitat.

Rather than reinitiation of a section 7(a)(2) consultation at the plan level, the Services

recommend these agencies develop section 7(a)(1) conservation programs in consultation with the Services when a new species is listed or critical habitat designated. This proactive, conservation planning process will enable them to better synchronize their 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.

In addition to seeking comment on the proposed revision to 50 CFR 402.16, we are seeking 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 are also seeking comment on this 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.

#### **Section 402.17—Other Provisions**

We propose to add a new § 402.17 titled “Other provisions.” Within this new section, we propose 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) in two specific contexts. This new proposed provision applies only to activities caused by but not included in the proposed action and activities under cumulative effects. We propose to address reasonable certainty in these two

contexts due to the substantial confusion that has sometimes resulted from determining when these sorts of activities should be considered. The proposed text addresses the relative level of certainty required and is intended to avoid inclusion of activities whose occurrence would be considered speculative, but also to avoid requiring an expectation that the activity is absolutely certain to occur. We also identify a non-exclusive list of factors that inform the determination of whether an activity should be considered reasonably certain to occur. For example, one of the factors to consider is the existence of any relevant plans (e.g., community plans, management plans, transportation plans, etc.). We also specify that this provision only applies to activities caused by but not included in the proposed action and activities under cumulative effects. Consistent with the Act, existing regulations, and agency practice, we do not propose to apply the reasonable certainty standard to whether the proposed action itself will be implemented, but again, only to the analysis of the effects of the action to ensure that the effects analysis does not focus on speculative impacts. This provision reflects the fundamental nature of consultation under section 7(a)(2) in which the Services consult on the action as proposed.

### **Request for Information**

We intend that a final regulation will consider information and recommendations from all interested parties. We therefore solicit comments, information, and recommendations from governmental agencies, Native American tribes, the scientific community, industry groups, environmental interest groups, and any other interested parties. All comments and materials received by the date listed in **DATES** above will be considered prior to the approval of a final document.

You may submit your information concerning this proposed rule by one of the methods listed in **ADDRESSES**. If you submit information via <http://www.regulations.gov>, your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on <http://www.regulations.gov>.

Information and supporting documentation that we receive in response to this proposed rule will be available for you to review at <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Environmental Review (see **FOR FURTHER INFORMATION CONTACT**).

## **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 rule in a manner consistent with these requirements. This proposed 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 proposed rule is expected to be a deregulatory action under E.O. 13771.

*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 certify that, if adopted as proposed, this proposed rule would 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 Endangered Species Act. Federal agencies are the only entities that are directly affected by

this rule, and they are not considered to be small entities under SBA's size standards. No other entities are directly affected by this rule. Moreover, this proposed rulemaking action is not a major rule under SBREFA.

This proposed rule, if made final, would be applied in determining 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 proposed 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 proposed rule would serve to provide clarity to the standards with which we will evaluate agency actions pursuant to section 7 of the Endangered Species Act.

*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 contained in the Regulatory Flexibility Act section above, this proposed rule would 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 would 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 rule would not place additional requirements on any city, county, or other local municipalities.

(b) This proposed rule would 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 proposed rule is not a "significant regulatory action" under the Unfunded Mandates Reform Act. This

proposed rule would impose no additional management or protection requirements on State, local, or tribal governments.

*Takings (E.O. 12630)*

In accordance with Executive Order 12630, this proposed rule would not have significant takings implications. This proposed rule would not pertain to “taking” of private property interests, nor would it directly affect private property. A takings implication assessment is not required because this proposed rule (1) would not effectively compel a property owner to suffer a physical invasion of property and (2) would not deny all economically beneficial or productive use of the land or aquatic resources. This proposed rule would substantially advance a legitimate government interest (conservation and recovery of endangered species and threatened 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 would have significant Federalism effects and have determined that a federalism summary impact statement is not required. This proposed rule pertains only to improving and clarifying the interagency consultation processes under the Endangered Species Act 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.

*Civil Justice Reform (E.O. 12988)*

This proposed 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 proposed rule would clarify the interagency consultation processes under the Endangered Species Act.

### *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 recognized Federal Tribes on a government-to-government basis.

### *Paperwork Reduction Act*

This 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 are analyzing this proposed regulation 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 the companion manual, “Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities,” which became effective January 13, 2017. We invite the public to comment on the extent to which this proposed regulation may have a significant impact on the human environment, or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. We will complete our analysis, in compliance with NEPA, before finalizing this regulation.

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

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The proposed 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.

#### *Clarity of the Rule*

We are required by Executive Orders 12866 and 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 comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

#### **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 proposed 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 proposed 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.

## **Proposed Regulation Promulgation**

Accordingly, we propose to 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 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.

*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.

\* \* \* \* \*

*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 § 402.14 by:

a. Revising paragraphs (c), (g)(2), (g)(4), (g)(8), and (h):

b. Redesignating paragraph (l) as paragraph (m); and

c. 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 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. This provision 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 specific binding plans or a clear, definite commitment of resources.

(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 effects of the action on listed species or critical habitat;

and

(iii) 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. The end result of the adoption consultation process is expected to be the 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.

\* \* \* \* \*

(1) *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) 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.

\* \* \* \* \*

4. Amend § 402.16 by:

a. Revising the section heading;

b. Redesignating paragraphs (a) through (d) as paragraphs (a)(1) through (a)(4);

c. Designating the introductory text as paragraph (a) and revising the newly designated paragraph (a); and

d. 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:

\* \* \* \* \*

(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, 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.

5. Add § 402.17 to read as follows:

**§ 402.17 Other provisions.**

(a) *Activities that are reasonably certain to occur.* To be considered reasonably certain to occur, the activity cannot be speculative but does not need to be guaranteed. Factors to consider include, but are not limited to:

(1) Past relevant experiences;

(2) Any existing relevant plans; and

(3) Any remaining economic, administrative, and legal requirements necessary for the activity to go forward.

(b) The provisions in paragraph (a) of this section apply only to activities caused by but not included in the proposed action and activities considered under cumulative effects.

**§ 402.40 [Amended]**

6. Amended § 402.40, in paragraph (b), by removing “§402.14(c)(1)–(6)” and in its place adding “§ 402.14(c)”.

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Dated: 07/18/18



Ryan K. Zinke,

*Secretary*

*Department of the Interior.*

**~~Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation~~**

Dated: 7/16/18

Wilbur Ross

Wilbur Ross,

*Secretary*

*Department of Commerce.*

**~~Endangered and Threatened Wildlife and Plants; Revision of Regulations for  
Interagency Cooperation~~**