

4310-55-P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 402

1018-AT50

DEPARTMENT OF COMMERCE

National Marine Fisheries Service

0618-AX15

50 CFR Part 402

Rule to Amend 50 CFR Part 402

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

ACTION: Proposed rule.

SUMMARY: The United States Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively, “Services” or “we”) propose to amend part 402 of title 50 of the Code of Federal Regulations, which implements section 7 of the Endangered Species Act of 1973, as amended (Act). The Services are proposing these changes to clarify several definitions, to clarify when the section 7 regulations are applicable and the correct standards for effects analysis, and to establish time frames for the informal consultation process.

DATES: We must receive your comments by [Insert date 60 days after date of FEDERAL REGISTER publication] to ensure their full consideration in the final decision on this proposal.

ADDRESSES: Submit your comments or materials concerning this proposed rule in one of the following ways:

(1) Through the Federal eRulemaking Portal at www.regulations.gov. Follow the instructions on the website for submitting comments.

(2) By U.S. mail or hand-delivery to Public Comment Processing, Attention: 1018-AT50, Division of Policy and Directives Management, US Fish and Wildlife Service, 4401 North Fairfax Drive, Suite 222, Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

FOR FURTHER INFORMATION CONTACT: Office of the Assistant Secretary for Fish and Wildlife and Parks, 1849 C Street NW, Washington, DC 20240; telephone: 202-208-3928; or James H. Lecky, Director, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910; telephone: 301-713-2332.

SUPPLEMENTARY INFORMATION:

•Background

The Endangered Species Act of 1973, as amended (“Act”; 16 U.S.C. 1531 et seq.) provides that the Secretaries of the Interior and Commerce (the “Secretaries”) share

responsibilities for implementing most of the provisions of the Act. Generally, marine species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior. Authority to administer the Act has been delegated by the Secretary of the Interior to the Director of the FWS and by the Secretary of Commerce through the Administrator of the National Oceanic and Atmospheric Administration to the Assistant Administrator for NMFS.

There have been no comprehensive amendments to the Act since 1988. With the exception of two section 7 counterpart regulations for specific types of consultations, there have been no comprehensive revisions to the implementing section 7 regulations since 1986. Since those regulations were issued, much has happened: the Services have gained considerable experience in implementing the Act, as have other Federal agencies, States, and property owners; there have been many judicial decisions regarding almost every aspect of section 7 of the Act and its implementing regulations; and the Government Accountability Office has completed reviews of section 7 implementation.

We also propose these regulatory changes in response to new challenges we face with regard to global warming and climate change. On May 15, 2008, Secretary of the Interior Dirk Kempthorne announced that he would propose common sense modifications to the section 7 regulations to provide greater clarity and certainty to the consultation process. Particularly as we are confronted with new and more complex issues, it is important that we have a section 7 consultation process that clearly sets out key definitions and the applicability of that process. As we negotiate the complexities of consultations in the 21st century, we need to have a regulatory framework that supplies guidance to shape those consultations as envisioned by the Act.

A 2004 GAO report on interagency collaboration during section 7 consultations found that although the Services had made improvements to the consultation process, it remained contentious between the Services and action agencies. In particular, the GAO found that action agencies continued to consider the consultation process burdensome. The GAO concluded that, given the unique requirements and circumstances of different species, a “healthy dose of professional judgment” from the Services would always be required, meaning there would always be some disagreements. Nevertheless, the GAO also concluded that the process could still be improved, and specifically recommended that the Services and other Federal agencies “resolve disagreements about when consultation is needed”

The proposed regulations respond to this recommendation by allowing for a variety of documents prepared for other purposes to suffice for initiating consultation, and by allowing for action agencies to determine the effects of their own actions, without concurrence from the Service, in some very specific narrow situations. In addition, we propose to clarify the appropriate causation standard to be used in determining the effects of agency actions. Finally, we propose relatively minor procedural changes to “informal” consultations, including inserting time frames into the informal consultation process.

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

Proposed Changes to 50 CFR Part 402

§ 402.02 Definitions.

This section sets out definitions of terms that are used throughout the regulations or in the current regulations. Discussed below are those definitions that are modified from the current regulations.

“Biological Assessment.” We propose to add a sentence to the current regulatory definition of biological assessment to clarify that action agencies do not necessarily have to create a new document to comply with the requirement for a biological assessment. 50 CFR 402.12. If the information required to initiate informal consultation has been included in a document prepared for another purpose, we propose to allow action agencies to submit that document, rather than requiring them to create a new document to satisfy the requirements for initiating consultation as set out in 50 CFR 402.14(c). Because the contents of the biological assessment are not prescribed by regulation but rather are at the “discretion of the Federal agency and will depend on the nature of the Federal action,” this is a minor procedural change that will increase efficiency for the Federal action agency without impairing the Services’ ability to perform their consultation role. *See* 50 CFR 402.12 (f). We note, however, that it will be the Federal action agency’s responsibility to describe with specificity where the relevant analyses for initiation of consultation can be found in the alternative document.

“Cumulative effects.” We propose to amend the current regulatory definition of cumulative effects to clarify that the definition of “cumulative effects” under section 7 of the Act is not the same as the use of “cumulative effects” in the National Environmental Policy Act (“NEPA”; 42 U.S.C. 4321, et seq.). The current ESA regulatory definition of cumulative effects (and this proposed definition) is narrower than the NEPA regulatory

definition of cumulative effects. NEPA defines "cumulative effects" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions" 40 CFR 1508.7. The term as used in the NEPA context includes the effects of future Federal actions and includes future actions that are merely "reasonably foreseeable" rather than reasonably certain to occur.

We propose to add the word "particular" to clarify and emphasize that for ESA section 7 "cumulative effects" are not effects "which result from" the action under consultation but rather include only those effects from future State or private activities in the action area of the specific action under consultation. We also propose to further clarify that cumulative effects do not include future Federal activities. This is not a new concept; the current regulations also limit cumulative effects to future state or private actions. In fact, the preamble to the current regulations notes that "Since all future Federal actions will at some point be subject to the section 7 consultation process pursuant to these regulations, their effects on a particular species will be considered at that time and will not be included in the cumulative effect analysis." 51 FR 19932 (June 3, 1986). Finally, we note that the preamble language cited above also establishes that the standard of "reasonably certain to occur" is an essential factor for both cumulative effects and indirect effects.

"Effects of the action." We propose to amend the current regulatory definition of "effects of the action." The current definition of "effects of the action" establishes that indirect effects are effects that are "later in time," "caused by" the action under consultation, and "reasonably certain to occur." The current regulations, however, do

not define “caused by” nor do they offer any guidance as to how to apply the phrase “reasonably certain to occur.” This lack of clarity has resulted in many disagreements between action agencies and the Services. We propose to offer more guidance in this definition as to what constitutes “caused by” and “reasonably certain to occur” to ensure consistent application of what we believe are the current and appropriate definitions of these terms.

Initially, we want to emphasize that both in the current regulations and these proposed regulations, an effect must both be caused by the action under consultation **and** must be “reasonably certain to occur” before it can be included in the effects analysis. It is a two-part test and both parts must be met. We propose to add language to the “effects of the action” definition to define “indirect effects” as those effects “for which the proposed action is an essential cause, and that are later in time, but still are reasonably certain to occur.” Further, we propose to add language to establish that reasonably certain to occur “is the standard used to determine the requisite confidence that an effect will happen. A conclusion that an effect is reasonably certain to occur must be based on clear and substantial information.” We are proposing this language to provide some additional clarity regarding the nature of the parameters to the effects analysis so that the effects analysis will focus on those effects that can meaningfully be considered in the context of the action under consultation. We hope that this proposed added language will allow action agencies and the Services to determine more readily the effects of the action and thus to determine if the action will jeopardize the species or adversely modify or destroy critical habitat. This will simplify the consultation process and make it less burdensome and time-consuming.

We think it is appropriate to require that for an indirect effect to be considered as an effect of the action under consultation that action must be an “essential cause” of that effect. We propose to use the term “essential” to denote that the action is necessary for that effect to occur. That is, the effect would not occur “but for” the action under consultation and the action is indispensable to the effect. Our intent is to clarify that there must be a close causal connection between the action under consultation and the effect that is being evaluated. As we noted in our proposed language, “if an effect would occur whether or not the action takes place, the action is not a cause of the direct or indirect effect.” As discussed above, our intention with the proposed language is to limit the effects analysis only to those effects that are appropriate, if an effect would occur regardless of the action, then it is not appropriate to require the action agency to consider it an effect of the action. However, it may be appropriate to address it as it relates to the baseline or cumulative effects analysis.

We propose to add the word “essential” to capture the requirement that in some instances there needs to be more than a technical “but for” connection. For example, if the action under consultation is issuance of a U.S. Army Corps of Engineers (Corps) permit (in this example, the only Federal permit needed for the project) necessary to allow a lengthy pipeline to cross a narrow waterway, one could argue that “but for” the Corps’ permit to cross the waterway, none of the future effects from the output from operation of that lengthy pipeline would occur. Therefore, in addition to considering the effects of building the pipe crossing on protected species in the area, the Corps would also have to consider the effects of the entire pipeline on threatened or endangered species, including any effects that might be caused by the material transported through

the pipeline once it reaches its destination. But because the portion of the pipe crossing the waterway is incidental to the entire pipeline, it is no more than a marginal contributor to the effects of the operation of that pipeline. In other words, there is an insufficient causal connection to attribute all of the future effects of the pipeline to the Corps' permit. On the other hand, an action to build a marina may also need a permit from the Corps. In this case, building the marina has a close causal connection to future effects (increased boat traffic) that are related to the marina itself. The purpose of the marina (the action under consultation) is to allow for increased boat traffic; the marina should therefore be seen as an essential cause of the increased boat traffic. By contrast, in the first example, the planned waterway crossing (the action under consultation) cannot be reasonably viewed as intended to bring about the future effects of the operation of the entire pipeline. The crossing should not be seen, therefore, as an essential cause of future effects associated with the operation of the entire pipeline.

We also propose to add language to the definition of "effects of the action" to further explain that "reasonably certain to occur" is the standard used to determine that an effect will happen. As noted above, the "reasonably certain to occur" standard is in the current regulations. We propose to add the requirement that there be "clear and substantial information" that the effect will happen. Our intention is to make it clear that the effect cannot just be speculative and that it must be more than just likely to occur.

We also intend to emphasize that "reasonably certain to occur" is not the equivalent of NEPA's reasonably foreseeable standard. It is a more stringent standard.

We believe the proposed language to require "clear and substantial" information is within the intent of the current regulations. We note that the preamble to the current

regulations discusses the difference between NEPA and the Act at length and concludes that “Congress did not intend that Federal action be precluded by such speculative actions.” 51 FR 19932 (June 3, 1986). Further, the preamble discusses, with regard to cumulative effects, that the Federal agency and the Service must bear in mind the “economic, administrative, or legal hurdles which remain to be cleared” before determining if the standard of “reasonably certain to occur” has been met. By proposing this language, we intend to endorse that preamble language and emphasize that there must be information, which is clear and substantial, that demonstrates that the effect is reasonably certain to occur.

§ 402.03 Applicability.

This proposed section would define the applicability of these regulations. The current regulations state that section 7 applies to “all actions in which there is discretionary Federal involvement or control.” 50 CFR 402.03. The first sentence of paragraph (a) of this proposed section reiterates the constraint that section 7 only applies to discretionary agency actions. We note that the Supreme Court recently upheld the Services’ determination in the current regulations that section 7 applies only to discretionary agency actions. *National Home Builders v. Environmental Protection Agency*, 127 S. Ct. 2518 (2007).

In paragraph (b), we propose to add new language to this section to delineate when section 7 is not applicable. For all the subparagraphs set out under paragraph (b) a threshold requirement is that no take is anticipated. Action agencies must be aware that when they make a determination that their action falls under one of the subparagraphs of paragraph (b), they are asserting that they do not anticipate take.

In paragraph (b)(1) we propose to add language that action agencies are not required to consult on those actions for which they determine their action will have “no effect” on listed species or critical habitat. Although the current regulations do not explicitly state that consultation is not required when a Federal action agency determines that its action will have no effect on listed species or critical habitat, an evaluation of the current regulations makes it clear that no consultation was contemplated for these situations; the current regulations only require Federal action agency consultation when there is a determination that an action “may affect” a listed species or designated critical habitat. 50 CFR 402.14(a). By policy and practice the Services have consistently determined that consultation is not required when an action has no effect on listed species or critical habitat.

In proposed paragraphs (b)(2) and (3), we intend to exclude from consultation those actions the effects of which are so inconsequential, uncertain, unlikely or beneficial that they are, as a practical matter, tantamount to having no effect on listed species or critical habitat. Again, an important threshold requirement for this subparagraph is that the action agency does not anticipate any take from the action under consultation with regard to the effect in question.

In proposed paragraph (b)(2), we propose to exclude from consultation actions that are “insignificant contributor[s]” to any effect on listed species or critical habitat. In proposed paragraph (b)(3), we propose to exclude from the consultation requirement those effects of an action that are not capable of being meaningfully identified or detected in a manner that permits evaluation; or, are wholly beneficial; or, are such that the potential risk of jeopardy to the listed species is remote. This proposed language broadly

tracks language from the Services' joint consultation handbook with regard to those actions that are "may affect" but "not likely to adversely affect" (NLAA) listed species or critical habitat. The Final Endangered Species Consultation Handbook (March 1998) defines "not likely to adversely affect" as:

... the appropriate conclusion when effects on listed species are expected to be discountable, insignificant, or completely beneficial. Beneficial effects are contemporaneous positive effects without any adverse effects to the species. Insignificant effects relate to the size of the impact and should never reach the scale where take occurs. Discountable effects are those extremely unlikely to occur. Based on best judgment, a person would not (1) be able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur. Final Endangered Species Consultation Handbook, March 1998, "Glossary of Terms used in Section 7 Consultations," p. xv.

Finally, we propose to add language to the applicability section by noting that if an action has one or more effects that fall outside paragraph (b) the Services and action agencies need only consider the effects that fall outside paragraph (b) when consulting on the action. The current regulations require that action agencies submit in writing a "description of the manner in which the action may affect any listed species or critical habitat..." 50 CFR 402.14(c). We anticipate that an action agency can set out those effects that fall outside of paragraph (b) in this description.

The intent of these proposed exclusions is to reduce the number of unnecessary consultations. Under the current regulations, the type of effects set out in paragraph (b) (3) could require consultation; that is, an action agency must consult if the action "may

affect” a listed species or critical habitat but can submit a “not likely to adversely affect” determination to the Service. The Service can then concur with that determination and the consultation obligation is satisfied for the action agency. 50 CFR 402.14(b). In cases where the Service has concurred with a “not likely to adversely affect” determination made by a Federal action agency, there would never be an incidental take statement because no take would be anticipated. There also would never be a jeopardy or an adverse modification determination because if the nature of the effects involved rose to that level, the Services would not concur.

To achieve the goal of reducing unnecessary consultations, the proposed language shifts some portion of the “is not likely to adversely affect” determination to the Federal action agencies. The Services believe this is appropriate for several reasons. First, the Services see little value in consulting on actions that fit in these “no anticipated take” categories, just as we see little value in consulting in “no effect” situations. Secondly, the proposed regulation emphasizes that it is the Federal action agencies’ responsibility to make these determinations. We believe the responsibility for such determinations properly rests with the Federal action agencies. Federal action agencies have now had decades of experience with section 7. The Services believe that Federal action agencies ultimately must be responsible for their determinations under the Act. In light of the tremendous workload and consumption of resources that formal consultations require, the Services believe it is not an efficient use of limited resources to review literally thousands of proposed Federal agency actions in which take is not anticipated and the potential effects are either unlikely, incapable of being meaningfully evaluated, wholly beneficial, or pose only a remote risk of causing jeopardy or adverse modification or destruction of

critical habitat. By definition, the potential effects that we propose to exclude from the consultation requirement could never amount to an adverse impact to listed species.

Finally, we believe Federal action agencies will err on the side of caution in making these determinations. Federal action agencies are well aware that take is not authorized without an incidental take statement and that ultimately they are held to the standard that they must insure that it is not likely that their action will jeopardize the continued existence of listed species or adversely modify or destroy designated critical habitat.

The Services are proposing these changes to the applicability of section 7 as part of our administrative authority and interpretive authority under the Act. The Services have the authority to determine what constitutes “consultation” and when consultation is triggered. Section 7 (a)(2) of the Act requires that Federal action agencies, in consultation with the Secretary, ensure that their actions are not likely to jeopardize the continued existence of listed species or adversely modify or destroy critical habitat. But, the Act does not define “consultation” nor does it define when the consultation obligation is triggered. Congress left the crafting of the consultation process, including the trigger for consultations, with the Services. *See Sweet Home v. Babbitt*, 515 U.S. 687, 708 (1995) (Congress delegated broad administrative and interpretive power to the Secretary in the Act to define terms).

In 1986, using our administrative and interpretive authority, the Service promulgated general consultation regulations (the “current regulations”) that established a tiered consultation process. 50 CFR 402.01-402.16. These regulations, not the Act, established a “may affect” trigger for consultations, an informal level of consultation for actions that are “not likely to adversely affect” and formal consultation for those actions

that are likely to adversely affect listed species or critical habitat. Under the current regulations, a Federal action agency can determine that its action is not likely to adversely affect listed species or designated critical habitat but then must seek and gain concurrence from the Services.

In 1986, this tiered process made sense. Very few Federal action agencies had any in-depth expertise with section 7 and listed species. For that matter, the more complex consultation process was relatively new to the Services as well. We erred on the side of over inclusion because our consultation experience and history was so limited at that time. After decades of experience and literally thousands of consultations, however, we have concluded that there is little value in requiring Federal action agencies to consult, even informally, for those potential effects described in proposed paragraphs (b) (2) and (b)(3). We recognize that Federal action agencies have more expertise now than in 1986 and are much more aware of the consequences and significance of their findings. That is, Federal action agencies are more informed about the Act as a whole and more aware of the ramifications of not making conscientious and thoughtful determinations under the Act. Federal action agencies understand that there are significant consequences if they were to take an action that resulted in prohibited take without an exemption through the section 7 process. We are confident that Federal action agencies will err on the side of caution. Further, the Federal action agencies will continue to have the option of “informal consultation” under 50 CFR 402.13 for those situations when an agency is not confident in its conclusions or seeks more expertise.

These regulations would reinforce the Services' current view that there is no requirement to consult on greenhouse gas (GHG) emissions' contribution to global warming and its associated impacts on listed species (e.g., polar bears).

For example, when a Federal agency provides funding for a new highway, there may be increased GHG emissions as a result. The proposed revisions make explicit that while the impact of tailpipe emissions on local air pollution could be an effect of the action, the GHG emissions' contribution to global warming and associated impacts to listed species (e.g., polar bears) are not, and the effects of those impacts would not need to be considered in any consultation.

First, GHG emissions from building one highway are not an "essential cause" of any impacts associated with global warming. Moreover, any such effects are later in time, but are not reasonably certain to occur (i.e., a finding that an effect is reasonably certain to occur must be based on clear and substantial information, cannot be speculative, and must be more than just likely to occur). For both reasons, impacts associated with global warming do not constitute "effects of the action" under the proposed revision to that definition. *See* proposed 50 CFR 402.02, 402.03(b)(1), (c).

Even if these impacts would otherwise fall within the definition of "effects of the action," they need not be considered in any consultation because under the proposed Applicability section as the building of one highway is "an insignificant contributor" to any such impacts. Further, any impacts associated with the GHG emissions from the building of one highway are "not capable of being meaningfully identified or detected in a manner that permits evaluation" and "are such that the potential risk of jeopardy to the

listed species or adverse modification or destruction of the critical habitat [from those GHG emissions] is remote." See proposed 50 CFR 402.03(b)(2)-(3), (c).

For the reasons discussed above, the Services believe the proposed changes to the current regulations are appropriate. Further, we believe them to be in compliance with the Act. As discussed above, the Act does not set the requirement for consultation. Rather, the Act requires that Federal action agencies consult with the Secretary to insure that their actions are not likely to jeopardize listed species or adversely modify or destroy designated critical habitat. The Act then requires the Secretary issue an opinion to help action agencies meet this obligation of ensuring that it is not likely that their action will result in jeopardy or adverse modification or destruction of critical habitat. For the reasons discussed above, just as we have determined in the past that an opinion from the Secretary is not necessary for "no effect" actions, we believe the Secretary's opinion is not necessary for those potential effects set out in proposed paragraphs (b)(2) and (b)(3).

§ 402.13 Informal Consultation

As discussed above, we propose to shift some "not likely to adversely affect" determinations to the action agency. We have retained this section, however, for those cases when an action agency seeks assistance from the Services to make that determination. We propose to add language that informal consultation can include "a number of similar actions, an agency program, or a segment of a comprehensive plan." This proposed language is similar to language found under formal consultation in 50 CFR 402.14(c). Here, however, we do not propose to require the Director's approval, as the regulations do for formal consultation. We believe this is appropriate because informal consultation, even for grouped actions, could never result in authorization of actions that

are expected to result in take or in the destruction or adverse modification of critical habitat or in an action that was likely to jeopardize the continued existence of the species. The analysis, then, should be less complex than what would be necessary for formal consultation.

In new proposed paragraph (b), we propose to add time deadlines to help limit the duration of informal consultation and lend greater certainty to the process. Specifically, we propose to allow action agencies to terminate consultation if the Service has not acted on its request for concurrence within 60 days. We are proposing, however, to allow the Services to advise the action agency that 60 days is not enough time to review the request for concurrence. In those cases, the Service would receive 60 more days to review the request for concurrence. Finally, we propose to allow the action agency to terminate the consultation, with written notice to the Service, if there is no written determination from the Service within the appropriate time frame.

We believe this proposal to be reasonable in light of the limitations of requests for concurrence. That is, an action agency would only be requesting concurrence for actions that are not expected ever to jeopardize the continued existence of a listed species or result in adverse modification or destruction of critical habitat. No take could be anticipated for an agency to request a concurrence on a not likely to adversely affect determination. Without the proposed time limitations, informal consultations can actually become longer and more drawn out than formal consultations. It is our hope that the new deadlines will make informal consultation a shorter, more efficient and more predictable process, as it was intended to be. Finally, we believe the proposed language which allows for action agencies to terminate consultation if they do not receive a

determination from the Service within the specified time frame is appropriate under the narrow circumstances in which it would come into play. While action agencies may have satisfied their consultation requirements under section 7(a)(2) of the Act, they will not have received any coverage for take nor will they have received an opinion with regard to adverse modification or destruction of critical habitat. Action agencies, therefore, will have to carefully review the circumstances of their consultation to determine whether to initiate formal consultation.

§ 402.14 Formal Consultation

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

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule because of the legal or policy issues it has raised; it was reviewed by the Office of Management and Budget (OMB) in accordance with the four criteria discussed below.

(a) These regulations will not have an annual economic effect of \$100 million or more or adversely affect an economic sector, productivity, jobs, the environment, or other units of government.

(b) These regulations are not expected to create inconsistencies with other agencies' actions.

(c) These regulations are not expected to significantly affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) OMB has determined that this rule may raise novel legal or policy issues and, as a result, this rule has undergone OMB review.

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

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions), unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act requires Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities.

Pursuant to the Regulatory Flexibility Act, the Secretaries of the Interior and Commerce certify that this regulation will not have a significant economic impact on a substantial number of small entities. The purpose of these regulations is to reduce the regulatory burden associated with conservation of threatened or endangered species, increase the efficiency of the Act's section 7 consultation process, and increase the involvement of State governments in the administration of the Act.

Therefore, the Secretaries of the Interior and Commerce certify that this action will not have a significant economic impact on a substantial number of small businesses, organizations, or governments pursuant to the RFA.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O. 13211) on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Although this rule is a significant action under Executive Order 12866, it is not expected to significantly affect energy supplies, distribution, or use. Therefore, this action is not a significant energy action and no Statement of Energy Effects is required.

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

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

(a) These regulations will not “significantly or uniquely” affect small governments. A Small Government Agency Plan is not required. We expect that these regulations will not result in any significant additional expenditures by entities that develop formalized conservation efforts.

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

Takings

In accordance with Executive Order 12630, these regulations do not have significant takings implications. These regulations have no impact on personal property rights.

Federalism

In accordance with Executive Order 13132, these regulations do not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Commerce regulations under section 7 of the Act, we coordinated development of these regulations with appropriate resource agencies throughout the United States.

Civil Justice Reform

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

Paperwork Reduction Act

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

sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB Control Number.

National Environmental Policy Act

The Services will conduct an analysis pursuant to the National Environmental Policy Act prior to finalizing these proposed regulations. The FWS and NMFS are considered the lead Federal agencies for the preparation of this proposed rule pursuant to 40 CFR 1501.

Clarity of this rule

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

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

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

Public Comments

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the ADDRESSES section. We will not consider comments sent by e-mail or fax or to an address not listed in the ADDRESSES section. Finally, we must receive your comments by the date specified in the DATES section to ensure their full consideration in the final decision on this proposal.

Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment – including your personal identifying information – may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Government-to-Government Relationship With Indian Tribes

In accordance with the Secretarial Order 3206, “American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act” (June 5, 1997); the President’s memorandum of April 29, 1994, “Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951); E.O. 13175; and the Department of the Interior’s 512 DM 2, we understand that we must relate to recognized Federal Indian Tribes on a Government-to-Government basis. However, these regulations are intended to streamline the administration of the Act; therefore, any indirect effect would be wholly beneficial.

List of Subjects in 50 CFR Part 402

Endangered and threatened species.

Lyle Laverty

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

James W. Balsiger

Acting Assistant Administrator, National Marine Fisheries Service,
National Oceanic and Atmospheric Administration

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

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

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

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

2. Amend § 402.02 to revise the definitions of “biological assessment,” “cumulative effects,” and “effects of the action” as follows:

§ 402.02 Definitions.

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

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

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"Effects of the action" means the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. Indirect effects are those for which the

proposed action is an essential cause, and that are later in time, but still are reasonably certain to occur. If an effect will occur whether or not the action takes place, the action is not a cause of the direct or indirect effect. Reasonably certain to occur is the standard used to determine the requisite confidence that an effect will happen. A conclusion that an effect is reasonably certain to occur must be based on clear and substantial information. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration.

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3. Revise § 402.03 as follows:

§ 402.03 Applicability.

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

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

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

(2) Such action is an insignificant contributor to any effects on a listed species or critical habitat; or

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

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

(ii) Are wholly beneficial; or

(iii) Are such that the potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat is remote.

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

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4. Revise § 402.13 as follows :

§ 402.13 Informal Consultation.

(a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency that the action, or a number of similar actions, an agency program, or a segment of a comprehensive plan, is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary, if the Service concurs in writing. For all requests for informal consultation, the Federal agency shall consider the effects of the action as a whole, including the effects on all listed species and critical habitats.

(b) If the Service has not provided a written determination regarding whether it concurs with a Federal agency's determination provided for in paragraph (a) of this section within 60 days following the date of the Federal agency's request for such determination, the Federal agency may, upon written notice to the Service, terminate

consultation without the Service's concurrence. The Service may, upon written notice to the Federal agency within the 60-day period, extend the time for informal consultation for a period no greater than an additional 60 days from the end of the 60-day period.

(c) During informal consultation, the Service may suggest modifications to the action that the Federal agency and any applicant could implement to avoid the likelihood of adverse effects to listed species or critical habitat.

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

§ 402.14 Formal consultation.

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

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

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8.6.08 3 pm -- Predecisional, deliberative draft