

Endangered and Threatened Wildlife and Plants; Interagency Cooperation Regulations

RIN 1018-BI75

Revisions

New proposed text is underlined while proposed deletions are indicated by strikethrough.

11/19/2025

§ 402.02 Definitions.

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

Environmental baseline is evaluated at the time of the proposed action and refers to the current condition of the listed species or its designated critical habitat in the action area as would reasonably be expected to occur, without the consequences to the listed species or designated critical habitat caused by the proposed action. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. The ~~impacts~~ consequences to listed species or designated critical habitat from ~~Federal~~ ongoing agency activities or existing ~~Federal~~

agency facilities that are not within the agency's discretion to modify are part of the environmental baseline.

Reasonable and prudent measures refer to those actions the Director ~~considers~~ believes necessary or appropriate to minimize the impacts ~~of the incidental take on the species, i.e.,~~ amount or extent, of incidental take.

§ 402.14 Formal consultation.

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(i) *Incidental take.* (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, ~~of incidental taking as the amount or extent of such taking. i.e., the~~ amount or extent, of such incidental taking on the species. A surrogate (e.g., similarly affected species or habitat or ecological conditions) may be used to express the amount or extent of anticipated take provided that the biological opinion or incidental take statement describes the causal link between the surrogate and take of the listed species, explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded;

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact; ~~of incidental taking on the species.~~

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action, and may involve only minor changes. ~~and may include measures implemented inside or outside of the action area that avoid, reduce, or offset the impact of incidental take.~~

~~(3) Priority should be given to developing reasonable and prudent measures and terms and conditions that avoid or reduce the amount or extent of incidental taking anticipated to occur within the action area. To the extent it is anticipated that the action will cause incidental take that cannot feasibly be avoided or reduced in the action area, the Services may set forth additional reasonable and prudent measures and terms and conditions that serve to minimize the impact of such taking on the species inside or outside the action area.~~

§ 402.17 Other provisions.

(a) Activities that are reasonably certain to occur. A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Factors to consider when evaluating whether activities caused by the proposed action (but not part of the proposed action) or activities reviewed under cumulative effects are reasonably certain to occur include, but are not limited to:

(1) Past experiences with activities that have resulted from actions that are similar in scope, nature, and magnitude to the proposed action;

(2) Existing plans for the activity; and

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

(4) The amount of State, tribal, territorial, or local administrative discretion remaining to be exercised.

(b) Consequences caused by the proposed action. To be considered an effect of a proposed action, a consequence must be caused by the proposed action (i.e., the consequence would not occur but for the proposed action and is reasonably certain to occur). A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Considerations for determining that a consequence to the species or critical habitat is not caused by the proposed action include, but are not limited to:

(1) The consequence is so remote in time from the action under consultation that it is not reasonably certain to occur; or

(2) The consequence is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur; or

(3) The consequence is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur; or

(4) The agency has no ability to prevent the consequence due to its limited statutory authority; or

(5) If the consequence would occur regardless of whether the proposed action goes forward.

(c) *Required consideration.* The provisions in paragraphs (a) and (b) of this section must be considered by the action agency and the Services.