Billing Code

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–2025–0044, FXES11140900000–256–FF09E23000; Docket No. 251105-0167]

RIN 1018–BI75; 0648-BN79

Endangered and Threatened Wildlife and Plants; Interagency Cooperation Regulations

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

ACTION: Proposed rule; request for comment.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS; collectively, the "Services") propose to revise portions of our regulations for section 7 of the Endangered Species Act of 1973, as amended (ESA or Act). The proposed revisions to the interagency cooperation regulations confirm the Services' application of statutory requirements for interagency cooperation, while continuing to provide for the conservation of listed species.

DATES: Comments must be received by [**INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER***].

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

(1) *Electronically*: Go to the Federal eRulemaking Portal: https://www.regulations.gov. In the Search box, enter FWS–HQ–ES–2025–0044, which is the docket number for this rulemaking action. Then, click on the Search button. On the resulting page, in the panel on the

left side of the screen, under the Document Type heading, check the Proposed Rule box to locate this document. You may submit a comment by clicking on "Comment." Please ensure that you have found the correct rulemaking before submitting your comment. Comments must be submitted to https://www.regulations.gov before 11:59 p.m. (Eastern Time) on the date specified in **DATES**.

(2) *By hard copy*: Submit by U.S. mail to: Public Comments Processing, Attn: FWS–HQ–ES–2025–0044; U.S. Fish and Wildlife Service, MS: PRB/3W, 5275 Leesburg Pike, Falls Church, VA 22041–3803.

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

Availability of reference materials: References and in accordance with 5 U.S.C 553(b)(4) a summary of this proposed rule is available at https://www.regulations.gov at Docket No. FWS–HQ–ES–2025–0044.

FOR FURTHER INFORMATION CONTACT: Craig Aubrey, Chief, U.S. Fish and Wildlife Service, Ecological Services, Division of Environmental Review, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703–358–2442; or Tanya Dobrzynski, National Marine Fisheries Service, Office of Protected Resources, Endangered Species Act Interagency Cooperation Division, 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. Please see Docket No. FWS–HQ–ES–2025–0044 on https://www.regulations.gov for a document that summarizes this proposed rule.

SUPPLEMENTARY INFORMATION:

Background

The Secretaries of the Interior and Commerce (the "Secretaries") share responsibilities for implementing the Endangered Species Act, as amended (hereafter referred to as ESA or the Act; 16 U.S.C. 1531 et seq.), and authority to administer the Act has been delegated by the respective Secretaries to the Director of FWS and the Assistant Administrator for NMFS. Together, the Services have promulgated regulations that establish the procedures governing interagency cooperation under section 7 of the Act, which requires Federal agencies, in consultation with and with the assistance of the Secretaries of the Interior and Commerce, to insure that any action authorized, funded, or carried out by such agencies is not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. These joint regulations, which are codified in title 50 of the Code of Federal Regulations (CFR) at part 402 (50 CFR part 402), were revised in 2019 (84 FR 44976, August 27, 2019) and again in 2024 (89 FR 24268, April 5, 2024; hereafter, "the 2019 rule" and "the 2024 rule," respectively).

States and environmental organizations challenged the 2019 regulations in the Northern District of California, with other States and industry participants intervening to support the regulations (*Ctr. for Biological Diversity* v. *Haaland*, No. 19-cv-5206 (N.D. Cal.) (related to *California* v. *Haaland*, 19-cv-6013, and *ALDF* v. *Haaland*, No. 19-cv-6812)). The district court remanded the regulations to the Services, and the Services developed the 2024 regulations, affirming some parts of the 2019 rule and revising or rescinding others. The 2024 rule became effective on May 6, 2024.

Like the 2019 rule, portions of the 2024 rule were challenged in several court cases (*National Hydropower Ass'n* v. *U.S. Fish & Wildlife Service*, No. 1:24-cv-02285 (D.D.C.) (challenges to the 2024 revisions to 50 CFR 402.14(i)(1)–(3), allowing the incorporation of offsets into reasonable and prudent measures); *Ctr. for Biological Diversity* v. *Dept. of the Interior*, No. 4:24-cv-04651-JST (N.D. Cal.) (substantive and procedural challenges to both the

2019 and 2024 regulations); *Am. Farm Bureau Fed'n* v. *U.S. Fish & Wildlife Service*, No. 1:25-cv-00947 (D.D.C.) (challenges to the 2024 rule and request to reinstate the 2019 rule)).

Additionally, months after the 2024 rule went into effect, the Supreme Court issued *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024). This case overruled *Chevron, U.S.A.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984), which previously allowed courts to defer to "permissible" agency interpretations of ambiguous statutory language, even where another, more reasonable interpretation existed (*Id.* at 843–44 and n.11).

Further, several Executive Orders (E.O.s) were issued following the 2024 rule's promulgation and the *Loper Bright* decision that direct agencies to reconsider multiple aspects of the regulatory process. First, on January 20, 2025, President Donald Trump signed E.O. 14154, "Unleashing American Energy." Section 3(b) of that E.O. requires that agency heads begin implementing action plans to suspend, revise, or rescind all agency actions identified as unduly burdensome on the development of domestic energy sources. Second, on January 24, 2025, President Trump issued E.O. 14181, "Emergency Measures to Provide Water Resources in California and Improve Disaster Response in Certain Areas." Section 2(e) of that E.O. directed the Secretary of the Interior to "promptly review, revise, or rescind any regulations or procedures specific to implementation of section 1536 of title 16 United States Code, as needed and consistent with applicable law, to conform with the plain meaning of the statute." The 2024 rule includes regulations specific to the implementation of section 1536 of title 16 of the U.S. Code and is therefore directly implicated by this E.O. Third, on February 19, 2025, the Services were directed to review their regulations for consistency with statutory text through E.O. 14219, "Ensuring Lawful Governance and Implementing the President's 'Department of Government Efficiency' Deregulatory Initiative." The E.O. requires review of various classes of regulations, and section 2(a)(iii) specifically requires review of any "regulations that are based on anything other than the best reading of the underlying statutory authority or prohibition."

Secretary of the Interior Burgum also issued Secretary's Order (S.O.) 3418 to implement E.O. 14154. Section 4(b) of S.O. 3418 requires FWS to review the 2024 regulations and develop a plan to "suspend, revise, or rescind" the 2024 regulatory revisions, as appropriate.

In compliance with these directives, the Services immediately began coordinating to re-evaluate the 2024 rule. The agencies, as discussed further below, have since identified concerns with the 2024 regulations in light of the intervening *Loper Bright* Supreme Court decision and various E.O.s and S.O.s, including those noted above.

Consistent with these ongoing regulatory efforts and considerations, the Services in *National Hydropower Ass'n* v. *U.S. Fish & Wildlife Service*, No. 1:24-cv-02285 (D.D.C.), filed a motion on April 14, 2025, requesting a voluntary remand without vacatur of the 2024 rule to allow the Services to address the substantial and legitimate concerns that the Services have with the 2024 regulatory revisions that allowed for the incorporation of offsets into reasonable and prudent measures, as described in more detail below. Specifically, the Services noted concerns that certain aspects of the 2024 rule are not considered the "best reading" of the statute. The Services recognized that "offset" does not appear in the statutory text, nor is the term "mitigation" employed in the portion of the statute related to reasonable and prudent measures. *See* 16 U.S.C. 1536. The Services also wished to reevaluate whether the offset provisions, described in 50 CFR 402.02 and 402.14(i)(1)–(3), are consistent with the regulatory requirement not to impose anything more than "minor changes" to a proposed action through reasonable and prudent measures (*See* 50 CFR 402.14(i)(2)).

Thus, in accordance with the various E.O.s and S.O.s and in consideration of recent case law, the Services have reviewed the 2024 rule and evaluated the specific regulatory revisions promulgated through that process. The Services now consider that parts of the 2024 rule are likely inconsistent with the best reading of the ESA. The Services also find that parts of the 2024 rule are likely unnecessary or inadvisable for various reasons, including their lack of clarity for the regulated Federal agencies and applicants engaged in the consultation process.

Regarding the offset provisions specifically, and as noted above, NMFS and FWS recognize that the term "offset" is not used in the statutory text, nor is the term "mitigation" employed in the portion of the statute related to reasonable and prudent measures. *See* 16 U.S.C. 1536. Therefore, NMFS and FWS propose removing the 2024 rule's offset provisions, consistent with the best reading of the Act.

Based on our considerations described in this preamble, and taking into account *Loper Bright* and the E.O.s described above, the Services also propose to revise the regulations at 50 CFR part 402 by reinstating certain provisions that were promulgated in 2019, with proposed modifications to the definition of "environmental baseline" in § 402.02 and to provisions addressing the "reasonably certain to occur" standard in § 402.17. These proposed changes are further explained below. We are not, however, proposing to revise the 2024 revisions to § 402.16 (Reinitiation of consultation).

The regulations that the Services propose in this rule reaffirm the processes by which the Services will interpret and implement various statutory requirements set forth in section 7 of the Act, while continuing to provide for the conservation of listed species. This proposed rule is intended to provide the public with a transparent explanation of proposed revisions to the regulations in 50 CFR part 402 and the opportunity to comment on these proposed revisions.

Proposed Changes to 50 CFR Part 402 Resulting from our Review of the 2024 Rule

Following a review of the 2024 rule, we propose to revise the regulations at 50 CFR part 402 by replacing all provisions of the regulations promulgated in 2024 with those promulgated or otherwise in existence in 2019, with the exception of § 402.16 (Reinitiation of consultation). In addition, we propose to make additional clarifying edits to the definition of "environmental baseline" in § 402.02 and to provisions addressing the "reasonably certain to occur" standard in § 402.17. Each of the proposed revisions is described below. The specific changes to the regulations proposed herein are intended to be prospective standards only. If finalized, these regulations would apply to section 7(a)(2) consultations finalized after the effective date of the

final rule and would not apply retroactively to section 7(a)(2) consultations finalized prior to the effective date of the final rule. Nothing in these proposed revisions to the regulations is intended to require (at such time as the final rule becomes effective) that any previously completed section 7(a)(2) consultations be reevaluated to comply with any subsequent regulatory changes.

This proposed rule is one of four proposed rules publishing in today's *Federal Register* affecting the regulations for the ESA. Two of these proposed rules, including this one and one on listing species and designating critical habitat at 50 CFR part 424, are joint between the Services, and two proposed rules related to critical habitat exclusions and threatened species protections at 50 CFR part 17 are specific to FWS.

Section 402.02—Definitions

Definition of "Effects of the Action"

The revisions we are proposing to the definition of "effects of the action" at 50 CFR 402.02 are discussed below under **Proposed Reinstatement of Other Provisions**.

Definition of "Environmental Baseline"

In 2019, we removed the definition of "environmental baseline" from the definition of "effects of the action" and established it as its own stand-alone definition at 50 CFR 402.02. We also added additional detail to the definition. In the new first sentence, we described environmental baseline as the condition of the listed species or critical habitat in the action area without the consequences caused by the proposed action. In the new third sentence, we stated that the consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline. In 2024, we did not make any changes to the first sentence and adopted minor revisions to the third sentence to replace the term "consequences" with the word "impacts," removed the word "ongoing," and added the word "Federal" in two locations to emphasize the central question of the Federal agency's discretion over their own activities and facilities in determining what is properly categorized as part of the environmental baseline. As

we noted in the June 22, 2023, proposed rule, the Services consider "consequences," "impacts," and "effects" to be equivalent terms, and we modified the text to be consistent with the language in the previous sentences of the definition (88 FR 40753 at 40755). Because ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify belong in the environmental baseline and not the proposed action, we revised the text to consistently use the term "impacts" throughout the definition for items that belong in the environmental baseline, while retaining the use of the term "consequences" in the first sentence for effects that are caused by the proposed action and not included in the environmental baseline. Further, we were concerned that the use of the term "ongoing" distracted from the intended focus on Federal agency discretion. These revisions in no way altered the intended meaning or application of the third sentence of the definition of environmental baseline.

We are now proposing revisions to the first and third sentence of environmental baseline. For the first sentence, the Services are proposing clarifying revisions so the sentence would read: "Environmental baseline is evaluated at the time of the proposed action and refers to the current condition of the listed species or its designated critical habitat in the action area as would reasonably be expected to occur without the consequences to the listed species or designated critical habitat caused by the proposed action." Because defining the environmental baseline can be one of the most challenging aspects of section 7 consultation, the Services are taking this opportunity to provide more detail on the approach to its establishment. The proposed revisions reflect the Services' existing practice. As we noted in the 2019 final rule, environmental baseline should be used to compare the condition of the listed species and the designated critical habitat in the action area with and without the effects of the proposed action, and this comparison is the effects of the action. (84 FR at 44976). The additions of "is evaluated at the time of the proposed action," the term "current," and "as they would be reasonably expected to occur" emphasize that the agency looks to the best available scientific information at the time of the consultation to

inform its understanding of the condition of the listed species or its designated critical habitat, and to draw the necessary comparison described in the 2019 final rule.

For the third sentence, the Services are proposing to reinstate the 2019 definition of "environmental baseline" which describes "consequences" to listed species as part of "ongoing agency activities." As we noted in 2023 and reaffirm here, when we refer to an "agency," "action agency," or "Federal agency," it is in reference to the Federal agency that has proposed the action undergoing section 7 consultation. Consistent with § 402.03, the obligation of a Federal agency to consult on a Federal action pursuant to section 7 and the requirements of the part 402 regulations apply to all actions in which there is discretionary Federal involvement or control. Therefore, those components of Federal activities or Federal facilities in which there is no discretionary involvement or control of the Federal agency are not subject to the requirement to consult, and, as a result, the impacts of those nondiscretionary activities and facilities to listed species and critical habitat are not a consequence of a proposed discretionary Federal action (88 FR 40753 at 40755–40756, June 22, 2023). This is supported by the Supreme Court's conclusion in *National Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 667–71 (U.S. 2007) ("Home Builders"), where the Court held that it was reasonable for the Services to narrow the application of section 7 to a Federal agency's discretionary actions because "[t]he regulation's focus on 'discretionary' actions accords with the commonsense conclusion that, when an agency is required to do something by statute, it simply lacks the power to 'insure' that such action will not jeopardize endangered species." *Id.* Thus, the final sentence of the definition of "environmental baseline" is applicable only to Federal agency facilities and Federal activities that are not within the Federal agency's discretion to modify.

While the intent in 2024 was to further refine the 2019 definition of "environmental baseline," upon review, we believe the minor revisions in 2024 were unnecessary as they do not meaningfully clarify or change the definition, and that the prior version is already consistent with longstanding practice. Therefore, the Services find that reverting back to the third sentence

in the 2019 definition adheres to the plain meaning in the statute, follows longstanding practice, and does not change our understanding and application of the environmental baseline to the jeopardy and destruction or adverse modification analyses.

Definition of "Reasonable and Prudent Measures"

The revisions we are proposing to the definition of "reasonable and prudent measures" at 50 CFR 402.02 are discussed below under **Proposed Changes to Reasonable and Prudent Measures**.

Proposed Changes to Reasonable and Prudent Measures

Section 402.02, Definition of "Reasonable and Prudent Measures," and Section 402.14, Formal Consultation

In the 2024 rule, we made amendments to the regulatory provisions relating to the scope of reasonable and prudent measures (RPMs) in an incidental take statement (ITS) and the definition of RPMs to facilitate "offsetting" RPMs, i.e., measures intended to compensate for the impacts of incidental take on listed species.

Upon further review and in accordance with the E.O.s and S.O.s described above, we have determined that the 2024 regulation's use of the terms "offset" and "mitigation" is not sufficiently rooted in express statutory language in section 7 of the ESA. After reconsidering the statutory and regulatory text in view of *Loper Bright*, the Services propose to rescind all changes made in 2024 that created the option for offsetting RPMs. We therefore propose to revert to these provisions as they existed prior to 2024 in 50 CFR part 402, in particular in the regulatory text at § 402.14(i)(1)–(3) and in the definition of RPMs at § 402.02.

Proposed Reinstatement of Other Provisions

Section 402.17, Other Provisions, and Section 402.02, Definition of "Effects of the Action"

In the 2019 and 2024 rules, the Services explained that the regulatory revisions of § 402.17 were intended to provide additional clarity to the interagency consultation process and did not change the various standards and requirements of the statutory or regulatory framework.

The 2019 rulemaking, which added § 402.17, and the subsequent 2024 rulemaking, which removed § 402.17, both discussed the meaning and application of this provision and, in 2024, reasons for revoking the provision. Readers are directed to those *Federal Register* publications (84 FR 44976, August 27, 2019; 89 FR 24268, April 5, 2024) for a full explanation. Our reasons for removal in 2024 included (1) avoiding a need for reference to multiple sections of the regulations for a full definition of "effects of the action"; (2) a potential source of confusion and tension between the phrase "clear and substantial information" and the statutory requirement to use the best scientific and commercial information available; and (3) a stated intent to include the type of guidance encompassed within § 402.17 in a planned revision of the 1998 Consultation Handbook.

However, the Services are now proposing to reinstate § 402.17 to prevent confusion and provide more clarity in the regulatory text. Additionally, the Services are proposing to add a fourth factor to § 402.17(a) for consideration when evaluating whether activities are reasonably certain to occur. In § 402.17(b), the Services are proposing to add two additional factors to consider for determining that a consequence is not caused by the proposed action.

The term "reasonably certain to occur" is found in the regulatory definitions (§ 402.02) of "effects of the action" and "cumulative effects" and is also an important concept for identifying "activities that are caused by the proposed action" within "effects of the action." We established a separate provision (§ 402.17) in 2019 to provide a non-exclusive list of factors to consider when it is unclear if a consequence or activity is reasonably certain to occur. The proposed text addresses the basis upon which a conclusion of reasonably certain to occur may be reached and is intended to help practitioners avoid inclusion of consequences or activities whose occurrence would be considered remote, but also does not require that the consequence or activity be absolutely certain to occur. While the proposed reinstatement of § 402.17 will again require practitioners to reference two separate sections of the regulations in their consideration of either "effects of the action" or "cumulative effects," we now believe the previous concern regarding

reference to two separate sections was overstated. In particular, the proposed definition of "effects of the action" includes an express reference to § 402.17, making it clear to any reader that this section should be consulted in addition to the definition itself. Similarly, the entire 50 CFR part 402 regulations are intended to work in concert with one another to administer the express statutory language of the ESA. Federal agencies and applicants engaged in the consultation process cannot effectively apply any of the specific sections in isolation but must consult all relevant sections in order to appropriately engage in effective consultation. To the extent there are lingering questions of how one provision of the regulations may fit with another, the Services will continue working with other Federal agencies to minimize the risk of confusion.

When the Services removed § 402.17 in 2024, the supporting discussion in both the 2023 proposed rule and the 2024 final rule noted potential confusion and tension between the phrase "clear and substantial information" and the statutory requirement for the Services and all Federal agencies to use the "best scientific and commercial information available" (16 U.S.C. 1536 (a)(2)). Largely, this confusion and tension stemmed from the appearance that the phrase added a second and potentially higher standard for the information and supporting basis used to determine if a consequence or activity was "reasonably certain to occur."

Although we are proposing to reinstate § 402.17, it is important to note that there is no actual tension between the use of "best available scientific information" and an expectation that "clear and substantial information" assists in the determination of "reasonably certain to occur." The key sentence reads "[a] conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available." Thus, as an initial matter, the standard expressly recognizes, consistent with the Act, that we use the best scientific and commercial data available to determine whether a particular consequence is reasonably certain to occur or not. Similarly, the standard does not limit what information and data the Services will consider in making that determination. Given the definition of "effects of

the action" requires reasonable certainty that a consequence or activity will occur, relying on "clear and substantial" information is appropriate.

We additionally note as we did in 2019 that the inclusion of § 402.17 would neither raise nor lower the bar on application of the "effects of the action" test. We also reiterate that the proposed reinsertion of § 402.17 as revised is not intended to require a certain numerical amount of data; rather, it is simply to illustrate that the determination of a consequence or activity to be reasonably certain to occur must be rooted in the best scientific and commercial information available, and should not be based on speculation or conjecture. The proposed reinserted section also does not mean the nature of the information would have to support that a consequence or activity is guaranteed to occur. The Services 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 and activities are or are not reasonably certain to occur. When understood in this manner, it becomes evident there is not a tension in the key sentence guiding the application of the "reasonably certain to occur" standard.

The Services also noted in both the 2023 proposed rule and 2024 final rule (88 FR 40753, June 22, 2023, and 89 FR 24268, April 5, 2024, respectively) that portions of the § 402.17 text from the 2019 rulemaking were unnecessary in regulatory text because we intended to discuss those considerations and other examples, as appropriate, in a revised Consultation Handbook. The Services are still working on a revised Handbook, and absent a specific timeline for completing that work, we have determined that the set of factors originally included in § 402.17(a) and (b) in the 2019 rulemaking should also be reinstated and expanded upon to clarify the regulatory requirements for section 7 practitioners and to avoid confusion due to lack of guidance to Federal agencies and applicants engaged in the consultation process.

Section 402.17(a) includes a non-exclusive list of factors intended to guide determinations as to what activities (either for purposes of "effects of the action" or "cumulative effects") are reasonably certain to occur. The factors originally included in 2019 in § 402.17(a)

that we propose to reinsert focus on considerations such as past experience, existing plans, and remaining requirements related to a potential activity. These considerations are similar to those mentioned in the preamble to the 1986 final rule on interagency cooperation (51 FR 19926 at 19933, June 3, 1986) and in the Services' 1998 Consultation Handbook (Handbook at 4-32). To those three factors, we also propose to add a fourth factor in § 402.17(a)(4): "[t]he amount of State, tribal, territorial, or local administrative discretion remaining to be exercised." This factor is a relevant consideration because the less administrative discretion that remains relative to an activity, the more likely it is to be considered reasonably certain to occur and, correspondingly, greater remaining discretion suggests greater uncertainty. The factor operates in a manner similar to § 402.17(a)(3), which considers the remaining economic, administrative, and legal requirements related to an activity.

The text at § 402.17(b) similarly describes a non-exclusive list of factors to determine when a consequence may not be reasonably certain to occur for purposes of applying the "effects of the action" definition. The factors originally included in 2019 in § 402.17(b) that we propose to reinsert focus on whether a consequence is remote in time, geographically remote, or may only be reached through a lengthy causal chain. As we noted in 2019, these are relevant considerations that help determine whether a particular consequence may or may not be considered reasonably certain to occur and are consistent with our longstanding practices (84 FR at 44981).

To those three considerations, we are proposing to add two additional provisions that are also relevant in determining whether a consequence is reasonably certain to occur. Section 402.17(b)(4) focuses on whether "the agency has no ability to prevent the consequence due to its limited statutory authority." Like 402.17(b)(1)-(3), considering the extent of an action agency's authority applies normal principles of proximate causation and helps determine whether a consequence is appropriately attributable to the proposed action. In the 2019 final rule, we noted that our two-part causation test reflected in our definition of "effects of the action" (but-for

causation plus reasonably certain to occur) adopts analogous principles to those of proximate causation (84 FR at 44991). While we declined to adopt an express third element in our effects test for the "jurisdiction or control" of the action agency in 2019 (84 FR at 44991), *Seven County Infrastructure Coalition vs. Eagle County, Colorado* recently confirmed that "a mere 'but-for' causal relationship is insufficient to make an agency responsible for a particular effect." 221 L.Ed.2d.820, 841 (2025) (*citing Department of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004)). The principles of proximate causation articulated in *Seven County* are trans-substantive and make clear that an agency's action cannot be considered a cause of an environmental effect when the agency has no authority to prevent the effect. As such, it is appropriate to consider the statutory authority of an action agency. Additionally, we are proposing to add § 402.17(b)(5) that examines "[i]f the consequence would occur regardless of whether the proposed action goes forward." If a consequence will happen irrespective of the proposed action, then it cannot be caused by the proposed action, i.e., it would not be a reasonably certain result of the proposed action. For this reason, we believe it is a useful addition to the non-exclusive list of considerations that action agencies and the Services should examine in determining what consequences of the proposed action are reasonably certain to occur.

One final proposed change to note is that in 2024, the Services removed § 402.17 from the regulations and revised the definition of "effects of the action" at 50 CFR 402.02 to remove the parenthetical reference to that section. Additionally, to retain a complete "effects of the action" definition, the Services moved the phrase "but that are not part of the action" from § 402.17 to the "effects of the action" definition in § 402.02.

Therefore, in coordination with our proposed reinstatement of § 402.17, the Services propose to remove "but that are not part of the action" from the "effects of the action" definition in § 402.02 and add the parenthetical reference to § 402.17 back to the end of that definition. The phrase "but that are not part of the action" is in proposed § 402.17. The proposed definition

for "effects of the action" would therefore reinstate the 2019 version~~, with additions~~, as set forth below under **Proposed Regulation Promulgation**.

Overall, as provided in our explanation in the 2019 final rule and as discussed in more detail above, the reinsertion and revision of § 402.17 provides helpful guidance consistent with the plain meaning of the statute and agency practice. This proposed change does not revise the scope of the "effects of the action" nor change the application of the "but for" and "reasonably certain to occur" causation test to determine consequences or activities caused by the proposed action.

Request for Comments

We seek public comments from all interested parties on the specific revisions we are now proposing to 50 CFR part 402, as well as the regulatory revisions we made in the 2019 and 2024 rules, and any of our analyses or conclusions discussed under **Required Determinations**, below. All relevant information will be considered prior to making a final determination regarding these regulations.

Based on comments received and on our experience in administering the Act, the final rule may include revisions to any provisions in part 402 that are a logical outgrowth of this proposed rule, consistent with the Administrative Procedure Act (5 U.S.C. subchapter II).

In proposing the above revisions, we also are considering whether there are legitimate reliance interests (e.g., commercial, economic, environmental, or aesthetic interests) on the regulations under reexamination. *Dep't of Homeland Sec.* v. *Regents of the Univ. of California*, 591 U.S. 1, 30 (2020). We therefore solicit public comment on reliance interests.

You may submit your comments concerning this proposed rule by one of the methods listed in **ADDRESSES**. Comments sent by any other method, to any other address or individual, may not be considered. Comments must be submitted to https://www.regulations.gov before 11:59 p.m. (eastern time) on the date specified in **DATES**. We will not consider hand-delivered or mailed comments that we do not receive by the date specified in **DATES**.

Comments and materials we receive will be posted and available for public inspection on https://www.regulations.gov. This generally means that we will post any personal information you provide us. If you provide personal identifying information in your comment, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so.

Required Determinations

Regulatory Planning and Review—E.O.s 12866 and 13563

E.O. 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this proposed rule is significant and has reviewed it.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. E.O. 13653 directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this proposed rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 et seq.), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; title II of Pub. L. 104–121, March 29, 1996), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). However, no regulatory

flexibility analysis is required if the head of an agency, or 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 RFA to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

We certify that, if adopted as proposed, this proposed rule would not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

This proposed rule, if made final, would be applied in determining whether a Federal agency has insured, in consultation with the Services, that any action it would authorize, fund, or carry out is not likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. The proposed rule would serve to confirm the Services' longstanding application of statutory requirements for interagency cooperation pursuant to section 7 of the ESA. Therefore, we certify that, if adopted as proposed, this rule would not have a significant economic effect on a substantial number of small entities.

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

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

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

(b) This proposed rule would not produce a Federal mandate on State, local, or Tribal governments or the private sector of $100 million or greater in any year; that is, this proposed

rule is not a "significant regulatory action"' under the Unfunded Mandates Reform Act. This proposed rule would impose no obligations on State, local, or Tribal governments.

Takings—E.O. 12630

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

Federalism—E.O. 13132

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

Civil Justice Reform—E.O. 12988

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

Government-to-Government Relationship with Tribes

In accordance with E.O. 13175 ("Consultation and Coordination with Indian Tribal Governments"), the Department of the Interior's manual at 512 DM 2, the Department of

Commerce (DOC) "Tribal Consultation and Coordination Policy" (May 21, 2013), DOC Departmental Administrative Order (DAO) 218–8, and National Oceanic and Atmospheric Administration (NOAA) Administrative Order (NAO) 218–8 (April 2012), we considered possible effects of this proposed rule on federally recognized Tribes. This proposed rule is general in nature and does not directly affect any specific Tribal lands, treaty rights, or Tribal trust resources. Therefore, we preliminarily conclude that this proposed rule does not have Tribal implications under section 1(a) of E.O. 13175. Thus, formal government-to-government consultation is not required by E.O. 13175 and related policies of the Departments of Commerce and the Interior. We will continue to collaborate with Tribes on issues related to federally listed species and their habitats. See Joint Secretary's Order 3206 ("American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act," June 5, 1997).

Paperwork Reduction Act (44 U.S.C. 3501 et seq.)

This proposed 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 (42 U.S.C. 4321 et seq.)

We are analyzing this proposed rule in accordance with the criteria of the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.), the Department of the Interior regulations on Implementation of National Environmental Policy Act (43 CFR part 46.), the Department of the Interior Manual (516 DM 1), the NOAA Administrative Order (NAO) 216–6A, and the NOAA Companion Manual, "Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities", which became effective June 30, 2025.

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

Energy Supply, Distribution or Use—E.O. 13211

E.O. 13211(Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare statements of energy effects "to the extent permitted by law" when undertaking actions identified as significant energy actions (66 FR 28355; May 22, 2001). E.O. 13211 defines a "significant energy action" as an action that (i) is a significant regulatory action under E.O. 12866 (or any successor order); and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy. The proposed revised regulations are not expected to affect energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and there is no requirement to prepare a statement of energy effects for this action.

Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.)

In developing this proposed rule, the Services are acting in their unique statutory role as administrators of the Act and are engaged in a legal exercise of interpreting the standards of the Act. The Services' promulgation of rules that govern their implementation of the Act itself is not an action that is subject to the Act's provisions, including section 7(a)(2). The Services have a historical practice of issuing their regulations under the ESA without undertaking section 7 consultation. This practice accords with the plain language, structure, and purposes of the ESA. Nothing in the statue places a consultation obligation on the Services' promulgation of regulations. Although the Services consult on actions through intra-agency consultations where appropriate (e.g., issuance of section 10 permits and actions under statutory authorities other than the ESA), the Services in those instances are acting principally as an "action agency"

implementing provisions of the Act or other statutes. Here, by contrast, the Services are acting solely in their role as administrators of the ESA; we are not also implementing the Act to propose or take a specific action. The Services are carrying out the most fundamental exercise of our roles as administrators of the ESA, and the Act cannot reasonably be construed as requiring the Services to "consult" with themselves under section 7(a)(2) in such cases.

Clarity of the Proposed Rule

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

(1) Be logically organized;

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

(3) Use clear language rather than jargon;

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

(5) Use lists and tables wherever possible.

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

Authority

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

List of Subjects in 50 CFR Part 402

Endangered and threatened species.

Proposed Regulation Promulgation

For the reasons set out in the preamble, we hereby propose to 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.

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. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action. (See § 402.17).

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

* * * * *

Reasonable and prudent measures refer to those actions the Director believes necessary or appropriate to minimize the impacts, i.e., amount or extent, of incidental take.

* * * * *

3. Amend § 402.14 by:

a. Revising paragraphs (i)(1) and (2);

b. Removing paragraph (i)(3); and

c. Redesignating paragraphs (i)(4) through (7) as paragraphs (i)(3) through (6).

The revisions 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, i.e., the amount or extent, of such incidental taking on the species. 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;

(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 (i)(1)(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, and may involve only minor changes.

* * * * *

4. Add § 402.17 to read as follows:

§ 402.17 Other provisions.

(a) *Activities that are reasonably certain to occur*. A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Factors to consider when evaluating whether activities caused by the proposed action (but not part of the proposed action) or activities reviewed under cumulative effects are reasonably certain to occur include, but are not limited to:

(1) Past experiences with activities that have resulted from actions that are similar in scope, nature, and magnitude to the proposed action;

(2) Existing plans for the activity; and

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

(4) The amount of State, tribal, territorial, or local administrative discretion remaining to be exercised.

(b) *Consequences caused by the proposed action*. To be considered an effect of a proposed action, a consequence must be caused by the proposed action (i.e., the consequence would not occur but for the proposed action and is reasonably certain to occur). A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Considerations for determining that a consequence to the species or critical habitat is not caused by the proposed action include, but are not limited to:

(1) The consequence is so remote in time from the action under consultation that it is not reasonably certain to occur; or

(2) The consequence is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur; or

(3) The consequence is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur; or

(4) The agency has no ability to prevent the consequence due to its limited statutory authority; or

(5) If the consequence would occur regardless of whether the proposed action goes forward.

(c) *Required consideration*. The provisions in paragraphs (a) and (b) of this section must be considered by the action agency and the Services.

* * * * *

Kevin Lilly,
Principal Deputy for Fish and Wildlife and Parks,
Exercising the delegated authority of the Assistant Secretary for Fish and Wildlife and Parks.
Department of the Interior

Neil A. Jacobs,
Under Secretary of Commerce for Oceans and Atmosphere
and NOAA Administrator.
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