(4) Notwithstanding paragraph (c)(1) of this section, any qualified employee or agent of a State conservation agency that is a party to a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by their agency for such purposes, may, when acting in the course of official duties, remove and reduce to possession from areas under Federal jurisdiction those endangered plants that are covered by an approved cooperative agreement for conservation programs in accordance with the cooperative agreement, provided that such removal is not reasonably anticipated to result in:

(i) The death or permanent damage of the specimens;

(ii) The removal of the specimen from the State where the removal occurred; or

(iii) The introduction of the specimen so removed, or of any propagules derived from such a specimen, into an area beyond the historical range of the species.

* * * * *

Subpart G—Threatened Plants

■ 16. Revise § 17.71 to read as follows:

§ 17.71 Prohibitions.

(a) Except as provided in a permit issued pursuant to § 17.72, the provisions of paragraph (b) of this section and all of the provisions of § 17.61, except § 17.61(c)(2) through (4), apply to threatened species of plants, unless the Secretary has promulgated species-specific provisions (see paragraph (c) of this section), with the following exception: Seeds of cultivated specimens of species treated as threatened are exempt from all the provisions of § 17.61, provided that a statement that the seeds are of ''cultivated origin'' accompanies the seeds or their container during the course of any activity otherwise subject to the regulations in this subpart.

(b)(1) Notwithstanding § 17.61(c)(1) and unless otherwise specified, any employee or agent of the Service, any other Federal land management agency, federally recognized Tribe, or a State conservation agency, who is designated by their agency or Tribe for such purposes, may, when acting in the course of official duties, remove and reduce to possession threatened plants from areas under Federal jurisdiction without a permit if such action is necessary to:

(i) Care for a damaged or diseased specimen;

(ii) Dispose of a dead specimen; or

(iii) Salvage a dead specimen that may be useful for scientific study.

(2) Any removal and reduction to possession pursuant to paragraph (b)(1) of this section must be reported in writing to the Office of Law Enforcement, via contact methods listed at *www.fws.gov,* within 5 calendar days. The specimen may only be retained, disposed of, or salvaged under directions from the Office of Law Enforcement.

(3) Notwithstanding § 17.61(c)(1) and unless otherwise specified, any employee or agent of the Service or of a State conservation agency that is operating a conservation program pursuant to the terms of an approved cooperative agreement with the Service that covers the threatened species of plants in accordance with section 6(c) of the Act, who is designated by their agency for such purposes, may, when acting in the course of official duties, remove and reduce to possession from areas under Federal jurisdiction those species.

(c) For threatened species of plants that have a species-specific rule in §§ 17.73 through 17.78, the provisions of paragraph (b) of this section and § 17.72 apply unless otherwise specified, and the species-specific rule will contain all the prohibitions and any additional exceptions that apply to that species.

■ 17. Amend § 17.72 by revising the undesignated introductory paragraph to read as follows:

§ 17.72 Permits—general.

Upon receipt of a complete application, the Director may issue a permit authorizing any activity otherwise prohibited with regard to threatened plants. The permit shall be governed by the provisions of this section unless a species-specific rule applicable to the plant and set forth in §§ 17.73 through 17.78 of this part provides otherwise. A permit issued under this section must be for one of the following: scientific purposes, the enhancement of the propagation or survival of threatened species, economic hardship, botanical or horticultural exhibition, educational purposes, or other activities consistent with the purposes and policy of the Act. Such a permit may authorize a single transaction, a series of transactions, or a number of activities over a specified period of time.

* * * * *

■ 18. Amend § 17.73 by revising the section heading to read as follows:

§ 17.73 Species-specific rules—flowering plants.

■ 19. Amend § 17.74 by revising the section heading to read as follows:

§ 17.74 Species-specific rules—conifers and cycads.

Shannon Estenoz,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2023–13055 Filed 6–21–23; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 402

[Docket No. FWS–HQ–ES–2021–0104; FXES1114090FEDR–234–FF09E300000; Docket No. NMFS–230607–0143]

RIN 1018–BF96; 0648–BK48

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

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

ACTION: Proposed rule; request for comment.

SUMMARY: We, FWS and NMFS (collectively referred to as the ''Services'' or ''we''), propose to amend portions of our regulations that implement section 7 of the Endangered Species Act of 1973, as amended. The Services are proposing these changes to further clarify and improve the interagency consultation processes, while continuing to provide for the conservation of listed species.

DATES: We will accept comments from all interested parties until August 21, 2023. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** below), the deadline for submitting an electronic comment is 11:59 p.m. eastern time on that date.

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

Electronically: Go to the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Search box, enter FWS–HQ–ES–2021–0104, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on ''Comment.''

By hard copy: Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–HQ–ES–2021–0104; U.S. Fish and Wildlife Service, MS: JAO/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803 or National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910.

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

FOR FURTHER INFORMATION CONTACT: Craig Aubrey, Ecological Services, U.S. Fish and Wildlife Service, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703/358–2442; or Tanya Dobrzynski, Chief, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301/427–8400. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

The purposes of the Endangered Species Act of 1973, as amended (''ESA'' or ''Act''; 16 U.S.C. 1531 *et seq.*) are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions. Moreover, the Act states that it is the policy of Congress that the Federal Government will seek to conserve threatened and endangered species and use its authorities in furtherance of the purposes of the Act. The Secretaries of the Interior and Commerce share responsibilities for implementing most of the provisions of the Act. Generally, marine species and some anadromous (sea-run) species are under the jurisdiction of the Secretary of Commerce, and all other species are under the jurisdiction of the Secretary of the Interior. Authority to administer the Act has been delegated by the Secretary of the Interior to the Director of the U.S. Fish and Wildlife Service (FWS) and by the Secretary of Commerce to the Assistant Administrator for the National Marine Fisheries Service (NMFS). References in this document to ''the Services'' mean FWS and NMFS.

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, 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. In 2019, the Services issued a final rule that revised several aspects of the regulations to clarify and improve the consultation process (84 FR 44976, August 27, 2019; hereafter referred to as ''the 2019 rule''). Those revised regulations became effective October 28, 2019 (84 FR 50333).

Executive Order 13990 (''Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis''), issued January 20, 2021, directed all departments and agencies immediately to review agency actions taken between January 20, 2017, and January 20, 2021, and, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding agency actions that conflict with important national objectives, including promoting and protecting our public health and the environment, and to immediately commence work to confront the climate crisis. A ''Fact Sheet'' that accompanied E.O. 13990 identified a non-exhaustive list of particular regulations requiring such a review and included the 2019 rule (see *www.whitehouse.gov/briefing-room/statementsreleases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/*). In response to E.O. 13990 and in light of recent litigation over the 2019 rule, the Services have reviewed the 2019 rule, evaluated the specific regulatory revisions promulgated through that process, and now propose to make revisions to the regulations at 50 CFR part 402, as discussed in detail below.

The 2019 rule, along with other revisions to the ESA regulations finalized in 2019, were subject to litigation in the United States District Court for the Northern District of California. On July 5, 2022, the court issued a decision vacating the 2019 rule, while remanding the rule to the Services without reaching the merits of the case. On September 21, 2022, the United States Court of Appeals for the Ninth Circuit temporarily stayed the effect of the July 5th decision pending the District Court's resolution of motions seeking to alter or amend that decision. On October 14, 2022, the Services notified the District Court that we anticipated proceeding with a rulemaking process to revise the 2019 rule. Subsequently, on November 14 and 16, 2022, the District Court issued orders remanding the 2019 regulations to the Services without vacating them, as the Services had asked the Court to do. Accordingly, the Services have developed the following proposal to amend some aspects of the 2019 rule.

Our review of the 2019 rule indicated that, while most of the changes finalized in that rule met the intent of clarifying and improving the consultation process, certain revisions would be beneficial to further improve and clarify interagency consultation, while continuing to provide for the conservation of listed species.

This proposed rule is one of three proposed rules publishing in today's **Federal Register** that propose changes to the regulations that implement the ESA. Two of these proposed rules, including this one, are joint between the Services, and one proposed rule is specific to the FWS.

In proposing the specific changes to the regulations and setting out the accompanying explanatory discussion in this preamble, the Services are proposing standards that, if finalized, would apply prospectively. Thus, nothing would require that any previous consultations under section 7(a)(2) of the Act be reevaluated on the basis of these proposed revisions, in the event they are finalized.

Proposed Changes to 50 CFR Part 402 Resulting From Our Review of the 2019 Rule

Section 402.02—Definitions

Definition of ''Effects of the Action''

In the 2019 rule, we revised the definition of ''effects of the action'' at 50 CFR 402.02. The 2019 definition revised the prior definition that had been in place since 1986 in six main respects.

First, we collapsed the various concepts of direct and indirect effects, and the effects of interrelated and interdependent actions, into a first sentence that indicates effects of the action are all consequences to the listed species and critical habitat caused by the proposed action. The first sentence of the revised definition stated that these consequences include ''the effects of other activities that are caused by the proposed action.'' It included a distinction between the word ''action,'' which referred to the action proposed to be authorized, funded, or carried out, in

whole or in part, by the Federal agency and brought in for consultation with the Services, and ''activity'' or ''activities,'' which referred to those activities that are caused by the proposed action but are not part of the proposed action. Under the pre-2019 definition, these activities would have been considered under either ''indirect effects'' or ''interrelated'' or ''interdependent'' activities. The Services' intent with the first sentence of the 2019 definition was for consultations to focus on identifying the full range of the effects rather than on categorizing them (84 FR 44976–44977, August 27, 2019; 83 FR 35178 at 35183, July 25, 2018).

Second, we adopted an explicit two-part test to determine when a consequence is caused by the proposed action. A consequence (an effect or an activity and its effects) is caused by the proposed action if it would not occur but for the proposed action, and it is reasonably certain to occur. Both of these concepts (''but-for'' causation and ''reasonably certain to occur'') have long been part of the Services' query into identifying the effects of the action. By making them explicit and applicable to all aspects of the causation standard, the Services' goal was to describe a transparent standard that simplified the definition of ''effects of the action,'' while still maintaining the scope of the assessment required to ensure a complete analysis of the effects of proposed actions.

Third, the Services removed the definition of ''environmental baseline'' from the definition of ''effects of the action'' and established it as its own stand-alone definition. Fourth, the Services 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). Fifth, consistent with the prior definition of ''indirect effects,'' the Services included a third sentence in the ''effects of the action'' definition to serve as a reminder that the effects of the action may occur throughout the action area and on an ongoing, or even delayed, timeframe after completion of the action. And, finally, the Services added a parenthetical reference to § 402.17, a new section that further defined the concept of ''reasonably certain to occur.''

While the 2019 changes to the definition of ''effects of the action'' have largely provided the clarity to the consultation process that the Services intended by articulating in more detail the standards that had been used for many decades in implementing section 7 of the Act, some revisions to the definition of ''effects of the action'' are warranted to align with other changes we are proposing. As described in more detail below, we propose to remove § 402.17 from the regulations, and, therefore, we propose a conforming change to remove the parenthetical reference to that section in the ''effects of the action'' definition. Due to our intent to maintain the scope of the analysis of effects of the action, we propose to move the phrase ''but that are not part of the action'' from § 402.17 to the end of the first sentence of the definition of ''effects of the action'' in § 402.02. The modified definition is set forth below in the proposed regulatory text section of this document.

As discussed above, the reference to ''activities'' in the first sentence of the 2019 ''effects of the action'' definition is to those activities that are caused by, but that are not part of, the proposed action. Because this concept is important, we are proposing to retain the concept by adding the text to the definition of the ''effects of the action.'' As the Services explained in 2019, the proposed action receives a presumption that it will occur (*e.g.,* 84 FR 44976 at 44979, August 27, 2019). For this reason, it would not be appropriate to apply the two-part causation test to the proposed action itself, especially the concept of reasonably certain to occur. However, activities that may be caused by the proposed action, but that are not part of the proposed action, are subject to the two-part causation test.

Definition of ''Environmental Baseline''

We are proposing minor, clarifying edits to the definition of ''environmental baseline.'' In 2019, we removed the definition of environmental baseline from the definition of ''effects of the action'' and established it as its own stand-alone definition at 50 CFR 402.02. At that time, we also added a third sentence to the definition that stated that 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. The purpose of the third sentence was to codify the Services' past practice and explain aspects of the environmental baseline and effects of the action definitions that had caused confusion in the past, particularly with regard to impacts from a Federal action agency's ongoing activities or existing facilities that are not within that Federal agency's discretion to modify. We are proposing three changes to this sentence.

The first change we are proposing is to replace the term ''consequences'' with the word ''impacts'' at the start of the third sentence of the definition of ''environmental baseline.'' While we consider ''consequences,'' ''impacts,'' and ''effects'' to be equivalent terms, we propose this modification to be consistent with the language in the previous sentence. Because ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify belong in the baseline and not the proposed action, we propose to consistently use the term ''impacts'' throughout the definition for items that belong in the environmental baseline while retaining the use of the term ''consequences'' in the first sentence for effects that are caused by the proposed action and not included in the environmental baseline.

The second and third changes we are proposing are to revise the third sentence of the definition of ''environmental baseline'' to remove the term ''ongoing'' and add the term ''Federal'' in two locations. These changes are intended to emphasize the central question of the Federal agency's discretion over their own activities and facilities in determining what is properly categorized as falling within the environmental baseline. Further, the use of the term ''ongoing'' has resulted in misinterpretation and distracted from the intended focus on Federal agency discretion.

The Services' 2019 revised definition did not articulate as clearly as it could have that the action agency's discretion to modify the activity or facility is the determining factor when deciding which impacts of an action agency's activity or facility should be included in the environmental baseline, as opposed to the effects of the action. We did not sufficiently emphasize that when the Services referred to an ''agency'' in that third sentence, we were referring to the Federal agency taking the action that is subject to the ESA section 7 consultation. Here, when we refer to an ''agency,'' ''action agency,'' or ''Federal agency,'' it is in reference to the Federal agency that has proposed the action undergoing section 7 consultation. Consistent with § 402.03, the obligation of a Federal agency to consult on a Federal action pursuant to section 7 and the requirements of the part 402 regulations apply to all actions in which there is discretionary Federal involvement or control. Therefore, those components of Federal activities or Federal facilities that are not within the discretionary control of the Federal agency are not subject to the requirement to consult, and as a result,

the impacts of those non-discretionary activities and facilities to listed species and critical habitat are not a consequence of a proposed discretionary Federal action.

Although we are proposing to further modify the 2019 rule's definition of ''environmental baseline'' for clarity, the practice of the Services and our application of the definition in consultations will not change. Thus, the information and examples provided in the 2019 rule's preamble (84 FR 44976 at 44978–44979, August 27, 2019) remain relevant. As discussed in the 2019 rule's preamble, the Services' practice of including in the baseline the impacts from Federal agency activities or existing Federal agency facilities that are not within the Federal 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 ''(t)he regulation's focus on 'discretionary' actions accords with the commonsense conclusion that, when an agency is required to do something by statute, it simply lacks the power to 'insure' that such action will not jeopardize endangered species.'' Id. It follows, then, that when a Federal agency has authority for managing or operating an existing facility, but lacks discretion to remove or fundamentally alter the physical structure of the facility, the impacts from the physical presence of the facility on the landscape to listed species and critical habitat are appropriately placed in the environmental baseline and are not considered an effect of the action under consultation.

To illustrate the interplay between a Federal agency's non-discretionary facility and its discretionary operations, consider an example where, prior to the passage of the ESA, Congress authorized a Federal agency to construct and operate a dam and provided the Federal agency with discretion to operate the dam for various purposes including fish and wildlife management but provided the Federal agency with no discretion to remove or fundamentally alter the structure of the dam in the future. If a species was subsequently listed after the passage of the ESA, the Federal agency would have a duty to consult on their continued discretionary operations of the dam, but the existence of the dam itself and its future impacts to the listed species would be considered part of the environmental baseline (along with the past and present impacts of dam operations up to the time of consultation). If the existence of this dam kills 100 individuals of the listed species per year, consultations on the discretionary operations of the dam would consider the consequences of the discretionary operations in addition to the baseline loss of 100 individuals per year, every year, for the duration of the consultation analysis. Further, future consequences of the entire discretionary operation would be evaluated as effects of the proposed action even if the proposed action does not contemplate changes to some aspects of past discretionary practices or operations. For example, the Federal agency may propose to continue the operations of the dam's flow regime with no changes from past practices, or with only minor changes. Regardless of their ''ongoing'' nature, all of the consequences of the proposed discretionary operations of the structure are ''effects of the action.'' Thus, deletion of the term ''ongoing'' from the original third sentence remedies a misperception that anything that was a continuation of past and present discretionary practice or operation would be in the environmental baseline.

Similarly, the addition of the word ''Federal'' to agency activities or existing facilities in the third sentence emphasizes that the question of discretion for purposes of defining what is in the environmental baseline versus the effects of a proposed action is relevant to the Federal agency's own facilities and activities but not those of third parties. Thus, in the example above, if the Federal agency's discretionary operations of the dam result in recreational activities by third parties using the reservoir created behind the dam, then the future consequences of those activities caused by the proposed action would be considered effects of the action (not environmental baseline) even though the Federal agency may lack the discretion to control or regulate the recreational activities.

When questions arise as to whether the impacts from a particular Federal agency activity or facility are treated as part of the environmental baseline, the Services will work closely with the Federal agency to understand the scope of the Federal agency's authorities and discretion. As with other aspects of a package to initiate consultation, the Services often confer with the Federal agency to seek clarification on or additional support for the Federal agency's description of their governing authorities and scope of their discretion. When initiating consultation and in these discussions, we would expect the Federal agency to clearly identify and describe with sufficient detail the governing authorities that may constrain their discretion over some or all of the Federal agency activity or facility at issue. Absent unusual circumstances, the Services anticipate we would likely defer to the Federal action agency's interpretation of their authorities.

Section 402.16—Reinitiation of Consultation

In the 2019 rule, we removed the term ''formal'' from the heading and text of § 402.16 to acknowledge that the requirement to reinitiate consultation applies to all section 7(a)(2) consultations (84 FR 44976 at 44980, August 27, 2019). We are proposing one change to the text of § 402.16(a) to clarify the responsibilities of the Federal agency and the Services regarding the requirement to reinitiate consultation.

The current text at § 402.16(a) states that 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. We now propose to delete the words ''or by the Service.''

The Services are aware that the wording of § 402.16(a) has often been misunderstood or misinterpreted in regard to whether the Federal action agency or the Services have the obligation to request reinitiation of consultation when one or more of the triggers has been met. In the 2019 rule, we stated clearly in the preamble that the Services do not have the authority to require reinitiation of a consultation when the requirements for reinitiation have been met. We explained that reference to the Service in that section does not impose an affirmative obligation on the Service to reinitiate consultation if the criteria have been met. Rather, this reference 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 request reinitiation of consultation with the relevant Service when warranted. See 84 FR 44976 at 44980, August 27, 2019.

The Services' attempt in the preamble of the 2019 rule to clarify the action agency's duty to reinitiate has not been sufficient to resolve this issue. See, *e.g., Center for Biological Diversity* v. *U.S. Forest Service,* CV–20–00020–TUC–DCB, 2020 WL 6710944 (D. Ariz. Nov. 16, 2020) (interpreting the language of

the regulation to require that FWS had a duty to reinitiate consultation). As a result, we are proposing to remove the reference to the Service in § 402.16(a) to conform to our longstanding practice and understanding of the limits of our authority under the Act. Under the statutory scheme of section 7 of the ESA, the Services lack the authority to require either the initiation of consultation or reinitiation of a completed consultation. See 51 FR 19926 at 19956, June 3, 1986 (consulting agencies lack the authority to require Federal agencies to reinitiate consultation if they choose not to do so). The legislative history of the ESA similarly reflects that it is the action agency that bears any duty to reinitiate consultation. See H.R. Rep. No. 97–567, at 27 (1982) (''if the specified impact on the species is exceeded, the Committee expects that the Federal [action] agency or permittee or licensee will immediately reinitiate consultation''). Similarly, the Services' Consultation Handbook recognizes that the Services cannot ''require Federal agencies to reinitiate consultation if they choose not to do so.'' Consultation Handbook (FWS and NMFS, March 1998) at 2–11.

To attempt to reinitiate consultation unilaterally without a request for reinitiation and cooperation from the action agency is contrary to the fundamental nature of the consultation process under section 7—a provision that Congress entitled ''interagency cooperation.'' The responsibility and obligation to reinitiate that consultation lies with the Federal agency that retains discretionary involvement or control over its action. Our proposed alteration does not prevent the Services from notifying the Federal agency if we conclude that circumstances appear to warrant a reinitiation of consultation or engaging in a conversation with the Federal agency over that issue.

Section 402.17—Other Provisions

In the 2019 rule, we added a new section, § 402.17, ''Other provisions,'' which was intended to clarify several aspects of the process of determining whether an activity or consequence is reasonably certain to occur.

Within this new section, paragraph (a) pertained to activities that are reasonably certain to occur, in order to clarify the application of the ''reasonably certain to occur'' standard to activities included in the definitions of ''effects of the action'' and ''cumulative effects'' in § 402.02. This new provision applied only to activities caused by, but not part of, the proposed action captured in the definition of ''effects of the action'' and future non-Federal activities under ''cumulative effects.'' Consistent with the ESA, existing regulations, and agency practice, we noted that the reasonable certainty standard does not apply to whether aspects of the proposed action itself will be implemented, but again, only to the analysis of the effects caused by the action to the listed species and critical habitat. (See 83 FR 35178 at 35189, July 25, 2018; also 84 FR 44976 at 44977–44978, August 27, 2019.)

In the 2019 rule, we also added § 402.17(b) pertaining to consequences caused by the proposed action to emphasize other considerations when reviewing whether a consequence is not reasonably certain to occur. Similar to the provisions of § 402.17(a), § 402.17(b)(1) through (b)(3) identified a list of factors that could be relevant to this inquiry. We explained that those factors were not exhaustive, new, or more stringent factors than what we have used in the past to determine if a consequence would or would not occur (84 FR 44976 at 44981, August 27, 2019). They were not meant to imply that time, distance, or multiple steps inherently make a consequence not reasonably certain to occur, but that these are relevant considerations. See id.

We also explained that each consultation will have its own set of evaluations and will depend on the underlying factors unique to that consultation. We used the following example in the 2019 rule: 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 (84 FR 44976 at 44981, August 27, 2019). Under our 2019 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. However, we also recognized that 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.

In both § 402.17(a) and (b), we also added a sentence intended to describe the nature of the information needed to determine that either an activity (paragraph (a)) or a consequence (paragraph (b)) is reasonably certain to occur. This sentence required the conclusion of reasonably certain to occur to be based on clear and substantial information, using the best scientific and commercial data available.

By adding this sentence, we explained that we did not intend to change the statutory requirement that determinations under the Act are made based on the best scientific and commercial data available. Rather, by clear and substantial information, we explained that the conclusion of reasonably certain to occur must be based on solid information and provide a firm basis for such conclusion (84 FR 44976 at 44981, August 27, 2019). Lastly, we added § 402.17(c) to reinforce that both the action agency and the Services must consider the framework provided by § 402.17(a) and (b).

Since the final rule was published in August 2019, the Services have noted several areas of potential confusion as to the intent and structure of § 402.17. Because of these concerns, we propose to remove section § 402.17 in its entirety.

Specifically, one point of potential confusion and structural complexity was that the language of § 402.17 included additional elements in the definition of ''effects of the action'' found in § 402.02. However, the definition in § 402.02 should be self-contained and complete on its own terms without the need to reference additional sections of the regulations. As described further below, we will address factors relevant for determining if a consequence is reasonably certain to occur in the more appropriate forum of a guidance document.

Second, another point of potential confusion centered around our introduction of the phrase ''clear and substantial information'' in § 402.17 to determine if an activity or consequence is reasonably certain to occur. This phrase has inadvertently created the misperception that it represents an additional, or different, standard upon which to base a conclusion as to whether an activity is reasonably certain to occur. That was not our intent. The standard regarding the information upon which to base such determinations, as noted in the phrase following ''clear and substantial information,'' is the statutory requirement of ''using the best scientific and commercial data available.'' The ''clear and substantial information'' standard was intended to indicate that any rationale regarding activities or consequences that are reasonably certain to occur needed to be solidly based on the ''best scientific and commercial data available.'' However, the addition of the ''clear and substantial information'' requirement

did not have the desired effect and, on reconsideration, we also find that it may be in tension with the statutory standard.

Although we did not intend for the language in the 2019 rule to require a certain amount of numerical data or to provide a guarantee that a consequence was reasonably certain to occur (84 FR 44976 at 44993, August 27, 2019), the preambular language that also described this standard as requiring a ''degree of certitude'' (*e.g.,* p. 44981) could contribute to confusion over application of this terminology. Rather than promoting consistency in application of how we determine the scope of effects of the action, this language instead creates confusion. In addition to the information standard supplied by the ESA itself, the standards for rational agency decision-making under the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) also apply and give courts the jurisdiction to review the Services' final agency actions on the basis of the relevant administrative record. Accordingly, by removing this section, we would not be changing the applicable standards for determining whether consequences may result from an agency action undergoing consultation but instead would be removing language that could otherwise contribute to inconsistent application of these standards.

Third, we propose to capture the point in § 402.17(a) that the ''reasonably certain to occur'' standard does not apply to the proposed action itself, but instead to activities that are caused by the proposed action, by the addition of the phrase ''but that are not part of the action'' directly to the definition of ''effects of the action'' in § 402.02, as discussed above.

Fourth, the provisions set forth in § 402.17(a)(1) through (a)(3) were an attempt to identify non-exclusive factors that could be examined to determine whether an activity is reasonably certain to occur. This language repeated elements that were similar to those mentioned in the preamble to the 1986 final rule on interagency cooperation (51 FR 19926 at 19933, June 3, 1986) and the Services' 1998 Consultation Handbook (Handbook at 4–32). The text at § 402.17(b) similarly described a non-exclusive list of factors to determine when a consequence may not be reasonably certain to occur. These are relevant considerations. However, on reconsideration, we find that this information would be better suited for discussion in a guidance document rather than regulations because these factors do not necessarily apply in all cases, and further explanation is needed on when and how these factors may be appropriately considered. We expect to address and expand on these factors in updates to the Services' Consultation Handbook. Additional explanation as to the appropriate application of the ''reasonably certain to occur'' standard may also be found in the preamble to the Services' 2015 ESA rulemaking in which the Services expressly adopted ''reasonably certain to occur'' as the standard for determining when incidental take is anticipated to occur (80 FR 26832 at 26837, May 11, 2015).

Because § 402.17(c) speaks directly to application of both § 402.17(a) and (b), we propose to eliminate paragraph (c) as well. Therefore, we are proposing to remove the entire section from the regulations in part 402.

The previously articulated bases for § 402.17 will be addressed by alternative means either through these proposed regulatory text revisions or future guidance. This proposed regulatory revision simplifies the regulations and eliminates the need for any reader to consult multiple sections of the regulations to discern what is considered an ''effect of the action.''

Additional Proposed Changes to 50 CFR Part 402

In addition to the regulatory changes proposed in response to our review of the 2019 rule, we are also proposing changes to other aspects of part 402 that were not addressed in 2019. To change the Services' implementation of the ESA so that it better reflects congressional intent and better serves the conservation goals of the ESA, we are proposing amendments to the regulatory provisions relating to the scope of reasonable and prudent measures (RPMs) in an incidental take statement (ITS). Minimizing impacts of incidental take on the species through the use of offsetting measures can result in improved conservation outcomes for species incidentally taken due to proposed actions and may reduce the accumulation of adverse impacts, sometimes referred to as ''death by a thousand cuts.'' In addition, by allowing the Services to specify offsets outside the action area as RPMs, conservation efforts can be focused where they will be most beneficial to the species. For example, in some circumstances, offsetting measures applied outside the action area would more effectively minimize the impact of the proposed action to the subject species.

RPMs authorized under ESA section 7(b)(4) are issued by the Services to minimize impacts to species from incidental take reasonably certain to occur from a Federal action analyzed in an ESA section 7 biological opinion. The Services have previously taken the position that RPMs [1] should be confined to only those measures that avoid or reduce incidental take and that occur inside the ''action area'' (which the ESA regulations define as ''all areas to be affected directly or indirectly by the Federal action,'' 50 CFR 402.02). For example, the Services' 1998 Consultation Handbook states:

> Section 7 requires minimization of the level of take. It is not appropriate to require mitigation for impacts of incidental take. Reasonable and prudent measures *can include only actions that occur within the action area,* involve only minor changes to the project, and *reduce the level of take* associated with project activities.
>
> FWS and NMFS, Final Endangered Species Act Consultation Handbook, 4–53 (1998) (''Consultation Handbook'') (italics added).

Thus, under this position taken in the Consultation Handbook, RPMs may not consist of measures that offset impacts from the taking of individuals through activities other than avoiding or reducing the level of incidental take. In addition, RPMs must occur within the action area.

With the benefit of having conducted a careful review of the Act's text, the purposes and policies of the ESA, and the 1982 ESA legislative history, the Services propose revisions to the regulations to reflect a change in the Services' interpretation of the Act's provisions relating to RPMs. Under these proposed regulatory revisions, the Services would clarify that, after considering measures that avoid or reduce incidental take within the action area, the Services may consider for inclusion as RPMs measures that offset any remaining impacts of incidental take that cannot be avoided. For example, in instances where the impact to the species occurs as the result of habitat modifications or destruction within the action area and cannot be minimized within the project site or action area, offsetting measures could include restoring or protecting suitable habitat for the affected species (*e.g.,* via a species conservation bank, conservation easement with endowment, in lieu fee program, restoration program, etc.).

Such offsetting measures are not an alternative to RPMs that reduce or avoid

[1] For the sake of brevity, this preamble will use the term ''RPMs'' to encompass both the reasonable and prudent measures prescribed under ESA section 7(b)(4) and the terms and conditions that implement them, including monitoring and reporting requirements.

incidental take, but rather are additional measures to address the residual impacts to the species that remain after measures to avoid and, therefore, reduce incidental take are applied. These additional measures do not modify the action subject to consultation and may occur inside or outside of the action area. As a shorthand, the preamble will sometimes refer to ''offsetting measures'' or ''offsets'' as measures that address the remaining impacts of incidental take that cannot be avoided.

To illustrate how offsetting measures may be applied under this proposal, assume a Federal agency consults on its issuance of a permit for a transmission line. The Service determines in a biological opinion the proposed action is not likely to jeopardize federally listed species. The project, as proposed, was designed to minimize impacts to the species, and incidental take would be kept to a minimum. When developing the incidental take statement, the Service then considers whether any RPMs could be applied within the action area to avoid and further reduce incidental take levels. Then, the Service considers whether any offsetting measures to minimize the remaining impacts to the species from incidental take could be applied, giving preference to offsets that can be applied within the action area. This offset would not be limited to the action area, and as mentioned previously, the offset could include the Federal agency or applicant restoring or protecting suitable habitat for the affected species though a conservation bank.

As further explained below, the Services have significant discretion to specify offsetting measures as RPMs and offsets would not be required in every case. Their use would also be subject to several limitations. As with all RPMs, they would be limited by the existing ''minor change rule'' in 50 CFR 402.14(i)(2). Offsetting measures would be considered for inclusion only in a sequence in which the Services first considered appropriate measures within the action area and may be included as RPMs for minimizing any remaining impacts that cannot otherwise be avoided. In addition, measures offsetting any remaining impacts of incidental take that cannot be avoided must be commensurate with the scale of the impact.

ESA section 7(b)(4) provides the requirements for issuance of an ITS. If, after consultation, the Secretary concludes that the agency action will not violate section 7(a)(2) of the Act (*i.e.,* will not jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat), but incidental take of the listed species is anticipated,[2] the Secretary must provide the agency with a written statement that includes certain components. The written statement must specify the impact of such incidental taking on the species and specify those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact (16 U.S.C. 1536(b)(4)). ESA section 7(o) further provides that taking in compliance with the terms and conditions of the ITS is then exempt from the taking prohibitions of ESA section 9 (16 U.S.C. 1536(o)).

None of these provisions indicate the specific types of RPMs that may be used to minimize impacts of incidental take, nor do they require RPMs to occur within the action area. By referring to measures the Services deem ''necessary or appropriate,'' the Act provides the Services with substantial discretion to identify RPMs, and the Act plainly states that RPMs minimize the impacts of incidental take, not minimize incidental take itself. Thus, contrary to the position taken in the Consultation Handbook, RPMs are not limited to measures that avoid or reduce levels of incidental take. Moreover, nothing in the ESA indicates that RPMs are to be carried out in the action area.

The proposed clarification would include a preferred order for RPMs. The Services would first consider and apply measures within the action area to minimize the impact of incidental take, including, as appropriate, measures to reduce or avoid incidental take of individuals. The Services may then consider measures within the action area that use offsets to further minimize any of the remaining impacts of incidental take. After fully considering these measures within the action area, the Services may then consider additional measures outside the action area that use offsets of take to further minimize any remaining impacts of incidental take. This approach allows the Services to implement our respective mitigation policies more effectively, as both policies are predicated on a mitigation hierarchy approach of avoiding impacts, and then addressing any remaining impacts that cannot be avoided.

Under this proposal, RPMs would still need to be ''reasonable and prudent'' and, therefore, must be measures that are within the authority and discretion of the action agency or applicants to carry out. See Consultation Handbook at 4–53. In addition, such measures would remain subject to the longstanding regulatory requirement that these measures ''cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.'' See 50 CFR 402.14(i)(2).

Moreover, the measures would need to be appropriately scaled. In addition to the limitations of the minor change rule, the scale of the take caused by the action would provide an upper limit on the scale of any offsetting measures. The discretion to ''minimize'' the impacts on the species means that the measures in any case would not be more than necessary or appropriate to offset the impacts of taking of the species in the action area that had not already been addressed through avoidance measures. As always, the Services must determine the extent of RPMs that are ''necessary or appropriate.''

This proposed change is compatible with other mitigation policies and guidance, including the Services' respective mitigation policies and the mitigation sequencing approach reflected in the Council on Environmental Quality's regulations implementing the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*). In fact, an additional reason for proposing this change is that it would allow the Services to adhere more effectively to the preferred sequence in the development of mitigation that aims to avoid impacts to the species first, and then potentially minimize residual impact to the species through offsets. Moreover, clarifying that RPMs are not restricted to the action area and may include offsets provides greater flexibility in meeting the statutory objective of minimizing the impact of take, which could be particularly helpful when incidental take cannot be avoided. In addition, if finalized, this change in our approach to RPMs would not affect the existing ability of action agencies to incorporate mitigative measures voluntarily as part of the proposed action being evaluated under ESA section 7(a)(2).

None of this is meant to imply that the Services must require offsetting measures inside or outside the action area, only that they have discretion to do so. In proposing specific changes to the regulations and setting forth the justification for these changes in this preamble, the Services are proposing revisions that, if finalized, would apply prospectively. Thus, nothing would require that any previous consultations under section 7(a)(2) of the Act be reevaluated on the basis of these proposed revisions, in the event they are finalized.

[2] Under the implementing regulations, an ITS is required if incidental take is ''reasonably certain to occur.'' 50 CFR 402.14(g)(7).

These proposed revisions would not alter the way that the impacts of incidental taking are currently specified in an ITS. Under current regulations, the impact of incidental taking is expressed in terms of ''amount or extent'' of such taking. See 50 CFR 402.14(i). Amount or extent may be expressed by specifying the number of individuals taken, or through an appropriate surrogate (*e.g.,* similarly affected species or habitat or ecological conditions). Id. Nor do the Services propose to change the requirement for reinitiation of consultation any time ''the amount or extent of taking specified in the incidental take statement is exceeded.'' 50 CFR 402.16(a). All that would change is a recognition that the ESA does not prohibit RPMs outside the action area and that such measures may, where necessary or appropriate, include minimization of the impacts of the taking on the species through offsets.

Based upon the above discussion, we are proposing the following:

Section 402.02—Definitions

Definition of ''Reasonable and Prudent Measures''

The current definition of ''reasonable and prudent measures'' provides that reasonable and prudent measures refer to those actions that the Director believes necessary or appropriate to minimize the impacts, *i.e.,* amount or extent, of incidental take.

In our proposed revisions, we would revise the definition to adhere more closely to the statute. We would do so by replacing the term ''believes'' with ''considers.'' In addition, we would replace the clause ''impacts, *i.e.,* amount or extent, of incidental take'' with ''impact of the incidental take on the species.'' This proposed change would more closely track the statutory language at section 7(b)(4); further, regulatory language in 50 CFR 402.14 already provides that the impact on the species is to be specified in terms of the amount or extent of incidental take caused by the action.

Section 50 CFR 402.14—Formal Consultation

We propose revising § 402.14(i)(1)(i) and (ii) to reflect our interpretation that RPMs are not limited solely to reducing incidental take and may occur outside of the action area. In addition, a new paragraph at (i)(3) is proposed to clarify that offsets within or outside the action area can be required to minimize the impact of incidental taking on the species. This proposed regulation specifies the sequence in which such measures will be considered, giving priority to measures that avoid or reduce incidental take, followed by consideration of measures that offset the remaining impacts of incidental take that cannot be avoided.

Request for Comments

We are seeking comments from all interested parties on the proposed revisions to 50 CFR part 402, as well as on any of our analyses or preliminary conclusions in the Required Determinations section of this document. While comments on all aspects of this proposed rule are solicited, we particularly note that the public is invited to comment on revisions to the regulations in 50 CFR 402.02 and 402.14 regarding the scope of RPMs in incidental take statements, given that this was a topic not raised in the 2019 rule revisions. We will also accept public comment on all aspects of the 2019 rule, including whether any of those provisions should be rescinded in their entirety (restoring the prior regulatory provision) or revised in a different way. All relevant information will be considered prior to making a final determination regarding the regulations for interagency cooperation. Depending on the comments received, we may change the proposed regulations based upon those comments.

You may submit your comments concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**. Comments sent by any other method, to any other address or individual, may not be considered.

Comments and materials we receive will be posted and available for public inspection on *https://www.regulations.gov.* This generally means that we will post any personal information you provide us. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866, 13563, and 14094

Executive Order (E.O.) 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 proposed rule is significant.

Executive Order 14094 amends E.O. 12866 and reaffirms the principles of E.O. 12866 and E.O 13563 and states that regulatory analysis should facilitate agency efforts to develop regulations that serve the public interest, advance statutory objectives, and be consistent with E.O. 12866, E.O. 13563, and the Presidential Memorandum of January 20, 2021 (Modernizing Regulatory Review). Regulatory analysis, as practicable and appropriate, shall recognize distributive impacts and equity, to the extent permitted by law. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements. This proposed rule is consistent with E.O. 13563, including 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.''

We are proposing revisions to the Services' implementing regulations at 50 CFR 402. Specifically, the Services are proposing changes to implementing regulations at: (1) § 402.02, definitions; (2) § 402.16, reinitiation of consultation; (3) § 402.17, other provisions; and (4) § 402.14(i)(1), formal consultation. The preamble to this proposed rule explains in detail why we anticipate that the regulatory changes we are proposing will improve the implementation of the Act.

When we made changes to §§ 402.02, 402.16, and 402.17 in 2019, we compiled historical data for a variety of metrics associated with the consultation process in an effort to describe for OMB and the public the effects of those regulations (on *https://www.regulations.gov,* see Supporting Document No. FWS–HQ–ES–2018–0009–64309 of Docket No. FWS–HQ–ES–2018–0009; Docket No. 180207140–8140–01). We presented various metrics related to the regulation revisions, as well as historical data supporting the metrics.

For the 2019 regulations, we concluded that because those revisions served to clarify rather than alter the standards for consultation under section 7(a)(2) of the Act, the 2019 regulation revisions were substantially unlikely to affect our determinations as to whether proposed Federal actions are likely to jeopardize listed species or result in the

destruction or adverse modification of critical habitat.

As with the 2019 regulations, the revisions we are now proposing, as described above, are intended to provide transparency and clarity and align more closely with the statute—not only to the public and stakeholders, but also to the Services' staff in the implementation of the Act. As a result, we do not anticipate any substantial change in 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.

Similarly, although the proposed revisions to the regulatory provisions relating to RPMs are amendments not considered in the 2019 rulemaking, this change, if finalized, would align the regulations with the plain language of the statute. This change would not affect most consultations under section 7(a)(2) of the Act. This is because most consultations are completed informally, and this change would only apply to formal consultations that require an ITS containing RPMs. Even among formal consultations that require an ITS containing RPMs, some of these consultations will be able to address impacts of incidental take through measures that avoid or reduce incidental take within the action area, and the change would not apply to those consultations. As explained in the preamble language above, the use of offsetting measures in RPMs would not be required in every consultation. As with all RPMs, these offsetting measures must be commensurate with the scale of the impact, subject to the existing ''minor change rule,'' be reasonable and prudent, and be necessary or appropriate to minimize the impact of the incidental taking on the species. Lastly, several different action agencies in various locations throughout the country readily include offsetting measures as part of their project descriptions. This practice of including offsets as part of the proposed action being evaluated in a consultation is not uncommon. The Services may find that offsets included in the proposed action adequately minimize impacts of incidental take, thus obviating the need to specify additional offsets as RPMs. Examples of these types of consultations that incorporate offsetting measures into the proposed action include programmatic consultations, certain consultations regarding transportation projects, and Army Corps of Engineers Clean Water Act section 404 permit projects.

It is not possible to know how many formal consultations will include offsetting measures as RPMs due to the tremendous variation in Federal actions subject to formal consultation, the specific impacts from these actions, and the affected species that may be analyzed. Although we cannot predict the costs of the RPM proposal due to these variable factors associated with formal consultations, any costs would be constrained by the statutory and regulatory requirements that RPMs are ''reasonable and prudent,'' commensurate with the residual impacts of incidental take caused by the proposed action, and subject to the ''minor change rule.'' Similarly, while we cannot quantify the benefits from this proposal, some of the benefits include further minimization of the impacts of incidental take caused by the proposed action, which, in turn, further mitigates some of the environmental ''costs'' associated with that action. In allowing for residual impacts to be addressed, the proposal may also reduce the accumulation of adverse impacts to the species that is often referred to as ''death by a thousand cuts.'' Sources of offsetting measures, such as conservation banks and in-lieu fee programs, have proven in other analogous contexts to be a cost-effective means of mitigating environmental impacts and may have the potential to enhance mitigative measures directed at the loss of endangered and threatened species when they are applied strategically. See, *e.g.,* U.S. Fish and Wildlife Service Mitigation Policy and Endangered Species Act Compensatory Mitigation Policy, Appendix 1, 501 FW 3 (May 15, 2023) or NOAA Mitigation Policy for Trust Resources, NOA 216–123 (July 22, 2022).

These changes provide transparency, clarity, and more closely comport with the text of the ESA. We, therefore, do not anticipate any material effects such that the rule would have an annual effect that would reach or exceed $200 million or would adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or Tribal governments or communities.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.,* small businesses, small organizations, and small government jurisdictions). 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 are certifying that these proposed regulations would not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

This proposed rule would revise and clarify existing requirements for Federal agencies, including the Services, under section 7 of the ESA. Federal agencies would be the only entities directly affected by this proposed rule, and they are not considered to be small entities under SBA's size standards. No other entities would be directly affected by this proposed rule.

This proposed rule, if made final, would be applied in determining whether a Federal agency has insured, in consultation with the Services, that any action it would authorize, fund, or carry out is not likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. This proposed rule will not affect our determinations as to whether proposed actions are likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. The proposed rule would serve to provide clarity to the standards with which we will evaluate agency actions pursuant to section 7 of the ESA. Therefore, we certify that, if adopted as proposed, this rule would not have a significant economic effect on a substantial number of small entities.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

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

(a) On the basis of information contained in the Regulatory Flexibility Act section above, this proposed rule would not ''significantly or uniquely'' affect small governments. We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502, that this proposed rule would not impose a cost of $100 million or more in any given year on local or State governments or private entities. A small government agency plan is not

required. As explained above, small governments would not be affected because the proposed rule would not place additional requirements on any city, county, or other local municipalities.

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

Takings (E.O. 12630)

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

Federalism (E.O. 13132)

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

Civil Justice Reform (E.O. 12988)

This proposed rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of E.O. 12988. This proposed rule would clarify the interagency consultation processes under the ESA.

Government-to-Government Relationship With Tribes

In accordance with E.O. 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 are considering possible effects of this proposed rule on federally recognized Indian Tribes and Alaska Native Corporations. This proposed rule is general in nature and does not directly affect any specific Tribal lands, treaty rights, or Tribal trust resources. Therefore, we preliminarily conclude that this proposed rule does not have ''tribal implications'' under section 1(a) of E.O. 13175. Thus, formal government-to-government consultation is not required by E.O. 13175 and related policies of the Departments of Commerce and the Interior. We will continue to collaborate and coordinate with Tribes and Alaska Native Corporations on issues related to federally listed species and their habitats. See Joint Secretaries' Order 3206 (''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,'' June 5, 1997) and Joint Secretaries' Order 3225 (''Endangered Species Act and Subsistence Uses in Alaska (Supplement to Secretarial Order 3206'')).

Paperwork Reduction Act

This proposed rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We are analyzing this proposed regulation in accordance with the criteria of NEPA, the Department of the Interior regulations on implementation of NEPA (43 CFR 46.10–46.450), the Department of the Interior Manual (516 DM 8), the NOAA Administrative Order 216–6A, and the companion manual, ''Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities,'' which became effective January 13, 2017. We invite the public to comment on the extent to which this proposed rule may have a significant impact on the human environment or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. We will complete our analysis, in compliance with NEPA, before finalizing these proposed regulations.

Endangered Species Act

In developing this proposed rule, the Services are acting in their unique statutory role as administrators of the Act and are engaged in a legal exercise of interpreting the standards of the Act. The Services' promulgation of interpretive rules that govern their implementation of the Act is not an action that is in itself subject to the Act's provisions, including section 7(a)(2). The Services have a historical practice of issuing their general implementing regulations under the ESA without undertaking section 7 consultation. Given the plain language, structure, and purposes of the ESA, we find that Congress never intended to place a consultation obligation on the Services' promulgation of implementing regulations under the Act. In contrast to actions in which we have acted principally as an ''action agency'' in implementing the Act to propose or take a specific action (*e.g.,* issuance of section 10 permits and actions under statutory authorities other than the ESA), here, the Services are carrying out an action that is at the very core of their unique statutory role as administrators—promulgating general implementing regulations interpreting the terms and standards of the statute.

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

E.O. 13211 requires agencies to prepare statements of energy effects when undertaking certain actions. The proposed revised regulations are not expected to affect energy supplies, distribution, and use. Therefore, this action is a not a significant energy action, and no statement of energy effects is required.

Clarity of the Rule

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

(1) Be logically organized;

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

(3) Use clear language rather than jargon;

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

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in **ADDRESSES**. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Authority

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

List of Subjects in 50 CFR Part 402

Endangered and threatened species.

Proposed Regulation Promulgation

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

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

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

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

Subpart A—General

■ 2. Amend § 402.02 by revising the definitions of ''Effects of the action'', ''Environmental baseline'', and ''Reasonable and prudent measures'' to read as follows:

§ 402.02 Definitions.

* * * * *

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

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

* * * * *

Reasonable and prudent measures refer to those actions the Director considers necessary or appropriate to minimize the impact of the incidental take on the species.

* * * * *

Subpart B—Consultation Procedures

■ 3. Amend § 402.14 by revising paragraph (i) to read as follows:

§ 402.14 Formal consultation.

* * * * *

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

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

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

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

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

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

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

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

(4) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement. The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 216.105 and 222.301(h) for NMFS.

(5) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this section, is exceeded, the Federal agency must reinitiate consultation immediately.

(6) Any taking that is subject to a statement as specified in paragraph (i)(1) of this section and that is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(7) For a framework programmatic action, an incidental take statement is not required at the programmatic level; any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7

consultation, as appropriate. For a mixed programmatic action, an incidental take statement is required at the programmatic level only for those program actions that are reasonably certain to cause take and are not subject to further section 7 consultation.

* * * * *

■ 4. Amend § 402.16 by revising the introductory text of paragraph (a) to read as follows:

§ 402.16 Reinitiation of consultation.

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

* * * * *

§ 402.17 [Removed]

■ 5. Remove § 402.17

Shannon A. Estenoz,

Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior.

Richard Spinrad,

Under Secretary of Commerce for Oceans and Atmosphere, NOAA Administrator, National Oceanic and Atmospheric Administration.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 424

[Docket No. FWS–HQ–ES–2021–0107, FF09E23000 FXES1111090FEDR 234; Docket No. 230607–0142]

RIN 1018–BF95; 0648–BK47

Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat

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

ACTION: Proposed rule; request for comment.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS; collectively, the ''Services''), propose to revise portions of our regulations that implement section 4 of the Endangered Species Act of 1973, as amended (Act). The proposed revisions to the regulations clarify, interpret, and implement portions of the Act concerning the procedures and criteria used for listing, reclassifying, and delisting species on the Lists of Endangered and Threatened Wildlife and Plants and designating critical habitat.

DATES: We will accept comments from all interested parties until August 21, 2023. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** below), the deadline for submitting an electronic comment is 11:59 p.m. eastern time on that date.

ADDRESSES: You may submit comments and information on this document by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *https://www.regulations.gov.* In the Search box, enter FWS–HQ–ES–2021–0107, which is the docket number for this rulemaking action. Then, click on the Search button. On the resulting page, in the panel on the left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on ''Comment.'' Please ensure that you have found the correct rulemaking before submitting your comment.

(2) *By hard copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS–HQ–ES–2021–0107; U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

See Request for Comments, below, for further information.

FOR FURTHER INFORMATION CONTACT: Carey Galst, U.S. Fish and Wildlife Service, Division of Ecological Services, Branch of Listing Policy and Support Chief, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703–358–1954; or Angela Somma, National Marine Fisheries Service, Office of Protected Resources, Endangered Species Division Chief, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301–427–8403. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

The Secretaries of the Interior and Commerce (the ''Secretaries'') share responsibilities for implementing most of the provisions of the Endangered Species Act, as amended (hereafter referred to as ''ESA or the Act;'' 16 U.S.C. 1531 *et seq.*), and authority to administer the Act has been delegated by the respective Secretaries to the Director of FWS and the Assistant Administrator for NMFS. Together, the Services have promulgated regulations that interpret aspects of the listing and critical habitat designation provisions of section 4 of the Act. These joint regulations, which are codified in the Code of Federal Regulations at 50 CFR part 424, were most recently revised in 2019 (84 FR 45020, August 27, 2019; hereafter, ''the 2019 rule''). Those revised regulations became effective September 26, 2019.

Executive Order 13990, ''Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis,'' issued January 20, 2021, directed all departments and agencies to immediately review agency actions taken between January 20, 2017, and January 20, 2021, and, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding agency actions that conflict with important national objectives, including promoting and protecting our public health and the environment, and to immediately commence work to confront the climate crisis. A ''Fact Sheet'' that accompanied E.O. 13990 provided a non-exhaustive list of particular regulations requiring such a review and included the 2019 rule (see *www.whitehouse.gov/briefing-room/statementsreleases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/*). In response to E.O. 13990 and in light of recent litigation over the 2019 rule, the Services have reviewed the 2019 rule, evaluated the specific regulatory revisions promulgated through that process, and now propose to make revisions to the regulations at 50 CFR part 424 as discussed in detail below.

The 2019 rule, along with other revisions to the ESA regulations finalized in 2019, were subject to litigation in the United States District Court for the Northern District of California. On July 5, 2022, the court issued a decision vacating the 2019 rule, without reaching the merits of the case. On September 21, 2022, the United States Court of Appeals for the Ninth Circuit temporarily stayed the effect of the July 5th decision pending the District Court's resolution of motions seeking to alter or amend that decision.