MEMORANDUM

TO: SLDMWA Board of Directors, Alternates

FROM: Rebecca Akroyd, Interim General Counsel

DATE: September 10, 2018

RE: Proposed Revisions to Endangered Species Act Regulations and Opportunity for Comment

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BACKGROUND

On July 19, 2018, the United States Fish and Wildlife Service ("FWS") and National Oceanic Atmospheric Administration ("NOAA") Fisheries published proposed revisions to the federal Endangered Species Act ("ESA") in the Federal Register.[1]

The proposed revisions include: (1) changes to section 4 of the ESA, which deals with procedures for listing species, recovery, and designating critical habitat; and (2) changes to section 7 of the ESA, which deals with consultation to ensure federal agency action is not likely to jeopardize the continued existence of endangered or threatened species or result in destruction or adverse modification of critical habitat.

BRIEF SUMMARY OF PROPOSED REVISIONS

1. Proposed Revisions to Section 4 of the ESA

A. Proposed Revisions to Listing / Designation Regulations

The proposed revisions to Section 4 of the ESA would "clarify, interpret, and implement portions of the Act concerning the procedures and criteria used for listing or removing species from the Lists of Endangered and Threatened Wildlife and Plants and designating critical habitat."[2]

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[1] The News Release issued by the agencies is available at https://www.fws.gov/news/ShowNews.cfm?ref=u.s.-fish-and-wildlife-service-and-noaa-fisheries-seek-public-input-on-&_ID=36286.

[2] The proposed revisions to 50 CFR Part 424 are presented in 83 Fed. Reg. 35193, available at: https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0006-0001.

The proposed revisions would clarify factors that are considered in listing species and designating critical habitat or de-listing and un-designating the same. The proposed revisions would also clarify when un-occupied habitat could be considered for designation as critical habitat, and when information regarding economic impacts may be presented.

B. Proposed Revisions to Regulations for Prohibition to Threatened Wildlife and Plants

The FWS also proposes to revise its regulations extending most of the prohibitions for activities involving endangered species to threatened species.[3] The proposed revisions would require the FWS, pursuant to Section 4(d) of the ESA, to determine what, if any, protective regulations are appropriate for species that FWS in the future determines to be threatened. This approach would be consistent with the approach taken by the National Marine Fisheries Service since Congress added Section 4(d) to the ESA.

2. Proposed Revisions to Section 7 of the ESA

FWS and NMFS (together, the "Services") jointly proposed to amend portions of their regulations that implement Section 7 of the ESA.[4] The proposed revisions are intended to improve and clarify the interagency consultation processes and make them more efficient and consistent. The proposed revisions would affect a number of definitions that affect Section 7 consultation, including the definitions of "destruction or adverse modification," "effects of the action," "environmental baseline," and "programmatic consultation," among others.

In the Federal Register notice presenting the proposed revisions, the Services request input on to whether the proposed stand-alone definition of "environmental baseline" would address various issues regarding incremental changes from ongoing actions. The Services also seek comment on the advisability of clarifying circumstances when agencies are not required to consult, and on the merit, authority, and means for the Services "to conduct a single consultation, resulting in a single biological opinion, for Federal agency actions affecting species that are under the jurisdiction of both FWS and NMFS."

OPPORTUNITY FOR COMMENT

Public comments on the proposed revisions must be received by September 24, 2018. They may be posted online through http://www.regulations.gov, with reference to the respective docket numbers:

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[3] The proposed revisions to 50 CFR Part 17 are presented in 83 Fed. Reg. 35174, available at https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0007-0001.

[4] The proposed revisions to 50 CFR Part 402 are presented in 83 Fed. Reg. 35179, available at https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0009-0001.

- Revision of the Regulations for Listing Species and Designating Critical Habitat (https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0006-0001) – Docket Number: FWS-HQ-ES-2018-0006;
- Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants (https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0007-0001) – Docket Number: FWS-HQ-ES-2018-0007; and
- Revision of Regulations for Interagency Cooperation (https://www.regulations.gov/document?D=FWS=HQ-ES-2018-0009-0001) – Docket Number: FWS-HQ-ES-2018-0009.

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Press Release

U.S. Fish and Wildlife Service and NOAA Fisheries Seek Public Input on Proposed Reforms to Improve & Modernize Implementation of the Endangered Species Act

July 19, 2018

Contact(s):

U.S. Fish and Wildlife Service: Gavin_Shire@fws.gov (mailto:Gavin_Shire@fws.gov), 703-358-2649

NOAA Fisheries: Katherine.Brogan@noaa.gov (mailto:Katherine.brogan@noaa.gov), 301-427-8030

Continuing efforts to improve how the Endangered Species Act (ESA) is implemented, the U.S. Fish and Wildlife Service and National Oceanic Atmospheric Administration (NOAA) Fisheries today proposed revisions (https://www.fws.gov/endangered/improving_ESA/regulation-revisions.html) to certain regulations to ensure clarity and consistency. The changes incorporate public input, best science and best practices to improve reliability, regulatory efficiency and environmental stewardship.

“The Trump Administration is dedicated to being a good neighbor and being a better partner with the communities in which we operate. One thing we heard over and over again was that ESA implementation was not consistent and often times very confusing to navigate. We are proposing these improvements to produce the best conservation results for the species while reducing the regulatory burden on the American people,” said U.S. Fish and Wildlife Service Principal Deputy Director Greg Sheehan. “We value public input and have already incorporated initial public comments we received in response to our notices of intent published in 2017. We encourage the public to provide us additional feedback to help us finalize these rules.”

“We work to ensure effective conservation measures to recover our most imperiled species,” said Chris Oliver, NOAA Assistant Administrator for Fisheries. “The changes being proposed today are designed to bring additional clarity and consistency to the implementation of the act across our agencies, and we look forward to additional feedback from the public as part of this process.”

Several proposed changes relate to section 4 of the ESA, which deals with procedures for listing species, recovery and designating critical habitat (areas essential to support the conservation of a species). First, the agencies propose to revise the procedures for designating critical habitat by reinstating the requirement that they will first evaluate areas currently occupied by the species before considering unoccupied areas. Second, the agencies propose to clarify when they may determine unoccupied areas are essential to the conservation of the species.

While the agencies recognize the value of critical habitat as a conservation tool, in some cases, designation of critical habitat is not prudent. Accordingly, they are proposing a non-exhaustive list of circumstances where they may find that designation for a particular species would not be prudent. The agencies anticipate that such not-prudent determinations will continue to be rare and expect to designate critical habitat in most cases.

The ESA defines a threatened species as one that is likely to become in danger of extinction within the “foreseeable future.” For the first time, the agencies are proposing an interpretation of “foreseeable future” to make it clear that it extends only as far as they can reasonably determine that both the future threats and the species’ responses to those threats are probable.

The agencies are also clarifying that decisions to delist a species are made using the same standard as decisions to list species. In both cases, that standard is whether a species meets the established ESA definition of an endangered species or threatened species.

The U.S. Fish and Wildlife Service is separately proposing to rescind its blanket rule under section 4(d) of the ESA, which automatically conveyed the same protections for threatened species as for endangered species unless otherwise specified. This brings its regulatory approach to threatened species protections in line with NOAA Fisheries, which has not employed such a blanket rule. The proposed changes would impact only future listings or downlistings and would not apply to those species already listed as threatened. The U.S. Fish and Wildlife Service will craft species-specific 4(d) rules for each future threatened species determination that are necessary and advisable for the conservation of the species, as has been standard practice for most species listed as threatened in recent years.

“No two species are the same, and so by crafting species-specific 4(d) rules for threatened species, we can tailor appropriate protections using best available science according to each species’ biological needs,” said Sheehan. “By creating a clearer regulatory distinction between threatened and endangered species, we are also encouraging partners to invest in conservation that has the potential to improve a species’ status, helping us work towards our ultimate goal: recovery.”

Under section 7 of the ESA, other federal agencies consult with the U.S. Fish and Wildlife Service and NOAA Fisheries to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in “destruction or adverse modification” of critical habitat. The proposed rule simplifies and clarifies the definition of “destruction or adverse modification” by removing redundant and confusing language. The proposed rule is not intended to alter existing consultation practice; rather, it seeks to revise and clarify language that was confusing to other federal agencies and the public.

Additional proposed revisions to the consultation regulations will clarify whether and how the U.S. Fish and Wildlife Service and NOAA Fisheries consider proposed measures to avoid, minimize or offset adverse effects to listed species or their critical habitat when conducting interagency consultations and will improve the consultation process by clarifying how biological opinions and interagency submissions should be formulated.

The proposed rules are available here (https://www.fws.gov/endangered/improving_ESA/regulation-revisions.html) and will publish in the *Federal Register* in coming days, including detailed information on how the public can submit written comments and information concerning these provisions.

Comments must be received within 60 days of publication. All comments will be posted on http://www.regulations.gov (http://www.regulations.gov). This generally means any personal information provided through the process will be posted.

The National Marine Fisheries Service is a part of the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA). NOAA's mission is to understand and predict changes in the Earth's environment, from the depths of the ocean to the surface of the sun, and to conserve and manage our coastal and marine resources. Join us on Twitter (http://www.twitter.com/noaa), Facebook (http://www.facebook.com/noaa), Instagram (http://www.instagram.com/noaa) and our other social media channels (http://www.noaa.gov/stay-connected/).

Public Comment

The proposed rules published in the *Federal Register* on **July 25, 2018.** Comments for each notice must be received within 60 days, by **September 24, 2018**. All comments will be posted on http://www.regulations.gov (http://www.regulations.gov). This generally means any personal information provided through the process will be posted.

To comment on any of these rules electronically please click on the links below. Then click the *Comment Now* button:

- Revision of the Regulations for Listing Species and Designating Critical Habitat (https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0006-0001) – Docket Number: FWS-HQ-ES-2018-0006
- Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants (https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0007-0001) – Docket Number: FWS-HQ-ES-2018-0007
- Revision of Regulations for Interagency Cooperation (https://www.regulations.gov/document?D=FWS-HQ-ES-2018-0009-0001) – Docket Number: FWS-HQ-ES-2018-0009

Additional means of commenting are provided in each *Federal Register* notice.

The mission of the U.S. Fish and Wildlife Service is working with others to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. We are both a leader and trusted partner in fish and wildlife conservation, known for our scientific excellence, stewardship of lands and natural resources, dedicated professionals, and commitment to public service. For more information on our work and the people who make it happen, visit www.fws.gov (https://www.fws.gov/).

For more information on our work and the people who make it happen, visit http://www.fws.gov/ (https://www.fws.gov/). Connect with our Facebook page (https://www.facebook.com/usfws), follow our tweets (https://twitter.com/usfws), watch our YouTube Channel (https://www.youtube.com/usfws) and download photos from our Flickr page (http://www.flickr.com/photos/usfwshq/).

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

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

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

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

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

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

* * * * *

■ 4. Amend § 402.16 by:

■ a. Revising the section heading;

■ b. Redesignating paragraphs (a) through (d) as paragraphs (a)(1) through (a)(4);

■ c. Designating the introductory text as paragraph (a) and revising the newly designated paragraph (a); and

■ d. Adding a new paragraph (b).

The revisions and addition read as follows:

§ 402.16 Reinitiation of consultation.

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

* * * * *

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

■ 5. Add § 402.17 to read as follows:

§ 402.17 Other provisions.

(a) *Activities that are reasonably certain to occur.* To be considered reasonably certain to occur, the activity cannot be speculative but does not need to be guaranteed. Factors to consider include, but are not limited to:

(1) Past relevant experiences;

(2) Any existing relevant plans; and

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

(b) The provisions in paragraph (a) of this section apply only to activities caused by but not included in the proposed action and activities considered under cumulative effects.

§ 402.40 [Amended]

■ 6. In § 402.40, amend paragraph (b) by removing ''§ 402.14(c)(1)–(6)'' and in its place adding ''§ 402.14(c)''.

Dated: July 18, 2018.

Ryan K. Zinke,

Secretary, Department of the Interior.

Dated: July 16, 2018.

Wilbur Ross,

Secretary, Department of Commerce.

[FR Doc. 2018–15812 Filed 7–24–18; 8:45 am]

BILLING CODE 3510–22–P; 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 424

[Docket No. FWS–HQ–ES–2018–0006; Docket No. 180202112–8112–01; 4500030113]

RIN 1018–BC88; 0648–BH42

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

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

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the ''Services'' or ''we''), propose to revise portions of our regulations that implement section 4 of the Endangered Species Act of 1973, as amended (Act). The proposed revisions to the regulations clarify, interpret, and implement portions of the Act concerning the procedures and criteria used for listing or removing species from the Lists of Endangered and Threatened Wildlife and Plants and designating critical habitat. We also propose to make multiple technical revisions to update existing sections or to refer appropriately to other sections.

DATES: We will accept comments from all interested parties until September 24, 2018. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on this date.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–HQ–ES–2018–0006, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–HQ–ES–2018–0006; U.S. Fish & Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803 or National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910.

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

FOR FURTHER INFORMATION CONTACT: Bridget Fahey, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703/358–2171; or Samuel D. Rauch, III, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301/427–8403. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800/877–8339.

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act of 1973, as amended (''Act''; 16 U.S.C. 1531 *et seq.*), states that the purposes of the Act are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions. 16 U.S.C. 1531(b). Moreover, the Act states that it is the policy of Congress that the Federal Government will seek to conserve threatened and endangered species, and use its authorities to further the purposes of the Act. 16 U.S.C. 1531(c)(1).

The Act defines an endangered species as any species that is ''in danger of extinction throughout all or a significant portion of its range'' and a threatened species as any species ''that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' 16 U.S.C. 1532(6); (20). The Act requires the Services to determine whether species meet either of these definitions. 16 U.S.C. 1533(a); 1532(15). Section 4 of the Act and its implementing regulations in Title 50 of the Code of Federal Regulations at 50 CFR part 424 set forth the procedures for adding, removing, or reclassifying species to the Federal Lists of Endangered and Threatened Wildlife and Plants (lists). The lists are in 50 CFR 17.11(h) (wildlife) and 17.12(h) (plants). Section 4(a)(1) of the Act sets forth the factors that we evaluate when we issue rules for species to list (adding a species to one of the lists), delist (removing a species from one of the lists), and reclassify (changing a species' classification or its status).

One of the tools provided by the Act to conserve species is the designation of critical habitat. The purpose of critical habitat is to identify the areas that are essential to the conservation of the species. The Act generally requires that the Services, to the maximum extent prudent and determinable, designate critical habitat when determining that a species is either an endangered species or a threatened species. 16 U.S.C. 1533(a)(3)(A).

The Secretaries of the Interior and Commerce (the ''Secretaries'') share responsibilities for implementing most of the provisions of the Act. Generally, marine and anadromous 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 FWS and by the Secretary of Commerce to the Assistant Administrator for NMFS.

Proposed Regulatory Revisions

In carrying out Executive Order 13777, ''Enforcing the Regulatory Reform Agenda,'' the Department of the Interior (DOI) published a document with the title ''Regulatory Reform'' in the **Federal Register** of June 22, 2017 (82 FR 28429). The document requested public comment on how DOI can improve implementation of regulatory reform initiatives and policies and identify regulations for repeal, replacement, or modification. This proposed rule addresses comments that DOI has received in response to the regulatory reform docket.

As part of implementing E.O. 13777, the National Oceanic and Atmospheric Administration (NOAA) published a notice entitled, ''Streamlining Regulatory Processes and Reducing Regulatory Burden'' (82 FR 31576, July 7, 2017). The notice requested public comments on how NOAA could continue to improve the efficiency and effectiveness of current regulations and regulatory processes. This proposed rule addresses comments NOAA received from the public.

This proposed rule is one of three related proposed rules, two of which are joint between the Services, that are publishing in today's **Federal Register**. All of these documents propose revisions to various regulations that implement the ESA.

Beyond the specific revisions to the regulations highlighted in this proposed rule, the Services are comprehensively reconsidering the processes and interpretations of statutory language set out in part 424. Thus, this rulemaking should be considered as applying to all of part 424, and as part of the rulemaking initiated today, the Services will consider whether additional modifications to the regulations setting out procedures and criteria for listing or delisting species and designating critical habitat would improve, clarify, or streamline the administration of the Act. We seek public comments recommending, opposing, or providing feedback on specific changes to any provisions in part 424 of the regulations, including but not limited to revising or adopting as regulations existing practices or policies, or interpreting terms or phrases from the Act. In particular, we seek public comment on whether we should consider modifying the definitions of ''geographical area occupied by the species'' or ''physical or biological features'' in section 424.02. Based on comments received and on our experience in administering the Act, the final rule may include revisions to any provisions in part 424 that are a logical outgrowth of this proposed rule, consistent with the Administrative Procedure Act.

In proposing the specific changes to the regulations in this rule and setting out the accompanying clarifying discussion in this preamble, the Services are proposing prospective standards only. Nothing in these proposed revisions to the regulations is intended to require (at such time as this rule becomes final) that any prior final listing, delisting, or reclassification determinations or previously completed critical habitat designations be reevaluated on the basis of any final regulations.

Section 424.11—Factors for Listing, Delisting, or Reclassifying Species

Economic Impacts

We propose to remove the phrase, ''without reference to possible economic or other impacts of such determination'', from paragraph (b) to more closely align with the statutory language. Section 4(b)(1)(A) of the Act requires the Secretary to make determinations based ''solely on the basis of the best scientific and commercial data available after conducting a review of the status of the species''. The word ''solely'' was added in the 1982 amendments to the Act (Pub. L. 97–304, 96 Stat. 1411) to clarify that the determination of endangered or threatened status was intended to be made ''solely upon biological criteria and to prevent non-biological considerations from affecting such decisions.'' In making the clarification, Congress expressed concerns with the requirements of the Regulatory Flexibility Act, Paperwork Reduction Act, and E.O. 12291 potentially introducing economic and other factors into the basis for determinations under the Act (H.R. Rep. No. 97–567 at 19–20, May 17, 1982).

In removing the phrase, the Services will continue to make determinations based solely on biological considerations. However, there may be circumstances where referencing economic, or other impacts may be informative to the public. For example, the Environmental Protection Agency conducts benefits and costs analyses of each proposed or revised National Ambient Air Quality Standard. These regulatory impact analyses are designed to inform the public and state, local, and tribal governments about the potential costs and benefits of implementation; however, the regulatory impact analyses are not a part of the standard selection

process. While Congress precluded consideration of economic and other impacts from being the basis of a listing determination, it did not prohibit the presentation of such information to the public. Since 1982, Congress has consistently expressed support for informing the public as to the impacts of regulations in subsequent amendments to statutes and executive orders governing the rulemaking process.

In removing the phrase, ''without reference to possible economic or other impacts of such determination'', the Services are not suggesting that all listing determinations will include a presentation of economic or other impacts. Rather, there may be circumstances where such impacts are referenced while ensuring that biological considerations remain the sole basis for listing determinations. The Services seek comment on this modification.

Foreseeable Future

We propose to add to section 424.11 a new paragraph (d) that sets forth a framework for how the Services will consider the foreseeable future. Section 3(20) of the Act defines a ''threatened species'' as ''any species which is likely to become endangered within the foreseeable future throughout all or a significant portion of its range.'' The term ''foreseeable future'' is not further described within either the Act or the Services' current implementing regulations. Guidance addressing the concept of the foreseeable future within the context of determining the status of species is articulated in a 2009 opinion from the Department of the Interior, Office of the Solicitor (M–37021, January 16, 2009). The Services have found the reasoning and conclusions expressed in this document to be well-founded, and this guidance has been widely applied by both Services. We are proposing to amend section 424.11 to include a framework that sets out how the Services will determine what constitutes the foreseeable future when determining the status of species.

Specifically, we propose the following framework: In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The term foreseeable future extends only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the ''foreseeable future'' in terms of a specific period of time, but may instead explain the extent to which they can reasonably determine that both the future threats and the species' responses to those threats are probable.

As stated above, under the proposed section 424.11(d), as under current practice, the foreseeable future will be described on a case-by-case basis. Congress did not set a uniform timeframe for the Secretary's consideration of whether a species was likely to become an endangered species, nor did Congress intend that the Secretary set a uniform timeframe. For each species considered for listing, the Services must review the best scientific and commercial data available regarding the likelihood of extinction over time, and then determine, with each status review, whether the species meets the definition of an endangered species or a threatened species. The foreseeable future is uniquely related to the particular species, the relevant threats, and the data available. Courts have expressly endorsed the Services' approach of tailoring analysis of the foreseeable future to each listing determination and considering the foreseeability of each key threat and the species' likely response. *See, e.g., In Re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation,* 709 F.3d 1, 15–16 (D.C. Cir. 2013) (noting that FWS ''determines what constitutes the 'foreseeable' future on a case-by-case basis in each listing decision'' based on how far into the future the available data allow for reliable prediction of effects to the species from key threats), *cert. denied sub nom. Safari Club Intern.* v. *Jewell,* 134 S. Ct. 310 (2013).

The analysis of the foreseeable future should, to the extent practicable, account for any relevant environmental variability, such as hydrological cycles or oceanographic cycles, which may affect the reliability of projections. Analysis of the foreseeable future should consider the timeframes applicable to the relevant threats and to the species' likely responses to those threats in view of its life-history characteristics. Data that are typically relevant to assessing the species' biological response include species-specific factors such as lifespan, reproductive rates or productivity, certain behaviors, and other demographic factors.

Under proposed section 424.11(d), as under current practice, the foreseeable future for a particular status determination extends only so far as predictions about the future are reliable. ''Reliable'' does not mean ''certain''; it means sufficient to provide a reasonable degree of confidence in the prediction. ''Reliable predictions'' is also used here in a non-technical, ordinary sense and not necessarily in a statistical sense.

As outlined in section 4(b)(1)(A) of the Act, status determinations must be based on the best scientific and commercial data available. By extension, in the context of determining whether a species meets the definition of a threatened species, the foreseeable future must also be based on the best scientific and commercial data available. The Services assess the data concerning each threat and the degree to which reliable predictions can be made. In many instances, the amount or quality of data available is likely to vary with respect to the relevant issues evaluated in a particular status determination; consequently, the Services may find varying degrees of foreseeability with respect to the multiple threats and their effects on a particular species. Although the Secretary's analysis as to the future status of a species may be based on reliable predictions with respect to multiple trends and threats over different periods of time or even threats without specific time periods associated with them, the final conclusion is a synthesis of that information. Thus, the foreseeable future is not necessarily reducible to a particular number of years. Nevertheless, if the information or data are susceptible to such precision, it may be helpful to identify the time scale used.

Depending on the nature and quality of the available data, predictions regarding the future status of a particular species may be based on analyses that range in form from quantitative population-viability models and modelling of threats to qualitative analyses describing how threats will affect the status of the species. In some circumstances, such analyses may include reliance on the exercise of professional judgment by experts where appropriate. In cases where the available data allow for quantitative modelling or projections, the time horizon presented in these analyses does not necessarily dictate what constitutes the ''foreseeable future'' or set the specific threshold for determining when a species may be in danger of extinction. Rather, the foreseeable future can extend only as far as the Services can reasonably depend

on the available data to formulate a reliable prediction and avoid speculation and preconception. Regardless of the type of data available underlying the Service's analysis, the key to any analysis is a clear articulation of the facts, the rationale, and conclusions regarding foreseeability. Ultimately, to determine that a species is likely to become an endangered species in the foreseeable future, the Services must be able to determine that the conditions potentially posing a danger of extinction in the future are probable. The Services will avoid speculating as to what is hypothetically possible.

Factors Considered in Delisting Species

In section 424.11, we propose to redesignate current paragraph (d) as paragraph (e) and revise it to clarify that we determine whether a species is a threatened species or an endangered species using the same standards regardless of whether a species is or is not listed at the time of that determination. After identifying a ''species'' as defined under the Act and conducting a review of the species' status considering the factors under section 4(a)(1) of the Act, the Services determine if the species meets the definition of a threatened species or an endangered species. If the species does not meet either definition, the species should not be listed (if it is not already), or should be delisted (if it is currently listed). The standard for a decision to delist a species is the same as the standard for a decision not to list it in the first instance. This is consistent with the statute, under which the five-factor analysis in section 4(a)(1) and the definitions of ''endangered species'' and ''threatened species'' in sections 3(6) and 3(20) establish the parameters for both listing and delisting determinations without distinguishing between them.

Additionally, we propose to modify the current regulatory text to clarify the situations in which it would not be appropriate for species to remain on the lists of endangered and threatened species. The current regulatory language was intended to provide examples of when a species should be removed from the lists; however, the language in the current regulations has been, in some instances, misinterpreted as establishing criteria for delisting. This proposed change is consistent with the Services' longstanding practice and the decision in *Friends of Blackwater* v. *Salazar,* 691 F.3d 428 (D.C. Cir. 2012). That decision confirms that, when reviewing whether a listed species should be delisted, the Services must apply the factors in section 4(a) of the Act. 691 F.3d at 433 (upholding FWS's decision to delist the West Virginia northern flying squirrel because the agency was not required to demonstrate that all of the recovery plan criteria had been met before it could delist the species and it was reasonable to construe the recovery plan as predictive of the delisting analysis rather than controlling it). In that case, the court held that ''Section 4(a)(1) of the Act provides the Secretary 'shall' consider the five statutory factors when determining whether a species is endangered, and section 4(c) makes clear that a decision to delist 'shall be made in accordance' with the same five factors.'' *Id.* at 432.

To more clearly align section 424.11 with section 4(a) of the Act we are proposing to streamline it. As is currently the case, any determination to remove a species from the lists because it is has become extinct is subject to the Act's requirement that any determination as to the species' status must be based on the best scientific and commercial data available. Thus, we are proposing to retain text at the beginning of the new section 424.11(e) that states; ''The Secretary will delist a species if the Secretary finds that, after conducting a status review based on the best scientific and commercial data available:''

Secondly, to align more closely with the Act, we are proposing to replace the current section 424.11(d)(1) with a new section 424.11(e)(1) that simply states the first reason for delisting a species as, ''The species is extinct.'' Our conclusion that a species is extinct will be based on the best scientific and commercial data available, as required under section 4(b)(1)(A), which may include survey data and information regarding the period of time since the last detection (*e.g.,* documented occurrence or sighting) of the species. It is unnecessary, and potentially confusing in the context of particular determinations, to specifically address these matters in the regulatory text. Our evaluations will be conducted on a case-by-case basis, considering the species-specific biological evidence for species extinction.

Third, we are replacing current section 424.11(d)(2), which referred to ''recovery,'' with language in new section 424.11(e)(2) that aligns with the statutory definitions of an endangered species or a threatened species. Although we are proposing to remove the word ''recovery'' from the current section 424.11(d)(2), we intend the proposed language to continue to refer, among other things, to species that have been recovered, because species that have been recovered no longer meet the definition of either an endangered species or a threatened species.

Fourth, we are proposing to add a new provision, section 424.11(e)(3), clarifying that listed entities will be delisted if they do not meet the definition of ''species'' as set forth in the Act. This could occur if new information, or new analysis of existing information, leads the Secretary to determine that a currently listed entity is neither a taxonomic species or subspecies, nor a ''distinct population segment.'' For example, where, after the time of listing, the Services conclude that a species or subspecies should no longer be recognized as a valid taxonomic entity, the listed entity would be removed from the list because it no longer meets the definition of a ''species.'' In other instances, new data could indicate that a particular listed distinct population segment does not meet the criteria of the Services' Policy Regarding the Recognition of Distinct Vertebrate Population Segments Under the Endangered Species Act (''DPS Policy''; 61 FR 4722, February 7, 1996). In either circumstance, the entity would not meet the definition of a ''species'' and would not qualify for listing under the Act.

Fifth, we are proposing to remove current section 424.11(d)(3), which specifies that delisting could be due to error in the original data that the Services relied upon when adding species to the lists. This language is unnecessary because any circumstance in which a species was listed in error would be covered by new section 424.11(e)(2) or (e)(3).

Lastly, we are proposing technical changes to the existing regulations that remain in place to accommodate the proposed revisions discussed above. We are proposing to modify current section 424.11(b) to include a reference to the proposed section 424.11(d) regarding the foreseeable future and the proposed section 424.11(e) regarding delisting. We are proposing to modify current section 424.11(c) by adding minor clarifying language to specify that this paragraph refers to the statutory definitions of an endangered species and a threatened species.

Section 424.12—Criteria for Designating Critical Habitat

Not Prudent Determinations

We propose to revise section 424.12(a)(1) to set forth a non-exhaustive list of circumstances in which the Services may find it is not prudent to designate critical habitat as contemplated in section 4(a)(3)(A) of the

Act. Under the clarifications that we propose in this revision, the Services would have the authority but would not be required to find that designation would not be prudent in the enumerated circumstances. This is a change from the current framework, which sets forth two situations in which critical habitat is not prudent. We anticipate that not-prudent determinations would continue to be rare. While this provision is intended to reduce the burden of regulation in rare circumstances in which designation of critical habitat does not contribute to the conservation of the species, the Services recognize the value of critical habitat as a conservation tool and expect to designate it in most cases.

We propose to retain the circumstance described in the longstanding language of current section 424.12(a)(1)(i), which is that the species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species.

We propose to remove the language in section 424.12(a)(1)(ii) indicating that it would not be prudent to designate critical habitat when ''designation of critical habitat would not be beneficial to the species.'' In a number of cases, courts have remanded not-prudent findings to the Service(s) because the courts construed ''would not be beneficial'' in ways the Services had not intended. For example, a number of courts have held that it was unreasonable for FWS to make a not-prudent determination simply because most or all of the areas that would be designated would not be subject to consultations under ESA section 7. *E.g., Natural Resources Defense Council* v. *U.S. Dept. of Interior,* 113 F.3d 1121 (9th Cir. 1997); *Conservation Council for Hawaii* v. *Babbitt,* 2 F. Supp. 2d 1280 (D. Haw. 1998). In *Conservation Council,* the court concluded that FWS had not determined that designation would ''not be beneficial to the species'' because designating critical habitat could bring other benefits to the species beyond consultation, such as informational benefits. 2 F. Supp. 2d at 1288. In *NRDC,* the court held that determining critical habitat to be not prudent because the majority of the areas that would be designated as critical habitat would not be subject to consultation was based on an improper interpretation of the regulatory phrase ''not beneficial to the species'' to mean ''not beneficial to most of the species.'' 113 F.3d 1125–16. The existing regulatory language is not in the statute, and the Services consider the language unnecessary and difficult to understand and apply.

Basing determinations on whether particular circumstances are present, rather than on whether a designation would be beneficial, provides an interpretation of the statute that is clearer, more transparent, and more straightforward. In some situations, the Services may conclude, after a review of the best available scientific data, that a designation would nevertheless be prudent even in the enumerated circumstances. Conversely, the Services may find in some circumstances that are not enumerated in the proposed language that a designation of critical habitat would otherwise be not prudent.

We propose a number of circumstances in which designation of critical habitat would generally be not prudent, including some circumstances that were already captured in the current regulations at section 424.12(a)(1)(ii) and some additional circumstances that we have identified based on our experience in designating critical habitat. We propose to retain and move into new section 424.12(a)(1)(iv) the circumstance described in current section 424.12(a)(1)(ii), which is that no areas meet the definition of critical habitat. It is not possible for us to designate critical habitat when no areas meet the definition of critical habitat in the Act; therefore, in these cases, designation is not prudent. We also propose to retain and expand the concept of current section 424.12(a)(1)(ii) regarding the lack of habitat-based threats to the species.

In our 2016 revision of section 424.12(a)(1)(ii) (81 FR 7414, February 11, 2016), we clarified that, in determining whether designation may not be prudent, the Services could consider whether the present or threatened destruction, modification, or curtailment of a species' habitat or range (*i.e.,* considerations under section 4(a)(1)(A) of the Act (Factor A)) is not a threat to the species. In the 2016 revision, we provided an example of a designation that would not be prudent due to the lack of habitat-based threats: A species is threatened primarily by disease, but the habitat upon which it relies remains intact without threat and would support conservation of the species if not for the threat of disease. Since then, we have encountered situations in which threats to the species' habitat stem solely from causes that cannot be addressed by management actions that may be identified through consultation under section 7(a)(2) of the Act. In those situations, a designation could create a regulatory burden without providing any conservation value to the species concerned. Examples would include species experiencing threats stemming from melting glaciers, sea level rise, or reduced snowpack but no other habitat-based threats. In such cases, a critical habitat designation and any resulting section 7(a)(2) consultation, or conservation effort identified through such consultation, could not prevent glaciers from melting, sea levels from rising, or increase the snowpack. Thus, we propose in section 424.12(a)(1)(ii) that designation of critical habitat in these cases may not be prudent because it would not serve its intended function to conserve the species.

We also propose to add as an additional circumstance under section 424.12(a)(1)(iii) situations where critical habitat areas under the jurisdiction of the United States provide negligible conservation value for a species that primarily occurs in areas outside of U.S. jurisdiction. In our 2016 revision of these regulations, we noted in the preamble that this could be a basis for determining that critical habitat designation would be not prudent; however, we find it is clearer to add this consideration directly to the regulatory text. We would apply this determination only to species that primarily occur outside U.S. jurisdiction, and where no areas under U.S. jurisdiction contain features essential to the conservation of the species. The circumstances when a critical habitat designation would provide negligible conservation value for a species will be determined on a case-by-case basis and may consider such factors as threats to the species or habitat and the species needs.

Designating Unoccupied Areas

On February 11, 2016, the Services published a final rule revising the regulations at section 424.12, which establish criteria for designating critical habitat (81 FR 7439). One of the revisions we made was to eliminate the following paragraph (e): ''The Secretary shall designate as critical habitat outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'' The Services explained in the preamble to the final rule that we had concluded that the ''rigid step-wise approach'' prescribed in that prior regulatory language may not be the best conservation strategy for the species and in some circumstances may result in a designation that is geographically larger, but less efficient as a conservation tool (81 FR 7415). Nonetheless, we are aware of continued perceptions that, by eliminating this provision, the Services

intended to designate as critical habitat expansive areas of unoccupied habitat. To address this concern, the Services propose to revise section 424.12(b)(2) by restoring the requirement that the Secretary will first evaluate areas occupied by the species. We also propose to clarify when the Secretary may determine unoccupied areas are essential for the conservation of the species.

In the Act, the term ''geographical area occupied by the species'' is further modified by the clause ''at the time it is listed.'' However, if critical habitat is not designated concurrently with listing, or is revised years after the species was listed, it can be difficult to discern what was occupied at the time of listing. The known distribution of a species can change after listing for many reasons, such as discovery of additional localities, extirpation of populations, or emigration of individuals to new areas. In many cases, information concerning a species' distribution, particularly on private lands, is limited because surveys are not routinely carried out on private lands. Although surveys may be performed as part of an environmental analysis for a particular development proposal, such surveys typically focus on listed rather than non-listed species. Thus, our knowledge of a species' distribution at the time of listing in these areas is often limited and the information in our listing rule may not detail all areas occupied by the species at that time.

Thus, while some of these changes in a species' known distribution reflect changes in the actual distribution of the species, some reflect only changes in the quality of our information concerning distribution. In these circumstances, the determination of which geographic areas were occupied at the time of listing may include data developed since the species was listed. This interpretation was supported by the court's decision, *Otay Mesa Property L.P.* v. *DOI,* 714 F. Supp. 2d 73 (D.D.C. 2010), *rev'd on other grounds,* 646 F.3d 914 (D.C. Cir. 2011) (San Diego fairy shrimp). In that decision, the judge noted that the clause ''occupied at the time of listing'' allows FWS to make a post-listing determination of occupancy based on the currently known distribution of the species in some circumstances. Although the D.C. Circuit disagreed with the district court that the record contained sufficient data to support the FWS' determination of occupancy in that case, the D.C. Circuit did not express disagreement with (or otherwise address) the district court's underlying conclusion that the Act allows FWS to make a post-listing determination of occupancy if based on adequate data. The Services acknowledge that to make a post-listing determination of occupancy we must distinguish between actual changes to species occupancy and changes in available information.

The Act defines unoccupied critical habitat in terms of a determination that such areas are essential for the conservation of the species. The proposed section 424.12(b)(2) specifies how the Services would determine whether unoccupied areas are essential. The proposed language states the Services would only consider unoccupied areas to be essential in two situations: When a critical habitat designation limited to geographical areas occupied would (1) be inadequate to ensure the conservation of the species, or (2) result in less-efficient conservation for the species. The proposed changes will provide additional predictability to the process of determining when designating unoccupied habitat may be appropriate. For example, the Services could consider unoccupied habitat to be essential when a designation limited to occupied habitat would result in a geographically larger but less effective designation.

There are situations where a designation focused on occupied critical habitat would result in less efficient conservation for the species than a designation that includes a mix of occupied and unoccupied critical habitat. In these cases, the designation of some unoccupied areas would result in the same or greater conservation for the species but would do so more efficiently. Efficient conservation for the species refers to situations where the conservation is effective, societal conflicts are minimized, and resources expended are commensurate with the benefit to the species. The flexibility to include unoccupied areas in a designation where limiting the designation to occupied areas would have resulted in less-efficient conservation of the species will allow the Services to focus agency resources thoughtfully in both designating critical habitat and conducting future consultations on the critical habitat.

In addition, we propose to further clarify when the Secretary may determine that an unoccupied area may be essential for the conservation of the species. In order for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable likelihood that the area will contribute to the conservation of the species. In making a determination as to whether such a reasonable likelihood exists, the Services will continue to take into account the best available science regarding species-specific and area-specific factors. This could include such factors as: (a) Whether the area is currently or is likely to become usable habitat for the species; (b) the likelihood that interagency consultation under Section 7 will be triggered, *i.e.,* whether any federal agency actions are likely to be proposed with respect to the area; and, (c) how valuable the potential contributions of the area are to the biological needs of the species.

When the Services evaluate if an area is now, or is likely to become, usable habitat for the species we would take into account, among other things, the current state of the area and extent to which extensive restoration would be needed for the area to become usable. For example, the Services might conclude that an area is unlikely to contribute to the conservation of the species where it would require extensive affirmative restoration that does not seem likely to occur such as when a non-federal landowner or necessary partners are unwilling to undertake or allow such restoration. Although the expressed intentions of such landowners or partners will not necessarily be determinative, the Services would consider those intentions in light of the mandatory duties and conservation purposes of the Act.

When the Services evaluate the likelihood that interagency consultation under section 7 will be triggered, we would consider whether there are any federal agency actions likely to be proposed within the area (*i.e.,* federal nexus). Because the only regulatory effect of a designation of critical habitat is the requirement that federal agencies avoid authorizing, funding, or undertaking actions that may destroy or adversely modify such habitat, the likelihood that an area will contribute to conservation is, in most cases, greater for public lands and lands for which such federal actions can be reasonably anticipated than for other types of land.

However, the Services would continue to consider the conservation purposes of the Act in determining how valuable the potential contributions of the area are to the biological needs of the species. In practice, this means that, in the rare instance where the potential contribution of the unoccupied area to the conservation of the listed species is extremely valuable, a lower threshold than ''likely'' may be appropriate. For example, where an area represents the only potential habitat of its type (*i.e.,* is uniquely able to support certain life functions of the species), the Services

may reasonably classify that area as essential even in the face of a low likelihood that the area would contribute to species conservation. Conversely, a greater showing of likelihood may be required for an area that provides less significant conservation value.

Public Comments

You may submit your comments and materials concerning the proposed rule by one of the methods listed in **ADDRESSES**. Comments must be submitted to *http://www.regulations.gov* before 11:59 p.m. (Eastern Time) on the date specified in **DATES**. We will not consider hand-delivered comments that we do not receive, or mailed comments that are not postmarked, by the date specified in **DATES**.

We will post your entire comment—including your personal identifying information—on *http://www.regulations.gov*. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov*.

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

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

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

Executive Order 13771

This proposed rule is expected to be an Executive Order 13771 deregulatory action.

Regulatory Flexibility Act

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

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

NMFS and FWS are the only entities that are directly affected by this rule because we are the only entities that list species and designate critical habitat under the Endangered Species Act. No external entities, including any small businesses, small organizations, or small governments, will experience any economic impacts from this rule.

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

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

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

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

Takings (E.O. 12630)

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

Federalism (E.O. 13132)

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

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

Civil Justice Reform (E.O. 12988)

This proposed rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. This proposed rule would clarify factors for listing, delisting, or reclassifying species and designation of critical habitat under the Endangered Species Act.

Government-to-Government Relationship With Tribes

In accordance with Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments,'' the Department of the Interior's manual at 512 DM 2, and the Department of Commerce (DOC) Tribal Consultation and Coordination Policy (May 21, 2013), DOC Departmental Administrative Order (DAO) 218–8 (April 2012), and NOAA Administrative Order (NAO) 218–8 (April 2012), we are considering possible effects of this proposed rule on federally recognized Indian Tribes. We will continue to collaborate/coordinate with tribes on issues related to federally listed species and their habitats. See Joint Secretarial Order 3206 (''American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act,'' June 5, 1997).

Paperwork Reduction Act

This proposed rule does not contain any new collections of information that require approval by the OMB under the Paperwork Reduction Act. This proposed rule will not impose recordkeeping or reporting requirements on State, local, or Tribal governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We are analyzing this proposed regulation in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10–46.450), the Department of the Interior Manual (516 DM 8), the NOAA Administrative Order 216–6A, and the NOAA Companion Manual (CM), ''Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities'' (effective January 13, 2017).

We anticipate that the categorical exclusion found at 43 CFR 46.210(i) likely applies to the proposed regulation changes. At 43 CFR 46.210(i), the Department of the Interior has found that the following category of actions would not individually or cumulatively have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: ''Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature.''

NOAA's NEPA procedures include a similar categorical exclusion for ''preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature.'' (Categorical Exclusion G7, at CM Appendix E).

We invite the public to comment on the extent to which this proposed regulation may have a significant impact on the human environment, or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. We will complete our analysis, in compliance with NEPA, before finalizing this regulation.

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

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

Clarity of the Rule

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

(1) Be logically organized;

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

(3) Use clear language rather than jargon;

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

(5) Use lists and tables wherever possible.

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

Authority

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

List of Subjects in 50 CFR Part 424

Administrative practice and procedure, Endangered and threatened species.

Proposed Regulation Promulgation

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

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

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

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

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

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

* * * * *

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

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

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

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

(3) Disease or predation;

(4) The inadequacy of existing regulatory mechanisms; or

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

(d) In determining whether a species is a threatened species, the Services

must analyze whether the species is likely to become an endangered species within the foreseeable future. The term foreseeable future extends only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future are probable. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time, but may instead explain the extent to which they can reasonably determine that both the future threats and the species' responses to those threats are probable.

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

(1) The species is extinct;

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

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

(f) The fact that a species of fish, wildlife, or plant is protected by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (see part 23 of this title 50) or a similar international agreement on such species, or has been identified as requiring protection from unrestricted commerce by any foreign nation, or to be in danger of extinction or likely to become so within the foreseeable future by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish, wildlife, or plants, may constitute evidence that the species is endangered or threatened. The weight given such evidence will vary depending on the international agreement in question, the criteria pursuant to which the species is eligible for protection under such authorities, and the degree of protection afforded the species. The Secretary shall give consideration to any species protected under such an international agreement, or by any State or foreign nation, to determine whether the species is endangered or threatened.

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

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

§ 424.12 Criteria for designating critical habitat.

(a) * * *

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

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

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

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

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

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

* * * * *

(b) * * *

(2) The Secretary will designate as critical habitat, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species only upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, the Secretary will first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species or would result in less efficient conservation for the species. Efficient conservation for the species refers to situations where the conservation is effective, societal conflicts are minimized, and resources expended are commensurate with the benefit to the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable likelihood that the area will contribute to the conservation of the species.

* * * * *

Dated: July 18, 2018

Ryan K. Zinke,

Secretary, Department of the Interior.

Dated: July 16, 2018.

Wilbur Ross,

Secretary, Department of Commerce.

[FR Doc. 2018–15810 Filed 7–24–18; 8:45 am]

BILLING CODE 4333–15–P; 3510–22–P

§ 73.671 Educational and informational programming for children.

* * * * *

(c) * * *

(3) For commercial broadcast stations only, the program is identified as specifically designed to educate and inform children by the display on the television screen throughout the program of the symbol E/I;

* * * * *

■ 3. Amend § 73.671 by removing paragraph (d), redesignating paragraph (e) as paragraph (d), and revising redesignated paragraph (d) to read as follows:

§ 73.671 Educational and informational programming for children.

* * * * *

(d) The Commission will apply the following processing guideline to digital stations in assessing whether a television broadcast licensee has complied with the Children's Television Act of 1990 (''CTA'') on its digital channel(s). A digital television licensee that has aired at least three hours per week of Core Programming (as defined in paragraph (c) of this section and as averaged over a six month period) on its main program stream will be deemed to have satisfied its obligation to air such programming and shall have the CTA portion of its license renewal application approved by the Commission staff. The licensee may air all of the Core Programing on its main program stream or on another free program stream, or may distribute it across multiple free program streams, at its discretion. Licensees that do not meet this processing guidelines will have full opportunity to demonstrate compliance with the CTA and be eligible for such staff approval by relying in part on sponsorship of Core educational/informational programs on other stations in the market that increases the amount of Core educational and informational programming on the station airing the sponsored program and/or on special nonbroadcast efforts which enhance the value of children's educational and informational television programming.

■ 4. Amend 73.3526 by revising paragraph (e)(11)(iii) to read as follows:

§ 73.3526 Local public inspection file of commercial stations.

(e) * * *

(11) * * *

(iii) *Children's television programming reports.* For commercial TV broadcast stations on an annual basis, a completed Children's Television Programming Report (''Report''), on FCC Form 398, reflecting efforts made by the licensee during the preceding year to serve the educational and informational needs of children. The Report is to be placed in the public inspection file by the tenth day of the succeeding calendar year. By this date, a copy of the Report is also to be filed electronically with the FCC. The Report shall identify the licensee's educational and informational programming efforts, including programs aired by the station that are specifically designed to serve the educational and informational needs of children, and it shall explain how programs identified as Core Programming meet the definition set forth in § 73.671(c). The Report shall include the name of the individual at the station responsible for collecting comments on the station's compliance with the Children's Television Act, and it shall be separated from other materials in the public inspection file. The Report shall also identify the program guide publishers to which information regarding the licensee's educational and informational programming was provided as required in § 73.673, as well as the station's license renewal date. These Reports shall be retained in the public inspection file until final action has been taken on the station's next license renewal application.

* * * * *

[FR Doc. 2018–15819 Filed 7–24–18; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

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

RIN 1018–BC97

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

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose to revise our regulations extending most of the prohibitions for activities involving endangered species to threatened species. For species already listed as a threatened species, the proposed regulations would not alter the applicable prohibitions. The proposed regulations would require the Service, pursuant to section 4(d) of the Endangered Species Act, to determine what, if any, protective regulations are appropriate for species that the Service in the future determines to be threatened.

DATES: We will accept comments received or postmarked on or before September 24, 2018. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** below) must be received by 11:59 p.m. Eastern Time on the closing date.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–HQ–ES–2018–0007, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–HQ–ES–2018–0007; U.S. Fish and Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

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

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

SUPPLEMENTARY INFORMATION:

Background

The Endangered Species Act of 1973, as amended (''ESA'' or ''Act''; 16 U.S.C. 1531 *et seq.*), states that the purposes of the Act are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions. Moreover, the Act states that it is the policy of Congress that the Federal Government will seek to conserve threatened and endangered species and use its authorities to further the purposes of the Act. This proposed rulemaking action pertains primarily to

sections 4 and 9 of the Act: Section 9 sets forth prohibitions for activities pertaining to species listed under the Act, and section 4(d) pertains to protective regulations for threatened species.

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

In carrying out Executive Order 13777, ''Enforcing the Regulatory Reform Agenda,'' the Department of the Interior (DOI) published a document with the title ''Regulatory Reform'' in the **Federal Register** of June 22, 2017 (82 FR 28429). The document requested public comment on how DOI can improve implementation of regulatory reform initiatives and policies and identify regulations for repeal, replacement, or modification. This proposed rule and the two related proposed rules in today's **Federal Register** address some of the comments that DOI has received in response to the regulatory reform docket.

Proposed Changes to Part 17

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

We propose to amend §§ 17.31 and 17.71, along with conforming amendments to other sections of title 50. Among other changes, the proposal would add language in both sections to paragraph (a) to specify that its provisions apply only to species listed as threatened species on or before the effective date of this rule. Species listed or reclassified as a threatened species after the effective date of this rule, if finalized, would have protective regulations only if the Service promulgates a species-specific rule (also referred to as a special rule). In those cases, we intend to finalize the species-specific rule concurrent with the final listing or reclassification determination. Notwithstanding our intention, we have discretion to revise or promulgate species-specific rules at any time after the final listing or reclassification determination. However, we specifically request comments on our stated intention of finalizing species-specific rules concurrent with final listing rules, including whether we should include any binding requirement in the regulatory text to do so, such as setting a timeframe for finalizing species-specific rules after a final listing or reclassification determination.

This change would make our regulatory approach for threatened species parallel with the approach that the National Marine Fisheries Service (NMFS) has taken since Congress added section 4(d) to the Act, as discussed below. The protective regulations that currently apply to threatened species would not change, unless the Service adopts a species-specific rule in the future. As of the date of this proposal, there are species-specific protective regulations for threatened wildlife in subpart D of part 17, but the Service has not adopted any species-specific protective regulations for plants. The proposed regulations would not affect the consultation obligations of Federal agencies pursuant to section 7 of the Act. The proposed regulations would not change permitting pursuant to 50 CFR 17.32.

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

Another reasonable approach is the one that the Department of Commerce, through NMFS, has taken in regard to the species under its purview. NMFS did not adopt regulations that extended most of the prohibitions for endangered species to threatened species as we did. Rather, for each species that they list as threatened, NMFS promulgates the appropriate regulations to put in place prohibitions, protections, or restrictions tailored specifically to that species. In more than 40 years of implementing the Act, NMFS has successfully implemented the provisions of the Act using this approach.

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

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

Upon reviewing the approach NMFS has taken and in light of the benefits we have noted in developing species-specific rules, we now conclude these proposed changes will align our practices with those of NMFS regarding threatened species under Department of Commerce purview, but also that they will better tailor protections to the needs of the threatened species while still providing meaning to the statutory distinction between ''endangered species'' and ''threatened species.''

The proposed regulations would remove the references to subpart A in § 17.31 and § 17.71. In § 17.31, we propose to specify which sections apply to wildlife, to be more transparent as to which provisions contain exceptions to the prohibitions. In § 17.71, we propose

to remove all reference to subpart A, because none of those exceptions apply to plants.

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

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

Request for Information

Any final rule based on this proposal will consider information and recommendations timely submitted from all interested parties. We solicit comments, information, and recommendations from governmental agencies, Native American tribes, the scientific community, industry groups, environmental interest groups, and any other interested parties on this proposed rule. All comments and materials received by the date listed in **DATES**, above, will be considered prior to the approval of a final rule.

You may submit your information concerning this proposed rule by one of the methods listed in **ADDRESSES**. If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Information and supporting documentation that we receive in response to this proposed rule will be available for you to review at *http://www.regulations.gov* in Docket No. FWS–HQ–ES–2018–0007.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

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

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

Executive Order 13771

This proposed rule is expected to be an Executive Order 13771 deregulatory action.

Regulatory Flexibility Act

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

This rulemaking revises the regulations for 4(d) rules for species determined to meet the definition of a ''threatened species'' under the Act. The changes in this proposed rule are instructive regulations and do not affect small entities.

The Service is the only entity that is directly affected by this proposed regulation change at 50 CFR part 17 because we are the only entity that is affected by changes to this section of the Code of Federal Regulations. No external entities, including any small businesses, small organizations, or small governments, will experience any economic impacts from this rule. Consequently, this proposed rulemaking action is not a major rule under SBREFA.

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

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

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

(b) This proposed rule would not produce a Federal mandate on State,

local, or tribal governments or the private sector of $100 million or greater in any year; that is, this proposed rule is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. This proposed rule would impose no obligations on State, local, or tribal governments.

Takings (E.O. 12630)

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

Federalism (E.O. 13132)

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

Civil Justice Reform (E.O. 12988)

This proposed rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988. This proposed rule would clarify the prohibitions to threatened species under the Endangered Species Act.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis.

Paperwork Reduction Act

This rule does not contain information collection requirements, and a submission to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) is not required. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We are analyzing this proposed regulation in accordance with the criteria of the National Environmental Policy Act (NEPA), the Department of the Interior regulations on Implementation of the National Environmental Policy Act (43 CFR 46.10–46.450), and the Department of the Interior Manual (516 DM 8).

We anticipate that the categorical exclusion found at 43 CFR 46.210(i) likely applies to these proposed regulation changes. At 43 CFR 46.210(i), the Department of the Interior has found that the following category of actions would not individually or cumulatively have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: ''Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature.''

We invite the public to comment on the extent to which this proposed regulation may have a significant impact on the human environment, or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. We will complete our analysis, in compliance with NEPA, before finalizing this proposed rule.

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

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This proposed rule, if made final, is not expected to affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

Clarity of the Rule

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

(1) Be logically organized;

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

(3) Use clear language rather than jargon;

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

(5) Use lists and tables wherever possible.

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

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

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

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

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

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

■ . 2. Revise § 17.31 to read as follows:

§ 17.31 Prohibitions.

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

(b) In addition to any other provisions of this part 17, any employee or agent of the Service, of the National Marine Fisheries Service, or of a State conservation agency that is operating a conservation program pursuant to the

terms of a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by that agency for such purposes, may, when acting in the course of official duties, take those threatened species of wildlife that are covered by an approved cooperative agreement to carry out conservation programs.

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

■ 3. Revise § 17.71 to read as follows:

§ 17.71 Prohibitions.

(a) Except as provided in a permit issued under this subpart, all of the provisions of § 17.61 shall apply to threatened species of plants that were added to the List of Endangered and Threatened Plants in § 17.12(h) on or prior to [**EFFECTIVE DATE OF THE FINAL RULE**], with the following exception: Seeds of cultivated specimens of species treated as threatened shall be exempt from all the provisions of § 17.61, provided that a statement that the seeds are of ''cultivated origin'' accompanies the seeds or their container during the course of any activity otherwise subject to these regulations.

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

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

Dated: July 18, 2018.

Ryan K. Zinke,

Secretary, Department of the Interior.

[FR Doc. 2018–15811 Filed 7–24–18; 8:45 am]

BILLING CODE 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 402

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

RIN 1018–BC87; 0648–BH41

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

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

ACTION: Proposed rule.

SUMMARY: We, FWS and NMFS (collectively referred to as the ''Services'' or ''we''), propose to amend portions of our regulations that implement section 7 of the Endangered Species Act of 1973, as amended. The Services are proposing these changes to improve and clarify the interagency consultation processes and make them more efficient and consistent.

DATES: We will accept comments from all interested parties until September 24, 2018. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on this date.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–HQ–ES–2018–0009, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–HQ–ES–2018–0009; U.S. Fish and Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803 or National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910.

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

FOR FURTHER INFORMATION CONTACT: Craig Aubrey, U.S. Fish and Wildlife Service, Division of Environmental Review, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703/358–2442; or Cathy Tortorici, ESA Interagency Cooperation Division, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301/427–8495. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

The purposes of the Endangered Species Act of 1973, as amended (''ESA'' or ''Act''; 16 U.S.C. 1531 *et seq.*) are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions. Moreover, the Act states that it is the policy of Congress that the Federal Government will seek to conserve threatened and endangered species, and use its authorities in furtherance of the purposes of the Act.

The Secretaries of the Interior and Commerce share responsibilities for implementing most of the provisions of the Act. Generally, marine species are under the jurisdiction of the Secretary of Commerce, and all other species are under the jurisdiction of the Secretary of the Interior. Authority to administer the Act has been delegated by the Secretary of the Interior to the Director of the U.S. Fish and Wildlife Service (FWS) and by the Secretary of Commerce to the Assistant Administrator for the National Marine Fisheries Service (NMFS). References in this document to ''the Services'' mean FWS and NMFS.

There have been no comprehensive amendments to the Act since 1988, and no comprehensive revisions to the implementing regulations since 1986. In the years since those changes took place, much has happened: The Services have gained considerable experience in implementing the Act, as have other Federal agencies, States, and property owners; there have been numerous court decisions regarding almost every provision of the Act and its implementing regulations; the Government Accountability Office has completed reviews of the Act's implementation; there have been many

terms of a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by that agency for such purposes, may, when acting in the course of official duties, take those threatened species of wildlife that are covered by an approved cooperative agreement to carry out conservation programs.

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

■ 3. Revise § 17.71 to read as follows:

§ 17.71 Prohibitions.

(a) Except as provided in a permit issued under this subpart, all of the provisions of § 17.61 shall apply to threatened species of plants that were added to the List of Endangered and Threatened Plants in § 17.12(h) on or prior to [**EFFECTIVE DATE OF THE FINAL RULE**], with the following exception: Seeds of cultivated specimens of species treated as threatened shall be exempt from all the provisions of § 17.61, provided that a statement that the seeds are of ''cultivated origin'' accompanies the seeds or their container during the course of any activity otherwise subject to these regulations.

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

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

Dated: July 18, 2018.

Ryan K. Zinke,

Secretary, Department of the Interior.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 402

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

RIN 1018–BC87; 0648–BH41

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

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

ACTION: Proposed rule.

SUMMARY: We, FWS and NMFS (collectively referred to as the ''Services'' or ''we''), propose to amend portions of our regulations that implement section 7 of the Endangered Species Act of 1973, as amended. The Services are proposing these changes to improve and clarify the interagency consultation processes and make them more efficient and consistent.

DATES: We will accept comments from all interested parties until September 24, 2018. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on this date.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–HQ–ES–2018–0009, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–HQ–ES–2018–0009; U.S. Fish and Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803 or National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910.

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

FOR FURTHER INFORMATION CONTACT: Craig Aubrey, U.S. Fish and Wildlife Service, Division of Environmental Review, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703/358–2442; or Cathy Tortorici, ESA Interagency Cooperation Division, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301/427–8495. If you use a telecommunications device for the deaf (TDD), call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

The purposes of the Endangered Species Act of 1973, as amended (''ESA'' or ''Act''; 16 U.S.C. 1531 *et seq.*) are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions. Moreover, the Act states that it is the policy of Congress that the Federal Government will seek to conserve threatened and endangered species, and use its authorities in furtherance of the purposes of the Act.

The Secretaries of the Interior and Commerce share responsibilities for implementing most of the provisions of the Act. Generally, marine species are under the jurisdiction of the Secretary of Commerce, and all other species are under the jurisdiction of the Secretary of the Interior. Authority to administer the Act has been delegated by the Secretary of the Interior to the Director of the U.S. Fish and Wildlife Service (FWS) and by the Secretary of Commerce to the Assistant Administrator for the National Marine Fisheries Service (NMFS). References in this document to ''the Services'' mean FWS and NMFS.

There have been no comprehensive amendments to the Act since 1988, and no comprehensive revisions to the implementing regulations since 1986. In the years since those changes took place, much has happened: The Services have gained considerable experience in implementing the Act, as have other Federal agencies, States, and property owners; there have been numerous court decisions regarding almost every provision of the Act and its implementing regulations; the Government Accountability Office has completed reviews of the Act's implementation; there have been many

scientific reviews, including review by the National Research Council; multiple administrations have adopted various policy initiatives; and non-governmental entities have issued reports and recommendations.

Title 50, part 402, of the Code of Federal Regulations establishes the procedural regulations governing interagency cooperation under section 7 of the Act, which requires Federal agencies, in consultation with and with the assistance of the Secretaries of the Interior and Commerce (the ''Secretaries''), to insure that any action authorized, funded, or carried out by such agencies is not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. These proposed regulatory amendments are intended to address the Services' collective experience of more than 40 years implementing the Act and several court decisions.

In carrying out Executive Order 13777, ''Enforcing the Regulatory Reform Agenda,'' the Department of the Interior (DOI) published a document with the title ''Regulatory Reform'' in the **Federal Register** of June 22, 2017 (82 FR 28429). The document requested public comment on how DOI can improve implementation of regulatory reform initiatives and policies and identify regulations for repeal, replacement, or modification. This proposed rule addresses some of the comments that DOI has received in response to the regulatory reform docket.

As part of implementing E.O. 13777, NOAA published a notice entitled, ''Streamlining Regulatory Processes and Reducing Regulatory Burden'' (82 FR 31576, July 7, 2017). The notice requested public comments on how NOAA could continue to improve the efficiency and effectiveness of current regulations and regulatory processes. This proposed rule addresses some of the comments NOAA received from the public.

This proposed rule is one of three related proposed rules that are publishing in today's **Federal Register**. All of these documents propose revisions to various regulations that implement the Act. Beyond the specific revisions to the regulations highlighted in this proposed rule, the Services are comprehensively reconsidering the processes and interpretations of statutory language set out in part 402. Thus, this rulemaking should be considered as applying to all of part 402, and as part of the rulemaking initiated today, the Services will consider whether additional modifications to the interagency cooperation regulations would improve, clarify, or streamline the administration of the Act. We seek public comments recommending, opposing, or providing feedback on specific changes to any provisions in part 402 of the regulations, including but not limited to revising or adopting as regulations existing practices or policies, or interpreting terms or phrases from the Act. Based on comments received and on our experience in administering the Act, the final rule may include revisions to any provisions in part 402 that are a logical outgrowth of this proposed rule, consistent with the Administrative Procedure Act.

In proposing the specific changes to the regulations in this rule, and setting out the accompanying clarifying discussion in this preamble, the Services are proposing prospective standards only. Nothing in these proposed revisions to the regulations is intended to require that any previous consultations under section 7(a)(2) of the Act be reevaluated on the basis of the final rule at such time that the final rule becomes effective.

The Services anticipate that the proposed changes, if finalized, will improve and clarify interagency consultation, and make it more efficient and consistent, without compromising conservation of listed species. Many of the changes should help reduce the costs of consultation. For example, clarifying the definition of ''effects of the action'' should decrease consultation timeframes (and costs) by eliminating confusion regarding application of terms in the existing definition, which has resulted in time being spent determining how to categorize an effect, rather than simply determining what the effects are regardless of category. As another example, codifying alternative consultation methods and the ability to adopt portions of Federal agencies' documents should reduce overall consultation times and costs. Increased use of programmatic consultations will reduce the number of single, project-by-project consultations, streamline the consultation process, and increase predictability and consistency for action agencies. Eliminating the need to reinitiate consultation in certain situations will avoid impractical and disruptive burdens (and costs), without compromising conservation of listed species. We seek comment on (1) the extent to which the changes outlined in this proposed rule will affect timeframes and resources needed to conduct consultation and (2) anticipated cost savings resulting from the changes.

While not reflected in any proposed changes to our regulations at this time, we also seek comment on the merit, authority, and means for the Services to conduct a single consultation, resulting in a single biological opinion, for Federal agency actions affecting species that are under the jurisdiction of both FWS and NMFS.

Proposed Changes to 50 CFR Part 402

Section 402.02 Definitions

This section sets out definitions of terms that are used throughout these proposed regulations. Some of these terms are further discussed as they pertain to the consultation procedures in appropriate, subsequent sections. Below we discuss those definitions that would be revised or added by these proposed regulations.

Definition of Destruction or Adverse Modification

We propose to revise the definition of ''destruction or adverse modification'' by adding the phrase ''as a whole'' to the first sentence and removing the second sentence of the current definition. The Act requires Federal agencies, in consultation with and with the assistance of the Secretaries, to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. In 1986, the Services established a definition for ''destruction or adverse modification'' (§ 402.02) that was found to be invalid by the U.S. Court of Appeals for the Fifth (2001) and Ninth (2004) Circuits. In 2016, we revised the definition, in part in response to these court rulings. We now propose to further clarify the definition, removing language that is redundant and has caused confusion about the meaning of the regulation.

Background of the Definition of ''Destruction or Adverse Modification''

In 1978, the Services promulgated regulations governing interagency cooperation under section 7 of the Act. (50 CFR part 402) (43 FR 870; Jan. 4, 1978). These regulations provided a definition for ''destruction or adverse modification'' of critical habitat, which was later updated in 1986 to conform with amendments made to the Act. The 1986 regulations defined ''destruction or adverse modification'' as: ''a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a

listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.'' (50 CFR 402.02) (51 FR 19926; June 3, 1986). The preamble to the 1986 regulation contained relatively little discussion on the concept of ''destruction or adverse modification of critical habitat.''

In 2001, the Fifth Circuit Court of Appeals reviewed the 1986 regulatory definition of destruction or adverse modification and found it exceeded the Service's discretion. *Sierra Club* v. *U.S. Fish and Wildlife Service,* 245 F.3d 434 (5th Cir. 2001). Specifically, the court found the regulatory definition to be invalid on its face and inconsistent with the Act. The court reasoned that the regulatory definition set too high a threshold for triggering adverse modification by its requirement that the value of critical habitat for both survival and recovery be appreciably diminished before adverse modification would be the appropriate conclusion. The court determined that the regulatory definition actually established a standard that would only trigger an adverse modification determination if the ''survival'' of the species was appreciably diminished, while ignoring the role critical habitat plays in the recovery of species. Citing legislative history and the Act itself, the court was persuaded that Congress intended the Act to ''enable listed species not merely to survive, but to recover from their endangered or threatened status.'' *Sierra Club,* 245 F.3d at 438. Noting the Act defines critical habitat as areas that are ''essential to the conservation'' of listed species, the court determined that ''conservation'' is a ''much broader concept than mere survival.'' *Sierra Club,* 245 F.3d at 441. The court concluded that the Act's definition of conservation ''speaks to the recovery'' of listed species.

In 2004, the Ninth Circuit Court of Appeals also reviewed the 1986 regulatory definition of destruction or adverse modification. *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F.3d 1059 (9th Cir. 2004). That court agreed with the Fifth Circuit's determination that the regulation was facially invalid. The Ninth Circuit, following similar reasoning set out in *Sierra Club,* determined that Congress viewed conservation and survival as ''distinct, though complementary, goals and the requirement to preserve critical habitat is designed to promote both conservation and survival.'' Specifically, the court found that ''the purpose of establishing 'critical habitat' is for the government to [designate habitat] that is not only necessary for the species' survival but also essential for the species' recovery.'' *Gifford Pinchot Task Force,* 378 F.3d at 1070.

After the Ninth Circuit's decision, the Services each issued guidance to discontinue the use of the 1986 adverse modification regulation (FWS Acting Director Marshall Jones Memorandum to Regional Directors, ''Application of the 'Destruction or Adverse Modification' Standard under Section 7(a)(2) of the Endangered Species Act 2004'' (FWS 2004); NMFS Assistant Administrator William T. Hogarth Memorandum to Regional Administrators, ''Application of the 'Destruction or Adverse Modification' Standard under Section 7(a)(2) of the Endangered Species Act, 2005'' (NMFS 2005)). Specifically, in evaluating a proposed action's effects on critical habitat as part of interagency consultation, the Services began applying the definition of ''conservation'' as set out in the Act, which defines conservation (and conserve and conserving) to mean ''to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this [Act] are no longer necessary.'' (16 U.S.C. 1532(3)) (*i.e.,* the species is recovered). See 50 CFR 424.02. Accordingly, after examining the status of critical habitat, the environmental baseline, and the effects of the proposed action, the Services began analyzing whether the implementation of the proposed action, together with any cumulative effects, would result in the critical habitat remaining ''functional (or retain the current ability for the primary constituent elements to be functionally established) to serve the intended conservation role for the species.'' *See* FWS 2004; NMFS 2005.

In 2016, we promulgated regulations to revise the regulatory definition of ''destruction or adverse modification.'' We adopted the following definition: ''Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.'' (81 FR 7214, February 11, 2016).

We explained in the 2016 rule that we did not intend for it to alter the section 7(a)(2) consultation process from existing practice and noted that previously completed biological opinions did not need to be reevaluated in light of that rule. The 2016 definition, particularly the first sentence, sought to clarify and preserve the existing distinction between the definitions of ''destruction or adverse modification'' and ''jeopardize the continued existence of'' by focusing the analysis for ''destruction or adverse modification'' on how the effects of a proposed action affect the value of critical habitat as a whole for the conservation of threatened or endangered species. The focus of the ''jeopardize the continued existence of'' definition, on the other hand, is whether a proposed action appreciably reduces the likelihood of survival and recovery by reducing a species' reproduction, numbers, and distribution.

The 2016 final rule's definition reflected several changes from what the Services proposed in 2014. The changes to the first sentence were relatively minor. In the 2014 proposed rule, the first sentence read: '''Destruction or adverse modification' means a direct or indirect alteration that appreciably diminishes the conservation value of critical habitat for listed species.'' (79 FR 27060, 27066; May 12, 2014). In the final rule, we made a minor clarification of the first sentence, by changing ''conservation value of critical habitat for listed species'' to ''the value of critical habitat for the conservation of a listed species.'' (81 FR at 7226, February 11, 2016).

Many commenters of the 2014 proposed rule expressed confusion or concern regarding the scale at which the determination of destruction or adverse modification of critical habitat is made. Some of these commenters thought that the language, ''critical habitat, as a whole,'' should be included in the definition and not just the preamble. While the Services declined to include the phrase ''as a whole'' in the 2016 final definition, we explained in the preamble that we make our determination on the value of the critical habitat and its role in the conservation of the species, and that the existing consultation process already ensures that the determination is made at the appropriate scale. We also explained that, while an action may result in adverse effects to critical habitat within the action area, those effects may not necessarily rise to the level of destruction or adverse modification to the designated critical habitat. In adding the phrase ''as a whole'' to the proposed revised definition, we intend to clearly indicate that the final destruction or adverse

modification determination is made at the scale of the entire critical habitat designation. Smaller scales can be very important analysis tools in determining how the impacts may translate to the entire designated critical habitat, but the final determination is not made at the action area, critical habitat unit, or other less extensive scale.

The analysis thus places an emphasis on the value of the designated critical habitat as a whole for the conservation of a species, in light of the role the action area serves with regard to the function of the overall designation. Just as the determination of jeopardy under section 7(a)(2) of the Act is made at the scale of the entire listed entity, a determination of destruction or adverse modification is made at the scale of the entire critical habitat designation. Even if a particular project would cause adverse effects to a portion of critical habitat, the Services must place those impacts in context of the designation to determine if the overall value of the critical habitat is likely to be reduced. This could occur where, for example, a smaller affected area of habitat is particularly important in its ability to support the conservation of a species (*e.g.,* a primary breeding site). Thus, the size or proportion of the affected area is not determinative; impacts to a smaller area may in some cases result in a determination of destruction or adverse modification, while impacts to a large geographic area will not always result in such a finding. Therefore, we are proposing to revise the first sentence of the definition by adding the phrase ''as a whole'' to clarify the appropriate scale of the destruction or adverse modification determination.

The second sentence proved more controversial. As proposed, the second sentence of the definition read: ''Such alterations may include, but are not limited to, effects that preclude or significantly delay the development of the physical or biological features that support the life-history needs of the species for recovery.'' (79 FR at 27066, May 12, 2014). Many commenters argued that the proposed second sentence established a significant change in practice by appearing to focus the definition on the preclusion or delay of the development of physical or biological features, to the exclusion of the alteration of existing features. A number of commenters believed these concepts were vague, undefined, and allowed for arbitrary determinations. One commenter asserted that focusing on effects that preclude or significantly delay development of features was an expansion of authority that conflicted with E.O. 13604 (*Improving Performance of Federal Permitting and Review of Infrastructure Projects*).

In an attempt to clarify our intent, in finalizing the rule, we revised the proposed second sentence to add reference to alterations affecting the physical or biological features essential to the conservation of a species, as well as those that preclude or significantly delay development of such features: ''Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.'' (81 FR at 7226, February 11, 2016).

The intended purpose of the language about precluding or delaying ''development of such features'' was to acknowledge ''that some important physical or biological features may not be present or are present in a sub-optimal quantity or quality. This could occur where, for example, the habitat has been degraded by human activity or is part of an ecosystem adapted to a particular natural disturbance (*e.g.,* fire or flooding), which does not constantly occur but is likely to recur.'' (79 FR at 27061, May 12, 2014). Our intent was for such determinations not to be based upon speculation.

However, the second sentence of the definition in the 2016 final rule has continued to cause controversy among the public and many stakeholders.

In this proposed rule, we seek to streamline and simplify the definition of ''destruction or adverse modification'' by removing the second sentence because the second sentence is unnecessary and has caused confusion. The second sentence of the definition attempted to elaborate upon meanings that are included within the first sentence, without attempting to exhaust them (hence, the use of the phrase ''may include, but are not limited to''). In all cases, the analysis of destruction or adverse modification must address whether the proposed action will result in an ''alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.''

Application of the Revised Definition

As with the 2016 rule, we do not intend our proposed change to alter existing section 7(a)(2) consultation practice. The bar for whether a proposed action is likely to result in destruction or adverse modification of critical habitat is neither raised nor lowered by this proposed rule, nor is the scope of analysis altered with respect to evaluating the effects of a proposed action on critical habitat. This proposed definition retains the key, operative first sentence of the 2016 regulation while adding the clarifying additional phrase of ''as a whole'' (as discussed above). Further guidance on how to apply the language in that sentence can be found in the 2016 rule.

It is not necessary, nor possible, for a concise regulatory definition to list every way in which alterations may affect the value of critical habitat for the conservation of a species. The value of critical habitat for the conservation of a listed species is described primarily through the critical habitat designation itself. That designation, in accordance with the Act, will identify, in occupied habitat, ''the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection.'' (16 U.S.C. 1532(5)(a)(i)). Accordingly, the Act already makes clear that, in occupied habitat, the value of critical habitat for the conservation of the species is directly associated with designated physical or biological features. Thus, destruction or adverse modification determinations may be based on alterations that affect such features, without needing to specify that fact in the regulatory definition. The Act and regulations also already state that unoccupied areas may be designated to the extent the Service determines they are ''essential for the conservation of the species.'' (16 U.S.C. 1532(5)(a)(ii)). Determining whether alterations in unoccupied critical habitat may constitute destruction or adverse modification will therefore need to consider the reasons for which the Service determined that such unoccupied habitat is ''essential to the conservation of the species.''

The Services have not changed their underlying view that it may be necessary and consistent with the Act in some circumstances for the destruction and adverse modification analysis to consider how alterations to critical habitat could affect the ability of the habitat to develop or support features essential to the conservation of the species. For example, in some circumstances, recovery of the species may depend upon retaining the ability of a designated area to maintain or re-create the essential features, for instance through ecological succession, fluvial processes, active management, or other dynamic processes. This is a longstanding interpretation and agency practice, as reflected in the 2016 rule and in the 2004 and 2005 FWS and NMFS guidance documents regarding

application of the destruction or adverse modification standard. This longstanding interpretation has never been meant to assert authority beyond that provided by the Act, nor to allow the Services to designate critical habitat or make adverse modification findings based merely on speculation or desire about future changes to the critical habitat. As required by the Act, such determinations must rely on the best scientific and commercial data available. (16 U.S.C. 1536(a)(2)).

In the proposed definition, ''appreciably diminish'' remains a key concept. This phrase has been part of the regulatory definition of ''destruction or adverse modification'' since 1978, and neither it nor its interpretation would be altered by this proposed rule. As we noted in the 2016 rule, with respect to ''diminish,'' the inquiry begins with whether the relevant effects will reduce, lessen, or weaken the value of the critical habitat for the conservation of the species. If so, then the inquiry is whether that reduction or diminishment will be ''appreciable'' to the value of the critical habitat for the conservation of the species.

As we also noted in 2016, the determination of ''appreciably diminish'' is made based upon the proposed action's effect on the value of the entire critical habitat to the conservation of the species. That is, the question is whether the ''effects of the action'' will appreciably diminish the value of the critical habitat as a whole to the conservation of the species, not just in the area where the proposed action takes place. In this respect, ''appreciably diminish'' is analogous to ''appreciably reduce'' in the context of determining whether an action will ''jeopardize the continued existence'' of a species, since that inquiry is similarly not merely addressing the effects within the action area, but rather is concerned with whether the effects ''appreciably reduce'' the likelihood of survival and recovery of the listed entity, the species.

The 2016 rule discussed the reasons we concluded, and here continue to conclude, that the phrase ''appreciably diminish'' does not need to be modified. As we noted in 2016, the Services' joint Consultation Handbook (FWS and NMFS, March 1998) uses the word ''considerably'' to interpret this phrase. In the 2016 rule, we clarified that the phrase ''appreciably diminish,'' like the Consultation Handbook's term ''considerably,'' means '' 'worthy of consideration' and is another way of stating that we can recognize or grasp the quality, significance, magnitude, or worth of the reduction in the value of critical habitat.'' (81 FR 7218, February 11, 2016).

We also explained in 2016 that it is not correct to conclude that every diminishment, however small, should constitute destruction or adverse modification. It was necessary to qualify the word ''diminish'' to exclude those adverse effects on critical habitat that are so minor in nature that they do not appreciably impact the value of designated critical habitat to the conservation of a listed species.

We also note that the word ''appreciably'' is used in both the Services' definition of ''jeopardize the continued existence of'' (''appreciably reduce'') and ''destruction or adverse modification'' (''appreciably diminish''). The meaning of the word ''appreciably'' is similar in either context. In both contexts, it is appropriate for the Services to consider the biological significance of effects when conducting a section 7(a)(2) consultation. As required by the ESA, we conduct formal consultation, and evaluate in detail the potential for destruction or adverse modification of critical habitat (and/or whether a proposed action is likely to jeopardize the continued existence of a species) whenever there are likely to be adverse effects to critical habitat or a listed species. In each of these analyses, we must evaluate, based on the totality of the circumstances and the best available scientific information, the nature and magnitude of the proposed action's effects, to determine whether such effects of the proposed action are consequential enough to rise to the level of ''appreciably diminish'' or ''appreciably reduce.'' See, *e.g., Oceana, Inc.* v. *Pritzker,* 75 F. Supp. 3d 469, 483 (D.D.C. 2014) (discussing and affirming a jeopardy analysis that considered whether a given reduction was ''meaningful from a biological perspective''). Reductions in the reproduction, numbers, or distribution of a species that are inconsequential at the species level, or alterations to the features or the extent of designated critical habitat that constitute only an inconsequential impact on the conservation value of designated critical habitat as a whole, would not be considered to rise to the level of ''reduce appreciably'' or ''appreciably diminish'' within the meaning of the regulations. Nor do we interpret section 7(a)(2) and the regulations thereunder to require that each proposed action improve or increase the likelihood of survival and recovery of the species, or improve the conservation value of critical habitat. Section 7(a)(2) focuses on the ''continued existence'' of the species and the ''adverse'' modification of critical habitat.

It should also be noted that the analysis must always consider whether such impacts are ''appreciable,'' even where a species already faces severe threats prior to the action. It is sometimes mistakenly asserted that a species may already be in a status of being ''in jeopardy,'' ''in peril,'' or ''jeopardized'' by baseline conditions, such that any additional adverse impacts must be found to meet the regulatory standards for ''jeopardize the continued existence of'' or ''destruction or adverse modification.'' See, *e.g., Nat'l Wildlife Fed'n* v. *Nat'l Marine Fisheries Serv.,* 524 F.3d 917, 930 (9th Cir. 2008) (asserting that ''where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm''); *Turtle Island Restoration Network* v. *United States Dep't of Commerce,* 878 F.3d 725, 735 (9th Cir. 2017) (''Where a species is already in peril, an agency may not take an action that will cause an 'active change of status' for the worse.'') (quoting *Nat'l Wildlife Fed'n,* 524 F.3d at 930). That approach is inconsistent with the statute and our regulations.

The terms ''jeopardize the continued existence of'' and ''destruction or adverse modification'' are, in the plain language of section 7(a)(2), determinations that are made about the effects of Federal agency actions. They are not determinations made about the environmental baseline or about the pre-action condition of the species. Under the ESA, a listed species will have the status of ''threatened'' or ''endangered,'' and all threatened and endangered species by definition face threats to their continued existence. See 16 U.S.C. §§ 1532(6), (20), 1533(a). But the ESA and our regulations do not use the terms ''in jeopardy,'' ''in peril,'' or ''jeopardized'' to describe the environmental baseline or the pre-action condition of a species; nor do the terms ''appreciably reduce'' or ''appreciably diminish'' have a different meaning where a species already faces very serious threats. In each biological opinion, the determination regarding destruction or adverse modification is made by evaluating the effects of the proposed action on the species in light of the overall status of the species, the baseline conditions within the action area and any cumulative effects occurring within the action area. While we acknowledge that for a species with a particularly dire status, a smaller impact could cause an alteration that appreciably diminishes the conservation value of critical habitat or appreciably

reduces the likelihood of survival and recovery of the species, there is no ''baseline jeopardy'' status even for the most imperiled species.

A related question that has arisen is whether the Services are required to identify a ''tipping point'' beyond which the species cannot recover in making section 7(a)(2) determinations. For example, the Ninth Circuit Court of Appeals has said that ''when a proposed action will have significant negative effects on the species' population or habitat, the duty to consider the recovery of the species necessarily includes the calculation of the species' approximate tipping point.'' *Oceana, Inc.* v. *Nat'l Marine Fisheries Serv.,* 705 F. App'x 577, 580 (9th Cir. 2017) (citing *Nat'l Wildlife Fed'n* v. *Nat'l Marine Fisheries Serv.,* 524 F.3d 917 (9th Cir. 2008)); *see also Wild Fish Conservancy* v. *Salazar,* 628 F.3d 513, 527 (9th Cir. 2010) (overturning jeopardy analysis based on purported NMFS failure to determine ''when the tipping point precluding recovery . . . is likely to be reached''). Neither the Act nor our regulations state any requirement for the Services to identify a ''tipping point'' as a necessary prerequisite for making section 7(a)(2) determinations. Section 7(a)(2) provides the Services with discretion as to how it will determine whether the statutory prohibition is exceeded. We have not interpreted that statutory language as requiring the identification of a tipping point. This interpretation is further supported by the fact that the state of science often does not allow the Services to identify a ''tipping point'' for many species. The Services have had success in the recovery of several listed species which, despite very low abundance, did not reach a ''tipping point.''

Definition of Director

We propose to amend the current definition of ''Director'' to clarify and simplify it, in accordance with the Act and agency practice of FWS and NMFS.

Definition of Effects of the Action

We propose to revise the definition of ''effects of the action'' in a manner that simplifies the definition. Confusion regarding application of terms has resulted in time being spent determining how to categorize an effect, rather than simply determining what the effects are regardless of category. By providing a simpler definition that applies to the entire range of potential effects, Federal agencies and the Services will be able to focus on better assessing the effects of the proposed action. In addition, we propose to make the definition of environmental baseline a stand-alone definition within § 402.02. Previously, this definition was articulated within the definition of effects of the proposed action. Finally, we have moved the instruction that the effects of the proposed action shall be added to the environmental baseline into the regulations guiding the Services' responsibilities in formal consultation in § 402.14(g).

A few aspects of the revised definition of effects of the action bear further discussion to understand our intent in the proposed revision. We collapsed the various concepts of direct and indirect effects, and the effects of interrelated and interdependent actions, into the new definition that the effects of the action include all effects caused by the proposed action. The revised definition notes that these effects include ''the effects of other activities that are caused by the proposed action.'' It includes a distinction between the word ''action'' which refers to the action proposed to be authorized, funded, or carried out, in whole or in part, by the Federal agency and brought in for consultation with the Services, and ''activity'' or ''activities,'' which refer to those activities that are caused by the proposed action but are not included in the proposed action. Under the current definition, these activities would have been considered under either ''indirect effects'' or ''interrelated'' or ''interdependent'' activities. An effect or activity is caused by the proposed action when two tests are satisfied: First, the effect or activity would not occur but for the proposed action, and second, the effect or activity is reasonably certain to occur.

Under the first of these two tests, if an effect or activity would occur regardless of whether the proposed action goes forward, then that effect or activity would not satisfy the ''but for'' test and would not be considered an effect of the action. The concepts of interrelated and interdependent actions in the existing regulations are now captured by the concept of effects of activities that are caused by the proposed action, but are not part of that proposed action. It has long been our practice that identification of direct and indirect effects as well as interrelated and interdependent activities is governed by the ''but for'' standard of causation. Our Consultation Handbook states . . .''In determining whether the proposed action is reasonably likely to be the direct or indirect cause of incidental take, the Services use the simple causation principle: *i.e.,* ''but for'' the implementation of the proposed action. . . .'' (Consultation Handbook, page 4–47). A number of courts have also adopted that position. *Sierra Club* v. *Bureau of Land Management,* 786 F.3d 1219, 1225 (9th Cir. 2015) (''The test for interrelatedness or interdependentness is 'but for' causation'') citing *Sierra Club* v. *Marsh,* 816 F.2d 1376, 1387 (9th Cir. 1987). This standard, while applicable to analyzing the effects of the action under section 7(a)(2), is not necessarily appropriate for other provisions of the ESA; we therefore do not address in this rulemaking the causation standards applying to other provisions of the Act, such as whether a violation of section 9(a)(1)(B) (the take prohibition) has resulted for purposes of a civil penalty or a criminal violation under the Act.

The second of the two tests speaks to the certainty of whether the effect or activity will occur. The concept of reasonable certainty already exists in our section 7 regulations and currently is explicitly applied in the context of indirect effects, cumulative effects, and incidental take. We propose to increase consistency and avoid confusion and speculation by explicitly applying the concept to all effects of the proposed action (not just indirect) and also to those other activities previously identified as interrelated and interdependent. This concept applies equally to evaluating the beneficial effects of a proposed action (*e.g.,* effects of any components proposed by the Federal agency to avoid, minimize, or offset the effects of the agency action, for example) and adverse effects of the proposed action. Our proposed revision applies the reasonably-certain-to-occur standard to the section 7 process in a consistent manner but does not change past practice on the evaluation of direct and indirect effects of actions. In practice, the Services have evaluated the direct effects of the action using the best available scientific and commercial information about the likelihood of an effect or activity and not on speculation about what effects might occur. As a result, we do not anticipate the revised language will change what types of effects or activities will be considered within our consultations; rather, we expect it to simplify and improve consistency in our effects analyses. For example, our prior discussion in our 2015 rulemaking adopting revisions to the incidental take statement portions of our section 7 regulations is instructive in this regard:

> As a practical matter, application of the ''reasonable certainty'' standard is done in the following sequential manner in light of the best available scientific and commercial data to determine if incidental take is anticipated: (1) A determination is made regarding whether a listed species is present within the area affected by the proposed

Federal action; (2) if so, then a determination is made regarding whether the listed species would be exposed to stressors caused by the proposed action (*e.g.,* noise, light, ground disturbance); and (3) if so, a determination is made regarding whether the listed species' biological response to that exposure corresponds to the statutory and regulatory definitions of take (*i.e.,* kill, wound, capture, harm, etc.). Applied in this way, the ''reasonable certainty'' standard does not require a guarantee that a take will result, rather, only that the Services establish a rational basis for a finding of take. While relying on the best available scientific and commercial data, the Services will necessarily apply their professional judgment in reaching these determinations and resolving uncertainties or information gaps. Application of the Services' judgment in this manner is consistent with the ''reasonable certainty'' standard. (80 FR 26832, 26837; May 15, 2015).

The preamble to the 1986 regulation implementing section 7 also discusses the Services' interpretation of the phrase ''reasonably certain to occur.'' (51 FR 19926, 19932–19933; June 3, 1986—''For State and private actions to be considered in the cumulative effects analysis, there must exist more than a mere possibility that the action may proceed. On the other hand, ''reasonably certain to occur'' does not mean that there is a guarantee that an action will occur.'')

It is important to note that both prongs of the causation standard must be met for the activity in question and the effects from that activity. So, for example, if an activity is not reasonably certain to occur, then the causation standard has not been met and neither the activity nor any effects from that activity are considered an effect of the proposed action.

In addition, for activities that are caused by the proposed action, we have established at § 402.17 a standard and set of factors to consider in determining whether activities are reasonably certain to occur. We believe that the combination of requiring that an effect be both ''but for'' and ''reasonably certain to occur'' will reasonably define the reach of the effects analysis and address concerns about extending the analysis into an unreasonably wide arena. Finally, the proposed provision includes a reminder that the effects of the action may occur throughout the action area and on an ongoing, or even delayed, timeframe after completion of the action that was the subject of consultation. Thus, under the proposed rule, there would no longer be a need for a separate definition of ''indirect effects,'' since the intent of the new definition is that the effects covered by that term are still included. And similarly, the new definition should not, in practice, change the determination or scope of the ''action area'' in a consultation.

As stated previously, the Services' intent is to simplify and clarify the definition of effects of the action, without altering the scope of what constitutes an effect. We seek comment on (1) the extent to which the proposed revised definition simplifies and clarifies the definition of ''effects of the action''; (2) whether the proposed definition alters the scope of effects considered by the Services; (3) the extent to which the scope of the proposed revised definition is appropriate for the purposes of the Act; and (4) how the proposed revised definition may be improved.

Definition of Environmental Baseline

We are proposing a stand-alone definition for ''environmental baseline'' as referenced in the discussion above in the proposed revised definition for ''effects of the action.'' The definition for environmental baseline retains its current wording. Moving it to a stand-alone definition clarifies that the environmental baseline is a separate consideration that sets the stage for analyzing the effects of the proposed action on the listed species and critical habitat within the action area by providing the foundation upon which to build the analysis of the effects of the action under consultation. The environmental baseline does not include the effects of the action under review in the consultation (See Consultation Handbook, at 4–22).

The Services are seeking public comment on potential revisions to the definition of ''environmental baseline'' as it relates to ongoing Federal actions. It has sometimes been challenging for the Services and Federal agencies to determine the appropriate baseline for those consultations involving ongoing agency actions. The complexities presented in these consultations include issues such as: What constitutes an ''ongoing'' action; if an ongoing action is changed, is the incremental change in the ongoing action the only focus of the consultation or is the entire action or some other subset reviewed; is the effects analysis different if the ongoing action has never been the subject of consultation as compared to if there is a current biological opinion for the ongoing action; if a change is made to an ongoing action that lessens, but does not eliminate, the harmful impact to listed species or critical habitat, is that by definition a ''beneficial action''; and can a ''beneficial action'' ever jeopardize listed species or destroy or adversely modify critical habitat. Further, the Services request comments as to whether the following language would address these issues: ''*Environmental baseline* **is the state of the world absent the action under review and** includes the past, present **and ongoing** impacts of all **past and ongoing** 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 in the action area which are contemporaneous with the consultation in process. **Ongoing means impacts or actions that would continue in the absence of the action under review.**''

As indicated above, we propose to move the instruction that the effects of the action shall be added to the environmental baseline from the definition of ''effects of the action'' into § 402.14(g) to retain this important step of the analytical process.

Definition of Programmatic Consultation

We propose to add a definition of ''programmatic consultation.'' This term is included in revised § 402.14(c)(4) to codify an optional consultation technique that is being used with increasing frequency and to promote the use of programmatic consultations as effective tools that can improve both process efficiency and conservation in consultations. Programmatic consultations can be completed under informal and formal consultation processes. They can be used to evaluate the effects of multiple actions anticipated within a particular geographic area; or to evaluate Federal agency programs that guide implementation of the agency's future actions by establishing standards, guidelines, or governing criteria to which future actions will adhere. By consulting on the program, plan, policy, regulation, series, or suites of activities as a whole, the Services can reduce the number of single, project-by-project consultations, streamline the consultation process, and increase predictability and consistency for action agencies. In addition, by looking across numerous individual actions at the programmatic level, the Federal action agencies and applicants can propose project design criteria, best management practices, standard operating procedures, and/or standards and guidelines that avoid, minimize, or offset the action's effects on listed species and/or designated critical habitat. Federal agencies and applicants often propose measures to avoid, minimize, and/or offset effects to listed

species and/or designated critical habitat as part of their proposed action when they consult with the Services. The Services consider these measures as part of the proposed action when they evaluate the effects of the proposed action.

Types of Programmatic Consultations

1. *Programmatic consultations that address multiple similar, frequently occurring, or routine actions expected to be implemented in particular geographic areas.* These are generally categories of actions for which there is a good understanding of the likely effects on resources listed under the Act, although the categories encompass future site-specific actions of which the precise details are not yet known. Many, but not all, of these types of programmatic consultations have been referred to as ''batched'' consultations in the past. They do not rely on, or specifically incorporate by reference, consultations on a higher level of Federal action or plan. Examples of these types of programmatic consultations would be consultations that involve a variety of routine activities such as a regional road maintenance program by State departments of transportation, or a U.S. Army Corps of Engineers general permitting program at the regional level that covers routine construction activities for in-and-over-water structures.

2. *Programmatic consultations that address a proposed program, plan, policy, or regulation providing a framework for future actions.* These programmatic consultations cover programs, plans, governing policies, and/or regulations such as a national or regional program, plan, policy, or regulation, where the Federal agency is generally not able to provide detailed specificity about the number, location, timing, frequency, precise methods and intensity of the activities expected to be implemented, or to determine the site-specific adverse effects the activities will have on listed species or critical habitat. In these cases, the Service conducts a more generalized review of effects and provides the appropriate section 7(a)(2) determination in a letter of concurrence or biological opinion for the programmatic consultation. In the future, when the site-specific information is known, and it is determined the project ''may affect'' a listed species or critical habitat, typically a subsequent consultation is completed. That subsequent consultation may, not exclusively, be referred to as a ''step-down'' or ''tiered consultation.'' The subsequent consultation commonly incorporates by reference portions of the previous consultation on the program, plan, policy, or regulations. A typical example of this type of programmatic action is a land management plan. A land management agency may have a program addressing issuance of a special use permit for various activities. The program, as a part of land management planning, has certain standards and guidelines to which each subsequent program action must adhere. A consultation on the program would examine generally what types of effects would be caused by the program and whether those effects were consistent with section 7(a)(2) of the Act. In the future, as issuance of specific permits are anticipated, the Federal agency will return to the Service later for consultation, and an additional consultation would take place on the site-specific facts of that permit issuance. However, the subsequent or ''step-down'' or ''tiered'' consultation would benefit from the initial program-level consultation, thus streamlining and reducing the amount of analysis needed for each site-specific consultation.

The Services recently promulgated changes to the section 7(a)(2) implementing regulations that define framework and mixed programmatic actions that address certain types of policies, plans, regulations, and programs (80 FR 26832, May 11, 2015). The types of programmatic consultations described above align with the suite of activities described in the 2015 rule.

The Services encourage Federal agencies to coordinate with us in order to determine what programmatic approach would be applicable and streamline the consultation process for their program or suite of actions.

Section 402.03—Applicability

In order to increase efficiency in implementing section 7(a)(2) consultations and capitalize upon the considerable experience the Services have gained in implementing the Act, the Services seek comment on the advisability of clarifying the circumstances upon which Federal agencies are not required to consult. More specifically, the Services seek comment regarding revising § 402.03 to preclude the need to consult when the Federal agency does not anticipate take and the proposed action will: (1) Not affect listed species or critical habitat; or (2) have effects that are manifested through global processes and (i) cannot be reliably predicted or measured at the scale of a listed species' current range, or (ii) would result at most in an extremely small and insignificant impact on a listed species or critical habitat, or (iii) are such that the potential risk of harm to a listed species or critical habitat is remote, or (3) result in effects to listed species or critical habitat that are either wholly beneficial or are not capable of being measured or detected in a manner that permits meaningful evaluation. The Services have learned through time that such actions are far removed from any potential for jeopardy or destruction or adverse modification of critical habitat, and that consultation on these actions does little to accomplish the intent of section 7(a)(2) of the Act—to ensure that any action authorized, funded, or carried out by a Federal agency is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

In prior consultations under section 7(a)(2), agencies with regulatory authority have consulted on actions that include effects to listed species or designated critical habitat that occur outside of the specific area over which they have regulatory jurisdiction. We also seek comment on whether the scope of a consultation under section 7(a)(2) should be limited to only the activities, areas, and effects within the jurisdictional control and responsibility of the regulatory agency.

Section 402.13—Deadline for Informal Consultation

Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency to assist the Federal agency in determining whether formal consultation or a conference is required. 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. Finally, the Services may issue a written concurrence with a Federal agency's determination that the action is not likely to adversely affect the listed species or critical habitat.

There is currently no deadline for the Services to complete an informal consultation, unlike formal consultations, which by regulation should be completed within 90 days unless extended under the terms at § 402.14(e). The Service's goal is to either complete the Letter of Concurrence for the project, or request additional information that is necessary to complete the consultation, within 30 days. NMFS completes approximately

1,200–1,500 individual informal consultations per year. Of the informal actions not under a programmatic Biological Opinion, 36 percent are within their 30-day goal, and 61 percent are within 3 months. NMFS currently has about 46 individual informal consultations that have been open for greater than 200 days as of July 31, 2017, that the agency is actively working to complete as soon as possible. Between fiscal years 2011 and 2017, FWS completed an average of 11,344 (ranging from 9,656 to 12,793) informal consultations per year. During those years, FWS completed between 78 percent and 85 percent of the informal consultations in less than 30 days, averaging between 26 and 39 days to complete informal consultation.

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

Section 402.14—Formal Consultation

Consistent with the Services' existing practice, we propose to revise § 402.14(c) to clarify what is necessary to initiate formal consultation. Decades of experience have demonstrated valuable time is lost due to lack of clarity in what information the Services need to initiate consultation. This often results in an ongoing exchange of documents (*e.g.,* biological assessments, biological evaluations, National Environmental Policy Act (NEPA) documents) in which the Federal agencies and Services seek to compile the necessary information, which results in significant inefficiencies and frustrations on the part of both the Federal agencies and the Services. The proposed revision is intended to eliminate the confusion and misunderstanding existing in the current regulations and significantly increase the efficiency of the process for both the Federal agencies and the Services. It is important to note the Services are not proposing to require more information than existing practice; instead, we are proposing to clarify in the regulations what is needed to initiate consultation in order to improve the consultation process.

The proposed revisions to § 402.14(c) would further describe the information from the Federal agency necessary to initiate consultation. This set of information is commonly called the ''initiation package,'' and that term is also used in our proposed regulations for alternative formal consultation procedures to refer to the information required in § 402.14(c). Consistent with § 402.06 (Coordination with other environmental reviews), we also propose at § 402.14(c) to allow the Services to consider other documents as initiation packages, such as: a document prepared for the sole purpose of providing the Service with information relevant to an agency's consultation, a document that has been prepared under NEPA or other authority that contains the necessary information to initiate consultation, or other such documents (*e.g.,* grant application, State of Washington Joint Aquatic Resources Permit Application, California Environmental Quality Act Environmental Impact Report, etc.) that meet the requirements for initiating consultation.

When such documents consider two or more alternative actions, the request for consultation must describe the specific alternative or action proposed for consultation and the specific locations in the document where the relevant information is found. The Services evaluate only the Federal agency's proposed alternative during the consultation process. If the Federal agency either adopts another alternative as its final agency action, or substantively modifies the proposed alternative, reinitiation of consultation may be required.

The proposed regulations describe categories of information that should be in an initiation package to initiate formal consultation. Information must be provided in a sufficient level of detail consistent with the nature and scope of the proposed action. Consistent with the Service's existing practice, the requirement to include sufficient detail ensures the Service has enough information to understand the action as proposed and conduct an informed analysis of the effects of the action, including with regard to those measures intended to avoid, minimize, or offset effects. See Consultation Handbook, at B–54 (Description of the proposed action should be ''detailed enough so that the reviewer can fully understand what the components of the action include and how the project will affect the species.'') Such information should include a description of the proposed action, including any measures intended to avoid, minimize, or offset the effects of the proposed action, a description of the area affected (the action area), information about species or critical habitat in the action area, a description of potential effects of the proposed action on individuals of any listed species or critical habitat, a description of the cumulative effects, a summary of information from the applicant, if any, and any other relevant information.

Service Responsibilities

We propose to revise portions of § 402.14(g) that describe the Services' responsibilities during formal consultation. We propose to clarify the analytical steps the Services undertake in formulating a biological opinion. These changes are intended to better reflect the Services' approach to analyzing jeopardy and adverse modification as well as address revisions to the definition of ''effects of the action.'' In summary, these analytical steps are: (1) Review all relevant information, (2) evaluate current status of the species and critical habitat and environmental baseline, (3) evaluate effects of the proposed action and cumulative effects, (4) add effects of the action and cumulative effects to the environmental baseline, and, in light of the status of the species and critical habitat, determine if the proposed action is likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. While we identify distinct steps in our analytical approach, each step is related to the others and necessarily informs and influences our analysis. For example, the condition of the environmental baseline is relevant to the nature and extent of the effects of the action. Effects of the action that in isolation would be of minor consequence may be amplified and of greater consequence when analyzed in light of the condition of the environmental baseline.

In § 402.14(g)(2), we propose to move from the current definition of ''effects of the action'' the instruction that the effects of the action shall be added to the environmental baseline to where this provision more logically fits with the rest of the analytical process, and we retain this important step of that process. In § 402.14(g)(4), we propose revisions to better reflect the manner in which the Services integrate and synthesize their analyses of effects of the action with cumulative effects, the environmental baseline, and status of the species and critical habitat to reach our jeopardy and adverse modification

determinations. Again, this proposed change reflects the Service's existing approach. *See* Consultation Handbook, at 4–33 (''The conclusion section presents the Services' opinion regarding whether the aggregate effects of the factors analyzed under ''environmental baseline,'' ''effects of the action,'' and ''cumulative effects'' in the action area—when viewed against the status of the species or critical habitat as listed or designated—are likely to jeopardize the continued existence of the species or result in destruction or adverse modification of critical habitat.'')

We propose clarifications to § 402.14(g)(8) regarding whether and how the Service should consider measures included in a proposed action that are intended to avoid, minimize, or offset adverse effects to listed species or critical habitat. Federal agencies often include these types of measures as part of the proposed action. However, the Service's reliance on a Federal agency's commitment that the measures will actually occur as proposed has been repeatedly questioned in court. The resulting judicial decisions have created confusion regarding what level of certainty is required to demonstrate that a measure will in fact be implemented before the Service can consider it in a biological opinion. In particular, the Ninth Circuit has held that even an expressed sincere commitment by a Federal agency or applicant to implement future improvements to benefit a species must be rejected absent ''specific and binding plans'' with ''a clear, definite commitment of resources for future improvements.'' *Nat'l Wildlife Fed'n* v. *Nat'l Marine Fisheries Serv.,* 524 F.3d 917, 935–36 (9th Cir. 2008).

This judicially created standard is not required by the Act or the existing regulations. The Act requires Federal agencies to consult with the Services, as appropriate, on ''any action authorized, funded or carried out by such agency.'' When a Federal agency proposes to take an action that it has the discretion and authority to implement, and where that proposed action or parts thereof ''may affect'' a listed species or its critical habitat, the section 7(a)(2) consultation process is triggered. Where these conditions are met, the Service's role is to assume that the action will be implemented as proposed and proceed to analyze the effects of that proposed action on listed species and critical habitat. Just as with the components of a proposed action with adverse effects, there is no additional or heightened standard or threshold requirement necessitating the Service to independently evaluate whether the proposed measures to avoid, minimize, or offset adverse effects will be implemented.

In some situations, a Federal agency may propose a suite or program of measures that will be implemented over time. The future components of the proposed action often have some uncertainty with regard to the specific details of projects that will be implemented. Nevertheless, a Federal agency or applicant may be fully capable of committing to specific levels and types of actions (*e.g.,* habitat restoration) and specific populations or species that will be the focus of the effort. If the Federal agency provides information in sufficient detail for the Services to meaningfully evaluate the effects of measures proposed to avoid, minimize, or offset adverse effects, the Services must consider the proposed measures during a consultation, as the Act requires the Services to issue their expert opinion on ''how the agency action affects the species or its critical habitat,'' 16 U.S.C. 1536(b)(3)(A), and thus, are entitled to rely on that information as proposed. Therefore, we are proposing revisions to § 402.14(c)(1) with respect to the information a Federal agency must submit to initiate formal consultation. Under this proposed rule and consistent with the Service's existing approach, a Federal agency must submit a description of the proposed action, including available information about any measures intended to avoid, minimize, or offset effects of the proposed action. As discussed above, the requirement for sufficient detail regarding all aspects of the proposed action ensures the Services have the information needed to conduct an informed analysis of the effects of all activities included in the proposed action. Provided the Federal agency submits the information required by § 402.14(c), the Services will take into consideration the effects of the action as proposed, both beneficial and adverse.

By describing what is included in the proposed action, the Federal agency has made a commitment and retains independent obligations to insure that its action is not likely to jeopardize listed species or destroy or adversely modify critical habitat. Should new information arise or our assumptions set forth in the consultation change during implementation—for instance, where the action or elements thereof are not implemented as proposed—the Federal agency must continue to ensure compliance with the Act and has several options to do so. This may include reinitiating consultation with the Service(s) to evaluate the changed circumstances. If an incidental take statement includes reasonable and prudent measures and terms and conditions intended to minimize the impact of incidental take, the Federal agency must carry out those measures or risk losing the exemption afforded by the incidental take statement. Ultimately, as consulting and action agencies, the Act's statutory and regulatory provisions provide distinct responsibilities such that there is no requirement for the Service to independently evaluate whether the Federal agency is likely to carry out its commitments. This is the Services' longstanding position, as reflected in other provisions of the regulations (for instance, those governing development of Reasonable and Prudent Alternatives), and is consistent with the Act. Therefore, we propose revisions to § 402.14(g)(8) to clarify there is no requirement for measures that avoid, minimize, or offset the adverse effects of an action that are included in the proposed action to be accompanied by ''specific and binding plans,'' ''a clear, definite commitment of resources'', or meet other such criteria.

Biological Opinions

We propose to add new paragraphs (h)(3) and (h)(4) to the current § 402.14(h) to allow the Services to adopt all or part of a Federal agency's initiation package in its biological opinion. Additionally, we propose to allow the Services to adopt all or part of their own analyses and findings that are required to issue a permit under section 10(a) of the Act in its biological opinion.

The Services have more than 30 years of experience in conducting consultation pursuant to section 7(a)(2) of the Act under the existing regulations. Based upon that experience, we have determined that the current regulations would be more efficient and clear if we were to codify or create additional optional procedures within formal consultation (Service adoption of all or part of a Federal agency's initiation package and expedited consultations) and streamline duplicative processes (consultation on permits issued under section 10 of the Act). We recognize that several factors, including the scope and complexity of the proposed action, the magnitude and extent of the effects that flow from the proposed action, and the expertise of various Federal agencies, all warrant more than the two general types of consultation provided for in the current regulations. In addition, the experience of recent decades has led to significant improvements in consultation efficiency and species conservation as a result of

the effective use of streamlined or programmatic approaches. We believe that these alternative consultation procedures will promote flexibility and efficiency for the action agencies, applicants, and the Services, and can be implemented in compliance with the Act while not compromising the conservation of listed species.

We propose that the Service may adopt all or part of a Federal agency's initiation package or the Services' analyses and findings that are required to issue a permit under section 10(a) of the Act in its biological opinion. This provision would allow the Services to utilize portions of these documents in the development of our biological opinion to improve efficiency in the consultation process and reduce duplicative efforts. Adoption or incorporation by reference is typically done during consultations, and this provision codifies that approach.

Further, the provision explicitly applies this approach to the Service's issuance of permits under section 10 of the Act. The review and analyses undertaken to develop a finding that various criteria have been met for issuing a permit pursuant to section 10(a)(1)(A) or 10(a)(1)(B) contain many of the elements reviewed and analyzed in a section 7 consultation. Therefore, we propose to adopt the analyses and review that supports issuance of these permits as part of the biological opinion required to meet the applicable provisions of the part 402 consultation regulations. As a result, the section 7 analysis and document can be streamlined to just those portions necessary to present a complete finding under section 7(a)(2) and 7(b)(3). We note also that the Service issuing the permit would have to ensure that its determination regarding jeopardy and destruction or adverse modification is not limited to the species for which the permit is authorizing take, but that it covers all listed species and all designated critical habitat under the Service's jurisdiction affected by the proposed action. In cases where issuance of a section 10 permit by one of the Services (*e.g.,* FWS) may affect listed species or critical habitat under the jurisdiction of the other Service (*e.g.,* NMFS), the permitting agency will still need to consult with the other Service, as well.

While it is the responsibility of the Federal agency to develop the initiation package, we propose a collaborative process to facilitate the Federal agency's development of an initiation package that could be used as all or part of the Service's biological opinion. First, the Federal agency and the Service must mutually agree that the adoption process is appropriate for the proposed action. Subsequently, the Services and the Federal agency may develop coordination procedures that would facilitate adoption. This agreement must be explained in the Federal agency's initiation package and acknowledged in the Services' biological opinion. The purpose of the collaboration is to bring the information and expertise of both the Federal agency and the Service (and any applicant) into the resulting initiation package to facilitate a more efficient and effective consultation process. The end result of the adoption consultation process is expected to be the adoption of the initiation package with any necessary supplementary analyses and incidental take statement to be added by the Service as the Secretary's biological opinion in fulfillment of section 7(b) of the Act.

Expedited Consultation

We propose to add a new provision titled ''Expedited consultations'' at § 402.14(l) to offer opportunities to streamline consultation, particularly for actions that have minimal adverse effects or predictable effects based on previous consultation experience. This consultation process is proposed to provide an efficient means to complete formal consultation on projects ranging from those that have a minimal impact, to those projects with a potentially broad range of effects that are known and predictable, but that are unlikely to cause jeopardy or destruction or adverse modification. The Services have developed a vast knowledge of projects, and in the course of doing so, have concluded that some types of projects can be consulted on in a more expeditious manner without compromising the conservation of listed species or critical habitat. For example, a habitat-restoration project that results in high conservation value for the species but may have a small amount of incidental take through construction or monitoring would likely lend itself to this type of consultation (for *Streamlined Consultation Guidance for Restoration and Recovery Projects,* see *https://www.fws.gov/endangered/esa-library/index.html#consultations* under ''Policies'' for guidance documents for consultations with the Fish and Wildlife Service).

Two elements are important to the successful implementation of this form of consultation. First is the mutual agreement between the Service and the Federal agency that this form of consultation is appropriate for the proposed action. Informal consultation has been an available optional process for 30 years and is most often utilized to address proposed actions that are not likely to adversely affect listed species or critical habitat. In contrast, expedited consultations are a new process and likely involve proposed actions that would otherwise go through the regular formal consultation process and require an incidental take statement. We make mutual agreement a required first step in the expedited consultation process to avoid wasted effort if Federal agencies propose actions for expedited consultation that would not be suitable for expedited analysis by the Service. The second important element is the development of a sufficient initiation package (as described in § 402.14(c) of the regulations) that provides all the information needed to allow the Service to prepare a streamlined consultation response within mutually agreed-upon expedited timeframes. We expect that a combination of one-on-one collaboration with Federal agency staff and the availability of guidance and templates will ensure the most efficient process for development of initiation packages and expedited biological opinions. For a NMFS example of a similar effort for informal consultations through the development of guidance, see *https://www.greateratlantic.fisheries.noaa.gov/protected/section7/guidance/consultation/index.html#writing.*

In § 402.14, we propose to redesignate current paragraph (l) as paragraph (m) to accommodate the addition of the proposed new paragraph (l).

Section 402.16—Reinitiation of Consultation

We propose two changes to this section. First, we propose to remove the term ''formal'' from the title and text of this section to acknowledge that the requirement to reinitiate consultation applies to all section 7(a)(2) consultations. By practice, action agencies have reinitiated informal consultations when a trigger for reinitiation has been met. Courts have also held that reinitiation is required in the context of informal consultation. See *Forest Guardians* v. *Johanns,* 450 F.3d 455, 458 (9th Cir. 2006). Second, we propose to amend this section to address issues arising under the Ninth Circuit's decision in *Cottonwood Environmental Law Center* v. *U.S. Forest Service,* 789 F.3d 1075 (9th Cir. 2015), *cert. denied,* 137 S. Ct. 293 (2016). In *Cottonwood,* the court held that the Forest Service was required to reinitiate consultation on certain forest management plans due to the designation of Canada lynx critical habitat. The court held that, even if an

approved land management plan is considered to be a completed action, the Forest Service nonetheless was obligated to reinitiate consultation since it retained ''discretionary Federal involvement or control'' over the plan. *Cottonwood,* 789 F.3d at 1084–85.

We propose to make non-substantive redesignations and then revise § 402.16 by adding a new paragraph (b) to clarify that the duty to reinitiate does not apply to an existing programmatic land management plan prepared pursuant to the Federal Land Policy Management Act (FLPMA), 43 U.S.C. 1701 *et seq.,* or the National Forest Management Act (NFMA), 16 U.S.C. 1600 *et seq.* when a new species is listed or new critical habitat is designated.

We reaffirm that only affirmative discretionary actions are subject to reinitiation under our regulations, and the mere existence of a programmatic land management plan is not affirmative discretionary action. *See generally Southern Utah Wilderness Alliance* v. *Norton,* 542 U.S. 55 (2004). *See also National Ass'n of Homebuilders* v. *Defenders of Wildlife,* 551 U.S. 644 (2007). While the Act does not expressly mandate reinitiation on discretionary affirmative actions, in 1986 we determined that the Act's legislative history and conservation goals supported reinitiation if certain triggers are met. After decades of experience cooperating with action agencies across the Federal Government, we have gained the expertise of when reinitiation of consultation is most effective to meeting the overall goals of the Act. Reinitiating on a purely programmatic land management plan when new species are listed or critical habitat designated does little to further these goals. Both the Bureau of Land Management (BLM) and U.S. Forest Service (USFS) are required to periodically update their land management plans, at which time they would consult on any newly listed species or designated critical habitat. BLM is required to periodically evaluate and revise Resource Management Plans (see 43 CFR 1610); the interval between reevaluations should not exceed 5 years (see BLM Handbook H–1601–1 at p. 34). USFS is required to revise their land management plans at least every 15 years (see 36 CFR 219.7). In addition to being required to periodically revise their land management plans, both BLM and USFS are required to consult on any specific on-the-ground actions that implement the land management plans if those actions may affect listed species or critical habitat. We are thus exercising our discretion and narrowing § 402.16 to exclude two types of plans that have no immediate on-the-ground effects. Requiring reinitiation on these completed plans based on newly listed species or critical habitat often results in impractical and disruptive burdens.

Moreover, reinitiating consultation on a programmatic land management plan results in little benefit to the newly listed species or critical habitat because the plan's mere existence does not result in any immediate effects upon either, thus rendering any reinitiation under these conditions inefficient and ineffective. In contrast, specific on-the-ground actions that implement the plan are subject to their own section 7 consultations if those actions may affect listed species or critical habitat. These on-the-ground, action-specific consultations allow us to direct our limited resources to those actions that actually cause effects and ensure that the USFS and the BLM fulfill their obligations under section 7. Thus, this new proposed regulation also restates our position that, while a completed programmatic land management plan does not require reinitiation upon the listing of new species or critical habitat, any on-the-ground subsequent actions taken pursuant to the plan must be subject to a separate section 7 consultation if those actions may affect the newly listed species or critical habitat.

Rather than reinitiation of a section 7(a)(2) consultation at the plan level, the Services recommend these agencies develop section 7(a)(1) conservation programs in consultation with the Services when a new species is listed or critical habitat designated. This proactive, conservation planning process will enable them to better synchronize their actions and programs with the conservation and recovery needs of listed and proposed species. Such planning can help Federal agencies develop specific, pre-approved design criteria to ensure their actions are consistent with the conservation and recovery needs of the species. Additionally, these section 7(a)(1) programs will facilitate efficient development of the next programmatic section 7(a)(2) consultations when the land management plan is renewed.

In addition to seeking comment on the proposed revision to 50 CFR 402.16, we are seeking comments on whether to exempt other types of programmatic land or water management plans in addition to those prepared pursuant to FLPMA and NFMA from the requirement to reinitiate consultation when a new species is listed or critical habitat designated. We are also seeking comment on this proposed revision in light of the recently enacted Wildfire Suppression Funding and Forest Management Activities Act, H.R. 1625, Division O, which was included in the Omnibus Appropriations bill for fiscal year 2018.

Section 402.17—Other Provisions

We propose to add a new § 402.17 titled ''Other provisions.'' Within this new section, we propose a new provision titled ''Activities that are reasonably certain to occur,'' in order to clarify the application of the ''reasonably certain to occur'' standard referenced in § 402.02 (defining effects of the action and cumulative effects) in two specific contexts. This new proposed provision applies only to activities caused by but not included in the proposed action and activities under cumulative effects. We propose to address reasonable certainty in these two contexts due to the substantial confusion that has sometimes resulted from determining when these sorts of activities should be considered. The proposed text addresses the relative level of certainty required and is intended to avoid inclusion of activities whose occurrence would be considered speculative, but also to avoid requiring an expectation that the activity is absolutely certain to occur. We also identify a non-exclusive list of factors that inform the determination of whether an activity should be considered reasonably certain to occur. For example, one of the factors to consider is the existence of any relevant plans (*e.g.,* community plans, management plans, transportation plans, etc.). We also specify that this provision only applies to activities caused by but not included in the proposed action and activities under cumulative effects. Consistent with the Act, existing regulations, and agency practice, we do not propose to apply the reasonable certainty standard to whether the proposed action itself will be implemented, but again, only to the analysis of the effects of the action to ensure that the effects analysis does not focus on speculative impacts. This provision reflects the fundamental nature of consultation under section 7(a)(2) in which the Services consult on the action as proposed.

Request for Information

We intend that a final regulation will consider information and recommendations from all interested parties. We therefore solicit comments, information, and recommendations from governmental agencies, Native American tribes, the scientific community, industry groups, environmental interest groups, and any

other interested parties. All comments and materials received by the date listed in **DATES** above will be considered prior to the approval of a final document.

You may submit your information concerning this proposed rule by one of the methods listed in **ADDRESSES**. If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the website. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this personal identifying information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov.*

Information and supporting documentation that we receive in response to this proposed rule will be available for you to review at *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Division of Environmental Review (see **FOR FURTHER INFORMATION CONTACT**).

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

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

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

Executive Order 13771

This proposed rule is expected to be a deregulatory action under E.O. 13771.

Regulatory Flexibility Act

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

This rulemaking revises and clarifies existing requirements for Federal agencies under the Endangered Species Act. Federal agencies are the only entities that are directly affected by this rule, and they are not considered to be small entities under SBA's size standards. No other entities are directly affected by this rule. Moreover, this proposed rulemaking action is not a major rule under SBREFA.

This proposed rule, if made final, would be applied in determining whether a Federal agency has insured, in consultation with the Services, that any action it would authorize, fund, or carry out is not likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. This proposed rule is substantially unlikely to affect our determinations as to whether or not proposed actions are likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. The proposed rule would serve to provide clarity to the standards with which we will evaluate agency actions pursuant to section 7 of the Endangered Species Act.

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

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

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

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

Takings (E.O. 12630)

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

Federalism (E.O. 13132)

In accordance with Executive Order 13132, we have considered whether this proposed rule would have significant Federalism effects and have determined that a federalism summary impact statement is not required. This proposed rule pertains only to improving and clarifying the interagency consultation processes under the Endangered Species

Act and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (E.O. 12988)

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

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis.

Paperwork Reduction Act

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

National Environmental Policy Act

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

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

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

Clarity of the Rule

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

(1) Be logically organized;

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

(3) Use clear language rather than jargon;

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

(5) Use lists and tables wherever possible.

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

References Cited

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

Authors

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

Authority

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

List of Subjects in 50 CFR Part 402

Endangered and threatened species.

Proposed Regulation Promulgation

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

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

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

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

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

§ 402.02 Definitions.

* * * * *

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

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

* * * * *

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

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.

* * * * *

Programmatic consultation is a consultation addressing an agency's multiple actions on a program, region, or other basis. Programmatic consultations allow the Services to

consult on the effects of programmatic actions such as:

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

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

* * * * *

■ 3. Amend § 402.14 by:

■ a. Revising paragraphs (c), (g)(2), (g)(4), (g)(8), and (h):

■ b. Redesignating paragraph (l) as paragraph (m); and

■ c. Adding a new paragraph (l).

The revisions and addition read as follows:

§ 402.14 Formal consultation.

* * * * *

(c) *Initiation of formal consultation.* (1) A written request to initiate formal consultation shall be submitted to the Director and shall include:

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

(A) The purpose of the action;

(B) The duration and timing of the action;

(C) The location of the action;

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

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

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

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

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

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

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

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

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

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

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

* * * * *

(g) * * *

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

* * * * *

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

* * * * *

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

(h) *Biological opinions.*

(1) The biological opinion shall include:

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

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

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

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

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

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

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

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

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

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

* * * * *

(l) *Expedited consultations.* Expedited consultation is an optional formal consultation process that a Federal

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

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

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

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

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

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

* * * * *

■ 4. Amend § 402.16 by:

■ a. Revising the section heading;

■ b. Redesignating paragraphs (a) through (d) as paragraphs (a)(1) through (a)(4);

■ c. Designating the introductory text as paragraph (a) and revising the newly designated paragraph (a); and

■ d. Adding a new paragraph (b).

The revisions and addition read as follows:

§ 402.16 Reinitiation of consultation.

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

* * * * *

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

■ 5. Add § 402.17 to read as follows:

§ 402.17 Other provisions.

(a) *Activities that are reasonably certain to occur.* To be considered reasonably certain to occur, the activity cannot be speculative but does not need to be guaranteed. Factors to consider include, but are not limited to:

(1) Past relevant experiences;

(2) Any existing relevant plans; and

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

(b) The provisions in paragraph (a) of this section apply only to activities caused by but not included in the proposed action and activities considered under cumulative effects.

§ 402.40 [Amended]

■ 6. In § 402.40, amend paragraph (b) by removing ''§ 402.14(c)(1)–(6)'' and in its place adding ''§ 402.14(c)''.

Dated: July 18, 2018.

Ryan K. Zinke,

Secretary, Department of the Interior.

Dated: July 16, 2018.

Wilbur Ross,

Secretary, Department of Commerce.

[FR Doc. 2018–15812 Filed 7–24–18; 8:45 am]

BILLING CODE 3510–22–P; 4333–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 424

[Docket No. FWS–HQ–ES–2018–0006; Docket No. 180202112–8112–01; 4500030113]

RIN 1018–BC88; 0648–BH42

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

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

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the ''Services'' or ''we''), propose to revise portions of our regulations that implement section 4 of the Endangered Species Act of 1973, as amended (Act). The proposed revisions to the regulations clarify, interpret, and implement portions of the Act concerning the procedures and criteria used for listing or removing species from the Lists of Endangered and Threatened Wildlife and Plants and designating critical habitat. We also propose to make multiple technical revisions to update existing sections or to refer appropriately to other sections.

DATES: We will accept comments from all interested parties until September 24, 2018. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on this date.

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

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter FWS–HQ–ES–2018–0006, which is the docket number for this rulemaking. Then, in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–HQ–ES–2018–0006; U.S. Fish & Wildlife Service, MS: BPHC, 5275 Leesburg Pike, Falls Church, VA 22041–3803 or National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910.

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

FOR FURTHER INFORMATION CONTACT: Bridget Fahey, U.S. Fish and Wildlife Service, Division of Conservation and Classification, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703/358–2171; or Samuel D. Rauch, III, National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301/427–8403. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800/877–8339.

SUPPLEMENTARY INFORMATION: