

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 402**

[Docket No. FWS-HQ-ES-2021-0104;  
FXES1114090FEDR-245-FF09E300000;  
Docket No. NMFS-240325-0087]

RIN 1018-BF96; 0648-BK48

**Endangered and Threatened Wildlife and Plants; 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:** Final rule.

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

**DATES:** This final rule is effective May 6, 2024.

**ADDRESSES:** Public comments and materials received, as well as supporting documentation used in the preparation of this final rule, are available online at <https://www.regulations.gov> at Docket No. FWS-HQ-ES-2021-0104.

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

**SUPPLEMENTARY INFORMATION:**

**Background**

The Secretaries of the Interior and Commerce (the “Secretaries”) share responsibilities for implementing most of the provisions of the Endangered Species Act, as amended (hereafter referred to as “ESA” or “the Act;” 16 U.S.C. 1531 *et seq.*), and authority to administer the Act has been delegated by the respective Secretaries to the Director of FWS and the Assistant Administrator for NMFS. Together, the Services have promulgated procedural regulations governing interagency cooperation under section 7 of the Act, which requires Federal agencies, in consultation with and with the assistance of the Secretaries of the Interior and Commerce, to ensure 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 joint regulations, which are codified in the Code of Federal Regulations at 50 CFR part 402, were most recently revised in 2019 (84 FR 44976, August 27, 2019; hereafter referred to as “the 2019 rule”). Those revised regulations became effective October 28, 2019 (84 FR 50333, September 25, 2019).

Executive Order 13990 (hereafter, “E.O. 13990”), which was entitled “Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis,” was issued January 20, 2021, and directed all departments and agencies to immediately review agency actions taken between January 20, 2017, and January 20, 2021, and, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding agency actions that conflict with important national objectives, including promoting and protecting our public health and the environment, and to immediately commence work to confront the climate crisis. A “Fact Sheet” that accompanied E.O. 13990 identified a non-exhaustive list of particular regulations requiring such a review and included the 2019 rule (see [www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/](https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/)). In response to E.O. 13990 and in light of litigation over the 2019 rule, the Services proposed revisions to portions of the ESA implementing regulations at 50 CFR part 402.

On June 22, 2023, we published in the **Federal Register** (88 FR 40753) a proposed rule to amend portions of our regulations that implement section 7 of

the Act. We accepted public comments on the June 22, 2023, proposed rule for 60 days, ending August 21, 2023. The proposed rule included clarifying the definitions of “effects of the action,” “environmental baseline,” and “reasonable and prudent measures”; removing § 402.17, “Other provisions,” which had been promulgated with the intent of clarifying several aspects of the process of determining whether an activity or consequence is reasonably certain to occur; clarifying the responsibilities of the Federal agency and the Services regarding the requirement to reinitiate consultation; and revising the regulations at 50 CFR 402.02 and 402.14 regarding the scope of reasonable and prudent measures (RPMs) in an incidental take statement (ITS). The proposed rule also sought comment on all aspects of the 2019 rule, including whether any of those provisions should be rescinded in their entirety (restoring the prior regulatory provision) or revised in a different way. The Services also conducted outreach to Federal and State agencies, industries regularly involved in section 7(a)(2) consultation, Tribes, nongovernmental organizations, and other interested parties and invited their comment on the proposal.

Following consideration of all public comments received in response to our proposed rule, we are proceeding to finalize revisions to our implementing regulations at 50 CFR part 402 as proposed, with no changes. The basis and purpose for this final rule are reflected in our explanation in the June 2023 proposed rule, the responses to comments below, as well as the 2019 final rule for those aspects of the 2019 final rule we are not changing here. These revisions will further improve and clarify interagency consultation. With the exception of the revisions at 50 CFR 402.02 and 402.14 regarding the RPMs in an incidental take statement (ITS), the revisions do not make any changes to existing practice of the Services in implementing section 7(a)(2) of the Act.

In the event any provision is invalidated or held to be impermissible as a result of a legal challenge, the “remainder of the regulations could function sensibly without the stricken provision.” *Belmont Mun. Light Dep’t v. FERC*, 38 F.4th 173, 187 (D.C. Cir. 2022) (quoting *MD/DC/DE Broad. Ass’n v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001)). Because each of the revisions stands on its own, the Services view each revision as operating independently from the other revisions. Should a reviewing court invalidate any particular revision(s) of this rulemaking, the

remaining portions would still allow the Services to issue biological opinions and incidental take statements that comprehensively evaluate the effects of federal actions on listed species and critical habitat and adequately address the impacts of incidental take that are reasonably certain to occur. Specifically, these distinct provisions include: (1) revisions to the definition of “environmental baseline,” (2) removal of section § 402.17 and conforming revisions to the definition of “effects of the action,” (3) revisions to § 402.16, and (4) revisions to the regulatory provisions regarding the scope of reasonable and prudent measures in incidental take statements (§§ 402.02 and 402.14(i)). To illustrate this with one possible example, in the event that a reviewing court were to find the revision adopted in 2019 that described expedited consultations at § 402.14(l) is invalid, that finding would not affect the current revisions to the provisions for reinitiation of consultation at Section § 402.16.

The revisions to the regulations in this final rule are prospective; they are not intended to require that any previous consultations under section 7(a)(2) of the Act be reevaluated at the time this final rule becomes effective (see **DATES**, above).

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

### Summary of Comments and Responses

In our June 22, 2023, proposed rule (88 FR 40753), we requested public comments by August 21, 2023. We received more than 140,000 comments by that date from individual members of the public, States, Tribes, industry organizations, legal foundations and firms, and environmental organizations. We received several requests for extensions of the public comment period. However, we elected not to extend the public comment period because we found the 60-day comment period provided sufficient time for a thorough review of the proposed revisions. The majority of the proposed revisions are to portions of the regulations that were previously revised in 2019, and we jointly announced in a public press release and on a Service website our intention to revise these regulations in June of 2021. The number of comments received indicated that members of the public were aware of the proposed rule and had adequate time to review it. In addition, we provided six

informational sessions for a wide variety of audiences. Over 500 attendees participated in these sessions, and we addressed questions from the participants during each session. Finally, on our website, we provided additional information about the proposed regulations, such as frequently asked questions and a prerecorded presentation on the proposed revisions.

Most of the comments we received were non-substantive, expressing either general support for, or opposition to, the proposed rule with no supporting information or analysis. Other comments expressed opinions beyond the scope of this rulemaking. We do not, however, respond to comments that are beyond the scope of this rulemaking action or that were not related to the 2019 rule. The vast majority of the comments received were nearly identical statements from individuals indicating their general support for the proposed revisions to the 2019 rule and concern for not including more revisions to the 2019 rule, but not containing substantive content. We also received approximately 95 letters with detailed substantive comments with specific rationales for support of or opposition to specific portions of the proposed rule.

Before addressing each of the comments, we reiterate the Services’ intention to provide additional guidance in an updated ESA Section 7 Consultation Handbook (Consultation Handbook) that we anticipate making available for public comment after the publication of this final rule. Related to topics addressed in this final rule, the additional guidance will address application of the definition of “effects of the action” and “environmental baseline,” examples for defining when an activity is reasonably certain to occur and guidance on application of the two-part causation test, additional information on consulting programmatically, guidance on implementation of section 7(a)(1) of the Act, and implementation of the expanded scope of RPMs.

Recognizing that the revisions to the regulatory provisions expanding the scope of RPMs represent a change to the Services’ practice, we would also like to highlight some of the key aspects of that amendment, which are discussed in more detail in the response to comments below. First, the Services find that the revision allowing for the use of offsets as RPMs will more fully effectuate the conservation goals of the ESA by addressing impacts of incidental take that may not have been sufficiently minimized through measures confined to avoiding or reducing incidental take

levels. In that regard, our prior approach, which restricted RPMs to measures that avoid or reduce incidental take, has led to the continued deterioration of the condition of listed species and their critical habitat through the accumulation of impacts from incidental take over time. Further, those impacts from incidental take may have been more adequately addressed through offsetting measures.

Second, as explained in our response to comments below, the respective revisions to § 402.02 and § 402.14(i), which recognize the use of offsets as RPMs, are supported by the plain language of the ESA. The relevant language at ESA section 7(b)(4)(C)(ii) plainly states that RPMs are to include measures that minimize the “impacts” of incidental take, not just incidental take itself. Like measures that avoid or reduce incidental take, offsetting measures also “minimize” the impacts of incidental take on the species. The legislative history of the 1982 amendments of the ESA also confirms that Congress did not intend to preclude the Services from specifying offsets as RPMs that minimize the impacts of incidental take. Lastly, the Services do not expect offsetting measures that occur outside the action area to violate the “minor change rule.” In most instances, offsetting measures operate as additional measures to minimize impacts of incidental take that would not prevent the action subject to consultation from proceeding essentially as proposed. Accordingly, text was added at 50 CFR 402.14(i)(2) to expressly recognize that offsets may occur within or outside the action area, consistent with the “minor change rule” (*i.e.*, the requirement that RPMs specify only minor changes that do not alter the basic design, location, duration, or timing of the action).

In addition, the Services would like to address a particular issue at the outset of this portion of the preamble. Several commenters asserted that a recent decision from the D.C. Circuit Court of Appeals, *Maine Lobstermen’s Association v. NMFS*, 70 F.4th 582 (D.C. Cir. 2023) (“*MLA*”), weighs against the Services removing § 402.17 from the section 7 regulations, especially the “clear and substantial information” standard that applies in determining if a consequence is reasonably certain to occur. We explain here our understanding of the decision and why it does not undermine our regulatory revision to remove § 402.17. Because the subject consultation in the *MLA* litigation required NMFS to grapple with scientific uncertainties, we also offer additional explanation of how the

Services address such uncertainties, in general, consistent with the holding in *MLA* and section 7(a)(2) of the Act. We respond to some of the more specific comments in the responses section below.

In *MLA*, lobster fishermen challenged a NMFS no-jeopardy biological opinion that analyzed the effects of authorizing the Federal lobster and Jonah crab fisheries in the Northeast on the highly endangered North Atlantic right whale. In developing the biological opinion, NMFS faced uncertainties in determining the anticipated level of right whale entanglements and any subsequent deaths the fishery was anticipated to cause over the next 50 years. The D.C. Circuit Court of Appeals found that NMFS impermissibly resolved these uncertainties by asserting the legislative history of the ESA required NMFS to apply worst case scenarios. See 70 F.4th at 597 (“When answering public comments the Service blamed the Congress, insisting that . . . the legislative history required it to deal in worst-case scenarios because ‘we need to give the benefit of the doubt to the species.’”). The *MLA* court held that legislative history cannot “compel a presumption in favor of the species not required by the statute” and that, under the ESA, the Services facing scientific uncertainty may not simply resort to “worst-case scenarios or pessimistic assumptions,” but must instead “strive to resolve or characterize the uncertainty through accepted scientific techniques.” *Id.* at 586, 598, 600.

That decision does not address the Services’ discretion to resolve ambiguities in the best available scientific data generally, or the Services’ decision to remove § 402.17 from the section 7 regulations. First, the court invalidated only the particular way in which NMFS resolved uncertainties in *MLA*—namely that the agency, in the court’s view, made a legal determination that it had to give the benefit of the doubt to an endangered species, rather than making a scientific judgment based on the best available scientific data. The court stated, for example, that agencies may not “jump to a substantive presumption [in favor of the endangered species] that distorts the analysis of effects and creates false positives.” *MLA*, 70 F.4th at 600. But the court also made clear that when agencies make “a scientifically defensible decision” by, for instance, “striv[ing] to resolve or characterize the uncertainty through accepted scientific techniques,” their “predictions will be entitled to deference.” *Id.* The court further anticipated that NMFS “will be able to make” such scientifically defensible

decisions “[i]n most realistic cases” and thereby avoid the specific issues the court found problematic in *MLA*. *Id.* The Services historically have resolved ambiguities or uncertainties in the data based on such “accepted scientific techniques.” As a result, the Services anticipate that the *MLA* decision will have limited implications for the Services’ overall implementation of section 7(a)(2).

Second, *MLA* does not constrain the Services’ decision to remove § 402.17, contrary to some commenters’ assertions. As discussed more fully below, the Services are removing the “clear and substantial information” requirement because it could be read as inappropriately restricting the scope of “the best available scientific and commercial data” by demanding a degree of certitude and quantification. The best available data are not always free of ambiguities and thus “clear,” nor are they invariably quantifiable or “substantial” in quantity. As the Services explained in the 2019 section 7 final rule: The best scientific and commercial data available is not limited to peer-reviewed, empirical, or quantitative data but may include the knowledge and expertise of Service staff, Federal action agency staff, applicants, and other experts, as appropriate, applied to the questions posed by the section 7(a)(2) analysis when information specific to an action’s consequences or specific to species response or extinction risk is unavailable. Methods such as conceptual or quantitative models informed by the best available information and appropriate assumptions may be required to bridge information gaps in order to render the Services’ opinion regarding the likelihood of jeopardy or adverse modification. Expert elicitation and structured decision-making approaches are other examples of approaches that may also be appropriate to address information gaps. (84 FR 45000)

*MLA* does not require a different view. In interpreting section 7(a) of the ESA, the court held that agencies must use “the best available scientific data, not the most pessimistic.” *MLA*, 70 F.4th at 599. The court did not hold that, within the best available scientific data, the statute permits reliance only on clear data that lack uncertainties or a substantial amount of such data. And while the court made a passing reference to § 402.17, it did so to support the proposition that, even under the Services’ own “interpretive rules,” NMFS’s approach in that case fell short because, in the court’s view, it lacked a clear and substantial basis for predicting

reasonably certain effects. The court did not indicate the *statute* demands “clear and substantial information.”

That understanding is consistent with the statutory text, which provides that each federal agency shall “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species.” 16 U.S.C. 1536(a)(2) (emphases added). As the Supreme Court has explained, “insure” in section 7(a)(2) means “[t]o make certain, to secure, to guarantee.” *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667 (2008) (quotation marks omitted). Thus, agencies do not determine the effects of an action using “the best scientific and commercial data available” in a vacuum. Rather, the ESA envisions that agencies would make any such scientific judgments in service of their overarching responsibility to “make certain” their actions are “not likely” to jeopardize protected species. Accordingly, a regulation that impairs agencies’ ability to carry out that duty by requiring them to disregard any reasonably certain effects that have ambiguities in the underlying information or that may be based on less than substantial information could be inconsistent with the statute.

We note that even with the removal of § 402.17, the two-part causation test (*i.e.*, the “but for” and “reasonably certain to occur” standards) for determining whether a particular activity or consequence falls under the definition of “effects of the action” remains in place. As the Services explained in the 2019 rule, the “reasonably certain to occur” standard adds an element of foreseeability and a limitation to our causation standard for determining “effects of the action.” 84 FR at 44991. That standard prevents the Services from engaging in speculative analyses, though it does not require a guarantee that an effect will occur. See 51 FR 19926 at 19932–19933; June 3, 1986 (1986 section 7 regulations final rule); 80 FR 26832 at 26837; May 11, 2015 (incidental take statement final rule); 83 FR 35178 at 35183; July 25, 2018 (2018 proposed rule to update section 7 regulations). These safeguards ensure that when faced with scientific uncertainties, the Services will not automatically rely on “worst-case scenarios.” See 84 FR 44967 at 45000; August 27, 2019. Instead, consistent with the statute and our regulations, the Services will continue to evaluate the best available evidence to arrive at principled scientific determinations in rendering our opinion under section 7

of the Act. Similarly, in rendering our opinion and resolving uncertainties, we will continue to be mindful of the fundamental duty—required by the text of section 7(a)(2)—to “insure” the agency action is not likely to jeopardize species protected under the Act.

Below, we summarize and respond to substantive and other relevant comments we received during the public comment period; we combined similar comments where appropriate.

## Section 402.02—Definitions

### Definition of “Effects of the Action”

As proposed, we are revising the definition of “effects of the action” by adding “but that are not part of the action” to the end of the first sentence and removing the parenthetical reference to § 402.17. The first sentence now reads: Effects of the action are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action but that are not part of the action. The Services received a wide variety of comments on our proposed revisions to the definition of “effects of the action.” These comments ranged from support of the proposed revisions, requests to revert to the pre-2019 definition, and recommendations for modifications to the proposed definition, largely to incorporate portions of § 402.17 in the “effects of the action” definition if that section is removed as had been proposed.

Commenters in support of the revisions to the 2019 definition generally agreed with the reasoning of the Services but many requested additional guidance on the application of the definition. The Services intend to provide additional guidance in an updated Consultation Handbook, which we anticipate publishing in the **Federal Register** for public comment after issuance of this final rule.

Commenters who requested the Services return to the pre-2019 definition of “effects of the action” generally pointed to the removal of the terms “direct,” “indirect,” “interrelated,” and “interdependent” and the use of the terms “consequences” and “other activities,” as well as the two-part causation test as being a change in practice that narrows the scope of the “effects of the action.” The Services respectfully decline to return to the pre-2019 definition of “effects of the action.” We reassert our position that the retained changes in the 2019 rule and the revisions adopted from the 2023 proposed rule maintain the pre-2019 scope of the effects analysis. These

changes provide further clarity in the application of the longstanding practice of determining the full range of effects of a proposed action under consultation, including those that result from other activities that would not occur but for the proposed action. Under the pre-2019 definition, there was undue focus on categorizing the specific type of effect analyzed as part of the “effects of the action” (*i.e.*, assigning effects to the categories of direct, indirect, interrelated, or interdependent). The changes promulgated in 2019 to the definition avoided that exercise of categorizing the effects, but all these effects are, nevertheless, still analyzed as part of the “effects of the action.” Many commenters requested the Services retain the reference to § 402.17 in the “effects of the action” definition and the content of § 402.17. The comments related to § 402.17 and the “effects of the action” definition centered on the two-part causation test, particularly the framework provided for determining whether an activity or consequence is reasonably certain to occur. Those comments that focused on § 402.17 are addressed below in the preamble to this final rule.

*Comment 1:* One commenter recommended adding the word “likely” to the definition of “effects of the action” to assist in distinguishing that consequences of the action must be likely to occur in order to result in effects.

*Response:* The current definition and the “but for” and “reasonably certain to occur” causation provide a clear test of what constitutes an effect of the action, including for other activities caused by the action. Adding the term “likely” would add ambiguity rather than clarifying the test for an effect of the action. The Services respectfully decline this requested change to the definition of “effects of the action.”

*Comment 2:* Several commenters proposed incorporating the statutory requirement to use the best available scientific and commercial data into the “effects of the action” definition to support the two-part causation test.

*Response:* The last sentence of section 7(a)(2) of the Act requires both the Federal action agencies and the Services to use “the best scientific and commercial data available.” This requirement applies to all aspects of the Services’ application of section 7(a)(2) consultation, including determining what activities or consequences are considered reasonably certain to occur when analyzing the “effects of the action” and any “cumulative effects.” Therefore, we respectfully decline the suggestion to add “using the best

scientific and commercial data available” to the “effects of the action” definition because using the best scientific and commercial data available is already an explicit requirement of the Act for agencies and incorporated into our formulation of the biological opinion under the regulations. See 16 U.S.C. 1536(a)(2), 50 CFR 402.14(g)(8).

*Comment 3:* Commenters recommended modifications to the definition of “effects of the action” to distinguish “activities” from the proposed action in order to apply the two-part causation test to both “activities” and “consequences.”

*Response:* The modification of the definition in the 2023 proposed rule to add “but that are not part of the action” addresses this recommendation so the Services did not further modify the “effects of the action” definition. The reference to “activities” in the first sentence of the 2019 “effects of the action” definition and in the revised version of the definition in this final rule is to those activities that are caused by, but are not part of, the proposed action. Under the pre-2019 definition, as described in the 2018 preamble for the proposed rule to the 2019 rule, the intent in changing the definition to “other activities” that would have been considered “indirect effects” or “interrelated” or “interdependent” actions was for consultations to focus on identifying the full range of the consequences rather than categorizing them (84 FR 44976–44977, August 27, 2019; 83 FR 35178 at 35183, July 25, 2018). The two-part causation test is used to determine when a consequence of these other activities is caused by the proposed action because the other activities (and the consequences of them) would not occur “but for” the proposed action and are “reasonably certain to occur.”

*Comment 4:* Several commenters suggested returning to the 1986 “effects of the action” definition to use the terms “direct,” “indirect,” “interrelated,” and “interdependent.” They believe the 2019 definition narrows the scope of “effects of the action” and argue that collapsing direct and indirect effects into a single “consequences” requirement changes past practice because indirect effects did not require “but for” causation prior to 2019. Commenters noted that the 1998 Consultation Handbook required “but for” only in analyzing “take” resulting from the action, as well as interrelated and interdependent actions.

*Response:* The 1986 definition of “indirect effects” referred to effects that are “caused by” the proposed action whereas the Services’ 1998 Consultation

Handbook includes the phrase “caused by or results from,” both of which require an assessment of a causal connection between an action and an effect. The “but for” causation test in the 2019 revised definition of “effects of the action” and as modified in this final rule is similar to “caused by” or “caused by or results from” in that both tests speak to a connection between the proposed action and the consequent results of that action, whether they be (1) physical, chemical, or biotic consequences to the environment, the species or critical habitat, or (2) activities that would not occur but for the proposed action. Both tests require a determination of factual causation, and since 2019 we have not observed a change in the Services’ practice in applying “but for” causation to consequences once termed “indirect effects” compared to the regulatory term “caused by.” As we noted in the preamble of the 2018 proposed rule, “[i]t has long been our practice that identification of direct and indirect effects as well as interrelated and interdependent actions is governed by the ‘but for’ standard of causation.” Similarly, as defined in § 402.02, “incidental take refers to takings that result from . . . an otherwise lawful activity.” 50 CFR 402.02 (emphasis added). Moreover, our 1998 Consultation Handbook states: “In determining whether the proposed action is reasonably likely to be the direct or indirect cause of incidental take, the Services use the simple causation principle: *i.e.*, ‘but for’ the implementation of the proposed action. . . .” (1998 Consultation Handbook, page 4–47). For these reasons, the Services continue to maintain that the “but for” test reflects the Services’ longstanding practice and has not changed the scope of our analyses. Therefore, we decline the commenters’ request.

**Comment 5:** Commenters recommended that consideration of effects of ongoing agency actions not be moved to the “environmental baseline.” They argued that, if ongoing agency actions are moved to the “environmental baseline,” it will be difficult for the Services to determine whether a species already exists in a state of baseline jeopardy because of these previously authorized ongoing Federal actions.

**Response:** The concept of “baseline jeopardy” originates from cases like *Nat’l Wildlife Fed. v. NMFS*, 524 F.3d 917, 930 (9th Cir. 2008) (“[l]ikewise, even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm”). As we noted

in our responses to comments in the 2019 rule and re-affirm here, the Services’ position on “baseline jeopardy” remains that the statute and regulations do not contain any provisions under which a species should be found to be already (pre-action) in an existing status of “baseline jeopardy,” such that any additional adverse impacts must be found automatically to meet the regulatory standards for “jeopardize the continued existence of” or “destruction or adverse modification.” See 84 FR 44976 at 44987; August 27, 2019. Please see the responses to comments on the definition of “environmental baseline” below for more details.

**Comment 6:** Commenters noted that, while the 2019 definition may reflect the Services’ longstanding practice, codifying the two-pronged test affects agencies’ ability to fulfill their duties under section 7. Many commenters reiterated concerns raised during rulemaking on the 2019 rule that moving ongoing actions and their effects from the “effects of the action” to the “environmental baseline” undermines the Services’ ability to conduct a thorough jeopardy analysis. Commenters argue that moving ongoing activities to the “environmental baseline” will exclude them from the jeopardy analysis.

**Response:** The Services respectfully disagree with the comments that use of the two-part causation test affects the ability of agencies to fulfill their section 7(a)(2) responsibilities. As we stated in 2019 and in the preamble to the 2023 proposed rule, the use of the two-part causation test has been part of our practice since the 1986 final rule on interagency cooperation (51 FR 19926 at 19933; June 3, 1986) (the Services did not define “effects of the action” in the original 1978 section 7 regulations (43 FR 870; January 4, 1978)). Consultation under the Act is conducted on the effects of the entire proposed action (all consequences caused by the proposed action). To further clarify, proposed actions for ongoing activities, even those that incrementally improve conditions may still have adverse effects (*i.e.*, are not wholly beneficial), and require formal consultation. The analysis of an action’s effects is fact-based and consultation-specific. In terms of the jeopardy and destruction-or-adverse-modification analyses, the Services consider the effects of the action added to the “environmental baseline” and cumulative effects in light of the status of the species and critical habitat. Therefore, removing the “environmental baseline” definition from the definition of “effects of the action” does not affect

either jeopardy or destruction-or-adverse-modification analyses, and the Services decline the suggestion to retain “environmental baseline” in the “effects of the action” definition. We provide additional discussion of how “ongoing activities” are considered for purposes of the “environmental baseline” in the “environmental baseline” section of this preamble below.

**Comment 7:** Other commenters asserted that the “effects of the action” definition is overly broad and will unnecessarily restrict future projects requiring section 7 consultation because of the need for the Services and Federal action agencies to analyze an array of effects that are unrelated or only tangentially related to the proposed action. Conversely, several commenters asserted the proposed changes to the definition specific to the two-part causation test raise the bar for any future review of the effects of a proposed action without supporting rationale as to why a higher bar is needed. These commenters argue that the “but for” and “reasonably certain to occur” requirements of the two-part causation test are too high given that “may affect” is the trigger for consultation.

**Response:** The revisions made in the 2019 rule and the further minor revisions in this final rule will not shift the scope of effects we consider under our revised definition of “effects of the action.” Therefore, as explained in the 2019 rule, our analyses will neither raise nor lower the bar for the scope of analysis of effects that has been in place since 1986. All the effects of the action considered since the 1986 revisions to the definition are still included in the scope of “effects of the action,” and no other effects or activities that are not caused by the proposed Federal action will be included. To the extent that commenters are asserting we should further restrict the definition of “effects of the action” to only those effects within the jurisdiction or control of the Federal agency, we decline this request for the same reasons discussed in 2019. See 84 FR 44991, August 27, 2019. The revisions to the definition and the changes made in 2019 did not change existing practice in determining the effects of the action, which includes what were referred to as direct, indirect, interrelated, and interdependent in the 1986 definition of “effects of the action.” The improvements to the definition in the 2019 rule and in this revision include the explicit establishment of the two-part test for effects, which codifies the Services’ longstanding analysis in a clear standard in order to be more consistent

and transparent. The Services do not find that the 2019 definition or the revised definition in this rule narrows or broadens the scope of the effects that would be considered in a section 7(a)(2) consultation. Similar comments were made relating to § 402.17; please see our responses pertaining to comments on that section of the proposed rule below in this preamble.

*Comment 8:* One commenter argued that removing the definition of “reasonably certain to occur” while leaving in the concept that effects are not bound by time or space will create an unworkable burden on the consulting agency because an agency will not be able to evaluate all possible effects. Eliminating the definition of “reasonably certain” removes the two-tier system for identifying effects.

*Response:* The Services are retaining “reasonably certain to occur” in the revisions to the “effects of the action” definition as part of the two-part causation test. As discussed above, the revisions to the definition in this final rule will not shift the scope of effects we consider in section 7(a)(2) consultations. In addition, while we provided guidance on the factors to consider when determining whether other activities are “reasonably certain to occur,” the Services did not define the term and do not intend to define it because we are not setting limits on the types of activities that are reasonably certain to occur. We intend to provide further guidance in an updated Consultation Handbook. See also our response to comments related to § 402.17.

*Comment 9:* Several commenters recommended retaining § 402.17 and the reference to it in the “effects of the action” definition or incorporating the content of § 402.17 in the definition if the section is removed from the regulations. Commenters also recommended examples for defining when an activity is reasonably certain to occur and guidance for action agencies and the Services to ensure consistency in the application of the test. In addition, commenters suggested regulatory language that considers additional factors such as the proximity of the action in relation to the effect, geographical distribution of effects, timing of the effect in relation to sensitive periods of a species’ life cycle, the nature and duration of the effect, and disturbance frequency as described in the 1998 Consultation Handbook discussion on the multi-factor tests to analyze the effects of a proposed action and related activities on species and critical habitat. Conversely, another commenter supported the removal of

§ 402.17 but encouraged the Services to work towards a stricter, quantifiable definition of “reasonably certain to occur.”

*Response:* The Services support the recommendation to provide examples for defining when an activity is reasonably certain to occur and guidance on application of the two-part causation test. We believe this information is more appropriately addressed in an update to the Consultation Handbook rather than regulatory text. The Services update to the Consultation Handbook will incorporate changes to the regulations since the handbook was issued in 1998. For comments related to § 402.17, please see that section of the preamble below.

*Comment 10:* Some commenters indicated that the proposed changes to the “effects of the action” definition will cause greater uncertainty in terms of what to include in the effects of the action. Several also noted that the addition of the phrase “but that are not part of the action” to the definition is unclear and recommended that guidance be created by the Services to ensure the interpretation of “not part of the action” is consistent across offices and to clarify the scope or extent of activities outside the proposed action that will be analyzed. Conversely, other commenters believe the addition of “but that are not part of the action” is a helpful clarification and recommend further modification of the definition to clarify that the two-part causation test does not apply to the proposed action itself (as opposed to other activities caused by, but that are not part of, the proposed action).

*Response:* As discussed previously, the Services believe the minor revisions to the definition in this final rule will not shift the scope of effects considered in section 7(a)(2) consultations. The addition of “but that are not part of the action” to the definition is meant to maintain the scope of the analysis of the effects by clarifying that it includes other activities caused by the proposed action that are reasonably certain to occur. The Services respectfully decline the suggestion to further refine the definition to explicitly state that the two-part causation test does not apply to the proposed action itself but agree that guidance on the application of the two-part causation test is warranted and anticipate including this information in the updated Consultation Handbook.

*Comment 11:* One commenter argued that the “but for” causation standard casts a wider net than a “proximate cause” standard. The commenter maintains that a proximate cause is a cause that directly produces an event

and without which the event would not have occurred. “But for” causation treats the effects of an action as a series of events and circumstances that can be traced to a particular action but without regard to whether either the agency action is responsible for or the agency has jurisdiction or authority to control those events and circumstances. The Services should revise the proposed “effects of the action” definition to eliminate the “but for” causation language and adopt a proximate cause standard.

*Response:* There is no Federal standard definition for “proximate cause,” a term that developed through judicial decisions. Proximate cause can differ if used for assigning liability in criminal action as compared to civil matters, neither of which is directly relevant in the section 7(a)(2) context of evaluating the anticipated effects of proposed Federal actions on listed species and critical habitat. We declined to include a proximate cause element in our definition of “effects of the action” in 2019 and do so again here. See 84 FR at 44990–44991, August 27, 2019. As discussed above, the “but for” causation standard is, in essence, a factual causation standard. As part of regular practice in conducting a complete analysis of the effects of proposed Federal actions, the Services’ practice is to apply the concepts of “but for” causation and “reasonably certain to occur” when identifying the effects of the action. The changes to the “effects of the action” definition in our 2019 rule merely made them explicit. The Services’ scope of the effects analysis did not change with the 2019 change to the “effects of the action” definition, and we do not anticipate a change in scope because of the minor changes to the “effects of the action” in this final rule.

*Comment 12:* Several commenters stated that the “reasonably certain to occur” limitation applied only to “indirect effects” and “cumulative effects” prior to the 2019 rule’s “effects of the action” definition. They noted that this situation leads to exclusion of effects, but that uncertainty or data gaps should not be used to limit consideration of effects of a proposed agency action. They further argue that the reasonable certainty standard could conflict with the requirement to use the best available scientific and commercial data, particularly where there may be incomplete information or emerging science.

*Response:* We reaffirm what we stated in the 2019 rule, that the two-part effects test adopted at that time does not alter the scope of the Services’ analysis.

The Services also agree that, in applying our two-part effects test, we must use the best available scientific and commercial data, which is expressly required by the statute and as part of our regulations at 50 CFR 402.14(g)(8). Consistent with considering the best available information, we will necessarily be required to exercise scientific judgment to resolve uncertainties and information gaps in applying our effects test. This process does not ignore effects but instead ensures that we adequately consider the range of effects caused by the proposed action. For further discussion relevant to this comment, please see the responses to comments regarding § 402.17.

*Comment 13:* Several commenters noted that the proposed change to the “effects of the action” definition will remove the framework for determining whether an activity or consequence is “reasonably certain to occur” that is critical for determining what to include in an agency’s effects analysis, including when applying the standard to larger scales such as a program.

*Response:* The Services respectfully disagree with these comments; the definition and current practice adequately capture the “reasonably certain to occur” standard. As described in the 2019 rule, a section 7(a)(2) consultation performed at the level of a regional or national program is often referred to as a programmatic consultation, and often the proposed action falls into the category referred to as a framework programmatic action described in our 2015 rule revising incidental take statement regulations (80 FR 26832, May 11, 2015). In these instances, the “but for” and “reasonably certain to occur” parts of the test extend to the consequences that would be expected to occur under the program generally, but not to the specifics of actual projects that may receive future authorization under the program. Effects analyses at this more generalized level are necessary because the Federal agency often does not have specific information about the number, location, timing, frequency, precise methods, and intensity of the site-specific actions or activities for their program. We are able to provide an informed effects analysis at a more generalized level by analyzing the project design criteria, best management practices, standards and guidelines, and other provisions the program adopts to minimize the impact of future actions under the program.

Alternatively, some Federal agencies may be able to provide somewhat more specific information on, e.g., the numbers, timing, and location of

activities under their plan or program. In those instances, we may have sufficient information to address not only the generalized nature of the program’s effects but also the specific anticipated consequences that are reasonably certain to occur from specific actions that will be subsequently authorized under the program. Additional guidance regarding application of the two-part causation test (“but for” and “reasonably certain to occur”) and programmatic consultation will be included in the updated Consultation Handbook. For more general discussion of the removal of the “reasonably certain to occur” framework provided by § 402.17, please see the responses to comments on that section in the preamble below.

*Comment 14:* Several commenters noted that the requirement that a “reasonably certain to occur” finding be based on “clear and substantial information” has created confusion and conflicts with the statutory requirement to use the “best scientific and commercial data available” and agreed with the removal of § 402.17 in its entirety. Another commenter supported retaining all of § 402.17, including the requirement to use “clear and substantial information,” noting that this language supports the requirement to use the “best scientific and commercial data available.”

*Response:* The Services are removing § 402.17 via this final rule. The use of the terms “clear and substantial information” creates confusion with the statutory requirement to use the “best scientific and commercial data available.” We disagree with the comment that retaining the “clear and substantial” language in § 402.17 supports the required use of the “best scientific and commercial data available.” Please see the discussion of the term “clear and substantial” provided in response to comments on § 402.17.

#### **Definition of “Environmental Baseline”**

As proposed, we are revising the third sentence of the definition of “environmental baseline” by replacing the term “consequences” with the word “impacts,” removing the term “ongoing,” and adding the term “Federal” in two locations. The third sentence now reads: The impacts to listed species or designated critical habitat from Federal agency activities or existing Federal agency facilities that are not within the agency’s discretion to modify are part of the environmental baseline. The changes to the definition of “environmental baseline” in this rule are narrow and serve to clarify the

intended application and scope of the final sentence that was added in 2019. The Services received a wide variety of comments on our proposed revisions to the definition of “environmental baseline,” most of which were focused on the original change in the 2019 rule. These comments ranged from support of the 2023 proposed revisions, requests to retain the original final sentence of the 2019 definition, and requests to remove the entire 2019 definition and revert to the definition as it stood prior to the 2019 rule. Commenters in support of the proposed revisions to the 2019 definition generally agreed with the reasoning of the Services and in some cases requested additional guidance on the application of the definition. The comments in opposition to the proposed revisions to the 2019 definition generally fell under two main themes of comments—both generally focused on the final sentence of the 2019 definition. One group focused specifically on the Services’ revisions to the final sentence of the 2019 definition and whether and how the role of Federal agency discretion should be considered during a section 7 consultation. The second group focused on the proposed language changes to the final sentence, with most attention on opposition to the removal of the word “ongoing.” With regard to the request for additional guidance, the Services intend to provide additional guidance and examples in an updated Consultation Handbook.

*Comment 1:* Several commenters requested the Services revert entirely to the definition of “environmental baseline” as it stood prior to the 2019 regulations by either (1) pointing to other issues as described in other comments below or (2) attributing the entire definition to an earlier Presidential administration despite much of the text of the definition stemming from the pre-2019 regulations.

*Response:* The Services decline to return to the pre-2019 “environmental baseline” definition for several reasons. First, the 2019 definition retained much of the language of the pre-2019 definition, while also making the definition a stand-alone definition within the § 402.02 regulations. This regulatory change did not change the role of the “environmental baseline” in the section 7 consultation analysis, and the Services also reaffirmed in § 402.14(g)(4) that the analysis presented in the biological opinion must add the “effects of the action” to the “environmental baseline” and “cumulative effects.” This regulatory revision also removed a circular reference that occurred when the “environmental baseline” definition

was previously embedded within the “effects of the action” definition. By creating two separate definitions of “effects of the action” and “environmental baseline,” we are underscoring the separate nature of the analyses which are then to be combined into an aggregate assessment.

Second, by clarifying that those portions of a Federal activity or facility that are outside the control of the Federal agency to modify are included in the “environmental baseline,” the Services highlighted that the effects of discretionary activities or facilities contained in the proposed action would be evaluated within the context of (added to) the baseline and “cumulative effects” in order to determine whether those added effects were or were not “likely to jeopardize” a species. Third, in the 2019 “environmental baseline” definition, the Services clarified that the primary purpose of the “environmental baseline” is to present the condition of the listed species and critical habitat in the action area as impacted by the various factors of the “environmental baseline.” Prior interpretations of the pre-2019 definition could indicate that the baseline was simply a description of the impacts of those factors on the action area—missing the important connection to the condition of the species and critical habitat that may be further affected by the effects of a Federal action. With the 2019 rule, the Services highlighted two important elements: (1) That the purpose of the baseline was to assess the condition of the species and critical habitat and (2) that this condition assessment was taken into consideration prior to adding the consequences of the proposed action (which in some instances might be the future continued, discretionary operations of a facility such as a dam). These two elements provide the foundation to which the Services add the effects of the proposed action.

*Comment 2:* Some commenters reiterated their 2019 comments that the 2019 revised definition of “environmental baseline” hides or ignores the significant impacts of past and present activities and facilities, some of which may have played a significant role in the present status of the species and its critical habitat, asserting that the species is thus in “baseline jeopardy.” Further, commenters seem to imply that only large actions could then likely jeopardize listed species or destroy or adversely modify critical habitat.

*Response:* The Services disagree and have revised the definition’s final sentence to clarify those aspects of a Federal action involving Federal

facilities and activities that are in the “environmental baseline” and those that will be considered as “effects of the action.” As required by the regulations, the “effects of the action” will be added to the “environmental baseline,” thus the effects to a listed species or critical habitat already impacted by the “environmental baseline” will be considered in full light of the condition of that species and critical habitat. In addition to the overall status of the species, the relative health and viability of the species absent the proposed action in the action area is the starting point for the assessment and that condition informs the ability of the species to withstand further perturbations to its numbers, reproduction, and distribution. As we noted in our responses to comments in the 2019 rule and re-affirm here, the statute and regulations do not contain any provisions under which a species should be found to be already (pre-action) “in baseline jeopardy,” such that any additional adverse impacts must be found to meet the regulatory standards for “jeopardize the continued existence of” or “destruction or adverse modification.” As we further noted in 2019, and reaffirm here, the Services do not dispute that some listed species are more imperiled than others, and that for some very rare or very imperiled species, the amount of adverse effects to the species or its critical habitat that can occur without triggering a jeopardy or “destruction or adverse modification” determination may be small. See 84 FR 44976 at 44987, August 27, 2019.

*Comment 3:* A few commenters focused on the issue of Federal agency discretion and whether it was appropriate to further consider whether a Federal agency had discretion over some or all of its proposed action once consultation was initiated.

*Response:* Consultation under section 7(a)(2) is required when a discretionary Federal action may affect a listed species or designated critical habitat. As part of that process, it is important that the Federal action agency and the Services correctly identify the Federal action. Following this step, it is then also important to assess the “effects of the action,” which include the activities caused by (but are not part of) the proposed action and the effects of those activities. As the Services noted in the 2019 rule, and re-affirm here, the courts and the Services have concluded that, in general, the effects on listed species and critical habitat attributable to Federal agency activities and existing Federal agency facilities are part of the “environmental baseline” when the action agency has no discretion to

modify them. For example, with respect to existing Federal facilities, such as a dam, courts have recognized that effects from the existence of the dam can properly be considered a past and present impact included in the “environmental baseline” when the Federal agency lacks discretion to modify the dam. See, e.g., *Friends of River v. NMFS*, 293 F. Supp. 3d 1151, 1166 (E.D. Cal. 2018). Under these lines of cases involving dams, when a Federal agency has authority for managing or operating a dam, but lacks discretion to remove or modify the physical structure of the dam, any impacts from the physical presence of the dam in the river are appropriately placed in the “environmental baseline” and are not considered an “effect of the action” under consultation. Thus, it is important to note that the above analytical process for determining the “effects of the action” does not include consideration of the discretion of the Federal action agency over the activities or facilities of another Federal agency or any other third party. To the extent that any effects are caused by the proposed Federal action, per the “but for” and “reasonably certain to occur” standards of the “effects of the action” definition, they would be considered as “effects of the action” in the consultation analyses. Those effects that are not caused by the Federal action would be included in the “environmental baseline” or “cumulative effects” as appropriate.

*Comment 4:* Several commenters advocated that the question of discretion should also apply to third party actions or the activities or facilities that are the subject of a Federal action, such as permitting or funding, with some commenters providing site-specific examples.

*Response:* As we noted above in this preamble and in the proposed rule, this determination is made on a case-by-case basis as determined by discussions between the Services and the appropriate Federal agency on the basis of the information and evidence available at the time. In most section 7 consultations, the question of discretion is not a factor and, indeed, several examples raised by commenters were on large-scale Federal activities such as water operations or land management, which make up a relatively small portion of ESA section 7 consultations. Many of the location-, activity-, or facility-specific concerns raised by some commenters are beyond the scope of this rule and best handled through site-specific consultations.

To answer some of the general questions or points of confusion, the Services note that the current revisions

are minor in scope to further clarify the intent of the final sentence added to the “environmental baseline” definition in 2019 and retained in this rule. These revisions do not modify current practice related to how past and present non-Federal actions are represented in the summary of impacts of the “environmental baseline” on the condition of listed species and critical habitat. In addition, the revisions do not alter current practice related to the analysis of the effects of a proposed discretionary Federal action that involves the authorization or funding of an action taken by a non-Federal entity such as a private landowner. The Services decline to speculate or generalize in a response to public comments as to the breadth of scope of agency discretion in all of these actions as these are case-specific determinations.

*Comment 5:* Some commenters requested additional discussion or guidance on how the determination of discretion would proceed. Another commenter argued that if discretion continues to be a factor when determining the “environmental baseline” the Services should retain the authority to make the determination on their own.

*Response:* As we noted in the proposed rule, we will work closely with the Federal action agency to understand the scope of their discretion in a particular case to inform those aspects of a Federal agency activity or facility that are a part of the “environmental baseline.” See 88 FR 40753 at 40756, June 22, 203. Typically, Federal discretion over an action or facility is defined within all the laws and regulations under which the action will be taken. Where questions regarding discretion arise during a consultation, the supporting record of the consultation should include the documentation upon which the separation between discretionary Federal agency action and those non-discretionary activities or facilities was made. While the Services ultimately determine the content and scope of the analyses in our biological opinions, generally we would defer to the Federal action agency’s supported interpretation of their authorities for purposes of identifying what non-discretionary Federal facilities and activities are included in the “environmental baseline.” See *id.* As a general matter, the Services and an action agency can come to a specific understanding about the nature of an action agency’s discretion and how to treat both effects of past and future actions stemming from the action agency’s decisions.

*Comment 6:* One commenter objected to the definitions of “environmental baseline” and “effects of the action” because the commenter asserts that the effects of the action would include even those consequences of the Federal action that have occurred in the past and that the action agency and any proponent do not intend to change going forward and that the approach does not allow for adaptation due to climate change. The commenter also requested that the Services define the parameters of actions and effects for ongoing Federal project operations such that: (1) the proposed action should be the future discretionary actions related to the operation of the existing facilities in the existing environment; (2) the effects of the action should focus on the manner in which the current status of the species and existing condition of its habitat will be affected by the proposed future discretionary actions; and (3) the examination of effects of the discretionary proposed action does not include the baseline effects of or from the original construction of the facilities or the past operations and maintenance activities that have occurred.

*Response:* The Services decline to define the parameters of the “environmental baseline” and “effects of the action” as the commenter requests. The Services’ definitions of “effects of the action” and “environmental baseline” are crafted to distinguish between those impacts that are properly considered as the “environmental baseline” and those consequences of a proposed discretionary Federal action that would be considered the “effects of the action.” Further, the baseline includes the original construction of facilities and past operations and maintenance that have occurred. However, the proposed future discretionary actions are all of the discretionary actions that will occur—even those ongoing discretionary actions for which no changes are envisioned. As we noted in the proposed rule, “the Federal agency may propose to continue the operations of the dam’s flow regime with no changes from past practices, or with only minor changes. Regardless of their “ongoing” nature, all the consequences of the proposed discretionary operations of the structure are “effects of the action” (88 FR 40753 at 40756, June 22, 2023). In other words, those future consequences of discretionary operations are properly considered “effects of the action” even if those similar operations that occurred in the past are included in the “environmental baseline.” A full assessment of the

proposed Federal action will ultimately include the “effects of the action” added to the “environmental baseline” and any anticipated “cumulative effects.” Regarding the comment about consideration of climate change and the consideration of action effects and the “environmental baseline,” the Services note that climate change is considered as appropriate in all ESA section 7 consultations, including how past, present, and future conditions are impacted and the resulting “effects of the action” in context with those impacts.

*Comment 7:* One commenter requested information regarding future planned revisions to the “environmental baseline” definition.

*Response:* The Services note that the commenter may have misread the proposed rule. We do not anticipate further refining the definition of “environmental baseline.”

*Comment 8:* Several commenters raised the issue of existing structures and how they would be considered under these regulations. Commenters inquired whether the 2019 regulations and the regulations in this rule allow for all existing structures to be included in the “environmental baseline.” Some commenters requested that the Services explicitly include that direction in the regulations. In other instances, commenters were concerned that the definition allows for past harms to the species and habitat to be ignored.

*Response:* The Services note that neither the 2019 definition of “environmental baseline,” nor the minor revisions adopted in this final rule, change current or past practice and thus do not treat existing structures differently than under the prior regulations. The final sentence of the definition in the 2019 rule was intended to clarify current practice and how the discretionary and non-discretionary portions of a Federal activity or facility are considered in the baseline and “effects of the action.” The Services decline to state that all existing structures are included in the “environmental baseline”; existing structures may be included in the analysis of the “effects of the action” depending on the Federal action under consultation. Whether an existing structure is in the baseline is a case-specific determination that includes discretion, prior consultations, and temporal considerations.

Regarding concerns that the current definition allows for past impacts to be ignored by residing in the baseline, the Services restate that the 2019 baseline definition revision, which primarily made the definition a stand-alone

definition versus an embedded definition within the “effects of the action,” along with current regulations as amended, clarifies longstanding past and current practice in the treatment of those impacts that are a part of the “environmental baseline.” Importantly, by accounting for these past and present impacts in the baseline and then adding the effects of the proposed action to the “environmental baseline,” the Services do not “let Federal agencies off the hook,” as suggested by some commenters, but instead consider the consequences of a Federal action in the context of the past and present impacts to listed species and critical habitat in the action area.

The ESA section 7(a)(2) consultation process applies only when a Federal agency proposes to authorize, fund, or carry out a discretionary action that may affect a listed species or designated critical habitat. At that time, the effects of the proposed Federal action are analyzed and added to the impacts of the “environmental baseline,” which includes the past impacts raised by commenters. However, the section 7(a)(2) consultation process is not intended to “right the wrongs of the past” but to ensure that proposed Federal actions are “not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat.” As noted elsewhere, the health and viability of the species absent the proposed action is the starting point for the assessment and that condition informs the ability of the species to withstand further perturbations to its numbers, reproduction, or distribution. Thus, past impacts and the resulting condition of the listed species and critical habitat are crucial to the overall analysis in the section 7 consultation.

*Comment 9:* A few commenters requested deletion of the final sentence of the “environmental baseline” definition given the purported confusion it creates or perceived inappropriate narrowing or expansion of the scope of the definition. Others suggested different revisions from the Services’ proposed minor amendments to the language.

*Response:* As noted previously, the sentence was added to distinguish those cases where an existing Federal facility or activity must be considered as part of the “effects of the action” versus past argued interpretations or confusion that all existing facilities and activities were de facto in the baseline. By evaluating the effects of discretionary actions against the backdrop of the “environmental baseline” and

“cumulative effects” (future non-Federal activities that are reasonably certain to occur), the Services are able to assess whether the proposed action is “likely to jeopardize a listed species” or destroy or adversely modify critical habitat. This evaluation applies whether the proposed action is a novel action upon the landscape or a proposed action that includes another 10 years of the same types of consequences that have already led to species declines and habitat degradation.

The Services appreciate the suggested revisions to the final sentence of the “environmental baseline” definition, which some commenters offered in the event that their requests to delete the sentence were declined. However, the suggested revisions unintentionally resulted in the very concerns raised by the commenters, and in one case, would have inappropriately narrowed the scope of the “environmental baseline.” In that case, a commenter suggested not including in the “environmental baseline” past or completed Federal actions that have not undergone and completed section 7 consultation. The Services decline to accept this proposed revision, as it could have an unintended and significant negative effect on listed species and critical habitat. By removing from the “environmental baseline” the impacts of those past or completed Federal actions (some of which pre-date the ESA itself and have no discretionary Federal action to trigger consultation), the Services would be restricted to looking at an incomplete “environmental baseline,” and thus an incomplete jeopardy analysis.

*Comment 10:* The Services have revised the final sentence of the “environmental baseline” definition to replace the term “consequences” with “impacts.” We received comments both supporting and opposing this revision. While most understood the Services’ intent to distinguish between those two terms, further explanation of the revision and the terms was requested.

*Response:* The Services appreciate the support for this revision to the final sentence of the “environmental baseline” definition. The Services understand the concern about the initial confusion with use of the term “consequences” to refer to those effects of a Federal action that were caused by the Federal action. The Services proposed to change the word “consequences” to “impacts” in the final sentence of the “environmental baseline” definition to address this confusion. More specifically, the “environmental baseline” and the “effects of the action” are two distinct assessments. Both are ultimately

aggregated when the “effects of the action” are added to the “environmental baseline.” However, the Services sought to reduce confusion and overlap between the two definitions by retaining the use of “consequences” when discussing the effects of the proposed Federal action and using “impacts” when discussing the “environmental baseline,” even though we consider “consequences,” “impacts,” and “effects” to be equivalent terms.

*Comment 11:* One commenter requested that the “environmental baseline” not be limited to Federal projects, but instead include all projects that pre-date the ESA and all projects that have previously undergone ESA section 7 consultation. Further, the commenter requested clarification regarding the treatment of existing non-Federal projects (e.g., residential or commercial piers and floats and private bulkheads), including the concept of “useful life” for both Federal and non-Federal actions.

*Response:* The Services affirm that the current definition of “environmental baseline” is not limited to just Federal projects, but we decline to state that “all projects” are automatically included in the “environmental baseline.” The definition includes (in relevant part.) “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 process” (50 CFR 402.02). The “Federal projects” in this excerpt refers to all actions proposed to be authorized, funded, or carried out by a Federal agency that have undergone consultation, which includes Federal permits for private or commercial actions. Because the definition of “environmental baseline,” including the minor revisions in this rule, does not change current practice, existing structures would be treated the same as they are under both current and prior practice (i.e., before the 2019 regulation revisions). The Services decline to speak to the “useful life” of structures and how that issue would be treated nationwide as both are beyond the scope of this rule and would be addressed on a case-specific basis.

*Comment 12:* The Services received a wide range of comments on the proposed revision to the final sentence of “environmental baseline” to remove the word “ongoing,” and to insert the word “Federal” in two places. Some commenters opposed the revision

because they opposed application of the standard to only Federal activities or facilities. A few commenters requested that “ongoing” be retained because they assert that all activities or facilities that are “ongoing” should be included in the “environmental baseline.” Some commenters opposed the revision because the result would be either that more activities and facilities would be “hidden” in the “environmental baseline” and not in the “effects of the action” or fewer would be in the “environmental baseline” and included within the “effects of the action.”

*Response:* Both the 2019 regulations and the regulations in this rule clarify existing practice related to the “environmental baseline.” While we cannot comment on the fact or site-specific circumstances that some commenters raise, every ESA section 7(a)(2) consultation is unique and based on what has been proposed by a Federal agency to authorize, fund, or carry out and the nature of the Federal agency’s discretion and authority. Some of the examples raised may have included consultations that appropriately identified the Federal action and “effects of the action” based upon specific facts, applicable laws or other authorities, and prior consultation history. Thus, the conclusions in those examples do not necessarily apply in other instances, and it is incumbent on the Services and the Federal action agency to carefully describe and discuss what the Federal action may be in any particular case.

Several commenters were focused on the “ongoing” nature of an activity for determining whether that activity is evaluated in the environmental baseline. The Services proposed to remove the term “ongoing” and insert the term “Federal” because our experience implementing the 2019 rule echoes this same unintended focus on “ongoing” and not on the relevant portions of the sentence (*i.e.*, the scope of the Federal agency’s discretion). As explained in our proposed rulemaking, we found that removal of the term “ongoing” from the relevant portion of the regulatory definition of “environmental baseline” would, instead, shift the focus to the appropriate factor for determining whether an activity is part of the “environmental baseline”—whether or not the action agency has discretion to modify that activity. The Services decline to reinstate the term “ongoing” or remove the term “Federal” to avoid this improper focus in the future.

The Services also re-affirm that the pre-2019 definition, the 2019 definition, and the minor revisions in this rule

maintain the same standards for the Federal, State, private, and other human activities that are considered in the “environmental baseline” and the scope of the effects of proposed Federal actions that will be analyzed as “effects of the action.” Existing non-Federal structures and activities occurring within an “action area” are a part of the “environmental baseline,” unless a Federal agency proposes to authorize, fund, or carry out an action related to the structure or activity. At that time, the non-Federal structure or activity may be subject to an ESA consultation if the proposed Federal action “may affect” listed species or designated critical habitat. Nothing in the revised “environmental baseline” definition changes this requirement of the statute. Despite the assertion of some commenters, if a Federal agency is proposing to authorize, fund, or carry out a repair or modification to a non-Federal structure, the consultation must evaluate the effects of the action, including all consequences to listed species or critical habitat caused by the proposed action.

Although commenters cite an example from the 1998 Consultation Handbook, that example fails to account for the wide variety of Federal actions that may occur related to an existing Federal facility, and thus one approach does not fit all situations. The Services again decline to universally state that all “ongoing” facilities or activities are in the “environmental baseline.” First, the term “ongoing” itself creates confusion when a longstanding operation that is within the discretionary authority of a Federal agency is being proposed for renewal. The prior operations are within the “environmental baseline,” but the future operations, which are part of the discretionary proposed action, are properly considered as effects of the action. In addition, the Services and Federal action agencies should work closely to examine and understand the consequences of a proposed Federal action. In some instances, the nature of the action may indeed result in a similar finding as the turbine example cited from the 1998 Consultation Handbook (See 1998 ESA Consultation Handbook, Chapter 4, Interrelated and Interdependent Actions p. 4–27). In other instances, the nature of the action may encompass more of the operations or even structure of the facility itself. It is beyond the scope of this rule to provide examples that cover all such possibilities. Case-specific circumstances must be considered and should be done in collaboration between the Services and the Federal

action agency as discussed in the 2019 rule and the 2023 proposed rule.

The Services also clarify that the 2019 regulatory amendments, and the minor revisions in this final rule, do not remove existing structures and operations from the baseline as some commenters suggested. Similarly, the 2019 and 2023 revisions do not move most structures and operations to the proposed action if they are not either the proposed action itself or activities caused by the proposed action. The full definition of the “environmental baseline” includes those past impacts or Federal, State, and private actions in the action area. The final sentence is intended to address questions that have arisen regarding the consideration of the non-discretionary aspects of Federal facilities or activities. In general, Federal permitting and authorization of existing non-Federal facilities and activities is a discretionary action and requires section 7(a)(2) consultation if the proposed action may affect listed species or critical habitat. The past impacts of non-Federal facilities or non-Federal activities would be included in the “environmental baseline” whereas future consequences of the proposed Federal authorization action for that facility or activity would be the subject of the consultation and “effects of the action” analysis. In some instances, an effects analysis may need to assess the future and extended life of a structure, yet the past existence and impacts of the structure are included in the “environmental baseline.”

The 2019 and current revisions to the “environmental baseline” definition do not prescribe particular assumptions that would be applied to all repair, maintenance, or modification activities proposed for authorization, funding, or implementation by a Federal agency. The consequences of such activities, including whether a proposed action extends the life of a structure or operation, would be reviewed per the standards of the “effects of the action” definition and may differ significantly from case to case. Further, what was or was not considered in prior consultations, if any, may also vary. The definition also does not prescribe how the effects of structures past their useful life would be analyzed as part of the “environmental baseline.” If those structures are not the subject of the consultation and are causing impacts to the condition of listed species and critical habitat in the action area, they would be included in the baseline, but it is beyond the scope of this rule to further describe or prescribe how that analysis would be done.

*Comment 13:* The Services received several comments specific to consultations on projects in the Salish Sea of Washington, an existing programmatic consultation, a NMFS 2018 internal guidance document, and the Puget Sound Nearshore Habitat Conservation Calculator.

*Response:* Generally, these comments are outside the scope of this rulemaking action, and given that the regulations do not alter current practice, the regulations are not expected to alter the consultations and tools raised by the commenters. Regarding the National Marine Fisheries Service, West Coast Region, Internal Guidance on Assessing the Effects of Structures in Endangered Species Act Section 7 Consultation (April 18, 2018), NMFS withdrew this guidance after issuance of the January 2022, Department of the Army (Civil Works) and the National Oceanic and Atmospheric Administration Memorandum. The 2022 Memorandum, which is based on existing legal requirements, is national in scope and clarifies potential differences between the U.S. Army Corps of Engineers Civil Works projects and Regulatory Program projects based on agency discretion. The 2022 memorandum is fully consistent with the Services' section 7 regulations, including the definitions of "effects of the action" and "environmental baseline" as revised in this final rule. The memorandum does not impose any new or additional requirements on action agencies, applicants, or NMFS, and does not alter the existing requirements relative to section 7 consultations. Commenters are correct that future Federal actions related to Federal or non-Federal facilities may trigger an ESA consultation on the proposed Federal action, but it is beyond the scope of this rule to speculate whether that consultation would require mitigation under existing programmatic or RPM offsetting measures, costly or otherwise.

*Comment 14:* One commenter questioned whether the modification to the final sentence of the "environmental baseline" definition forecloses the consideration of what used to be considered "interrelated" and "interdependent" actions as "effects of the action."

*Response:* The Services appreciate the commenter's perspective on the possible interpretation of the revised sentence. If the activities of other Federal agencies would be caused by the proposed Federal action that is subject to consultation, then they would properly be considered as "effects of the action" and those Federal agencies should be action agencies in the section 7(a)(2)

consultation. Further, in situations where there are multiple Federal agencies taking actions (authorizing and funding, for example) on the same non-Federal action, an efficient consultation process could include all of these agencies (even if one is designated as the lead agency). Our interpretation and application of the "environmental baseline" and "effects of the action" definitions would not be a change in practice. In most cases, other Federal agency activities or facilities that are not caused by the proposed Federal action would be included within the "environmental baseline" (or subject to their own ESA consultation as needed). The Services decline to further revise the final sentence but note the commenter's concern for potential inclusion in further guidance.

*Comment 15:* One commenter was concerned that the addition of "Federal" in the final sentence of the "environmental baseline" definition restricted the "effects of the action" to only the consequences where the Federal action agency has the discretion to modify the activity or facility.

*Response:* Commenters misconstrue the effect of this revision. The Services are clarifying that the scope of application in the final sentence of "environmental baseline" is to Federal action agency (or agencies) activities and facilities. The inclusion of the word "Federal" does not alter the scope of the definition of "effects of the action." As discussed in the "effects of the action" section above, if an activity or consequence meets the two-part test for an effect, then it is considered an "effect of the action" regardless of whether that activity or consequence is within the control of the Federal agency.

*Comment 16:* One commenter was concerned that the revision to the final sentence of "environmental baseline" implies that facilities such as irrigation, diking, and drainage infrastructure are not within the "environmental baseline," and any future Federal permitting, even for maintenance and repair of existing infrastructure, would require costly mitigation.

*Response:* Existing Federal and non-Federal facilities and their operations are a part of the "environmental baseline," as described in the definition (in relevant part): "The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area" (50 CFR 402.02). Commenters are correct that future Federal actions related to Federal or non-Federal facilities may require consultation under section 7(a)(2) of the ESA on the proposed Federal action,

including a full analysis of the consequences of the Federal actions and activities caused by the Federal action. If consultation is required under section 7(a)(2) of the Act, it would be subject to the revisions of the implementing regulations at 50 CFR part 402 by this final rule, including revisions to the scope of RPMs. However, it is beyond the scope of this rule to speculate whether that consultation would require RPMs with offsetting measures that are costly or otherwise.

*Comment 17:* One commenter suggested a revision to the final sentence for "environmental baseline." The commenter recommended changing "The impacts to listed species or designated critical habitat from Federal agency activities or existing Federal agency facilities that are not within the agency's discretion to modify are part of the environmental baseline." to "The ongoing impacts to listed species or designated critical habitat from existing facilities or activities that are not caused by the proposed action or that are not within the Federal action agency's discretion to modify are part of the environmental baseline."

*Response:* The Services decline to accept the suggested edits to the third sentence of the "environmental baseline" definition. As we described in the proposed rule, the original sentence inadvertently caused confusion and a focus on the term "ongoing" instead of the Federal agency's discretion to modify their own facilities and activities. However, the commenter's suggested language would inadvertently include in the "environmental baseline" those facilities and activities that are caused by the proposed action if the Federal agency has no discretion to modify them. Further, the language suggested by the commenter could be read also to include all or portions of the very activities or facilities that are the subject of the proposed Federal action of funding or permitting. Both results would improperly limit the scope of the jeopardy or adverse modification analysis. The Services' definition clarifies that the past and present impacts of existing activities and facilities entirely unrelated to the Federal action in the action area would be in the "environmental baseline" whether they are Federal, State, private, or other human activities.

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

As proposed, we are revising the text at § 402.16(a) by deleting the words "or by the Service" to clarify that the responsibility and obligation to reinitiate consultation lies with the

Federal agency that retains discretionary involvement or control over its action. The text at § 402.16(a) now reads: Reinitiation of consultation is required and shall be requested by the Federal agency, where discretionary Federal involvement or control over the action has been retained or is authorized by law and . . . This revision will not prevent the Services from notifying the Federal agency if we conclude that circumstances appear to warrant a reinitiation of consultation.

*Comment 1:* Multiple commenters opposed the deletion of the phrase “or by the Service,” multiple other commenters supported the removal of “or by the Service,” and others noted that the Services are able to provide technical assistance to Federal action agencies when reinitiation is appropriate and requested that the regulations clarify the roles of the Services and action agencies in the “Reinitiation of Consultation” section (50 CFR 402.16(a)).

*Response:* We are removing the language “or by the Service” because the sentence as written creates confusion as to the scope of the authorities and roles of the Services relative to the Federal action agency. As explained in our 2019 rule and 2023 proposed rule, only the Federal action agency has the authority and responsibility to initiate or reinitiate consultation when warranted. The Services do not have the power to order other agencies to initiate or reinitiate consultation (*Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987); *Defs. of Wildlife v. Flowers*, 414 F.3d 1066, 1070 (9th Cir. 2005); 51 FR 19949, June 3, 1986); instead, we are able to recommend that the Federal action agency reinitiate consultation. Because the act of reinitiating consultation is solely the responsibility of the Federal action agency, removing “or by the Service” in this portion of the regulations clarifies that responsibility. As noted in the 2023 proposed rule, the Services may still notify the Federal agency if circumstances warrant a reinitiation of consultation. The Services conclude that no additional regulatory language is needed to address this ability.

*Comment 2:* Two commenters suggested that it would be appropriate to delete § 402.16(b): One believes that the regulations in that paragraph exceed the Services’ authority to choose when to reinitiate, and the other believes that identifying only these exceptions is arbitrary. Both stated that § 402.16(b) is “bad conservation policy.”

*Response:* Section 402.16(b) was added in the 2019 rule to address issues

arising under *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075 (9th Cir. 2015), and to comport with the 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. The 2018 statute exempted land management plans prepared pursuant to the Federal Land Policy Management Act (FLPMA), 43 U.S.C. 1701 *et seq.*, and the National Forest Management Act (NFMA), 16 U.S.C. 1600 *et seq.*, from reinitiation of consultation when a new species is listed or new critical habitat is designated provided that any authorized actions under the plan that may affect listed species or critical habitat are subject to their own site-specific consultations. We respectfully disagree that § 402.16(b) is “bad conservation policy” because the regulations in that paragraph allow the Services to focus our limited resources on those site-specific actions that may cause effects to listed species and designated critical habitat. As we noted in the 2019 rule, the Bureau of Land Management and the 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 critical habitat.

*Comment 3:* One commenter recommended that reinitiation of consultation because of a new species listing or critical habitat designation be limited to that species or critical habitat, unless one of the other conditions for triggering reinitiation has been met.

*Response:* Informal or formal consultations that are reinitiated on the basis that the action may affect newly listed species or newly designated critical habitat are, in fact, limited to evaluating the effects of the action on that species or critical habitat, unless another regulatory condition requiring reinitiation applies.

*Comment 4:* The Services received several comments urging us to make changes to the 2019 regulatory revision clarifying that the duty to reinitiate consultation does not apply to certain existing programmatic land management plans prepared pursuant to the FLPMA or the NFMA when a new species is listed or new critical habitat is designated that may be affected by the plan. Some of the comments maintained that the revision exceeded our authority under the Act and did not support the conservation purposes of the Act.

*Response:* The Services decline to make changes to the 2019 regulatory revision exempting certain land management plans from the requirement

to reinitiate consultation. The 2019 regulatory revision essentially incorporates the exemption (and the statutory conditions for applying that exemption) enacted by Congress in the 2018 Wildfire Suppression Funding and Forest Management Activities Act as part of the 2018 Omnibus Appropriations Act. Although the 2019 regulatory revision extended the exemption to land management plans issued under FLPMA, which were not addressed in the 2018 Omnibus Appropriations Act, the Services disagree that we lack authority to exempt these plans from the reinitiation requirement established by our regulations, not by statute. Because our regulations clarify that the exemption applies only if any action taken under a FLPMA or NFMA land management plan that may affect a newly listed species or newly designated critical habitat can be evaluated in a separate section 7 consultation, we find that this regulatory provision is consistent with ESA section 7 and the overarching conservation purposes of the ESA.

#### Section 402.17—Other Provisions

As proposed, in this final rule, we are removing § 402.17 in its entirety. This regulatory revision simplifies the regulations and eliminates the need for any reader to consult multiple sections of the regulations to discern what is considered an “effect of the action.” The previously articulated basis for § 402.17 will be addressed in an updated Consultation Handbook.

*Comment 1:* Several commenters disagreed with removal of § 402.17. They supported retaining the requirement that for an activity or consequence to be considered reasonably certain to occur it “must be based on clear and substantial information.” The commenters asserted that removing § 402.17 would lead to less clarity and more confusion.

*Response:* In the proposed rule, the Services articulated several reasons why removing § 402.17 is preferable, including unnecessary confusion and regulatory complexity and potential inconsistency with the statutory requirement to use “the best scientific and commercial data available.”. These reasons adequately explain why removal of § 402.17 is warranted. First, removing § 402.17 simplifies the structural complexity of the “effects of the action” definition. Currently, the term “effects of action” is defined in § 402.02, but that definition cross-references § 402.17. Removing § 402.17 would make the “effects of the action” definition self-contained within

§ 402.02 without requiring reference to a separate regulatory provision.

Second, section 7(a)(2) of the Act requires both the Federal action agencies and the Services to use “the best scientific and commercial data available.” This requirement applies to all aspects of section 7(a)(2), including determining what activities or consequences are considered reasonably certain to occur when analyzing the “effects of the action” and any “cumulative effects.” The requirement that such analysis must also be based on “clear and substantial information” creates an additional standard that could be read to limit what “best scientific and commercial data available” the Services may consider. Rather than focusing on the “best available” data, the “clear and substantial information” requirement would appear to circumscribe that data to only that which meets those heightened requirements.

Third, when read in combination with the preamble discussion in the 2019 final rule that emphasized a need for a “degree of certitude” in determining effects of the action that are reasonably certain to occur, § 402.17 could be construed as narrowing the scope of what constitutes the “best available scientific and commercial data.” In other words, in light of the “degree of certitude” discussion in the preamble of the 2019 rule, § 402.17’s “clear and substantial information” standard could be read to suggest that even if particular data were considered the best available, they potentially should not be relied upon if they lacked a heightened degree of certitude. The best available data will not always be free of uncertainty and often may be qualitative in nature, and, under the requirements of section 7(a)(2), are to be used by the Services in fulfilling their consultative role under the Act. For these reasons and also as discussed further below, we are removing 50 CFR 402.17 from the section 7 regulations.

*Comment 2:* Some commenters supported removing § 402.17, particularly the “clear and substantial information” standard, asserting that it conflicts with the statute, including the “best scientific and commercial data available” requirement, and inappropriately limits the effects analysis.

*Response:* The Services agree that removing § 402.17 is appropriate for the reasons discussed in this final rule.

*Comment 3:* Some commenters asserted the Services had not adequately explained how § 402.17 creates the potential for confusion.

*Response:* The Services’ response above and in the preamble of our proposed rule (88 FR 40753, June 22, 2023) explains why § 402.17 has the potential to create confusion. As explained, § 402.17 creates potentially competing requirements between its “clear and substantial information” standard and the statutory requirement to use the best scientific and commercial data available. Such competing mandates necessarily contribute to confusion on the part of agencies and applicants who are forced to reconcile them in carrying out their obligations under section 7(a)(2). Additionally, as discussed more fully below, the factors identified in § 402.17, particularly § 402.17(b), are circular in nature, making them potentially unhelpful or confusing as to when an activity is or is not reasonably certain to occur.

*Comment 4:* As mentioned above, several commenters asserted that the recent *MLA* decision, weighs against the Services removing § 402.17 from the section 7 regulations. They contend that the decision supports the following: the notion that effects must be “likely” to occur, the requirement of “clear and substantial information,” and limitations on engaging in speculation. They also asserted that the Services should look to the *MLA* decision for direction in any guidance documents the Services develop.

*Response:* For the reasons discussed above, the *MLA* decision does not undermine the Services’ decision to remove § 402.17. To the extent the *MLA* decision raises questions about how the Services resolve uncertainty, the Services reiterate that we will continue to follow accepted scientific methods and evaluate all lines of best available evidence to arrive at principled scientific determinations, including as to what consequences are or are not reasonably certain to occur. This is our longstanding approach to performing the section 7(a)(2) inquiry, and the *MLA* court did not reject this approach. The narrow adverse holding of *MLA* did not speak to the Services’ ability to remove § 402.17 from the section 7 regulations for all the reasons stated in the preamble. As with other court decisions, the Services will give appropriate consideration to *MLA* as applicable when developing future guidance.

*Comment 5:* Some commenters asserted that removing § 402.17 and the requirement of “clear and substantial information” is inconsistent with the Act and the best available science standard and would be problematic for consultations that involve assumptions

and projections in areas of scientific uncertainty.

*Response:* As stated above, removing § 402.17 and the “clear and substantial information” standard does not change the fundamental “reasonably certain to occur” test, which will continue to be applied by the Services in our analyses, including those involving scientific uncertainty. Moreover, the 2019 rule specifically stated that the regulatory changes made in that rule were clarifications and did not “lower or raise the bar on section 7 consultations,” and did not “alter what is required or analyzed during a consultation.” 84 FR 44976 at 45015, August 27, 2019. While that was the intent of the 2019 rule, for the reasons discussed above, there are concerns that the “clear and substantial information” standard itself can cause confusion and could be read to be in tension with the Act’s “best available scientific and commercial data” requirement. For all these reasons and as discussed throughout, removing § 402.17 is consistent with the Act.

*Comment 6:* Some commenters urged the Services to retain the factors set forth in § 402.17(a) and (b), rather than address them in a future guidance document.

*Response:* As stated in the proposed rule, the § 402.17(a) and (b) factors are a non-exclusive list of relevant considerations for determining whether an activity (§ 402.17(a)) or a consequence (§ 402.17(b)) is reasonably certain to occur. Because they are non-exclusive, general in nature, and read more as suggestions than regulatory requirements, they are more appropriately addressed in an update to the Services’ Consultation Handbook than in regulatory text. A discussion in the updated Consultation Handbook will lend itself to a more appropriate treatment of these factors and their relevance to identifying activities and consequences that are reasonably certain to occur. Moreover, factors similar to those in § 402.17(a) are already set forth in the Services’ original 1998 Consultation Handbook. See Services’ 1998 Consultation Handbook at 4–32. And while the § 402.17(b) factors (remoteness in time, remoteness in geographic location, and lengthy causal chain) were not specifically discussed in the 1998 Consultation Handbook, the factors themselves are tautological or circular in nature, *i.e.*, each falls back on the concept of what is not reasonably certain to occur to satisfy the factor (*e.g.*, a consequence is too remote in time if it is not reasonably certain to occur). At the same time, this portion of § 402.17 has the potential to

create the misperception that the presence of any of the factors alone indicate that a consequence is not reasonably certain to occur, but the fact that a consequence may be remote in time, for instance, is not dispositive of whether it is not reasonably certain to occur. These potential problems with § 402.17(b) raise the question of whether the factors, in fact, provide much in the way of effective guidance. A more detailed discussion in the updated Consultation Handbook can remedy this potential deficiency.

An additional reason to remove the identified factors is how each set of factors is introduced in the regulatory text. For both § 402.17(a) and (b), they are described as factors to evaluate whether “activities” or “consequences” are “caused by the proposed action,” which is governed by the two-part test of “but for” causation and reasonably certain to occur. Yet the factors themselves speak only to what may be considered reasonably certain and ignore what may be relevant for evaluating the “but for” prong of the test. While this potential shortcoming might be addressed through further regulatory revision, we believe removal of § 402.17 is the preferred solution for all the reasons stated.

*Comment 7:* Some commenters supported removing the factors set forth in § 402.17. They asserted that the factors like those found in § 402.17(b) are one-sided and lean only toward negating consideration of certain effects as opposed to also including factors that weigh in favor of considering effects. They assert that such an approach risks inappropriately limiting the effects analysis and species protections, which they consider at odds with the purpose of the ESA. They also question the utility of guidance that might repeat the identified deficiencies.

*Response:* The Services agree that the removal of § 402.17 is advisable for the reasons stated elsewhere in this final rule. We will take into consideration the commenter’s suggestion to potentially broaden the scope of any guidance on factors relevant to what activities or consequences are considered “reasonably certain to occur” in developing our updated Consultation Handbook.

*Comment 8:* Some commenters recommended adding the factors listed in § 402.17(b) as part of the definition of “effects of the action.”

*Response:* The Services respectfully decline this suggestion. For the reasons discussed above, we are removing the non-exclusive list of factors in § 402.17(b) from the regulations. Additionally, including these non-

exclusive, general factors in the definition of “effects of the action” would add unnecessary complexity to the definition.

*Comment 9:* Some commenters asserted that removing § 402.17 will lead to delays, increased costs for stakeholders, less efficient consultation processes, increased regulatory burdens, and inconsistent outcomes. They also assert that, without § 402.17, the Services would be free to presume consequences regardless of their likelihood or “degree of certitude.”

*Response:* We respectfully disagree with the commenters. For the various reasons discussed in this preamble, the Services conclude that removing § 402.17 overall will be more consistent with the Act, resolve potential confusion, and remove regulatory text that is better addressed in an updated Consultation Handbook. As referenced in the preamble of the 2019 rule, the 2019 regulatory changes to the section 7 regulations did not lower or raise the bar on section 7 consultations or alter the scope of analysis. The fundamental test of “reasonably certain to occur” remains, which places limitations on the scope of our causation analysis and avoids speculation. To the extent that some commenters are suggesting that one may read § 402.17 to heighten the requirements for determining what activities or consequences are reasonably certain to occur, such heightened requirements (as discussed above) may well be inconsistent with the statutory mandate to use the “best scientific and commercial data available.” In particular, the agencies have a fundamental duty to “insure that any action authorized, funded, or carried out by [an action] agency is not likely to jeopardize the continued existence of a list species.” 16 U.S.C. 1536(a)(2). Unduly limiting the scope of “the best scientific and commercial data available” that an agency may consider could undermine the agency’s duty to “insure”—i.e., “to make certain,” *Home Builders*, 551 U.S. at 667—that an action is not likely to jeopardize. Because the fundamental causation test remains, removal of the “clear and substantial information” standard will reduce, not increase, confusion. And, we expect the non-exclusive factors set forth in § 402.17 will be addressed and expanded upon in the updated Consultation Handbook. As a result, we do not anticipate removal of § 402.17 will lead to delays, increased costs or regulatory burdens for stakeholders, or less consistent outcomes.

*Comment 10:* Some commenters expressed a preference for the factors identified in § 402.17(a) and (b) to be

addressed in rulemaking rather than guidance. These commenters claimed that rulemaking affords the public with opportunities to comment and requires additional process to revise the regulatory text compared to non-binding guidance. One commenter also asserted the Services should not remove § 402.17 until after public comment on any updated draft Consultation Handbook. Commenters also expressed a concern about how long it will take the Services to issue any updated guidance.

*Response:* The Services intend to provide an opportunity for public comment on any updated Consultation Handbook, which we anticipate making available after this final rule. Therefore, the public will have an opportunity to review and comment on guidance developed based on the factors identified in § 402.17. While any future Consultation Handbook is not expected to be binding, the non-exclusive, general nature of the factors found in § 402.17 make their regulatory effect to be of, at most, limited import. As for timing, the reasons discussed above explain why it is appropriate to remove § 402.17 now, including the factors of § 402.17(a) and (b). The Services therefore respectfully decline the request to delay their removal.

*Comment 11:* One commenter opposed the 2019 rule’s expansion of the “reasonably certain to occur” standard beyond indirect effects and relatedly urged the Services not to adopt guidance perpetuating the expansion. If guidance is necessary on an analytical framework for how to reasonably predict future effects, the commenter urged the Services to adopt an approach similar to the Department of the Interior Solicitor’s M-Opinion (Department of the Interior, Office of the Solicitor, Opinion M–37021 (Jan. 16, 2009)) regarding the term “foreseeable future” in the context of species listing.

*Response:* For the reasons discussed in the 2019 rule and elsewhere in this rule, we choose to keep our two-part causation test including “reasonably certain to occur” (which collapsed the concepts of direct effects, indirect effects, and interrelated and interdependent activities). Because we are keeping our two-part test, we expect to provide guidance in an updated Consultation Handbook on appropriate considerations. We will consider all credible sources, including the 2009 Solicitor M-Opinion, as we prepare helpful guidance on what is “reasonably certain to occur.”

## Sections 402.02 and 402.14—Scope of RPMs

As proposed, we are revising the definition of “reasonable and prudent measures” to adhere more closely to the statute by replacing the term “believes” with “considers” and replacing the clause “impacts, *i.e.*, amount or extent, of incidental take” with “impact of the incidental take on the species.” The definition now reads: Reasonable and prudent measures refer to those actions the Director considers necessary or appropriate to minimize the impact of the incidental take on the species. We are also revising § 402.14(i)(1)(i) and (ii) to reflect the above change. To recognize that RPMs are not limited solely to reducing incidental take and may occur outside of the action area, we are also adding the following language to the end of § 402.14(i)(2): “and may include measures implemented inside or outside of the action area that avoid, reduce, or offset the impact of incidental take.” Further, we are adding to § 402.14 a new paragraph at (i)(3) to clarify that offsets within or outside the action area can be required to minimize the impact of incidental taking on the species: Priority should be given to developing reasonable and prudent measures and terms and conditions that avoid or reduce the amount or extent of incidental taking anticipated to occur within the action area. To the extent it is anticipated that the action will cause incidental take that cannot feasibly be avoided or reduced in the action area, the Services may set forth additional reasonable and prudent measures and terms and conditions that serve to minimize the impact of such taking on the species inside or outside the action area.

Comments were received on a variety of aspects of the above changes that expand the scope of RPMs but can be grouped under the following two general categories: authority and application.

### Authority

*Comment 1:* Some commenters contended that the Services’ proposal allowing for the use of offsets as RPMs conflicts with the plain language of ESA section 7(b)(4)(C)(ii). Specifically, these commenters asserted that ESA section 7(b)(4)(C)(ii) requires RPMs to “minimize” the impacts of incidental take rather than to compensate for or eliminate those impacts through offsetting measures.

*Response:* The Services disagree that the RPM regulatory revision conflicts with the plain language of ESA section 7(b)(4)(C)(ii), and, in fact, assert the

opposite. As discussed more fully below, the plain language of section 7(b)(4)(C)(ii) supports the use of offsets as RPMs. The relevant language plainly states that RPMs are to include measures that minimize the impacts of incidental take, not incidental take itself. Like measures that avoid or reduce incidental take, offsetting measures also minimize the impacts of incidental take on the species.

Regarding these commenters’ specific assertion that ESA section 7(b)(4)(C)(ii) used the term “minimize” rather than “eliminate” or “compensate for,” these commenters appear to view the use of “minimize” as reflecting congressional intent to preclude the Services from using offsets that minimize the impact of incidental taking to the degree that it is eliminated or compensated for. We note, however, that the ordinary meaning of “minimize” found in dictionary definitions does not refer to any specific quantum that may be reduced. Some definitions, in fact, indicate that the term means “[t]o reduce (esp. something unwanted or unpleasant) to the smallest possible amount, extent, or degree.” *Minimize*, Oxford English Dictionary, <https://www.oed.com/search/dictionary/?scope=Entries&q=minimize> (last accessed on October 26, 2023). The ESA, similarly, does not specify the extent to which impacts are to be minimized. Accordingly, offsets may minimize the impacts of incidental take on the species through measures that counterbalance the loss of individuals taken as a result of the action subject to consultation (*e.g.*, through restoration of habitat anticipated to result in the replacement of the individuals that were taken). Such offsetting measures must be proportional to the impact of incidental take that cannot be avoided or reduced, with the amount or extent of the taking (as described in the incidental take statement) representing the upper limit on the scale of any offsetting measures.

*Comment 2:* Many commenters maintained that Congress intended offsetting measures to address impacts from incidental take under ESA section 10, not ESA section 7. ESA section 10(a)(2)(B)(ii) authorizes the Services to issue incidental take permits if, among other things, applicants’ conservation plans “minimize and mitigate” impacts from incidental take. Because ESA section 7(b)(4)(C)(ii), unlike ESA section 10(a)(2)(B)(ii), specifies that RPMs are to “minimize” impacts of incidental take, these commenters asserted that Congress did not intend for RPMs to also “mitigate” impacts through offsetting measures. These commenters

further argued that the proposal allowing for the use of offsets under ESA section 7 impermissibly conflated “minimize” with “mitigate.”

*Response:* The Services disagree that the statutory criteria for issuing incidental take permits under ESA section 10 indicates that Congress intended to require mitigation from private applicants in the context of section 10, but specifically limited the use of such measures when addressing the *same* impacts in the context of section 7. The plain language of the ESA indicates that Congress considered the terms “minimize” and “mitigate” to have overlapping meaning when those terms were added as part of the 1982 ESA amendments.

In 1982, when Congress added the provisions for reasonable and prudent measures and ESA section 10 incidental take permits, Congress also revised the process by which a Federal agency, State, or applicant may seek an exemption from the requirement in ESA Section 7(a)(2) to ensure against the likelihood of jeopardy or adverse modification. *See* H.R. Rep. No. 97–56, at 28 (May 17, 1982) and S. Rep. No. 97–418, at 19 (May 26, 1982). Included in the amendments adopted by Congress were additional criteria to be considered by the Endangered Species Committee in granting an exemption. *See* 16 U.S.C. 1536(h)(1) (ESA section 7(h)(1)). Specifically, these amendments provided that the Endangered Species Committee can issue an exemption if, among other things, it “establishes such reasonable *mitigation* and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to *minimize* the adverse effects of the agency action.” 16 U.S.C. 1536(h)(1)(B) (ESA section 7(h)(1)) (emphasis added). Thus, in the same section of the Act as the RPMs provision, Congress specifically described mitigation measures that offset adverse effects as measures that *minimize* such effects. This provision provides strong support that Congress considered the terms “minimize” and “mitigate” to have overlapping meaning and that mitigative measures also encompass measures that minimize the impacts of incidental take and vice versa.

This reading of the 1982 ESA amendments is also supported by the ordinary meaning of the terms “minimize” and “mitigate,” which have a substantial degree of overlap. For example, as mentioned above, the Oxford English Dictionary defines the term “minimize” as “[t]o reduce (esp. something unwanted or unpleasant) to

the smallest possible amount, extent, or degree.” *Minimize*, Oxford English Dictionary, <https://www.oed.com/search/dictionary/?scope=Entries&q=minimize> (last assessed on October 26, 2023). Similarly, the term “mitigate” means “[t]o alleviate or give relief from (an illness or symptom, pain, suffering, sorrow, etc.); to lessen the trouble caused by (an evil or difficulty).” *Mitigate*, Oxford English Dictionary, [https://www.oed.com/dictionary/mitigate\\_v?tab=meaning\\_and\\_use#36427497](https://www.oed.com/dictionary/mitigate_v?tab=meaning_and_use#36427497) (last accessed on October 26, 2023).

The Services’ view of the proper interpretation of section 10 and section 7 is longstanding. For instance, the Services’ position that Congress did not intend for section 10 to establish more rigorous criteria for addressing the same impacts of incidental take than section 7 is found in the preamble to the 1989 rule that finalized revisions to the implementing regulations for addressing incidental take of marine mammals under the Marine Mammal Protection Act and the ESA. *See* Incidental Take of Endangered, Threatened, or Other Depleted Marine Mammals, Final Rule, 54 FR 40338 at 40346, September 29, 1989. In the response to public comments, the Services specifically rejected a comment suggesting that ESA section 10(a)(1)(B) provided for heightened requirements over section 7(a)(2). *See id.* The Services stated the two sections were intended to provide “the same level of protection for endangered and threatened species.” *Id.* According to the Services, these comments “misconstrued the purpose and effect of section 10 provisions relating to private actions” because they implied that “private activities are subject to stricter protection standards than activities with Federal involvement.” *Id.* As the Services further explained, there was “no indication in the ESA or its legislative history that Congress intended to set up substantially different or stricter protection standards for private activities by requiring a conservation plan.” *Id.*

For these reasons, section 10’s reference to measures that “minimize and mitigate” impacts from incidental take should not be read to limit the Services’ ability to specify offsets as RPMs to minimize the same impacts in the context of section 7.

*Comment 3:* We received some comments indicating the Services’ current approach that confines RPMs to measures that avoid and reduce incidental take levels proposed is consistent with the legislative history of the 1982 amendments to the ESA.

*Response:* The Services disagree with these comments. Review of the legislative history of the 1982 ESA amendments demonstrates that Congress considered, but rejected, competing bill language to amend the ESA that would have required reasonable and prudent measures under section 7 and habitat conservation plans under section 10 to minimize “incidental take,” rather than minimize the “impacts” from incidental take. S. 2309, 97th Cong. section 6(2) (May 26, 1982). As alluded to above, the 1982 ESA amendments changed section 7(b) to include provisions concerning incidental taking of listed species. The new provisions included in sections 7(b)(4) and 7(o)(2) were aimed at addressing a situation in which the Service’s biological opinion advises a Federal agency and an applicant (if any) that the proposed action, or the adoption of reasonable and prudent alternatives, will not violate ESA section 7(a)(2), but is still likely to result in taking individuals in violation of ESA section 9. *See* H.R. Conf. Rep. No. 97–835, (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2868 (Federal agencies receiving a favorable biological opinion still may be subjected to citizen suits or civil or criminal penalties for violating section 9 of the Act). To remedy this potential conflict, the 1982 ESA amendments contained an exemption to the ESA’s prohibition on “take” of listed species for takings that comply with any terms and conditions specified in the incidental take statement to carry out the reasonable and prudent measures required by the Service. *See* 16 U.S.C. 1536(b)(4) (ESA section 7(b)(4)) and 16 U.S.C. 1536(o)(2) (ESA section 7(o)(2)).

The two bills under consideration by Congress in reauthorizing and amending the ESA in 1982 were H.R. 6133 and S. 2309. Both bills were reported out of the respective committees to the full House and Senate with important differences in defining the scope of reasonable and prudent measures. *See* H.R. Rep. No. 97–567 (May 17, 1982) and S. Rep. No. 97–418 (May 26, 1982). As reported out of the House Committee on Merchant Marine and Fisheries, H.R. 6133 contained the language that Congress ultimately adopted in the ESA to describe the scope of reasonable and prudent measures intended to address the impact of the taking on the species: “those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such *impact*.” H.R. 6133, 97th Cong. section 3(2) (May 17, 1982) (emphasis added).

In contrast, S. 2309, as reported out of the Committee on the Environment and

Public Works, explicitly directed that these measures be confined to reducing incidental take. S. 2309, in relevant part, provided “those reasonable and prudent measures that must be followed to minimize *such takings of such species*.” S. 2309, 97th Cong. section 6(2) (May 26, 1982) (emphasis added). Unlike H.R. 6133, this Senate bill was explicitly directed at the incidental take itself, rather than the impacts on the species.

In resolving the differences between the House and Senate, the Conference Committee chose the House provisions requiring reasonable and prudent measures to minimize *the impact of the take* on the species, rather than the Senate amendments that restricted the measures to minimizing *the levels of take*. *See* H.R. Conf. Rep. No. 97–835, (1982), *reprinted in* 1982 U.S.C.C.A.N. 2860, 2868. On September 20, 1982, and September 30, 1982, the Senate and House, respectively, agreed to the Conference Report on H.R. 6133. *See* 128 Cong. Rec. S 11822–24 (September 20, 1982) and 128 Cong. Rec. H 8040–42 (September 30, 1982). H.R. 6133 was subsequently signed by the President and became law on October 13, 1982. *See* Endangered Species Act Amendments of 1982, Pub. L. 97–307, 96 Stat. 1411 (October 13, 1982).

Given that Congress considered and rejected specific language that would have restricted reasonable and prudent measures to activities aimed at reducing incidental take, the legislative history reveals a purposeful choice of Congress in favor of the authority of the Services to select measures that address “impacts to the species” from incidental take, rather than confining these measures to reducing incidental take levels *only*. Consistent with this legislative history, all incidental take statements will continue to retain the requirement to describe the amount or extent of incidental take for the purpose of establishing a clear and transparent measure for re-initiating consultation. Thus, impacts on the species, expressed in terms of the amount or extent of incidental take, may be minimized by measures that not only avoid or reduce incidental take levels, but that also offset any residual impacts that cannot be feasibly avoided or reduced. For example, if an incidental take statement quantified the amount or extent of take as the death of 10 individuals of the species and the take of those individuals cannot be avoided or reduced, the Services may minimize the loss of those individuals by specifying offsetting RPMs such as habitat improvements that would result in the anticipated addition of up to 10 individuals

(provided other regulatory requirements are satisfied).

*Comment 4:* Some commenters questioned why the Services were proposing to change their long-established position that section 7 requires minimization of the level of incidental take and that it is not appropriate to require mitigation for impacts from incidental take. Other commenters noted, however, that no rationale has previously been provided to support restricting RPMs to measures that solely avoid or reduce incidental take levels.

*Response:* We agree with the comments that observed the sparse rationale underpinning our prior approach in restricting RPMs to avoiding or reducing incidental take within the action area. With this rulemaking, however, the Services take this opportunity to explain why a change is justified.

In over 30 years of practice, we have found that there have been instances in which impacts from incidental take could not be feasibly minimized through measures that avoid or reduce impacts within the action area. In some of those instances, the impacts potentially could have been minimized through offsetting measures, providing a better conservation outcome for the species. Overall, our prior approach of focusing solely on reducing the amount or extent of incidental take within the action area has led to the continued deterioration of the condition of listed species and their habitats and has not sufficiently minimized the impact of incidental take. In recognition that our prior approach was unnecessarily restrictive in carrying out ESA Section 7(b)(4)(ii)'s direction to specify those measures that are "necessary or appropriate" to minimize the impacts of incidental take on the species, the Services are, therefore, revising the section 7 implementing regulations to expand the scope of RPMs to allow for the use of offsetting measures. These measures will further minimize the impacts of incidental take caused by the action that cannot be feasibly avoided or reduced. Under this regulatory change, the amount or extent of take described in the incidental take statement will be the maximum level of impacts to minimize.

As explained above, this regulatory revision is based upon a careful review of the Act's text, the purposes and policies of the ESA, and the 1982 ESA legislative history. Based upon that review, we find that this change more fully effectuates the intent of Congress and better serves the conservation goals of the ESA. See, e.g., 16 U.S.C. 1531(b)

(describing the conservation purposes of the Act). This regulatory revision will allow the Services to specify measures to offset residual impacts of incidental take that cannot otherwise be feasibly addressed through avoidance and reduction measures. In allowing for residual impacts to be addressed, this revision may reduce the accumulation of adverse impacts to the species that is often referred to as "death by a thousand cuts," which can undermine the Act's overarching goal of providing for the conservation of listed species.

As explained in the proposed rule, this approach for identifying RPMs will also allow the Services to adhere more effectively to the preferred sequence or hierarchy in the development of mitigation. That preferred sequence or hierarchy aims to avoid or reduce impacts to the species first, and then potentially minimize residual impact to the species through offsets.

*Comment 5:* Several commenters maintained that the proposal allowing for use of offsetting measures as RPMs violates the "minor change rule," which requires RPMs to specify only minor changes that do not alter the basic design, location, duration, or timing of the action. For example, some noted that offsets occurring outside of the action area would necessarily violate the "minor change rule."

*Response:* The Services disagree that the revision allowing for RPMs to consist of offsets violates the "minor change rule." Because, in most instances, they operate as additional measures to minimize impacts of incidental take that cannot be avoided, offsets (regardless of whether they occur within or outside of the action area) would not be expected to result in any modifications that would prevent the action subject to consultation from proceeding as essentially proposed. For example, a consultation on a residential development may include RPMs that offset the take of members of a listed species through contributions to a conservation bank established to repair habitat for that species outside of the action area. In this example, the offset would not result in any changes to the development, including its location, and the development would be able to proceed as planned. On the other hand, RPMs that include measures designed to avoid and reduce incidental take may result in direct changes to the subject action. In the example involving the residential development, for instance, RPMs that specify re-routing an access road to skirt the edge of wetland habitat for a listed species would result in less incidental take. Because the measure directly modifies the design of the

residential development, the Services would need to consider whether this change would be "minor," in compliance with the "minor change rule." If the measure would not alter the fundamental design of the development project, the action would go forward as essentially planned, and the change in design would not violate the "minor change rule."

Because we do not expect offsetting measures that occur outside of the action area to violate the "minor change rule," we are adopting clarifying language at 50 CFR 402.14(i)(2), which expressly recognizes that offsets may occur within or outside of the action area.

*Comment 6:* The Services received comments asserting that the proposal relating to RPMs should be carried out under section 7(a)(1), not section 7(a)(2), of the Act. Additionally, one commenter sought specific regulatory changes withholding issuance of an incidental take statement unless the relevant action agency has an ESA section 7(a)(1) conservation program in place for species covered under the subject incidental take statement.

*Response:* Although section 7(a)(1) and section 7(a)(2) have complementary roles in fulfilling the ESA's conservation goal (see ESA section 2(b)), section 7(a)(1) is not the preferred statutory mechanism to carry out the Services' revision relating to the use of offsets to minimize impacts of incidental take.

The regulatory changes we are adopting in this final rule relating to offsetting RPMs are based on statutory language arising from the process set forth in section 7 for the issuance of biological opinions and incidental take statements, especially section 7(b). Section 7(a)(1) provides separate authority not directly related to these changes. We, therefore, decline the commenters' request.

In addition, the ESA provides no authority for the Services to require Federal action agencies to have a conservation program under ESA section 7(a)(1) as a condition of an incidental take statement. See 16 U.S.C. 1536(b)(4) (setting forth the conditions for issuance of incidental take statements). Therefore, we decline to adopt the commenter's recommendation, as it conflicts with the plain language of section 7(b)(4) of the Act.

*Comment 7:* The Services received comments that claimed the proposal recognizing the use of offsets as RPMs could violate the Takings Clause of the Fifth Amendment of the United States Constitution. Some of these comments urged the Services to withdraw the

proposal based upon the same concerns raised in the 2018 notice announcing the withdrawal of the 2016 FWS Endangered Species Act Compensatory Mitigation Policy (83 FR 36469, July 30, 2018).

*Response:* In light of the statutory and regulatory requirements in place for issuing RPMs, the concerns that the use of offsets as RPMs may lead to unconstitutional takings are misplaced. The grounds for withdrawing the 2016 FWS Endangered Species Act Compensatory Mitigation Policy centered on the notion that offsite mitigation raises concerns of whether a sufficient “nexus” exists establishing that the relevant impact caused by the specific project proponent (rather than some other actor) is being addressed through the requested mitigation. *See* 83 FR 36469, July 30, 2018. In addition, according to the withdrawal notice, mitigation that adhered to the FWS’s policy goal of achieving a “net conservation benefit” (which is no longer in effect) could potentially run afoul of Supreme Court precedent requiring “rough proportionality” between the government’s requested mitigation and the impact being remedied.

Under this revision, however, any offsetting measures, regardless of whether they are applied within or outside of the action area, must be “necessary or appropriate” to minimize the impacts of incidental take on the species caused by the action that is subject to consultation. To be in accordance with this statutory requirement, all RPMs (including offsets) must have the requisite nexus between the impacts of incidental take caused by the action and measures that minimize those impacts. In other words, any offsetting measures that are “necessary or appropriate” would necessarily target the impacts of incidental take caused by the proposed Federal action, though such offsets may occur in locations that have been subject to impacts from other activities. As previously explained, the Services may minimize the impacts of incidental take by specifying offsetting measures (such as habitat improvements) that would result in the anticipated addition of individuals estimated in the incidental take statement to be taken by the proposed action.

With regard to the concern that mitigation (particularly mitigation with the goal of achieving a “net conservation gain”) will fail to be proportional to the harm, offsets specified as RPMs must be commensurate with the impact of the incidental taking caused by the action.

As explained in the preamble of the proposed rule (88 FR 40753, June 22, 2023), the scale of the impacts from incidental take will serve as the upper limit for the scale of the offset.

Importantly, the Services are not specifying RPMs with the goal of achieving “net conservation gain,” which was the planning goal referenced in the 2016 FWS Endangered Species Act Compensatory Mitigation Policy but is no longer the goal used by FWS.

*Comment 8:* Some commenters suggested that the proposal to consider offsetting measures to minimize the impacts of incidental take exceeds the agencies’ authority under the ESA. Quoting the decision in *Maine Lobstermen’s Association v. NMFS*, 70 F.4th 582, 596 (D.C. Cir. 2023), these commenters maintain that Congress intended the Services to have a more limited role under section 7 that involves providing expert assistance to the Federal action agency, rendering an opinion, and if the conclusion is no jeopardy, issuing the incidental take statement.

*Response:* The Services disagree that the revision recognizing that RPMs may include offsetting measures to minimize impacts of incidental take caused by the action subject to consultation represents a broad expansion of power in contravention of the ESA. The Act plainly authorizes the Services to issue measures that are necessary or appropriate to “minimize” the impacts of incidental take. As explained above, offsetting measures, like measures that avoid and reduce incidental take, also minimize the impacts of incidental take on the species.

Under many circumstances, measures that avoid and reduce incidental take will be all that is necessary or appropriate to minimize the impacts of incidental take. However, in those circumstances when impacts from incidental take cannot feasibly be minimized through measures that avoid and reduce incidental take, this revision would allow the Services to consider offsetting measures for inclusion as RPMs. This approach is fully consistent with the Services’ statutory authority, and the *MLA* case (which did not address the Services’ authority with regard to RPMs) does not stand for a contrary position. For additional discussion of the *MLA* case and the requirements of section 7, please see the discussion of the case at the beginning of the “Summary of Comments and Responses” section and the specific discussion relating to the removal of § 402.17 above.

For all the reasons mentioned above, we find that the revision recognizing the

use of offsets as RPMs is consistent with the plain language of the Act, a better reflection of Congressional intent, and better serves the conservation goals of the Act.

*Comment 9:* We received several comments questioning the relationship between the “minor change rule,” the Services’ mitigation policies, and costs of offsets as RPMs.

*Response:* Please see our response to comment 5 above regarding the relationship between the “minor change rule” and the use of offsets as RPMs. As a matter of practice, when offsetting measures are applicable to a specific formal consultation, the Services will identify potential offsetting measures and work with the action agency (and applicant, if applicable) when developing RPMs (including offsets) to determine, among things, the economic feasibility of these measures. Thus, any costs associated with the offsetting measures would be considered during development of the measure, in coordination with the Federal action agency (and applicant, if applicable), to ensure that the offsetting measure is reasonable and prudent. Measures that are cost-prohibitive in view of the nature of the action may not be considered reasonable and prudent.

With respect to the Services’ consideration of their respective mitigation policies, these policies will help inform the development of offsetting measures but will not change the statutory or regulatory requirements that apply to all RPMs. Offsetting measures will be proportionate to the impact of the taking. In addition, monitoring and reporting requirements, as part of the terms and conditions, will continue to be used to verify implementation and efficacy of RPMs, including offsets.

#### Application

*Comment 1:* Several commenters questioned how offsets would be developed and state that the relationship of habitat and critical habitat to offsetting measures is unclear. Some commenters asked whether the Services would use habitat types and ratios to determine appropriate offsets.

*Response:* RPMs that include offsetting measures will be species-specific and will depend upon the factual circumstances surrounding the consultation. Implementing the offsets specified by the Services would be the responsibility of the action agency or applicant. In specifying offsetting measures to minimize the impacts of incidental take, the Services may identify offsetting measures that are implemented through various types of

mechanisms such as conservation banks, in-lieu fee programs, and other kinds of mitigation devices established previously by project proponents. However, any offsetting measures included as RPMs would be designed to minimize the impact of the incidental take resulting from the proposed action to the subject species, and there are scientifically recognized techniques and methodologies that have been used to determine the appropriate level of offsets for species commensurate with the impact of the take to the species. Offsetting measures may consist of purchasing, preserving, or restoring the habitat of the applicable species impacted by incidental take caused by the action. However, offsets do not necessarily have to be applied within critical habitat designated for the relevant species. In addition, RPMs that include offsetting measures may be directed at improving the habitat of the relevant species, regardless of whether the proposed action resulted in impacts to that species' habitat. Offsets may be based on habitat ratios, equivalency modeling, or one-to one replacement, for example. Consistent with the ESA and its implementing regulations, offsets will be necessary or appropriate for minimizing the impacts of incidental take. In all cases, the impact of the take caused by the action, as expressed in the ITS as the amount or extent of incidental take, would provide an upper limit on the scale of any offsetting measures.

*Comment 2:* Several comments requested information on what specific mechanisms may be used to deliver offsets, and whether these mechanisms may be sponsored by third parties or undertaken by the project proponent.

*Response:* Some potential mechanisms that could be used to deliver offsets include conservation banks, in-lieu fee programs, and restoration programs. Other mechanisms that may be considered are described in the Services' mitigation policies. Mechanisms that may be considered by the Services could be sponsored by third parties or be the responsibility of the project-proponent. In addition to the Services' mitigation policies that provide guidance in the selection of mechanisms to deliver offsets, the FWS, pursuant to the 2021 National Defense Authorization Act (Pub. L. 116–283), is preparing a rule regarding conservation banking and other mechanisms that, if finalized, will address specific criteria and requirements of those mechanisms to receive FWS approval.

*Comment 3:* Several commenters expressed concern regarding the lack of existing mitigation banks or in-lieu fee

programs for various species or parts of the country, which they contend may result in a delay in completing consultation and implementing their project.

*Response:* The Services do not anticipate that the lack of available offsetting mechanisms would result in delays to completing consultations in a timely manner or within the statutory or regulatory time frames. The Services understand the current availability of third-party offset mechanisms (e.g., conservation banks and in lieu fee programs) varies greatly across the country and by species, and we will consider the availability of these mechanisms when identifying RPMs. If these mechanisms to deliver offsets are not available, the Services anticipate that such measures would generally not be identified as an RPM. However, more banks and in-lieu fee programs are being established each year as identified in the Regulatory In-lieu Fee and Bank Information Tracking System (U.S. Army Corps of Engineers, *RIBITS: Regulatory In-lieu Fee and Bank Information Tracking System*, last accessed November 8, 2023. <https://ribits.ops.usace.army.mil/ords/f?p=107:2:5966340072209>). Again, the availability of existing mechanisms is one important factor the Services will consider when determining whether measures are necessary or appropriate to minimize the impact of incidental take.

*Comment 4:* Some commenters recommended avoiding redundant, additional layers of regulation and multiple mitigation mandates.

*Response:* The Services disagree that the regulatory change to the scope of RPMs will create redundant regulation and additional mitigation mandates. On the contrary, this regulatory change is in alignment with our initiatives to develop efficiencies and holistic approaches to conserving federally listed species. This regulatory change was developed in consideration of existing regulatory frameworks (e.g., Clean Water Act Section 404(b)(1) Guidelines) used by permitting agencies with whom the Services have routinely worked in the conservation of listed species. Mitigation associated with other existing regulatory frameworks is often included in the proposed action by the action agency requesting consultation. The effect of these mitigation measures is considered in the jeopardy analysis and can also minimize the impacts of incidental take caused by the proposed action. When the proposed action includes mitigation measures, there may be no need to include additional offsets as RPMs. As part of the Services' initiatives aimed at

leveraging other conservation efforts and building consistency and efficiencies in planning and implementing resource offsets, this regulatory revision promotes conservation at a landscape scale to help achieve the conservation purposes of the ESA. In promoting these purposes, the revision would provide flexibility to the Services to specify measures to address impacts from incidental take that cannot be feasibly addressed through measures that avoid or reduce incidental take. As mentioned in the preamble of the proposed rule (88 FR 40753, June 22, 2023), impacts from incidental take that are not addressed can accumulate over time, potentially leading to more severe impacts on the species (sometimes referenced as "death by a thousand cuts"). In addition, to the extent that RPMs may not be feasible within the action area, this revision provides the flexibility to specify measures within locations outside of the action area that serve as important corridors for species survival, reproduction, or distribution, providing benefits to the species on a landscape scale.

*Comment 5:* A few commenters asked for clarification or a definition of the term "feasibly" proposed in the RPM regulatory revisions at 50 CFR 402.14(i)(3): To the extent it is anticipated that the action will cause incidental take that cannot feasibly be avoided or reduced in the action area, the Services may set forth additional reasonable and prudent measures and terms and conditions that serve to minimize the impact of such taking on the species inside or outside the action area.

These commenters requested the Services describe the circumstances under which the Services will determine that the impacts of the agency action "cannot feasibly" be "avoided or reduced" within the action area.

*Response:* The term "feasibly" should be understood to have the same ordinary meaning found in the dictionary definition of that term. For instance, "feasibly" is the adverb form of the term "feasible," which means "[o]f a design, project, etc.: [c]apable of being done, accomplished or carried out; possible, practicable". *Feasible*, Oxford English Dictionary, <https://www.oed.com/search/dictionary/?scope=Entries&q=feasible> (last accessed on November 5, 2023). We, therefore, do not find that a regulatory definition is needed. The Services may find measures that avoid or reduce incidental take cannot feasibly minimize the impacts of incidental take when such measures would violate the

“minor change rule.” Or, in some cases, the Services may determine that specifying measures that avoid or reduce incidental take within the action area as RPMs would not be feasible because the degraded condition of the area would require cost prohibitive measures that are not reasonable and prudent. Under these types of limited circumstances, the Services may consider minimizing the impacts from incidental take caused by the proposed action through offsetting measures that occur within or outside of the action area.

*Comment 6:* We received several comments related to the preferred order of RPMs and a request for clarification of the term “priority.” Many commenters supported a preferred order/hierarchy, while others wanted more flexibility.

*Response:* Under this regulatory change expanding the scope of RPMs, the Services will place a priority on measures that avoid or reduce incidental take over offsetting measures. In recognition of the Services’ preference to specify measures that prevent incidental take from occurring in the first instance, we will first consider measures that avoid or reduce incidental take in the action area. See 88 FR 40753, June 22, 2023. If impacts from incidental take cannot be feasibly minimized through measures that avoid or reduce incidental take, the Services will then consider offsetting measures to minimize the residual impacts of incidental take in the action area. After considering whether offsetting measures can feasibly be applied within the action area, the Services may then consider specifying offsets outside of the action area to minimize the impacts of incidental take caused by the action subject to consultation. In summary, the steps are as follows:

1. Avoid or reduce, within the action area, the impact of incidental taking on the species.
2. Offset, within the action area, the impact of incidental taking on the species.
3. Offset, outside the action area, the impact of incidental taking on the species.

*Comment 7:* One commenter stated that the determination of whether offsetting RPMs are or are not reasonably available in the action area may depend in part on whether the action area is broadly or narrowly defined and how well the site-specific effects of the proposed Federal action are identified and analyzed in the biological opinion. The commenter asked the Services to clarify how they will ensure that an action area is

properly drawn and keyed to the actual impacts of the agency action and that the effects of the action are properly analyzed at a site-specific level, to minimize the potential for arbitrary determinations that off-site mitigation is necessary.

*Response:* The Services do not define the action area broadly or narrowly for the purpose of ensuring that RPMs are available in the action area. In accordance with the regulatory definition of “action area,” the action area must be based upon the specific action subject to the consultation and must consist of “all areas to be affected directly or indirectly by the Federal action and are not merely the immediate area involved in the action.” 50 CFR 402.02. The Services did not propose any changes to the definition of “action area” or the process of defining it. Thus, the Services will continue to ensure that an action area is properly drawn and keyed to the actual impacts of the agency action and that the effects of the action are properly analyzed within the defined action area. Regarding application of offsetting measures, the Services clarify that offsetting measures could be included as RPMs inside and outside the action area. As previously explained in comment 6 above, the Services will follow a preferred sequence for developing RPMs that is set forth in § 402.14(i)(3) of the implementing regulations. Under this preferred order for specifying RPMs, we anticipate that offsetting measures outside of the action area will be specified under limited circumstances when, for instance, RPMs within the action area would violate the “minor change rule” or would not be economically or technologically feasible.

*Comment 8:* Several commenters requested additional detailed information on the specific timing for implementing offsetting measures to minimize the impacts of incidental take.

*Response:* Ideally, offsetting measures would be implemented in advance of the impact from the action occurring in order to reduce risk and uncertainty and reduce the temporal impacts from incidental take. However, the timing of implementation will be determined on a case-by-case basis and will depend upon various factors such as the availability of existing mechanisms to offset impacts from incidental take (e.g., conservation banks) and the best scientific and commercial data available.

*Comment 9:* Several commenters requested additional detailed information on the location of offsetting measures outside of the action area.

*Response:* As stated above, the specific location of offsetting measures will be determined on a case-by-case basis and will depend upon various factors such as the availability of existing mechanisms to offset impacts from incidental take and the best scientific and commercial data available.

*Comment 10:* Many commenters supported the application of RPMs outside the action area when such application would create efficiencies and be beneficial.

*Response:* The Services appreciate the commenters’ support, and we agree that the regulatory change allowing for the application of RPMs outside the action area will provide additional conservation benefits to affected species and create efficiencies in extending these benefits. For example, additional benefits would be provided to the affected species when measures that avoid or reduce incidental take could not feasibly be applied. The regulation can also create efficiencies by using established mechanisms to deliver offsets, such as specifying the purchase of an offsetting credit from a conservation bank already established and approved in connection with a habitat conservation plan (HCP).

*Comment 11:* One commenter expressed concern that allowing RPMs to go outside the action area may be in conflict with County, State, and Tribal mitigation programs that require offsets to be implemented locally.

*Response:* As stated previously, all RPMs must be reasonable and prudent and within the authority of the action agency to implement. If there are laws that apply to the proposed action that require all mitigative measures to be located within a specific geographic area (locally) and offsetting measures outside of that area would violate those legal restrictions, then the offsets would not be within the action agency’s (or applicant’s) authority to implement.

*Comment 12:* One commenter contends that offsetting measures should not be required for biological opinions that use surrogates to express the amount or extent of anticipated take because it is hard to determine if take even occurs since the “reasonable certainty” standard does not require a guarantee that take will occur.

*Response:* The Services decline to adopt the commenter’s suggestion to exclude the use of offsetting measures when a surrogate is used to express the amount or extent of the taking caused by the action. This suggestion conflicts with the ESA’s requirement to specify RPMs that are necessary or appropriate to minimize the impacts of incidental

take on the species. The implementing regulations governing the use of surrogates in estimating the amount or extent of incidental take is found at § 402.14(i)(1)(i). When using surrogates, the Services are required to ensure they establish a clear standard for determining when the level of anticipated take has been exceeded. Because many offsetting measures are likely to be habitat-based and the Services often use impacts to habitat as a surrogate for estimating the amount or extent of incidental take, the metrics used to identify a surrogate can be useful and appropriate for establishing offsetting measures as RPMs. For example, if a surrogate for take of a cryptic listed insect is identified by the number of host trees lost that the species uses for reproduction and survival, measures to conserve the amount of host trees lost due to the action could also serve as offsetting RPMs.

*Comment 13:* Some commenters stated that monitoring and reporting on the implementation of the offsetting measures is needed.

*Response:* As with all incidental take statements, monitoring and reporting are required parts of the terms and conditions to implement RPMs, pursuant to ESA section 7(b)(4)(iv) and its implementing regulations. This statutory and regulatory requirement would still apply to the terms and conditions to carry out offsetting measures, and this rulemaking does not make any changes to that requirement. Regardless of whether third-party mitigation arrangements or project proponent mitigation is used, these mechanisms for delivering offsets must satisfy any monitoring and reporting requirements contained in the terms and conditions of the incidental take statement.

*Comment 14:* Some commenters requested that specific actions be excluded from the Services' ability to impose additional RPMs that offset impacts. One example mentioned by commenters as warranting exclusion from imposition of additional RPMs involves consultations on habitat restoration projects that have net benefits to habitat functions or services.

*Response:* Identifying specific types of actions for exclusion in this rulemaking may be in conflict with the requirements of section 7 and cannot be predicted in advance. Thus, we decline to specify such actions. However, in practice, the Services have found that project proponents of these types of specific actions often voluntarily include measures that minimize the impacts of incidental take, potentially

eliminating the need for additional RPMs.

*Comment 15:* One commenter stated they "oppose perpetual offsets in situations where a species is not meeting recovery goals and there is not a clear or quantifiable link to pesticides as a stressor."

*Response:* We interpret that this commenter intended to oppose offsets that are perpetual in nature for species in decline and offsets that are not directly linked to the amount or extent of incidental take identified in the incidental take statement. However, it is important to note that RPMs are required to be "necessary or appropriate" to minimize the impacts of incidental take that is reasonably likely to occur from the proposed action. To be in accordance with these statutory and regulatory requirements, all RPMs (including offsets) must have the requisite nexus between the impacts of incidental take caused by the action and the measures that minimize those impacts. Thus, offsetting measures, as with all RPMs, would not address impacts caused by other activities that are not the subject of the consultation. RPMs, including offsets (if appropriate), whether perpetual or not, will be determined on a case-by-case basis.

*Comment 16:* Several commenters asked for sideboards that limit the extent of offsetting measures and how the Services will minimize uncertainty, prevent inconsistency, and ensure that offsetting RPMs are not arbitrary. Other commenters stated that offsets should achieve a "no net loss," or even a net gain, with no upper limit.

*Response:* As explained in the preamble of the proposed rule (88 FR 40753, June 22, 2023) and elsewhere in this final rulemaking, there are several statutory and regulatory standards that will govern the application of offsetting measures. First, only after fully considering measures that will avoid or reduce incidental take would the Services consider specifying measures that offset the residual impacts of incidental take that cannot feasibly be avoided. In most cases, measures that avoid or reduce incidental take within the action area will be preferred in minimizing the impacts of incidental take, consistent with the preferred sequence at 50 CFR 402.14(i)(3) and as further described in the response to comment number 6 above.

Second, the Services will coordinate as appropriate with the action agency and applicant, if any, on development of offsetting measures. As always, this coordination is essential to ensure that RPMs are within a Federal action agency's, and applicant's (if any),

authority or discretion to implement. All RPMs, including offsetting measures, must be reasonable and prudent; any RPMs, including those consisting of offsetting measures, that are not within a Federal action agency's, and applicant's (if any), authority or discretion to implement would not be reasonable and prudent. Measures that are cost-prohibitive may also not be reasonable and prudent to minimize the impacts of incidental take.

Third, the impact of the incidental take on the species caused by the action will provide the upper limit on the scale of any offsetting measures. Only offsetting measures that are necessary or appropriate to minimize the impacts of incidental take will be specified as RPMs. Thus, RPMs, including those consisting of offsetting measures, will be proportional to the impacts of incidental take caused by the action and not be required to provide a net benefit to the species.

Fourth, as with all RPMs, monitoring and reporting requirements will be required as part of the terms and conditions of the ITS.

Lastly, this revision to the scope of RPMs does not change the Services' long-standing practice of working with Federal action agencies and applicants in developing "conservation measures," as defined in the 1998 Consultation Handbook, that may be voluntarily incorporated as part of the "action" to minimize adverse effects. In fact, the Services have a long history of working with Federal action agencies and applicants to develop these voluntary measures, some of which include offsets, to produce strong conservation outcomes. The Services' expertise gained in developing offsetting measures that may be incorporated as part of the action will be used in the development of offsets included as RPMs.

*Comment 17:* We received comments questioning whether offsetting RPMs would be applied to consultations on listed plant species and critical habitat.

*Response:* As with all RPMs, RPMs that consist of offsets, are specified to minimize the impacts of incidental take of wildlife (not plants or critical habitat) caused by the action. Because incidental take statements are issued only for incidental take of wildlife, this regulatory revision allowing for offsetting measures as RPMs would not apply to plants or critical habitat.

*Comment 18:* Several commenters shared concerns regarding the costs of offsetting measures. Some stated the costs would be significant to the regulated community and some stated

the cost is unpredictable, but the range of potential costs is substantial.

*Response:* Offsetting measures, as with all RPMs, do have an associated cost. However, we anticipate offsetting measures will be used in limited circumstances. For example, most consultations are completed informally, and this regulation would apply only to formal consultations that require an ITS containing RPMs. Even among formal consultations that require an ITS containing RPMs, some of these consultations will be able to address impacts of incidental take through measures that avoid or reduce incidental take within the action area, and offsets would be considered only if measures that avoid or reduce incidental take cannot feasibly minimize the impacts of incidental take caused by the proposed action. Although we anticipate that offsetting measures will be used under limited circumstances when measures that avoid or reduce incidental take cannot feasibly be applied, it is not possible to know how many formal consultations will include offsetting measures as RPMs due to the tremendous variation in Federal actions subject to formal consultation, the specific impacts from these actions, and the affected species that may be analyzed.

Although we cannot predict the costs of the RPM proposal due to these variable factors associated with formal consultations, any costs would be constrained by the statutory and regulatory requirements that RPMs are “necessary or appropriate,” commensurate with the residual impacts of incidental take caused by the proposed action. In addition, as previously mentioned, the Services consider the economic feasibility of any RPMs.

#### All Other Aspects of the 2019 Rule

As stated earlier, the proposed rule also sought comment on all aspects of the 2019 rule. Although the vast majority of the comments received on all other aspects of the 2019 rule were non-substantive, we did receive substantive comments and other relevant comments warranting response on the topics of the definition of “destruction or adverse modification,” programmatic consultations, non-Federal representatives, § 402.13(c)(2) informal consultation timelines, § 402.14(h)(3) and (4) adoption of analysis, section 7(a)(1) (programs for the conservation of listed species), project modifications, the geographic scope of section 7(a)(2), and “small Federal handle.” Our responses to the

comments on these topics and others are provided below.

#### Destruction or Adverse Modification

*Comment 1:* Commenters request the removal of the phrase “as a whole” from the definition of destruction or adverse modification. These commenters assert that the phrase undermines conservation and recovery of species because it would allow more piecemeal, incremental losses of critical habitat over time that would add up cumulatively to significant losses or fragmentation (referred to by many comments as “death by a thousand cuts”). Furthermore, they contend the phrase “as a whole” limits the Services’ ability to analyze impacts and lacks scientific justification.

*Response:* As discussed in the 2019 rule (see 84 FR 44976 at 44983–44985, August 27, 2019), the Services again decline to remove the phrase “as a whole” from the definition of destruction or adverse modification. The definition of “destruction or adverse modification” is focused first on the critical habitat itself, and then considers how alteration of that habitat affects the “conservation” value of critical habitat. The phrase “as a whole” will not reduce or alter how the Services consider the effects of small changes to critical habitat. This approach is fully consistent with the nature of critical habitat and the duty to avoid destruction or adverse modification of critical habitat under the Act, as well as the scientific principles underlying those provisions.

Additionally, this approach does not limit our ability to analyze impacts to critical habitat using the best available scientific and commercial information. As discussed in the 2019 rule, consistent with longstanding practice and guidance, the Services must place impacts to critical habitat into the context of the entire designation to determine if the overall value of the critical habitat is likely to be appreciably reduced, but this consideration does not mean that the entirety of the designated critical habitat must be affected by the proposed action. This situation could occur where, for example, a smaller affected area of habitat is particularly important for 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.

Moreover, with regard to concerns of “death by a thousand cuts,” the regulations require the Services’ biological opinion to assess the status of the critical habitat (including threats and trends), the “environmental baseline” of the action area, and cumulative effects. The Services’ summary of the status of the affected species or critical habitat considers the historical and past impacts of activities across time and space for the entire listed entity and critical habitat designation. In this context, the effects of any particular action and “cumulative effects” are added to those impacts identified in the “environmental baseline.” This analytical process avoids situations where each individual action, when viewed in isolation, may cause only relatively minor adverse effects but, over time, accumulated effects of these actions would erode the conservation value of the critical habitat. In the 2019 rule, we clarified the text in § 402.14(g)(4) regarding status of the species and critical habitat to better articulate the analytical process used to determine whether an action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. The clarification helped to ensure the “incremental losses” described by the commenters are appropriately considered in our jeopardy and “destruction or adverse modification” determinations.

*Comment 2:* Some commenters asserted that inclusion of “as a whole” in the definition of destruction or adverse modification is inconsistent with case law.

*Response:* None of the cases cited favorably by commenters directly address the issue of the appropriate scale of the “destruction or adverse modification” analysis. And while commenters may disagree with the holding, the Ninth Circuit Court of Appeals has specifically endorsed the approach of analyzing the impacts to critical habitat at the scale of the entire designation. See *Butte Env’t Council v. U.S. Army Corps of Eng’rs*, 620 F.3d 936, 947–48 (9th Cir. 2010) (citing the Services’ 1998 Consultation Handbook at 4–34).

*Comment 3:* Some commenters asserted that inclusion of “as a whole” does not adequately afford protection to critical habitat of species that are wide-ranging and migratory.

*Response:* As discussed above, the Services’ approach to analyzing impacts to portions of a critical habitat provides a full assessment of individual actions by relying on the jeopardy and

destruction/adverse modification framework. That framework considers the overall status of the critical habitat, and in that context, adds the effects of any particular action and any “cumulative effects” to those impacts identified in the “environmental baseline.” Thus, under this analytical framework, incremental impacts from prior actions are not ignored, and the overall conservation value of critical habitat is appropriately preserved for the benefit of the listed species. This same framework applies to species with expansive critical habitat designations and ensures any impacts to particular areas are appropriately considered within the context of the respective critical habitat designation as a whole.

#### **Programmatic Consultation**

*Comment 1:* One commenter requested revision of the definition of “programmatic action” to clarify whether programmatic consultations are required, how programmatic consultations can be used, and the roles of multiple Federal agencies, and of non-Federal applicants.

*Response:* Given the nature of programmatic consultation and the significant flexibilities provided by section 7 of the ESA, additional details regarding the specifics and scope of programmatic consultation are better addressed through updates to the Consultation Handbook rather than additional regulatory text. The current definition of “programmatic consultation” is quite broad and covers a broad suite of actions that could constitute a program, plan, policy, or regulation providing a framework for future proposed actions. See 50 CFR 402.02. Although broad, the examples of actions included in the definition are not intended to identify every type of program or set of activities that may be consulted on programmatically. The programmatic consultation process offers great flexibility and can be strategically developed to address multiple listed species and multiple Federal agencies, including applicants as appropriate, for both informal and formal consultations. We encourage Federal agencies and applicants to reach out to the Services to discuss the potential ways to structure a consultation (such as the use of programmatic consultations) to streamline the consultation process.

#### **Non-Federal Representative**

*Comment 1:* One commenter suggested agencies allow the developer to be designated as a “non-federal representative” for purposes of consultation to prepare the biological

assessment and hold pre-application meetings. The commenter also suggested that NMFS help with communication and resolving fundamental questions.

*Response:* Regulations at 50 CFR 402.08 allow a Federal agency to designate a non-Federal representative for conducting informal consultation or preparing a biological assessment. The Services may provide technical assistance to the non-Federal representative, in coordination with the Federal action agency, to address questions regarding the consultation process, but the section 7(a)(2) consultation responsibility ultimately lies with the Federal action agency.

#### **Section 402.13(c)(2)—Informal Consultation Timelines**

*Comment 1:* Some commenters advocated for the removal of the 60-day timeline in § 402.13(c)(2). Those commenters stated that according to information included in the preamble to the 2018 draft revisions, only 3 percent of informal consultations take more than 3 months to complete, and therefore there is no rational justification to adopt a timeline to address this low number of informal consultations, nor is there reason to believe that this small number of informal consultations lasting longer than 3 months causes a problem for action agencies. The commenters ask the Services to focus on addressing the small number of lengthier informal consultations rather than imposing an across-the-board timeline.

*Response:* The Services are retaining the 60-day timeline for issuing a concurrence or non-concurrence for informal consultations. The Services’ intention with this timeline is to increase regulatory certainty and timeliness for Federal agencies and applicants. Based upon more than 3 years of implementing this provision, the Services find that the 60-day timeline is justified to promote the goals of increasing regulatory certainty and timeliness. As stated in the preamble and response to comments in the 2019 rule, the 60-day timeline begins only after receipt of information sufficient for the Services to determine whether to concur. See § 402.13(c)(2) (requiring information similar to the types of information needed to initiate formal consultation). The Services typically review all initiation request packages within 30 days. In addition, should more time be required for the Services’ determination, § 402.13(c)(2) provides for a 60-day extension upon mutual consent. We anticipate that this provision will continue to provide greater certainty for Federal agencies

and applicants, while ensuring that the Services have sufficient information and time to reach an informed decision. Finally, we have not experienced problems in practice with § 402.13(c)(2) under the 2019 rule; this provision’s assurances for regulatory certainty and timeliness outweigh any concerns with implementation.

#### **Section 402.14(h)—Adoption of Analysis**

*Comment 1:* Some commenters expressed concern that the 2023 proposed regulations make no change to the 2019 revisions at 50 CFR 402.14(h)(3)(i) allowing the Services to adopt, as part of their biological opinions, all or part of a Federal action agency’s consultation initiation package. These commenters claim that in doing so the Services abdicate their statutory consultation duty in violation of ESA section 7(b)(3)(A) (requiring the Services to issue an opinion to the action agency).

*Response:* The Services disagree that adoption of part or all of the information in an action agency’s initiation package, including biological analyses, violates the ESA. Furthermore, under the provision, the Services will not indiscriminately adopt analyses or documents from non-Service sources. Rather, the Services perform their statutory consultative function, adopting analyses provided in the initiation package only after we have conducted an independent evaluation to determine whether the analyses meet statutory and regulatory requirements, including the requirement to use the best scientific and commercial data available. As we expressed in our response to comments on the proposed rule to the 2019 rule, the intent of this provision is to avoid needless duplication of analyses and documents that already meet applicable statutory and regulatory standards. In some situations, the Services may supplement or revise these analyses or documents to merit inclusion in our letters of concurrence or biological opinions, but even in those situations, adopting useful existing information makes the consultation process more efficient and streamlined.

In the 2019 rule, we explained that it was already common practice for the Services to adopt portions of biological analyses and initiation packages in our biological opinions. The codification of that practice created a more collaborative process and incentive for Federal agencies to produce high-quality analyses and documents suitable for inclusion in biological opinions, which streamlines the timeframe for

completion of the consultation. The Services continue to exercise their independent judgment and biological expertise in reaching conclusions under the ESA.

*Comment 2:* Commenters representing the pesticide manufacturing and end user communities remained supportive of those provisions of § 402.14(h)(3) and (4) allowing for a collaborative process and the adoption of biological analyses provided by action agencies, explaining that adoption of such analyses produced by the Environmental Protection Agency (EPA) would further increase collaboration between the Services and Federal action agencies, consistent with the commenters' long-standing advocacy for greater coordination in this vein.

*Response:* We agree that § 402.14(h)(3) and (4) continue to add value by promoting increased collaboration and allowing for the adoption of biological analyses provided by a Federal agency, where appropriate and in line with the Services' scientific standards. The Services are maintaining these provisions, as they further expediency, collaboration, and the use of sound science.

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

*Comment 1:* Some commenters advocated for the removal of 50 CFR 402.14(l), which provides for the Services to enter into expedited consultation upon mutual agreement with a Federal agency. Commenters argued that the Services provided no evidence to support the claim in the 2019 rule that the new expedited process “will benefit species and habitats by promoting conservation and recovery through improved efficiencies in the section 7 consultation process,” or “will still allow for the appropriate level of review.” 84 FR 44976 at 45008, August 27, 2019. Commenters noted that the Services provided only one example of an action that could benefit from expedited consultation and included no qualifying criteria for such projects. The commenters express concern that a lack of guidelines on when to apply this provision will cause confusion and arbitrary application of the regulation.

*Response:* The Services' intention in retaining § 402.14(l) is to allow for an optional process that is intended to streamline the consultation process for those projects that have minimal adverse impact but still require a biological opinion and incidental take statement and for projects where the effects are either known or are predictable and unlikely to cause

jeopardy or destruction or adverse modification. As we explained in our response to comments in the 2019 rule, many of these projects historically have been completed under the routine formal consultation process and statutory timeframes, and this provision will expedite the timelines of the formal consultation process for Federal actions while still requiring the same information and analysis standards. While less time may be necessary to analyze projects that fit under the provision due to their primarily beneficial nature or their known and predictable effects, the Services must still apply all required analysis to the actions under consideration. We simply expect that given the nature of the actions, a streamlined process would allow for a better use of our limited resources, yet still be consistent with section 7 of the ESA.

The Services have not included specific qualifying criteria for expedited consultations because there is a range of different actions or classes of actions that may qualify. Acceptance into expedited consultation will require the exercise of independent judgment and discretion on the part of the Services for each such request. We also note, as we expressed in our response to comments on the 2019 rule, that a key element for successful implementation of this process is mutual agreement between the Services and Federal agency (and applicant when applicable). The mutual agreement will contain the specific parameters necessary to complete each step of the process, such as the completion of a biological opinion.

The Services strive to complete consultations within the established regulatory deadlines and continue to identify ways to improve efficiencies. Section 402.14(l) provides one such streamlining mechanism intended to improve efficiencies in the section 7(a)(2) consultation process for the Services, Federal agencies, and their applicants while ensuring full compliance with the responsibilities of section 7. One example of an expedited formal consultation process agreed to by the FWS and the USFS is the programmatic consultation for the Rangewide Conservation Activities Supporting Whitebark Pine Recovery Project (Project). The Project includes ongoing and future activities proposed by the USFS to support the conservation of federally threatened whitebark pine (*Pinus albicaulis*) across its range, specifically cone collection, scion collection, pollen collection, operational seedling production, genetic white pine blister rust screening, planting, insect prevention and control, selection and

care of mature trees with white pine blister rust resistance, protection of healthy and unsuppressed regenerating stands, clone banks, seed and breeding orchards, genetic evaluation plantations, development of seed production areas, surveys, and research, monitoring, and education. While these activities are intended to be beneficial to whitebark pine, some adverse effects are anticipated to occur because of the Project. This expedited consultation process reduced the consultation timeline allowing beneficial actions to move forward more quickly.

*Comment 2:* Commenters representing the pesticide manufacturing and end user communities remained supportive of those provisions of § 402.14(l) allowing for expedited consultation and encourage the Services to work with Federal agencies to streamline initiation packages by using templates and guidance. Commenters also requested the Services reconsider and re-promulgate 50 CFR part 402, subpart D, regarding pesticide consultations, following adverse litigation.

*Response:* The Services agree that the expedited consultation provisions of § 402.14(l) are a potentially valuable tool for creating efficiency in the consultation process, including efficiencies that could potentially be applied in pesticide consultations. We will continue to work with Federal action agencies and applicants to help them develop strong biological analyses that can allow for expedited consultation. We acknowledge the commenters' request for reconsideration of subpart D, which was not the subject of any regulatory changes in the 2019 rule and thus outside the scope of this rulemaking. Any such changes would require a separate rulemaking process, which would first require careful consideration and consultation with the EPA and others.

#### **Section 7(a)(1) of the ESA**

*Comment 1:* Some commenters requested that the Services develop and finalize implementing regulations for section 7(a)(1), which requires Federal agencies in consultation with the Services to utilize their authorities to establish programs for the conservation of listed species.

*Response:* At this time, because there are no implementing regulations for section 7(a)(1), the Services expect to include guidance on section 7(a)(1) in an updated Consultation Handbook and develop additional guidance as necessary. We recognize there are opportunities for Federal action agencies to proactively support species conservation, consistent with their

authorities, and we anticipate that providing additional guidance regarding section 7(a)(1) will help further those efforts.

### Project Modifications

*Comment 1:* One commenter raised issues related to project modifications that happen during a consultation, as well as once consultation has been completed and a biological opinion or letter of concurrence has been issued. The commenter requested that consultation continue even if a proposed action has been modified and that changes in the action could be reflected in future consultations as part of the “environmental baseline.” The commenter also requested that the Services indicate that no further consultation would be needed if an action was subsequently modified in such a way that does not increase the amount or extent of incidental take.

*Response:* The Services note that the commenter’s request relates to the existing regulations regarding reinitiation of consultation at § 402.16. As the commenter noted, criteria exist for the reinitiation of completed consultations with issued biological opinions or letters of concurrence: These include whether incidental take is exceeded; if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion or written concurrence; or if a new species is listed or critical habitat designated that may be affected by the identified action.

These criteria are independent of one another; thus, modification of the action may trigger reinitiation of an already completed consultation if the manner of effects changes, even when the extent of those effects is not greater. This determination is case-specific, and it is beyond the scope of this rule to state that only those cases where anticipated incidental take is exceeded would trigger reinitiation.

The commenters also provide an example of a consultation that was restarted due to modification of the proposed action as a result of “new” information. With regard to changes to the action or new information that arises during a pending consultation, the Services typically coordinate with the action agency and any applicant to determine the significance of any change or new information and the needed response. Although case specific, the responses range from minor

supplements to the existing initiation package to withdrawal and resubmittal of the entire package. This practice ensures the final concurrence letter or biological opinion is based on up-to-date information, including a correct description of the proposed action.

### Geographic Scope of Section 7(a)(2)

*Comment 1:* One commenter suggested the Services revise 50 CFR part 402 to restore the full geographic scope of the Services’ implementation of the ESA with respect to consultations under section 7 of the Act.

*Response:* This request is beyond the scope of the proposed rule and would require a new rulemaking process. The current geographic scope of the section 7 regulations as reflected in the definition of “action” is appropriate, and the Services do not anticipate revisiting this issue. See 50 CFR 402.02; 51 FR 19926 at 19930–31, June 3, 1986 (discussing geographic scope of section 7 of the ESA).

### Small Federal Handle

*Comment 1:* One commenter suggested that the Services promulgate regulations clarifying the scope of “small Federal handle” projects affording project proponents input into whether to become part of a consultation where the Federal agency has only limited authority over significant aspects of a larger project.

*Response:* The Services decline to adopt regulations clarifying the scope of “small federal handle” projects. As discussed in the 2019 rule, when the Services write an incidental take statement for a biological opinion under section 7(b)(4)(iv) of the Act, they can assign responsibility for specific terms and conditions of the incidental take statement to the Federal action agency, the applicant, or both, taking into account their respective roles, authorities, and responsibilities. The Services have worked with Federal action agencies in the past, and will continue to do so into the future, to ensure that a reasonable and prudent measure assigned to a Federal action agency does not exceed the scope of a Federal action agency’s authority.

### Other Comments

*Comment 1:* One commenter suggested changing the regulatory threshold for consulting on federally listed plant species to only situations where the project is likely to jeopardize the listed plant.

*Response:* The commenter misconstrues the consultation regulations, and no regulatory change is needed. The purpose of consultation is

for the Services to assist the Federal agency in meeting their obligation to ensure their action is not likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat. Consultation is the process by which the Services determine whether the action is likely to jeopardize the listed plant.

*Comment 2:* One commenter suggested revisions that would allow applicants to choose their method of ESA compliance through a programmatic HCP to take advantage of the streamlining opportunity it provides rather than being directed into programmatic consultations.

*Response:* The Services’ existing regulations and practice allow for this approach and, in many situations, an applicant’s compliance with ESA section 7(a)(2) requirements through an existing incidental take permit under an ESA section 10 HCP can be achieved. In these cases, Federal agencies can meet their separate section 7(a)(2) responsibilities using a simple expedited process. Thus, no regulatory changes are necessary.

*Comment 3:* One commenter suggested that the Services align ESA terms similar to terminology in the National Environmental Policy Act (NEPA), e.g., “mitigation,” and that we use consistent language in regulations and not switch between the terms “effects” and “impacts.”

*Response:* The Services decline to undertake the action recommended by this commenter. ESA section 7(a)(2) and its implementing regulations include specific terms of art that are not interchangeable with terms used in other statutory contexts such as NEPA. See above in the “environmental baseline” section for discussion of the Services’ use of the terms “effects” and “impacts.”

*Comment 4:* A couple of commenters stated the ESA Compensatory Mitigation Policy was issued without opportunity for public notice and comment.

*Response:* The FWS ESA Compensatory Mitigation Policy (Appendix 1, 501 FW 3 <https://www.fws.gov/policy-library/a1501fw3>) provides internal, non-binding guidance and does not establish legally binding rules. Because the policy is guidance rather than a rule, there are no requirements for public review and comment. Nonetheless, the FWS solicited public comment during three separate public comment periods related to the 2016 FWS mitigation policies. The initial public comment periods solicited input on the proposed revisions to the Mitigation Policy (81 FR 12380, March 8, 2016), and on the draft

ESA Compensatory Mitigation Policy (81 FR 61031, September 2, 2016). The FWS later requested additional public comment on the mitigation planning goal within both mitigation policies that had already been finalized (82 FR 51382, November 6, 2017). The documents, comments, and process related to prior revisions may be viewed within docket number FWS–HQ–ES–2015–0126 (mitigation) and docket number FWS–HQ–ES–2015–0165 (compensatory mitigation) on <https://www.regulations.gov>. The final ESA Compensatory Mitigation Policy is substantively similar to the 2016 policy and reflects input from those previous public-comment opportunities.

### Comments on Determinations

*Comment 1:* One commenter asserted the need to complete intra-service consultation pursuant to section 7 of the Act on the issuance of the final regulations.

*Response:* We have addressed this issue in our Required Determinations section of the preamble to this final rule.

*Comment 2:* Several commenters requested additional economic analyses pursuant to Executive Order (E.O.) 12866 and related E.O.s. Some commenters suggested that the Services characterize the rulemaking as a “significant regulatory action” and that we must include an economic analysis as specified in Office of Management and Budget (OMB) Circular A–4. Several commenters expressed concern with potential costs associated with the RPM revisions.

*Response:* Although OMB determined that the proposed revisions to 50 CFR part 402 were a significant regulatory action pursuant to E.O. 12866, OMB agreed with the Services’ assessment that the expected effects of the proposed rule did not fall within the scope of E.O. 12866 section 3(f)(1) and did not warrant an analysis as specified in OMB Circular A–4. We do not anticipate the revisions to result in any substantial change in our determinations as to whether proposed actions are likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. None of these changes are expected to result in delays to completing consultations in a timely manner or within the statutory or regulatory timeframes. And, although offsetting measures as RPMs can be associated with costs, those measures must be constrained by the statutory and regulatory requirements of RPMs, as we have noted in response to previous comments. It is worth noting that any economic analysis of the revisions to RPMs would be limited by substantial

uncertainty about how many formal consultations will include offsetting measures as RPMs due to the tremendous variation in Federal actions subject to formal consultation, the specific impacts from these actions, and the affected species that may be analyzed. Although we cannot predict the costs of the RPM proposal due to these variable factors associated with formal consultations, any costs would be constrained by the statutory and regulatory requirements of RPMs as described above and in the proposed rule. Thus, because consultations under section 7(a)(2) are so highly fact-specific, it is also not possible to specify future benefits or costs stemming from this rulemaking.

*Comment 3:* Several commenters believed the Services’ findings under the Regulatory Flexibility Act (RFA) and consideration of responsibilities under Executive Order (E.O.) 13132 (Federalism) and E.O. 13211 (Effects on the Energy Supply) were insufficient or incorrect. Commenters claimed that modifying existing consultation requirements will likely result in increased compliance costs and delays for projects involving small entities. The commenters also disagreed with our finding for E.O. 12630 (Takings) that the proposed rule would not have significant takings implications and that a takings implication assessment is not warranted. They urged us to conduct additional assessments before finalizing the rule.

*Response:* Regarding all required determinations for the rulemaking, all the revisions provide transparency and clarity to the consultation process under section 7(a)(2) of the Act and align the regulations with the plain language of the statute. As a result, we do not anticipate any substantial change in our determinations as to whether proposed actions are likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. Regarding the revisions to RPMs, most consultations under section 7(a)(2) will not be affected since most consultations are completed informally, and this change would apply only to formal consultations that require an ITS containing RPMs. Even among formal consultations that require an ITS containing RPMs, some of these consultations will be able to address impacts of incidental take through measures that avoid or reduce incidental take within the action area, and the change would not apply to those consultations.

Regarding the RFA and E.O. 13211, this final rule which contains revisions that provide transparency, clarity, and

more closely comport with the text of the ESA, will not have a significant economic impact on a substantial number of small entities or any other entities and is unlikely to cause any adverse effects on energy supply, distribution, or use (including a shortfall in supply, price increases, and increased use of foreign supplies). An analysis of small entity impacts is required when a rule directly affects small entities. However, Federal agencies are the only entities directly affected by this rule, and they are not considered to be small entities under SBA’s size standards. No other entities will be directly affected by this rulemaking action. While some commenters suggested that the rule may impact small entities indirectly as applicants to Federal actions subject to ESA section 7(a)(2), we are unaware of any significant economic effect on a substantial number of small entities. Although we received comments raising generalized concerns about alleged potential effects on small entities, none of these comments described direct, concrete economic effects on small entities, much less “significant” economic effects on a “substantial” number of small entities.

Regarding E.O. 13132, “Policies that have federalism implications,” that Executive Order includes federalism implications from regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. This rulemaking has no such federalism implications. Federal agencies are the only entities that are directly affected by this rule, as a Federal nexus is necessary for requiring consultation under section 7(a)(2) of the ESA. In addition, as stated for E.O. 13132 in the Required Determinations section of this preamble, this rule pertains only to improving and clarifying the interagency consultation processes under the ESA and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

Regarding E.O. 12630, as discussed in the proposed rule, this rulemaking will not directly affect private property, nor will it cause a physical or regulatory taking. It will not result in a physical taking because it will not effectively compel a property owner to suffer a physical invasion of property. Further,

the rulemaking will not result in a regulatory taking because it will not deny all economically beneficial or productive use of the land or aquatic resources. This rule will substantially advance a legitimate government interest (conservation and recovery of endangered species and threatened species) and will not present a barrier to all reasonable and expected beneficial use of private property.

#### Required Determinations

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

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

##### *Revisions to 50 CFR part 402.*

Specifically, the Services are revising the implementing regulations at: (1) § 402.02, definitions; (2) § 402.16, reinitiation of consultation; (3) § 402.17, other provisions; and (4) § 402.14(i)(1), formal consultation. The preamble to the proposed rule explains in detail why we anticipate that the regulatory changes we are proposing will improve the implementation of the Act (88 FR 40753, June 22, 2023).

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

related to the regulation revisions, as well as historical data supporting the metrics.

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

As with the 2019 regulations, the revisions in this rule, as described above, are intended to provide transparency and clarity and align more closely with the statute. As a result, we do not anticipate any substantial change in our determinations as to whether proposed actions are likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat.

Similarly, although the revisions to the regulatory provisions relating to RPMs in this final rule are amendments that were not considered in the 2019 rulemaking, this final rule will align the regulations with the plain language of the statute. These changes will not affect most consultations under section 7(a)(2) of the Act because most consultations are completed informally, and this regulation will apply only to formal consultations that require an ITS containing RPMs. Even among formal consultations that require an ITS containing RPMs, some of these consultations will be able to address impacts of incidental take through measures that avoid or reduce incidental take within the action area, and offsets would be considered only if measures that avoid or reduce incidental take cannot feasibly minimize the impacts of incidental take caused by the proposed action. As explained in the preamble language above, the use of offsetting measures in RPMs will not be required in every consultation. As with all RPMs, these offsetting measures must be commensurate with the scale of the impact, subject to the existing “minor change rule,” be reasonable and prudent, and be necessary or appropriate to minimize the impact of the incidental taking on the species.

Lastly, several different action agencies in various locations throughout the country readily include offsetting measures as part of their project descriptions. This practice of including offsets as part of the proposed action being evaluated in a consultation is not uncommon. The Services may find that offsets included in the proposed action

adequately minimize impacts of incidental take, thus obviating the need to specify additional offsets as RPMs. Examples of these types of consultations that incorporate offsetting measures into the proposed action include programmatic consultations, certain consultations regarding transportation projects, and activities authorized by the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act (33 U.S.C. 1344).

It is not possible to know how many formal consultations will include offsetting measures as RPMs due to the tremendous variation in Federal actions subject to formal consultation, the specific impacts from these actions, and the affected species that may be analyzed. Although we cannot predict the costs of the RPM regulation due to these variable factors associated with formal consultations, any costs would be constrained by the statutory and regulatory requirements that RPMs are “reasonable and prudent,” commensurate with the residual impacts of incidental take caused by the proposed action, and subject to the “minor change rule.”

Similarly, while we cannot quantify the benefits from this rule, some of the benefits include further minimization of the impacts of incidental take caused by the proposed action, which, in turn, further mitigates some of the environmental “costs” associated with that action. In allowing for residual impacts to be addressed, the rule may also reduce the accumulation of adverse impacts to the species that is often referred to as “death by a thousand cuts.” Sources of offsetting measures, such as conservation banks and in-lieu fee programs, have proven in other analogous contexts to be a cost-effective means of mitigating environmental impacts and may have the potential to enhance mitigative measures directed at the loss of endangered and threatened species when they are applied strategically. See, e.g., U.S. Fish and Wildlife Service Mitigation Policy and Endangered Species Act Compensatory Mitigation Policy, Appendix 1, 501 FW 3 (May 15, 2023) or NOAA Mitigation Policy for Trust Resources, NOA 216-123 (July 22, 2022).

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

State, local, territorial, or Tribal governments or communities.

#### *Regulatory Flexibility Act*

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions) directly affected by the rule. However, no regulatory flexibility analysis is required if the head of an agency, or that person's designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We certified at the proposed rule stage that this rule would not have a significant economic impact on a substantial number of small entities (88 FR 40761). We received no information that changes the factual basis of this certification.

This rulemaking revises and clarifies existing requirements for Federal agencies, including the Services, under section 7 of the ESA. Federal agencies are the only entities directly affected by this rule, and they are not considered to be small entities under SBA's size standards. No other entities would be directly affected by this rulemaking action. While some commenters suggested that the rule may impact small entities indirectly as applicants to Federal actions subject to ESA section 7(a)(2), we are unaware of any significant economic effect on a substantial number of small entities. Although we received comments raising generalized concerns about alleged potential effects on small entities, none of these comments described direct, concrete economic effects on small entities, much less "significant" economic effects on a "substantial" number of small entities.

This rulemaking applies to determining whether a Federal agency has ensured, 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 rulemaking will not result in any additional change in

our determination as to whether proposed actions are likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. This rulemaking serves to provide clarity to the standards with which we will evaluate agency actions pursuant to section 7 of the ESA.

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

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

#### *Takings (E.O. 12630)*

In accordance with E.O. 12630, this rule will not have significant takings implications. This rule will not directly affect private property, nor will it cause a physical or regulatory taking. It will not result in a physical taking because it will not effectively compel a property owner to suffer a physical invasion of property. Further, the rule will not result in a regulatory taking because it will not deny all economically beneficial or productive use of the land or aquatic resources, and it will substantially advance a legitimate government interest (conservation and recovery of endangered species and threatened species) and will not present a barrier to all reasonable and expected beneficial use of private property.

#### *Federalism (E.O. 13132)*

In accordance with E.O. 13132, we have considered whether this rule will have significant federalism effects and have determined that a federalism summary impact statement is not required. This rule pertains only to improving and clarifying the

interagency consultation processes under the ESA and will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

This rule does not unduly burden the judicial system and meets the applicable standards provided in sections 3(a) and 3(b)(2) of E.O. 12988. This rule revises the Service's regulations for protecting species pursuant to the Act.

#### *Government-to-Government Relationship With Tribes*

In accordance with E.O. 13175, "Consultation and Coordination with Indian Tribal Governments," and the Department of the Interior's manual at 512 DM 2, we have considered possible effects of this rule on federally recognized Indian Tribes and Alaska Native Corporations. We held three informational webinars for federally recognized Tribes in January 2023, before the June 22, 2023, proposed rule published, to provide a general overview of, and information on how to provide input on, a series of rulemakings related to implementation of the Act that the Services were developing, including the June 22, 2023, proposed rule to revise our regulations at 50 CFR part 402. In July 2023, we also held six informational webinars after the proposed rule published, to provide additional information to interested parties, including Tribes, regarding the proposed regulations. Over 500 attendees, including representatives from federally recognized Tribes and Alaska Native Corporations, participated in these sessions, and we addressed questions from the participants as part of the sessions. We received written comments from Tribal organizations; however, we did not receive any requests for coordination or government-to-government consultation from any federally recognized Tribes.

This rule is general in nature and does not directly affect any specific Tribal lands, treaty rights, or Tribal trust resources. Therefore, we conclude that this rule does not have Tribal implications under section 1(a) of E.O. 13175. Thus, formal government-to-government consultation is not required by E.O. 13175 and related DOI policies. This rule revises regulations for protecting endangered and threatened species pursuant to the Act. These regulations will not have substantial direct effects on one or more Indian Tribes, on the relationship between the

Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

We will continue to collaborate with Tribes and Alaska Native Corporations on issues related to federally listed species and their habitats and work with them as we implement the provisions of the Act. See Secretaries' Order 3206 ("American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act," June 5, 1997) and Secretaries' Order 3225 ("Endangered Species Act and Subsistence Uses in Alaska (Supplement to Secretarial Order 3206)," January 19, 2001).

#### *Paperwork Reduction Act*

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

#### *National Environmental Policy Act*

In the proposed rule we invited the public to comment on whether and how the regulation may have a significant impact on the human environment, including any effects identified as extraordinary circumstances at 43 CFR 46.25 or fall within one of the categorical exclusions for actions that have no individual or cumulative effect on the quality of the human environment. After considering the comments received, the Services analyzed this rule in accordance with the criteria of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality NEPA regulations (40 CFR parts 1500–1508), the Department of the Interior (DOI) NEPA regulations (43 CFR part 46), the DOI 516 Departmental Manual Chapters 1–4 and 8, and the National Oceanic and Atmospheric Administration (NOAA) Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities (NOAA Administrative Order (NAO) 216–6A and Companion Manual for NAO 216–6A. This analysis was undertaken in an abundance of caution only, as we maintain that one or more categorical exclusions apply to this rule. Documentation of our compliance under NEPA is available online at <https://www.regulations.gov> at Docket No. FWS–HQ–ES–2021–0104.

#### *Endangered Species Act*

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

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

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

#### **Authority**

We issue this final 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.

#### **Regulation Promulgation**

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

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

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

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

#### **Subpart A—General**

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

#### **§ 402.02 Definitions.**

\* \* \* \* \*

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

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

\* \* \* \* \*

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

\* \* \* \* \*

#### **Subpart B—Consultation Procedures**

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

#### **§ 402.14 Formal consultation.**

\* \* \* \* \*

(i) *Incidental take.* (1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine

mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

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

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

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

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

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

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

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

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

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

(6) Any taking that is subject to a statement as specified in paragraph (i)(1) of this section and that is in compliance with the terms and

conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

(7) For a framework programmatic action, an incidental take statement is not required at the programmatic level; any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate. For a mixed programmatic action, an incidental take statement is required at the programmatic level only for those program actions that are reasonably certain to cause take and are not subject to further section 7 consultation.

\* \* \* \* \*

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

**§ 402.16 Reinitiation of consultation.**

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

\* \* \* \* \*

**§ 402.17 [Removed]**

■ 5. Remove § 402.17.

**Shannon A. Estenoz,**  
*Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior.*

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

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