4310-55-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 402

1018-AT50

DEPARTMENT OF COMMERCE

National Marine Fisheries Service

0618-AX15

50 CFR Part 402

Interagency Cooperation Under the Endangered Species Act

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

ACTION: Final rule.

SUMMARY: With this final rule, the United States Fish and Wildlife Service and the National Marine Fisheries Service (collectively, "Services" or "we") amend regulations governing interagency cooperation under the Endangered Species Act of 1973, as amended (ESA). This rule clarifies several definitions, provides assistance as to when consultation under section 7 is necessary, and establishes time frames for the informal consultation process.

EFFECTIVE DATE: This rule is effective [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Office of the Assistant Secretary for Fish and Wildlife and Parks, 1849 C Street NW, Washington, DC 20240; telephone: 202-208-4416; or

James H. Lecky, Director, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910; telephone: 301-713-2332.

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act of 1973, as amended ("ESA"; 16 U.S.C. 1531 et seq.) provides that the Secretaries of the Interior and Commerce (the "Secretaries") share responsibilities for implementing most of the provisions of the ESA. Generally, marine species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior. Authority to administer the Act has been delegated by the Secretary of the Interior to the Director of the Fish and Wildlife Service and by the Secretary of Commerce through the Administrator of the National Oceanic and Atmospheric Administration to the Assistant Administrator for National Marine Fisheries Service.

In this rule, we refer to the Fish and Wildlife Service as FWS and the National Marine Fisheries Service as NMFS. The word "Services" refers to both FWS and NMFS. We use the word "Service" when we describe a situation that could apply to either agency. We use the term "1986 regulations" to reference the 1986 section 7 regulations found at 50 CFR Part 402.

Procedural Background

On August 15, 2008, the Services published the Proposed Rule. The public was given 30 days to comment. On September 15, 2008, that comment period was extended by 30 days. Approximately 235,000 comments were received; of these, approximately 215,000 were largely similar "form" letters.

Changes from Proposed Rule in Responses to Comments

After reviewing the public comments and further interagency discussion, the Services made certain clarifications and modifications in the final rule. The parts of the rule that were changed are set out immediately below. Those changes are discussed in more detail in a section- by-section analysis of comments set out later in this preamble.

Definitions (§402.02).

The proposed rule set out a new definition for "Biological Assessment". In the final rule, a sentence was added to the end of the definition. The additional sentence requires that the Federal agency provide the Services a specific guide or statement as to the location of the relevant consultation information, as described in 402.14, in any alternative document submitted in lieu of a biological assessment.

The proposed rule set out a new definition of "cumulative effects." No changes were made to the definition of cumulative effects in the final rule.

The proposed rule set out a new definition of "Effects of the Action". In the final rule, a definition of "direct effects" was added and the fourth sentence of the proposed rule was changed.

Applicability – (§402.03)

The proposed rule set out a new applicability section. In the final rule, paragraph (b)(2) and paragraph (b)(3)(i) were changed and paragraph (b)(3)(iii) was deleted. Specifically, paragraph

(b)(2) deleted language that "such action is an insignificant contributor to any effects on a listed species or critical habitat" and replaced it with language that the effects of such action are manifested through global processes and cannot be reliably predicted or measured at the scale of a listed species' current range; or, would result at most in an extremely small, insignificant impact on a listed species or critical habitat; or, are such that the potential risk of harm to a listed species or critical habitat is remote. Paragraph (b)(3)(i) was changed to by moving the word "meaningful" to directly before the word "evaluation." Finally, paragraph (b)(3) was deleted in its entirety.

Informal Consultation (§402.13)

The proposed rule amended the informal consultation procedures. In the final rule, a sentence was added to the end of paragraph (b) and a paragraph (c) was added. Specifically, a sentence was added to the end of paragraph (b) to set out that if the Federal agency terminates consultation at the end of the 60-day period, or if the Service's extension period expires without a written statement whether it concurs with a Federal agency's determination provided for in paragraph (a) of this section, the consultation provision in section 7(a)(2) is satisfied. Paragraph (c) was added to the final rule to provide that notwithstanding the provisions of paragraph (b) the Service, the Federal agency, and the applicant, if one is involved, may agree to extend informal consultation for a specific time period.

Formal Consultation (§402.14)

The proposed rule made a change to the formal consultation procedures. In the final rule, we changed the "exception" language in § 402.14 to note that informal consultation may be

concluded without the written concurrence of the Director under the circumstances set out in §402.13(b).

General Comments

Many of the comments received on the proposed rule focused on particular regulatory provisions of the proposed regulation or concepts captured in specific sections of the proposed regulation. These comments are discussed in a section-by-section analysis. Some commenters, however, expressed broad comments related to the proposed regulation. We discuss those comments below.

Comment: Some commenters question why this rule is being promulgated. Some of these commenters think that the 1986 regulations are working so there is no need for change.
Response: As discussed in the preamble to the proposed rule, we believe the narrow changes made in this rule will be beneficial for the consultation process. This rule is intended to accomplish several objectives. First, it is intended to clarify several definitions. Second, it is intended to assist the agencies in determining when consultation is necessary under section 7(a)(2). Since 1986, and continuing under this rule, action agencies are required to review their actions to determine if the effects of that action "may affect" listed species or critical habitat. Action agencies and agency personnel have struggled periodically to determine when informal and formal consultation is required. As part of this guidance on when consultation is required, this rule assists action agencies in determining when consultation is necessary in the very narrow circumstances of agency actions where no take is anticipated, and at least one of several other criteria are satisfied. This rule will provide greater guidance to help the action agencies and the

Services negotiate the complexities of consultations in the 21st century, particularly with regard to global processes. Third, it is intended to introduce time frames into the informal consultation process, which, just as in formal consultation, can be waived. As discussed above, the standards for jeopardy and adverse modification remain the same, as do the protection provided to species by sections 4(d), 9, and 11.

Comment: Some commenters asserted that this rule changes standards and responsibilities under the ESA. Others assert that this rule is an attempt to weaken or repeal the ESA.
Response: This rule does not change the substantive standard for protection of listed species and critical habitat set out in section 7(a)(2) of the ESA. This rule is not intended to, nor does it, repeal or weaken the ESA. Only Congress can modify a statute. Federal action agencies are still required to use the best scientific and commercial data available to ensure that their actions are not likely to jeopardize listed species or adversely modify or destroy critical habitat. Further, the statutory definition of "take" and all prohibitions regarding "take" remain in place under this rule. Similarly, an action agency cannot proceed with a discretionary agency action that is anticipated to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect any listed species without consulting with the Services first.

All aspects of formal consultation, as found in the 1986 regulations, remain intact. Nothing in this final rule allows action agencies to adversely affect listed species or critical habitat without consultation with the Services. Action agencies remain obligated to review their actions to determine if they "may affect" a listed species. In formal consultation, the action agency continues to be required to produce a biological assessment for "major construction activities."

to produce a consultation initiation package that describes the action to be considered, the specific area that may be affected by the action, any listed species or critical habitat that may be affected by the action, the manner in which the action may affect listed species or critical habitat, and cumulative effects. An action agency must submit any relevant reports to the Services and the action agency is still required to provide the Services with the "best scientific and commercial data available." Further, nothing in this final rule prevents an action agency from engaging in informal consultation or technical assistance from the Service.

Comment: One commenter expressed concern that the proposed regulation would affect the listing of species.

Response: There is no correlation between this rule and listing procedures set out in section 4 of the ESA. Listing decisions are made pursuant to section 4 of the ESA and regulations located in 50 C.F.R. Part 424. This rule does not alter the listing process or the listing regulations.

Comment: Some commenters addressed matters that are beyond the scope of the proposal. For example, several commenters suggested that we amend several definitions ("environmental baseline", "adverse modification"), which were not addressed in the proposed regulation. Some commenters suggested new regulatory language or concepts that were not part of the proposed rule or made budgetary suggestions. Specifically, there were suggestions to add regulatory language related to conservation banks and habitat conservation plans. Further there were comments that related to sections 4, 7(p), 7(a)(1), and 10 of the ESA.

Response: These comments were not considered as they were beyond the scope of the rule. The Services, however, may propose changes to address some of these issues at a future date.

Comment: A commenter asserted that the proposed regulations violate the Services' obligation under section 7(a)(1) to utilize their authorities to further the purposes of the ESA.

Response: We disagree. This rule does not violate section 7(a)(1). The first sentence of section 7(a)(1) requires the Secretaries of Interior and Commerce to review "other programs administered by him and utilize such programs in furtherance of the purposes of the Act." The requirement that the Services utilize other programs to further the purposes of the ESA does not apply to this rulemaking, which involves implementation of the ESA itself. Nevertheless, the changes to the 1986 regulations made by this rule are to further the purposes of the ESA. That is, this rule will allow the Services to focus their resources on those actions that have adverse impacts to listed species or critical habitat.

Comment: Several commenters expressed concern that this rule is contrary to the "benefit of the doubt to the species" standard.

Response: The phrase "benefit of the doubt to the species" originated in a Conference Report that accompanied the 1979 amendments to the ESA. Relevant to section 7, those amendments changed the statutory text at 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 explained that the amendment permitted the Services to render biological opinions based on the "best available evidence" or evidence that "can be developed during consultation." 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 to have been offered as reassurance that the statutory language, as amended, would remain protective of the species. At most, this 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. This rule does not change any statutory requirements found in section 7(a)(2) of the ESA and nothing in this rule is contrary to the statutory standard.

Comment: There were several comments related to administrative matters. Some commenters requested public hearings on this rule. Others stated there was not enough time allowed for adequate public comments. Others objected to not being able to submit e-mails or faxes as a method of commenting and some found the Federal Docket Management System difficult to navigate. Finally, some objected to the potential lack of privacy with regard to their comments.
Response: In promulgating this rule, the Services acted in accordance with the Administrative Procedure Act (APA). The APA sets forth procedures to be followed by Federal agencies for rulemaking, and the Services have complied with the APA. The APA does not require public hearings for this type of rule making, although the Secretary of the Interior held 25 "listening

sessions" about cooperative conservation prior to the publishing of the proposed rule. The APA does not set forth specific time frames for a public comment period. The Services initially considered a thirty day comment period to strike an appropriate balance between providing the public an opportunity to address the limited changes in the proposed rule and the Services' desire for prompt action. However, we extended the comment period to provide a total of sixty days in response to comments that more time was needed. The proposed rule stated that e-mails and faxes would not be accepted. However, the Service provided public opportunity to comment electronically via the Federal eRulemaking Portal. Section 206 of the E-Government Act of 2002, Pub.L.107-347, and 116 Stat. 2899 directs the use of the Federal eRulemaking Portal for posting public comments electronically. The Office of Management and Budget (OMB) issued "Implementation Guidance for the E-Government Act of 2002" in August, 2003 which directs Federal agencies to utilize regulations.gov in order to accept electronic submissions related to rulemaking proposals. The rulemaking portal has proven to be an extremely useful tool for the public to efficiently provide comment and insight on Federal rulemaking efforts. The rulemaking portal also assists Federal agencies in managing electronic records so they can efficiently review and respond to comments submitted by the public on rulemaking documents. In most circumstances, we no longer accept comments from the public over facsimile since doing so often caused fax machines to become overwhelmed with incoming documents and because the documents received by fax are usually in paper form and must then be scanned into an electronic form for storage and review. Additionally, the proposed rule generated over 235,000 comments. Therefore, there is no indication that commenters did not have time to submit comments or that the Federal Docket Management System posed difficulty for commenters or last minute submitters.

Finally, with regard to the privacy of commenters, a commenter may request that their personal identifying information be withheld from public review. However, the Services cannot guarantee that they will be able to do so. The Services must comply with the provisions of the Freedom of Information Act, Privacy Act and other applicable laws. Under such laws, the Service may be required to release this information. As a result, the Services advise commenters (as we did in the proposed rule) that, before including addresses, phone numbers, e-mail addresses or other personal identifying information in their comments, they should be aware that the entire comment, including all personal identifying information, may be made publicly available. The Services cannot guarantee that they will be able to withhold this information given a lawful request.

Comment: There were several comments related to various economic issues. Some commenters asserted that there would be a major increase in costs or prices to consumers, state and local governments and geographic regions because Federal agencies are "ill-prepared" to implement this rule. These commenters argued that this rule would "significantly and adversely affect" employment, investments, and productivity.

Response: There is no basis to conclude that this rule will have any negative economic impacts that will result in major increases in costs or prices to consumers, state and local governments or geographic regions, or that community economies will be weakened by the proposed rule. Additionally, commenters provided no credible evidence that the proposed rule will significantly and adversely affect employment, investments and/or productivity of U.S. based enterprises. The Services believe that the proposed rule will improve the overall consultation process and make it less burdensome, which should benefit Federal agencies and the regulated entities that seek

permits, approvals, or funding from them. Moreover, action agencies already must have the wherewithal to determine if their action "may affect" listed species or critical habitat. Further, the proposed rule does not require action agencies to bypass informal consultation. Finally, action agencies can choose to continue to take advantage of informal consultation procedures if they believe that their resources would be strained by making unilateral applicability determinations.

Comment: A commenter asserted that without the requirement to obtain Service concurrence, the burden of species protection will fall on state, local, tribal governments and private industry.

Response: The proposed rule does not change the protections, standards or obligations under the Endangered Species Act. Under the proposed rule, Federal agencies still have a responsibility to ensure that their action is not likely to jeopardize the continued existence of listed species or adversely modify or destroy critical habitat. This rule does not preclude informal consultation, and formal consultation is still required where the action is likely to adversely affect listed species and critical habitat. Therefore, no new responsibilities for species protection will be transferred to non-Federal entities by this rule.

Comment: Several commenters suggested the proposed rule is a "major rule" as defined by the Small Business Regulatory Enforcement Fairness Act.

Response: Subtitle E of the Small Business Regulatory Enforcement and Fairness Act (also known as the "Congressional Review Act" or CRA) establishes procedures for Congressional review of Federal agency final rules. Under the CRA, a rule cannot take effect until a copy of the rule and various supporting documentation have been submitted to both GAO and Congress.

For "major" rules, the rule cannot take effect until 60 days after it has been submitted, in order to allow Congress time to consider and take action on the rule if it so chooses. This waiting period does not apply to rules not designated as major. The CRA defines "major" as any rule that the Administrator of the Office of Information and Regulatory Affairs finds has resulted in or is likely to result in: (A) an annual effect on the economy of $100 million or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. This rule is not a major rule as that term is defined in the CRA. It will become effective 30 days after it has been published in the Federal Register.

Comment: Several commenters suggested the proposed rule is a significant rule under Executive Order 12866.

Response: We agree that this rule is a significant rule. As such, it has been submitted to the Office of Management and Budget for review. We note that while the rule is "significant" under the definition provided in EO 12866, it is not "economically significant."

Proposed Changes to 50 CFR Part 402

§ 402.02 Definitions.

This section sets out definitions of terms. As noted above, the proposed rule altered only three definitions. Only comments that specifically addressed the definitions used in this rule are discussed in this section.

Biological Assessment

A sentence was added to the definition of biological assessment. As delineated above, this additional regulatory text requires action agencies to describe with specificity where the relevant information can be found in an alternative document submitted in lieu of a biological assessment.

Comment: We received several comments that expressed concern that the proposed change to the definition of biological assessment would create more work for the Services and therefore be less efficient. These commenters thought that action agencies might not describe where the relevant analyses for initiation of consultation could be found in the alternative document. Another commenter thought that documents prepared for other purposes may not properly analyze all the potential effects. Finally, we received a comment that this change is more efficient.

Response: We agree with the comment that the consultation process will be more efficient if the rule expressly allows for flexibility in the format of the information submitted by the action agency. However, it would not be more efficient and could add unnecessary delays if action agencies simply attached the alternate document to the request for consultation. Thus, in the preamble to the proposed rule we noted that it was the action agency's responsibility to identify the relevant information from the alternate document being used in place of a biological assessment. To strengthen this message, a final sentence has been added to the regulatory text in the final rule to make it clear that the action agency must provide a guide or statement as to where the relevant information can be found. The requirements for initiation of consultation set out at 402.14(c) remain unchanged. If the document prepared for "other purposes" does not

include all required information, then consultation is not initiated and the action agency may have to provide supplemental information.

Comment: Action agencies are likely to rely on documents other than their biological assessments to analyze the impacts to species and critical habitat, which will increase the complexity of environmental analyses performed by an action agency.

Response: The Services intend for this modification to recognize current practice and disagree that it will increase the complexity of environmental analysis. Currently only Federal "major construction activities" require preparation of biological assessments. Other Federal actions may be subject to environmental reviews under other environmental laws, in particular the National Environmental Protection Act (NEPA). Most Environmental Impact Statements (EISs) include analyses of effects of proposed actions on threatened and endangered species; these analyses can be as robust as those presented in biological assessments. In circumstances where Federal agencies have conducted sufficient analysis, they should be able to benefit by relying on that analysis in the interagency consultation process. As discussed above, however, the Services have added language to the final rule to ensure that the information requirements for a consultation specified in 50 CFR 402.14(c) are identified.

Cumulative effects.

There were no changes between the proposed rule and this final rule.

Comment: Several commenters questioned exclusion of future Federal actions from consultations, claiming either there is no basis for the exclusion or that it provided a way for Federal agencies to not consult on future actions. Some commenters stated that they believed this clarification is consistent with the Services' practice.

Response: The amendment to the cumulative effects language is to clarify and distinguish the term "cumulative effects" under the ESA from the term "cumulative impacts" under the NEPA. Nothing in the rephrasing of the definition of cumulative effects changes the Services current practice. That is, the effects analysis in consultations under the 1986 regulations does not include future Federal actions that have not undergone consultation. Future Federal actions that have already undergone consultation are added to the environmental baseline; they are weighed, therefore, in the calculus of how the action under consultation is likely to affect listed species. Federal actions that have not undergone consultation will have to do so before they could proceed in compliance with section 7(a)(2). The effects from those actions, therefore, will be considered in a separate consultation and it would not be appropriate to include them as cumulative effects.

Comment: Some commenters thought that informal grouped actions may contribute to cumulative effects and should be considered. Other commenters thought the proposed definition would encourage or allow agencies to move forward with multiple, small-scale projects. A commenter noted that cumulative effects omitted Tribal activities.

Response: Any effect or activity that was considered as a cumulative effect under the 1986 regulations, will be considered under this rule. This rule clarifies the current regulatory definition of cumulative effects and distinguishes it from the definition of "cumulative impact" in NEPA. It does not change any requirements or factors to be considered from the 1986 regulations. As set out in the standardized paragraph in the Consultation Handbook, cumulative effects include the effects of "future State, tribal, local or private actions that are reasonably certain to occur in the action area..." Joint Endangered Species Consultation Handbook, p.4-30

(March 1998 Final), (hereafter "Consultation Handbook"). The change to the definition in the 1986 regulations will not exclude any contributions to cumulative effects that would be appropriately reviewed under the 1986 regulations and should not encourage action agencies to move forward with "small-scale" and/or grouped projects. The change in definition of cumulative effects does not change any evaluations, procedures, obligations, or responsibilities for the action agency or the Service.

Effects of the Action

We made several changes in the definition of "effects of the action" in response to public comments. First, we have added a sentence defining "direct effects" in order to clarify the distinction between "direct effects" and "indirect effects"." In addition, we have modified the sentence that, in the proposed rule, read as follows: "If an effect will occur whether or not the action takes place, the action is not a cause of the direct or indirect effect." In the final rule, the sentence reads: "If an effect will occur whether or not the action takes place, the action is not an essential cause of the indirect effect." These changes were intended to clarify the manner in which direct and indirect effects are identified and analyzed, which has been an area of confusion since these terms were created in the 1986 regulations. The removal of the reference to "direct effects" from the original sentence in the proposed rule is intended to clarify that the quoted sentence provides further clarification of the term "essential cause" as applied to indirect effects. By focusing the regulatory revision on indirect effects we do not intend to suggest that an effect that will occur whether or not the action takes place is a direct effect of the action. To the contrary, in most instances such an effect would not be considered a direct effect unless, as discussed below, it is one that inevitably will result from the action. Rather, our purpose is to emphasize that the causal connection between a proposed action and indirect effects must be

examined closely.

Comment: The Services received a wide range of comments regarding the proposed modification of the definition of "effects of the action." Several commenters stated that the Services should better explain the appropriate standard of causation with respect to direct and indirect effects. Many comments recommended no change to the existing definition of "effects of the action." Other commenters recommended the use of proximate cause instead of essential cause. Alternatively, one commenter suggested that the appropriate standard for causation is that there needs to be a "close causal connection."

Response: The ESA does not specify the nature of the causal relationship that must be examined when considering whether a Federal agency action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat. Nevertheless, an analysis under section 7(a)(2) necessarily requires examining the causal connection between the agency action and the ultimate biological effects on a species. In the 1986 regulations, the Services recognized three categories of effects: direct, indirect, and cumulative. Each category is distinguished, in part, from the other two by the degree of causal connection it has to the proposed Federal action-- i.e., by the degree to which the taking of the Federal action can be said to be responsible for the cause of the effect occurring to the species. These categories remain intact in the regulations the Services are adopting today.

At one end of the spectrum are direct effects. As the Services have explained in the Consultation Handbook, direct effects are the direct, immediate effects on the species or its habitat from the taking of the action itself, or from interdependent or interrelated activities. These are the effects

that will inevitably occur if the action is taken. For example, if permission or funding is provided for the construction of a road, constructing the road will result in direct, easily identifiable modifications to the landscape. The modifications are inescapable; if the action is taken as proposed, they will occur. As the revised definition of "effects of the action" explains, direct effects are not dependent upon the occurrence of any additional intervening actions for the impact to listed species or critical habitat to occur. Thus, there is no question that the action agency is responsible for these effects. Conversely, if the road is not constructed, the modifications would not occur (or at least not as a result of the construction), so any effects that would occur anyway are caused by something else, not the permission of or funding for the construction of the road. This does not mean that if a Federal action will cause a direct change to the landscape that impacts listed species or critical habitat it can avoid consultation merely because another private or non-Federal public actor would take a similar action if the Federal agency did not. Thus, using the road example, if a private developer were expected to build the road if the action agency does not fund, permit, or build the road, the action agency could not avoid analyzing the direct effects of the road construction solely because somebody else would build the road anyway.

At the other end of the spectrum are cumulative effects. They are the effects of other entities' actions in the action area of the proposed Federal action that are reasonably certain to occur, but that have no causal connection to the proposed Federal action. In other words, they are effects that would be reasonably certain to occur in the action area even if the proposed Federal action were never taken. There is no question that for these effects within the action area, the agency is not responsible, even though these effects are taken into account when analyzing the likelihood a

particular Federal action might jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat.

Located along the spectrum between the direct effects and cumulative effects are other effects that are more difficult to define precisely. These effects are distinguished from direct effects in that they depend on the occurrence of some intervening factors to bring them about. It is more difficult in these situations to determine where to precisely draw a line as to whether the Federal agency should be considered responsible for those effects within the application of section 7(a)(2). In the 1986 regulations the Services determined that action agencies should be responsible for what was termed "indirect effects," which were defined as those effects that are "caused by" the proposed Federal action and are "reasonably certain to occur," and are "later in time." The level of causal connection that must exist for an effect to be considered to be "caused by" the taking of the proposed Federal action and the degree of certainty that must exist for an effect to be considered "reasonably certain to occur" has not been clearly explained previously.

In the preambles for the proposed and final rules for the 1986 regulations, the Services described indirect effects as those that are "induced by" the Federal action, but did not elaborate further. The Services also referred to *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976), in which the U.S. Court of Appeals for the Fifth Circuit found a need to look at the total impacts of a Federal agency action, not simply those direct effects that occur within the project's footprint. A close read of the *Coleman* case reveals its consistency with the understanding the Services are articulating here. In particular, the court's decision in *Coleman* was based on consideration of facts reflected in the particular record before the court; and, that record

indicated that it was virtually certain that future development would follow construction of the highway interchange that was proposed by the Federal agency and that this development would impact the species.

The Services have also referenced a "but for" standard of causation in a number of contexts. Under a "but for" test, any effect that would not occur "but for" the proposed action is considered to be caused by the proposed action. See Consultation Handbook 4-27 (interrelated and interdependent); 4-47 (amount or extent of incidental take); 1986 preamble (interrelated and interdependent) 51 FR 19932 (1986). However, neither the 1986 rule nor the Consultation Handbook specifically articulate the "but for" standard as applicable to determining whether something is an indirect effect.

At all times, the Services have understood there to be a requirement for a close causal connection between a Federal agency action and an effect on the species. In seeking to clarify what is meant by indirect effects, in the context of ESA section 7, it is important to keep the purpose of the section 7(a)(2) in mind. The purpose is to require Federal agencies to insure that their actions are not likely to jeopardize listed species or adversely modify or destroy critical habitat. The ESA does not seek to bring the otherwise beneficial and necessary actions of those agencies to a halt based on speculation about what could conceivably happen in the future as the result of the taking of an action. Thus, the 1986 regulations appropriately imposed constraints on the extent of the effects analysis by incorporating causation and foreseeablity standards.

This rule clarifies the terms "caused by" and "reasonably certain to occur" in order to capture the appropriate practice of the Services to require a close causal connection. Essential cause is the standard used to determine whether a close causal connection exists between the action and the effect. Reasonably certain to occur is the standard used to determine the requisite confidence that an activity, which will result in an indirect effect, will occur. The changes are intended to promote consistency in section 7 consultations.

The Services have chosen not to specifically employ, as suggested by some, the concept of "proximate cause," which developed in the law of torts. Utilizing proximate cause would only complicate matters further as there is no commonly accepted, easily applied definition of proximate cause. Instead, we clarified the term "caused by" by incorporating new language that looks to whether the action is an "essential cause" of a particular effect. The phrase "essential cause" denotes that the action is necessary or indispensable for the effect to occur. The addition of the term "essential" is meant to emphasize and reaffirm that the effects analysis is limited to those effects for which it is appropriate to hold the Federal agency responsible because there is a close causal connection between the Federal action under consultation and the effects on the species in question.

The concept of "essential cause" is not a new one. The Services have previously recognized that to cause an effect under the ESA, the proposed Federal action "must be essential in causing the effect to the species and also reasonably certain to occur." A 2003 joint agreement among BLM, Forest Service, FWS and NMFS explains that a proposed agency action must be "essential" in causing the effect to the species and also reasonably certain to occur in order to be recognized as

an "indirect effect" under the Department's regulations. *Application of the Endangered Species Act to proposals for access to non-Federal lands across lands administered by the Bureau of Land Management and the Forest Service*, January 2003, at 2 (2003 Joint Agreement). On July 1, 2005, this memorandum was clarified by the Director, U.S. Fish and Wildlife Service. In that policy clarification, the Director again reiterated that the correct standard to determine if an indirect effect is caused by an action is whether that action is "essential" for the effect to occur. *Policy Clarification of March 10, 2005 memo on Regarding Consultation on Requests for Access Across National Forest and Bureau of Management Lands*, July 2005.

Essential cause focuses on both the nature and degree of the connection between the agency action and the effect to the species. For example, if an indirect effect would occur regardless of the action, then the action is not an essential cause of that effect, and it would not be appropriate to consider its effects as an effect of the action. Similarly, when the agency action merely helps to facilitate an effect it is not necessarily an essential cause of the effect. In such circumstances, it is appropriate to consider the nature of intervening factors and whether and the extent to which the potential effect to the species requires independent action by someone other than the Federal agency or the entity it funded or authorized. Depending upon the particular factual circumstances, the proposed Federal action may not be essential in causing the effect to the species. Of course, when the effects to the species are caused by such independent activities they may be considered as cumulative effects, provided they are within the action area. The courts have long recognized the requirement for there to be a close causal relationship between an environmental effect and an alleged cause for that effect. See, *Metropolitan Edison Co. v.*

People Against Nuclear Energy, 460 U.S. 766, 777 (1983) (in the context of examining cumulative effects under NEPA).

Comment: We received several comments regarding the use of the term "reasonably certain to occur" and the addition of the term "clear and substantial" information. Some commenters asserted that these terms as defined in the proposed rule were appropriate and reasonable. Some commenters disagreed that the term "reasonably certain to occur" was an appropriate standard while others questioned why the standard was not "reasonably foreseeable."

Response: As noted above, the final rule also clarifies the term "reasonably certain to occur." Reasonably certain to occur is the standard used to determine the requisite confidence that an action, which will result in an effect, will occur. Like the phrase "caused by", the existing regulations do not define the phrase "reasonably certain to occur."

The phrase "reasonably certain to occur" was first used in a 1981 opinion issued by Department of the Interior's Office of the Solicitor as it related to cumulative impacts. The 1981 opinion was focused upon cumulative impacts and explained that:

> A non-Federal action is "reasonably certain" to occur if the action requires the approval of the state or local resource or land use control agency and such agencies have approved the action, and the project is ready to proceed. Other indications which may also support such a determination include whether the project sponsors proved assurance that the action will proceed, whether contracting has been initiated, whether there is obligated venture capital, or whether State or local planning agencies indicate that grant of authority for the action is imminent. These indications must show more than the

> **possibility** that the non-Federal project **will occur**; they must demonstrate with reasonable certainty that it will occur. The more that state or local administrative discretion remains to be exercised before a proposed state or private action can proceed, the less there is reasonable certainty that the project will be authorized. In summary, the consultation team should consider only those state or private projects which satisfy all major land use requirements which appear to be economically viable.

Solicitor's Opinion, M-36938, *Cumulative Impacts under Section 7 of the Endangered Species Act*, August 27, 1981. (emphasis in original)

Additionally, the preamble to the 1986 regulation explained the Services' interpretation of the phrase "reasonably certain to occur." 51 Fed. Reg. 19,926, 19,932 (June 3, 1986). The preamble notes that some commenters "believed that the proposed [definition] of 'cumulative effects' and 'effects of the action,'" both of which were defined to include only effects that are "reasonably certain to occur," "were too narrow." *Id.* As described in the preamble, the commenters "suggested that cumulative effects should include the effects of all reasonably foreseeable future Federal, State and private actions," because to do so "would be more in line with that mandated under NEPA," and "any lesser review could detrimentally affect endangered species." *Id.* While the focus of the comments, and the Service's response, was on "cumulative effects," rather than "indirect effects," the Service's reasoning in rejecting the suggestion that the regulations rely on a broader or more lenient standard than "reasonably certain to occur" applies equally to the use of the phrase in the definition of "indirect effects."

The Service noted that "NEPA is procedural in nature, rather than substantive, which would warrant a more expanded review of ... effects" than the ESA, which imposes "a substantive prohibition." *Id.* at 19933. In other words, NEPA is designed to insure that a decision maker has a full complement of information about the possible environmental effects of the decision before making it; it does not, however, require that any particular decision be made. The theory is that the more information the decision maker has, the better the decision is likely to be. For that reason, requiring the consideration of all "reasonably foreseeable" environmental effects makes sense in the NEPA context. The ESA, on the other hand, is designed to insure the accomplishment of a particular substantive objective—i.e., that Federal actions are not likely to jeopardize the continued existence of listed species or adversely modify or destroy critical habitat. Unlike NEPA, the prohibition in the ESA can stop an otherwise worthwhile Federal project from going forward. For that reason, it makes sense that the Service consider "indirect effects" to be only those "reasonably certain to occur," rather than merely "reasonably foreseeable." As the Service put it, "[o]therwise, in a particular situation, the jeopardy prohibition [of the ESA] could operate to block 'nonjeopardy' actions," *id.*, based on mere speculation about the effects that might occur to listed species or critical habitat. In the Service's view, "Congress did not intend that Federal actions be precluded" based on speculative effects. *Id.*

The discussion in the 1986 preamble makes clear that "reasonably certain to occur" focuses on the probability that a future action will occur and is a stricter standard than "reasonably foreseeable." As the Service explained, "reasonably certain to occur" requires "more than a mere possibility that the action may proceed." *Id.* At the same time, however, the Service

recognized that "'reasonably certain to occur' does not mean that there is a guarantee that the action will occur. [Agencies should consider the] effects of those actions that are likely to occur, bearing in mind the economic, administrative, or legal hurdles which remain to be cleared." *Id.*

The Consultation Handbook provides additional illustration of the exacting nature of determining whether a future action, which may cause an effect, is "reasonably certain to occur." The Services emphasized in the discussion of cumulative effects that when looking at future actions, the "action agency and the Services should consider the economic, administrative, and legal hurdles remaining before an action proceeds." *Id.* at 4-30. The Services further explained that:

> Indicators of actions "reasonably certain to occur" may include, but are not limited to: approval of the action by State, tribal, or local agencies or governments (e.g. permits, grants); indications by State, tribal or local agencies or governments that granting authority for the action is imminent; project sponsors' assurance the action will proceed; obligation of venture capital; or the initiation of contracts. The more State, tribal or local administrative discretion remaining to be exercised before a proposed non-Federal action can proceed, the less there is a reasonable certainty the project will be authorized.

Consultation Handbook, at 4-30.

In the context of cumulative effects, the discussion of "reasonably certain to occur" necessarily focused on the certainty of activities occurring because by definition the effects at issue do not derive from the Federal action but from activities of others operating in the action area of the action under consultation. In similar fashion, some indirect effects of the action ultimately may occur only after subsequent activities of others, which themselves are caused by the Federal

action under consultation. In the context of indirect effects, the Consultation Handbook notes that "reasonably certain to occur may be evidenced by appropriations, work plans, permits issued, or budgeting; they follow a pattern of activity undertaken by the agency in the action area, or they are the logical extensions of the proposed action." *Id.* at 4-28. Just as with cumulative effects, then, evaluating and establishing the reasonable certainty that those activities will occur and produce the indirect effect of concern is appropriate where indirect effects also depend on a subsequent actor to bring about their outcome. If the subsequent activity is not reasonably certain to occur then the indirect effect is not reasonably certain to occur. Reasonably certain to occur allows for a possibility that the activity will not occur, but that possibility has to be low.

Finally, the 2003 Joint Agreement among BLM, Forest Service, FWS and NMFS provides guidance on the "reasonably certain to occur" standard:

> "Reasonably certain to occur" requires existence of clear and convincing information establishing that an effect to the species or its habitat that will be caused by the proposed action is reasonably certain to occur. This is a rigorous standard; it is not based on speculation or the mere possibility that effects to the species may occur. Nor is this a foreseeablity standard as is commonly used in NEPA analysis. If no such information exists, or is speculative or not credible, then that effect is not reasonably certain to occur and should be disregarded. In no event should a conclusion be reached that some effect is reasonably certain to occur absent clear and convincing information to support that finding in the record.

2003 Joint Agreement at 2. Similarly, the final rule incorporates a "clear and substantial" standard to reemphasize that there must be a firm basis, based on best available scientific and commercial data, for believing that a future activity is reasonably certain to occur before its effects should be viewed as caused by the Federal action under consultation. The information need not be dispositive, free from all uncertainty, or immune from disagreement to meet this standard. However, there must be a clear and substantial basis to support the conclusion.

Comment: Several commenters asked questions about how the use of the word "essential" will impact baseline analysis with regard to jeopardy opinions. Specifically, they questioned how "essential cause" would be employed in cases where a species status is seriously imperiled.
Response: Nothing in this rule changes the jeopardy analysis. The term "essential" clarifies the term "caused by" as used in the definition of indirect effects. After the effects of the action are determined, the impacts of those effects are then analyzed to determine if the effects of the action (combined with cumulative effects) are likely to jeopardize the continued existence of listed species or adversely modify or destroy critical habitat. The status of the species is part of that analysis but the action under consultation must still impact the species in a negative fashion in order for there to be a jeopardy determination.

§ 402.03 Applicability.

Paragraph (b)(2) was amended and now only pertains to effects that are "manifested through global processes." The subparagraphs of (b)(2) are clarified and further limit the application of

this paragraph. Paragraph (b)(3)(iii) was deleted.

Initially, we will address the general comments on this section as a whole. Comments specific to various subparts of this section are discussed below.

Comment: While some commenters supported the change in the applicability section under the proposed rule, many commenters asserted the Services cannot allow action agencies to make applicability determinations as set out in the rule. That is, they asserted that action agencies cannot decide, without formal or informal consultation with the Services, that their action has no effect or is essentially not likely to adversely affect listed species or critical habitat. These commenters relied on the wording of section 7(a)(2) of the ESA that states "Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action..." The commenters read these words to be absolute. That is, they read the words "in consultation with" to mean that action agencies must enter into formal or informal consultation with the Secretary to insure that any of their actions will not violate the prohibitions set out in the remainder of section 7(a)(2).

Response: The existing regulations recognize that there are a variety of ways that action agencies can meet their procedural obligations under section 7(a)(2). The 1986 regulations, the thousands of interactions between the Services and the action agencies over the past thirty years, and these revisions are, in addition to the formal and informal consultation procedures established under the regulations, part of the framework for "consultation" and "assistance" provided to action agencies to allow them to determine the steps they must take to insure that their actions are not likely to jeopardize the continued existence of listed species or adversely

modify or destroy critical habitat.

Section 7 does not define the term "consultation." While Congress has provided certain requirements for what should happen after consultation, the statute does not provide any direction or criteria as to how consultation is to be carried out. In relevant part, section 7 provides that:

> [e]ach Federal agency shall, *in consultation with and with the assistance of the Secretary*, insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat...

16 U.S.C. 1531(a)(2) (emphasis added). Neither the term "consultation" nor "assistance" is defined within the section, or elsewhere in the ESA. These terms are quite broad and suggest that Congress has provided a great deal of discretion to define consultation and assistance in this provision, as it has throughout the ESA. Furthermore, Congress did not specify that the consultation obligation can be fulfilled only by consulting with the Services on each and every action they take. Indeed, we believe the mandatory term "shall" in section 7(a)(2) refers to the obligation of the action agency to avoid jeopardy or destruction or adverse modification of critical habitat, not to a requirement to consult on each and every action. Recently, one court determined that a broad interpretation of section 7(a)(2) to require consultation in each and every case does not "comport with either the plain meaning of the ESA or the legislative intent underlying it." *Defenders of Wildlife v. Kempthorne*, 2006 U.S. Dist. LEXIS 71137 (D.D.C. Sept. 29, 2006).

An interpretation that requires "consultation" under 7(a)(2) on each and every action ignores

both the 1986 regulations, and the Services practice since then. The Services established the current process as a regulatory mechanism for efficient implementation of the mandate to provide their expertise to the action agencies. The 1986 regulations recognized that case-by-case consultation on certain actions was not necessary or beneficial. The Services devised off-ramps to eliminate those actions from case-by-case consultation.

The 1986 regulations provided that action agencies need only consult case-by-case on those actions that are "discretionary." Section 7(a)(2) does not specifically recognize such an exception, but the Services recognized that there was no benefit in consulting case-by-case on actions that the action agencies were powerless to modify for the benefit of listed species. The Supreme Court recently upheld the Services' regulatory interpretation that non-discretionary agency actions could be excluded from case-by-case consultation. *National Association of Home Builders v. Environmental Protection* Agency, 127 S. Ct. 2518 (2007).

Similarly, the Services have long implemented section 7(a)(2) through regulations that exclude from case-by-case consultation those actions that the action agency determines will have "no effect" on listed species or critical habitat even though the statute makes no express exception for such actions. The original section 7 regulations, promulgated in 1978, specified that "[i]f a Federal agency decides that is activities or programs will not affect listed species or their habitat, consultation shall not be initiated unless required by the Service." 43 Fed. Reg. 870, 875 (Jan. 4, 1978). Subsequently, when the Services modified the regulatory scheme in 1986, we implicitly retained the no effect/may affect threshold for consultation. Thus, section 402.14 requires consultation for any action that "may affect" listed species or critical habitat. The courts have

routinely upheld action agency "no effect" determinations, notwithstanding that they have been made without consultation with the Services. See, e.g., *Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443 (9th Cir. 1996) (upholding Forest Service determination that salvage timber sale would have "no effect" on listed species and concluding that formal consultation was not necessary); *Ground Zero Center for Non-Violent Action v. United States Department of Navy*, 383 F.3d 1082 (9th Cir. 2004); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994); and, *Defenders of Wildlife v. Kempthorne*, at 60. In addition, Congress has amended the ESA several times and never made any changes to section 7 that would express their disapproval with this interpretation.

The rule that is being published today is an incremental change that builds upon the existing regulatory framework and attempts to address the increased burden of informal consultations, case-by-case, as well as the new challenge the agencies and Services confront regarding case-by-case consultation as it relates to greenhouse gas emissions and climate change.

The Services have seen steady increases in section 7 consultations since adoption of the 1986 regulations. For example, the number of consultations completed by FWS doubled between fiscal year 1996 and fiscal year 2002. Although NMFS' workload has also increased significantly due to new listings and court decisions, it has not collected these statistics. As the number of section 7 consultations has increased, the workload for the Services has grown. For example, requests to the Services for technical assistance or section 7 consultations increased from 41,000 requests in 1999 to over 68,000 requests in fiscal year 2006. In 2006, there were 39,346 requests for technical assistance, 26,762 requests for informal consultations, and 1,936

requests for formal consultations.

To meet these challenges, the Services have developed several carefully crafted and narrow categories of actions for which they believe case-by-case consultation would not be necessary or beneficial. The pre-existing "may affect" trigger for formal consultation is retained, except in the case of projects where no take is anticipated and the effects are: wholly beneficial; or cannot be measured or detected in a manner that permits meaningful evaluation; or are manifested through global processes (and meet one of several additional criteria). The Services have determined that such actions are far removed from any potential for jeopardy or destruction or adverse modification of critical habitat, and consultation in these limited circumstances is therefore not required. In 1986, the Services recognized the key concern was to set thresholds for consultation (there speaking of formal consultation) that are "sufficiently low to allow Federal agencies to satisfy their duty to 'insure' under Section 7(a)(2)." 51 Fed. Reg. 19926. The applicability criteria established in the final rule do that. As noted, the action agencies already make no effect/may affect determinations without assistance from the Services. Clearly such actions do not violate the substantive standard of section 7(a)(2). The Services have also determined that no further consultation and advice on specific actions is necessary for those agency actions that are wholly beneficial. Because of the threshold requirement that no take is anticipated and the requirement that the action be beneficial in its entirety, such actions also inherently are not likely to jeopardize listed species or adversely modify or destroy critical habitat. The threshold of no take being anticipated also applies for those effects that are so insignificant that they cannot be measured or detected in a manner that permits meaningful evaluation. These effects were previously determined to be "not likely to adversely affect."

Consultation Handbook, at XV. By definition, then these effects are not likely to adversely affect and cannot be likely to jeopardize listed species or adversely modify critical habitat and, therefore, no further consultation on the specific action is necessary. Finally, section 402.03(b)(2) provides that effects that are manifested through global processes (and meet one or more of the additional criteria) do not require further consultation. As discussed in more detail below, the Services believe that section 7(a)(2) simply was not intended to deal with global processes at individual project level consultations. Further, the threshold requirement of no anticipated take and the additional criteria set out in 402.03(b)(2) limit the use of this subparagraph to only those effects from an action that would not be likely to jeopardize listed species.

The Services' determination that case-by-case consultation is not necessary or beneficial in these instances is consistent with the latitude Congress has granted the Services to implement the procedural aspects of section 7(a)(2), including the development of appropriate triggers for case-by-case consultation. In addition, through this regulation we provide our advice and guidance to action agencies with regard to those narrow categories set out in section 402.03. Thus, we have determined that compliance with this rule by action agencies satisfies the procedural requirements of section 7(a)(2) for those narrow categories of actions set out in section 402.03. Moreover, the change from prior practice is an appropriate response to the burden of increased informal consultations.

Comment: Some commenters asserted that all agency actions must undergo the process set out in the 1986 regulations as "formal consultation."

Response: We disagree and conclude that these commenters read far more into section 7(a)(2) of the ESA than exists. Simply put, under section 7(a)(2), Federal agencies must insure their action "is not likely to jeopardize the continued existence of any endangered species or threatened species," and the Services must provide expert advice and help ("consultation and assistance") to the action agencies. The precise form and manner in which this expert advice and help is provided is not specifically prescribed by Congress; instead, the Services and action agencies can "fine tune" the regulations as appropriate.

Moreover, such an assertion flies in the face of many years of agency practice. Indeed, a district court recently noted, "the Services play no role whatsoever in that threshold determination." *Defenders of Wildlife v Kempthorne*, at 60 (referencing the initial determination as to whether a proposed action 'may affect' listed species or critical habitat). Since 1978, if an action agency concludes that a proposed action will have no effect on a listed species, it is under no obligation to consult with the Services.

The Services have provided guidance to action agencies in the past with regard to when formal or informal consultation on specific actions is required. The 1986 regulations determined that action agencies need only consult on those actions that are "discretionary." The statutory language found in section 7(a)(2) of the ESA does not make such an exception. Rather, the Services, by regulation, determined that neither formal nor informal consultation on specific actions was required for non-discretionary actions. The Supreme Court recently upheld the Services' determination that no further consultation is required once an agency determines that their action is non-discretionary. *National Association of Home Builders v. Environmental*

Protection Agency, 127 S. Ct. 2518 (2007).

The Services have also interpreted section 7(a)(2) to not require formal or informal consultation on specific actions for those instances when the action agency determines that its action will have "no effect" on listed species or critical habitat. Consultation Handbook, p 3-12. Statutory language does not specifically make such an exception; rather, the determination that consultation is not necessary was made at the Secretaries' discretion. Since 1978, Federal agencies have been making their own determinations about whether a project would result in no effect to a listed species. The original section 7 regulations issued in 1978 specified that "[i]f a Federal agency decides that its activities or programs will not affect listed species or their habitat, consultation shall not be initiated unless required by the Service." 43 Fed. Reg. 870, 875 (January 4, 1978). Congress confirmed this regulatory approach when it reviewed, with approval, the 1978 regulations when deliberating over the 1978 amendments to the ESA. *See e.g.* 1978 U.S.C.C.A.N. 9484, 9486. Later, in 1986, Congress had the ability to require section 7 consultation for each and every action carried out by a Federal action agency, but it chose not to make any changes to the section 7 consultation process in its amendments to the ESA in 1986. 51 Fed. Reg. at 19,927.

In summary, we do not believe section 7(a)(2) mandates Federal action agencies to undertake a separate ESA formal or informal consultation with the Services for each and every action they take. No definition of "consultation" is provided in section 7(a)(2) or elsewhere in the ESA. Congress left it to the Services to craft the consultation process, including the interpretation of the reach of the statute and the development of an appropriate trigger for formal and informal

consultation. *See Sweet Home v. Babbitt* 515 U.S. 687, 708 (1995). This interpretation is not new. As discussed above, the Services have already identified two situations where no further consultation on specific actions has been required once a threshold determination was met.

Comment: Several commenters suggested that action agencies are not equipped to make their own determinations either because they lack the requisite expertise, lack funding, will not be able to find qualified reviewers, or do not have a mission compatible with resource protection.
Response: The Services disagree that agencies with other missions are not equipped to make the determinations required to implement the new applicability provisions. Most major action agencies already have well-qualified staff that support their ESA compliance. And, agencies regularly make their own consultation determinations on a number of issues under the 1986 regulations. As under the 1986 regulations, this rule does not preclude an action agency from seeking the expertise of the Services or taking advantage of expertise that may be available from State or local agencies, universities, non-governmental organizations or other sources, which often work cooperatively with Federal agencies on species conservation matters. Finally, nothing in the applicability section requires that action agencies bypass informal consultation. If action agencies have any limitations in their ability to make their determinations under the ESA, the rule explicitly recognizes that the action agencies retain the ability to seek informal consultation with the Services. If an action agency believes that it does not have the scientific expertise to make an accurate assessment of its project's impacts on listed species and critical habitat, it may avail itself of the expertise offered by the Services under the current regulatory procedures.

In this regard, we note that the final rule represents an incremental change regarding the extent to which the action agencies will make their own determinations about the effects of their actions on listed species. Under the 1986 regulations, and continuing under this rule, action agencies presently are responsible for determining if their action may affect listed species and critical habitat. They need not engage in case-by-case consultation where they determine that the proposed action will have no effect on listed species. The final rule adds several narrow additional categories in which they will also not need to consult case-by-case where they determine that their actions will not result in take and satisfy the criteria in 402.03(b).

The types of actions that we believe will fall into the "wholly beneficial" or incapable of meaningful evaluation categories are ones for which we have routinely concurred on action agency NLAA determinations in the past. For example, these have included, but are not limited to:

> Construction, maintenance or repair of small-scale bulkheads, docks, piers and boat ramps;
> Small-scale shoreline or streambank stabilization projects;
> Routine bridge repair and maintenance;
> Construction, maintenance or repair or replacement of culverts and tide gates;
> Construction, maintenance and repair of aids to navigation, e.g., buoys and moorings.

We have engaged in many thousands of informal consultation on these types of activities over the past thirty years. We have routinely agreed with the action agencies' conclusions (supported by their biologists' opinions) that the projects are not likely to adversely affect the species because the actions will occur at a time when listed species are not present and habitat will not be affected or will recover prior to species returning to the area, or they enhance the biological value of the habitat without any short term risk to species or harm to the habitat. Also, based on

years of consulting informally, many agencies have developed best management practices for these types of actions to ensure adverse effects are avoided. Based on this lengthy experience, we believe that action agencies are well equipped to make and document appropriate determinations under the applicability provisions.

As a legal matter, action agencies cannot assert that lack of resources or that contrary missions excuse them from compliance with their ESA obligations. Indeed, the action agencies have a strong incentive to ensure that they are equipped to make appropriate determinations. If they fail to do so, they will be subject to lawsuits challenging those determinations and their actions could be delayed or enjoined.

Comment: Several commenters pointed to the report from the Healthy Forest Counterpart regulations to support the assertion that action agencies will not make credible effects determinations.

Response: We do not agree that this report requires such a conclusion. In our view this report demonstrates the importance of action agencies developing administrative records that demonstrate the soundness of their conclusions with respect to the potential effects of a project and reflect the information available to them.

Comments: Several other commenters believe that there needs to be an "oversight" role for the Services. One commenter believed that action agencies needed to set up internal procedures to assure funding for biologists and to require an independent decision-maker. Another commenter suggested that action agencies should enter into alternate consultation procedures with the

Services to suit their individual needs. Several commenters believed the Services should offer guidance to the action agencies as to how to make effects determinations.

Response: The Services have determined that a formal oversight process is not necessary or consistent with the purposes of this rule. The objective of this rule, in part, is to provide for a more efficient process for certain very narrow situation where the Services have determined no further consultation on specific actions is necessary or beneficial, as discussed above. Action agencies, however, can create any internal procedures they deem necessary to establish a credible administrative record to support their determinations. Further, nothing in this rule prevents action agencies from entering into agreements or promulgating counterpart regulations with the Services. Finally, the Services do offer training courses on section 7, which have been well-attended by action agency personnel. And, the Services' Consultation Handbook is available for guidance.

Comment: Several commenters questioned how "contested determinations" among agencies would be resolved. Another commenter noted there was no mechanism for the Services to "overturn" an incorrect determination made by an action agency.

Response: It is not clear what is meant by "contested determinations." Currently, there is no mechanism for the Services to "overturn" decisions made by action agencies. The Services can exercise, and have exercised, their authority under 402.14(a) to request that an action agency consult on an agency action. This option continues to be available to the Services.

Comment: Some commenters questioned how the rule will impact applicants.

Response: This rule does not affect the level of involvement an applicant may have either before

or during informal consultation or formal consultation, except to the extent any applicant must agree to the extension of informal consultation beyond 120 days. Action agencies may involve applicants to any extent they choose, beyond the minimum requirements for applicant involvement established in the 1986 regulations.

Comment: Other commenters noted that action agencies already may face an increased litigation risk if they make determinations under the applicability section of this rule.

Response: As discussed above, action agencies already have a potential litigation risk when making the "no effect" determination as well as the ultimate liability with regard to jeopardy and adverse modification. Action agencies that determine that an action fits under the applicability section of this rule and forgo informal consultation on that basis should, as appropriate, develop an administrative record that supports the determination and should be prepared to defend it.

Comment: Some commenters believe this regulation will reduce collaboration between the action agencies and the Services, which they believe could result in an increase in adverse effects to listed species.

Response: In light of the narrow provisions set out in the applicability section, it is difficult to surmise when there would be likely adverse effects that would not be subject to formal consultation under this rule. Further, nothing in this rule prevents action agencies from consulting with the Services informally. Nor does this rule change an action agency's obligation to consult formally if there are likely to be adverse effects to listed species or critical habitat. Typically, in those consultations, the action agency and the Services collaborate to reduce impacts.

Comment: Several commenters questioned how this rule would impact listed plants and some believed the applicability section (402.03) of this rule would lessen protection for listed plants.

Response: This rule does not lessen protections for plants. The applicability section of this final rule sets a threshold for an off-ramp from consultation whereby no take is anticipated to result from the agency action. The ESA defines take to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect any listed species." While some of these terms are more appropriate to listed wildlife, many of them would apply to plants. We recognize that take of listed plants is not prohibited under section 9 of the ESA; nevertheless, under section 7(a)(2) and the regulations, Federal agencies are still responsible for assessing whether their actions are likely to adversely affect (which may include take) listed plant species. Under this rule, even once the threshold of "no take is anticipated" has been met, the action agency must still demonstrate that its action is either wholly beneficial to listed plants, will have no effect on listed plants, or will have effects that are so insignificant they cannot be measured or detected in a manner that would permit meaningful evaluation of those effects. If the effect will be manifested through global processes, the remaining conditions set out in paragraph (b)(2) must also be met. Nothing in this rule changes the manner in which plants are dealt with in informal or formal consultation; listed plants, therefore, will continue to be protected under this rule.

Paragraph (b)(1) – no effects

Comment: Several commenters agreed that the rule should formalize the long-standing practice of the Services to not require consultation on "no effects" determinations made by action

agencies. On the other hand, a few commenters thought consultation was required even for "no effects."

Response: As discussed above, case-by-case consultation is not required on every action taken by an action agency. Paragraph 402.03(b)(1) of the rule makes explicit the guidance to the action agencies inherent in the 1986 regulations that no consultation is required in those instances when an action poses no effects to listed species or critical habitat. We determined that consultation is not required because an action that has no effect on listed species or critical habitat inherently meets the section 7(a)(2) statutory requirement that agencies ensure their actions are not likely to jeopardize a listed species or adversely modify or destroy critical habitat. Moreover, requiring consultation when an action is determined to have no effect on listed species or critical habitat is an unnecessary diversion of scarce resources.

Paragraph (b)(2) - insignificant contributor

Comment: Many commenters were troubled by paragraph 402.03(b)(2) as set out in the proposed rule. The proposed rule stated that consultation was not required when no take was anticipated and "such action is an insignificant contributor to any effects on a listed species or critical habitat." Some commenters were concerned how broad the language appeared and that it would be used to avoid reviewing effects that were simply "not significant."

Response: After considering those comments, we determined that this portion of the rule should be revised. Accordingly, paragraph 402.03(b)(2) now is limited in scope to those effects that are "manifested through global processes" and: (i) the effects cannot be reliably predicted or measured at the scale of a listed species' current range; or (ii) would result at most in a small,

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.

We have revised section 402.03(b)(2) to establish a very narrow applicability exception to consultation for certain effects that are manifested through "global processes." This exception would apply where the effects of an action are manifested through such processes and at least one of the following applies: the effects cannot be reliably predicted or measured at the scale of a listed species' current range; or the effects would result at most in an extremely small, insignificant impact on a listed species or critical habitat; or the effects are such that the potential risk of harm to a listed species or critical habitat is remote. The phrase "manifested through global processes" covers those effects that are the result of a specific source but become well mixed and diffused at the global scale such that they lose their individual identity. The combined effect of any particular source and other sources then becomes a potential contributor to a separate phenomenon with possible global impacts. Typically, however, the contribution of any particular source to the global process that then affects the local environment is very, very small. The most topical example of effects that would be manifested only through a global process is the effects of individual sources of greenhouse gas emissions and their contribution to global climate change and warming. "Manifested through global processes" does not refer to effects that can be evaluated for the immediate effects on the surrounding area caused by their primary physical and chemical characteristics. In that context, they would be traced and measured to the extent possible. It is also possible that an action might have some effects that are manifested through global processes and other that are not. In this case, consultation would be required with respect to those other effects, but under revised section 402.03(c) consultation

would not be required with respect to those effects manifested through global processes, provided at least one of the other criteria of section 402.03(b)(2) is met. These revisions reflect our conclusion that section 7(a)(2) is not an appropriate or effective mechanism to assess individual Federal actions as they relate to global issues such as global climate change and warming. We do not believe that Congress designed or intended the ESA to be utilized as a tool to regulate global processes, nor is it appropriate to hold an agency responsible for global processes.

Comment: Some commenters questioned why it was appropriate to exclude effects that contribute to climate change.

Response: This very narrow type of effect is generally beyond the scope of section 7(a)(2) because of the inability to separate out the effect of a specific Federal action from a multitude of other factors that contribute through global processes. In addition, the case-by-case consultation on specific effects that would fall under this provision would not be necessary or beneficial. As discussed above, the exclusion applies only to those effects that lose their individual identity and only produce the potential to have an impact when they combine with other factors through a global process.

Even after the threshold of the effect being manifested through global processes, there are other limiting factors. The effects under this section must also be of such a nature that they cannot be reliably predicted or measured at the scale of a listed species' current range or would result at most in a small, insignificant impact on a listed species or critical habitat, or are of the nature that the potential risk of harm to a listed species or critical habitat is remote. In the context of

greenhouse gases, current models, though capable of quantifying the contribution to changes in global atmospheric greenhouse gas concentrations and temperature, do not allow us to quantitatively link an individual action to localized climate impacts relevant to consultation. However, based on the best scientific information available, we are presently able to conclude that the impacts of a particular source are likely to be extremely small. For example, in a recent exchange of letters, EPA provided a model-based analysis that projected that even the emissions of a very large coal-fired power plant would likely result in a rise in the maximum global mean temperature of less than one-thousandth of a degree.

Finally, to attempt to regulate effects at a global scale would have the untenable consequence of transforming the "action area" for consultation into the globe itself, which would eviscerate any meaningful limit on the concept of "action area" and defy analysis. The concept of "action area," as established in the 1986 regulations and unchanged by this rule, is an important and necessary tool to keep consultations manageable and tied to the particular action under consultation. In a global context, the concept of "action area" would be rendered meaningless.

Comment: Several commenters asked for a further explanation of "remote". One commenter suggested that we clarify that remote applies to effects that are remote "in time, space, or in probability of occurrence."

Response: This comment was originally submitted with regard to paragraph 402.03(b)(3)(iii), which has been withdrawn, but we will respond because of the use of the word "remote" in paragraph 402.03(b)(2). We agree with the commenter that remote can qualify an effect with regard to time, space, or in probability of occurrence, among other things.

Comment: Some commenters expressed concern that this regulation would prevent review of climate change in all consultations, even when the best available science indicates that climate change may impact a species.

Response: Paragraph (b)(2) is intended to deal with effects that are manifested through a global process. For example, under this paragraph consultation would not be required for actions involving the emission of greenhouse gases so long as they met the threshold of no anticipated take and one of the three criteria specified in paragraph (b)(2). This paragraph does not preclude the appropriate consideration of climate change, generally, for purposes of establishing the environmental baseline and the status of the species in the action area. For example, if, based upon the best available information it is determined that an action area will face a different precipitation pattern than it had experienced in the past, (from the effects of climate change overall rather than from the project under consultation) that information would be appropriately evaluated for purposes of establishing the environmental baseline.

Paragraph (b)(3)

The proposed regulation set out three types of effects that would not require consultation: those effects that are wholly beneficial, those effects that are "not capable of being meaningfully identified or detected in a manner that permits evaluation," and those effects for which the "potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat is remote."

Comment: There were limited comments on the concept of "wholly beneficial" as set out in paragraph (b)(3)(ii). One commenter acknowledged that it would be a waste of time and resources to consult on such an action, but stated the ESA would still require it. One commenter preferred the words "clearly beneficial."

Response: As discussed above, we disagree that the ESA requires consultation on every action taken by an action agency. The final rule continues the use of the words "wholly beneficial" to establish clearly that the action can have no adverse effects on listed species or habitat in order to be deemed "wholly beneficial." This subparagraph does not allow a balancing of beneficial against detrimental. We believe the term "wholly beneficial" better captures that concept than "clearly beneficial." Further this language tracks language in the Consultation Handbook, which defined "beneficial effects" as effects that are "contemporaneous positive effects without any adverse effects to the species." We believe that no consultation is required for these effects because there is no question that an action agency can ensure that its action does not violate section 7(a)(2) with effects that are wholly beneficial.

Comment: Some commenters objected to proposed rule paragraph (b)(3)(i), which does not require further consultation on effects that are "not capable of being meaningfully identified or detected in a manner that permits evaluation."

Response: After review of several comments, we concluded that the language set out in the proposed rule should be amended to better reflect the language contained in the Consultation Handbook. We made two technical changes to lend more precision to this applicability criterion. First, we changed the term "identified" to "measured." The terms "identified" and "detected" are so similar in meaning that using both terms diminished the clarity of the provision. The term

"measured," however, is clearly distinct and provides an independent basis for examining whether an effect is suitable for consultation. The second change we made was to move the word "meaningfully" to the end of the sentence to modify "evaluated." If an effect cannot be measured or detected in a manner that permits meaningful evaluation, we do not think consultation is beneficial or necessary.

We think the language in this rule captures the intent of language used to describe insignificant effects as defined in the Consultation Handbook under "is not likely to adversely affect." That language reads, "Based on best judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate" such effects. We think these effects were properly excluded from formal consultation by the determination that they were "not likely to adversely affect." Consultation Handbook, p.xv. If an effect cannot be measured or detected to the point that it cannot be meaningfully evaluated, there is simply no point in requiring consultation on such an effect. We believe they are properly placed in the category of effects that do not require consultation once a determination has been made that no take is anticipated and any effects satisfy the criterion of section 402.03(b)(3)(i). However, this provision is not meant to suggest that consultation is not required merely because the predicted effect of an action is small in magnitude. Even though the magnitude of an effect is small, if the effects on the environment can be measured or detected in a manner that permits meaningful evaluation, then informal consultation may be necessary.

Comment: Many commenters objected to the language set out in the proposed rule at paragraph (b)(3)(iii) that consultation was not required for those effects that "are such that the potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat is

remote." Primarily, the commenters thought this required or allowed action agencies to make a jeopardy determination, without consultation with the Services. Several commenters asked for clarification of the difference between "potential risk of jeopardy" with the jeopardy determination made as part of formal consultation. Another commenter noted that they did not see how this evaluation meshed with the threshold requirement for this entire paragraph that no take is anticipated.

Response: After considering the comments, we decided to remove paragraph (b)(3)(iii) from the final rule. Although, as discussed above, we have incorporated the concept of "remoteness" in the specialized global processes exception (402.03(b)(2)), we have delinked it from the statutory jeopardy standard.

§402.13 Informal Consultation – A sentence was added to the end of paragraph 402.13(b) to explain when consultation has been satisfied. A new paragraph, 402.13(c), was added to establish that consultations, by mutual agreement, could be extended beyond the 120 day time period.

Comment: Several commenters expressed concerns about the new time frames for informal consultation and the provision that allows action agencies to terminate informal consultation. One commenter stated that the provisions to allow up to 120 days for informal consultation are not authorized by law. Other comments stated that the new time line allows action agencies to terminate informal consultation and move forward with the project without Service concurrence, which seriously weakens the consultation process, and that the proposed deadline for informal

consultation is arbitrary and counterproductive. Other commenters supported the proposed establishment of a time limit for informal consultation as appropriate.

Response: The ESA does not require an informal consultation procedure. Rather, the informal consultation process as it has been implemented was created by regulation as part of the mechanism for streamlining consultations when an action agency does not need an incidental take statement and the effects are not expected to be adverse. The Services retain the authority to adapt the procedure based on their experience with implementation. Experience has shown that under the existing regulations informal consultations can be prolonged, sometimes lasting longer than formal consultations. This delay affects the action agencies' execution of their actions and fulfillment of their missions. Adding a time frame to this process is expected to contribute to achieving the efficiencies that were anticipated when the concept of informal consultation was introduced. The sixty-day period we have added (with a sixty day extension) emphasizes the need for the Services to conduct timely review of requests for informal consultation and provides the Services an adequate opportunity to raise any concerns they may have. At the same time, the time frames provide action agencies with greater certainty by allowing them to terminate consultation and move forward after an established time. However, the action agency may move forward with the action only if the action agency concludes that the action will not result in take and is not likely to adversely affect listed species or critical habitat.

Comment: The proposed regulations fail to provide for at least a *pro forma* written opinion of the Secretary, which is contrary to the statutory duty.

Response: Section 7(b)(3) requires that "[p]romptly after conclusion of consultation" under either section 7(a)(2) or (3), "the Secretary shall provide to the Federal agency and applicant, if

any, a written statement setting forth the Secretary's opinion." Under the 1986 regulations, the Services provide a biological opinion only after formal consultation. This rule does not change that requirement. We assume that the commenter refers to the concurrence letter in the informal consultation process as a *pro forma* written opinion of the Secretary. Although the Services expect that in many cases informal consultation will conclude in a letter of concurrence or a request for formal consultation, the final rule permits action agencies to move forward without one. Neither informal consultation nor concurrence with "not likely to adversely affect" determinations are set forth in the ESA. The Services are exercising their discretion under the ESA by concluding that in certain narrow circumstances a written statement from the Services is neither required nor beneficial.

Comment: Revise the proposed section 402.13(b) to clearly state that termination means that the action agency has fulfilled its procedural obligation to consult with the Services.

Response: The Services have modified the proposed text to clarify that if the action agency terminates consultation at the end of the sixty day period established under section 402.13(b) (or the end of an extension pursuant to that section), or if the appropriate period has expired without a written statement from the Service, the action agency will be considered to have satisfied its procedural duty to consult under section 7(a)(2) of the ESA. However, we have also added a provision to the final rule to clarify that the Service, the action agency, and the applicant, if any, may agree to extend informal consultation for a specified period of time. This provision will allow the relevant parties to continue informal consultation in situations where progress has been made so that the Service's written concurrence will still be a possible outcome. Because the

purpose of the time limit is to expedite informal consultation, we expect that extensions beyond 120 days will be rare.

Comment: The requirement to consult when the action agency is unable to find that its action is "not likely to adversely affect" a species has not changed.

Response: We agree, in this circumstance the Federal agency would proceed to formal consultation.

Comment: Some comments supported the use of informal consultation for review of batched, similar, or grouped actions.

Response: We agree this is appropriate provided that the group of actions or batched actions meet the threshold criterion of "no take is anticipated."

Comment: Several commenters questioned what the implications are if an action agency chooses to proceed without a concurrence from the Services.

Response: In the final rule the Services have clarified that a Federal agency may consider lack of a response at the end of 60 days (unless extended by the Services to 120 days) as satisfying their procedural obligations under 7(a)(2). The action agency can choose to proceed with the action. The Services have determined that this approach has little risk of adverse affect on species, because the threshold requirement of informal consultation is that no take is expected to occur and because the Service has ample opportunity in 60 or 120 days to raise issues with the action agency if adverse effects are likely and move the action into formal consultation.

Comment: Several commenters noted that it is sometimes helpful to have extended informal

consultations that allow the action agencies and the Services to work together to lessen impacts to species and critical habitat. Some of those commenters requested additional language be added to clarify that consultations could proceed past 120 days.

Response: The Services also have considered that circumstances may arise in which the informal consultation is proceeding but is not likely to conclude in 120 days. If the action agency wishes to continue informal consultation, then Services may agree with the action agency on an extension, provided the applicant also agrees. Although the Services have incorporated this provision into the regulation, as noted above, we expect that it will be rarely utilized.

We also note that the Services may indicate that they do not concur when they have not been provided adequate information to consider the action agency's not likely to adversely affect determination. In such circumstances, the Services should specify in detail the supplemental information they think is necessary to consider the action agency's determination.

§ 402.14 Formal Consultation

We made a minor change to this section to reflect changes in the informal consultation section of the rule. Specifically, we changed the "exception" language in § 402.14 to note that informal consultation may be concluded without the written concurrence of the Director under the circumstances in § 402.13(b).

Comment: Some commenters thought that the exception language in 402.14 appeared to require formal consultation even when the action agency chooses to conclude consultation.

Response: We agree that there could be some confusion as to whether formal consultation was

required when an action agency chooses to conclude consultation without receiving a concurrence from the Services. We think the rule makes it clear that under those circumstances, consultation under section 7(a)(2) is satisfied.

Required Determinations

Regulatory Planning and Review (E.O. 12866).

Executive Order 12866 requires Federal agencies to submit proposed and final significant rules to the Office of Management and Budget (OMB) prior to publication in the FR. The EO defines a rule as significant if it meets one of the following four criteria:

(a) the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government;

(b) the rule will create inconsistencies with other Federal agencies' actions;

(c) the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients;. or

(d) the rule raises novel legal or policy issues.

If the rule meets criteria (a) above it is called an "economically significant" rule and additional requirements apply. It has been determined that this rule is "significant" but not "economically significant." It was submitted to OMB for review prior to promulgation.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (5 U.S. C. 601 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an 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), unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act requires 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.

Pursuant to the Regulatory Flexibility Act, the Secretaries of the Interior and Commerce certify that this regulation will not have a significant economic impact on a substantial number of small entities. This rule applies only to Federal agencies and does not regulate, either directly or indirectly, any small entities

Congressional Review Act (CRA).

This rule is not a major rule under 5 U.S.C. 804(2), Subpart E of the Small Business Regulatory Enforcement Fairness Act, also known as the Congressional Review Act. This rule:

a. Does not have an annual effect on the economy of $100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

As discussed above, this rule makes narrow changes to the section 7 consultation process. As such, the impacts are relatively narrow and limited to the Federal action agencies. A copy of the rule and required supporting documentation will be provided to the Comptroller General and both Houses of Congress before the rule goes into effect.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The rule is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

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

In accordance with the Unfunded Mandates Reform Act:

(1) The rule will not "significantly or uniquely" affect small governments. A Small Government Agency Plan is not required. We expect that these regulations will not result in any significant additional expenditure by entities that develop formalized conservation efforts.

(2) The 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; and so is not a "significant regulatory

action" under the Unfunded Mandates Reform Act. The rule imposes no obligations on State, local, or tribal governments.

Takings

In accordance with Executive Order 12630, this rule does not have significant takings implications. The rule has no impact on personal property rights. A takings implication assessment is not required.

Federalism

In accordance with Executive Order 13132, this rule does not have significant Federalism effects. A Federalism Assessment is not required.

Civil Justice Reform

In accordance with Executive Order 12988, this rule does not unduly burden the judicial systems and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We promulgate this rule consistent with the Executive Order.

Paperwork Reduction Act

This rule will not impose any new requirements for collection of information that require approval by the OMB under the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). This rule will not impose new recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. We 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.

Data Quality Act

In developing this rule we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106-554).

National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. In compliance with the requirements of the National Environmental Policy Act of 1969 (NEPA), and the Council on Environmental Quality's regulation for implementing NEPA (40 CFR 1500-1508), we published the availability of a draft environmental assessment on October 27, 2008 (73 FR 63667), followed by a 10-day comment period. The final environmental assessment is available to the public (see ADDRESSES). The action falls within the scope of the final environmental assessment and accompanying Finding of No Significant Impact. The FWS and NMFS are considered the lead Federal agencies for the preparation of this rule, pursuant to 40 C.F.R. part 1501.

Government-to-Government Relationship With Indian Tribes

In accordance with the Secretarial Order 3206, "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and Endangered Species Act" (June 5, 1997); the President's memorandum of April 29, 1994, "Government-to-Government relations with Native American Tribal Governments" (59 FR 22951); E.O. 1315; and the Department of the Interior's 512 DM 2, we understand that we must relate to recognized Federal Indian Tribes on a Government-to Government basis. The rule applies only to Federal agencies, not to Indian Tribes. To the extent that Federal actions requiring consultation may indirectly affect the Tribes, the rule is intended

only to streamline the administration of the ESA and clarify definitions; the rule does not change any substantive requirements concerning protections of listed species or critical habitat. Any indirect effect to Tribes, therefore, would be minimal.

List of Subjects in 50 CFR Part 402

Endangered and threatened species.

Lyle Laverty _____ Dated NOV 2 6 2008

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

_____ Dated _____

Samuel D. Rauch,
Deputy Assistant Administrator
for Regulatory Programs, National Marine Fisheries Service, National Oceanic and Atmospheric Administration.

For the reasons set forth in the preamble, the Services amend part 402, title 50 of the Code of Federal Regulations as follows:

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

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

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

only to streamline the administration of the ESA and clarify definitions; the rule does not change any substantive requirements concerning protections of listed species or critical habitat. Any indirect effect to Tribes, therefore, would be minimal.

List of Subjects in 50 CFR Part 402

Endangered and threatened species.

_____ Dated _____

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

_____ Dated 11/26/08

Samuel D. Rauch,
Deputy Assistant Administrator
for Regulatory Programs, National Marine Fisheries Service, National Oceanic and Atmospheric Administration.

For the reasons set forth in the preamble, the Services amend part 402, title 50 of the Code of Federal Regulations as follows:

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

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

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

2. In § 402.02 revise the definitions for "Biological assessment," "Cumulative effects," and "Effects of the action" to read as follows:

§ 402.02 Definitions.

* * * * *

"Biological assessment" means the information prepared by or under the direction of the Federal agency concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation of potential effects of the action on such species and habitat. A biological assessment may be a document prepared for the sole purpose of interagency consultation, or it may be a document or documents prepared for other purposes (e.g., an environmental assessment or environmental impact statement) containing the information required to initiate consultation. The Federal agency is required to provide the Services a specific guide or statement as to the location of the relevant consultation information, as described in 402.14, in any alternative document submitted in lieu of a biological assessment.

* * * * *

"Cumulative effects" means those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the particular Federal action subject to consultation. Cumulative effects do not include future Federal activities that are physically located within the action area of the particular Federal action under consultation.

* * * * *

"Effects of the action" means the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action that will be added to the environmental baseline. 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. Direct effects are the immediate effects of the action and are not dependent on the occurrence of any additional intervening actions for the impacts to species or critical habitat to occur. Indirect effects are those for which the proposed action is an essential cause, and that are later in time, but still are reasonably certain to occur. If an effect will occur whether or not the action takes place, the action is not an essential cause of the indirect effect. Reasonably certain to occur is the standard used to determine the requisite confidence that an effect will happen. A conclusion that an effect is reasonably certain to occur must be based on clear and substantial information. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

* * * * *

3. Revise § 402.03 to read as follows:

§ 402.03 Applicability.

(a) Section 7 of the Act and the requirements of this part apply to all actions in which the Federal agency has discretionary involvement or control.

(b) Federal agencies are not required to consult on an action when the direct and indirect effects of that action are not anticipated to result in take and:

(1) Such action has no effect on a listed species or critical habitat; or

(2) The effects of such action 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, 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) The effects of such action on a listed species or critical habitat:

(i) Are not capable of being measured or detected in a manner that permits meaningful evaluation; or

(ii) Are wholly beneficial.

(c) If all of the effects of an action fall within paragraph (b) of this section, then no consultation is required for the action. If one or more but not all of the effects of an action fall within paragraph (b) of this section, then consultation is required only for those effects of the action that do not fall within paragraph (b) of this section.

4. Revise § 402.13 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. If during informal consultation it is determined by the Federal agency that the action, or a number of similar actions, an agency program, or a segment of a comprehensive plan, is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary, if the Service concurs in writing. For all requests for informal consultation, the Federal agency shall consider the effects of the action as a whole on all listed species and critical habitats.

(b) If the Service has not provided a written statement regarding whether it concurs with a Federal agency's determination provided for in paragraph (a) of this section within 60 days following the date of the Federal agency's request for concurrence the Federal agency may, upon written notice to the Service, terminate consultation. The Service may, upon written notice to the Federal agency within the 60-day period, extend the time for informal consultation for a period no greater than an additional 60 days from the end of the 60-day period. If the Federal agency terminates consultation at the end of the 60-day period, or if the Service's extension period expires without a written statement whether it concurs with a Federal agency's determination provided for in paragraph (a) of this section, the consultation provision in section 7(a)(2) is satisfied.

(c)Notwithstanding the provisions of paragraph (b), the Service, the Federal agency, and the applicant, if one is involved, may agree to extend informal consultation for a specific time period.

(d) 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.

5. In § 402.14 revise paragraphs (a) and (b)(1) to read as follows:

§ 402.14 Formal consultation.

(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required, except as noted in paragraph (b) of this section. The Director may request a Federal agency to enter into consultation if he identifies any action of that agency that may affect listed species or critical habitat and for which there has been no consultation. When such a request is made, the Director shall forward to the Federal agency a written explanation of the basis for the request.

(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines that the proposed action is not likely to adversely affect any listed species or critical habitat, and the Director concurs in writing or informal consultation has been completed under § 402.13(b) without a written statement by the Service as to whether it concurs;

* * * * *