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**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 402**

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

**RIN 1018–BC87; 0648-BH41**

**Endangered and Threatened Wildlife and Plants; 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, Commerce.

**ACTION:** Final rule.

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

**DATES:** This final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

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

## **SUPPLEMENTARY INFORMATION:**

### **Background**

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

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

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

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

## **Final Regulatory Revisions**

### **Discussion of Changes from Proposed Rule**

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

### **Section 402.02—Definitions**

#### **Definition of “Effects of the Action”**

The Services proposed to revise the definition of “effects of the action” in a manner that simplified the definition by collapsing the terms “direct, “indirect,” interrelated,” and

“interdependent” and by applying a two-part test of “but for” and “reasonably certain to occur.”

The proposed definition was:

*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.

The Services requested comments on (1) the extent to which the proposed revised definition simplified and clarified the definition of “effects of the action”; (2) whether the proposed definition altered the scope of effects considered by the Services; (3) the extent to which the scope of the proposed revised definition was appropriate for the purposes of the Act; and (4) how the proposed revised definition may be improved. We received numerous comments regarding the proposed revision to the definition of “effects of the action,” including the two-part test, and the scope of the definition as proposed. Some commenters felt that the proposed two-part test for both effects and activities caused by the proposed action was either inappropriate or still subject to misapplication and misinterpretation. Others were concerned that the changed definition would narrow the scope of effects of the action, resulting in unaddressed negative effects to listed species and critical habitat. As stated in the proposed rule, the Services’ intended purpose of the revised definition of effects of the action was to simplify the definition while still retaining the scope of the assessment required to ensure a complete analysis of the effects of proposed actions. Further, we stated that by revising the definition, consultations between the Services and action agencies, including consultations involving applicants, can

focus on identifying the effects and not on categorizing them. The two-part test was included to provide a transparent description of how the Services identify effects of the proposed action. A summary of the comments and our responses are below at **Summary of Comments and Recommendations**.

In response to comments and upon further consideration, the Services are adopting a revised, final definition of “effects of the action” to further clarify that effects of the action include all consequences of a proposed action, including consequences of any activities caused by the proposed action. We revised the definition to read as follows:

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

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

The Services believe that the definition of “effects of the action” contained in this final rule will reduce confusion and streamline the process by which the Services identify the relevant effects caused by a proposed action. The Services do not intend for these regulatory changes to alter how we analyze the effects of a proposed action. We will continue to review all relevant

effects of a proposed action as we have in past decades, but we determined it was not necessary to attach labels to various types of effects through regulatory text. That is, we intend to capture those effects (consequences) previously listed in the regulatory definition of effects of the action—direct, indirect, and the effects from interrelated and interdependent activities—in the new definition. These effects are captured in the new regulatory definition by the term “all consequences” to listed species and critical habitat.

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

As discussed in the proposed rule, the Services have applied the “but for” test to determine causation for decades. That is, we have looked at the consequences of an action and used the causation standard of “but for” plus an element of foreseeability (i.e., reasonably certain to occur) to determine whether the consequence was caused by the action under consultation. In this final rule, we have added regulatory text to confirm that, by definition, “but for” causation means that the consequence in question would not occur if the proposed action did not go forward. This added regulatory language does not add a more stringent standard than what was applied already under our current “but for” causation, but is meant to clarify and reinforce the standard we currently implement and will do so in the future. Additionally, there are several

relevant considerations where the proposed action is not the “but for” cause of another activity (not included in the proposed action) because the other activity would proceed in the absence of the proposed action due to the prospect of an alternative approach (e.g. , if a Federal right-of-way (proposed action) is not granted, a private wind farm on non-federal lands (other activity) would still be developed through the building of a road on private lands (alternative approach)). In particular, the Services consider case-specific information including, but not limited to, the independent utility of the other activity and proposed action, the feasibility of the alternative approach and likelihood the alternative approach would be undertaken, the existence of plans relating to the activity and whether the plans indicate that an activity will move forward irrespective of the action agency’s proposed action, and whether the same effects would occur as a result of the other activity in the absence of the proposed action. In other words, if the agency fails to take the proposed action and the activity would still occur, there is no “but for” causation. In that event, the activity would not be considered an effect of the action under consultation.

Consequences to the species or critical habitat caused by the proposed action must also be reasonably certain to occur. The term “reasonably certain to occur” is not a new or heightened standard, but it was not clearly defined or given any parameters in previous regulations. Experience has taught us that the failure to provide a definition and any parameters to the term “reasonably certain to occur” left the concept vague and occasionally produced determinations that were inconsistent or had the appearance of being too subjective. As such, there were sometimes disagreements between the Services and action agencies as to what constituted “reasonably certain to occur.” Our intention in these regulations is to provide a solid framework, with specific factors for both action agencies and the Services to evaluate, in order to determine

whether a consequence is “reasonably certain to occur.” In addition, we added a regulatory requirement that this framework be reviewed and followed by both the action agency and the Services. See § 402.17(c). When the Services write an incidental take statement for a biological opinion, under section 7(b)(4)(iv) of the Act they can assign responsibility of specific terms and conditions of the incidental take statement to the Federal action agency, the applicant, or both taking into account their respective roles, authorities, and responsibilities. The Services have worked with Federal action agencies in the past, and will continue to do so into the future, to ensure that a reasonable and prudent measure assigned to a Federal action agency does not exceed the scope of a Federal action agency's authority.

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

We revised § 402.17 to help guide the determination of “reasonably certain to occur.” The “reasonably certain to occur” determination applies to other activities caused by (but not part of) the proposed action, activities considered under cumulative effects (as defined at § 402.02),

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

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

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

## **Definition of Environmental Baseline**

We proposed a stand-alone definition for “environmental baseline” as referenced in the discussion above in the proposed revised definition for *effects of the action*. The proposed definition read:

*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.

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

In response to these comments and upon further consideration, through this final rule, we are revising the definition of “environmental baseline” to read as follows:

*Environmental baseline* refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. The consequences to listed species

or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline.

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

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

We added this third sentence because we concluded that it was necessary to explicitly answer the question as to whether ongoing consequences of past or ongoing activities or facilities should be attributed to the environmental baseline or to the effects of the action under consultation when the agency has no discretion to modify either those activities or facilities. The Courts and the Services have concluded that, in general, ongoing consequences attributable to ongoing activities and the existence of agency facilities are part of the environmental baseline when the action agency has no discretion to modify them. With respect to existing facilities, such as a dam, courts have recognized that effects from the existence of the dam can properly be

considered a past and present impact included in the environmental baseline, particularly when the Federal agency lacks discretion to modify the dam. See, e.g., *Friends of River v. Nat'l Marine Fisheries Serv.*, 293 F. Supp. 3d 1151, 1166 (E.D. Cal. 2018). Having the environmental baseline include the consequences from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify is supported by the Supreme Court's conclusion in *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667-71 (U.S. 2007) ("Home Builders"). In that case, the Court held that it was reasonable for the Services to narrow the application of section 7 to a Federal agency's discretionary actions because it made no sense to consult on actions over which the Federal agency has no discretionary involvement or control. It follows, then, that when a Federal agency has authority for managing or operating a dam, but lacks discretion to remove or modify the physical structure of the dam, the consequences from the physical presence of the dam in the river are appropriately placed in the environmental baseline and are not considered an effect of the action under consultation.

We distinguish here between activities and facilities where the Federal agency has no discretion to modify and those discretionary activities, operations, or facilities that are part of the proposed action but for which no change is proposed. For example, a Federal agency in their proposed action may modify some of their ongoing, discretionary operations of a water project and keep other ongoing, discretionary operations the same. The resulting consultation on future operations analyzes the effects of all of the discretionary operations of the water project on the species and designated critical habitat as part of the effects of the action, even those operations that the Federal agency proposes to keep the same. We also note that the obligation is on the Federal action agency to propose actions for consultation and while they should not improperly

piecemeal or segment portions of related actions, a request for consultation on one aspect of a Federal agency's exercise of discretion does not de facto pull in all of the possible discretionary actions or authorities of the Federal agency. This is a case-by-case specific analysis undertaken by the Services and the Federal action agency as needed during consultation.

Attributing to the environmental baseline the ongoing consequences from activities or facilities that are not within the agency's discretion to modify does not mean that those consequences are ignored. As discussed in more detail below, the environmental baseline is a description of the condition of the species or the designated critical habitat in the action area. To the extent ongoing consequences are beneficial or adverse to a species, the environmental baseline evaluations of the species or designated critical habitat will reflect the impact of those consequences and the effects of the action must be added to those impacts in the Services' jeopardy and adverse modification analysis.

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

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

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

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

(b) During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat.

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

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

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

total from the date of receipt of the Federal agency's written request consistent with paragraph (c)(1) of this section.

These changes institute a new § 402.13(c), which is a process framework for the Federal agency's written request for concurrence and the Service's response. The changes to the informal consultation process are limited to only the written request for concurrence and the Service's response. This preserves the flexibility in discussions and timing inherent in the portion of the informal consultation process that is intended to assist the Federal agency in determining whether formal consultation is required. In the new framework, we require in § 402.13(c)(1) that the written request for our concurrence should contain information similar to that required in § 402.14(c)(1) for formal consultation, but only at a level of detail sufficient for the Services to determine whether or not it concurs. Consistent with past practice, the Services determine whether the information provided by the Federal agency provides sufficient information upon which to make its determination whether to concur with Federal agency's request for concurrence. We anticipate that this level of detail will often be less than that required for the initiation of formal consultation and the evaluation of adverse effects to species and designated critical habitat. Second, we establish in § 402.13(c)(2) a timeline for the written request and concurrence process. As stated in the new § 402.13(c)(2), upon receipt of an adequate request for concurrence from a Federal agency, the Services shall provide their written response within 60 days. The 60-day response period may be extended, with the mutual consent of the Federal agency (or its designated representative) and any applicant, for up to an additional 60 days, bringing the total potential timeframe for this written request and response process to

120 days. The intent of the 60-day, and no more than 120-day, deadline is to increase regulatory certainty and timeliness for Federal agencies and applicants.

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

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

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

The proposed revisions to § 402.14, Formal consultation, were as follows:

*(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.

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(g) \* \* \*

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

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(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.

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(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.

The Services received numerous comments related to our proposed amendments to this section. A summary of those comments and our responses are below at **Summary of Comments and Recommendations**.

In response to these comments and upon further consideration, in this final rule, we are finalizing the proposed revisions to § 402.14(g)(2), (g)(4), and (l). In addition, we are amending § 402.14(c), (g)(8), and (h) to read as follows:

*(c) Initiation of formal consultation.*

(1) A written request to initiate formal consultation shall be submitted to the Director and shall include:

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

(A) The purpose of the action;

(B) The duration and timing of the action;

(C) The location of the action;

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

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

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

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

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

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

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

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

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

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

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

\* \* \* \* \*

(g) \* \* \*

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

\* \* \* \* \*

(h) *Biological opinions.*

(1) The biological opinion shall include:

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

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

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

and

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

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

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

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

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

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

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

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

to be added by the Service, if appropriate, as the Service's biological opinion in fulfillment of section 7(b) of the Act.

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

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

The simplified regulatory text avoids potential confusion between the need to sufficiently describe measures a Federal agency is committing to implement as part of a proposed action to avoid, minimize, or offset effects pursuant to § 402.14(c)(1), and how those measures are taken into consideration after consultation is initiated. Any type of action proposed by a Federal agency receives a presumption that it will occur, but it must also be described in sufficient detail that the Services can both understand the action and evaluate its adverse and beneficial effects. By eliminating the word "specific" in § 402.14(g)(8), we reinforce that an appropriate level of specificity regarding the description of measures included in the proposed action may be necessary to provide sufficient detail to assess the effects of the action on listed species and critical habitat. However, inclusion of measures to avoid, minimize, or offset adverse effects as

part of the proposed action does not result in a requirement for an additional demonstration of binding plans. To simplify the regulatory text and improve clarity, we also eliminated the reference to “a clear, definite commitment of resources.” That change is not meant to imply that an additional demonstration of a clear and definite commitment of resources, beyond the commitment to implement such measures as part of the proposed action, is required before the Services can take them into consideration. Rather, we intend the phrase “do not require any additional demonstration of binding plans” that is retained in § 402.14(g)(8) to reflect that demonstrations of resource commitments and other elements are not required before allowing the Services to take into account measures included in a proposed action to avoid, minimize, or offset adverse effects. Therefore, this final rule maintains the intent of the proposed revisions to § 402.14(g)(8).

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

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

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

The proposed revisions to § 402.16, Reinitiation of consultation, were as follows:

(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.

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

In response to these comments and upon further consideration, we revised § 402.16, Reinitiation of consultation, to read as follows:

(a) Reinitiation of consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

\* \* \* \* \*

(3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or

\* \* \* \* \*

(b) An agency shall not be required to reinitiate consultation after the approval of a land management plan prepared pursuant to 43 U.S.C. 1712 or 16 U.S.C. 1604 upon listing of a new species or designation of new critical habitat if the land management plan has been adopted by the agency as of the date of listing or designation, provided that any authorized actions that may affect the newly listed species or designated critical habitat will be addressed through a separate action-specific consultation. This exception to reinitiation of consultation shall not apply to those land management plans prepared pursuant to 16 U.S.C. 1604 if:

(1) Fifteen years have passed since the date the agency adopted the land management plan prepared pursuant to 16 U.S.C. 1604; and

(2) Five years have passed since the enactment of Public Law No. 115-141 [March 23, 2018], or the date of the listing of a species or the designation of critical habitat, whichever is later.

The language at § 402.16(a)(3) is modified in this final rule to correct the inadvertent failure of our proposed rule to reference the written concurrence process in this criterion for reinitiation of consultation. This criterion references the information and analysis the Services considered, including information submitted by the Federal agency and applicant, in the development of our biological opinion or written concurrence and not just the information contained within the biological opinion or written concurrence documents. The remaining three reinitiation criteria at § 402.16(a)(1), (2), and (4) are unchanged. We also take this opportunity to clarify the meaning of the reference to the Service in the current and adopted, final version of 402.16(a) that reads, “Reinitiation of consultation is required and shall be requested by the Federal agency or by the Service, . . .”. The reference to the Service in this language does not

impose an affirmative obligation on the Service to reinitiate consultation if any of the criteria have been met. Rather, the reference here has always been interpreted by the Services to allow us to recommend reinitiation of consultation to the relevant Federal action agency if we have information that indicates reinitiation is warranted. It is ultimately the responsibility of the Federal action agency to reinitiate consultation with the relevant Service when warranted. The same holds true for initiation of consultation in the first instance. While the Services may recommend consultation, it is the Federal agency that must request initiation of consultation. See 50 CFR 402.14(a).

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

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

We proposed to add a new § 402.17 titled “Other provisions.” Within this new section, we proposed a new provision titled “Activities that are reasonably certain to occur,” in order to clarify the application of the “reasonably certain to occur” standard referenced in § 402.02 (defining effects of the action and cumulative effects).

The proposed provision entitled “Activities that are reasonably certain to occur” reads as follows:

(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.

The Services received numerous comments related to the proposed provision, many of which stated the Services should further clarify the language of the provision. In response to these comments and upon further consideration, we revised § 402.17 to read as follows:

(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 experience with activities that have resulted from actions that are similar in scope, nature, and magnitude to the proposed action;
- (2) Existing plans for the activity; and

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

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

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

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

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

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

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

First, we clarified that for a consequence or an activity to be considered reasonably certain to occur, the determination must be based on clear and substantial information. The term “clear and substantial” is used to describe the nature of information needed to determine that a consequence or activity is reasonably certain to occur. We do not intend to change the statutory

requirement that determinations under the Act are made based on “best scientific and commercial data available.” By clear and substantial, we mean that there must be a firm basis to support a conclusion that a consequence of an action is reasonably certain to occur. This term is not intended to require a certain numerical amount of data; rather, it is simply to illustrate that the determination of a consequence to be reasonably certain to occur must be based on solid information. This added term also does not mean the nature of the information must support that a consequence is guaranteed to occur, but must have a degree of certitude.

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

Second, in response to requests made in public comments for clarification of the factors to consider, we revised § 402.17(a)(1) and (a)(2) to further elaborate what we meant in the original proposed versions of those factors. In particular, we revised § 402.17(a)(1) to describe that the Services would include past experience with “activities that have resulted from actions that are similar in scope, nature, and magnitude to the proposed action” when considering whether an activity might be reasonably certain to occur as a result of the proposed action under consultation. This is intended to capture the important knowledge developed by the action agencies and Services over their decades of consultation experience. We also made minor revisions to clarify § 402.17(a)(2). The proposed language used the phrase “any existing

relevant plans” but did not reference to the activity itself. We recognize that this language may have been confusing and vague for readers and therefore have modified the text to clarify that we are referencing plans specific to that activity, not general plans that may contemplate a variety of activities or uses in an area.

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

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

## **Summary of Comments and Recommendations**

### **Section 402.02—Definitions**

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

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

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

#### **Comments on the Destruction and Adverse Modification Definition**

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

**Response:** The term “destruction or adverse modification” has been defined by regulation since 1978. We continue to believe it is appropriate and within the Services’ authority to define this term and believe that this revision to that definition will improve the clarity and consistency in the application of these concepts. Furthermore, the Services have discretion to issue a regulatory interpretation of the statutory phrase “destruction or adverse modification” and are not required to break such a phrase into separate definitions of its individual words. The Services believe that the inquiry is most usefully and appropriately defined by the general standard in our definition, and that ultimately the determination focuses on how the agency action affects the value of the critical habitat for the conservation of the species, regardless of whether the contemplated effects constitute “destruction” or “adverse modification” of critical habitat.

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

**Response:** The final rule does not alter the use of the phrase “or indirect” which has been in all prior versions of this definition. In addition, we note that the phrase has long been included in, and continues to be used in, the definitions of “jeopardize the continued existence of” and “action area.” We continue to believe its inclusion is appropriate in this context and takes into

account that some actions may affect critical habitat indirectly. The Services use the best scientific and commercial data available and do not rely upon speculation in determining the effects of a proposed action or in section 7(a)(2) “destruction or adverse modification” determinations. The standards for determining effects of a proposed action are further discussed above under **Definition of “Effects of the Action”**.

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

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

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

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

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

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

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

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

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

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

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

#### **Comments on the Addition of the Phrase “As a Whole”**

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

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

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

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

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

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

of a species (e.g., a primary breeding site). Thus, the size or proportion of the affected area is not determinative; impacts to a smaller area may in some cases result in a determination of destruction or adverse modification, while impacts to a large geographic area will not always result in such a finding.

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

**Response:** As already noted, the revisions to the definition will not reduce or alter how the Services consider the aggregated effects of smaller changes to critical habitat. It should be emphasized that the revisions to this definition also do not alter or impose any additional burdens on action agencies or applicants to provide information on the nature of the proposed action or that action’s effects on critical habitat or listed species. The regulations require the Services’ biological opinion to assess the status of the critical habitat (including threats and trends), the environmental baseline of the action area, and cumulative effects. The Services’ summary of the status of the affected species or critical habitat considers the historical and past impacts of activities across time and space. The effects of any particular action are thus evaluated in the context of this assessment, which incorporates the effects of all current and previous actions.

This avoids situations where each individual action is viewed as causing only relatively minor adverse effects but, over time, the aggregated effects of these actions would erode the conservation value of the critical habitat.

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

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

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

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

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

**Response:** The Services do not agree that the addition of “as a whole” leads to improper conflation of the meanings of “jeopardize the continued existence of” and “destruction or adverse modification.” The terms “destruction or adverse modification” and “jeopardize the continued existence of” have long been recognized to have distinct meanings yet implicate overlapping considerations in their application. See, e.g., *Sierra Club v. U.S. Fish & Wildlife Service*, 245 F.3d 434, 441 (5<sup>th</sup> Cir. 2001); *Greenpeace v. National Marine Fisheries Serv.*, 55 F.Supp.2d 1248, 1265 (W.D. Wash.1999); *Conservation Council for Hawai‘i v. Babbitt*, 2 F.Supp.2d 1280, 1287 (D. Haw. 1998). The phrase “jeopardize the continued existence of” focuses directly on the species’ survival and recovery, while the definition of “destruction or

adverse modification” is focused first on the critical habitat itself, and then considers how alteration of that habitat affects the “conservation” value of critical habitat. Thus, the terms “jeopardize the continued existence of” and “destruction or adverse modification” involve overlapping but distinct considerations. See *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 441 (5th Cir. 2001) (noting that the critical habitat analysis is more directly focused on the effects on the designated habitat and has a “more attenuated” relationship to the survival and recovery of the species than the “jeopardize” analysis).

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

**Response:** The use of the phrase “as a whole” is not solely meant to establish a geographic scale for “destruction or adverse modification” determinations. The phrase applies to assessing the value of the whole designation for conservation of the species. Effects at a smaller scale that could be significant to the value of the critical habitat designation will be considered. As the preamble to the proposed rule notes, “the Services must [then] place those impacts in

context of the designation to determine if the overall value of the critical habitat is likely to be reduced” (83 FR 35178, July 25, 2018, p. 83 FR 35180). Thus, while the destruction or adverse modification analysis will consider the nature and significance of effects that occur at a smaller scale than the whole designation, the ultimate determination applies to the value of the critical habitat designation as a whole.

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

**Response:** The revised definition is not inconsistent with the quoted 1998 Consultation Handbook guidance. As we stated in our preamble to the proposed rule, under the revised definition, “if a particular project would cause adverse effects to a portion of critical habitat, the Services must place those impacts in context of the designation to determine if the overall value of the critical habitat is likely to be reduced. This could occur where, for example, a smaller affected area of habitat is particularly important in its ability to support the conservation of a species (e.g., a primary breeding site). Thus, the size or proportion of the affected area is not determinative; impacts to a smaller area may in some cases result in a determination of destruction or adverse modification, while impacts to a large geographic area will not always result in such a finding” (83 FR 35178, July 25, 2018, p. 83 FR 35180). In other words, it may be appropriate to focus on a unit of analysis that is smaller than the entire designation, but it

would not be appropriate to conclude the analysis without relating the result of the alterations at that scale back to the listed entity, which is the designation “as a whole,” in order to assess whether the value of that designation to the conservation of a listed species is appreciably diminished.

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

**Response:** The Services do not agree that any adverse effect to critical habitat is per se “destruction or adverse modification,” a subject further discussed in the discussion of “appreciably diminish” in the preamble to the proposed rule and the discussion of comments on that preamble provided below. Nor do the Services agree that the use of the term “essential to the conservation of the species” in the Act’s definition of critical habitat requires such an interpretation. The phrase “essential to the conservation of the species” guides which areas will be designated but does not require that every alteration of the designated critical habitat is prohibited by the statute. Just as the determination of jeopardy under section 7(a)(2) of the Act is made at the scale of the entire listed entity, a determination of destruction or adverse modification must ultimately consider the diminishment to the value for conservation at the scale of the entire critical habitat designation. As the 1998 Consultation Handbook states, adverse

effects on elements or segments of critical habitat “generally do not result in jeopardy or adverse modification determinations unless that loss, when added to the environmental baseline, is likely to result in significant adverse effects throughout the species’ range, or appreciably diminish the ability of the critical habitat to satisfy essential requirements of the species.” See 1998 Consultation Handbook at p. 4-36. Accordingly, the Ninth Circuit Court of Appeals has held that “a determination that critical habitat would be destroyed was thus not inconsistent with [a] finding of no ‘adverse modification.’” See also *Butte Envir. Council v. U.S. Army Corps of Eng’rs*, 620 F.3d 936, 947-48 (9th Cir. 2010).

### **Deletion of the Second Sentence**

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

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

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

**Response:** As already noted, the deletion of the second sentence was meant to clarify and simplify the definition, but not to change the Services’ current practice and interpretation regarding the applicability of the definition. Nor does the change mean that the recovery role of

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

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

**Response:** The Services agree that the second sentence was unnecessary and that its removal will simplify and clarify the definition. The Services agree that it is important in any

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

### **Appreciably Diminish**

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

the Services' regulations. Below is discussion of comments received on this proposed rule preamble discussion of "appreciably diminish," as well as related comments on the preamble discussion of associated topics of "baseline jeopardy" and "tipping point."

**Comment:** A number of commenters expressed agreement with this section of the preamble, and the Services' interpretation that not every adverse effect to critical habitat constitutes "destruction or adverse modification" (and relatedly, that not every adverse effect to a species "jeopardizes the continued existence of" a listed species). Some commenters noted that this interpretation comports with case law holding that a finding of adverse effects on critical habitat do not automatically require a determination of "destruction or adverse modification," such as *Butte Env. Council*, 620 F.3d 936, 948 (9th Cir. 2010).

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

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

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

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

After effects are determined to be adverse at the action-area scale, they are analyzed with regard to the critical habitat as a whole. That is, the Services look at the adverse effects and evaluate their impacts when added to the environmental baseline and cumulative effects on the

value of the critical habitat for the conservation of the species, taking into account the total and full extent as described in the designation, not just in the action area. It is at this point that the Services look to whether the effects diminish the role of the entire critical habitat designation. As discussed further above in our discussion of the phrase “as a whole,” the Services must place impacts to critical habitat into the context of the overall designation to determine if the overall value of the critical habitat is likely to be reduced.

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

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

**Response:** The Services believe our revised definition of “destruction or adverse modification” will be clearer than before, while retaining continuity by keeping important

language from prior versions of the definition. We do not think the various proposed definitions for “appreciably diminish” would improve upon the “destruction or adverse modification” definition, and we conclude they would themselves introduce additional undefined, ambiguous terminology that would not likely improve the clarity of the definition or the consistency of its application.

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

**Response:** We believe the interpretation provided in our proposed rule preamble and as described above in detail is consistent with the guidance provided in the 1998 Consultation Handbook and the language used in the 2016 final rule (81 FR 7214; February 11, 2016). The

preamble language in the draft rule did not seek to raise or lower the bar for making a finding of destruction or adverse modification. As with the 2016 definition and prior practice on the part of the Services, and as discussed above, destruction or adverse modification is more than a noticeable or measurable change. As we have detailed above, in order to trigger adverse modification, there must be an alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

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

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

**Comment:** Some commenters asserted that the preamble discussion of “appreciably diminish” stated an interpretation that was inconsistent with the statute, insufficiently protective of critical habitat, and would make the bar too high for making findings of “destruction or adverse modification.” Many of these comments linked the “appreciably diminish” language in the preamble with the “as a whole” change to the first sentence of the definition and concluded

that these operated together to raise the tolerance for incremental and cumulative losses that would over time degrade critical habitat and undermine conservation. Thus, some of these comments are also addressed above in the discussion of “as a whole.” These comments often also raise issues about the concepts of “tipping point” and “baseline jeopardy” addressed further below.

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

### **Baseline Jeopardy and Tipping Point**

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

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

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

**Response:** The Services do not dispute that some listed species are more imperiled than others, and that for some very rare or very imperiled species, the amount of adverse effects to critical habitat or to the species itself that can occur without triggering a "jeopardize" or "destruction or adverse modification" determination may be small. However, the statute and regulations do not contain the phrase "baseline jeopardy." Nor does the statute or its regulations recognize any state or status of "baseline jeopardy." While the term "jeopardy" is sometimes used as a shorthand, the statutory language is "jeopardize the continued existence," and it applies prospectively to the effects of Federal actions, not to the pre-action status of the species. As we

stated in our proposed rule preamble, “[t]he terms ‘jeopardize the continued existence of’ and ‘destruction or adverse modification’ are, in the plain language of section 7(a)(2), determinations that are made about the effects of Federal agency actions. They are not determinations made about the environmental baseline or about the pre-action condition of the species. Under the [Act], a listed species will have the status of ‘threatened’ or ‘endangered,’ and all threatened and endangered species by definition face threats to their continued existence” (83 FR 35178, July 25, 2018, p. 83 FR at 35182). For the “jeopardize” determinations, as with the “destruction or adverse modification” determinations, a determination that there are likely to be adverse effects of a Federal action is the starting point of formal consultation. The Services are then obliged to consider the magnitude and significance of the effects they cause, when added to the environmental baseline and cumulative effects, and the status of the species or critical habitat, before making our section 7(a)(2) determination.

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

**Response:** Different commenters, as well as prior court opinions, have offered varying interpretations of what the term “tipping point” means. For example, one commenter on the proposed rule says that “[t]ipping points for species are when the environment degrades itself to where the population growth is too low to support a viable population.” The Ninth Circuit Court of Appeals has described the concept as “a tipping point beyond which the species cannot recover.” See *Oceana, Inc. v. Nat'l Marine Fisheries Serv.*, 705 F. App'x 577, 580 (9th Cir. 2017); see also *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 527 (9th Cir. 2010) (referring to a “tipping point precluding recovery”). Another Ninth Circuit case described the issue as one

of determining “at what point survival and recovery will be placed at risk” (*Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008)), in order to avoid “tipping a listed species too far into danger.” *Id.* We disagree that a rational analysis of whether an action is likely to jeopardize a species necessarily requires identification of such a “tipping point.” The state of the science regarding the trends and population dynamics of a species may often not be robust enough to establish such tipping points with sufficient certainty or confidence, and the Services have successfully increased the abundance of some species from a very small population size (e.g., California condor). In addition, there are myriad variables that affect species viability, and it would not likely be the case that one could reduce the inquiry to a single “tipping point.” For example, species viability may be closely tied to abundance, reproductive rate or success, genetic diversity, immunity, food availability or food web changes, competition, habitat quality or quantity, mate availability, etc. In those cases, the attempt to define a tipping point could undermine the rationality of the determination, bind the Services to base their judgment on overly rigid criteria that give a misleading sense of exactitude, and unduly limit the ability to exercise best professional judgment and factor in the actual scientific uncertainties. The Services do not dispute that, in some cases, there could be a species that is so rare or imperiled that it reaches a point where there is little if any room left for it to tolerate additional adverse effects without being jeopardized by the action. But even in those cases, the Services would apply the necessary “reduce appreciably” standard to the “jeopardize” determination. The Services’ final determination should be judged according to whether it reasonably applied the governing statutory and regulatory standards and used the best scientific and commercial data

available. There is no de facto or automatic requirement that a reasonable conclusion must include an artificial requirement, ungrounded in the statute, to identify a “tipping point.”

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

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

## **Definition of Director**

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

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

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

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

Related to this revised definition, we also proposed to make the definition of environmental baseline a stand-alone definition within § 402.02 and moved the instruction that the effects of the proposed action shall be added to the environmental baseline into the regulations guiding the Services' responsibilities in formal consultation in § 402.14(g). In addition, we proposed to add a new § 402.17 titled "Other provisions" and, within that new section, add a new provision titled "Activities that are reasonably certain to occur" in order to clarify the application of the "reasonably certain to occur" standard referenced in two specific contexts: activities caused by but not included as part of the proposed action, and activities under "cumulative effects."

As discussed above under **Discussion of Changes from Proposed Rule**, the Services received numerous comments on the proposed definition of "effects of the action" and the new provision at § 402.17(a) "Activities that are reasonably certain to occur." We have adopted a final, revised definition of "effects of the action" and revised text at § 402.17(a) in response to those comments. Below, we summarize other comments received on the scope of the "effects of the action" and the proposed two-part test for effects of the action of "but for" and "reasonably certain to occur" and present our responses. We address changes to the environmental baseline definition in a separate discussion below.

### **Scope of Effects of the Action**

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

**Response:** The terms are not prohibited from use in discussion, as they can be useful

when discussing the mode or pathway of the effects of an action or activity. However, as discussed above, elimination of these terms simplifies the definition of “effects of the action” and causes fewer concerns about parsing what label applies to each consequence. Now consequences caused by the proposed action encompass all effects of the proposed action, including effects from what used to be referred to as “direct” and “indirect” effects and “interrelated” or “interdependent” activities.

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

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

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

**Response:** The Services decline to make the suggested addition to the definition of

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

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

**Response:** The Services are adopting a revised definition of effects of the action, as described above. The distinction between activities and effects (now “consequences”) in this definition is intended to capture two aspects of the analysis of the “effects of the action.” First, a proposed Federal action may cause other associated or connected actions, which are referred to as other activities caused by the proposed action in the definition to differentiate them from the proposed Federal “action.” These activities would have been called “interrelated” or “interdependent” actions or “indirect effects” under the prior definition codified at § 402.02. In large part due to the three possible categories these activities could have fallen into, and the debates that regularly ensued while attempting to categorize them, we chose to collapse those

three possible categories and “direct effects” into “all consequences” caused by the proposed action. Second, both the proposed action and the other activities caused by the proposed action may have physical, chemical, or biotic consequences on the listed species and critical habitat. Both the proposed action and other activities caused by the proposed action must be investigated to determine the physical, chemical, and biotic consequences. In the case of an activity that is caused by (but not part of) the proposed action, the two-part test must be examined twice—once for the activity and then again for the consequences of that activity. Additionally, if Federal activities caused by the Federal agency action under consultation are identified, those additional activities should be “combined in the consultation and a lead agency . . . determined for the overall consultation” (1998 Consultation Handbook at p. 4-28).

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

**Response:** The proposed definition of “effects of the action” neither ignored the multiple threats facing listed species and critical habitats nor did it reduce all effects analysis only to the consideration of direct effects. The Services have adopted a revised, final definition of “effects of the action” that clarifies that all of the consequences of a proposed action must be evaluated, and that the causation tests are applied to all effects of the proposed action. Contrary to the commenter’s assertion, a complete assessment of the “effects of the action” would require, where

appropriate, the consideration of multiple stressors and consequences resulting from any synergistic, or compounding factors. These consequences would then be added to the environmental baseline and cumulative effects per the provisions now found at § 402.14(g)(4).

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

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

determined on a case-by-case basis. Further, the effects of other actions such as those described in the example may already be included in the overall jeopardy analysis as part of the status of the species, environmental baseline, and/or cumulative effects.

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

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

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

**Response:** As we further discuss below under § 402.03, Applicability, the Services decline to limit the “effects of the action” to only those effects or activities over which the Federal agency exerts legal authority or control. As an initial matter, section 7 applies to actions in which there is discretionary Federal involvement or control (50 CFR 402.03). Once in consultation, all consequences caused by the proposed action, including the consequences of activities caused by the proposed action, must be considered under the Services’ definition of “effects of the action.” These may include the consequences to the listed species or designated critical habitat from the activities of some party other than the Federal agency seeking consultation, provided those activities would not occur but for the proposed action under consultation, and both the activities and the consequences to the listed species or designated critical habitat are reasonably certain to occur. Where this causation standard is met, the action agency has a substantive duty under the statute to ensure the effects of its discretionary action are not likely to jeopardize a listed species or destroy or adversely modify its critical habitat. We recognize that the Services and action agencies sometimes struggle with the concept of reviewing the consequences from other activities not under the action agency’s control in a consultation. However, including all relevant consequences is not a fault assessment procedure; rather, it is the required analysis necessary for a Federal agency to comply with its substantive duties under section 7(a)(2). When the Services write an incidental take statement for a biological opinion, under section 7(b)(4)(iv) of the Act they can assign responsibility of specific terms and conditions of the incidental take statement to the federal agency, the applicant, or both. As the Supreme Court noted in *Home Builders*, “*TVA v. Hill* thus supports the position ... that the

[Act]'s no-jeopardy mandate applies to *every* discretionary agency action—*regardless* of the expense or burden its application might impose” (551 U.S. at 671 [emphasis added]).

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

### **“But for” Causation**

**Comment:** Several commenters expressed concern that the proposed application of the “but for” test to the effects of the proposed action would result in a simplistic evaluation of

effects that would miss important considerations of the consequences of multiple effects, synergistic effects, or other more complex pathways by which an action may affect listed species or critical habitat.

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

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

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

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

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

**Response:** The Services decline to adopt the sort of “proximate cause” standard in the context of section 7 of the Act that has been applied by courts in the NEPA context. A

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

With regard to that distinction, the cited cases point to the underlying policy differences between NEPA and the Act, with an emphasis on the affirmative burden on Federal action agencies with regard to endangered species. This is a significant distinction as the Supreme Court noted in *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983), “courts must look to the underlying policies or legislative intent in order to draw a manageable

line between those causal changes that may make an actor responsible for an effect and those that do not.” *Id.* at 774 n. 7. The underlying policy of a statute and legislative intent must shape the causation nexus. In that regard, section 7(a)(2) of the Act imposes an affirmative and substantive duty on Federal agencies to avoid actions that are likely to jeopardize listed species or adversely modify/destroy critical habitat. See *Home Builders*, 551 U.S. at 671 (“the [Act]’s no-jeopardy mandate applies to every discretionary agency action—regardless of the expense or burden its application might impose”). In light of the above, and the related reasons the Services discussed in rejecting a “jurisdiction or control” limit to the effects of discretionary agency actions, the Services decline to impose an additional proximate causation requirement applicable in the NEPA context for effects of the action under section 7(a)(2).

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

**Response:** The original definition of “indirect effects” in regulation at § 402.02 refers to effects that are “caused by” the proposed action whereas the Services’ 1998 Consultation Handbook includes the phrase “caused by or results from,” both of which require an assessment of a causal connection between an action and an effect. The “but for” causation test in the revised, final definition of “effects of the action” is similar to “caused by” or “caused by or results from” in that both tests speak to a connection between the proposed action and the consequent results of that action, whether they be physical, chemical, or biotic consequences to the environment, the species, or critical habitat, or activities that would not occur but for the proposed action. Both tests require a determination of factual causation, and we do not

anticipate a change in the Services' practice in applying "but for" causation to consequences once termed "indirect effects" compared to the regulatory term "caused by." As we noted in the preamble of the proposed rule, "[i]t has long been our practice that identification of direct and indirect effects as well as interrelated and interdependent activities is governed by the 'but for' standard of causation. Our [1998] Consultation Handbook states . . . 'In determining whether the proposed action is reasonably likely to be the direct or indirect cause of incidental take, the Services use the simple causation principle: i.e., 'but for' the implementation of the proposed action. . . .' ([1998] Consultation Handbook, page 4–47)" (83 FR 35178, July 25, 2018, p. 83 FR 35183).

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

**Response:** The Services requested comment whether the proposed definition altered the scope of the effects of the action. With the revisions we are making in this final rule and as discussed elsewhere in this rule, there will not be a shift in the scope of the effects we consider under our new definition of "effects of the action," and, therefore, our analyses will be neither over nor under inclusive. Some of the commenters expressing concerns about over-inclusivity refer to a multi-factor test (pages 4-23 through 4-26 of the 1998 Consultation Handbook) for

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

### **“Reasonably Certain to Occur”**

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

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

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

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

**Comment:** Some commenters requested that the Services elaborate on the factors to consider when determining whether an activity is reasonably certain to occur as part of the two-part test for effects of the action. Others provided proposals of appropriate factors or specificity that should be contained in such an assessment. These included: (1) The extent to which a prior action that is similar in scope, nature, magnitude, and location has caused a consequent action or activity to occur; (2) any existing plans for the initiation of an action or activity by the consulting action agency, the permit or license applicant or another related entity that is directly connected to, and dependent upon, implementation of the proposed action; and (3) the extent to which a

potential action or activity has intervening or necessary economic, administrative, and legal requirements that are prerequisites for the action to be initiated and the level of certainty that can be attributed to the completion of such intervening or necessary steps. A few commenters suggested that the only factor should be whether the activity was “definitely planned and concretely identifiable,” while others suggested the only factor should be the use of the best scientific and commercial data available.

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

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

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

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

**Response:** Oftentimes, when a section 7(a)(2) consultation is performed at the level of a regional or national program, it is referred to as a programmatic consultation, as defined by the Services in the proposed rule, and the proposed action is referred to as a framework programmatic action from our 2015 rule revising incidental take statement regulations (80 FR 26832, May 11, 2015). In these instances, the “but for” and “reasonably certain to occur” parts of the test extend to the consequences that would be expected to occur under the program generally, but not to the specifics of actual projects that may receive future authorization under

the program. Effects analyses at this more generalized level are necessary because the Federal agency often does not have specific information about the number, location, timing, frequency, precise methods, and intensity of the site-specific actions or activities for their program.

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

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

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

**Response:** As discussed above, we have revised the definition of “effects of the action”

so that the reasonably certain to occur standard applies to all consequences caused by the proposed action, which include the effects formerly captured by “direct” and “indirect” effects and “interrelated” and “interdependent” activities .

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

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

be based on speculation or conjecture. This added term also does not mean the nature of the information must support that a consequence or activity is guaranteed to occur.

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

### **Definition of Environmental Baseline**

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

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

## **Comments on the Environmental Baseline Definition**

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

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

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

**Response:** The commenters appear to misunderstand how the various regulatory provisions (e.g., environmental baseline, status of the species and critical habitat, etc.) guide the Services’ section 7(a)(2) analyses. The purpose of our section 7(a)(2) analyses is to determine if the action proposed to be authorized, funded, or carried out by a Federal agency is not likely to jeopardize the listed species and also not likely to destroy or adversely modify critical habitat designated for the conservation of listed species. In section 7(a)(2) analyses, we first consider the status of the species and critical habitat in order to describe the antecedent or preceding likelihood of survival and recovery of the listed species and value of critical habitat that may be affected by the proposed action. For a listed species, for example, this may be expressed in terms of the species’ chances of survival and recovery or through discussion of the species’ abundance, distribution, diversity, productivity, and factors influencing those characteristics. Following on the status assessment, the purpose of the environmental baseline is to describe, for the action area of the consultation, the condition of the portion of the listed species and critical habitat that will be exposed to the effects of the action. A significant body of scientific literature

has established that, without understanding this antecedent condition, we cannot predict the expected responses of the species (at the individual or population level) or critical habitat (at the feature or area level) to the proposed action.

Ultimately, the environmental baseline is used to understand the consequences of an action by providing the context or background against which the action's effects will occur. Comparing alternative courses of action is not the purpose of the environmental baseline—the task is to determine only what is anticipated to occur as a result of what has been proposed. When establishing the environmental baseline, the focus is on the past and present impacts that human activities and other factors (e.g., environmental conditions, predators, prey availability) have had on the fitness of individuals and populations of the species and features or areas of critical habitat in the action area. For example, if we were to consult on pile-driving activities (e.g., the installation of piles or poles into a substrate to support a structure such as a dock by hammering or vibrating the piles into place), the baseline is intended to describe the physiological and behavioral condition of an animal that will be exposed to the sound waves produced by pile driving. This condition is the product of that animal's life history, physiology, and environment and which predisposes the animal to a set reaction or range of reactions to the sound and pressure waves. Animals in good physiological condition may not be perturbed by the action, whereas animals in poor health or stressed by other natural or anthropogenic factors, may leave the area, stop feeding, or fail to reproduce. Numerous case studies in the scientific literature have examined the varying physiological and behavioral responses of individuals to perturbations given the animal's antecedent condition. Similarly, populations of animals respond differently given their abundance, distribution, productivity, and diversity in the action area.

The effects of the action and cumulative effects are added to the environmental baseline to determine how (or if) the proposed action affects the fitness of individuals and populations or the function, quantity, or quality of critical habitat features and areas that are exposed to the action given that antecedent condition. Because action areas are often just a small portion of the overall critical habitat designation or contain only some of the individuals or populations that comprise the listed species, the Services must then evaluate whether these action area effects translate into meaningful changes in the numbers, reproduction, or distribution of the listed species or reductions in the functional value or role the affected critical habitat plays in the overall designated critical habitat. This information is then considered with the overall viability of the listed species and value of designated critical habitat to determine if the consequences of the proposed action are likely to appreciably reduce the species' likelihood of survival and recovery and appreciably diminish the value of critical habitat for the conservation of the species. As we noted in the responses to comments on the revised definition of "destruction or adverse modification," the size or proportion of the affected area of critical habitat is not determinative; impacts to a smaller area may in some cases result in a determination of destruction or adverse modification, while impacts to a large geographic area will not always result in such a finding. Similarly, when considering the effects of the action on the likelihood of survival and recovery of listed species, the key consideration is the antecedent status of the species and its vulnerability to further perturbation, not simply a measure of whether the number of individuals affected by the proposed action is "small" or "large."

**Comment:** Several commenters requested clarification of the term "aggregate effects" and how the Services conduct this analysis, given the proposal to revise "effects of the action"

and § 402.14(g)(2) and (4) and existing language in the 1998 Consultation Handbook at p. 4-33. This language states, “The conclusion section presents the Services’ opinion regarding whether the aggregate effects of the factors analyzed under ‘environmental baseline,’ ‘effects of the action,’ and ‘cumulative effects’ in the action area—when viewed against the status of the species or critical habitat as listed or designated—are likely to jeopardize the continued existence of the species or result in destruction or adverse modification of critical habitat.” Commenters were concerned that our proposed revisions would result in only assessing the additional effects of the proposed action and not the “aggregate effects” as they are presented in the 1998 Consultation Handbook.

**Response:** As we noted in the preamble to the proposed rule, our proposed revisions to § 402.14(g)(2) and (4) are intended to clarify the analytical steps the Services undertake in formulating its biological opinion: “In summary, these analytical steps are: (1) Review all relevant information, (2) evaluate current status of the species and critical habitat and environmental baseline, (3) evaluate effects of the proposed action and cumulative effects, (4) add effects of the action and cumulative effects to the environmental baseline, and, in light of the status of the species and critical habitat, determine if the proposed action is likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat” (83 FR 35178, July 25, 2018, p. 83 FR 35186). These steps encompass the “aggregate effects” of adding the effects of the action to the environmental baseline, and then taken together with cumulative effects, considering those results in light of the status of the species and critical habitat. There is no change from current Service practice or the “aggregate effects” guidance in the 1998 Consultation Handbook.

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

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

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

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

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

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

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

**Comment:** Some commenters supported the suggested revised definition of “environmental baseline” that was presented in the preamble of the proposed rule. Those in support agreed with different treatment for ongoing (or pre-existing) actions or effects and felt

that this would avoid overstatement or analysis of the effects of ongoing actions under consultation.

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

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

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

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

alter ongoing projects in order to fulfill the goals of the Act” (*Tennessee Valley Authority v. Hill*, 437 U.S. 153, 186 (1978))).

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

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

**Response:** We have revised the definition of environmental baseline to address ongoing actions. Additionally, the Services provide some basic discussion of the treatment of this issue earlier in this rule. In most instances, the resolution of ongoing agency activities or existing agency facilities will be a fact-based inquiry that turns on the circumstances of a particular consultation.

**Comment:** Some commenters argued against viewing any improvements in ongoing activities as “beneficial” and that they should be evaluated appropriately as ongoing adverse

(albeit reduced) effects of an action and not through improper comparative or incremental analyses.

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

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

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

**Comment:** A few commenters noted that the purpose of the environmental baseline is not to create a hypothetical environment in which certain features, projects, or events have, or have not, occurred. Those commenters assert that, in establishing the environmental baseline, the action agency and the Services are not picking and choosing facts, they are observing and

recording data on the present conditions. They further assert that the environmental baseline should include both past and present effects of existing structures that the Federal action agency has no discretion to modify and any impacts from their continued physical existence are not part of the proposed action, which is properly focused on future project operations.

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

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

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

### **Definition of Programmatic Consultation**

We proposed to add a definition for the term "programmatic consultation" to codify a consultation technique that is being used with increasing frequency and to promote the use of

programmatic consultations as effective tools that can improve both process efficiency and conservation in consultations. We received numerous comments on the proposed definition, several of which requested further clarification of the definition terms, scope, and geographic extent of activities and process for programmatic consultations. The discussion below contains the Services' responses to these comments.

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

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

While action agencies do have a duty to consult on programs that are considered agency actions that may affect a listed species or critical habitat, many types of programmatic consultation would be considered an optional form of section 7 compliance to, for example,

address a collection of agency actions that would otherwise be subject to individual consultation. These optional types of programmatic consultation may be appropriate for a wide range of activities or a suite of programs.

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

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

**Comment:** One commenter suggested the Services more clearly explain in the preamble to the final rule how the terms “framework programmatic action” and “mixed programmatic action” relate to “programmatic consultation.”

**Response:** As defined at § 402.02, “framework programmatic action” and “mixed programmatic action” refer to the way in which an agency's programmatic actions are structured.

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

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

In the proposed rule, we requested public comment on several questions related to the need for and imposition of a deadline on the informal consultation process described within § 402.13. Specifically we asked: (1) whether a deadline would be helpful in improving the

timeliness of review; (2) the appropriate length for a deadline (if not 60 days); and (3) how to appropriately implement a deadline (e.g., which portions of informal consultation the deadline should apply to [e.g., technical assistance, response to requests for concurrence, etc.], when informal consultation begins, and the ability to extend or “pause the clock” in certain circumstances, etc.).

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

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

**Response:** As described at § 402.13, informal consultation is an optional process that includes all discussions, correspondence, etc., between the Services and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. One aspect of the informal consultation process is the further option that, if a Federal agency has determined that their proposed action is

not likely to adversely affect listed species or critical habitat, they may conclude their section 7(a)(2) consultation responsibility for that action with the written concurrence of the Services. It is this final aspect of the informal consultation process that has received the most scrutiny and concerns about timeliness and the ability of Federal agencies to proceed with actions that are not likely to adversely affect listed species or critical habitat. The Services specifically requested comment on this issue in the proposed rule, including whether to add a 60-day deadline, subject to extension by mutual consent, for informal consultations.

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

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

The revised regulation points to the types of information required to initiate formal consultation under § 402.14(c)(1) as indicative of the type of information that should be included in a request for concurrence. We also note in the preamble that the level of detail is likely less than that required to initiate formal consultation. Federal agencies, designated non-Federal representatives, and applicants preparing the request for concurrence should draw upon any technical assistance provided by the Services during informal consultation and provide the amount and type of information that is commensurate with the scope, scale, and complexity of the proposed action and its potential effects on listed species and critical habitat. The Services hope to gain efficiencies in avoiding unnecessary back and forth between the Services and Federal agency by describing the information required to obtain the Services' concurrence in the revised regulation. Federal agencies submitting requests for concurrence that contain this information allow the Services to adequately evaluate whether the concurrence is appropriate and readily meet the 60-day deadline.

Comments regarding a time period for "sufficiency review" are referring to the Service's review of the request for concurrence. This review is to determine if the information provided is sufficient for the Services to understand the Federal agency's action and analysis and to evaluate

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

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

**Comment:** Those commenters opposed to the imposition of a deadline generally did so on one of two bases: (1) the data we present indicates that we generally complete concurrence requests in a timely fashion and so no deadline was necessary, or (2) a deadline could have the

effect of truncating or hampering the ability of Federal agencies and the Services to conduct effective informal consultations generally.

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

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

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

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

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

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

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

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

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

**Section 402.14—Formal Consultation—general—including what information is needed to initiate formal consultation and considering other documents as initiation packages**

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

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

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

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

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

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

**Response:** This proposed change is unnecessary. The Services already request Federal agencies and applicants provide information necessary to initiate consultation when it has not

been provided or is unclear in the original initiation package. As discussed for informal consultation above, the Services typically provide this type of sufficiency review within 30 days of receipt of the request for formal consultation and an accompanying initiation package. No further regulatory language is required to specify that we can request this information because initiation of formal consultation is predicated on provision of the required information as per § 402.14(c)(1). Further, as already provided by § 402.14(d) and (f), additional information may be needed or requested by the Services during the formal consultation, once it is initiated.

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

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

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

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

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

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

**Response:** The Services decline to change the language in § 402.14(f). This language

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

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

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

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

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

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

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

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

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

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

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

prudent alternative at § 402.02 includes the requirement that the alternative “can be implemented in a manner consistent with the intended purpose of the action.”

#### **Section 402.14 Service Responsibilities—General**

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

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

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

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

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

**Comment:** Commenters support expanded opportunities for participation by States, applicants, and designated non-Federal representatives in the section 7(a)(2) consultation process, including the review of the underlying data and scientific analyses being considered and

greater input into any potential jeopardy or adverse modification finding, the development of reasonable and prudent alternatives and minimization measures, and all parts of the draft biological opinion.

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

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

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

**Comment:** One commenter requested that when proposed actions have the potential to affect tribal rights or interests, formal consultation section pursuant to § 402.14(1)(3) should

require disclosure of all information to affected tribes, adherence to policies regarding consultation with Native American governments, and an analysis of how the action or reasonable and prudent alternatives comport with the conservation necessity standards embodied in Secretarial Order 3206, NOAA Procedures for Government-to-Government Consultation with Federally Recognized Indian Tribes and Alaska Native Corporations, and the FWS Native American Policy.

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

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

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

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

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

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

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

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

**Response:** Consistent with the Services’ existing consultation approaches, we are adopting revisions to § 402.14(c) to ensure that a Federal agency submits an adequate description of the proposed action, including available information about any measures intended to avoid, minimize, or offset effects of the proposed action. The request for a description of measures to

avoid, minimize, or offset project impacts applies in those cases where these types of measures are included by the Federal agency or applicant as part of the proposed action and is not intended to require these types of measures for all proposed actions. Provided the Federal agency submits the information required by § 402.14(c)(1), the Services will take into consideration the effects of the action as proposed, both beneficial and adverse.

**Section 402.14(g)(4)—Service Responsibilities—clarifying the analytical steps by which the Services integrate and synthesize their analyses to reach jeopardy and adverse modification determinations.**

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

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

**Response:** The Services agree that the proposed language at § 402.14(g)(4) will clarify and support gains in efficiencies in the section 7 consultation process.

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

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

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

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

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

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

to protect listed species and to consider such plans in the formulation of reasonable and prudent alternatives.

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

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

**Clarifications to § 402.14(g)(8) regarding whether and how the Service should consider measures included in a proposed action that are intended to avoid, minimize, or offset adverse effects to listed species or critical habitat.**

We proposed clarifications to § 402.14(g)(8) regarding whether and how the Services should consider measures included in a proposed action that are intended to avoid, minimize, or offset adverse effects to listed species or critical habitat. Federal agencies often include these types of measures as part of the proposed action. However, the Services' reliance on a Federal agency's commitment that the measures will actually occur as proposed has been repeatedly questioned in court. The resulting judicial decisions have created confusion regarding what level of certainty is required to demonstrate that a measure will in fact be implemented before the Services can consider it in a biological opinion. In particular, the Ninth Circuit has held that even an expressed sincere commitment by a Federal agency or applicant to implement future

improvements to benefit a species must be rejected absent “specific and binding plans” with “a clear, definite commitment of resources for future improvements.” *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 935–36 (9th Cir. 2008). To address this issue, we are proceeding with the revisions to § 402.14(g)(8), including the changes described in Discussion of Changes from Proposed Rule, above. We summarize the comments and provide our responses on the changes to § 402.14(g)(8) below.

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

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

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

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

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

requiring the Services to consider the effects of the proposed action in its entirety, including aspects of the proposed action with adverse or beneficial effects.

Some courts have inappropriately conflated the Services' role with that of the action agency by concluding the Services cannot lawfully consider measures proposed to avoid, minimize, or offset adverse effects unless we second guess the intent and veracity of an action agency's commitments. The resulting case law has led to confusion. For instance, the Ninth Circuit has held that even an expressed sincere commitment by a Federal agency or applicant to implement future improvements to benefit a species must be rejected absent "specific and binding plans" with "a clear, definite commitment of resources for future improvements." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 935-36 (9th Cir. 2008). More recently the Ninth Circuit held that its "precedents require an agency to identify and guarantee" measures to avoid, minimize, or offset adverse effects only to the extent the measures "target certain or existing negative effects" of the proposed action. *Def. of Wildlife v. Zinke*, 856 F.3d 1248, 1258 (9th Cir. 2017). In some cases, courts have also stated that "mitigation measures supporting a biological opinion's no-jeopardy conclusion must be 'reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards.'" *Ctr. for Biological Diversity v. Rumsfeld*, 198 F.Supp.2d 1139, 1152 (D.Ariz. 2002) (citing *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987))." *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 99 F. Supp. 3d 1033, 1055 (N.D. Cal. 2015). However, the Ninth Circuit has also indicated that the question of whether measures to avoid, minimize, or offset adverse effects are sufficiently

enforceable turns on whether or not the measures are included in the proposed action, concluding that “[i]f [the measures] are part of the project design, the [Act]’s sequential, interlocking procedural provisions ensure recourse if the parties do not honor or enforce the agreement, and so ensure the protection of listed species.” *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1115 (9th Cir. 2012). We disagree with the commenter that the regulatory revisions to § 402.14(g)(8) will add to the confusion of the current case law on the subject. Instead, we believe it will resolve confusion by explaining our interpretation of the statute.

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

revisions to § 402.14(g)(8). The Services do not intend to hold these actions to either a higher or lower standard than any other type of action or measure proposed by a Federal agency. Any type of action proposed by a Federal agency receives a presumption that it will occur, but it must also be described in sufficient detail that the Services can both understand the action and evaluate its adverse effects and beneficial effects.

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

**Comment:** Some commenters stated that there are examples of projects where resource impacts occurred, but that years later, measures to offset those adverse effects had not been implemented. According to some commenters, history provides numerous examples of action agencies (or the Services themselves in the development of reasonable and prudent alternatives):

(1) promising more than they could deliver in order to alleviate the harmful effects of a proposed action; and/or (2) making optimistic assumptions about the efficacy of the measures that fall far short of what's needed to avoid jeopardy. Therefore, some commenters believed the Services should require that all measures proposed to avoid, minimize, or offset adverse effects demonstrate clear and binding plans with financial assurances.

**Response:** As described above, the regulatory revisions in § 402.14(g)(8) are consistent with the statutory text and retain the Federal action agencies' substantive duty to insure that their actions are not likely to jeopardize the continued existence of listed species or result in destruction or adverse modification of designated critical habitat. An action agency that fails to implement the measures proposed to avoid, minimize, or offset adverse effects risks violating the substantive provisions of the Act, engaging in conduct prohibited by section 9, and increasing its vulnerability to enforcement action by the Services or citizen suits under section 11(g) of the Act. This is particularly true if reinitiation of consultation was required based on the failure to implement a proposed measure and the Federal agency fails to reinitiate consultation. For instance, our regulations at § 402.16 require reinitiation of consultation if the amount or extent of take specified in the incidental take statement is exceeded, if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered, and if the action is subsequently modified in a manner that causes an effect to listed species or critical habitat that was not considered in the biological opinion. Failure to implement a measure proposed to avoid, minimize, or offset adverse effects could implicate those reinitiation triggers. Accordingly, we do not believe the revisions will encourage

promises of implementing measures to avoid, minimize, or offset adverse effects that are unrealistic or unachievable.

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

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

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

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

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

the success of proposed measures, but we decline to require the use of specific agency guidance on measures to avoid, minimize, or offset adverse effects, which can vary over time.

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

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

As described above, an action agency that fails to implement the measures proposed to avoid, minimize, or offset adverse effects risks violating the substantive provisions of the Act,

engaging in conduct prohibited by section 9, and increasing its vulnerability to enforcement action by the Services or citizen suits under section 11(g) of the Act. This is particularly true if reinitiation of consultation was required based on the failure to implement a proposed measure and the Federal agency fails to reinitiate consultation.

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

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

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

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

proposed measure as part of the action under consultation, before the Services can lawfully evaluate the effects of the action.

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

**Comment:** One commenter remained concerned that, even with the proposed clarification, the Services may continue to exclude from consideration conservation measures that are funded by the applicant but undertaken by another entity or conducted by a related party. The commenter therefore requested that the proposed regulatory text in 50 CFR 402.14(g)(8) be further modified to state that "...the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions as proposed, or taken, funded or otherwise sponsored by the Federal agency, applicant, or related party, including any actions taken prior to the initiation of consultation. Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action regardless of their geographic proximity

to the proposed action, and do not require any additional demonstration of specific binding plans or a clear, definite commitment of resources."

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

We also decline to categorically include revisions that would expand the scope of measures that would be "considered like other portions of the action" to include those actions "regardless of their geographic proximity to the proposed action." If a proposed measure is not within the geographic proximity of the other components of the proposed action, but would nonetheless have effects to listed species or critical habitat, then the action area would include the area affected by the proposed offsite measures and the effects to listed species and critical habitat would be considered during consultation to the extent they are relevant. No regulatory change is needed for that to occur.

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

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

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

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

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

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

**Response:** We disagree that allowing for ambiguity and creating alternative contingency requirements is a preferable way for the Services to evaluate the effects of a proposed action. We consult on the action as proposed by the Federal agency and will only consider the effects of

measures intended to avoid, minimize, or offset adverse effects if presented with sufficient information to meaningfully evaluate the effects of the action.

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

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

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

Services' analysis, but harmful effects and activities must meet a more rigorous test before they will be considered.

**Response:** We disagree that the changes would render the Services unable to raise concerns with Federal agencies with respect to measures proposed to avoid, minimize, or offset adverse effects. As described above, the Services retain the discretion to advise Federal agencies about all aspects of their proposed action to assist them in making an informed determination regarding compliance with section 7 and in achieving the greatest conservation benefit. However, the Federal agency is ultimately responsible for describing its proposed action and providing the information required by § 402.14(c)(1). If the Federal agency provides information in sufficient detail for the Services to meaningfully evaluate the effects of measures proposed to avoid, minimize, or offset adverse effects, the Services will consider the effects of the proposed measures during a consultation. Once consultation is initiated, the Services apply the same definition of “effects of the action” adopted in this final rule both to the portions of the action with adverse effects and those portions of the proposed action intended to avoid, minimize, or offset adverse effects. Accordingly, the Services will evaluate all consequences of all portions of the proposed action that would not occur “but for” the proposed action and are reasonably certain to occur as effects of the action. Therefore, the changes to § 402.14(g)(8) do not create an irrational double standard. To the contrary, the changes eliminate a double standard such that all aspects of the proposed action are treated the same by assuming the action will be implemented as proposed in its entirety. In other words, the proposed avoidance, minimization or offsetting measures will not be forced to meet a heightened threshold but will

instead be held to the same standard as the portions of the proposed action likely to result in adverse effects. .

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

This rule does not change any statutory requirements found in section 7(a)(2) of the Act, and the Services will continue to utilize the best scientific and commercial data available when evaluating the efficacy of measures proposed to avoid, minimize, or offset adverse effects.

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

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

#### **Section 402.14(h)—Biological Opinions**

We proposed to add new paragraphs (h)(3) and (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 proposed to allow the Services to adopt all or part of their own analyses and findings that are required to issue a permit under section 10(a) of the Act in its biological

opinion. We are proceeding with those proposed changes, as well as the changes described under **Discussion of Changes from Proposed Rule** above. We summarize the comments and provide our responses on this topic below related to revisions to § 402.14(h) below.

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

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

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

**Response:** The intent of the proposed rule is to provide flexibility to adopt in a biological opinion, after appropriate review, relevant parts of internal analyses or documents prepared to

support issuance of a section 10 permit. This could include the project description, site-specific species information and environmental baseline data, proposed conservation measures, analyses of effects, etc., all of which may be appropriate for use in Service determinations pursuant to both sections 7 and 10 of the Act.

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

**Response:** The Services' proposal is not to indiscriminately adopt analyses or documents from non-Service sources, but to adopt these analyses only after our independent, science-based evaluation of existing analyses or documents that meet our regulatory and scientific standards. The intent is to avoid needless duplication of analyses and documents that meet our standards, including the use of the best scientific and commercial data available. In some situations, the analyses or documents may need to be revised to merit inclusion in our biological opinions, but even those situations will make the consultation process more efficient and streamlined. For example, it is a common practice for the Services to adopt portions of biological assessments and initiation packages in their biological opinions. The codification of this practice creates a more collaborative process and incentive for Federal agencies and section 10 applicants to produce high-quality analyses and documents that are suitable for inclusion in biological opinions, which streamlines the timeframe for completion of the consultation process.

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

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

#### **Section 402.14(l)—Expedited Consultation**

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

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

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

**Comment:** Several commenters were concerned that consultations undergoing the expedited process would have reduced oversight and not allow for a thorough analysis of the potential effects of a Federal agency's proposed action and therefore may not meet the standards required under section 7(a)(2) of the Act. Another commenter indicated that the proposed expedited consultation process could provide some benefits. However, the commenter raised

concerns that the ability to evaluate a project on a specific basis would be missed, and this provision would open the door for blanket permissions to proceed on particular projects that could be detrimental to species, especially if there are new or specific impacts to species in time and place despite the project being similar to others.

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

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

**Response:** A key element for successful implementation of this process is mutual agreement between the Service and Federal agency (and applicant when applicable). The mutual

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

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

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

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

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

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

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

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

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

The Services proposed to revise the title of section 402.16 to remove the term “formal” in order to recognize long standing practice between the Services and Federal agencies that reinitiation of section 7(a)(2) consultation also applies to the written concurrences that complete the section 7(a)(2) process under § 402.13 *Informal Consultation*. We are proceeding with that revision to § 402.16 and also further revising the text at § 402.16(c) to clarify the connection of

the reinitiation criteria to the written concurrence process. This latter revision is described above in this final rule. We received several comments on this section, and those comments and our responses to the public comment received on the proposal to codify that reinitiation of consultation applies to the informal consultation written concurrence process are here provided.

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

In addition to seeking comment on the proposed revision to § 402.16, we sought comments on whether to exempt other types of programmatic land or water management plans in addition to those prepared pursuant to FLPMA and NFMA from the requirement to reinitiate consultation when a new species is listed or critical habitat designated. We also requested

comment on the proposed revision in light of the recently enacted Wildfire Suppression Funding and Forest Management Activities Act, H.R. 1625, Division O, which was included in the Omnibus Appropriations bill for fiscal year 2018.

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

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

Informal consultation is an optional process in which a Federal agency may determine, with the Services' concurrence, that formal consultation is not necessary because the action is not likely to adversely affect listed species and critical habitat. In these cases, the relevant

reinitiation triggers still apply to the action as long as the agency retains discretionary involvement or control over the action. For example, if the action is changed or new information reveals effects to listed species or critical habitat may occur in a manner not previously considered, then reinitiation of consultation is warranted. This could occur where a permitted activity proceeds in a manner different than originally proposed, or if new scientific or commercial information indicates that the permitted activities or effects flowing from those activities have different or greater impacts on the critical habitat or species than originally evaluated during the informal consultation process.

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

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

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

**Response:** Only approved USFS programmatic land management plans prepared pursuant to NFMA are temporarily relieved from the reinitiation of consultation when a new species is listed or critical habitat designated. Other types of plans are still subject to reinitiation

if one of the triggers is met under § 402.16(a) and the agency retains discretionary authorization or control over the plan.

**Comment:** Many commenters believed that our proposed regulation is in contravention to controlling case law, including *Cottonwood, Forest Guardians v. Forsgren*, 478 F.3d 1149 (10th Cir. 2007), and *Pacific Rivers Council v. Thomas*, 30 F. 3d 1050 (9th Cir. 1994).

Likewise, a few comments criticized the proposed regulation because the duty to reinstate derives from the action agency's substantive and procedural duties under section 7, which would be undermined.

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

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

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

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

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

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

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

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

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

**Response:** We agree with this approach and note this type of focus is best achieved through a section 7(a)(1) conservation program in consultation with the Services when a new species is listed or critical habitat designated. As we noted in the proposed rule's preamble, this

proactive, conservation planning process will enable an action agency to better synchronize its actions and programs with the conservation and recovery needs of listed and proposed species. Such planning can help Federal agencies develop specific, pre-approved design criteria to ensure their actions are consistent with the conservation and recovery needs of the species. Additionally, these section 7(a)(1) programs will facilitate efficient development of the next programmatic section 7(a)(2) consultations when the land management plan is renewed.

**Comment:** Many commenters expressed concern with the relief from reinitiation provision applying to a forest or land management plan that is out of date. A few suggested that we revise the regulation to require only up-to-date land management plans be subject to the exemption provided in § 402.16(b) so as to ensure the science and public input are not stale.

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

USFS is required to revise their land management plans at least every 15 years (*see* 36 CFR 219.7). Congress, in the Wildfire Suppression Funding and Forest Management Activities

Act, limited the relief from reinitiation with respect to plans prepared pursuant to NFMA to only those plans that are up to date, and that Congressional limitation is now also reflected in our revised final regulation.

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

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

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

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

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

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

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

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

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

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

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

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

#### **Miscellaneous**

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

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

**Response:** The Services appreciate the wide variety of thoughtful comments and suggestions we received on these concepts. While many commenters supported the potential revisions, many did not. Though not an exhaustive list, the majority of the comments covered topics such as a belief that the concepts would streamline the consultation process and allow more time for consultation on projects with greater harm and risk to listed species, potential legal risks to action agencies if we were to revise the regulations to address these circumstances, unclear legal authority to adopt such regulations, concern regarding reduced opportunity for cooperation between the Services and Federal agencies, lack of adequate expertise in Federal agencies to correctly make the needed determinations, delays in consultation completion, complication of the consultation process, and failure to examine larger environmental

phenomena. While such input may inform the future development of additional regulatory amendments, policies, or guidance, we have determined at this time, in the interests of efficiency, to defer action on this issue, which we may address at a later time. Because the Services are required only to respond to those “comments which, if true, ... would require a change in [the] proposed rule,” *Am. Mining Cong. v. United States EPA*, 907 F.2d 1179, 1188 (D.C. Cir. 1990) (quoting *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987)), those that were not specifically addressed in our proposed regulatory amendments are not “significant” in context of the proposed rule. *See also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n. 58 (D.C. Cir. 1977), *cert. denied*, 485 U.S. 959, 108 S.Ct. 1220, 99 L.Ed.2d 421 (1988). Therefore, we will not respond further to these comments at this time.

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

**Response:** The Services appreciate the many insightful comments and suggestions we received on section 7 and the consultation process. While such input may inform the future development of additional regulatory amendments, policies, or guidance, we have determined at this time, in the interests of efficiency, to go forward with the scope of the originally proposed regulatory revisions and defer action on other issues until a later time. Because the Services are required only to respond to those “comments which, if true, ... would require a change in [the] proposed rule,” *Am. Mining Cong. v. United States EPA*, 907 F.2d 1179, 1188 (D.C. Cir. 1990)

(quoting *ACLU v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir. 1987)), those that were not specifically addressed in our proposed regulatory amendments are not “significant” in context of the proposed rule. *See also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n. 58 (D.C. Cir. 1977), *cert. denied*, 485 U.S. 959, 108 S.Ct. 1220, 99 L.Ed.2d 421 (1988). Therefore, we will not respond to these “miscellaneous” comments at this time.

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

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

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

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

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

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

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

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

Tribes and Alaska Native Corporations, and the FWS Native American Policy, as part of the formal consultation process.

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

### **National Environmental Policy Act**

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

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

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

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

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

**Merit, authority, and means for the Services to conduct a single consultation, resulting in a single biological opinion, for Federal agency actions affecting species that are under the jurisdiction of both FWS and NMFS**

In the proposed rule, we sought comment on “the merit, authority, and means for the Services to conduct a single consultation, resulting in a single biological opinion, for Federal agency actions affecting species that are under the jurisdiction of both FWS and NMFS.” We received a variety of comments in response to our request. Some of them interpreted the Services’ request to mean that we were requesting comment on our ability to conduct a joint consultation, resulting in a single biological opinion, when both Services have species that

require consultation (e.g., both Services participate in the consultation and then prepare a single biological opinion in which each agency addresses the species for which it has responsibility). One commenter interpreted our request to be that one Service could conduct a consultation and prepare a biological opinion for a species for which the other agency has responsibility (e.g., FWS could consult and prepare a biological opinion for a listed chinook salmon, which is listed under NMFS' authority).

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

**Response:** The Services acknowledge that there can be challenges with completing joint biological opinions in cases where the Services have joint jurisdiction (e.g., sea turtles), as well as in cases where the species addressed by the two agencies are different but both Services are engaged in consultation on the same project. Joint consultations require additional coordination,

which often adds to complexity in scheduling meetings, preparing the biological opinion, etc. However, in some circumstances (e.g., where the Services' respective reasonable and prudent measures and terms and conditions have the potential to contradict one another), the additional coordination can be beneficial. Joint biological opinions are often the most efficient way to implement the Services' authorities and provide clarity to the action agencies and applicants. For these reasons, the decision to conduct a joint biological opinion is best made on a case-by-case basis.

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

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

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

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

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

### **Role of applicants and designated non-Federal representatives in section 7(a)(2)**

#### **consultations**

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

**Response:** The Services appreciate these comments and agree that applicants play a significant role in the consultation process. The Act, the regulations, and the 1998 Consultation Handbook all provide for a role of an applicant in several stages of the consultation process. With regard to informal consultation, an applicant can act as the non-Federal representative and, under the guidance of the action agency, write any biological evaluations or assessments. With regard to formal consultation, as delineated in the regulations and 1998 Consultation Handbook, an applicant: (1) is provided an opportunity to submit information through the action agency; (2)

must be informed by the action agency of the estimated length of time for an extension for preparing a biological assessment beyond the 180-day timeframe and the reason for the extension; (3) must be provided an explanation if the formal consultation timeframe is extended and must consent to any extension of more than 60 days; (4) may request to review a final draft biological opinion through the Federal agency and provide comments through the Federal agency; (5) have discussions with the Services for the basis of their biological determinations and provide input to the Services for any reasonable and prudent alternatives if necessary; and (6) be provided a copy of the final biological opinion.

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

**Comment:** Some commenters requested full participation by designated non-Federal representatives in the consultation process.

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

consistent with the regulations. As such, further regulation regarding non-Federal representatives in the consultation process is unnecessary.

## **Required Determinations**

### *Regulatory Planning and Review—Executive Orders 12866 and 13563*

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

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

### *Executive Order 13771*

This rule is an Executive Order 13771 deregulatory action.

### *Regulatory Flexibility Act*

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

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

This final rule will determine whether a Federal agency has insured, in consultation with the Services, that any action it would authorize, fund, or carry out is not likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. This rule is

substantially unlikely to affect our determinations as to whether or not proposed actions are likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. The rule serves to provide clarity to the standards with which we will evaluate agency actions pursuant to section 7 of the Act.

*Unfunded Mandates Reform Act*

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

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

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

*Takings (E.O. 12630)*

In accordance with Executive Order 12630, this final rule will not have significant takings implications. This rule will not pertain to “taking” of private property interests, nor will it directly affect private property. A takings implication assessment is not required because this

final rule (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. This final rule will substantially advance a legitimate government interest (conservation and recovery of endangered species and threatened species) and will not present a barrier to all reasonable and expected beneficial use of private property.

#### *Federalism*

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

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

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

#### *Government-to-Government Relationship with Tribes*

In accordance with Executive Order 13175 “Consultation and Coordination with Indian Tribal Governments,” the Department of the Interior’s manual at 512 DM 2, and the Department of Commerce (DOC) Tribal Consultation and Coordination Policy (May 21, 2013), DOC Departmental Administrative Order (DAO) 218-8, and NOAA Administrative Order (NAO) 218-8 (April 2012), we have considered possible effects of this final rule on federally recognized

Indian Tribes. Two informational webinars were held on July 31 and August 7, 2018, to provide additional information to interested Tribes regarding the proposed regulations. After the opening of the public comment period, we received multiple requests for coordination or government-to-government consultation from multiple tribes: Cowlitz Indian Tribe; Swinomish Indian Tribal Community; The Confederated Tribes of the Grand Ronde Community of Oregon; Confederated Tribes of Warm Springs, Oregon; Quinault Indian Nation; Makah Tribe; Confederated Tribes of the Umatilla Indian Reservation; and the Suquamish Tribe. We subsequently hosted a conference call on November 15, 2018, to listen to Tribal concerns and answer questions about the proposed regulations. On March 6, 2019, FWS representatives attended the Natural Resources Committee Meeting of the United and South and Eastern Tribes' Impact Week conference in Arlington (Crystal City), VA. At this meeting, we presented information, answered questions, and held discussion regarding the regulatory changes.

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

### *Paperwork Reduction Act*

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

### *National Environmental Policy Act*

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

This final rule does not lower or raise the bar on section 7 consultations, and it does not alter what is required or analyzed during a consultation. Instead, it improves clarity and consistency, streamlines consultations, and codifies existing practice. For example, the change in the definition of “effects of the action” simplifies the definition while still retaining the scope

of the assessment required to ensure a complete analysis of the effects of the proposed Federal action. The two-part test articulates the practice by which the Services identify effects of the proposed action. Likewise, the causation standard to analyze effects provides additional explanation on how we analyze activities that are reasonably certain to occur.

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

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

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

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

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The final revised regulations are not expected to affect energy

supplies, distribution, or use. Therefore, this action is a not a significant energy action, and no Statement of Energy Effects is required.

### **References Cited**

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

### **Authors**

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

### **Authority**

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

### **List of Subjects in 50 CFR Part 402**

Endangered and threatened species.

### **Regulation Promulgation**

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

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

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

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

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

**§ 402.02 Definitions.**

\* \* \* \* \*

*Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.

*Director* refers to the Assistant Administrator for Fisheries for the National Marine Fisheries Service, or his or her authorized representative; or the Director of the U.S. Fish and Wildlife Service, or his or her authorized representative.

\* \* \* \* \*

*Effects of the action* are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur

later in time and may include consequences occurring outside the immediate area involved in the action. (See § 402.17).

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

\* \* \* \* \*

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

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

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

\* \* \* \* \*

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

**§ 402.13 Informal consultation.**

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

\* \* \* \* \*

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

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

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

4. Amend § 402.14 by:

- a. Revising 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 the species' habitat, including any critical habitat.

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

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

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

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

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

(4) Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area, a programmatic consultation, or a segment of a comprehensive plan. 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 binding plans.

(h) *Biological opinions.*

(1) The biological opinion shall include:

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

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

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

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

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

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

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

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

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

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

(4) A Federal agency and the Service may agree to follow an optional collaborative process that would further the ability of the Service to adopt the information and analysis provided by the Federal agency during consultation in the development of the Service’s biological opinion to improve efficiency in the consultation process and reduce duplicative efforts. The Federal agency and the Service shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat, and other relevant factors to determine whether an action or a class of actions is appropriate for this process. The Federal agency and the Service may develop coordination procedures that would facilitate adoption of

the initiation package with any necessary supplementary analyses and incidental take statement to be added by the Service, if appropriate, as the Service's biological opinion in fulfillment of section 7(b) of the Act.

\* \* \* \* \*

(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.

\* \* \* \* \*

5. 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);
- d. Revising the newly designated paragraphs (a) and (a)(3); and
- e. Adding a new paragraph (b).

The revisions and addition read as follows:

**§ 402.16 Reinitiation of consultation.**

(a) Reinitiation of consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law and:

\* \* \* \* \*

(3) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or

\* \* \* \* \*

(b) An agency shall not be required to reinitiate consultation after the approval of a land management plan prepared pursuant to 43 U.S.C. 1712 or 16 U.S.C. 1604 upon listing of a new species or designation of new critical habitat if the land management plan has been adopted by

the agency as of the date of listing or designation, provided that any authorized actions that may affect the newly listed species or designated critical habitat will be addressed through a separate action-specific consultation. This exception to reinitiation of consultation shall not apply to those land management plans prepared pursuant to 16 U.S.C. 1604 if:

(1) Fifteen years have passed since the date the agency adopted the land management plan prepared pursuant to 16 U.S.C. 1604; and

(2) Five years have passed since the enactment of Public Law No. 115-141 [March 23, 2018] or the date of the listing of a species or the designation of critical habitat, whichever is later.

6. Add § 402.17 to read as follows:

**§ 402.17 Other provisions.**

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

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

(2) Existing plans for the activity; and

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

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

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

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

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

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

**§ 402.40 [Amended]**

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

Dated: \_\_\_\_\_

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David L. Bernhardt,

*Secretary*

*Department of the Interior.*

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

Dated: \_\_\_\_\_

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Wilbur Ross,

*Secretary*

*Department of Commerce.*

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