

we have also updated contact information and our website address to review the proposed rule and supporting materials.

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: January 5, 2021.

Samuel D. Rauch, III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 402

[Docket No. FWS-HQ-ES-2020-0102; FXES1114090FEDR-201-FF09E30000; Docket No. 201231-0363]

RIN 1018-BF17; 0648-BJ77

Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation

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

ACTION: Proposed rule.

SUMMARY: The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the “Services” or “we”) propose to amend the Services’ consultation regulations under the Endangered Species Act of 1973, as amended, pertaining to the U.S. Forest Service and Bureau of Land Management. The proposed revisions would clarify that reinitiation of consultation would not be required for these agencies’ previously approved land management plans when new information reveals that effects of a plan may affect listed species or critical habitat in a manner or to an extent not previously considered, provided that any authorized actions for which the new information is relevant will be addressed through a separate action-specific consultation. The proposed revisions would also replace the existing regulation’s temporary

instructions concerning National Forest System lands with permanent instructions. The Services are proposing this change to improve and clarify the interagency cooperation procedures by making them more efficient and consistent.

DATES: We will accept comments from all interested parties until February 11, 2021. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES** below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Standard Time on this date.

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

(1) *Electronically:* Go to the *Federal eRulemaking Portal*: <http://www.regulations.gov>. In the Search box, enter FWS-HQ-ES-2012;2020-0102, which is the docket number for this rulemaking. Then in the Search panel on the left side of the screen, under the Document Type heading, click on the Proposed Rules link to locate this document. You may submit a comment by clicking on “Comment Now!”

(2) *By Hard Copy:* Submit by U.S. mail to: Public Comments Processing, Attn: FWS-HQ-ES-2020-0102, U.S. Fish and Wildlife Service, MS:JAO/3W, 5275 Leesburg Pike, Falls Church, VA 22041-3803 or National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910.

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

FOR FURTHER INFORMATION CONTACT: Gary Frazer, U.S. Fish and Wildlife Service, Department of the Interior, Washington, DC 20240, telephone 202/208-4646; or Samuel D. Rauch, III, National Marine Fisheries Service, Department of Commerce, 1315 East-West Highway, Silver Spring, MD 20910, telephone 301/427-8000. If you use a telecommunications device for the Deaf (TDD), call the Federal Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Background

The purposes of the Endangered Species Act of 1973, as amended (“ESA” or “Act”; 16 U.S.C. 1531 *et seq.*), are to provide a means to conserve the ecosystems upon which listed species depend, to develop a program for the conservation of listed species, and to achieve the purposes of certain treaties and conventions. Moreover, the

Act states that it is the policy of Congress that the Federal Government shall seek to conserve threatened and endangered species and use its authorities in furtherance of the purposes of the Act. The Lists of Endangered and Threatened Wildlife and Endangered and Threatened Plants (hereafter, “the Lists”) are in title 50 of the Code of Federal Regulations in part 17 (§ 17.11(h) and § 17.12(h)).

Part 402 of title 50 of the Code of Federal Regulations establishes the procedural regulations governing interagency cooperation under section 7 of the Act, which requires Federal agencies, in consultation with and with the assistance of the Secretaries of the Interior and Commerce, 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. The Secretary of the Interior and the Secretary of Agriculture, through the Bureau of Land Management (BLM) and the U.S. Forest Service (FS), respectively, are responsible for the administration, management, and protection of approximately 438 million surface acres of Federal lands. Congress has directed that both Departments develop land management plans that provide for management of these Federal lands in accordance with the concepts of multiple use and sustained yield.

More specifically, the Federal Land Policy and Management Act of 1976 (FLPMA) and the National Forest Management Act (NFMA) require the Secretaries of the Interior and Agriculture, respectively, to “develop, maintain, and, as appropriate, revise” land management plans and to coordinate such planning with other Federal agencies. See 43 U.S.C. 1712(a), (c)(1)–(c)(9); 16 U.S.C. 1604(a); see also *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (*SUWA*); *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 728 (1998) (*Ohio Forestry*). The BLM and FS develop plans that provide standards and guidelines for land and resource management that reflect both economic and environmental considerations. Once a plan is adopted, the agencies’ individual project decisions and associated permits, contracts, and other instruments regulating use and occupancy within a unit covered by the plan must be consistent with the plan. See 43 U.S.C. 1732(a); 16 U.S.C. 1604(i); 43 CFR 1601.0–5, 1610.5–3(a); 36 CFR 219.15.

Land management plans are broad planning documents that guide long-term natural resource management. Unless it expressly states otherwise, a plan generally does not authorize any on-the-ground action such as road building or timber cutting. *Ohio Forestry*, 523 U.S. at 729–730; *SUWA*, 542 U.S. at 59, 69–70. Before authorizing a project in an area governed by an approved land management plan, the BLM and FS must ensure that the proposed project is consistent with the applicable plan, while also complying with other applicable laws, including section 7 of the ESA.

In 2019, the Services revised 50 CFR 402.16 to address issues arising under the Ninth Circuit's decision in *Cottonwood Environmental Law Center v. U.S. Forest Service*, 789 F.3d 1075 (9th Cir. 2015), *cert. denied*, 137 S. Ct. 293 (2016), which held that the FS must reinitiate consultation on its existing programmatic forest plan when the FWS designated critical habitat for the Canada lynx. *See* 84 FR 44976–45018 (August 27, 2019). We added a new paragraph (b) to 50 CFR 402.16 to clarify that the duty to reinitiate consultation does not apply to an approved land management plan prepared pursuant to FLPMA or NFMA when a species is added to the Lists or new critical habitat is designated, in certain specific circumstances, provided that any authorized actions that may affect the newly listed species or designated critical habitat will be addressed through a separate action-specific consultation. Consistent with the Wildfire Suppression Funding and Forest Management Activities Act, H.R. 1625, Division O, section 208, which was included in the Omnibus Appropriations bill for fiscal year 2018 (codified at 16 U.S.C. 1604(d)(2)(B)), we noted that this statutory exception to reinitiation of consultation does not apply to those land management plans prepared pursuant to 16 U.S.C. 1604 if (1) 15 years have passed since the date the agency adopted the land management plan and (2) 5 years have passed since the enactment of Public Law 115–141 [March 23, 2018] or the date of the listing of a species or the designation of critical habitat, whichever is later. These statutory timing provisions are discussed in greater detail below.

We aligned the application of § 402.16(a)(4) to exclude from reinitiation of consultation approved land management plans (including approved amendments and revisions) prepared pursuant to the FLPMA or the NFMA that have no immediate on-the-

ground effects, but rather are frameworks for future actions. Those excluded approved plans contrast with specific on-the-ground actions that are subject to their own section 7 consultations if those on-the-ground actions may affect listed species or critical habitat. Thus, the 2019 revised regulation also noted that a previously approved land management plan prepared pursuant to FLPMA or NFMA does not require reinitiation of consultation upon the new listing of species or new designation of critical habitat, if any effects on newly listed species or newly designated critical habitat (to the extent there are any) will be analyzed in a separate section 7 consultation on a subsequent authorized action taken under the plan.

Proposed Regulatory Revisions Concerning New Information

We now propose to further amend our regulations to address a closely related issue that also arose in *Cottonwood* by revising § 402.16 (b) to clarify that the duty to reinitiate does not apply to an approved land management plan prepared pursuant to FLPMA, 43 U.S.C. 1701, or NFMA, 16 U.S.C. 1604, if new information reveals effects of the plan on listed species or critical habitat in a manner or to an extent not previously considered, provided that any subsequent actions taken pursuant to the plan will be subject to a separate section 7 consultation if those actions may affect listed species or critical habitat. Generally, ground-disturbing actions would be authorized subsequent to approval of the plan and addressed through a subsequent action-specific consultation. However, there are actions in some BLM land management plans that allow ground-disturbing action upon approval. For example, BLM plans may include off-highway vehicle (OHV) “open areas” that do not require subsequent approval. If the plan directly authorizes the action (e.g., OHV open areas), then this proposed exemption from reinitiation does not apply if new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered with respect to those activities under the plan (e.g., OHV use in an open area) that would not be subject to future action-specific consultation.

This proposed regulatory revision would improve the efficiency of the consultation process while ensuring consideration of new information prior to the implementation of actions that may affect listed species or critical habitat. Unless they expressly state otherwise, completed land management

plans do not result in any immediate on-the-ground effects, and relevant new information would be considered during a separate section 7 consultation on a subsequent action taken in conformance with the approved land management plan if those actions may affect listed species or critical habitat. As discussed in greater detail below, this is consistent with the government's longstanding legal position that the duty to consult under section 7 is limited to affirmative agency actions, which include prospective or ongoing actions authorized, funded, or carried out by Federal agencies—but not to completed actions or agency inaction.

Land management plans prepared pursuant to NFMA or FLPMA do not differ significantly in overall structure and generally contain a framework for desired conditions, objectives, and guidance for project and activity decision-making in the plan area. Plans do not generally grant, withhold, or modify any contract, permit, or other legal instrument or create any legal rights. As courts have noted, “a statement in a plan that BLM “will” take this, that, or the other action” is not a legally binding commitment enforceable under the [Administrative Procedure Act.]” *Forest Guardians v. Forsgren*, 478 F.3d 1149, 1156 n. 9 (10th Cir. 2007) (*quoting SUWA*, 542 U.S. at 72).

The proposed revision appropriately relies on the proposition that a land management plan prepared pursuant to NFMA or FLPMA establishes a framework for the development of specific future action(s) but does not normally authorize future action(s). Land management plans do not generally fund, authorize, or carry out ground-disturbing actions. However, as described above, there are actions in some BLM land management plans that are directly authorized by the plan itself and will not be reviewed in a separate ESA section 7 consultation. Thus, to the extent that new information reveals effects to listed species or critical habitat from these actions directly authorized by the plan and that were not previously considered, this proposed exemption from reinitiation of consultation would not apply.

The proposed revisions to the regulations are consistent with the statutory purposes of section 7 of the ESA. New information regarding effects not previously considered in the programmatic biological opinion would be evaluated in a separate consultation in which more site-specific details would be available to better assess any impacts on listed species or critical habitat. In addition, to the maximum

extent that doing so is consistent with the agencies' responsibilities under the ESA, the process of updating or revisiting programmatic consultations on land management plans is usually best conducted in conjunction with the amendment and revision process set forth in the planning statutes rather than on an *ad hoc* basis. Thus, the proposed revision to the regulations would make the consultation process more efficient and consistent, while ensuring that species and the habitats upon which they depend are conserved. Specifically, we propose to revise paragraph (b) of § 402.16 by moving some of the existing language to new paragraph (b)(1) and adding a new paragraph (b)(2), which includes language pertaining to land management plans for which new information reveals that effects of the action may affect listed species or critical habitat in a manner or to an extent not previously considered.

Congress did not address land management plans prepared pursuant to FLPMA in the 2018 Omnibus Act, except for grant lands under the Oregon and California Revested Lands Act, 39 Stat. 218, and the Coos Bay Wagon Road Reconveyed Lands Act, 40 Stat. 1179. No expiration date was attached to these provisions. Accordingly, like the 2019 regulatory exemption from reinitiation on the basis of newly listed species or designated critical habitat, this proposal would exclude from the reinitiation requirement any completed land management plan prepared pursuant to FLPMA from reinitiation of consultation on the basis of new information on effects of the plan, as long as any action taken pursuant to the plan will be subject to an action-specific section 7 consultation if that action may affect a listed species or critical habitat. For the same reasons set forth below as to National Forest System lands, the Services conclude that these instructions may be established on a permanent basis.

After decades of experience cooperating with action agencies across the Federal Government, we have gained expertise with respect to when reinitiation of consultation is most effective in meeting the overall goals of the Act. As a legal matter, as the Department of Justice correctly argued in *Cottonwood*, the duty to reinitiate consultation does not apply to completed land and resource management plans. See, e.g., *Forest Guardians v. Forsgren*, 478 F.3d at 1158–59 (disagreeing with *Pacific Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994)). Independently of any such legal considerations, as a policy matter, similar to reinitiating consultation on a

land management plan when new species are listed or critical habitat designated, reinitiation of consultation on those plans based on new information on effects of the plan does little to further the goals of the Act. Both the BLM and the FS periodically update their land management plans, at which time they would consider any new information during consultation on effects of the plan. The BLM periodically evaluates and revises resource management plans (see 43 CFR subpart 1610), and the interval between reevaluations should not exceed 5 years (see BLM Handbook H–1601–1 at p. 34). FS is required to revise their land management plans at least every 15 years (see 36 CFR 219.7). In addition to periodically revising their land management plans, both BLM and FS are required to consult on any specific actions if those actions may affect listed species or critical habitat.

We propose, therefore, to expand § 402.16(b) to apply likewise to the receipt of new information revealing effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered. Requiring reinitiation on these completed plans based on new information of effects of the existing plans often results in impractical and disruptive burdens while resulting in little benefit to listed species or critical habitat. Generally, specific on-the-ground actions taken in conformance with the approved land management plan are subject to their own action-specific section 7 consultations if those actions may affect listed species or critical habitat, and relevant new information would be analyzed at that time. In these cases, focusing on these action-specific consultations would allow the affected agencies to direct their limited resources to those actions that cause on-the-ground effects to listed species or designated critical habitats and ensure that the FS and the BLM fulfill their obligations under section 7, while avoiding unnecessary reinitiation at the plan level.

For example, if new information revealed a higher density of a listed species in a plan area than was known during the consultation on the land management plan, that new information would be considered and incorporated in future consultations on specific authorized actions that may affect that species and/or its critical habitat. As another example, if, after completion of consultation on a land management plan, it was learned that a technique or practice that was anticipated to be used during subsequent projects is reasonably certain to have a greater impact on the

environment than that analyzed in the consultation on the land management plan, that new information would also be considered and incorporated in future consultations on specific authorized actions that may affect listed species and/or critical habitat. Each consultation builds on past consultations no matter whether the action being consulted on relates to a plan or to a specific action.

At the early stage and broad scale of plan consultation, the agencies lack specific information on whether and how actual projects and activities will occur. As discussed, plans are programmatic documents that set broad goals and guidelines for land management, but typically do not authorize ground-disturbing activities. See *Ohio Forestry*, 523 U.S. at 733–34. The number, type, timing, location, and other details for any activities that may occur in the plan area mostly are unknown to the action and consulting agencies at the time of consultation on a plan.

By contrast, in the context of project consultations, the consulting agency knows specifically where and when the actions are to occur and the details about the types of activities proposed that were unknown at the time of the consultation on the plan. Moreover, as part of the environmental baseline, the consulting agency knows how other Federal, State, and private actions have affected the species and its critical habitat and analyzes those impacts during the project consultations. See 50 CFR 402.02. Significantly, the project consultations are not narrowly limited to the effects of the individual action on the species or its critical habitat but include “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 [that] . . . would not occur but for the proposed action and it is reasonably certain to occur.” *Id.* § 402.02. These include effects that may occur later in time or outside the immediate area involved in the action. *Id.*; see also § 402.17. Thus, each section 7 consultation builds on the consultations for previous actions.

This proposed revision to the regulations would not change the approach for subsequent consultations on specific authorized actions. During consultation, the Services and the action agency are required to use the best scientific and commercial data available, and this requirement necessarily encompasses considering new relevant information.

Proposed Regulatory Revisions Concerning Permanent Rulemaking as to National Forest System Lands

The proposed revisions would remove the existing regulation's timing limitations concerning National Forest System lands. To be sure, the 2018 Act's instructions will remain in force for the time specified by the statute itself. But while Congress' legislative solution has proven to be protective of species' interests and workable for all of the agencies involved, it is only a temporary fix. Therefore, we have decided to invoke our general authority under section 7 concerning inter-agency consultation and issue permanent consultation instructions for FS planning efforts, just as we did for the BLM in 2019.

As previously noted, in 2018 Congress statutorily intervened to temporarily resolve the effects of the *Cottonwood* ruling regarding ESA reinitiation requirements following critical habitat designations. The Omnibus Act created a temporary, safe harbor exempting the FS from reinitiating consultation for approved land management plans when a new species is listed or new critical habitat designation occurs. The Omnibus Act also established a permanent exemption from reinitiation for certain lands managed by the BLM. To recognize these instructions, the Services amended the reinitiation regulations at 50 CFR 402.16 to incorporate the Omnibus Act's instructions that reinitiation of consultation shall not be required for land management plans upon listing of a new species or designation of new critical habitat, subject to the time limitations on this safe-harbor relief that were specified in the Omnibus Act (84 FR 45017, August 27, 2019). The regulatory provisions applicable to National Forest System lands reflected the Omnibus Act's rolling sunset of the safe-harbor exemptions from reinitiation of consultation. For a National Forest System plan that is outside the time limitations that apply to the relief afforded by the Omnibus Act, reinitiation of consultation is governed by standard ESA statutory and regulatory requirements and is not subject to the safe harbor afforded by the Act.

While the Omnibus Act set specific temporal timeframes for its temporary safe-harbor exemption of NFS lands, the Services retain their general ESA section 7 authority to establish procedures governing inter-agency cooperation. Congress' negotiated outcome of a temporary safe-harbor solution to the problems created by *Cottonwood* leaves

intact the Services' authority to establish a permanent administrative remedy to such problems.

First, the ESA sets forth a general duty to consult on agency action and broadly authorizes the Services to determine the manner in which that duty is carried out. See *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 708 (1995) ("When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary."); 16 U.S.C. 1533(b)(8) (authorizing "publication in the **Federal Register** of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this Act"). We also note that while section 7 was enacted in 1973 and initial ESA regulations were issued in 1978, no reinitiation regulation was issued until 1986. Agencies routinely revisit their regulations seeking improvement and resolving ambiguities. See *Nat'l Cable & Telecomm. Ass'n v. Brand X internet Servs.*, 545 U.S. 967, 982–83 (2005). The Services' authority to clarify and adjust the consultation procedures is well-supported in the ESA's text and case law and is necessary to ensure the ESA's proper administration. A permanent solution to resolve conflicting judicial interpretations of administrative regulations is entirely appropriate and within the Service's authority.

Second, the fact that Congress already has enacted a narrow, temporary fix does not preclude a permanent administrative solution. Nothing in the Omnibus Act's text suggests a broad preemptive effect as to the Services' general rulemaking authority. More specifically, while 16 U.S.C. 1604(d)(2)(B) provides that the protection afforded by subparagraph (A) "shall not apply" if certain temporal limits have been exceeded, subparagraph (A) provides that "notwithstanding any other provision of law, the Secretary shall not be required to engage in consultation under this section or any other provision of law (including section 7 of Public Law 93–205 (16 U.S.C. 1536) and § 402.16 of title 50, Code of Federal Regulations (or a successor regulation)) with respect to" species listings and critical habitat designations. That "notwithstanding any other provision of law" provision does not change the meaning of the underlying law, and therefore does not disturb the preexisting ESA authorities outside its specific instructions. The Omnibus Act's "notwithstanding" language disavows other provisions of law to create an independent, self-executing limitation that is self-contained and not preemptive of the

Service's general authority under the ESA. The Act's "notwithstanding" language signifies that no matter how a court may read the ESA or section 7 requirements in general, no consultation is required on forest plans in the circumstances specifically addressed by the legislation. The Act therefore does not preclude the broader administrative adjustment of the underlying regulations proposed here, particularly given the sweeping delegation of rulemaking authority that the ESA affords to the Services as a general matter. See *Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. at 708 ("When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his.").

Viewing the Omnibus Act through the familiar rules of statutory construction, it is clear that nothing is to be added to what the Omnibus Act's text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered. As the Fifth Circuit said with respect to similar safe-harbor amendments to the Migratory Bird Treaty Act, "[w]hether Congress deliberately avoided more broadly changing the [statute] or simply chose to address a discrete problem, the most that can be said is that Congress did no more than the plain text of the amendment means." *United States v. Citgo*, 801 F.3d 477, 491 (5th Cir. 2015); see *id.* ("A single carve-out from the law cannot mean that the entire coverage of the MBTA was implicitly and hugely expanded.").

Third, a permanent resolution also aligns with the government's longstanding position that the duty to consult under section 7 is limited to affirmative agency actions and is not applicable to completed actions or agency inaction. The United States' 2016 Petition for Certiorari in *Cottonwood* clearly and unequivocally stated that "the Ninth Circuit's holding that federal agencies must reinitiate consultation pursuant to section 7 of the ESA on a completed agency action at the programmatic level because the agency retains discretion to authorize site-specific projects governed by the programmatic action has no basis in the ESA or its implementing regulations." Petition for Writ of Certiorari, *United States Forest Service v. Cottonwood Environmental Law Center*, No. 15–1387 (June 2016). As previously noted, unless expressly stated otherwise, completed land management plans do not result in any immediate on-the-ground effects, and all relevant information is

considered during the separate section 7 consultations that occur for subsequent project activities if those actions may affect listed species or critical habitat. The Forest Service's current planning regulations confirm that "[a] plan does not authorize projects or activities or commit the Forest Service to take action." 36 CFR 219.2(b)(2).

Further, plan level consultation will of course continue to occur when the FS proposes to amend or revise a plan. Cyclical or periodic consultation aligns with other Ninth Circuit caselaw such as *California Sportfishing Protection Alliance v. FERC*, 472 F.3d 593, 595, 598 (9th Cir. 2006), where the Circuit reviewed a challenge to the Federal Energy Regulatory Commission's decision not to initiate consultation over the ongoing operation of a private hydroelectric plant operated under a 30-year license. In that case, FERC had the discretion to institute proceedings to amend an existing license, but the court emphasized, that "[t]he ESA and the applicable regulations . . . mandate consultation with [the consulting agency] only before an agency takes some affirmative agency action, such as issuing a license." The court concluded that "the agency action of granting a permit is complete," and that the mere unexercised discretion to modify the license for the benefit of listed species did not constitute "action" triggering a duty to initiate consultation.

A permanent rule addressing programmatic plan consultation will promote predictability for agencies and the public and allow the FS and BLM to efficiently accomplish their species conservation objectives and land management missions.

Public Comments

The proposed amendments would adjust reinitiation practices addressing new information supplementing the Services' rulemaking governing reinitiation for critical habitat designations and species listings which was the subject of both legislation and administrative rulemaking. These proposed procedural adjustments provide clarity and transparency about how the Secretaries intend to exercise their discretion regarding evaluation of new information concerning land management plans under section 7(a)(2) of the ESA. As the ESA does not provide a specific public comment period for issuance of inter-agency consultation regulations, generally speaking, any otherwise applicable notice requirement will be satisfied if it affords interested persons a reasonable and meaningful opportunity to participate in the rulemaking process. The 30-day

comment period provides such an opportunity given the proposed rule's limited scope and the other recent rulemaking pertaining to reinitiation practices.

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

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

Required Determinations

Regulatory Planning and Review—Executive Orders 12866 and 13563

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

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

effective or less burdensome in achieving the regulatory objectives."

Executive Order 13771

This proposed rule is an Executive Order 13771 "other" action.

Regulatory Flexibility Act

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

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

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

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

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

Takings (E.O. 12630)

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

Federalism (E.O. 13132)

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

Civil Justice Reform (E.O. 12988)

This proposed rule would clarify responsibilities for reinitiation of consultation under the Endangered Species Act. 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 Executive Order 12988.

Government-to-Government Relationship With Tribes

In accordance with Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments,” the Department of the Interior’s manual at 512 DM 2, and the Department of Commerce (DOC) Tribal Consultation and Coordination Policy (May 21, 2013), DOC Departmental Administrative Order (DAO) 218–8 (April 2012), and

NOAA Administrative Order (NAO) 218–8 (April 2012), we are considering possible effects of this proposed rule on federally recognized Indian Tribes. The Services have reached a preliminary conclusion that the proposed changes to these implementing regulations are general in nature and do not directly affect specific species or Tribal lands. These proposed regulations clarify the processes for reinitiation of consultation and directly affect only the Services and Federal land-managing agencies. Therefore, we conclude that these regulations do not have “Tribal implications” under section 1(a) of E.O. 13175, and, formal government-to-government consultation is not required by the Executive Order and related policies of the Departments of the Interior and Commerce. We will continue to collaborate with Tribes on issues related to federally listed species and their habitats and work with them as we implement the provisions of the Act. See Joint Secretarial Order 3206 (“American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act”, June 5, 1997).

Paperwork Reduction Act

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

National Environmental Policy Act

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

As a result, we anticipate that the categorical exclusion found at 43 CFR 46.210(i) applies to the proposed regulation changes. At 43 CFR 46.210(i), the Department of the Interior has found that the following categories of actions would not individually or cumulatively

have a significant effect on the human environment and are, therefore, categorically excluded from the requirement for completion of an environmental assessment or environmental impact statement: “Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature.” NOAA’s NEPA procedures include a similar categorical exclusion for “preparation of policy directives, rules, regulations, and guidelines of an administrative, financial, legal, technical, or procedural nature.” (Categorical Exclusion G7, at CM Appendix E).

We are continuing to consider the extent to which this proposed regulation may have a significant impact on the human environment or fall within one of the categorical exclusions. We invite the public to comment on these or any other aspects of NEPA compliance that may be needed for these revisions. We will comply with NEPA before finalizing this regulation.

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

Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The proposed revised regulations are not expected to affect energy supplies, distribution, and use, and the Administrator of OIRA has not otherwise designated it as a significant energy action. Accordingly, no Statement of Energy Effects is required.

Clarity of the Rule

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

- (1) Be logically organized;
- (2) Use the active voice to address readers directly;
- (3) Use clear language rather than jargon;
- (4) Be divided into short sections and sentences; and
- (5) Use lists and tables wherever possible.

If you 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 of the rule that are not clearly written, which sections or sentences are too long, the sections where you believe 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 propose to amend subpart B of part 402, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as set forth below:

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

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

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

■ 2. Amend § 402.16 by revising paragraph (b) to read as follows:

§ 402.16 Reinitiation of consultation.

* * * * *

(b) After an agency approves a land management plan prepared pursuant to 43 U.S.C. 1712 or 16 U.S.C. 1604, the agency need not reinitiate consultation on that plan upon:

(1) The listing of a new species or designation of new critical habitat, provided that any authorized actions that may affect the newly listed species or designated critical habitat will be addressed through a separate action-specific consultation; or

(2) The receipt of new information revealing effects of the action that may affect listed species or critical habitat in

a manner or to an extent not previously considered, provided that any authorized actions for which the new information is relevant will be addressed through a separate action-specific consultation.

George Wallace,

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

Christopher Wayne Oliver,

Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration.

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