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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.

Billing Code 4333–15

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[Docket No. FWS–HQ–ES–2018–0007; 4500030113]

RIN 1018–BC97

Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service or FWS), revise our regulations related to threatened species to remove the prior default extension of most of the prohibitions for activities involving endangered species to threatened species. For species already listed as a threatened species, the revised regulations do not alter the

applicable prohibitions. The revised regulations provide that the Service, pursuant to section 4(d) of the Endangered Species Act (“ESA” or the “Act”), will determine what protective regulations are appropriate for species added to or reclassified on the lists of threatened species.

DATES: This final regulation is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. This final regulation is available on the Internet at <http://www.regulations.gov> in Docket No. FWS–HQ–ES–2018–0007. Comments and materials received, as well as supporting documentation used in the preparation of this final regulation, are also available at the same website.

FOR FURTHER INFORMATION CONTACT: Bridget Fahey, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703/358–2171. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service at 800/877–8339.

SUPPLEMENTARY INFORMATION:

Background

On July 25, 2018, the Service published proposed regulation revisions in the *Federal Register* (83 FR 35174) regarding section 4(d) of the Act and its implementing regulations in title 50 of the Code of Federal Regulations at 50 CFR part 17 setting forth the prohibitions for species listed as threatened on the Federal Lists of Endangered and Threatened Wildlife and Plants (lists). In the July 25, 2018, *Federal Register* document,

we provided the background for our proposed regulation revisions in terms of the statute, legislative history, and case law.

The regulations that implement the ESA are located in title 50 of the Code of Federal Regulations. This final rule revises regulations found in part 17 of title 50, particularly in subpart D, which pertains to threatened wildlife, and subpart G, which pertains to threatened plants.

In this final rule, we amend §§ 17.31 and 17.71. Among other changes, language is added in both sections to paragraph (a) to specify that its provisions apply only to species listed as threatened species on or before the effective date of this rule. Species listed or reclassified as a threatened species after the effective date of this rule would have protective regulations only if the Service promulgates a species-specific rule (also referred to as a special rule). In those cases, we intend to finalize the species-specific rule concurrent with the final listing or reclassification determination. Notwithstanding our intention, we have discretion to revise or promulgate species-specific rules at any time after the final listing or reclassification determination.

This change makes our regulatory approach for threatened species similar to the approach that the National Marine Fisheries Service (NMFS) has taken since Congress added section 4(d) to the Act, as discussed below. The protective regulations that currently apply to threatened species would not change, unless the Service adopts a species-specific rule in the future. As of the date of this final rule, there are species-specific protective regulations for threatened wildlife in subpart D of part 17, but the Service has not adopted any species-specific protective regulations for plants. These final regulations do not affect the consultation obligations of Federal agencies pursuant

to section 7 of the Act. These final regulations do not change permitting pursuant to 50 CFR 17.32.

The prohibitions set forth in ESA section 9 expressly apply only to species listed as endangered under the Act, as opposed to threatened. 16 U.S.C. 1538(a). ESA section 4(d), however, provides that the Secretaries of the Interior and Commerce may by regulation extend some or all of the section 9 prohibitions to any species listed as threatened. *Id.* § 1533(d). 16 U.S.C. 1533(d). *See, also* S. Rep. 93-307 (July 1, 1973) (in amending the ESA to include the protection of threatened species and creating “two levels of protection” for endangered species and threatened species, “regulatory mechanisms may more easily be tailored to the needs of the” species). Our existing regulations in §§ 17.31 and 17.71, extending most of the prohibitions for endangered species to threatened species unless altered by a specific regulation, is one reasonable approach to exercising the discretion granted to the Service by section 4(d) of the Act. *See Sweet Home Chapter of Communities for a Great Or. v. Babbitt*, 1 F.3d 1, 7 (D.C. Cir. 1993) (“regardless of the ESA’s overall design, § 1533(d) arguably grants the FWS the discretion to extend the maximum protection to all threatened species at once, if guided by its expertise in the field of wildlife protection, it finds it expeditious to do so”), *altered on other grounds in rehearing*, 17 F.3d 1463 (D.C. Cir. 1994).

Another reasonable approach is the one that the Department of Commerce, through NMFS, has taken in regard to the species under its purview. NMFS did not adopt regulations that extended most of the prohibitions for endangered species to threatened species as we did. Rather, for each species that they list as threatened, NMFS promulgates the appropriate regulations to put in place prohibitions, protections, or

restrictions tailored specifically to that species. In more than 40 years of implementing the Act, NMFS has successfully implemented the provisions of the Act using this approach.

Moreover, we have gained considerable experience in developing species-specific rules over the years. Where we have developed species-specific 4(d) rules, we have seen many benefits, including removing redundant permitting requirements, facilitating implementation of beneficial conservation actions, and making better use of our limited personnel and fiscal resources by focusing prohibitions on the stressors contributing to the threatened status of the species. This final rule will allow us to capitalize on these benefits in tailoring the regulations to the needs of threatened species.

For example, we finalized a species-specific 4(d) rule for the coastal California gnatcatcher (*Polioptila californica californica*) on December 10, 1993 (58 FR 65088). In that 4(d) rule, we determined that activities that met the requirements of the State of California's Natural Communities Conservation Plan for the protection of coastal sage scrub habitat would not constitute violations of section 9 of the Act. Similarly, in 2016, we finalized the listing of the Kentucky arrow darter (*Etheostoma spilotum*) with a species-specific 4(d) rule that exempts take as a result of beneficial in-stream habitat enhancement projects, bridge and culvert replacement, and maintenance of stream crossings on lands managed by the U.S. Forest Service in habitats occupied by the species (81 FR 68963, October 5, 2016). As with both of these examples, if the proposed rule is finalized, we would continue our practice of explaining in the preamble the rationale for the species-specific prohibitions included in each 4(d) rule.

These final regulations would remove the references to subpart A in § 17.31 and § 17.71. In § 17.31, we specify which sections apply to wildlife, to be more transparent as to which provisions contain exceptions to the prohibitions. In § 17.71, we remove all reference to subpart A, because none of those exceptions apply to plants.

In finalizing the specific changes to the regulations that follow, and setting out the accompanying clarifying discussion in this preamble, the Service is establishing prospective standards only. Nothing in these final revised regulations is intended to require (now or at such time as these regulations may become final) that any previous listing or reclassification determinations or species-specific protective regulations be reevaluated on the basis of any final regulations. The existing protections for currently listed threatened species are within the discretion expressly delegated to the Secretaries by Congress.

Pursuant to section 10(j) of the Act, members of experimental populations are generally treated as threatened species and, pursuant to 50 CFR 17.81, populations are designated through population-specific regulation found in §§ 17.84–17.86. As under our existing practice, each such population-specific regulation will contain all of the applicable prohibitions, along with any exceptions to prohibitions, for that experimental population. None of the changes associated with this rulemaking will change existing special rules for experimental populations. Any 10(j) rules promulgated after the effective date of this rule that make applicable to a nonessential experimental population some or all of the prohibitions that statutorily apply to endangered species will not refer to 50 CFR 17.31(a); rather, they will instead independently articulate those prohibitions or refer to 50 CFR 17.21.

We are finalizing the revised regulations as proposed without further changes. In these final regulation revisions, we focus our discussion on significant and substantive comments we received during the comment period. For additional background on the statutory language, legislative history, and case law relevant to these regulations, please see our proposed regulation revision, which is available at <http://www.regulations.gov> under Docket No. FWS–HQ–ES–2018–0007.

This final rule is one of three related final rules that we are publishing in the *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 listing or reclassification determination under section 4 of the Act be reevaluated.

Final Regulatory Revisions

Summary of Comments and Recommendations

In our proposed rule published on July 25, 2018 (83 FR 35174), we requested public comments on our specific proposed changes to 50 CFR part 17. We received several requests for public hearings and requests for extensions to the public comment period. However, we elected not to hold public hearings or extend the public comment period beyond the original 60-day public comment period. We received more than 69,000 submissions representing hundreds of thousands of individual commenters by the deadline on September 24, 2018. Many comments were nonsubstantive in nature, expressing either general support for or opposition to provisions of the proposed rule with no supporting information or analysis or expressing opinions regarding topics not

covered within the proposed regulation. We also received many detailed substantive comments with specific rationale for support of or opposition to specific portions of the proposed rule. Below, we summarize and respond to the significant, substantive comments sent by the September 24, 2018, deadline and provide responses to those comments.

Comment 1: Many commenters stated that rescinding the previous regulation, referred to as the “blanket rules,” will leave threatened species with no protections or prohibitions in place, which will result in their status declining even more and the Service being unable to conserve them.

Our Response: In the proposed rule, we stated our intention to finalize species-specific 4(d) rules concurrent with final threatened listing or reclassification determinations. In this final rule, we restate our intention to finalize species-specific section 4(d) rules concurrently with final listing or reclassification determinations. Finalizing a species-specific 4(d) rule concurrent with a listing or reclassification determination ensures that the species receives appropriate protections at the time it is added to the list as a threatened species (e.g., we anticipate that foreign species 4(d) rules will generally include prohibitions of import and export and species-specific 4(d) rules for marine mammals will generally incorporate applicable provisions of the Marine Mammal Protection Act). This approach also adds efficiency, predictability, and transparency to the rulemaking process because it correlates the Service’s analysis of threats impacting the species (as discussed in the final listing or reclassification rule) to its analysis of protective regulations for the species. The publication of *Federal Register* documents that propose and finalize both listing and 4(d) rules simultaneously adds

administrative efficiencies and cost-savings to the listing process relative to the time and cost of conducting those two processes sequentially.

We expect this concurrent process to promote transparency and predictability in the rulemaking process for the regulated community. Publishing species-specific 4(d) rules concurrent with the classification rules provides the public knowledge of the primary drivers to the species' status. The 4(d) rule includes specific actions or activities that can be undertaken that would or would not impair species' conservation. In turn, this information may assist with streamlining future section 7 consultations. For example, if project activities could be tailored to avoid forms of take prohibited by the 4(d) rule, consultation on those activities should be more straightforward and predictable. Furthermore, we anticipate landowners would be incentivized to take actions that would improve the status of endangered species with the possibility of downlisting the species to threatened and potentially receiving regulatory relief in the resulting 4(d) rule. As a result, we believe these measures to increase public awareness, transparency, and predictability will enhance and expedite conservation.

Comment 2: Several commenters stated that rescinding the blanket rules will allow for political interference and industry pressure on the Service to reduce protections and prohibitions of threatened species at the detriment of species conservation.

Our Response: As explained in the preamble to the proposed regulation, the intent of this regulation is to focus prohibitions on the stressors contributing to the threatened status of the species and to facilitate the implementation of beneficial conservation efforts. This practice of tailoring regulations to individual threatened species is guided by the Service's extensive history of implementing the Act. Our

determinations about which prohibitions, exceptions to the prohibitions, or protective regulations should be applied to threatened species have consistently been, and will continue to be, based upon the best available scientific and commercial information available to us at the time of listing.

Comment 3: Many commenters stated that FWS has a substantial listing and reclassification workload and lacks the additional resources necessary to promulgate species-specific 4(d) rules for every species added to the list as threatened. They stated that the additional resources necessary to promulgate additional rules will impact FWS' ability to put into place the protections necessary and species will be left unprotected.

Our Response: Promulgating species-specific 4(d) rules for every threatened species may require additional resources at the time of listing relative to our prior practice of defaulting to invoking the blanket rules. If historical percentages of threatened species and endangered species determinations were to continue into the future, we estimate that each year approximately four species would be listed as threatened species; therefore, we would develop four species-specific 4(d) rules per year. Historically, we finalized an average of 2 species-specific 4(d) rules per year (37 species-specific 4(d) rules over 21 years (Service 2019). However, in the past 10 years, we have promulgated 17 domestic and 6 foreign species-specific rules (2.3 per year) as compared to 12 domestic and 2 foreign species-specific rules in the 11 years prior (1.3 per year) (Service 2019). We expect to continue with an increased rate of issuing species-specific rules in the coming years. Therefore, we expect that we would promulgate species-specific rules for most or all species listed as threatened even if the blanket rule were to remain in place.

Developing species-specific 4(d) rules is a prudent and efficient use of our resources because of the benefits gained from tailoring protections specific to the needs of the species. When we tailor regulations by limiting the prohibitions to those activities that are causing the threat of extinction, we save the public and FWS resources by reducing the need for section 10 permits. Likewise, tailored regulations will encourage actions compatible with, or supportive of, a species' conservation. Tailored prohibitions may also assist the Service and other Federal agencies in streamlining the section 7 consultation processes for actions that result in forms of take that are not prohibited by a 4(d) rule. For example, the Services would have already determined that forms of take not prohibited by a 4(d) rule were compatible with the species' conservation, which should streamline our analysis on whether an action would jeopardize the continued existence of the species and would streamline the incidental take statement, if required. Species-specific regulations will also allow the Service to facilitate and promote conservation actions that will aid in the conservation of threatened species. In addition, because we intend to put in place species-specific rules at the time of listing (as noted in our response to comment (1), we will continue to rely on our analysis of stressors to the species from the listing determination, including forms of "take," that are acting on a species. Because of this concurrent analysis of all factors influencing the species carrying over from the listing determination, we anticipate the development of species-specific protective regulations will be more efficient than if done in separate rulemakings.

In general, the provisions of a 4(d) rule should be closely tied to the species' needs and primary factors influencing the biological status identified in the Species

Status Assessment (SSA) report or other analysis of the species' biological status. Determining which protective regulations or section 9 prohibitions or exceptions to prohibitions a species requires to address the stressors leading to threatened species status logically flows from our analyses at the time of listing. Furthermore, when developing new species-specific 4(d) rules, we intend to review existing species-specific 4(d) rules that could be used as a model or applied to the species in question. This approach would be beneficial when there are species with similar threats or that occur in a similar geographic area, or species with similar life histories or similar biological needs. For example, the Service has an existing species-specific 4(d) rule for threatened species within the parrot family, which is found at 50 CFR 17.41(c), that includes protective regulations for four different species. Where appropriate, the Service adds additional listed members of the parrot family to this rule. In this fashion, developing species-specific regulations will not be as time consuming or burdensome as the commenters predict because the Service will be able to rely on existing regulatory language and analysis. Similar examples are the Service's existing species-specific 4(d) rules for threatened primates (50 CFR 17.40(c)), crocodilians (50 CFR 17.42(c)), certain fish (50 CFR 17.44(c), (h), and (j)), and certain butterflies (50 CFR 17.47(a)).

Comment 4: Several commenters stated that the prior regulations for threatened species have been working to conserve threatened species for the last 40 years and FWS should not rescind them.

Our Response: We are required to develop regulations as described in section 4(d) of the Act that are necessary and advisable for the conservation of threatened species. Additionally, section 4(d) of the Act provides us the authority to prohibit

specific forms of take. Developing species-specific 4(d) rules will enhance transparency to the regulated public because particular forms of incidental take that are prohibited or excepted will be enumerated in the species-specific 4(d) rule. The only thing that this rulemaking will change is that the decision about what regulations to put in place will now by necessity be in the form of promulgating a species-specific rule.

Although the blanket rules have worked, and will continue to work, to conserve already-listed threatened species, we believe that species-specific 4(d) rules for threatened species tailor species' protection with appropriate regulations that may incentivize conservation, reduce unneeded permitting, or streamline section 7 consultation processes as described above. In practice, the FWS has been promulgating more species-specific 4(d) rules in the last decade. The Service has finalized 22 species-specific 4(d) rules in the last decade (2009–2018) compared to finalizing 13 species-specific rules in the 12 years prior (1997–2008). Consequently, we have found significant benefits from developing and implementing species-specific 4(d) rules, such as removing redundant permitting requirements, facilitating implementation of beneficial conservation actions, and making better use of our limited personnel and fiscal resources by focusing prohibitions on the stressors contributing to the threatened status of the species.

This rule will facilitate beneficial conservation actions. For example, the species-specific 4(d) rule for the elfin-woods warbler (81 FR 40547, June 22, 2016) sets forth a comprehensive set of conservation measures regarding otherwise lawful activities for conversion of sun-grown to shade-grown coffee plantations, riparian buffer establishment, and reforestation and forested habitat enhancement. The 4(d) rule

provides details on the timing and acceptable methods by which these activities can occur such that any incidental take would not be a violation of the Act. Thus, projects that meet the conservation measures for the elfin-woods warbler outlined in the species-specific 4(d) rule do not need an incidental take permit from the Service in order to proceed. Likewise, the species-specific 4(d) rule for the Kentucky arrow darter (81 FR 68984, October 5, 2016) contains recommended conservation measures that, when conducted in accordance with the 4(d) rule, ensure that incidental take would not be considered a violation of the Act. The species-specific 4(d) rule details activities such as in-stream restoration or reconfiguration, bank stabilization, bridge and culvert replacement or removal that must be conducted in accordance with conservation measures that maintain connectivity of habitat, minimize instream disturbance, and maximize the amount of in-stream cover. Therefore, projects that are conducted in accordance with the conservation measures in the species-specific 4(d) rule for the Kentucky arrow darter do not require an incidental take permit from the Service.

Comment 5: Several commenters stated that FWS did not provide enough justification or logical rationale for why the change is necessary.

Our Response: Our preamble to the proposed rule provides an explanation of why we proposed to change our prior practice of the blanket rules. This regulatory change to emphasize the creation of species-specific 4(d) rules is within the discretion provided by the Act. We recognize that our prior “blanket rules” were also considered “reasonable and permissible” constructions of section 4(d) of the Act. *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d 1, 8 (D.C. Cir. 1993), *modified on other grounds on reh’g*, 17 F.3d 1463 (D.C. Cir. 1994), *rev’d on other*

grounds, 515 U.S. 687 (1995). For this reason, we are not altering the existence of the “blanket rules” for species already listed as threatened. However, we conclude that moving to an emphasis on species-specific regulations is also a reasonable and permissible interpretation of the discretion found in section 4(d) of the Act. As explained elsewhere, we believe this change will aid in the conservation of species. We also consider this change to further highlight the statutory distinction between species meeting the definitions of “endangered species” and “threatened species.” This change would make our regulatory approach for threatened species similar to the approach that NMFS has taken since Congress added section 4(d) to the Act. NMFS did not adopt regulations that extended most of the prohibitions for endangered species to threatened species as we did. Rather, when putting into place protections for threatened species, NMFS promulgates the appropriate regulations regarding section 9 prohibitions, exceptions to prohibitions, or other regulatory protections tailored specifically to that species. In more than 40 years of implementing the Act, NMFS has successfully implemented the provisions of the Act using this approach.

Moreover, the Service has gained considerable experience in developing species-specific rules over the past decade. As noted elsewhere in this response to comments, we have found species-specific 4(d) rules beneficial in removing redundant permitting requirements, facilitating implementation of beneficial conservation actions, and making better use of our limited personnel and fiscal resources by focusing prohibitions on the stressors contributing to the threatened status of the species. For instance, some species-specific 4(d) rules would not require a Federal permit for incidental take resulting from activities that are conducted under a State permit if the permit was issued pursuant to a

State program that furthers the goals of the Act. Other species-specific 4(d) rules may set forth exceptions to take prohibitions for activities that are de minimis in their effect on the species, or beneficial when conducted in adherence to certain timeframes or using certain protocols (e.g., elfin woods warbler species-specific 4(d) rule; 81 FR 40547, June 22, 2016). This regulatory revision allows us to capitalize on these benefits in tailoring section 9 prohibitions, exceptions to prohibitions, or other regulatory protections to the conservation needs of the species.

We conclude that, while the prior “blanket rules” were one possible means of implementing section 4(d) of the Act, the changes finalized today will better tailor protections to the needs of the threatened species while also providing meaning to the statutory distinction between species meeting the definitions of “endangered species” and “threatened species.”

Comment 6: Some commenters stated that this change is not actually aligning the Service’s practice with NMFS, because NMFS does not consistently promulgate species-specific 4(d) rules for threatened species.

Our Response: NMFS does not have a default blanket rule for threatened plants and animals but rather approaches each species on a case-by-case basis on the basis of the discretion afforded under section 4(d). Therefore, rescinding the Service’s blanket rules will closely align the two agencies’ regulatory approaches. Although we have indicated that our intention is to promulgate species-specific 4(d) rules at the time of listing, we do not read the Act to require that we promulgate a 4(d) rule whenever we list a species as a threatened species.

Comment 7: Some commenters stated that if a threatened species did not have

section 9 prohibitions, private landowners would not have an incentive to conserve species and landowners may be unlikely to enter into partnership agreements to conserve threatened species.

Our Response: We intend for each species listed or reclassified as a threatened species to have a species-specific 4(d) rule that outlines section 9 prohibitions, exceptions to prohibitions, or other regulatory protections as appropriate. Any species-specific 4(d) will follow the Service's standard rulemaking process, which by law includes an opportunity for public comment on a proposed rule. As a result, private landowners will be aware of proposed regulations and have an opportunity to proactively engage in voluntary conservation efforts. By meaningfully recognizing the differences in the regulatory framework between endangered species and threatened species, we believe that crafting species-specific 4(d) rules will incentivize conservation for both endangered species and threatened species. Private landowners and other stakeholders may see more of an incentive to work on recovery actions for endangered species, with an eventual goal of downlisting to threatened species status with a species-specific 4(d) rule that might result in reduced regulation.

For threatened species, 4(d) rules can limit the scope of prohibitions so that they do not apply to certain activities conducted pursuant to conservation efforts contained in conservation plans or agreements. We anticipate that private parties, including landowners, will be incentivized to participate in conservation efforts identified in the 4(d) rule that protect the species. In these instances, specified activities would be able to continue without Federal regulation because of participation in the identified conservation plan. At the same time, the plan will provide conservation to the

threatened species. In addition, tailoring the prohibitions applicable to a threatened species identifies for the public the specific actions or activities that are driving the species to a threatened status. Developing species-specific 4(d) rules will incentivize positive conservation efforts to improve the species' status such that it no longer warrants listing.

Comment 8: Several commenters stated that the Service should include binding timeframes in the regulatory text as to when the final 4(d) rule would be promulgated. Some of these included the suggestion that it be within 90 days of the final listing, others stated that it should be concurrent with listing, and others did not provide a specific time period but stated that a set timeframe would be most transparent to the public.

Our Response: As stated above, we intend to finalize species-specific 4(d) rules concurrently with final listing or reclassification determinations. We believe this approach will be most efficient and will also ensure that threatened species have in place the protective regulations supporting their recovery. We considered including a regulatory timeframe to reflect our intention to promulgate 4(d) rules at the time of listing, but ultimately determined that creating a binding requirement was not needed. The Act does not mandate a specific requirement to implement protective regulations concurrently with threatened determinations.

Comment 9: We received many comments on topics that were not specifically addressed in our proposed regulatory amendment, but, instead, focus on issues that may arise during implementation of this rulemaking. These included recommendations on which existing species-specific 4(d) rules would provide a good model for future rules, opinions as to the scope of the Service's discretion in extending section 9 prohibitions in

future rules, views on how the Service should interpret the terms “necessary and advisable” in the Act, and suggestions of approaches to take in future guidance documents on how to develop species-specific 4(d) rules.

Our Response: The Service appreciates the many insightful comments and suggestions we received on developing species-specific 4(d) rules. While that input may inform the development of future species-specific 4(d) rules, policies, or guidance, in the interests of efficiency we are finalizing the revisions for which we specifically proposed regulatory text. The Service considered those comments, but is required only to respond to “significant” comments—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)). Comments that either were outside the scope of the issues we specifically addressed in our proposed regulatory amendments, or that raise questions that may arise during future implementation of this rulemaking, are not “significant” in the 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). We therefore will not respond to them at this time. However, to the extent commenters raised questions about the substance of future species-specific 4(d) regulations that have not been proposed, we urge commenters to provide this feedback when a proposed species-specific 4(d) regulation raises these concerns. Any species-specific 4(d) regulation will be proposed and subject to public comment prior to adoption by the Service.

After a review and careful consideration of all of the public comments received during the open public comment period, we have finalized this rule as proposed.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

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

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This 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 final 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 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. The following discussion explains our rationale.

This rulemaking revises the regulations for 4(d) rules for species determined to meet the definition of a “threatened species” under the Act. This final rule is fundamentally a procedural change for the Service that affects only the form of the Service’s decisions with respect to regulations that provide for the conservation of threatened species. The Service is therefore the only entity that is directly affected by this final regulation change at 50 CFR part 17. The statute states, “Whenever any species is listed as a threatened species . . . , the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species.” This provision requires the Secretary to make a decision about what protections to apply to threatened species. The blanket rules established that, as a general principle, the protections that the statute prescribes for endangered species are also necessary and

advisable to provide for the conservation of threatened species. But even with the blanket rules in place, it fell to the Secretary to decide, upon listing or classifying individual species as threatened, what protections to put in place for the species. That decision was in the form of whether to allow the relevant blanket rule to apply or to promulgate a species-specific rule. The need for that decision is even ensconced in the blanket rules themselves—they expressly contemplate that the Secretary could choose to promulgate a “special rule” that would replace the blanket rule and “contain all the applicable prohibitions and exceptions.” 50 CFR 17.31(c) and 17.71(c).

With promulgation of this rule, when species get listed in the future, the blanket rules will no longer be in place, but the Secretary will still be required to make a decision about what regulations to put in place for that species. The only thing that this rulemaking will change is that the decision about what regulations to put in place will now necessarily be in the form of promulgating a species-specific rule. To the extent that any regulations that provide for the conservation of threatened species affect external entities, those effects result from the substance of the subsequent rulemaking where the Service will decide what regulations would provide for the species’ conservation, not from this rulemaking, which affects only the form of that decision. As a result, no external entities—including any small businesses, small organizations, or small governments—will experience any economic impacts from this rule. We certify that this final rule will 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 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 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 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 rule is not a “significant regulatory action” under the Unfunded Mandates Reform Act. This final rule will not impose obligations 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 final 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 threatened species) and will not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether this final rule would have significant Federalism effects and have determined that a federalism summary impact statement is not required. This final rule pertains only to prohibitions for activities pertaining to threatened species under the Endangered Species Act and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

This 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 prohibitions to threatened species under the Endangered Species Act.

Government-to-Government Relationship with Tribes

In accordance with Executive Order 13175 “Consultation and Coordination with Indian Tribal Governments” and the Department of the Interior’s manual at 512 DM 2, we have considered 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, Service 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 Service concludes that the changes to these implementing regulations make general changes to the ESA implementing regulations and do not directly affect specific species or Tribal lands or interests. As explained earlier, the only thing that this rulemaking will change is that the decision about what regulations to put in place to provide for the conservation of threatened species will now necessarily be in the form of promulgating a species-specific rule. To the extent that any regulations that provide for the conservation of threatened species affect federally recognized Indian Tribes, those effects will result from the substance of the subsequent rulemaking where the Service will decide what regulations would provide for the species' conservation, not from this rulemaking, which affects only the form of that decision. Therefore, we conclude that this regulation does not have "tribal implications" under section 1(a) of E.O. 13175 and formal government-to-government consultation is not required by E.O. 13175 and related policies of the Department of the Interior. 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 rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) is not required. 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 (NEPA)

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), and the Department of the Interior Manual (516 DM 8). 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 two categorical exclusions listed at 43 CFR 46.210(i). First, the amendments are of a legal, technical, or procedural nature. Second, any potential impacts of this rule are too broad, speculative, and conjectural to lend themselves to meaningful analysis and will be examined as part of any NEPA analysis, if applicable, in stand-alone species-specific 4(d) rules. The revisions finalized in this action are intended to clarify, interpret, and implement portions of the Act concerning the procedures and criteria used for determining what protective regulations are appropriate for species added to or reclassified as threatened species on the Lists of Endangered and Threatened Wildlife and Plants.

These revisions are an example of an action that is fundamentally administrative, technical, or procedural in nature. As explained with respect to the Regulatory Flexibility Act, this final rule is fundamentally a procedural change for the Service that affects only the form of the Service's decisions with respect to regulations that provide for the conservation of threatened species. The Service is, therefore, the only entity that is directly affected by this final regulation change at 50 CFR part 17. The statute states, "Whenever any species is listed as a threatened species . . . , the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species." This provision requires the Secretary to make a decision about what protections to apply to threatened species. When species get listed in the future, the blanket rules will no longer be in place, but the Secretary will still be required to make a decision about what regulations to put in place for that species. The only thing that this rulemaking will change is that the decision about what regulations to put in place will now necessarily be in the form of promulgating a species-specific rule. To the extent any regulations that provide for the conservation of threatened species significantly affect the environment, those effects result from the substance of the subsequent rulemaking where the Service will decide what regulations would provide for the species' conservation, not from this rulemaking, which affects only the form of that decision. Therefore, this final rule falls within the categorical exclusion for rulemakings that are administrative, procedural, or technical in nature.

We completed an environmental action statement for the categorical exclusion for the revised regulations in 50 CFR part 17. The environmental action statement is available at <http://www.regulations.gov> in Docket No. FWS-HQ-ES-2018-0007.

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

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This final rule is not expected to affect energy supplies, distribution, and use. As explained earlier, the only thing that this rulemaking will change is that the decision about what regulations to put in place to provide for the conservation of threatened species will now necessarily be in the form of promulgating a species-specific rule. To the extent any regulations that provide for the conservation of threatened species affect energy supply, distribution, or use, those effects will result from the substance of the subsequent rulemaking where the Service will decide what regulations would provide for the species' conservation, not from this rulemaking, which affects only the form of that decision. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we hereby amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

1. The authority citation for part 17 continues to read as follows:

AUTHORITY: 16 U.S.C. 1361–1407; 1531–1544; and 4201–4245, unless otherwise noted.

2. Revise § 17.31 to read as follows:

§ 17.31 Prohibitions.

(a) Except as provided in §§ 17.4 through 17.8, or in a permit issued under this subpart, all of the provisions of § 17.21, except § 17.21(c)(5), shall apply to threatened species of wildlife that were added to the List of Endangered and Threatened Wildlife in § 17.11(h) on or prior to [INSERT EFFECTIVE DATE OF THE RULE], unless the Secretary has promulgated species-specific provisions (see paragraph (c) of this section).

(b) In addition to any other provisions of this part 17, any employee or agent of the Service, of the National Marine Fisheries Service, or of a State conservation agency that is operating a conservation program pursuant to the terms of a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by that agency for such purposes, may, when acting in the course of official duties, take those threatened species of wildlife that are covered by an approved cooperative agreement to carry out conservation programs.

(c) Whenever a species-specific rule in §§ 17.40 through 17.48 applies to a threatened species, none of the provisions of paragraphs (a) and (b) of this section will apply. The species-specific rule will contain all the applicable prohibitions and exceptions.

3. Revise § 17.71 to read as follows:

§ 17.71 Prohibitions.

(a) Except as provided in a permit issued under this subpart, all of the provisions of § 17.61 shall apply to threatened species of plants that were added to the List of Endangered and Threatened Plants in § 17.12(h) on or prior to [INSERT EFFECTIVE DATE OF THE RULE], with the following exception: Seeds of cultivated specimens of species treated as threatened shall be 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 these regulations.

(b) In addition to any provisions of this part 17, any employee or agent of the Service or of a State conservation agency that is operating a conservation program pursuant to the terms of a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by that agency for such purposes, may, when acting in the course of official duties, remove and reduce to possession from areas under Federal jurisdiction those threatened species of plants that are covered by an approved cooperative agreement to carry out conservation programs.

(c) Whenever a species-specific rule in §§ 17.73 through 17.78 applies to a threatened species, the species-specific rule will contain all the applicable prohibitions and exceptions.

Dated: _____.

David L. Bernhardt,

Secretary

Department of the Interior.

~~[Endangered and Threatened Wildlife and Plants; Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants]~~

Billing Code 4333-15

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-2018-0006; Docket No. 180202112-8112-01; 4500030113]

RIN 1018-BC88; 0648-BH42

**Endangered and Threatened Wildlife and Plants; Revision of the Regulations for
Listing Species and Designating Critical Habitat**

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

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the “Services” or “we”), revise portions of our regulations that implement section 4 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 procedures and criteria used for listing or removing species from the Lists of Endangered and Threatened Wildlife and Plants and designating critical habitat.

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

Applicability date: These revised regulations apply to classification and critical habitat rules for which a proposed rule was published after [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Public comments and materials received, as well as supporting documentation used in the preparation of this final regulation, are available on the Internet at <http://www.regulations.gov> in Docket No. FWS–HQ–ES–2018–0006.

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

On July 25, 2018, the Services published a proposed rule in the *Federal Register* (83 FR 35193) regarding section 4 of the Act and its implementing regulations in title 50 of the Code of Federal Regulations (CFR), part 424, which sets forth the procedures for the addition, removal, or reclassification of species on the Federal Lists of Endangered and Threatened Wildlife and Plants (lists) and designating critical habitat. In the July 25, 2018, *Federal Register* document, we provided the background for our proposed revisions to these regulations in terms of the statute, legislative history, and case law.

In this final rule, we focus our discussion on changes from the proposed revisions based on comments we received during the comment period and our further consideration of the issues raised. For background on the statutory and legislative history and case law relevant to these regulations, we refer the reader to the proposed rule (83 FR 35193, July 25, 2018).

In finalizing the specific changes to the regulations in this document, and setting out the accompanying clarifying discussion in this preamble, the Services are establishing prospective standards only. Although these regulations are effective 30 days from the date of publication as indicated in **DATES** above, they will apply only to relevant rulemakings for which the proposed rule is published after that date. Thus, the prior version of the regulations at 50 CFR part 424 will continue to apply to any rulemakings

for which a proposed rule was published before the effective date of this rule. Nothing in these final revised regulations is intended to require that any previously completed classification decision or critical habitat designation must be reevaluated on the basis of these final regulations.

This final rule is one of three related final rules that are publishing in today's *Federal Register*. All of these documents finalize revisions to various regulations that implement the Act.

Discussion of Changes from the Proposed Rule

In this section we discuss changes between the proposed regulatory text and regulatory text that we are finalizing today regarding the foreseeable future, factors for delisting, and designation of unoccupied critical habitat. We also explain a revision to the regulatory definition of “physical or biological features.” We are not modifying the proposed regulatory text for the section on prudent determinations of critical habitat or the proposed revision to 50 CFR 424.11(b). We are finalizing those sections as proposed.

Foreseeable Future

We proposed that the framework for the foreseeable future in 50 CFR 424.11(d) read as follows: “The term foreseeable future extends only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species’ life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time, but may instead explain the extent

to which they can reasonably determine that both the future threats and the species' responses to those threats are probable.”

The Services received numerous comments stating that many of the terms and phrases in the proposed framework are vague and unclear, and that the proposed framework impermissibly raises the bar for listing species as threatened species. Some commenters suggested in particular that “likely” should be used instead of “probable,” to avoid confusion and to ensure that the provision is consistent with the statutory definition of “threatened species.” In response to these comments and upon further consideration, we have revised the framework to read as follows: “The term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time.”

We have removed the phrase “conditions potentially posing a danger of extinction in the foreseeable future,” and are replacing it with “both the future threats and the species' responses to those threats.” In light of the public comments received, we determined that this particular phrase, as originally proposed, could be read incorrectly to imply that “conditions” could include something other than “threats,” and that “conditions” affecting the species need only be “potential conditions” and not actual or operative threats. In addition, we concluded that the phrase “posing a danger of extinction” could conflate the concept of the foreseeable future with the status of the

species, instead of indicating that the foreseeable future is the period of time in which the Services can make reliable predictions about the threats and the species' responses to those threats.

We have also replaced the word “probable” with the word “likely.” While we had intended “probable” to have its common meaning, which is synonymous with the term “likely,” we have determined that it is most consistent with the statutory definition of “threatened species” to instead use the term “likely.” We have deleted the term “probable” and replaced it with the term “likely” to avoid any confusion on this point and to address public comments. We clarify that by “likely” the Services mean “more likely than not.” This is consistent with the Services' long-standing interpretation and previous judicial opinions.

Factors Considered in Delisting Species

We are making one minor change to the proposed regulatory text for 50 CFR 424.11(e). We have replaced “will” with “shall” in the first sentence of this provision to make it consistent with the language in other sections of 50 CFR 424.11. While we have not made any other changes, we note that when we use the term “status review” in the context of evaluating extinction or not meeting the definition of a “species,” this review may not necessarily involve an evaluation of the species' status relative to the five listing factors in section 4(a)(1) of the Act. As is our common practice, if the Services determine the entity does not meet the statutory definition of a “species,” the status review would conclude at that point. Likewise, if the Services determine an entity is extinct, there would be no need for the Services to evaluate the factors affecting the species as part of a status review.

We received many comments expressing concern over removing the terms “recovery” and “error” from the regulatory text because of a perception that the basis of the Services’ actions would not be clear. As is the Services’ current practice, we will continue to explain in proposed and final delisting rules why the species is being removed from the lists—whether due to recovery, extinction, error, or other reasons. These revisions do not alter, in any way, the Services’ continued goal of recovery for all listed species.

Not Prudent Determinations

We proposed the following language in revised 50 CFR 424.12(a)(1)(v):

After analyzing the best scientific data available, the Secretary otherwise determines that designation of critical habitat would not be prudent.

We note that this formulation could be misconstrued to suggest that the Secretary may make a determination irrespective of the data, provided the Secretary first analyzes the data. This interpretation, although grammatically possible, was not our intent and is not permissible under the Act. However, given that numerous comments expressed concern about expanding circumstances when the Services may find critical habitat designation to be not prudent, we decided to reorder 50 CFR 424.12(a)(1)(v) as follows to avoid any possible confusion:

The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

Designating Unoccupied Areas

We proposed the following language in revised 50 CFR 424.12(b)(2): “The Secretary will only consider unoccupied areas to be essential where a critical habitat

designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species or would result in less efficient conservation for the species. Efficient conservation for the species refers to situations where the conservation is effective, societal conflicts are minimized, and resources expended are commensurate with the benefit to the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable likelihood that the area will contribute to the conservation of the species.”

The Services received numerous comments that the term “efficient conservation” is vague and would introduce a requirement not contained in the statute. We also received numerous comments that the reasonable likelihood standard was not defined and is unclear. In response to these comments and upon further consideration, we revised 50 CFR 424.12(b)(2) to read as follows: “The Secretary will designate as critical habitat, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species only upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

We have removed the proposed language regarding “efficient conservation.” Therefore, we will only designate unoccupied critical habitat if we determine that occupied critical habitat is inadequate for the conservation of the species. Public comments indicated that the “efficient conservation” concept was confusing and that implementation of this provision would be inordinately complex and difficult.

We have also revised the proposed language by replacing “reasonable likelihood” with “reasonable certainty.” Although “reasonable likelihood” and “reasonable certainty” both convey the need for information beyond speculation but short of absolute certainty, we find that the latter requires a higher level of certainty than the former. We intend the phrase “reasonable certainty” as applied to designation of unoccupied critical habitat in this final regulation to preclude designations of unoccupied critical habitat based upon mere potential or speculation—either as to the contribution of the area of unoccupied critical habitat to the species’ conservation or as to the existence of one or more of the physical or biological features essential to the conservation of the species. At the same time, we do not intend to require that designations of unoccupied critical habitat be based upon guarantees or absolute certainty about the future conservation contributions of, or features present within, unoccupied critical habitat. In light of the public comments that the “reasonable likelihood” language was undefined and unclear, and could allow too much discretion to designate areas that would not ultimately contribute to species conservation, we concluded that the language of this final rule better reflects the need for high confidence that an area designated as unoccupied critical habitat will actually contribute to the conservation of the species. We consider the phrase “reasonable

certainty” to confer a higher level of certainty than “reasonable likelihood,” meaning a high degree of certainty, but not to require absolute certainty.

The Supreme Court recently held that an area must be habitat before that area could meet the narrower category of “critical habitat,” regardless of whether that area is occupied or unoccupied. See *Weyerhaeuser Co. v. U.S. FWS*, 139 S. Ct. 361 (2018). We have addressed the Supreme Court’s holding in this rule by adding a requirement that, at a minimum, an unoccupied area must have one or more of the physical or biological features essential to the conservation of the species in order to be considered as potential critical habitat. We note that we do not in the rule attempt to definitively resolve the full meaning of the term “habitat.”

First, the language and structure of the statute support this interpretation. By its very terms the Act requires that areas designated as critical habitat be habitat for the species: “The Secretary . . . shall . . . designate any *habitat* of [a listed] species which is then considered to be critical habitat” (section 4(a)(3)(A)(i) of the Act (emphasis added)). Moreover, paragraph (C) of the statutory definition of “critical habitat” at section 3(5) makes clear that “critical habitat shall not include the entire geographical area which can be occupied by the [listed] species.” The phrase “can be occupied” in the definition demonstrates that all critical habitat—both occupied and unoccupied alike (the use of “can be” instead of “is” demonstrates that the provision is not limited to occupied habitat)—must be habitat because the only way that an area “can be occupied” is if it is habitat. Further, the use of the present tense—“are essential”—in section 3(5)(A)(ii) indicates that for an unoccupied area to qualify as “critical habitat,” it must currently be essential for the conservation of the species. The Services interpret this requirement to

mean that there is a reasonable certainty both that the area currently contains one or more of the physical or biological features essential to the conservation of the species and that the area will contribute to the species' conservation. A reasonable reading of the statutory definition of "unoccupied" critical habitat would find that areas that do not contain at least one of the features essential to life processes of the species or will not contribute to the conservation of the species cannot be essential for conservation.

Second, the legislative history supports the conclusion that unoccupied habitat must contain one or more of those physical or biological features essential to the conservation of the species. While the 1973 Act did not define "critical habitat," the Services' 1978 regulations did define "critical habitat" as "any air, land, or water area . . . and constituent elements thereof, the loss of which would appreciably decrease the likelihood of survival and recovery of a listed species The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion." 43 FR 870, 874–875 (Jan. 4, 1978).

In response to the Tellico Dam decision by the Supreme Court, *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), Congress amended the Act in a number of ways, including by providing a statutory definition of "critical habitat." Notably, Congress did not adopt the Services' regulatory definition. Congress was concerned that the agencies' "regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat." H.R. Rep. No. 95-1625, at 25 (1978).

The House “narrow[ed]” the definition and told the agencies to be “exceedingly circumspect in the designation of critical habitat outside of the presently occupied areas of the species.” *Id.* at 18, 25. Additionally, the Senate Report noted there is “little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are critical to a species’ continued survival.” S. Rep. No. 95-874, at 10 (1978).

The Senate Report recognized the potential value of designating unoccupied habitat to expand populations, but questioned how broadly it could be used. *Id.* at 9-10 (“The goal of expanding existing populations of endangered species in order that they might be delisted is understandable”; “This process does, however, substantially increase the amount of area involved in critical habitat designation and therefore increases proportionately the area that is subject to the regulations and prohibitions which apply to critical habitats”). The Senate specifically criticized designations of critical habitat that include land “that is not habitat necessary for the continued survival” of the species, but is instead “designated so that the present population within the true critical habitat can expand.” *Id.* at 10.

Thus, we conclude that Congress intended that the test be more demanding for designating unoccupied critical habitat than for occupied habitat. All the courts to address this issue have agreed with this general principle. *E.g., Home Builders Ass’n v. U.S. Fish & Wildlife Service*, 616 F.3d 983, 990 (9th Cir. 2010) (“Essential conservation is the standard for unoccupied habitat . . . and is a more demanding standard than that of occupied critical habitat.”); *Cape Hatteras Access Pres. All. v. U.S. Dep’t of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) (“it is not enough that the area’s features be essential

to conservation, the area itself must be essential”). As the Act and its legislative history makes clear, Congress intended that unoccupied critical habitat be defined more narrowly than as areas contemplated for species expansion. H.R. Rep. No. 95-1625 pp. 18, 25 (1978); S. Rep. No. 95-874, at 9-10 (1978). We have concluded that requiring that areas contain one or more features that the species needs furthers this congressional intent.

Note that, although the Conference Committee changed the definition of “critical habitat” so that it was no longer modeled after the 1978 regulatory definition as closely, Congress did not call into question the rest of that definition, which focused uniformly on aspects of habitat that were analogous to the concept of “essential features”: “‘Critical habitat’ means any air, land, or water area . . . and constituent elements thereof The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air.” 43 FR 870, 874–875 (Jan. 4, 1978). Moreover, areas outside the occupied geographical range are not likely to be “essential for the conservation of the species” unless they contain at least one of the features that are essential for survival and recovery of the species.

We acknowledge that the reference to “physical or biological features” in the definition of “critical habitat” only occurs in the portion addressing occupied habitat. Nevertheless, given that Congress intended that a higher standard apply to the designation of unoccupied critical habitat than to the designation of occupied critical habitat, the Services conclude that it furthers congressional intent to require that those areas contain one or more of the physical or biological features that are essential to the conservation of the species. This interpretation retains the 1978 regulation’s focus on

physical or biological features and furthers the objective Congress referenced when it adopted the definition of “critical habitat” that included both occupied and unoccupied habitat: allowing for the possibility of protecting areas that are reasonably certain to contribute to the conservation of the species while limiting the designation to areas where the species can survive.

We note that the Services have not previously taken the position that unoccupied habitat must contain physical or biological features that are essential to the conservation of the species. In fact, in litigation FWS has sometimes argued the contrary. *E.g.*, *Weyerhaeuser Co. v. U.S. FWS*, No. 17-71 (S. Ct.); *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015). Although our previous interpretation was reasonable, we have revisited our interpretation in light of the recent *Weyerhaeuser* decision, which held that critical habitat must be “habitat.” Given the ambiguity of the language at issue, we may interpret it in any manner that is a reasonable construction of the Act and consistent with controlling court decisions.

Physical or Biological Features

We received a number of comments in response to our invitation for recommendations on whether the Services should consider modifying the definition of “physical or biological features” at 50 CFR 424.02. We adopted this regulatory definition in 2016 to provide an interpretation of this term, which appears in the Act’s definition of “critical habitat,” that was simpler and closer to the statutory text than the prior approach we had followed since 1984. The prior approach had involved

identification of “primary constituent elements,” which is a term not used in the statute and which we found led to significant confusion.

We defined the term “physical or biological features” at a general level in 2016, with the expectation that the Services would first identify the physical or biological features that support the species’ life-history needs, and then narrow that group of features down to a subset of those features that meet all the requirements the statute imposes for features that could lead to a designation of occupied critical habitat. Thus, once physical or biological features had been identified, the Services would apply the language from section 3(5)(A) of the Act. That language layers on additional qualifiers, including that the features “are essential to the conservation of the species” and “may require special management considerations or protection.” Further, the statute limits designation of occupied habitat to “specific areas” on which one or more of those features are found.

Many commenters expressed concern that the definition should be more clearly limited only to those features that could, in the context of the statutory requirements, actually lead to designation of a specific area as critical habitat.

We have decided in the interests of clarity to make the following minor modifications to the existing definition: “*Physical or biological features essential to the conservation of the species.* The features that occur in specific areas and that are essential to support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat

characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.”

We find that the changes we are making, which we detail below, are helpful to emphasize the key statutory language and make clear that only those features that are essential to the conservation of the species can lead to a designation of occupied critical habitat (assuming the requirement that the features may require special management considerations or protection is also met). First, in order to bring such clarity directly into the regulatory text, we have found that we should identify the term more specifically. The full term used in the statutory definition of occupied critical habitat is "physical or biological features . . . *essential to the conservation of the species*," and therefore we are modifying the defined term to read “physical or biological features essential to the conservation of the species.”

Second, we incorporate the statutory requirement that essential features be found on specific areas by qualifying “features” with the new phrase “that occur in specific areas.” We note that the use of the word ‘on’ in the statute has been interpreted by the Services to mean ‘in’ when used in conjunction with specific areas. Therefore, “features found on specific areas” is synonymous with “features found in specific areas.” Finally, instead of referring to the broader group of features that “support the life-history needs” of the species, and in keeping with further focusing the scope of the defined term, we have added language specifying that these are the features which are “*essential* to support the life-history needs” of the species. We retain the rest of the language of the current definition, which makes clear that, in identifying the essential physical or biological

features, the Services are to articulate those features with the level of specificity previously associated with “primary constituent elements” (an issue we discuss further in response to comments, below).

Summary of Comments and Responses

In our proposed rule published on July 25, 2018 (83 FR 35193), we requested public comments on our specific proposed changes to 50 CFR part 424. We also sought public comments recommending, opposing, or providing feedback on specific changes to any provisions in part 424 of the regulations, including but not limited to revising or adopting as regulations existing practices or policies, or interpreting terms or phrases from the Act. In particular, we sought public comment on whether we should consider modifying the definitions of “geographical area occupied by the species” or “physical or biological features” in 50 CFR 424.02. We received several requests for public hearings and requests for extensions to the public comment period. Public hearings are not required for regulation revisions of this type, and we elected not to hold public hearings or extend the public comment period beyond the original 60-day public comment period. We received more than 65,000 submissions representing hundreds of thousands of individual commenters. Many comments were nonsubstantive in nature, expressing either general support for or opposition to provisions of the proposed rule with no supporting information or analysis. We also received many detailed substantive comments with specific rationale for support of or opposition to specific portions of the proposed rule. Below, we summarize and respond to the significant, substantive public

comments sent by the September 24, 2018, deadline and provide responses to those comments.

Comments on Presentation of Economic or Other Impacts

Comment: Most commenters disagreed with removing the phrase “without reference to possible economic or other impacts of such determination” and our proposal to present the economic impacts of listing determinations. Many stated that this change violates the intent of the Act and cited the Act and its legislative history in support of their statements. Furthermore, a commenter also stated that the Services are prohibited by the Act from compiling and presenting economic data on the listing of a species as a threatened or an endangered species, citing the conference report language from the 1982 amendments to the Act: “economic considerations have no relevance to determinations regarding the status of species and the economic analysis requirements of Executive Order 12291, and such statutes as the Regulatory Flexibility Act and the Paperwork Reduction Act, will not apply to any phase of the listing process.” Many commenters also questioned how the Services could compile such economic information and not have it influence their decision whether to list a species as a threatened or an endangered species, noting that the statute and legislative history are clear that listing decisions are to be based solely on the best scientific and commercial data available. In contrast, several commenters stated that providing the economic impacts of listing species shows transparency to the public and local, State, and tribal governments, and could be useful for planning purposes. Commenters noted that making this information available does

not mean that it will be used in the decisionmaking process, but it would provide important information about the impacts of implementing the Act.

Response: In this final rule, the Services remove the phrase “without reference to possible economic or other impacts of such determination.” As discussed in the preamble to the proposed rule, we acknowledge that the statute and its legislative history are clear that listing determinations must be made solely on the basis of the best scientific and commercial data available. Moreover, the listing determination must be based on whether a species is an endangered species or a threatened species because of any of the five statutory factors. However, the Act does not prohibit the Services from compiling economic information or presenting that information to the public, as long as such information does not influence the listing determination. Similarly, the statements Congress included in the legislative history focus on ensuring that economic information would not affect or delay listing determinations, but do not demonstrate an intention to prohibit the Services from compiling information about economic impacts. For example, the legislative history for the 1982 amendments to the Act describes the purposes of the amendments using the following language (emphases added): “to prevent non-biological considerations *from affecting* [listing] decisions,” Conf. Rep. (H.R.) No. 97-835 (1982) (“Conf. Rep.”), at 19; “[listing and delisting] decisions *are based* solely upon biological criteria,” Conf. Rep., at 20; “economic considerations *have no relevance to* [listing] determinations,” Conf. Rep., at 20; “to prevent [critical habitat] designation] *from influencing* the [listing] decision,” H.R. Rep. No. 97-567, at 12. Because neither the statute nor the legislative history indicates that Congress intended to prohibit the Services from compiling economic information altogether, we removed the language at issue.

Comment: Some commenters stated that Congress intended that “the balancing between science and economics should occur subsequent to listing” and pointed to statements in the legislative history and in the court’s decision in *Alabama Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1266 (11th Cir. 2007): “While ‘economic analysis’ is meant to ‘offer[] some counter-point to the listing of species without due consideration for the effects on land use and other development interests,’ Congress wanted ‘to prevent [habitat] designation from influencing the decision on the listing of a species,’ and for that reason intended that the ‘balancing between science and economics should occur subsequent to listing through the exemption process.’ House Report at 12 (emphasis added); cf. Senate Report at 4.”

Response: The commenters’ characterizations of the legislative history and the court’s decision in the *Alabama-Tombigbee* case are not accurate. In that case, FWS listed two fish without concurrently designating critical habitat, and the court concluded that Congress did not intend to prohibit designating critical habitat subsequent to the final listing decision. The court based its reasoning on the statute and legislative history: the requirement to complete final listing determinations within 1 year of listing proposals, the removal of the requirement to propose critical habitat concurrently with proposed listings, the addition of authority to make not-determinable findings for critical habitat, and the quoted language in the legislative history demonstrating Congress’s intent to keep consideration of economic factors (part of the critical habitat designation process) separate from listing decisions. Thus, the court in that case was analyzing not whether compilation of economic information *must* come after the final listing decision, but whether compilation of economic information during the critical habitat designation *may*

come after listing decisions. As a result, the decision in *Alabama-Tombigbee* and the legislative history that the court quoted in that case are an unsuitable comparison to the regulatory change the Services proposed. And, more fundamentally, the mandate that the Secretary “shall, concurrently with making a [listing] determination ..., designate any habitat of such species which is then considered to be critical habitat” is qualified by the “to the maximum extent prudent and determinable” language. Therefore, Congress authorized, but did not require, the Services to designate critical habitat after the final listing decision, and the Services continue to publish final critical habitat designations (whenever designation is prudent) concurrently with final listing decisions unless they are not determinable at the time of listing.

Comment: Some commenters stated that the Services’ comparison to the Environmental Protection Agency’s (EPA’s) practice of conducting cost-benefit analyses under the Clean Air Act’s National Ambient Air Quality Standards is irrelevant and pointed to differences between the Act and the Clean Air Act. Specifically, the Clean Air Act directs the EPA to compile economic information and has a follow-on process (development of State implementation plans) that the economic information informs. Other commenters stated that EPA’s process for completing a regulatory impact analysis (RIA) of the ambient air quality standards under the Clean Air Act is not comparable to the Services’ process for listing a species under the Act. These commenters stated that the costs associated with ambient air quality measures are more easily estimated, and that costs associated with listing a species do not necessarily have an economic value and assessing their “worth” or “value” would be very difficult. Some commenters also noted

that EPA typically does not “make reference” to the impact analysis in their rules proposing or adopting air standards.

Response: While the Services recognize that there are differences between the statutory frameworks of the Clean Air Act and the Act, the EPA example illustrates that it is possible for an agency to compile and present economic data for one purpose while not considering it in the course of carrying out a decision process where consideration of economic data is prohibited. Nothing in the Act precludes the agencies from compiling or disclosing information relating to the economic impacts for purposes of informing the public. With regard to whether EPA “makes reference” to its impact analyses in its rulemakings adopting national ambient air quality standards, we note that the commenter’s observation highlights an ambiguity in the existing regulatory language that we are removing. The commenter seems to equate “reference” to economic impacts to mean “making reference to,” *i.e.*, “citing,” the information in agency determinations or giving such considerations significance in the decisionmaking. However, the term “reference” can be construed more broadly as an instance of simply referring to something as a source of information, *i.e.*, to use or consult, which could be done in passing. It is not our intention to “make reference” to economic information in our listing determinations either by citing it or by considering it.

Comment: Some commenters noted that the Act does not expressly authorize compiling or referring to economic information regarding listing determinations. Some noted that it would not be appropriate to attempt to do so to inform critical habitat designations (citing *Arizona Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1173 (9th

Cir. 2010) (holding that analysis of the impacts of designation of critical habitat is separate from analyzing impacts from listing)).

Response: The Act does not expressly authorize compiling economic information, and the statute does not prohibit compiling the information in order to inform the public. We rely on our inherent authority to administer our programs in the interest of public transparency in concluding that the Services have discretion to compile such information regarding a particular listing if they choose.

Comment: Several commenters asserted that the Services’ reasoning for deleting the “without reference to economic or other impacts of listing” phrase contradicts their interpretation and reasoning from when they adopted the previous regulations following the 1982 amendments to the Act, which added the word “solely.” They cited to the Services’ proposed rule, which stated: “Changes made by the Amendments were designed to ensure that decisions in every phase of the listing process are based solely on biological consideration, and to prohibit considerations of economic or other non-biological factors from affecting such decisions. . . . This new paragraph is proposed to implement the requirement of the Amendments that determinations regarding the biological status of a given species not be affected or delayed by any consideration of the possible economic or other effects of such a determination.” 48 FR 36062 (Aug. 8, 1983).

Response: The preamble to the 1984 final rule originally adopting the existing language is illuminating. After the language was proposed in 1983, a commenter had recommended that the “without reference to possible economic or other impacts of such determination” not be included in the final language, but the Services responded that “no

substantial change” would result from adopting such a recommendation. 49 FR 38900, 38903 (Oct. 1, 1984). At the time, the Services felt that including the language would more clearly express Congressional intent and reflect the guidance in the Conference Report to the 1982 amendments, but also made clear their understanding that the legal effect of the 1982 amendment adding the word “solely” was to insure economic or other impacts were not “considered” by the decision-maker “as part of the identification and listing process,” *id.*, and to prevent such considerations from “affecting decisions regarding endangered or threatened status” or being “taken into account in deciding whether to list a given species.” *Id.* at 38900.

The statutory amendment requiring that listing determinations be based solely on the best scientific and commercial data did not address whether the Services could prepare information for the public on other aspects of the implications of their decisions. On its face, the statutory amendments merely required that the Services not take such matters into consideration in determining whether a species meets the definition of a threatened species or an endangered species. Some members of the public and Congress have become increasingly interested in better understanding the impacts of regulations including listing decisions. Therefore, we find it is in the public interest and consistent with the statutory framework to delete the unnecessary language from our regulation while still affirming that we will not consider information on economic or other impacts in the course of listing determinations.

Comment: Several commenters opined that removing the existing regulatory language “without reference to possible economic or other impacts of such determination” would signal that the Services’ commitment to abide by the will of

Congress to base listing decisions solely on the best scientific and commercial data has weakened. Some commenters suggested that the Services' motives were suspect given that the regulation has been in place since 1984 with no indication that implementation was problematic. Some claimed that removing the regulatory language was inconsistent with the Supreme Court's holdings in *T.V.A. v. Hill*, 437 U.S. 153 (1978).

Response: Removing the phrase does not signal any difference in the basis upon which listing determinations will be made. As we have affirmed in several instances through the proposed and final rules, the Services understand and appreciate the statutory mandate to base listing determinations solely on whether a species is an endangered species or a threatened species because of any of the factors identified in section 4(a)(1) using the best scientific and commercial data available. Removing this phrase from the regulation, which could be construed to not allow the Services to inform the public of the economic implications of the Services' listing decisions, will not violate any direction of Congress or holdings of the Supreme Court. Rather, we are responding to strong and growing interest by some members of Congress and the public for increased transparency regarding the economic impacts of regulations. We note that the *T.V.A.* decision was decided in the particular context of compliance with section 7 after a species had been listed and has no direct bearing on interpretation of the Act's listing provisions. *T.V.A.* was also decided before Congress amended section 4(a)(1) to include the term "solely," so its holding has no relevance to the interpretation of this term in the statute.

Comment: One commenter suggested that it was unnecessary to delete the "without reference to economic or other impacts" language if the Services' intent is merely to be able to inform the public of the impacts of listing. The commenter agreed

that Congress did not prohibit doing so, as long as the listing determinations are not influenced by such information, but noted that the Services had not pointed to any situation where the existing language had presented a hurdle to providing desired public information. Rather, the commenter asserted, maintaining the existing language in the regulations would provide a daily reminder to Service staff about the importance of cabining consideration in listing determinations to only the factors authorized under the Act.

Response: We believe that the removal of the phrase will more closely align the regulatory language to the statutory language. Because the prior language could be read to preclude conducting an analysis merely for the purposes of informing the public, it is more transparent to delete the phrase.

Comment: Many commenters asked for more information regarding when the Services would conduct an economic analysis for listing determinations, how the Services would estimate potential economic impacts, what criteria would be considered, and whether economic benefits of a particular species, which can be difficult to quantify, would be considered. Some commenters expressed concern that cost/benefit analyses would be skewed toward only accounting for potential costs. Another commenter suggested our impacts analysis include an analysis of the negative impacts to other species, as management for a listed species could be a contributing factor for the endangerment of a non-listed species.

Response: The Services are not creating a framework or guidelines for how or when the presentation of economic impacts of listing, reclassifying, or delisting species would occur as part of this rulemaking. We remain committed to basing species'

classification decisions on the best available scientific and commercial data and will not consider economic or other impacts when making these decisions.

Comment: Many commenters questioned how the Services would comply with the statutory timeframes if we conducted economic analyses on the listing determination. Commenters stated that the Services have not explained how they will deal with this additional workload. They also expressed concerns about the amount of time and effort it would take to gather the necessary economic or other impact information and stated that this added work would slow the number of listings that could be done under current budget conditions. Such a delay, the commenters stated, could make the Services more vulnerable to deadline litigation.

Response: The Services intend to comply with statutory, court-ordered, and settlement agreement timelines for classification determinations. The Services are equally committed to public transparency in the implementation of the Act. Additionally, we recognize the uncertainty of budget cycles and appropriated funding. Therefore, we will continue to prioritize our work according to the requirements of the Act and remain flexible to work on other actions as funding allows.

Comment: At least one commenter suggested that the Services should affirmatively declare that information regarding the economic or related impacts of a potential listing can be considered in making listing determinations, in light of the statutory reference to the best scientific “and commercial data” available.

Response: We decline to do so.

Comment: Some commenters stated that even though the Act does not expressly prohibit presenting information regarding economic impacts, doing so will contravene

Congress' intention that listing decisions should be purely a biological question immune from political concerns. They asserted that presenting analysis of economic impacts even merely to inform the public would open the Services to pressure to avoid listings where there are significant social, political, or economic implications. They noted that the provisions regarding designation of critical habitat expressly authorize consideration of economic and other impacts, demonstrating that Congress consciously chose not to authorize such for listing decisions. They cited the decision in *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988), as an example where the court set aside a decision not to list a species on the grounds that it was "arbitrary and capricious or contrary to law," predicting that such litigation and adverse results would be more common if the proposed change is finalized.

Response: Congress did not authorize the Services to consider the economic impacts of listing decisions. Therefore, the Services have expressly confirmed their intention that all listing determinations must be based solely on the best scientific and commercial data available. While the commenter is correct that the *Hodel* decision was unfavorable for FWS, resulting in remand of the determination not to list the northern spotted owl, the basis for the decision was the court's view of the sufficiency of the scientific support and explanation for the FWS' decision, rather than a direct consideration of whether economic considerations had impermissibly played a role in the determination.

Comment: The Services cannot rely on the Regulatory Flexibility Act (RFA) as providing authority for presentation of economic impact information of listing determinations because the Services have taken the position that the RFA is not

applicable to listing determinations. *See, e.g.,* Endangered and Threatened Wildlife and Plants: Final Rule to List the Taiwanese Humpback Dolphin as Endangered Under the Endangered Species Act, 83 FR 21182, 21186 (May 9, 2018).

Response: We do not rely on the RFA as a basis for presentation of economic impacts of classification determinations (H.R. Conf. Rep. No. 97-835, at 20 (1982)). The Services may elect to provide a presentation of economic impacts of particular listing decisions to inform the public of those costs. The Act does not preclude the compilation and presentation of those impacts to the public.

Comments on the Foreseeable Future

Comment: Commenters stated that if the intended goal of the proposed foreseeable future framework is to continue to follow a 2009 opinion from the Department of the Interior (M-37021) for interpretation of “foreseeable future,” as the Services indicate in the proposed rule, then there is no need to make the proposed revision to the regulations. Some commenters recommended that the Services simply base the “foreseeable future” on the best available data and not proceed with the proposed regulation, which does nothing to clarify how the Services will determine the foreseeable future.

Response: Although listing determinations must be based on the best available scientific and commercial data, the Services also must be able to determine the likelihood of a species’ future state, and in some circumstances the best available data may not be sufficient to go beyond speculation. In these cases, the data are insufficient to allow the Services to foresee the future threats and the species’ response to those threats so as to be

able to determine that a species is likely to become endangered in the future. To give meaning to the phrase “foreseeable future,” the Services are providing a consistent explanation of this term, and we find that it is appropriate to do so in our implementing regulations. While the two Services have both applied the principles articulated in a 2009 opinion from the DOI Office of the Solicitor when interpreting the phrase “foreseeable future,” including a foreseeable future framework in our joint implementing regulations gives the public more transparency, provides the Services with a shared regulatory meaning for this important term, and makes it clear that both agencies will adhere to the same framework.

Comment: Numerous commenters supported the Services’ effort to clarify the meaning of the term “foreseeable future”; however, most of these commenters also stated that one or more of the terms used in the proposed “foreseeable future” framework, such as “potential,” “probable,” “reasonably,” “reasonably determine,” and “reliable,” are vague, unclear, or could be misinterpreted. Commenters specifically requested that one or more of these terms be clarified or removed, because they give the public little understanding of what criteria the Services will use to evaluate the foreseeable future. Various commenters were concerned that the proposed foreseeable future language could allow for speculation, prevent or undermine the Service’s ability to rely on the best available science, result in a less streamlined process, or invite political interference with listing decisions.

Several commenters recommended that the terms “potentially” and “reasonably” be omitted, because those terms could be misread and dilute the statutory standard of “likely.” A commenter stated that “reasonably” could be misconstrued to suggest a

reasonable basis is sufficient, rather than the affirmative finding of “likely” actually required by the Act. Another commenter noted that a standard that relies on a mere “potential” for future conditions to pose a danger invites speculation about future circumstances, and, as the Services acknowledge, they should “avoid speculating as to what is hypothetically possible.” 83 FR at 35196, July 25, 2018.

Other commenters recommend specific edits, such as replacing “reasonably determine” with “scientifically determine,” and removal of the term being defined (i.e., “foreseeable future”) from the proposed definition of “foreseeable future.”

Response: We appreciate the many comments regarding the wording of the proposed “foreseeable future” framework. We agree with the comments that including the term “foreseeable future” as part of the definition of this term is somewhat circular and therefore not appropriate, so we have revised the language to remove this circular phrasing. We have also removed the phrase containing the word “potentially” as explained further in response to the comment below. However, we are not defining the terms “reliable” and “reasonably determine,” because these terms are commonly used and should be interpreted as having their everyday meaning. The regulatory framework is consistent with how these terms are used in the M-Opinion (M-37021, January 16, 2009), which states, in a footnote, that “the words “rely” and “reliable” [are used] according to their common, non-technical meanings in ordinary usage. Thus, for the purposes of this memorandum, a prediction is reliable if it is reasonable to depend upon it in making decisions.” As a concluding statement, the M-Opinion also states that ““reliable” does not mean “certain”; it means sufficient to provide a reasonable degree of confidence in the prediction, in light of the conservation purposes of the Act.” We find that these

statements make it clear how the Services intend to interpret these terms and conclude that further attempts to define words within the “foreseeable future” framework are not necessary.

Lastly, we find that the framework’s term “reasonably” does not dilute or establish an incompatible, lower standard for the affirmative finding of “likely” required by the statute. The foreseeable future framework acknowledges that we must make a ‘reasonable determination,’ based on the best available data. In other words, in the context of determining the foreseeable future, our conclusions need not be made with absolute certainty, but they must be reasonable, and must not be arbitrary or capricious. We also decline to replace the phrase “reasonably determine” with “scientifically determine,” because the foreseeable framework does not in any way alter the requirement that the Services rely on the best available scientific and commercial data when interpreting the foreseeable future and listing species as threatened. We fully intend to continue to apply the best available data when making conclusions about the foreseeable future.

Comment: Several commenters stated that the foreseeable future should not be based on general “conditions” and requested that we clarify that the word “conditions” refers to threats and species’ responses to those threats. Commenters stated the statute does not allow for broader consideration of any “conditions” that are not encompassed within the five factors defined by Congress. Another commenter also stated that the use of the term “conditions” in the context of the proposed regulatory framework suggests that the Services will only examine the environmental conditions affecting a species (i.e., the threat factors) and not the corresponding response of the species when determining the

species' future population status. The commenter noted that it is well established that a species cannot be listed merely because there is an identified threat (*e.g.*, *Ctr. for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 955 (N.D. Cal. 2010); *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1143 (9th Cir. 2001)). The commenter stated that by referencing conditions “potentially posing a danger of extinction,” the Services are not incorporating the appropriate level of certainty with respect to whether the “conditions” will occur and the corresponding relationship to the future status of the species. The Services are also raising the possibility that a “benefit of the doubt” standard could erroneously be applied during the listing determination (*Bennett v. Spear*, 520 U.S. 154, 176 (1997); *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011)).

Response: As some commenters point out, the Act requires listing determinations to be based on whether a species is an endangered species or threatened species because of one or more of the five factors in section 4(a)(1), and it is the Services' long-established practice to refer to these factors in listing determinations. The “foreseeable future” framework in these final regulations does not supplant those five factors or the statutorily required status review. Rather, use of the word “conditions” was intended to capture the full range of possible natural and manmade threats that may be affecting a particular species and that would be considered under section 4(a)(1). However, we now find it is more clear to simply use the word “threats,” rather than “conditions,” and thus have made this revision to the final regulatory text. In addition, after further consideration of the proposed language, we find that the phrase “potentially posing a danger of extinction” could be interpreted as implying that the Services would rely on a

“benefit of the doubt” standard for determining the existence of a threat or consider the mere possibility of threat occurring sufficient when assessing a species’ future status. This was not our intention, and we acknowledge that the statutory requirement to use the “best scientific and commercial data available” is intended “to ensure that the Act not be implemented haphazardly, or on the basis of speculation or surmise.” *See Bennett v. Spear*, 520 U.S. 154, 176-77 (1997) (construing substantially identical requirement in section 7 context). Thus, we have removed this phrase from the final regulatory language to eliminate this source of confusion.

Comment: A large number of comments addressed the Services’ use of the word “probable” within the proposed foreseeable future framework. Several commenters stated that the use of the word “probable” introduces more ambiguity to an already ambiguous framework and that it is unclear, for example, what degree of probability and certainty are required to be considered “probable.” Several commenters specifically requested that the Services clarify that the term “probable” means “likely” in this particular context, and others requested use of the word “likely” in place of “probable” to reflect the statutory standard. Some commenters stated that the word “probable” implies that the Services will rely on too low of an evidence threshold and that the word “probable” should be replaced with “clear and convincing.”

The majority of commenters who addressed this issue stated that use of the word “probable” would set too high of a bar for threatened listings, provides the Services greater latitude to reject listings, and contravenes Congress's intent that the Act “give the benefit of the doubt to the species” (H.R. Rep. No. 96-697, at 12 (1979)). The commenters also argued that the proposed regulation would be inconsistent with the

statements expressed in the M-Opinion (M-37021, January 16, 2009). Multiple commenters indicated specifically their view that the proposed framework is much narrower than that expressed in the 2009 M-Opinion, which does not use the term “probable,” and that the Services did not adequately explain their reasoning for departing from the standards expressed in the M-Opinion. Commenters further noted that the “probable” standard would undermine the Secretary's duty to list species that are primarily threatened by climate change. Others stated that it would prevent the application of the Act’s requirement to rely on the “best available scientific and commercial data” and that the Services cannot interpret the foreseeable future in a way that sets an arbitrary threshold for how much science is required before a species can be listed as threatened. Multiple commenters recommended that if the Services wish to adopt a definition in line with the M-Opinion, they should adhere more closely to the 2009 Solicitor's opinion or publish it as a draft joint policy for notice and comment, which would accord with the Services' past practice of publishing joint policies to interpret the Act’s key phrases such as "significant portion of the range" and "distinct population segment.”

Some commenters provided discussions of other reasons why use of a “probable” standard would be inappropriate. A group of commenters stated that use of the term “probable” implies that the Services may only consider threats that have a 50 percent or greater chance of occurring during a particular time period and that the Services have not explained how they would reliably quantify the percentage of likelihood of threats to species. These commenters also noted that it would be unlawful and arbitrary to discount several threats that may be, say, 40 percent likely but that would be extremely dangerous

to the species and that such an approach would be contrary to the Services' longstanding precautionary approach. *Cf.* 48 FR 43098, 43102–43103 (Sept. 21, 1983) (FWS guidelines for reclassification from threatened species to endangered species status based on magnitude and immediacy of threats). Other commenters pointed out the only way to assess what is “probable” requires quantitative methods such as statistical prediction and modeling. Several commenters stated that this approach is flawed in that it does not take into account the severity of the threats or the different types or levels of uncertainty associated with various threats.

Lastly, we received comments suggesting that because the Services used both terms—“likely” and “probable”—in the proposed regulatory framework, the inconsistent terminology suggests that different meanings are contemplated. Other comments noted that, to the extent that the Services intend “probable” to require any greater likelihood than the statutory term “likely” from the definition of “threatened species” at 16 U.S.C. 1532(20), it would be an impermissible interpretation of the statute, and that neither “likely” nor “probable” can permissibly be interpreted to require the probability of extinction is “more likely than not.”

Response: For maximum clarity and consistency with the statutory language, this final rule uses “likely” in place of “probable” in the relevant sentence of the provision describing the “foreseeable future.” We are making this change to avoid any unintended confusion. We further clarify that “likely,” in turn, means “more likely than not.” This interpretation is supported by case law (e.g., *Alaska Oil and Gas Association v. Pritzker*, 840 F.3d 671, 684 (9th Cir. 2016); *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 944 (D. Or. 2007); *WWP v. FWS*, 535 F.Supp.2d 1173, 1184 & n.3 (D. Idaho 2007)). Our

foreseeable future framework does not depart from the standards expressed in the 2009 M-Opinion that forms the basis for the framework (M-37021, January 16, 2009); rather, it is fully consistent with that opinion.

Our replacement of the term “probable” with “likely” within the foreseeable future framework should also eliminate concerns that the Services are impermissibly raising the bar for listing species as threatened to something beyond a threshold of “likely” or allowing that classification determinations could be based on anything other than the “best scientific and commercial data” standard. We must rely on the “best scientific and commercial data,” available, but that data may or may not indicate whether something is likely. To determine an event is likely, we must be able to determine that it is more likely to occur than not after taking the “best scientific and commercial data” into account. We will continue to apply the best available scientific and commercial data in making our listing determinations as required under the Act.

We appreciate the recommendation to develop and publish a more detailed policy based on the M-Opinion. However, at this time, we expect that the regulatory framework that we revise in this final regulation after considering public comment, in combination with the supporting text of the existing M-Opinion that further explains the background and reasoning for this longstanding approach, will provide adequate guidance to the Services.

Comment: Some commenters stated that when concluding that a species should be listed, the Services must specifically find “that both future threats and the species’ responses to those threats are probable.” In contrast, other commenters questioned the Services’ proposal to assess the foreseeable future based on both “future threats” and the

“species’ responses.” These commenters said this would involve a combined evaluation of both time and impact and instead recommended that the Services separate the concept of foreseeable future from its analysis of the potential threats that the Service can concretely determine will affect the species during that time period. Others cautioned that we should evaluate the species’ response at the population level because threats faced by one segment of the population do not necessarily result in a negative response by the population as a whole.

Response: This regulation takes the position that “the foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species’ responses to those threats are likely.” This approach is consistent with the M-Opinion (M-37021, January 16, 2009). It is not sufficient for us to determine that a particular threat is likely; we must also conclude that the manifestation of that threat is likely to result in a response from the species. By “species’ response” we mean a change in the species’ status after encountering the adverse effects of the threats. We cannot separate the forward-looking analysis of threats from the forward-looking consideration of how those threats are expected to affect the species. To do so would essentially prevent an evaluation of the species’ status in the foreseeable future.

With respect to consideration of threats operating in the foreseeable future that affect only a portion or some individuals within the species (*i.e.*, species, subspecies, or DPS) being evaluated for listing, we agree with the commenter that during a status review we must consider how that threat is affecting the particular species at a population or higher level. Listing decisions are ultimately based on a synthesis of all relevant data

regarding the status of the species and the threats, taking into consideration how those threats may vary spatially or temporally across individuals or populations of that species.

Comment: Several commenters referred to the Council on Environmental Quality's (CEQ's) implementing regulations for the National Environmental Policy Act (NEPA regulations) at 40 CFR 1502.22, which present discussion of reasonably foreseeable significant adverse impacts. The commenter noted that the NEPA regulations do not define "reasonably foreseeable," but requested that the Services adopt a regulatory definition for foreseeable future rather than apply a subjective, case-by-case approach for defining foreseeable future. Commenters specifically requested we adopt the following "accepted legal definition" or something similar: "A consequence is reasonably foreseeable if it could have been anticipated by an ordinary person of average intelligence as naturally flowing from his actions." The commenters stated that a definition along these lines would inject reasonable consideration of common sense into decisions that have such profound impacts on the human environment.

Response: As requested by the commenters, we reviewed the regulations at 40 CFR 1502.22, which address situations in which a Federal agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information. The CEQ NEPA regulations, as noted by the commenter, do not provide a definition for the term "reasonably foreseeable." Overall, we did not find these regulations useful in refining or revising the foreseeable future framework. The Act has a very different purpose and imposes different mandates on the Services than NEPA. Whereas NEPA directs agencies to engage in a process to consider a broad range of potential impacts as a

means to guide the agencies in choosing among possible actions, the Act directs specific actions and imposes a mandate that decisions be based on the best available information. We have not adopted the commenters' proposed alternative definition.

Comment: Many commenters stated that they supported the Services' attempt to clarify the term "foreseeable future" in the proposed regulations, and many agreed with the proposed qualitative framework in which the foreseeable future would be determined on a case-by-case basis using the best available scientific and commercial data for the particular species. However, some of these commenters stated that the foreseeable future should still be defined in terms of a specific period of time or range of years (*e.g.*, 20–25 years) so that the reasonableness of this particular aspect of threatened listings can be assessed in a meaningful way by the public. In contrast, many other commenters stated that the same time period should be applied as the foreseeable future for all species, because the information on foreseeability is not species dependent. We also received a specific recommendation to use a definition for the foreseeable future that is already in place and used by many indigenous people—the next seven generations of human life.

Response: Using a predetermined number of years or period of time (*e.g.*, seven generations) as a universally applied "foreseeable future" for all listings would be arbitrary and would preclude the Services from relying on the best available data. Although some threats might manifest according to certain consistent timeframes, the species' likely response to those stressors is uniquely related to the particular plant or animal's characteristics, status, trends, habitats, and other operative threats. Furthermore, when multiple threats affect a particular species, these threats may have synergistic effects that are also unique to that particular species. Therefore, we do not intend to

specify a particular timeframe to be applied universally to all species. However, we will continue to provide information regarding the particular timeframes used when evaluating threats and a species' risk of extinction to the extent possible in all listing decisions. Providing such information facilitates the public's ability to evaluate the reasonableness of the Services' listing decisions.

Comment: Multiple commenters recommended that the Services adopt a more quantitative approach in determining the foreseeable future to reduce uncertainty and litigation and increase transparency and consistency. Many of these commenters also recommended adopting certain quantitative approaches, such as: defining risk of extinction and uncertainty in a manner similar to approaches used by The Intergovernmental Panel on Climate Change; identifying timeframes over which certain threats (*e.g.*, wind-energy development) or certain population trends for specific taxonomic groups (*e.g.*, salmonids) are foreseeable; and using previous listing decisions to identify any consistent patterns in the time horizons used for certain types of threats or taxa.

Response: When quantitative methods are available and consistent with best practices, we use them along with other available data and methods. However, the 'best available data' standard under the Act does not necessarily require use of quantitative methods and data, and we are not specifying particular quantitative methods in the regulations we are finalizing today.

Comment: Several commenters stated that to assess the danger of extinction, and thus be able to list a species as threatened, the Services must first identify the extinction threshold for that species and the likelihood of reaching that point in the future.

Commenters noted that NMFS has explained previously that “[a] species is ‘threatened’ if it exhibits a trajectory indicating that in the foreseeable future it is likely to be at or near a qualitative extinction threshold below which stochastic/depensatory processes dominate and extinction is expected.” (NMFS, Interim Protocol for Conducting Endangered Species Act Status Reviews at 12 (2007).) Commenters also stated that in cases where the Services lack the data or ability to identify future population trends, assess the impact of population declines on the species’ overall population status, or establish an extinction threshold, it is not possible to determine or foresee the likelihood of future extinction for purposes of the listing determination. A commenter noted that Congress explained that the threatened classification was included to give effect to the Secretary’s ability to forecast population trends (S. Rep. No. 93-307 at 3 (July 1, 1973)).

Response: The Services do not need to identify an extinction threshold or the likelihood of reaching that threshold in the future in order to determine whether a species meets the definition of a threatened species. Rather than wait for such data and analyses to become available, the Services are required to apply the best available data to make a determination whether the species meets the definition of a “threatened species” or an “endangered species” as a result of any of the factors outlined in section 4(a)(1) of the Act. Secondly, predicting extinction thresholds requires certain data regarding population parameters and environmental variables, and it requires the use of appropriate models. Modeling extinction thresholds is often not possible with the nature or type of data available.

Comment: A commenter recommended that the Services formally define “in danger of extinction” and apply the definitions and analysis in the remanded

memorandum that FWS filed with the United States District Court for the District of Columbia in *In re: Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*, No. 08-mc-00764-EGS, Doc. No. 237 (Dec. 22, 2010) (“Polar Bear memo”).

Response: FWS developed the Polar Bear memo after the court in that case held that the definition of “endangered species” under the Act is ambiguous and ordered the agency to provide on remand an additional explanation for the legal basis of the agency’s decision to list the polar bear as a threatened species. To develop the Polar Bear memo, FWS surveyed the history of the agency’s listing determinations in light of the text of the Act and the applicable legislative history and encapsulated FWS’s overall, general understanding of the phrase “in danger of extinction” as “currently on the brink of extinction in the wild.” Polar Bear memo at 3. FWS noted that it does not employ its general understanding in a narrow or inflexible way and that a species need not be likely to become extinct to be “on the brink of extinction.” *Id.* The memo also described four categories of circumstances in which FWS had found species to be “currently on the brink of extinction in the wild.” *Id.* at 4-6.

Although the Polar Bear memo is not binding and does not have the force of law, *see Alliance for the Wild Rockies v. Zinke*, 265 F. Supp. 3d 1161, 1180-81 (D. Mont. 2017), it remains a statement by FWS as to what may constitute “in danger of extinction.” FWS stated explicitly in the memo that it applied only to the listing decision for the polar bear. Polar bear memo at 1 n.1. FWS’s general understanding, the historical survey of its listing decisions in the memo, and the associated discussion in the Polar Bear memo can still serve as a useful starting point for analyzing whether a species is in danger of extinction.

As the Polar Bear memo noted, FWS has not promulgated a binding interpretation of “in danger of extinction,” due in part to the contextual and fact-dependent nature of listing determinations. *Id.* at 3. The Services continue to conclude that codification of FWS's general understanding of “in danger of extinction” is not necessary at this time.

Comment: We received comments expressing disagreement with the Services’ proposed framework for foreseeable future in that it allows for different “foreseeable futures” depending on the particular threat being considered. Instead, the commenter recommended that the Services select a single number of years or range of years in which to determine the future status of the species. The commenter stated that if the Services adopt varying foreseeable futures for the different listing factors for a single species, they are conceivably assessing whether that species is likely to become an endangered species based on fewer than all the listing factors. While the Act allows the Service to list a species based on a single factor, it does not allow the Service to disregard any of the factors in making the holistic determination whether a species has “become an endangered species.” In addition, the listing factors assess both positive and negative impacts on the status of the species. So being unable to assess certain listing factors at the end of a long foreseeable future for other listing factors means the Service is ignoring potentially beneficial conditions, for example, the existing regulatory mechanisms.

Response: We appreciate the commenter’s concern and clarify in this response that, although there may be different degrees of “foreseeability” with respect to particular threats and their impacts on the species, we ultimately base listing determinations on consideration of all of the available data and a review of all of the section 4(a)(1) factors. As stated in the M-Opinion, “Although the Secretary's conclusion as to the future status

of a species may be based on reliable predictions with respect to multiple trends and threats over different periods of time or even threats without specific time periods associated with them, the final conclusion is a synthesis of that information.” (M–37021, January 16, 2009). The Services have been following this approach for nearly a decade, and courts have found it to be reasonable and appropriate (*See, e.g., In Re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation*, 709 F.3d 1, 15-16 (D.C. Cir. 2013)). The approach reflects the reality that there is a variation among the kinds and levels of information the Services typically have available when assessing specific threats. The approach allows the Services to comprehensively consider all that is known about the threats acting on the species, and the listing determination itself is based on a synthesis of that information. No information is disregarded merely because it relates to a time horizon that is different from that associated with other threats. As a matter of practice, the Services consider applicable data regarding both negative (*e.g.*, poaching) and positive (*e.g.*, enforcement efforts to reduce poaching) factors when making their listing determinations and will continue to do so under the “foreseeable future” framework being finalized in this rule.

Comment: A commenter stated that the discussion included in the proposed rule on data and use of models is unclear. The commenter specifically pointed to the statements in the proposed rule that the foreseeable future can extend only as far as the Services can reasonably depend on the available data to formulate a reliable prediction and avoid speculation and preconception, and that “in cases where the available data allow for quantitative modeling or projection, the time horizon presented in these analyses does not necessarily dictate what constitutes the ‘foreseeable future’ or set the

specific threshold for determining when a species may be in danger of extinction.” The commenter said this seems to be contradictory, because if there is enough information to provide a reliable prediction that avoids speculation, based on quantitative modeling or projection, it seems that the Services should consider that as a “foreseeable future.” The commenter said this phrasing seems to indicate that models may show specific time periods, but that it can still be ignored. The commenter said all data and information should be reviewed and interpreted, including modeling.

Response: We agree that, if available and reliable, quantified studies or analyses should not be ignored, and our proposed rule was not meant to imply otherwise. Our intention with the particular language quoted by the commenter was to indicate that the existence of a quantitative model or projection will not necessarily determine the foreseeable future in all cases or situations. A particular model or analysis may in fact be used by the Services to determine the period of time that can be considered the foreseeable future. However, this will not always be the case. In some instances, a model’s time horizon may fall short of how far into the future the Services can foresee; and in other instances, a model may extend out to a point at which the model’s predictions become speculative or highly uncertain. In both cases, the time period covered by the particular model would not dictate the time period for what the Services consider to be “foreseeable.” In addition, even if a model is considered reliable, it may not be possible to limit the time horizon considered in the status review based on what one particular model or analysis indicates as a reasonable period of time. When we review a species’ status over the foreseeable future, we must take all available data into account. In other words, while we fully agree that reliable predictions based on

quantitative models should not be ignored, those quantitative models may not in themselves establish what constitutes the “foreseeable future” for the entire species or every threat. They may simply reflect possible, but not likely, outcomes.

Comment: Multiple commenters stated that foreseeable-future timeframes are very uncertain with respect to forecasted climate-change impacts and that additional clarifications or modifications to the proposed “foreseeable future” framework are needed. Various commenters stated that there is too much uncertainty associated with foreseeable futures that extend too far (e.g., 100 years) and that the foreseeable future should be shorter (e.g., 10 years, 25–30 years). Commenters, citing Congressional reports, stated that Congress intended the foreseeable future to be in the near future. Commenters provided various suggested approaches or parameters that would dictate how far the foreseeable future could extend, such as using three generation lengths for long-lived species, and considering threats in light of the biology of the species (e.g., long generation versus short generation lengths). Commenters stated that if predictions are too speculative, then the Services cannot give the species the benefit of the doubt and must acknowledge that listing the species is not warranted. Lastly, commenters requested that NMFS align its procedures for determining foreseeable future with those of the FWS, particularly regarding incorporation of uncertainty in climate models and other elements.

Response: We acknowledge that levels of uncertainty can increase the further into the future that climate-change impacts are projected. The magnitude of this increase in uncertainty over time will vary from case to case depending on the available data for the particular issues at hand. Nevertheless, we must carefully consider the available data and the levels of uncertainty, make a reasoned conclusion, and explain that conclusion in a

transparent way in our proposed and final listing determinations. Our regulatory framework for the “foreseeable future” does not undermine these requirements.

For these reasons, we do not agree that a predetermined period of years is appropriate in order to minimize uncertainty when making threatened species listing determinations. Including such a time limit in the foreseeable future regulation would be arbitrary and would preclude the Services from meeting the best-available-data standard required under section 4 of the Act. Furthermore, as noted in the M-Opinion, Congress purposefully did not set a timeframe for the Secretary's consideration of whether a species was likely to become an endangered species, nor did Congress intend that the Secretary set a uniform timeframe. Thus, we do not intend to specify one in the regulatory framework being finalized today.

We conclude that it is generally appropriate to consider the foreseeable future in light of the particular species’ biology. This principle is explicitly embedded in the regulatory framework for the foreseeable future, which states: “The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species’ life-history characteristics, threat-projection timeframes, and environmental variability.”

We agree that listing decisions cannot be based on speculation. As stated in our proposed rule, “the foreseeable future can extend only as far as the Services can reasonably depend on the available data to formulate a reliable prediction and avoid speculation and preconception.” 83 FR 35195, 35196, July 25, 2018. Our “foreseeable future” framework is explicit in this respect, because it states that foreseeable future extends only so far into the future as we can reasonably determine that both the future

threats and the species' responses to those threats "are likely." However, we note that as long as that standard is met, we are not required to wait to make listing determinations until better or more-concrete science is available, and that the Act requires that we base our decision on the best *available* data. *See, e.g., San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) ("best available" standard does not require perfection or best information *possible*) (citing *Building Indus. Ass'n v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001)); *Alaska v. Lubchenco*, 825 F. Supp. 2d 209, 223 (D.D.C. 2011) (same); *Maine v. Norton*, 257 F. Supp. 2d 357, 389 (D. Me. 2003) (noting that the "best available" standard "is not a standard of absolute certainty"). By the same token, we acknowledge that the precautionary principle does not apply to listing determinations, so we do not list species merely as a precaution if there is not reliable evidence indicating that the species meets the definition of a "threatened species." *E.g., Center for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 955 (N.D. Cal. 2010) (finding the "benefit of the doubt" concept does not apply in the listing context); *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 947 (D. Or. 2007).

Lastly, as the two Services agree to these principles and have worked cooperatively to develop this rule, we find that the two Services have already largely aligned their approaches. Any apparent differences in outcomes stem from species-specific considerations rather than from having different interpretations of the statute.

Comment: A few commenters stated that, although a uniform "foreseeable future" time period should not be applied to all species, the Services must identify the period of foreseeability for each operative threat and the species' response to that threat. A commenter also stated the Services should be specific regarding what time period they

are using for a particular decision and that, absent that information, their decisions will be extremely unclear, unpredictable, and difficult to review.

Response: We agree that status reviews and listing determinations should transparently discuss the time horizons over which any analyses were conducted, threats were evaluated, and/or species' responses were projected. However, it is not always possible or even necessary in every circumstance to define the "foreseeable future" as a particular number of years. As stated in the M-Opinion: "In some cases, quantifying the foreseeable future in terms of years may add rigor and transparency to the Secretary's analysis if such information is available. Such definitive quantification, however, is rarely possible and not required for a 'foreseeable future' analysis." (M-37021, January 16, 2009). Ultimately, although the Secretary has broad discretion to determine what is foreseeable, this discretion is exercised based on the best scientific and commercial data available and is subject to review in accordance with the applicable standards of the Act and the Administrative Procedure Act.

Comment: Multiple commenters stated that the Services must modify the definition of the "foreseeable future" such that healthy, viable species are not listed as threatened species. Another commenter stated that the Services should only rarely list currently viable, stable species as threatened so that their resources can be more appropriately focused on species already in need of conservation. Commenters also stated that the Services should not list healthy species, like polar bears and ice seals, based on speculation or on the possibility of a future threat. Multiple commenters stated that Congress intended that only species experiencing current threats that are affecting their population numbers may be considered for listing and stated that a species must

already be experiencing the effects of a threat and be “depleted in numbers” to be considered for listing as threatened. Commenters also asserted that the Ninth Circuit’s interpretation in *Alaska Oil & Gas Assoc. v. Pritzker*, 840 F.3d 671, 683 (9th Cir. 2016) was an illogical result of the potential application of the Act to every species based on the possibility that climate-related threats may pose some effect at some remote future time. Commenters noted this Congressional intent is also reflected by the definition of “conservation” in section 3 of the Act, which they noted clearly does not apply to a healthy species that is not being affected by present threats to its existence because it would not be possible to “bring” that species “to the point” where the protections of the Act “are no longer necessary.”

Response: We agree that we cannot list a species as threatened due to speculation about future declines of that species; however, it does not follow that listing a species as threatened under the Act requires that a decline has already begun. If the best available scientific and commercial data allow us to make a reliable prediction (as opposed to speculating) that a not-yet-begun decline makes it likely that the species will become in danger of extinction, then that species meets the definition of a threatened species. In other words, the Services need not wait until a species has reached a particular tipping point if the best available data indicate the threats the species currently faces will result in it likely becoming an endangered species within the foreseeable future. Furthermore, the Services cannot ignore the threats a species faces even if the species has not yet begun to decline. Some species may also exhibit nonlinear changes in their population levels. For example, some species are vulnerable, due to demographic factors affecting their abundance, productivity, or other reasons, to sudden ecological regime shifts, which can

cause population collapse even though population declines had not been previously evident.

Lastly, we do not agree with the suggestion that the definition of “conservation” in section 3 of the Act reflects an intention by Congress that only species with declining abundances be listed under the Act. The Act defines “conserve,” “conserving,” and “conservation” as “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.” A species that is properly listed due to reliable predictions of future declines can benefit from conservation methods and procedures that will forestall or ameliorate that decline. If successful, such conservation measures will eventually no longer be necessary, the species will no longer be “likely to become an endangered species,” and the species can be delisted. Listing a species as threatened due to future declines that are foreseeable is thus completely compatible with the definition of “conservation.”

Comment: Multiple commenters expressed concern that under the proposed “foreseeable future” framework the Services would consider climate change as a hypothetical and not a “probable” threat or would otherwise ignore the best available science on climate change. Commenters stated that under the proposed definition of “foreseeable future,” the Services could arbitrarily cite climate change as a justification to avoid species protections if none of the specific projections reaches the 50 percent “probability” threshold due to uncertainty stemming from environmental variability. They further stated that the regulations should instead be explicit that the best available science regarding the “foreseeable future” must include climate-change and ocean-

acidification projections as well as any studies regarding what those projections will mean for both specific species and larger ecosystems. The commenters stated that the Services must consider the associated ranges of probabilities and uncertainties as best science even though they do not present a single likelihood of any particular impact. Commenters further noted that oftentimes there is high confidence in the directionality of a climate trend or impact (e.g., sea-level rise), even when there is lower confidence in the rate or ultimate magnitude of the change, and that under the proposed definition of “foreseeable future” it would be possible to dismiss such projections by focusing on the uncertainty in rate instead of the certainty in trend.

Response: Consistent with our longstanding practice, in all classification decisions we will consider the best available science and evaluate impacts to the species that may result from changing climate within the foreseeable future. Also consistent with our standard practice and per the Act’s section 4(a)(1) factors for listing, we will consider what the particular climate-related predictions mean in terms of impacts on the species as well as impacts on the larger ecosystem. In reviewing and applying the best available data in our foreseeable future framework, we will also consider the ranges of probabilities and uncertainties associated with the available data, and we will not arbitrarily dismiss reliable aspects of various climate change predictions or projections (e.g., directionality) even if other aspects (e.g., rate of change) have greater levels of uncertainty. We will take all of the available climate change data into consideration when making a reasonable determination regarding the foreseeable future and the status of the species in the foreseeable future.

Comment: Numerous commenters expressed concern regarding how the Services will address uncertainty and reliability under the proposed foreseeable future framework when models are used. Commenters noted that models used to project future conditions are often flawed by the inclusion of too few factors, or the exclusion of factors that may be unknown or not fully known, and that models can be manipulated. Therefore, commenters recommended that explanatory language should state that models must be identified as such and data inputs used to construct them must be listed, and that model outputs do not constitute data in and of themselves. Other commenters stated that models often cannot provide reliable predictions of future conditions at narrow geographical scales or on short time horizons sufficient to support specific conclusions about the future condition of species or habitat at precise locations. The commenters specifically noted that, in withdrawing their proposed rule to list the wolverine as threatened, the FWS recognized the significant disagreement and uncertainty regarding the accuracy of localized climate change projections for a species' habitat or population persistence (79 FR 47522, 47533; August 13, 2014). In contrast, other commenters stated the Services can rely on models even if they are not perfect, and that, under the proposed approach, species will impermissibly be left without protection until the science is developed enough to establish with "reasonable certainty" that they will be in danger of extinction.

Response: We agree that, when models are applied in a status review, we should provide detailed, explanatory language to describe the particular data sources and inputs used to construct the model. We will also strive to explicitly describe the assumptions, limitations, and relevant measures of uncertainty associated with the particular models. However, it is important to note that models can often provide useful and robust

predictions even in the absence of certain variables or data. Thus, the Services may consider, among other sources of scientific data, models that are not “perfect” or do not indicate a “reasonable certainty” of a species being in danger of extinction. Indeed, nothing in the framework we have set forth for determining the “foreseeable future” we adopt is designed or intended to require “reasonable certainty” of a species being in danger of extinction in the foreseeable future before it may be listed as threatened. Models are analytical tools that can be applied to better understand complex datasets. We will continue to use various types of analytical tools, as appropriate and as transparently as possible, when conducting status reviews. We conclude that the requirement to use the “best available” data means that we cannot insist that information must be free from all uncertainty, and further agree that the Act’s protections should not be withheld until a species’ status has declined to the point that the future risk of extinction is certain.

With respect to the comment regarding the degree of spatial and temporal precision of models, we agree that models will not always support specific conclusions about the future condition of species or habitat at fine scales or in precise locations. As stated previously, in reaching any conclusions regarding the foreseeable future or the extinction risk of a particular species, we will apply model results only to the extent that we have determined they are the best available data and they are relevant.

Comment: A few commenters stated that “professional judgment” is ambiguous terminology and there is no clear indication on when use of professional judgment is considered appropriate. Some commenters expressed concern that subjectivity and opinion would take the place of data where gaps exist in the available science, and one

commenter noted that the use of best professional judgment does not relieve the Services of their statutory duty to make listing determinations “solely on the basis of the best scientific and commercial data available.” One commenter recommended adopting guidance requiring that experts provide their credentials demonstrating their expertise and that their detailed recommendations be made available to the public.

Response: These comments refer to a discussion in the proposed rule regarding the types of data that may inform what is “foreseeable.” Specifically, we stated that, depending on the nature and quality of the available data, “predictions regarding the future status of a particular species may be based on analyses that range in form from quantitative population-viability models and modelling of threats to qualitative analyses describing how threats will affect the status of the species. In some circumstances, such analyses may include reliance on the exercise of professional judgment by experts where appropriate.” (83 FR 35193, July 25, 2018).

This discussion was intended to clarify that the data underlying any “foreseeable future” could take several forms and that it would not, for example, exclusively depend on quantitative analysis. Professional judgment is not used in place of the best available scientific or commercial data; it is used when there are gaps in such data that require scientific interpretation to address. We note that when professional judgment is applied, it should be done transparently and in accordance with applicable standards.

Comment: Multiple commenters raised concerns regarding what constitutes the “best available scientific and commercial data” in establishing a probable foreseeable future and requested we further clarify the term and its use. Several commenters stated it is imperative that the data considered during the listing process be made available to the

public, and that any assumptions made are disclosed in a transparent manner. One commenter stated that the FWS has inconsistently applied standards for what constitutes the best available science and suggested that, to avoid interference with the application of the best available data, the words “the Services” should be replaced with “the Services’ biologists.” We also received a request to insert the words “scientific and commercial” into the phrase “best available data” within the foreseeable future regulatory text. Lastly one commenter noted that the proposed rule fails to provide clarifying language regarding what constitutes “commercial data” and expressed concern that this could open the door to an over-reliance on the use of potentially biased and non-peer-reviewed data for listing and delisting decisions.

Response: Multiple requirements have already been established to guide the Services’ use and application of the best available data and provide sufficient guidance on this topic. For example, the Information Quality Act (IQA, Public Law 106-554), agency policy directives for implementing the IQA (e.g., NMFS Policy Directive 04–108, June 2012, and FWS Information Quality Guidelines, June 2012; and the Office of Management and Budget’s (OMB’s) Final Information Quality Bulletin for Peer Review (M–05–03, December 16, 2004) guide the Services in ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the Services. In addition, the Services comply with the policy memorandum issued on February 22, 2013, by the Office of Science and Technology Policy regarding public access to federally funded research results. That memorandum establishes a set of principles to guide Federal agencies in providing access to and archiving results of Federal or federally funded research. Lastly, as a matter of practice,

the Services' status reviews are subjected to both peer and public review before they are relied upon in a final listing determination. Overall, we find these existing requirements sufficient to ensure the quality, integrity, and accessibility of the data used by the Services in support of their listing decisions.

To ensure status reviews and listing decisions are transparently based on the best available scientific and commercial data, we fully disclose any assumptions made. The Services consider this to be a standard best practice. Additionally, the Services make available cited literature that is used in listing rules and that are not already publicly available, taking into account issues of intellectual property law, copyright, and open access.

We decline to specify in our regulations that the Services' biologists make any determination of what constitutes the best available data. The proposed wording change is both unnecessary and in conflict with the statute. In practice, it is the Services' biologists that gather, review, and synthesize the best available data, but as the statute clearly requires, the Secretary must make the ultimate determination regarding whether species meet the definition of a threatened or endangered species.

Likewise, we decline to make the requested insertion of the words "scientific and commercial" into the regulatory framework for the foreseeable future, which we had originally omitted for conciseness and readability. The addition of these words is unnecessary, because the Services are held to the requirement to rely on the best "scientific and commercial data" under section 4(b)(1)(A) of the Act. The regulatory foreseeable future framework does not alter this statutory requirement in any way.

We also decline to add clarifying language to the regulations regarding the term “commercial data,” and we disagree that the absence of such language may lead to reliance on potentially biased and non-peer-reviewed data for listing and delisting decisions. The term “commercial data” is used in the statute and, as clearly indicated by the legislative history, this term refers to trade data such as commercial harvest and landings data. See H.R. Rep. 97-657 (H.R. Rep. No. 567, 97th Cong., 2nd Sess. 1982, 1982 U.S.C.C.A.N. 2807, 1982 WL 25083) at 20. While those data are not subject to a peer review process equivalent to the process applied to published scientific literature articles, the statute clearly allows the Services to consider them. When doing so, the Services apply their own assessment of the nature, quality, and limitations of the data, and use the data only to the extent appropriate. Furthermore, when commercial data are used, the Services discuss their application and interpretation of the data transparently and subject that interpretation to both peer and public review.

Comment: Some commenters noted that, while they generally support the proposed changes to the regulations regarding the foreseeable future, the general framework for making threatened determinations would benefit from additional specific criteria. In particular, they requested that the framework require that the best available scientific and commercial data demonstrate that listing the species as threatened would have a measurable beneficial effect.

Response: The suggested change is not consistent with the statute. Section 4(a)(1) sets out the factors by which the Secretaries may determine a species is threatened or endangered. These factors do not include a category that allows for or requires consideration of the beneficial effect of the listing. Therefore, we have no basis for

requiring that a species listing have some measurable benefit in order for that species to receive the protections of the Act.

Comment: Some commenters stated that the Services should provide additional clarification on how they will address future projections associated with a species' life-history characteristics and demographic factors, as well as divergent projections associated with each threat-projection timeframe. The commenters stated that the Services should further explain how species' responses will be predicted and should explicitly state that the adaptability and resilience of a species to each operative threat will also be considered. The commenters specifically noted that adaptability and resilience are important considerations when contemplating the risk of extinction in relation to loss of range. Another commenter stated that, while they appreciate that the proposed foreseeable future framework takes into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability, they recommended adding additional considerations, such as changes in climatic characteristics, phenology, geographic ranges, and home range sizes of some species, which can be particularly informative in the face of global changes to climate for which the only reference condition is the past.

Response: As we indicated in the proposed rule, how we analyze and predict species' responses to threats will vary from case to case. For example, in data-rich cases, population viability analyses may be used to predict species' responses, whereas in data-poor situations, we will likely conduct a qualitative risk assessment. In all cases, species' likely responses to particular threats will be evaluated using the best data available for that species.

We can and do take factors such as climate, adaptability, resilience, phenology, and home-range sizes into account when assessing a species' status into the foreseeable future. It is our longstanding practice to take such types of information into account, as appropriate, when conducting status reviews. The foreseeable future framework refers to several categories of considerations (i.e., “such as life-history characteristics, threat-projection timeframes, and environmental variability”) as examples of relevant factors that will inform how far into the future the foreseeable future extends for a particular species. The framework does not exclude other relevant considerations. Thus, we conclude that additional revisions to foreseeable future framework are not necessary.

Comments on Delisting

Comment: Several commenters agreed with the proposal that the criteria for determining whether a species qualifies for protection under the Act are the same whether the context is a potential decision to delist or the initial decision whether to list a species. Numerous commenters stated that the standard for delisting a species should be higher than for listing a species; thus, the Services have a higher burden in proving that a listed species has recovered such that it can be delisted than they have in listing the species in the first instance. Further, some stated that under the precautionary principle embodied in the Act, scientific uncertainty must be considered differently in the context of delistings and downlistings versus initial listings. Many commenters stated that the precautionary principle embodied in the Act necessarily means that, once a species is listed, a subsequent reversal of that conclusion must be specifically supported by

evidence that explains why the species no longer meets the definition associated with its prior listing.

Response: The standard for a decision to delist a species is the same as the standard for a decision not to list it in the first instance. This approach is consistent with the statute, under which the five-factor analysis in section 4(a)(1) and the definitions of “endangered species” and “threatened species” in sections 3(6) and 3(20) establish the parameters for both listing and delisting determinations without distinguishing between them. The Services determine whether species meet the definitions of a “threatened species” or an “endangered species” based on the best scientific and commercial data available. We must consider the best available scientific data the same way regardless of whether it is in the context of delistings and downlistings versus initial listings. This interpretation is consistent with the Services’ longstanding practice and the decision in *Friends of Blackwater v. Salazar*, 691 F.3d 428 (D.C. Cir. 2012). That decision confirms that, when reviewing whether a listed species should be delisted, the Services must apply the factors in section 4(a) of the Act. 691 F.3d at 433 (upholding FWS’s decision to delist the West Virginia northern flying squirrel because the agency was not required to demonstrate that all of the recovery plan criteria had been met before it could delist the species and it was reasonable to construe the recovery plan as predictive of the delisting analysis rather than controlling it). In that case, the court held that “Section 4(a)(1) of the Act provides the Secretary ‘shall’ consider the five statutory factors when determining whether a species is endangered, and section 4(c) makes clear that a decision to delist ‘shall be made in accordance’ with the same five factors.” *Id.* at 432. Therefore, we have finalized the proposed change.

Comment: Some commenters stated that the only "standard" articulated in the proposed regulations is that the species "shall be listed or reclassified if the Secretary determines on the basis of the best scientific and commercial data available after conducting a review of the species' status, that the species meets the definition of an endangered species or a threatened species." Further, they stated that a decision to delist a species is not made against a blank slate. Rather, it is made in light of a prior factual determination by the Service. Therefore, the Services must explain and factually substantiate the departure from that prior determination. In making a new evaluation of a species' status, the Services cannot base their decision only on the available scientific and commercial data but must also consider their prior determination and substantiate the reasons for departing from their prior conclusions. An agency must provide "a more detailed justification" when it makes a decision that "rests upon factual findings that contradict" its prior findings. A failure to do so violates the Administrative Procedure Act.

Response: The Act defines "threatened species" and "endangered species" and directs the Services to make determinations regarding whether a species is threatened or endangered based upon the best available scientific and commercial data. This determination requires the Services to take into account all material in the record, including prior findings and the discussion of facts supporting those findings, and discuss how the newly available information has led to different conclusions in a transparent manner.

The underlying obligation of the Services to articulate a rational connection between their decisions and facts in the record is the same regardless of the context of the

determination being made (listing or delisting). Of course, where there is substantial information in the record that a listed species is likely to face a continuing threat, this responsibility is particularly acute. *See Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015, 1030 (9th Cir. 2011) (holding that, in particular circumstance where strong evidence of continuing threat to species was documented in the record, the Act’s policy of “institutionalized caution” required that FWS explain why delisting the species was appropriate in face of the uncertainty regarding the extent of the threat).

Comment: Several commenters stated that the removal of recovery as one of the reasons for delisting is in direct conflict with the main stated purpose of the Act and will allow the Services to delist species before they are recovered. They also stated that the Services have failed to adequately explain the purpose of removing the word "recovery" from § 424.11(d)(2). They noted the only reasoning provided in the proposed rule was to align with statutory definitions of endangered and threatened species. The Services did not explain how removing this word creates better alignment.

Response: We note that the Act does not use the term ‘recovery’ or ‘recovered’ when referring to removing a species from the list. Rather, a species is removed from the list when it does not meet the definition of an endangered species or threatened species. Furthermore, the Services do not agree that this change will allow species to be delisted before they are recovered. The Services will continue to use the best scientific and commercial data available to make determinations as to whether species meet the definition of an endangered species or a threatened species. If a review of a listed species indicates a species does not meet either definition, the Services will propose the species for delisting. Likewise if, following a review, a listed species is determined to still meet

the definition of an endangered or a threatened species, the Services would not propose the species for delisting. Thus, this revision in no way conflicts with the intention of the Act.

The Services removed the reference to “recovery” from § 424.11(d)(2) because the existing regulatory language, which was intended to provide examples of when a species should be removed from the lists, has been, in some instances, misinterpreted as establishing criteria for delisting. Although we are removing the word “recovery” from this section, the language will continue to include species that have recovered, because recovered species would no longer meet the definition of either an “endangered species” or a “threatened species.” However, the Services reiterate that the goal of the Act and the Services is to recover threatened and endangered species.

Comment: Some commenters objected to the removal of recovery from § 424.11 and stated the proposed rule appeared to circumvent recovery plans and improperly make section 4(f) of the Act meaningless. Additionally, they stated that removing this provision disconnects recovery from species recovery plans that in turn guide State-level actions and are effective means to address recovery. They argued the Services should include a discussion of recovery and recovery plans as part of this change and consider if protections are in place to support continued recovery of the species into the future.

Response: This change does not make recovery meaningless. Section 4(f) requires the development of recovery plans for most listed species. Recovery plans are a key component in conservation planning and provide an important roadmap for a species’ recovery. This provision does not undermine the importance or effectiveness of recovery plans. Recovery plans will continue to guide the Services’ recovery efforts.

Comment: A commenter expressed concern that the proposed addition of new paragraph (e) to § 424.11 would circumvent the requirement that delisting decisions must be made based on the best science and data available at the time of the decision. The commenter argued that the proposed revisions would allow for delisting based solely upon achieving any recovery criteria identified at the time of listing, even if this occurs prior to the attainment of the plan's recovery criteria and without regard to current information.

Response: The Services are required to make delisting determinations based upon the best scientific and commercial data available at the time the determination is made. When the Services determine whether a species meets the definition of a “threatened species” or “endangered species,” they will rely upon the best available data. The Services will continue to review all relevant information when making a delisting determination, including whether the recovery criteria have been achieved. Recovery plans provide important guidance to the Services, States, and other partners on methods of minimizing threats to listed species and measurable objectives against which to measure progress towards recovery, but they are not regulatory documents. A decision to revise the status of a species or remove a species from the List is ultimately based on an analysis of the best scientific and commercial data available to determine whether a species is no longer an endangered species or a threatened species, regardless of whether that information differs from the recovery plan.

Comment: Some commenters suggested that the Services clarify that delisting decisions are not contingent upon the satisfaction of a recovery plan. Others requested that the proposed revision at 50 CFR 424.11 also explicitly specify that species should be

considered for delisting when the original recovery objective (i.e., target population goal) in the species' recovery plan is met.

Response: The Services conclude that further clarification in this regard is not necessary. As noted in the proposed rule, the Services' intention is to clarify that the standard for whether a species merits protection under the Act should be applied consistently whether the context is potential listing or potential delisting. Thus, delisting decisions are not contingent upon the satisfaction of a recovery plan for that species. This interpretation is consistent with the Services' longstanding practice and the decision in *Friends of Blackwater v. Salazar*, 691 F.3d 428 (D.C. Cir. 2012). That decision confirms that, when reviewing whether a listed species should be delisted, the Services must apply the factors in section 4(a) of the Act. 691 F.3d at 433 (upholding FWS's decision to delist the West Virginia northern flying squirrel because the agency was not required to demonstrate that all of the recovery plan criteria had been met before it could delist the species and it was reasonable to construe the recovery plan as predictive of the delisting analysis rather than controlling it). In that case, the court held that "Section 4(a)(1) of the Act provides the Secretary 'shall' consider the five statutory factors when determining whether a species is endangered, and section 4(c) makes clear that a decision to delist 'shall be made in accordance' with the same five factors." *Id.* at 432. The Services will delist a species when, based upon the best available scientific and commercial data, they determine the species no longer meets the definition of a threatened or endangered species.

Comment: Several commenters stated that removing the requirement that the data substantiate that the species is no longer endangered or threatened lowers the bar for

delisting a species and will promote delisting species before they are actually recovered. Several commenters stated that the Services' proposed revisions to drop the requirement that data "substantiate" any delisting decision would strip listed species of the Act's protections and contravene the policy of "institutionalized caution" Congress adopted in enacting the Act. *Tenn. Valley Auth. v. Hill*, 437 U.S. at 194.

Response: The Services do not agree that removing this language will lower the bar for delisting species and allow them to be delisted before they have recovered. As required by the Act, the Services make determinations as to whether species warrant listing, including decisions to remove species from the lists of threatened or endangered species, based on the best scientific and commercial data available. The Services will not proceed with a delisting determination unless the best scientific and commercial data support that conclusion. Because the statutory standard for delisting is whether a species meets the definition of a threatened or endangered species based on the best scientific and commercial data available, it is not necessary to have a separate requirement that the data substantiate that the species is no longer threatened or endangered. Therefore, removing the requirement that the data substantiate that the species is no longer endangered or threatened does not contravene the policy of institutionalized caution because, before making a determination to delist a species, the Services are already required to assess the best scientific and commercial data available about the status of the species, threats it may face, the adequacy of regulatory mechanisms, and the effectiveness of any conservation efforts.

Comment: Some commenters stated that the Services inappropriately propose to be allowed to delist a species by simply reinterpreting data that were used to make the original listing determination.

Response: In proposing this change, the Services attempted to address any ambiguities in the regulatory text by simplifying this provision and returning to the underlying statutory standard. In order to delist a species, the Services must evaluate the best scientific and commercial data available at the time a determination to delist a species is made. They must review all information that is available and may not limit their inquiry to the interpretation of data that were used to make the original listing determination. However, if the best available data supports reinterpreting the data used in the original listing determination, the Services may do so.

Comment: Several commenters stated that the proposed revision to the regulation addressing delisting based on extinction provides no rationale for weakening the informational requirements imposed by the current regulations. They stated that the language describing the period of time that must pass before a species can be delisted due to extinction should be retained because it allows for consistent implementation of the Act and provides clarity to the public. Additionally, some commenters stated that the proposed changes stating that evidence may include survey information is inconsistent with the precautionary approach that should be used when protecting imperiled species. Others stated that criteria should be developed for determining “extinction” or defining the term “extinct” for purposes of removing a species from the list due to extinction.

Response: The Services modified the text in this section because the Services’ conclusion that a species is extinct will be based on the best scientific and commercial

data available, as required under section 4(b)(1)(A). That decision may include, among other things, survey data and information regarding the period since the last documented occurrence or sighting of the species. We will make each determination on a case-by-case basis, considering the species-specific biological evidence for species extinction. We find it is more consistent with the statute to acknowledge this overarching obligation that all classification decisions must use the best available scientific and commercial data than to highlight only certain kinds of information as the current regulatory provision does. A determination that a species is “extinct” will be based on the best scientific and commercial data available, as required under section 4(b)(1)(A), according to the common understanding of the term.

Comment: Some commenters supported the provision related to delisting due to extinction, but requested that the Services add another section to this provision that would state that, when a species that was extinct in one area is reintroduced into an area, the reintroduced species can be managed to protect the new ecosystem that developed in the absence of the extinct species.

Response: The Services decline to add the proposed section. There are other provisions of the Act, such as section 10(j), that govern the introduction of populations back into areas where they no longer exist, and that issue is therefore beyond the scope of the regulations implementing section 4 of the Act.

Comment: Some commenters requested the Services add the term “extirpated” in addition to “extinct.” They suggested this addition would be useful in cases where a particular species may be extirpated from a region or local area without being fully extinct from an adjoining State or region.

Response: The Services decline to add “extirpated” to this section of the regulations. This provision of the regulations, and the Services’ modifications to this section of the regulations, govern factors considered in delisting species. Extirpation of a population of a listed species from a particular area is not the equivalent of a species being extinct nor a valid reason to remove the species from the lists of threatened and endangered species.

Comment: Several commenters opposed the clarification that listed entities would be delisted if they do not meet the definition of “species” because they believe it is an effort to give the Services additional tools not to list species in need of listing and protection of the Act. Others argued that the proposed language would allow the Services to provide less or no protection to some populations within a larger species. And still others argued that, while it is true that new information could suggest a currently listed species is not a taxonomic species or subspecies, new science is not always definitive. Those commenters stated the proposed language could lead the Services to move prematurely to delist a species based on new information that may be inadequate, or later proved to be inaccurate, without any evaluation of whether the particular population in question is a threatened or endangered distinct population segment (DPS) of the new taxonomic subspecies or species into which the new evidence places it.

Response: This provision merely reflects the text and intent of the Act, i.e., only “species,” as defined in section 3 of the Act, may be listed under the Act. If the Services determine that a group of organisms on the list does not constitute a “species,” then the listing is contrary to the Act, and the Services may initiate rulemaking procedures to

delist the entity. We note that the Services may choose to consider whether there is an alternative, valid basis for listing some or all of the listed entity before finalizing a delisting. For example, in some circumstances, for vertebrate species, if the constituent vertebrate populations constitute DPSs, they may be separately listed. This does not preclude the Services from considering whether a valid “species,” comprising some or all of the organisms covered by the delisted entity, warrants listing as a threatened or endangered “species.”

This provision would apply if new information, or a new analysis of existing information, leads the Secretary to determine that a currently listed entity is not a taxonomic species, subspecies, or a DPS. When, after the time of listing, the Services conclude that a species or subspecies should no longer be recognized as a valid taxonomic entity, the listed entity should be removed from the list because it no longer meets the Act’s definition of a “species.” In other instances, new data could indicate that a particular listed DPS does not meet the criteria of the Services’ Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (“DPS Policy”; 61 FR 4722, February 7, 1996). In either circumstance, the entity would not qualify for listing under the Act.

Contrary to one of the comments, this provision would not allow some populations to be delisted while others remain listed if the combination of populations still meets the definition of a “species” and that species meets the definition of “threatened species” or “endangered species.” The courts have made clear that, before delisting any DPS of a listed species, the Services must consider how the delisting will affect other members of the listed entity. E.g., *Humane Soc’y of the U.S. v. Zinke*, 865

F.3d 585, 602 (D.C. Cir. 2017) (holding that the delisting of the Western Great Lakes DPS of the grey wolf was invalid because FWS had failed to consider “whether both the segment and the remainder of the already-listed wolves would have mutually independent statuses as species”); *Crow Indian Tribe v. U.S.A.*, 343 F. Supp. 3d 999, 1014 (D. Mont. 2018) (delisting of the Greater Yellowstone Ecosystem population of grizzly was invalid because FWS had failed to consider how delisting would affect the remainder).

The Services agree that new scientific data or information is not necessarily more definitive, and we acknowledge that scientific and taxonomic data are always evolving. Delisting a species following a determination that it no longer meets the definition of a species will only be undertaken after a rigorous review of the best available scientific and commercial data, and a proposed and final rulemaking process.

Comment: Some commenters opposed the provision regarding delisting when an entity does not meet the definition of a “species,” because they are concerned the change would allow the Services to retroactively reanalyze original listing information and decide that a species, evolutionarily significant unit, or DPS no longer requires protection based on political factors.

Response: The Services’ determination that a species no longer meets the definition of a species must be based on the best available scientific and commercial data. Even under the current regulations (current 50 CFR 424.11(d)(3)), the Services have the ability to delist when the entity is found not to qualify as a listable entity. The Services do not intend the regulatory language change to allow for listing determinations to be based on anything but the statutory standard.

Comment: Some commenters opposed delisting a species when it does not meet the definition of a “species” because they believe it will increase litigation and result in

continuous listings, delistings, and relistings by focusing on how a species is defined rather than the species' status.

Response: Under the current regulations, we have authority to delist entities that do not meet the definition of a “species” under the Act, so the language does not change our requirements in this regard. Acting consistently with the Act in this way allows the Services to focus their resources on recovering species that are threatened or endangered. If a species, subspecies, or DPS no longer meets the Act’s definition of a “species,” it should be removed from the list so the Services can focus their resources on species most in need.

Comment: Some commenters opposed delisting based on a listed entity not meeting the definition of “species” because they argued many taxonomic changes have been made in recent years based solely on DNA information and analysis. They argued that, while DNA analysis is a good tool, it has limitations and is still subjective in regard to distinct species because our taxonomic system is subject to human error.

Response: As stated above, new information is not always definitive. The Services’ determinations identifying species, subspecies, and DPSs are not typically made solely on the basis of DNA analyses. Determinations that a listed entity does not meet the definition of “species” will be based on the best available scientific and commercial data.

Comment: Some commenters stated that delisting an entity when it does not meet the definition of “species” would allow the Services to forgo considering whether the taxonomic subspecies or species of which the Service now believes the entity to be a part

must now be considered threatened or endangered in a significant portion of its range based on the status of that population.

Response: This provision will not allow the Services to delist one or more populations of a species or subspecies without considering whether the species or subspecies is threatened or endangered throughout all or a significant portion of its range. As discussed earlier, the courts have made clear that, before delisting a population of a listed species, the Services must consider how the delisting will affect other members of the listed species.

Comment: Several commenters objected to delisting a species when it does not meet the definition of "species" because they believe it would result in leaving highly imperiled populations at risk of a gap in the Act's protections merely because of a taxonomic reclassification.

Response: Delisting a species when it does not meet the definition of a "species" under the Act would not leave imperiled populations that otherwise would merit listing at risk. This provision refers to taxonomic reclassifications. If a particular entity no longer meets the Act's definition of a species, that entity would not qualify for listing under the Act.

Comment: Some commenters opposed delisting a species when it does not meet the definition of "species" because they believe it is unnecessary. They stated this type of taxonomic information would come out in a species assessment using the five factors. They argued the taxonomic proposal is duplicative, in that it singles out one issue for specific treatment, when it is already covered by the broader language of § 424.11(e)(2). Further, some stated that, in addition to the regulatory change, the Services should also

consider adopting objective standards and criteria for the Services' taxonomic determinations.

Response: The Services conclude that this provision provides a helpful clarification of the basis for delisting a species. Specifically, if an entity is not a "species" within the meaning of the Act, then, by definition, it cannot be a "threatened species" or "endangered species." The Services will make their determinations based on the best available scientific information for determining whether a group of organisms is a species, subspecies, or DPS. The Services joint DPS Policy (61 FR 4722, February 7, 1996) already provides sufficient criteria and standards when determining whether vertebrate species are DPSs. In order to be designated a DPS, vertebrate populations must be discrete and significant to the taxon as a whole.

Comment: Some commenters were concerned that recovery actions that mix genes of a DPS with other populations of the taxon, or significantly modify the distribution of the DPS, may inadvertently undermine protections of the Act. That outcome may occur if the proposed rule allows for the interpretation that a DPS for which recovery actions have modified genetic makeup or distribution is no longer discrete or significant and therefore does not meet the species definition required for protection under the Act.

Response: We understand the commenter's concern; however, if a population or set of populations qualify as a DPS under the two criteria set out in the DPS Policy it is extremely unlikely that a situation such as described by the commenter would arise, and it is not the Services' intention to create such situations. Secondly, if, through the process of recovery, a listed DPS begins mixing or interbreeding with other populations of that

taxon such that it no longer met the DPS criteria, the Services could still evaluate whether that altered or larger entity is a “species” at risk of extinction and that warrants listing under the Act. As with any listing and delisting determination, the Services would base any such determination on the best available scientific and commercial data and after conducting a status review of the particular “species.”

Comment: Several commenters stated that the reference to data in error as a reason for delisting should be retained because it is important for the public to know when an error has been made. Other commenters stated its removal is unnecessary and was not justified by the Services. They also requested the following be added as a fourth fact for delisting in 50 CFR 424.11(e): “(4) The best scientific or commercial data available when the species was listed, or the interpretation of such data, were in error.”

Response: The Services have determined this provision is unnecessary because the other delisting factors being finalized in this rule, including whether the listed entity meets the definition of “species” or a determination that a species meets the definition of a “threatened species” or “endangered species,” adequately capture instances in which a species was listed due to an error in the data, or in the interpretation of that data, at the time of the original classification. Furthermore, our delisting rules will clearly contain the rationale and justification for our proposed and final actions; if a species were listed in error, these rules would provide the requested transparency to the public. The Services had also rarely invoked the prior § 424.11(e)(3) due to confusion about when it should apply, so adopting a more simple structure that tracks the foundational statutory standards is appropriate and will result in more transparent and fulsome explanations of precisely

why particular species are no longer found to warrant protection under the Act. We have therefore decided not to make the requested regulatory text change.

Comment: Some commenters stated that the revised § 424.11(e) creates an expedited delisting process whereby a 5-year status review automatically leads to delisting. They suggested the proposed changes would trigger that automatic process for delisting, but not for uplisting a species.

Response: Section 424.11(e) does not create an expedited or automatic delisting process following a 5-year review. Under the revised regulations finalized today, as is the case currently, no changes to a species' listing status will be made except through a rulemaking that complies with the notice and comment procedures of the Act. This is true regardless of whether a species is considered for uplisting, downlisting, or delisting.

Comment: Some commenters suggested the introductory clause of proposed § 424.11(e) be revised to read, "The Secretary will delist a species if the Secretary, based on the best available scientific and commercial data available, including any information received in accordance with procedures set forth in § 424.15 or § 424.16(c), finds that:" They believe this change will help clarify that the public will continue to have a role in reviewing, commenting on, and providing information concerning proposed delistings.

Response: The additional language suggested by the commenter is not necessary. The procedures set forth in § 424.15 and § 424.16(c) relate to providing the public notice and an opportunity to review proposed regulations and other decisions such as identification of candidate species. As noted above, any determination by the Services to list, delist, or reclassify a species must be effectuated through the rulemaking process,

which provides the public the right to review and comment on those determinations before they are finalized.

Comment: Some commenters suggested the Services should expressly permit a species to be delisted in part of its range because doing so would allow the Services to better tailor the protections of the Act to a species' conservation needs by removing unneeded protections while retaining protections in other parts of its range.

Response: The Act authorizes the Services to list "species," which includes species, subspecies, or DPSs. With regard to vertebrate species, the Services may determine there are DPSs within a listed species or subspecies. The Services may then assess the status of those DPSs. Should any of those DPSs be determined not to meet the definition of a threatened or endangered species, they could be delisted under the Act after the Services consider how delisting the DPS would affect the listed species or subspecies. This approach permits the Services to better tailor protections and prohibitions of the Act to the listed DPSs that warrant protection.

Comment: Some commenters stated the delisting process should be streamlined to allow for easier removal of species once documentation shows they are no longer threatened or endangered.

Response: The process that must be followed to delist or reclassify a species is the same as must be followed in listing a species. The Services are required to assess the status of a species based on the best available scientific and commercial data, applying the five factors, and engaging in the mandatory notice-and-comment rulemaking procedures as noted above.

Comment: Some commenters requested that “will” be replaced with “shall” in the first sentence of § 424.11(e) to ensure the Services abide by the strict requirements of the Act.

Response: The Services have made this change to make this provision consistent with the other paragraphs of § 424.11.

Comment: Some commenters stated that the Services should add conservation plans and agreements as a factor to consider in delisting decisions.

Response: The Services consider conservation plans and agreements, as well as all other conservation efforts, in their decisions to list, reclassify, or delist a species. Section 4(b)(1)(A) of the Act requires the Secretary to make determinations solely on the basis of the best scientific and commercial data available after conducting a review of the status of the species and after taking into account those efforts, if any, by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species when determining whether a species meets the definition of a “threatened” or “endangered” species.

Comment: Some commenters requested the regulatory text for the proposed delisting factors at 50 CFR 424.11(e) address these issues by being revised to add “reclassify.” They requested that the text would read: “The Secretary will delist or reclassify a species if the Secretary finds that, after conducting a status review based on the best scientific and commercial data available....”

Response: As noted in the heading of 50 CFR 424.11, this section addresses factors for listing, delisting, and reclassifying species. Paragraph (e) of that section pertains only to delisting species. Therefore, it would not be appropriate to reclassify a

species if any of the three findings in 50 CFR 424.11(e) are made by the Secretary. Reclassification is covered in existing (and revised) 50 CFR 424.11(c).

Comment: Some commenters stated that the Services should develop criteria to inform the assessment of the “adequacy” of State or local regulatory programs when making a delisting or downlisting determination. To ensure that future delisting and downlisting decisions are fully explained, documented, and can proceed expeditiously, the Services should develop guidelines establishing the necessary criteria for the development, and the Services’ review, of State and local regulatory mechanisms. They further requested the Services convene a working group that includes representatives of State and local governments and members of the regulated community to inform the development of the appropriate guidelines and that the Services make these guidelines available for public review and comment prior to adoption.

Response: The Services decline to adopt or develop criteria at this time. The Services may in the future consider developing such criteria, such as in guidance.

Comment: Some commenters stated the Act’s five listing criteria are not particularly well suited to delisting. While they need to be addressed prior to delisting, they are focused on threats instead of recovery, and, therefore, do not provide a science-based recovery objective. They suggested the Services should provide recovery teams with additional clarity on how to identify recovery goals that are clear, consistent, measurable, and based on the best available science, in order to ensure that the long-term health and viability of recovered species will be maintained after they are returned to State management.

Response: The Services decline to make revisions to these regulations in this regard. First, regarding the suggestion that section 4(a)(1) factors are not relevant to a delisting determination, the statute and case law are in fact clear that the section 4(a)(1) factors are intrinsically central to determining whether a species meets the definition of a “threatened species” or an “endangered species,” whether the question is asked in the context of a potential listing or a potential delisting. [See discussion above and citation to the *Friends of Blackwater* case.] In response to the suggestion to provide guidance to recovery teams, the Services note that they rely on their Joint Interim Recovery Planning Guidance to provide guidance to recovery teams and others on developing recovery goals.

Comment: Some commenters stated the five listing criteria should be based on “known” data and information, instead of making assumptions in order to list a species.

Response: The Services are required to make listing decisions based on the best available scientific and commercial data. Those data are not required to be free from uncertainty. We are not required to wait to make listing determinations until better or more concrete science is available, and the Act requires that we base our decision on the best available data. See, e.g., *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) (“best available” standard does not require perfection or best information possible) (citing *Building Indus. Ass’n v. Norton*, 247 F.3d 1241, 1246 (D.C. Cir. 2001)); *Alaska v. Lubchenco*, 825 F. Supp. 2d 209, 223 (D.D.C. 2011) (same); *Maine v. Norton*, 257 F. Supp.2d 357, 389 (D.Me. 2003) (noting that the “best available” standard “is not a standard of absolute certainty”).

Comment: Some commenters expressed agreement that the standard and criteria for delisting should be no more than that for listing. The standards should be the same but for one exception the FWS has previously recognized. The commenter stated that the prioritization to list [sic] foreign species should be greater than for domestic listed species because of the lack of benefits for foreign listed species in the negative effects in the balance.

Response: We assume the commenter to mean ‘prioritization for delisting’, rather than ‘list’. The Services agree that the standards for listing and delisting are the same. The Act does not allow the Services to use different standards with regard to listing domestic and foreign species. FWS recognizes that the benefits of listing species that are not under U.S. jurisdiction may be more limited than the benefits that domestic species realize and allocates its funding to reflect this difference. With the limited resources that FWS allocates to foreign species, we prioritize those where listing can result in conservation, for example, species that are in trade across U.S. borders.

Comment: Some commenters noted that the proposed regulations include changes in paragraph designations and cross-references, but not in the substantive content of certain provisions, in particular new paragraphs (f) and (g). The commenter requested that these provisions be modified to better take into account State and foreign nation programs and species listings under the Convention on International Trade in Endangered Species (CITES) when making listing determinations.

Response: The Services decline to make this change. Those provisions sufficiently take into account State and foreign programs and CITES listings when making listing determinations under the Act and do not merit revision at this time.

Comments Regarding Not Prudent Determinations

Comment: Several commenters thought the Services should retain as a basis for a not-prudent determination that designation of critical habitat for a species would not be beneficial to its conservation. Some noted that this approach would be consistent with legislative history and several court decisions that cited to the legislative history. *See Natural Resources Council v. U.S. Dep't of the Interior*, 113 F.3d 1121 (9th Cir. 1997); *Conservation Council of Hawaii v. Babbitt*, 2 F. Supp. 2d 1280 (D. Hawaii 1998).

Response: The House Report for the 1978 amendments contains statements indicating that Congress intended for the Services to designate critical habitat except in those rare instances when critical habitat would not be “beneficial to” or “in the best interests of” the species. H.R. Rep. No. 97-1625, at 16-18 (1978). Consistent with this understanding of the authority to make not prudent findings, we identify in these revised regulations a number of specific circumstances in which we anticipate that it would not be prudent to designate critical habitat because it would not benefit the species. This final regulation includes some circumstances that were already captured in the current regulations at § 424.12(a)(1)(ii) and some additional circumstances that we have identified based on our experience in designating critical habitat.

Basing prudency determinations on whether particular circumstances are present, rather than on whether a designation would be “beneficial,” provides an interpretation of the statute that is clearer, more transparent, and more straightforward. It also eliminates some confusion reflected in the courts’ decisions in the *NRDC* and *Conservation Council* cases. In those decisions, the courts remanded the not prudent determinations at issue

because the FWS had not articulated a rational connection between the facts and the agency's conclusion that designating critical habitat would not be beneficial for the species. 113 F.3d at 1125-26; 2 F. Supp. 2d at 1284. Although the courts held that FWS had failed to weigh the benefits and risks, or had failed to consider potential benefits beyond consultation benefits, the courts' reasoning indicates that the decisions were based on the insufficiency or absence of any factual analyses of the specific data available. The court in *NRDC* also found that, in implementing the regulations that were in place at the time, FWS had erroneously applied a "beneficial to *most of* the species" standard instead of a "beneficial to the species" standard. Moreover, the decisions' reliance on the legislative history statements equating "not prudent" with "not beneficial to the species" is undermined by the fact that ultimately Congress did not choose to include the "not beneficial to the species" language as a standard or limitation in the statute.

Further, we note that in both decisions the courts seem to have considered principles related to the discretionary process for weighing the impacts of critical habitat designation under section 4(b)(2) of the Act, which do not govern "not prudent" determinations. In part, this appears to be due to the courts' interpretations of statements the Services had made regarding their intentions in applying the regulatory provisions. *See* 113 F.3d at 1125 (citing 49 FR 38900, 38903 (1984) (noting that the Services would balance the risks to the species of designating and the benefits that might derive from designation and would forgo designations of critical habitat where the possible adverse consequences would outweigh the benefits)). We now take the opportunity to clarify the separate nature of "not prudent" designations and the discretionary analyses that we may

elect to take under section 4(b)(2) of the Act. We intend these evaluations to address separate factors.

We emphasize that determining that a species falls within one or more of the circumstances identified in the revised regulations does not bring the prudency analysis to an end. As the courts in both *NRDC* and *Conservation Council* found, in determining whether or not designation of critical habitat is prudent, the Services must take into account the specific factual circumstances at issue for each species. 113 F.3d at 1125; 2 F. Supp. 2d at 1287-88. However, as we clarify below, this does not require the Services to engage in the type of area-by-area weighing process that applies under section 4(b)(2) of the Act.

Comment: Numerous commenters stated that the expansion of circumstances when the Services may find critical habitat designation to be not prudent is not consistent with the Act or congressional intent. Commenters expressed concerns that this change will result in numerous species being denied the protections afforded by critical habitat designations. They also stated that determinations that critical habitat is not prudent will be much more common under the proposed regulations than they have been in the past, and that this is a major change from the current regulation.

Response: It is permissible under the Act, as well as the current and revised regulations, for the Services to determine that designating critical habitat for a species is not prudent. *See* 16 U.S.C. 1533(a)(3)(A) (directing the Secretary to designate critical habitat for listed species concurrent with listing that species “to the maximum extent prudent and determinable”). The changes to the regulations are not intended to expand the circumstances in which the Services determine that designation of critical habitat is

not prudent. Rather, the revisions are intended to provide clarity and specificity with respect to the circumstances in which it may not be prudent to designate critical habitat by replacing the vague phrase “not beneficial.” Congress recognized that not all listed species would be conserved by, or benefit from, the designation of critical habitat, but did not specify what those circumstances might be. While the statutory language allows us to forgo designating critical habitat in rare circumstances in which designation of critical habitat does not contribute to the conservation of the species, the Services recognize the value of critical habitat as a conservation tool and expect to designate it in most cases. Therefore, the Services anticipate that not prudent findings will remain rare and would be limited to situations in which designating critical habitat would not further the conservation of the species.

Comment: Several commenters stated that the Services may only properly make a not prudent determination if there is specific information that a species would be harmed by designating critical habitat.

Response: Congress did not impose any such limitation on the Secretaries’ authority to make not prudent determinations. The statutory language requires that the Services designate critical habitat “to the maximum extent prudent.” The Services have long interpreted that language to apply to a broader range of circumstances beyond those in which a species would be harmed by the designation. Other circumstances occasionally may arise where a designation is not wise, such as when a designation would apply additional regulation but not further the conservation of the species. The current regulations (81 FR 7414; February 11, 2016, and at 50 CFR 424.12(a)(1)) allow for a determination that critical habitat is not prudent for a species if such designation

would: (1) increase the degree of threat to the species through the identification of critical habitat, or (2) not be beneficial to the species. The determination that critical habitat is not prudent for a listed species is uncommon, especially because most species are listed, in part, because of impacts to their habitat or curtailment of their range. Most not prudent determinations have resulted from a determination that there would be increased harm or threats to a species through the identification of critical habitat. For example, if a species was highly prized for collection or trade, then identifying specific localities of the species could render it more vulnerable to collection and, therefore, further threaten it. However, Congress did not limit “not prudent” findings to those situations; in some circumstances, a species may be listed because of factors other than threats to its habitat or range, such as disease. In such a case, a not prudent determination may be appropriate.

Comment: Several commenters suggested additional circumstances where designation may not be prudent, including when the economic and societal impacts outweigh the benefits to the species, when areas to be designated are already under Federal management for other purposes, or when areas are covered by a habitat conservation plan under section 10(a)(1)(B) or other conservation plan.

Response: Under section 4(b)(2) of the Act, the Secretaries have the discretion to determine whether areas should be excluded from a critical habitat designation if the benefits of exclusion outweigh the benefits of inclusion, unless the exclusion will result in the extinction of the species concerned. A discretionary weighing analysis under section 4(b)(2) can involve economic or other impacts and land management of the areas concerned. We note that the “not prudent” determination and any section 4(b)(2)

weighing are separate processes. Because of the specific reference in section 4(b)(2) to weighing of benefits, we conclude that Congress intended the prudency language to address other matters, as reflected in this final regulation.

As a result, we do not infer from the *NRDC* and *Conservation Council* decisions that, to determine whether or not it is prudent to designate critical habitat, the Services must undertake a balancing or weighing of benefits akin to the section 4(b)(2) analysis for determining whether or not to exclude specific areas from a critical habitat designation. We now take the opportunity to clarify the separate nature of “not prudent” designations and the discretionary analyses that we may elect to take under section 4(b)(2) of the Act. First, in making prudency determinations, the Services evaluate critical habitat designation *as a whole* for that species, while in making exclusion determinations under section 4(b)(2) the Services must evaluate *specific areas*. Second, as referenced earlier, unlike exclusion analyses under section 4(b)(2), the statute does not expressly require a balancing of benefits. Third, prudency determinations must be made at the time of listing based on the best scientific information available at that time, while exclusion determinations are only made if the Secretary first determines the boundaries of the areas that meet the definition of “critical habitat.” Based on these differences, prudency determinations must address different factors, on a different scale, based on a different set of data, and usually at a different time from section 4(b)(2) analyses. Indeed, a “not prudent” determination precludes the need to undertake the process of identifying specific areas and considering the impacts of designation of such specific areas under section 4(b)(2).

Comment: Several commenters objected to the Services making a not prudent determination if areas within U.S. jurisdiction would provide only negligible conservation value to a species that occurs primarily outside the jurisdiction of the United States. Some expressed concern that “negligible” is vague and undefined. Some stated that this course of action is contrary to the plain language of the Act and does not consider the need for migratory or transitory areas that contribute to the conservation of the species.

Response: In our 2016 revision of these regulations (81 FR 7414; February 11, 2016), we noted in the preamble that the consideration of whether areas within U.S. jurisdiction provide conservation value to a species that occurs in areas primarily outside U.S. jurisdiction could be a basis for determining that critical habitat designation would not be prudent (81 FR 7432; February 11, 2016). For the purposes of clarity and transparency, we proposed to add this consideration directly to the regulatory text. In the preamble to our proposed regulations, we explained that we would apply this determination only to species that primarily occur outside U.S. jurisdiction and where no areas under U.S. jurisdiction contain features essential to the conservation of the species.

The dictionary defines “negligible” to mean “so small or unimportant as to be not worth considering; insignificant.” In the context of “negligible conservation value” we mean that the conservation value of habitats under U.S. jurisdiction would be insignificant to the conservation of the listed entity. The circumstances when a critical habitat designation would provide negligible conservation value for a species that primarily occurs outside of U.S. jurisdiction will be determined on a case-by-case basis,

and factors such as threats to the species or its habitat and the species' recovery needs may be considered.

Finally, if areas under U.S. jurisdiction are important to the species' conservation for migratory or transitory purposes, we expect that we would not make a determination that critical habitat is not prudent. Based on the Services' history of implementing critical habitat, we anticipate that not prudent determinations will continue to be rare.

Comment: Some commenters suggested that critical habitat carries substantive and procedural benefits aside from those arising from the obligation to consult under section 7, even if consultation through section 7 is the sole regulatory mechanism for protecting critical habitat under the Act. These benefits include educating the public and State and local governments about the importance of certain areas to listed species, assisting in species recovery planning efforts, protecting against unanticipated Federal actions affecting the habitat that could be important in allowing the species time to adapt or demonstrate possible resilience to encroaching effects of climate change, or establishing a uniform protection plan prior to consultation. They cited the decisions in *NRDC* and *Conservation Council*, 113 F.3d at 1121; 2 F. Supp. 2d at 1280. They also noted that the Services acknowledged such benefits at the time of adopting the prior regulations, at 81 FR 7414–7445 (Feb. 11, 2016) (describing “several ways” that critical habitat “can contribute to the conservation of listed species”). In light of the myriad benefits of designating, the commenters assert that the threat of climate change actually emphasizes the importance of designating critical habitat rather than justifying creating an additional exception from designation where threats to habitat stem from climate

change. They further urge that designation can still benefit a species even if section 7 alone cannot address all the threats to a species' habitat.

Response: Although the direct benefit that the statute provides for designated critical habitat is through section 7 consultation, depending on the factual circumstances surrounding a given species, designating critical habitat may carry incidental additional benefits to the species beyond the protections from section 7 consultation. These regulatory revisions would not preclude us from designating critical habitat if any of the specific circumstances that the revised regulations identify, including climate change, is present—when we determine that designating critical habitat could still provide for the conservation of the species. However, through implementing the Act we have encountered situations in which threats to the species' habitat leading to endangered or threatened status stem solely from causes that cannot be addressed by management actions identified through consultations under the destruction or adverse modification standard of section 7(a)(2) of the Act.

In those situations, a designation of critical habitat could create a regulatory burden, as well as divert resources away from listing and designating critical habitat for other species, without providing any overall conservation value to the species concerned. Examples would include species experiencing threats stemming from melting glaciers, sea level rise, or reduced snowpack but no other habitat-related threats. In such cases, a critical habitat designation and any resulting section 7(a)(2) consultation, or conservation effort identified through such consultation, could not ensure protection of the habitat. The revised regulations identify this situation as a circumstance in which designation of critical habitat is often not prudent, but determining that a species falls within this

category does not make a not prudent finding mandatory, nor is the list of circumstances in which designation may not be prudent exhaustive. As we discussed in response to an earlier comment, in such situations (as with all not prudent analyses), the Services would need to take into account the specific factual circumstances at issue for the given species.

Comment: Several commenters expressed concern that the proposed regulatory changes to the circumstances in which the designation of critical habitat would not be prudent would result in the Services not designating critical habitat for species threatened by climate change. This outcome would eliminate the possibility of designating unoccupied critical habitat that could provide habitat for species under a changing climate in the future.

Response: The Services intend to make not prudent determinations only in the rare circumstance when the designation of critical habitat would not assist in conserving the species. For example, the Services might conclude that Federal action agencies could take no meaningful actions to address the threats to the habitat of a particular species that might arise from climate change. Under these circumstances, the Services might determine that it is not prudent to designate critical habitat because the designation would not be able to further the conservation of the species in the face of these threats, and our resources are better spent on other actions that assist in the conservation of listed species. These regulatory revisions would not preclude us from designating occupied or unoccupied critical habitat if any of the specific circumstances that the revised regulations identify, including climate change, is present if we determine that designating critical habitat could still provide for the conservation of the species.

Comment: Several commenters stated that the Services should be required to

determine that a designation is not prudent when any of the situations listed in the proposed regulation at § 424.14(a)(1) exist, rather than stating that the Secretary “may, but is not required to, determine that a designation would not be prudent.” Others thought that use of phrases such as “not limited to” was too open-ended and would result in more not-prudent determinations. Both sets of commenters believe the proposed approach leaves too much discretion to the Services.

Response: We recognize that some commenters would appreciate the greater certainty that would occur if a not prudent determination were mandatory rather than discretionary, while other commenters believe that critical habitat designation should be prudent in almost all cases. However, the question regarding whether designating critical habitat is prudent must be addressed on a case-by-case basis. Each species is different, and the threats they face can be complex; a one-size-fits-all approach is not required by the statute and may not be in the best interests of the species. The inclusion of “but not limited to” to modify the statement “the factors the Services may consider include” allows for the consideration of circumstances where a determination that critical habitat is not prudent would be appropriate. It is important to expressly reflect this flexibility in the revised regulations. Any future rule that includes a not prudent determination will clearly lay out the Services’ rationale as to why a not prudent determination is appropriate in that particular circumstance.

In some situations, the Services may conclude, after a review of the best available scientific data, that a designation would nevertheless be prudent even in the enumerated circumstances.

Comment: Several commenters thought the Services should simply delete §

424.12(a)(1)(ii) instead of revising it. They further stated that the Act does not require that a species currently be threatened by habitat loss before critical habitat is designated and protected, and the spirit of the Act would not be served by the imposition of such a requirement by regulation.

Response: The Services are finalizing the proposed revisions to § 424.12(a)(1)(ii) because we have concluded that they will provide the public and the Services with a clearer, more transparent, and more straightforward interpretation of when it may not be prudent to designate critical habitat. Critical habitat is a conservation tool under the Act that can provide for the regulatory protection of a species' habitat. The previous regulations and these revisions do not establish a requirement that a species be threatened by the modification, fragmentation, or curtailment of its range for critical habitat to be prudent to designate. However, the regulation and revisions establish a framework whereby if we list a species under the Act and determine through that process that its habitat is not threatened by destruction, modification, or fragmentation, or that threats to the species' habitat stem primarily from causes that cannot be addressed by management actions, then the Secretary may find that it would not be prudent to designate critical habitat. Examples would include species experiencing threats stemming from melting glaciers, sea level rise, or reduced snowpack but no other habitat-based threats. In such cases, a critical habitat designation and any resulting section 7(a)(2) consultation, or conservation effort identified through such consultation, could not ensure protection of the habitat. While this provision is intended to reduce the burden of regulation in rare circumstances in which designating critical habitat would not contribute to conserving the species, the Services recognize the value of critical habitat as a conservation tool and

expect to designate it in most cases.

Comment: Some commenters suggested that, by allowing for not prudent determinations where the threats stem solely from causes that cannot be addressed through management actions resulting from consultation under section 7(a)(2) of the Act, the Services would be pre-judging future Federal actions and outcomes of the consultations without basis for doing so. They cited two decisions from the Ninth Circuit Court of Appeals holding that the Services may not rely on the availability of other protections as a basis for not carrying out the mandatory duty of designating critical habitat.

Response: The Services will make a determination as to whether a designation of critical habitat is prudent based upon the best scientific data available to us at the time of listing. This determination includes a thorough analysis of the factors contributing to listing; therefore, we will be able to assess the degree to which these factors *can be*—not whether they *will be*—influenced by consultations under the destruction or adverse modification standard of section 7(a)(2) of the Act. In the rare circumstances in which we determine that the threats to the species' habitat are of such a nature that Federal action agencies are unable to modify or manage their actions such that the underlying causes posing risks to the habitat can be affected or influenced, then conducting consultations under the destruction or adverse modification standard of section 7(a)(2) of the Act on the impacts of the Federal action on critical habitat would not further the conservation of the species, and designation of critical habitat would be not prudent. If the best available information changes over time such that habitat-based human intervention is possible, we can designate critical habitat at that time. In reaching the

conclusion that it may not be prudent to designate in such circumstances, we are not relying on the existence of other protections and thus the cited cases are not relevant. Our interpretation of the statutory term “prudent” set forth in this rule is not contingent on there being other available protections.

Comments Regarding Unoccupied Critical Habitat

Comment: Numerous commenters stated that the Services have not justified the proposed change from current regulations that were recently amended in 2016.

Response: On May 12, 2014, the Services published a proposed rule revising the regulations at § 424.12 (79 FR 27066), in which we changed the step-wise approach we had been using since 1984 to allow for simultaneous consideration of occupied and unoccupied habitat according to the definition of “critical habitat” in the Act. We finalized the rule on February 11, 2016 (81 FR 7414), eliminating the sequenced approach to considering occupied habitat before unoccupied habitat. In carrying out Executive Order 13777, “Enforcing the Regulatory Reform Agenda,” the Department of the Interior (DOI) and the National Oceanic and Atmospheric Administration (NOAA) published documents in the *Federal Register* in summer 2017 (82 FR 28429, June 22, 2017; 82 FR 31576, July 7, 2017) requesting public comment on how the agencies could implement regulatory reform and improve the efficiency and effectiveness of regulations. Both of these documents resulted in input from States, trade organizations, and private landowner groups indicating that the Services should go back to considering occupied habitat before unoccupied habitat when designating critical habitat.

This final rule responds to those concerns as well as comments made on the proposed rule here by restoring the requirement that the Secretary will first evaluate areas occupied by the species. In addition, this approach furthers Congress's intent to place increased importance on habitat within the geographical area occupied by the species when it originally defined "critical habitat" in 1978. The Conference Report accompanying the amendments specified that Congress was defining "critical habitat" as "specific areas *within* the geographical area occupied by the species at the time it is listed that is essential to the species conservation and requires special management." H.R. Rept. No. 95-1804 (emphasis in the original). The report went on to state in the paragraph that followed: "In addition, the Secretary may designate critical habitat outside the geographical area occupied by the species at the time it is listed if he determines such areas are essential for the conservation of the species."

Comment: Returning to the sequenced approach of considering occupied habitat first will result in critical habitat designations that are not adequate to conserve species that may face range shifts into previously unoccupied habitat that will be species' best chance for survival in a rapidly changing environment as a result of climate change.

Response: As the Act requires, we designate unoccupied critical habitat when it is essential to the conservation of the species. For species threatened by climate change, we will designate unoccupied habitat if we determine that occupied areas are inadequate to ensure the conservation of the species and we identify unoccupied areas that are essential for the conservation of the species (including that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area

currently contains one or more of those physical or biological features essential to the conservation of the species).

In specific circumstances where the best scientific data available indicate that a species may be shifting habitats or habitat use, it is permissible to include specific areas accommodating these changes in a designation, provided that the Services can explain why the areas meet the definition of “critical habitat.” In other words, we may find that an unoccupied area is currently “essential for the conservation” even though the functions the habitat is expected to provide may not be used by the species until a point in the future. The data and rationale on which such a designation is based will be clearly articulated in our proposed rule designating critical habitat. The Services will consider whether habitat is occupied or unoccupied when determining whether to designate it as critical habitat and use the best available scientific data on a case-by-case basis regarding the current and future suitability of such habitat for recovery of the species.

Comment: Many commenters stated that the changes to the procedures for designating unoccupied habitat do not adequately account for the species’ recovery needs. Relatedly, some commenters suggested that the Services designate enough critical habitat at the time of listing to ensure that a species can recover.

Response: Although designation of critical habitat and the development of recovery plans are guided by two separate provisions of the Act and implementing regulations, the ultimate goal of each is the same: to provide for the conservation of listed species. “Conservation” is defined as the use of all methods and procedures that are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary, i.e., the species is

recovered in accordance with § 402.02. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

In evaluating which areas qualify as critical habitat (subject to section 4(b)(2) exclusions), we follow the statutory requirements. Designation of critical habitat is one important tool that contributes to recovery, but a critical habitat designation alone may not be sufficient to achieve recovery. Indeed, given the limited regulatory role of a critical habitat designation (i.e., through section 7's mandate that Federal agencies avoid destruction or adverse modification of critical habitat), it is generally not possible for a critical habitat designation alone to ensure recovery. Also, we must designate critical habitat according to mandatory timeframes, very often prior to development of a formal recovery plan. See *Home Builders Ass'n of Northern Cal. v. U.S. Fish and Wildlife Service*, 616 F.3d 983, 989-90 (9th Cir. 2010). However, although a critical habitat designation will not necessarily ensure recovery, it will generally further recovery because the Services base the designation on the best available scientific data about the species' habitat needs at the time of designation.

Comment: Many commenters did not agree with the Service's proposal that we would consider whether unoccupied areas could result in more efficient conservation when determining whether these areas are essential, for a variety of reasons. Some stated that "less-efficient conservation" is not defined and no thresholds were offered for determining what would be considered efficient conservation. Others thought this

provision would grant the Services overreaching discretion to designate unoccupied areas that is not based on what is actually essential for conservation. Others stated that a decision on whether unoccupied areas are essential for conservation should be a scientific determination. Some commenters stated that the Services should not consider societal conflicts when designating critical habitat. They further stated that determining whether an area is essential for the survival or recovery of a species is an entirely different question than determining whether managing that area would be economically "efficient."

Response: Based on the confusion generated by this provision, we have removed the provision allowing the designation of unoccupied habitat where a designation limited to occupied habitat would result in less efficient conservation. We will only consider whether unoccupied areas are essential to the conservation of a species when occupied areas are not sufficient to conserve the species. When the Services propose to designate specific areas pursuant to section 3(5)(A)(ii), we will explain the basis for the determination, including the supporting data. Thus, the Services' explanation will be available for public comment in the context of each proposed critical habitat designation.

Comment: Some commenters suggested that the Act requires concurrent consideration of potential occupied and unoccupied critical habitat together, based on data showing occupancy at the time of listing as well as at the time of designating critical habitat, which could be later. The commenters are concerned that, if the Services prioritize occupied habitat and are not designating until later in time, some areas that the species used to occupy at the time of listing will lose the opportunity for protection. They suggest this course of action would violate the approach of "institutionalized caution" mandated in *T.V.A. v. Hill*, 437 U.S. 153, 194 (1978).

Response: As explained in the preamble to the final rule in 2016, the Services acknowledge that occupancy is to be determined with reference to where the species could be found at the time of listing. Where designation is taking place later in time, the Services will rely on evidence that was contemporaneous with the time of listing where possible or, where necessary, may rely on more current evidence of distribution if there is a reasonable basis to conclude that it reflects distribution at the time of listing. Thus, the Services are able to appropriately analyze areas for possible inclusion as occupied critical habitat using the touchstone of occupancy at the time of listing even where designation takes place later in time. This course of action adequately fulfills the Services' statutory mandate to designate critical habitat. We note that *T.V.A. v. Hill* was decided in the context of a section 7 consultation and an earlier version of the statute that predated even the statutory definition of "critical habitat." The decision does not shed light on proper interpretation of the statutory provisions addressing designation of critical habitat.

Comment: Several commenters were concerned that the Services must commit to using the best scientific data available when designating unoccupied areas as critical habitat.

Response: We are mandated by the Act to use (and are committed to using) the best scientific data available in determining any specific areas as critical habitat, regardless of occupancy.

Comment: Some commenters stated that landowner willingness is an undefined term and will lead to confusion and inconsistent implementation. They further stated that success of conserving species is dependent on working with non-Federal landowners, and facilitating a process where they would be relieved from the responsibility of conserving

species will put an undue burden on Federal and State landowners.

Response: We recognize that “landowner willingness” is not a defined term, but we are not required to define every term used in a preamble. Rather, it is appropriate to give such phrases their ordinary meaning in the context of making case-specific determinations. Given the varied circumstances that may be involved in designation of critical habitat, we conclude that it is a relevant factor to consider when we evaluate whether an unoccupied area is likely to contribute to the conservation of the species. We agree that conservation of most listed species is dependent on working with non-Federal landowners. That said, section 7 of the Act places special responsibility on Federal agencies to provide for the conservation of listed species. Therefore, it is appropriate to place more responsibility, relative to the public generally or to private landowners, on Federal landowners to conserve listed species.

Comment: Some commenters stated that the definition of “essential” in the proposed regulations would limit Secretarial discretion to designate unoccupied areas as critical habitat.

Response: The statute limits Secretarial discretion to designate unoccupied areas to when we can determine such areas are essential to the conservation of a species. In the final regulation we explain that to be a specific area that is essential to the conservation there must be a reasonable certainty that the area currently contains one or more of those physical or biological features that are essential to the conservation of the species. It is appropriate through regulation to describe the circumstances or considerations that would lead the Secretary to conclude that unoccupied habitat is essential. Consistent with the requirements of section 3(5)(A)(ii), the question of whether unoccupied areas are

essential can be complex and include an evaluation of which unoccupied areas are best suited to provide for long-term conservation. For example, unoccupied areas might be in Federal or conservation ownership with willing partners already committed to working on restoration and reintroduction. Some unoccupied areas could be free of threats or face reduced threats in comparison with other areas. Some unoccupied areas might require fewer financial and human resources in order to contribute to the conservation of a species than other areas. These are the types of case-specific factors that could be considered when making a determination that we are reasonably certain an area will contribute to the conservation of a species.

Comment: Numerous commenters raised issues with the proposed regulatory language that unoccupied areas needed to have a “reasonable likelihood” of contributing to conservation in order to be designated as critical habitat. Some thought this language provided too much deference to the willingness of the current landowner. Others raised concerns that the preamble language allowing the Services to use a lower threshold than “likely” to contribute to conservation would allow the Services too much discretion to designate unoccupied areas that would not be likely to contribute to species conservation and could lead to arbitrary decisions. Others suggested additional considerations of how we should determine that an area has a “reasonable likelihood” of contributing to the species conservation.

Response: In this final rule, we replace “reasonable likelihood” with “reasonable certainty.” As described above, in light of the public comments that the “reasonable likelihood” language was undefined, unclear, and could allow too much discretion to designate areas that would not ultimately contribute to species conservation, we

concluded that the language of this final rule better reflects the need for high confidence that an area designated as unoccupied critical habitat will actually contribute to the conservation of the species. We consider the phrase “reasonable certainty” to confer a higher level of certainty than “reasonable likelihood” but not to require absolute certainty.

Comment: Some commenters stated that the Services should require a higher bar for designation of unoccupied critical habitat and require that unoccupied habitat be "habitable" as is, without restoration. Other commenters recommended that the Services require that unoccupied areas contain all the physical or biological features that occupied habitat has in order to designate them, or, if the Services determine they have the authority to designate unoccupied lands that require restoration, they should expressly declare a policy that doing so is a disfavored approach, only appropriate in dire circumstances.

Response: After considering these comments carefully, we agree that requiring reasonable certainty that any unoccupied area has, at the time of the designation, one or more of those physical or biological features that are essential to the conservation of the species comports with the language, legislative history, and purposes of the Act. Therefore, we have changed the regulatory text to substitute “reasonable certainty” for “reasonable likelihood” and are requiring that one or more of the physical or biological features be present.

Comment: Numerous commenters stated that the Services should have specific criteria for designating unoccupied critical habitat. They suggested criteria specifying: whether the area currently supports usable habitat for the species; the extent to which

restoration may be needed for the area to become usable habitat; the financial and other resources available to accomplish any needed restoration; any landowner or other constraints on such restoration; how valuable the potential contributions will be to the biology of the species; and how likely it is that section 7 consultations will be triggered by Federal agency actions in the area.

Response: We agree and have clarified that one or more of those physical or biological features essential to the conservation of the species must be present for an area to be designated, even an unoccupied area.

Comment: A commenter recommended adding “significantly” to the last sentence of unoccupied habitat so that it reads, “the Secretary must determine that there is a reasonable likelihood that the area will significantly contribute to the conservation of the species.”

Response: The insertion of “significantly” is not necessary because the Act already requires unoccupied critical habitat to be "essential," and addition of the term "significantly" would be vague and unclear. Therefore, we decline to adopt the commenter’s suggestion and will continue to rely on the statutory standard that unoccupied critical habitat must be “essential for the conservation of” a species.

Comment: Some commenters suggested that the Services have not adequately identified a reasonable basis to shift back to the sequential approach for designating critical habitat (of focusing first on occupied habitat and then looking to unoccupied habitat only if limiting to the first type of habitat would be inadequate to conserve the species). They cited to the explanation provided by the Services in a 2014 rulemaking action that proposed revisions to this provision that indicated the Services did not believe

Congress mandated this restriction and that such a restriction was unnecessary in light of the statutory limitation of designation of unoccupied areas to those that are “essential” for the species’ conservation. *See, e.g.*, 79 FR 27066, 27073 (May 12, 2014). They stated that, in the face of such a definitive rejection of the approach in 2016, the Services now propose to revert to a version of the prior approach based merely on perceptions that the Services intended to designate expansive areas of unoccupied habitat.

Response: The Services’ preamble statements at the time of proposing the 2016 amendments to these regulations (in 2014) are not binding law, and we have explained the reasons for reconsidering these provisions. Even if the Services were correct in 2014 that the provision requiring sequencing of occupied and unoccupied habitat was not necessary, there was no suggestion that the prior provision had exceeded the Services’ discretion. It is permissible for the Services to nevertheless reincorporate a similar provision back into the regulations that we have concluded is a preferable approach. While we initially proposed during this rulemaking to adopt a slightly different approach from the one we followed prior to 2016 (in that we proposed to allow for designation of unoccupied areas in lieu of occupied areas where doing so would result in “more efficient conservation,”), a number of commenters expressed concerns with that approach as being vague in that it introduces uncertainty and unpredictability into the determination and may be difficult to implement. After considering those comments, we concluded that the concept ultimately was not the best interpretation of the statute. Therefore, the approach in this final rule has been changed to be more aligned with the approach taken in the regulations prior to 2016.

Comment: The Services should require that both (1) occupied areas are insufficient and (2) designation of occupied areas would result in less-efficient conservation.

Response: As explained above, in response to comments that the “efficient conservation” concept was vague, we have removed the provisions regarding “efficient conservation.” Thus, unoccupied areas can be considered for potential designation only if limiting the designation to occupied areas would be inadequate to ensure recovery.

Comment: One State recommended that the Services develop a policy or metric to determine whether a particular area should be designated as critical habitat in unoccupied areas.

Response: This final rule explains the Services’ general parameters for designating critical habitat. The details of why a specific area is determined to be essential to the conservation of the species will be in part informed by any generalized conservation strategy that may have been developed for the species, which is an optional step, and clearly articulated in our proposed and final rules designating critical habitat. That determination is a fact-specific analysis and is based on the best available scientific data for the species and its conservation needs. The proposed rule for each critical habitat designation will be subject to public review and comment.

Comments on Geographical Area Occupied by the Species

Comment: We received multiple comments stating that the regulatory definition of the "geographical area occupied by the species" gives the Services too much discretion and allows for the inclusion of areas that are not occupied by the species. Some

commenters cited the court’s decision in *Arizona Cattlegrowers’ Ass’n v. Salazar*, 606 F.3d 1160, 1166 (9th Cir. 2010), in support of this view. Some commenters requested that the Services revise the definition to avoid inclusion of areas that are only used temporarily or periodically by the species, or modify the definition to explicitly equate occupancy with sustained or regular use rather than mere presence or occurrence of the species. Several commenters requested we remove the term “range” because, as indicated by the statute’s use of this word in section 4(c), “range” is a broader concept than “geographical area occupied by the species” and can include unoccupied areas. Some commenters requested that the existing definition be withdrawn.

Response: We are not revising the regulatory definition of “geographical area occupied by the species” at this time.

Comment: Numerous commenters stated that protection of habitat is a key to species’ survival and that the Services should not alter their existing definition of “geographical area occupied by the species.” Commenters stated that changing this definition could have a significant negative impact on habitat conservation. Multiple commenters stated that the existing regulatory definition should not be changed, because it appropriately reflects the importance of wildlife connectivity to the survival of migratory species in particular. Some comments also stated that, because the Services did not propose specific changes to the regulations, they could not provide meaningful comments regarding this regulation.

Response: We are retaining the existing regulatory definition for “geographical area occupied by the species” and are not revising the definition as part of this rulemaking.

Comment: Multiple commenters stated that the current regulatory definition for “geographical area occupied by the species” inappropriately allows the Services to determine occupancy at the time of listing based on presumed migratory corridors or based on indirect or circumstantial evidence. Several commenters also stated that occupancy should be based on population-level information, and that it cannot be determined based on an “occurrence” of a species or on data for individual animals.

Response: Although we requested comment on the definition of the phrase “geographical area occupied by the species,” we have decided not to include such a definition in the regulations at this time.

Comment: We received comments stating that the existing regulatory definition for “geographical area occupied by the species” could be in conflict with the proposed changes to 50 CFR 424.12(b)(2), where the Secretary is given discretion to designate critical habitat “at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species only upon a determination that such areas are essential for the conservation of the species.” In order to remove this conflict commenters suggested removing, “Such areas may include those areas used throughout all or part of the species' life cycle, even if not used on a regular basis (e.g., migratory corridors, seasonal habitats, and habitats used periodically, but not solely by vagrant individuals).”

Response: The existing regulatory definition for “geographical area occupied by the species” is not in conflict with the changes to 50 CFR 424.12(b)(2) regarding the designation of unoccupied areas because areas that are not permanently occupied are still considered occupied for both determining the range of a species and when designating

critical habitat. Some areas that may not be permanently occupied by the species may be crucial for a species to complete necessary phases of its life cycle. For example, terrestrial amphibians might only inhabit breeding ponds for a short time of year, but without these ponds the species would not be able to successfully reproduce.

Comment: Some commenters stated that use of the term “life-cycle” is confusing and requires further clarification. The commenters noted that a species’ occupancy of an area and its habitat needs from such area may fundamentally change depending upon the species’ life-cycle stage, and that an area and its supporting habitat features may be “essential” to conservation of the species in certain life stages, but not others. The commenters requested that the Services address these complexities by further detailing, in regulatory text, how they will identify the species’ life-cycle stages, and habitat features for such life-cycle stages, requiring designation of critical habitat.

Response: While we agree with the comment that a species’ distribution and habitat use can change depending upon the particular stages in its life cycle, we disagree that additional clarification within our implementing regulations is required to explain how this possibility will affect the designation of critical habitat. The existing regulatory definition for “geographical area occupied by the species” makes clear that any areas used by the species, at any one or more stages of its life history, are considered “occupied” areas. To determine what specific areas within the “geographical area occupied by the species” meet the definition of critical habitat, the Services must evaluate the best available scientific data regarding that species’ habitat requirements. A clear rationale, supported by the best available science, must then be articulated in any subsequent proposed rule to designate critical habitat. The nature and type of areas

included in any proposed rule will depend on the particular species and the scientific understanding of that species' habitat needs during its life cycle.

Comments Related to Physical or Biological Features

Comment: We received a number of comments in response to our request for feedback on the existing regulatory definition of “physical or biological features.” Several commenters suggested that it would be preferable for the Services to return to the “primary constituent elements” approach followed since 1980 and until the 2016 revisions to the Services' implementing regulations, which added the current definition, because the commenters claim that approach requires a higher degree of specificity in describing the attributes of critical habitat and is more consistent and objective than the approach codified in the current regulation.

Response: While the Services understand and agree with the need for as much specificity in the description of the attributes of critical habitat as the best available scientific data allow, we conclude that it is neither necessary nor desirable to revive the prior approach. Over our three decades of experience implementing the prior regulatory provision, the Services found that the “primary constituent elements” terminology had unnecessarily complicated implementation of the statutory provision. Also, the language of the “primary constituent elements” provision was itself somewhat vague and non-specific. As explained when we proposed to add the regulatory definition of the term “physical or biological features,” the “primary constituent elements” concept did not have a clear or consistent relationship to the operative statutory language—“physical or biological features” (see 79 FR 27066 and 27071, May 12, 2014). In shifting away from

the term “primary constituent elements,” our intent was to simplify the designation process and make it more transparent. We ensured continuity between the prior and current approaches by incorporating some of the previous regulatory language that had described primary constituent elements and emphasizing that designations should continue to be as specific as possible (See 81 FR 7414 and 7426, Feb. 11, 2016) (“The specificity of the primary constituent elements that has been discussed in previous designations will now be discussed in the descriptions of the physical or biological features essential to the conservation of the species.”). Because the statutory term “physical or biological features” is the operative concept under the statute, we concluded in our 2016 final rule (and reaffirm) that it is most efficient and transparent to focus on clarifying that concept rather than reintroduce unnecessary and complicated terminology.

Comment: Several commenters suggested that the definition of physical or biological features should focus on those features that are “essential to the conservation of the species” rather than those that “support the life-history needs of the species.” The commenters stated that “essential to the conservation of the species” is a greater biological significance than “supporting the life-history needs of the species” and we should not be allowed to designate an area that is of lower significance than “essential to the conservation of the species.”

Response: As noted above, we have decided to clarify the term “physical or biological features” to more specifically track some of the key statutory language from the Act’s definition of “critical habitat.” We have slightly modified the defined term, which is now “physical or biological features essential to the conservation of the species.” In doing so we have focused the definition more precisely on only those

features that may be the basis for a designation of occupied critical habitat if the other conditions are met (*i.e.*, that the features are found in specific areas and may require special management considerations or protections). We have made clear that the essential features are only the subset of physical or biological features that are necessary to support the species' life-history needs.

Comment: Several commenters stated that the phrase “including but not limited to” in the definition of physical or biological features is too vague or broad and should be removed from the definition.

Response: In defining physical and biological features and including this particular phrase, we provided a non-exhaustive list of examples of types of features and conditions that we have found to be essential to certain species based on experience over many years of designating critical habitat for a wide variety of species. The determination of specific features essential to the conservation of a particular species will be based on the best scientific data available and explained in the proposal to designate critical habitat for that species, which will be available for public comment and peer review.

Comment: Several commenters stated that the Services should not include the phrase “habitat characteristics that support ephemeral or dynamic habitat conditions” as a feature that could be considered essential and a basis for designation under section 3(5)(A)(i) of the Act. They stated that the definition goes too far by allowing the Services to include areas that do not currently have the essential physical or biological features necessary for a species, and it improperly allows the critical habitat designation to include areas that may develop the essential features sometime in the future. Further,

some stated that it is not clear what is meant by “habitat characteristics that support ephemeral or dynamic habitat conditions.” They stated that the language is unbounded, and the Services should define what is meant to support these conditions.

Response: We decline to remove the phrase “habitat characteristics that support ephemeral or dynamic habitat conditions” from the definition of physical or biological features. However, our proposed and final rules designating critical habitat for each species always include a detailed explanation of how the essential features relate to the life-history and conservation needs of the species based on the best scientific data available. When considering what features are essential, it is sometimes necessary to allow for the dynamic nature of the habitat, such as seasonal variations in habitat or successional stages of habitat, which could consist of water flow or level changes throughout the year or old-growth habitat or habitat newly formed through disturbance events such as fire or flood events. Thus, the physical or biological features essential to the conservation of the species may include features that support the occurrence of ephemeral or dynamic habitat conditions. The example we gave in the 2016 final rule (81 FR 7430, February 11, 2016) was a species that may require early-successional riparian vegetation in the Southwest to breed or feed. Such vegetation may exist only 5 to 15 years after a local flooding event. The necessary features, then, may include not only the suitable vegetation itself, but also the flooding events, topography, soil type, and flow regime, or a combination of these characteristics and the necessary amount of the characteristics that can result in the periodic occurrence of the suitable vegetation. The flooding event would not be a subsidiary characteristic, as suggested by the commenter, but would itself be a feature necessary for the vegetation to return. As is our general

practice, this type of specificity regarding the features and how they relate to the needs of the species will be clearly explained in each proposed and final rule designating critical habitat.

Comment: Several commenters suggested that we remove “principles of conservation biology” from the definition of “physical or biological features.” Further, they stated that this theory should not be included in regulations and it creates a higher bar than the best-available-data standard.

Response: The sentence that reads, “Features may also be expressed in terms of relating to principles of conservation biology, such as patch size, distribution distances, and connectivity” explains more clearly how we may identify the features. The principles of conservation biology are generally accepted among the scientific community and consistently used in species-at-risk status assessments and development of conservation measures and programs. We stated in the final rule (81 FR 7414, February 11, 2016) that, using principles of conservation biology such as the need for appropriate patch size, connectivity of habitat, dispersal ability of the species, or representation of populations across the range of the species, the Services may evaluate areas relative to the conservation needs of the species. The Services must identify the physical and biological features essential to the conservation of the species and unoccupied areas that are essential for the conservation of the species. When using this methodology to identify areas within the geographical area occupied by the species at the time of listing, the Services will expressly translate the application of the relevant principles of conservation biology into the articulation of the features. Aligning the physical and biological features identified as essential with the conservation needs of the

species and any conservation strategy that may have been developed for the species allows us to develop more precise designations that can serve as more effective conservation tools, focusing conservation resources where needed and minimizing regulatory burdens where not necessary. Furthermore, not including widely accepted scientific concepts into our process and procedures for designating critical habitat would amount to ignoring some of the best available scientific data.

Comments on Required Determinations

Comment: Many commenters stated the proposed changes are substantive and will have a significant impact on the environment and, therefore, the Services must comply with NEPA and issue either an environmental assessment or an environmental impact statement (EIS), including a robust set of alternatives. CEQ regulations state that, if a Federal action “may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the” Act, that possibility makes it more likely that the action may be considered significant and a full environmental review be conducted. 40 CFR 1508.27(b)(9). Commenters stated the proposed changes constitute a major Federal action because there is “the possibility that an action may have a significant environmental effect.” See *Citizens for Better Forestry v. USDA*, 481 F. Supp. 2d 1059, 1087 (N.D. Cal. 2007). Furthermore, commenters stated the Services cannot delegate their authority in NEPA by asking the public for opinions regarding whether an EIS is or is not appropriate. Finally, the proposed changes cannot be considered administrative, financial, legal, technical, or procedural in nature and therefore do not qualify for categorical exclusion.

Response: The Services have complied with NEPA by documenting their invocation of the categorical exclusions afforded under their relative procedures, including consideration as to whether the existence of any “extraordinary circumstances” would preclude invoking an exclusion here. We have determined that this final regulation is categorically excluded from further NEPA review and that no extraordinary circumstances are present (see **Required Determinations**, below). We do not consider merely asking the public for input regarding the applicability of an EIS abrogating our authority in complying with the provisions of NEPA, and it has been our practice to do so for similar recent rulemakings.

Comment: Several commenters stated that the proposed rule, if made final, would have significant economic impacts on small business, small government jurisdictions, and small organizations and therefore requires an initial regulatory flexibility analysis and economic analysis under the Regulatory Flexibility Act (RFA).

Response: We interpret the RFA, as amended, to require that Federal agencies evaluate the potential incremental impacts of rulemaking only on those entities directly regulated by the rulemaking itself and, therefore, not on indirectly regulated entities. Recent case law supports this interpretation (Small Business Association 2012, pages 22–23). NMFS and FWS are the only entities that are directly affected by this rule because we are the only entities that add or remove species from the Lists and designate critical habitat. This rule pertains to the procedures for carrying out those authorities. No external entities, including any small businesses, small organizations, or small governments, will experience any direct economic impacts from this rule (see **Required Determinations**, *Regulatory Flexibility Act*, below, for certification).

General Comments

Comment: We received many comments on topics that were not specifically addressed in our proposed regulatory amendments, such as recommendations to change our policies on DPSs and the significant portion of a species' range, define "best available scientific and commercial information," modify the Services' implementation of section 6 of the Act, and revise the regulations at § 424.19 regarding how we consider the impacts of the designation of critical habitat.

Response: The Services appreciate the many insightful comments and suggestions we received on various areas of section 4 implementation. 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 finalize the revisions for which we specifically proposed regulatory text or on which we sought particular comment (e.g., the term "physical or biological features"), and to defer action on other issues until a later time. The Services are required only to respond to "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)). Such comments constitute the universe of "significant" comments. Therefore, comments that pertain to issues that were not specifically addressed in our proposed regulatory amendments are not "significant" in the 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). We are not responding to comments that are not "significant."

Comment: Some commenters suggested that the Services should delay finalizing the proposed rule until the United States Supreme Court resolves the pending *Weyerhaeuser* litigation (*Weyerhaeuser Co. v. U.S. Fish and Wildlife Service*, No. 17-71 (docketed July 13, 2017)) because the Court’s analysis of the Act’s statutory framework could have implications for the interpretations of the proposed rule. The commenters suggest that waiting until spring 2019 to finalize the rule would allow time to digest the resulting decision, determine its implications for this rulemaking, and make any modifications or take any procedural steps that might be necessary in light of the decision.

Response: The Services carefully evaluated the Supreme Court’s recent opinion in the *Weyerhaeuser* litigation. The final rule has been modified in response to the decision to make clear that unoccupied habitat must be “habitat,” by requiring reasonable certainty that at least one physical or biological feature essential to the conservation of the species is present. This rule is therefore consistent with the Court’s decision. While the Services are considering further clarification of the meaning of habitat through separate rulemaking, we find that the Services’ and public’s interests are served by clarifying the existing regulatory framework in this final rule without delay.

Comment: Several commenters stated that the proposed regulatory changes to part 424 are an attempt by the Services to expand their own discretion and authority without congressional authorization and thus is neither justified nor lawful.

Response: The amended regulations do not expand the Services’ discretion beyond the authority provided in the Act. Rather, they clarify the existing process and, in some instances, narrow the Services’ discretion when designating critical habitat based on

lessons learned over many years of implementing the Act and relevant case law. The amendments synchronize the language in the implementing regulations with that in the Act to minimize confusion and clarify the discretion and authority that Congress provided to the Secretaries under the Act. The Services are exercising their discretion to resolve ambiguities and fill gaps in the statutory language, and the amended regulations are a permissible interpretation of the statute.

Comment: Several commenters referred to the following statement in the proposed rule: “the final rule may include revisions to any provisions in part 424 that are a logical outgrowth of this proposed rule.” The commenters stated that any amendments adopted in the final rule must come from specific proposals announced in the proposed rule and not the Services’ open-ended request for suggestions. Furthermore, commenters stated that if the Services make changes based on this open-ended and vague premise, the final rule would fail the logical-outgrowth test and be in violation of the Administrative Procedure Act (APA) because this outcome would deny the public and all stakeholders the opportunity to provide comments regarding these changes.

Response: Although we do not necessarily agree with the commenters’ interpretation of the APA, none of the changes we make in this final rule relies upon the assertion in the quoted sentence that the final rule may include changes to “any provisions in part 424” not addressed in the proposed rule. The regulatory changes we finalize today flow directly from the regulatory provisions in the proposed rule, with modifications made in response to comments as explained throughout this document, and from the Services’ specific invitation for public comment on whether they should modify the definition of “physical or biological features.” We have determined to reserve for a

later date our consideration of, and any action regarding, issues outside the scope of those specific provisions.

Comment: Many commenters had concerns regarding specific proposed changes, calling them arbitrary and capricious and therefore in violation of the APA.

Response: We do not agree with the assertion that the specific proposed changes to our implementing regulations are arbitrary and capricious. We published our proposal, detailed our proposed revised regulation changes, explained our rationale for changes and explicitly asked for public comment. We have now reviewed the public comments and in this final rule have provided responses to significant comments and made some changes in response to those comments as explained throughout this document. As to two issues (the definitions for “geographical area occupied by the species” and “physical or biological features”), we sought specific public comment without proposing regulatory text. In this final rule, we have decided to address one of those issues (the definition of “physical or biological features essential to the conservation of the species”) through minor regulatory edits that merely incorporate and interpret some of the statutory language from the Act’s provision defining occupied critical habitat without substantively changing the meaning or process for identifying occupied critical habitat. We have provided the public with our rationale and a meaningful opportunity to comment on all aspects of the proposed rule. Thus, the process that we used to promulgate this rule complied with the applicable requirements of the APA.

Comment: Several commenters stated that the Services have misled stakeholders and effectively failed to provide adequate notice and opportunity for public comment. The comments assert that 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: The Services have not misled stakeholders. 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 process satisfies the Services' obligation to provide notice and comment under the APA.

Comment: Several tribes commented that traditional ecological knowledge should constitute the best scientific data available and be used by the Services.

Response: 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 Services have often used TEK to inform decisions under the Act regarding listings, critical habitat, and recovery. The Act requires that we use the best scientific and commercial data available to inform decisions to list a species and the best scientific data available to inform designation of critical habitat, and in some cases TEK may be included as part of what constitutes the best data available. However, the Services cannot predetermine, as a general rule, that TEK will be the best available data in every rulemaking. We will continue to consider TEK along with other available data, weighing all data appropriately in the decision process.

Comment: A State agency requested that we codify a requirement for consultation with affected State wildlife management agencies, giving effect to the statutory language contained in section 7(a)(2) of the Act to consult with the affected States on critical

habitat designations, as appropriate, to interpret inconclusive information, particularly involving individuals.

Response: We do not agree that additional requirements are needed to give effect to the statutory language in section 7(a)(2) regarding consulting affected States prior to designating critical habitat. The nature of this required consultation is already articulated in section 4(b)(5)(A)(ii), which requires the Secretary to give actual notice of any proposed critical habitat designation to the appropriate State agencies and invite their comment on the proposed designation. The Services will continue to meet this requirement.

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 will review all significant rules. OIRA has determined that this rule is significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and

an open exchange of ideas. We have developed this rule in a manner consistent with these requirements. This 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 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. The following discussion explains our rationale.

This rulemaking revises and clarifies requirements for NMFS and FWS regarding factors for listing, delisting, or reclassifying species and designating critical habitat under the Endangered Species Act to reflect agency experience and to codify current agency practices. The changes to these regulations do not expand the reach of species protections or designations of critical habitat.

NMFS and FWS are the only entities that are directly affected by this rule because we are the only entities that list species and designate critical habitat under the Endangered Species Act. No external entities, including any small businesses, small organizations, or small governments, will experience any economic impacts from this rule. At the proposed rule stage, we certified that this rule would not have a significant economic effect on a substantial number of small entities. Nothing in this final rule changes that conclusion.

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

(b) This 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 rule is not a “significant regulatory action” under the Unfunded Mandates Reform Act. This rule would impose no obligations on State, local, or tribal governments.

Takings (E.O. 12630)

In accordance with Executive Order 12630, this rule would not have significant takings implications. This 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 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 rule would substantially advance a legitimate government interest (conservation and recovery of endangered species and threatened species) and would not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether this rule would have significant Federalism effects and have determined that a federalism summary impact statement is not required. This rule pertains only to factors for listing, delisting, or reclassifying species and designation of critical habitat under the Endangered Species Act, and would not have substantial direct effects on the States, on the

relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

This 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 rule would clarify factors for listing, delisting, or reclassifying species and designation of critical habitat under the Endangered Species 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; 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, Service 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 the changes to these implementing regulations make general changes to the Act's implementing regulations and do not directly affect specific species or Tribal lands or interest. These regulations streamline and clarify the processes for listing species and designating critical habitat and directly affect only the Services. With or without these regulatory revisions, the Services would be obligated to continue to list species and to designate critical habitat based on the best available data. Therefore, we conclude that these regulations do not have "tribal implications" under section 1(a) of E.O. 13175, and formal government-to-government consultation is not required by the Executive order and related policies of the Departments of Commerce and the Interior. We will continue to collaborate with Tribes on issues related to federally listed species and their habitats 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 rule does not contain any new collections of information that require approval by the OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State, local, or Tribal governments,

individuals, businesses, or organizations. 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 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 the 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 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).

These revisions are an example of an action that is fundamentally administrative, legal, technical, or procedural in nature. The revisions go no further than to clarify the existing regulations and make them more consistent with the statutory language, case law, and plain-language standards. They are an effort to streamline and clarify the procedures and criteria that the Services use for listing or delisting species and for designating critical habitat. These revisions directly affect only the FWS and NMFS, which are the agencies charged with implementing the provisions of the statute, and they do not affect any specific areas. Specifically, rather than substantively changing the

status quo, the effect of these revisions is to respond to court decisions and articulate the Services' understanding and practice with respect to the statutory provisions for listing species and designating critical habitat. Further, the Services must still continue to list species and to designate critical habitat based on the best available scientific information, with or without these regulatory revisions. Finally, none of these revisions will affect the opportunity for public involvement in, or outcome of, either agency's decisions on listing species or designating critical habitat.

We also considered whether any "extraordinary circumstances" apply to this situation, such that the DOI categorical exclusion would not apply. See 43 CFR 46.215 ("Categorical Exclusions: Extraordinary Circumstances"). We have determined that none of the circumstances apply to this situation. Although the final regulations would revise the implementing regulations for section 4 of the Act, the effects of these changes would not "have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species or have significant impacts on designated Critical Habitat for these species," as the effect of the revisions is to provide transparency about the Services' implementation of the Act based upon court decisions and the Services' understanding and practices. Furthermore, the revised regulations do not "[e]stablish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects" (43 CFR 46.215(e)), as any future listing, classification, or delisting decisions will continue to be based on the best available scientific information presented in a particular record. None of the extraordinary circumstances in 43 CFR 46.215(a) through (l) apply to the revised regulations in 50 CFR 17.31 or 17.71. Nor would the final regulations trigger any of the extraordinary

circumstances under NOAA's Companion Manual to NAO 216–6A. This rule does not involve: a) adverse effects on human health or safety that are not negligible or discountable; b) adverse effects on an area with unique environmental characteristics (e.g., wetlands and floodplains, national marine sanctuaries, or marine national monuments) that are not negligible or discountable; c) adverse effects on species or habitats protected by the ESA, the MMPA, the MSA, NMSA, or the Migratory Bird Treaty Act that are not negligible or discountable; d) the potential to generate, use, store, transport, or dispose of hazardous or toxic substances, in a manner that may have a significant effect on the environment; e) adverse effects on properties listed or eligible for listing on the National Register of Historic Places authorized by the National Historic Preservation Act of 1966, National Historic Landmarks designated by the Secretary of the Interior, or National Monuments designated through the Antiquities Act of 1906; Federally recognized Tribal and Native Alaskan lands, cultural or natural resources, or religious or cultural sites that cannot be resolved through applicable regulatory processes; f) a disproportionately high and adverse effect on the health or the environment of minority or low-income communities, compared to the impacts on other communities. . . ; g) contribution to the introduction, continued existence, or spread of noxious weeds or nonnative invasive species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of the species; h) a potential violation of Federal, State, or local law or requirements imposed for protection of the environment; i) highly controversial environmental effects; j) the potential to establish a precedent for future action or an action that represents a decision; in principle about future actions with potentially significant environmental effects; k) environmental effects that are uncertain,

unique, or unknown; or l) the potential for significant cumulative impacts when the proposed action is combined with other past, present and reasonably foreseeable future actions, even though the impacts of the proposed action may not be significant by themselves.

FWS completed an Environmental Action Statement, which NOAA adopts, explaining the basis for invoking the agencies' substantially similar categorical exclusions for the regulatory revisions to 50 CFR 424.02, 424.11 and 424.12. The environmental action statement is available at <http://www.regulations.gov> in Docket No. FWS-HQ-ES-2018-0006.

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

Executive Order 13211 requires agencies to prepare statements of energy effects when undertaking certain actions. The revised regulations are not expected to affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Authority

We issue this 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 424

Administrative practice and procedure, Endangered and threatened species.

Regulation Promulgation

For the reasons set out in the preamble, we hereby amend part 424, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as set forth below:

PART 424—LISTING ENDANGERED AND THREATENED SPECIES AND DESIGNATING CRITICAL HABITAT

1. The authority citation for part 424 continues to read as follows:

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

2. Amend § 424.02 by removing the definition of “Physical or biological features” and in its place adding a definition for “Physical or biological features essential to the conservation of the species” to read as follows:

§ 424.02 Definitions.

* * * * *

Physical or biological features essential to the conservation of the species. The features that occur in specific areas and that are essential to support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features. A feature may be a

single habitat characteristic, or a more complex combination of habitat characteristics. Features may include habitat characteristics that support ephemeral or dynamic habitat conditions. Features may also be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.

* * * * *

3. Amend § 424.11 by revising paragraphs (b) through (f) and adding a new paragraph (g) to read as follows:

§ 424.11 Factors for listing, delisting, or reclassifying species.

* * * * *

(b) The Secretary shall make any determination required by paragraphs (c), (d), and (e) of this section *solely* on the basis of the best available scientific and commercial information regarding a species' status.

(c) A species shall be listed or reclassified if the Secretary determines, on the basis of the best scientific and commercial data available after conducting a review of the species' status, that the species meets the definition of an endangered species or a threatened species because of any one or a combination of the following factors:

(1) The present or threatened destruction, modification, or curtailment of its habitat or range;

(2) Overutilization for commercial, recreational, scientific, or educational purposes;

(3) Disease or predation;

(4) The inadequacy of existing regulatory mechanisms; or

(5) Other natural or manmade factors affecting its continued existence.

(d) In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time.

(e) The Secretary shall delist a species if the Secretary finds that, after conducting a status review based on the best scientific and commercial data available:

(1) The species is extinct;

(2) The species does not meet the definition of an endangered species or a threatened species. In making such a determination, the Secretary shall consider the same factors and apply the same standards set forth in paragraph (c) of this section regarding listing and reclassification; or

(3) The listed entity does not meet the statutory definition of a species.

(f) The fact that a species of fish, wildlife, or plant is protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (see part 23 of this title 50) or a similar international agreement on such species, or has been identified as requiring protection from unrestricted commerce by any foreign nation, or to be in danger of extinction or likely to become so within the foreseeable future by any State agency or by any agency of a foreign nation that is responsible for the conservation of

fish, wildlife, or plants, may constitute evidence that the species is endangered or threatened. The weight given such evidence will vary depending on the international agreement in question, the criteria pursuant to which the species is eligible for protection under such authorities, and the degree of protection afforded the species. The Secretary shall give consideration to any species protected under such an international agreement, or by any State or foreign nation, to determine whether the species is endangered or threatened.

(g) The Secretary shall take into account, in making determinations under paragraphs (c) or (e) of this section, those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

4. Amend § 424.12 by revising paragraphs (a)(1) and (b)(2) to read as follows:

§ 424.12 Criteria for designating critical habitat.

(a) * * *

(1) The Secretary may, but is not required to, determine that a designation would not be prudent in the following circumstances:

(i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;

(iv) No areas meet the definition of critical habitat; or

(v) The Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.

* * * * *

(b) * * *

(2) The Secretary will designate as critical habitat, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species only upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.

* * * * *

Dated: _____.

David L. Bernhardt,

Secretary

Department of the Interior.

**~~Endangered and Threatened Wildlife and Plants; Revision of the Regulations for
Listing Species and Designating Critical Habitat~~**

Dated: _____

Wilbur Ross,

Secretary

Department of Commerce.

**~~Endangered and Threatened Wildlife and Plants; Revision of the Regulations for
Listing Species and Designating Critical Habitat~~**

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.

* * * * *

(g) * * *

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

* * * * *

(4) Add the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, formulate the Service's opinion as to whether the action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

* * * * *

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

(h) *Biological opinions.*

(1) The biological opinion shall include:

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

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

and

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

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

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

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

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

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

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

(4) A Federal agency and the Service may agree to follow an optional collaborative process that would further the ability of the Service to adopt the information and analysis provided by the Federal agency during consultation in the development of the Service’s biological opinion to improve efficiency in the consultation process and reduce duplicative efforts. The Federal agency and the Service shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat, and other relevant factors to determine whether an action or a class of actions is appropriate for this process. The Federal agency and the Service may develop coordination procedures that would facilitate adoption. The end result of the adoption consultation process is expected to be the adoption of the initiation package with any necessary supplementary analyses and incidental take statement to be added by the Service, if appropriate, as the Service’s biological opinion in fulfillment of section 7(b) of the Act.

* * * * *

(1) *Expedited consultations.* Expedited consultation is an optional formal consultation process that a Federal agency and the Service may enter into upon mutual agreement. To determine whether an action or a class of actions is appropriate for this type of consultation, the Federal agency and the Service shall consider the nature, size, and scope of the action or its anticipated effects on listed species or critical habitat and other relevant factors. Conservation actions whose primary purpose is to have beneficial effects on listed species will likely be considered appropriate for expedited consultation.

(1) Upon agreement to use this expedited consultation process, the Federal agency and the Service shall establish the expedited timelines for the completion of this consultation process.

(2) *Federal agency responsibilities:* To request initiation of expedited consultation, the Federal agency shall provide all the information required to initiate consultation under paragraph (c) of this section. To maximize efficiency and ensure that it develops the appropriate level of information, the Federal agency is encouraged to develop its initiation package in coordination with the Service.

(3) *Service responsibilities:* In addition to the Service's responsibilities under the provisions of this section, the Service will:

(i) Provide relevant species information to the Federal agency and guidance to assist the Federal agency in completing its effects analysis in the initiation package; and

(ii) Conclude the consultation and issue a biological opinion within the agreed-upon timeframes.

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 (5th 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 Env'tl. 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(l)(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. *Defs. 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 reinitiate 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 reinitiation 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 reinitiation. *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 reinitiation 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 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: _____

David L. Bernhardt,

Secretary

Department of the Interior.

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

Dated: _____

Wilbur Ross,

Secretary

Department of Commerce.

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