

Part 402 is revised to read as follows.

Sec. 402.01 Scope.

(a) This part interprets and implements sections 7(a)(2)–(d) [16 U.S.C.1536(a)(2)–(d)] of the Endangered Species Act of 1973, as amended (“Act”). Section 7(a) grants authority to and imposes requirements upon Federal agencies regarding endangered or threatened species of fish, wildlife, or plants (“listed species”) and habitat of such species that has been designated as critical (“critical habitat”). Section 7(a)(1) of the Act directs Federal agencies to utilize their authorities to further the purposes of the Act by carrying out conservation programs for listed species. Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat. Section 7(a)(3) of the Act authorizes a prospective permit or license applicant to request the issuing Federal agency to enter into early consultation with the Service on a proposed action to determine whether such action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Section 7(a)(4) of the Act requires Federal agencies to confer with the Secretary on any action that is likely to jeopardize the continued existence of proposed species or result in the destruction or adverse modification of proposed critical habitat.

Section 7(b) of the Act requires the Secretary, after the conclusion of consultation, to issue a written statement setting forth the Secretary's opinion and a summary of the information on which the opinion is based, detailing how the agency action affects listed species or critical habitat.

Biological assessments are required under section 7(c) of the Act if listed species or critical habitat may be present in the area affected by any major construction activity.

Section 7(d) of the Act prohibits Federal agencies and applicants from making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternatives which would avoid jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat

Section 7(e)–(o)(1) of the Act provide procedures for granting exemptions from the requirements of section 7(a)(2). Regulations governing the submission of exemption applications are found at 50 CFR part 451, and regulations governing the exemption process are found at 50 CFR parts 450, 452, and 453.

(b) The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) share responsibilities for administering the Act. The Lists of Endangered and Threatened Wildlife and Plants are found in 50 CFR 17.11 and 17.12 and the designated critical habitats are found in 50 CFR 17.95 and 17.96 and 50 CFR part 226. Endangered or threatened species under the jurisdiction of the NMFS are located in 50 CFR 223.102(a) and 224.101. If the subject species is cited in 50 CFR 223.102 or 224.101, the Federal agency shall contact the NMFS. For all other listed species the Federal Agency shall contact the FWS.

§ 402.02 Applicability.

Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.

§ 402.03 Definitions.

“Act” means the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 et seq.

“Action” means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States, its territories, or on the high seas.

“Action area” means all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.

Bring in the definition of conservation, recovered, and PCEs in from 424 and recovery from 402?

“Destruction or adverse modification” means a direct or indirect alteration of the PCEs, or, for the purposes of unoccupied critical habitat, the ability of the PCEs to be established, that appreciably diminishes the recovery role of critical habitat in its entirety. To evaluate whether an action adversely modifies or destroys critical habitat, the temporal and spatial nature of the effects should be considered.

Preamble – add discussion of what is meant by “in the context with the temporal and spatial nature of the effects.”

“Applicant” refers to any person or their designated representative, as defined in section 3(13) of the Act, who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the activity that is the subject of the consultation.

Note: move this to a new section that describes better the rights of applicants: An applicant has a right equal to the Federal Agency to be involved in the consultation process.

“Biological opinion” is the opinion of the Director as to whether or not the Federal action is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

“Conference” is the process used to evaluate the effects of federal actions on species proposed for listing or on proposed critical habitat

“Conservation recommendations” are suggestions by the Service regarding discretionary measures to minimize or avoid adverse effects of a proposed action on listed species or critical habitat or regarding the development of information.

“Consultation” is a process between the Service and a Federal agency that assists the Federal agency in fulfilling its responsibilities under section 7(a). There are various methods for conducting consultation using the components described within these regulations.

“Critical habitat” refers to an area designated as critical habitat listed in 50 CFR parts 17 or 226.

“Designated non-Federal representative” refers to a person designated by the Federal agency as its representative to conduct consultation and/or to prepare any biological assessment.

“Director” refers to the Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration, or his authorized representative; or the Fish and Wildlife Service Director, or his authorized representative.

“Effects of the action” means those effects that will occur to the species as a result of the action under consultation. The analysis of the effects of the action compares the future status of the species with the proposed action to the future status of the species without the proposed action. The federal action under consultation and any further actions which would not occur but for the federal action and that are reasonably certain to occur should be analyzed. Once the

actions are defined, determine the effects of those actions on the species and designated critical habitat.

The following sentence should be used in the appropriate place in the preamble: If additional actions are predicted to occur, yet they do not meet the “but for” test or are not reasonably certain to occur, parties responsible for the additional actions and effects will be responsible for seeking authorization for any additional anticipated take.

“Emergency consultation” means, a consultation on the response to situations where: 1) use of the regular consultation procedures would delay emergency response and potentially place human health or safety or the environment at risk; or 2) either a state government or the President has declared an emergency.

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“Future status of the species without the proposed action” means the reference condition representing the status of the species into the future absent the action under consultation. The purpose of the “future status of the species without the proposed project” is to provide frame of reference to which the future status of the species as influenced by the proposed project under consultation will be compared.

The future status of the species without the proposed action includes:

(a) The effects on the species of all past actions;

(b) The anticipated impacts of all proposed federal actions that have undergone required consultation;

(c) Those effects both beneficial and adverse of contemporaneous and future state or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation; and

(d) the effects of any non-discretionary portion of the action under consultation.

“Incidental take” refers to takings that are caused by, but are not the purpose of, carrying out an activity conducted by the Federal agency or applicant.

“Jeopardize the continued existence of a species” means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

“Listed species” means any species of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Act. Listed species are found in 50 CFR 17.11–17.12.

“Low effects” are adverse effects to listed species or designated critical habitat that are minor or negligible when considered in the context of the status of the species and the designated critical habitat. Low effects may include take.

“Major construction activity” is a construction project (or other undertaking having similar physical impacts) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act [NEPA, 42 U.S.C.4332(2)(C)].

“Not likely to adversely affect” means an action whose potential effects are:

- (1) Extremely unlikely to occur; or
- (2) Insignificant (meaning they cannot be meaningfully measured, detected, or evaluated, and never reach the scale where take occurs); or
- (3) Wholly beneficial to the species (not resulting in any take).

“Preliminary biological opinion” refers to an opinion issued as a result of early consultation.

“Proposed critical habitat” means habitat for which a proposed regulation to designate critical habitat under section 4 of the Act has been published in the Federal Register.

“Proposed species” means any species of fish, wildlife, or plant for which a proposed regulation to list the species under section 4 of the Act has been published in the Federal Register.

“Reasonable and prudent alternatives” refer to alternative actions developed in coordination between the Service, the action agency, and the applicant (if any) that can be implemented in a manner consistent with the intended purpose of the action by the Federal agency, or the applicant, that are economically and technologically feasible, and that are reasonably likely to avoid jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat.

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“Reasonable and prudent measures” refer to those actions, developed in coordination between the Service, the action agency, and the applicant necessary or appropriate to minimize the impact of the incidental take.

“Reasonably certain to occur” means that economic, administrative, and legal requirements or constraints have been or are likely to be met or overcome, indicating that the action will occur.

“Service” means the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate.

“Technical assistance” refers to information and any other forms of assistance provided by the Service to action agencies to assist in fulfilling their responsibilities under section 7 of the Act.

§ 402.04 Coordination with states and other environmental reviews.

(a) Consultation, conference, and biological assessment procedures under section 7 may be consolidated with interagency cooperation procedures required by other statutes, such as the National Environmental Policy Act (NEPA) (42 U.S.C. 4321 et seq., implemented at 40 CFR Parts 1500–1508) or the Fish and Wildlife Coordination Act (FWCA) (16 U.S.C. 661 et seq.) if requested by the action agency.

(b) To better inform interagency consultation, the Services will regularly solicit information and data regarding involved threatened or endangered species from relevant state agencies and coordinate with state agencies in the development of new information.

§ 402.05 Designation of lead agency.

When a particular action involves more than one Federal agency, the consultation and conference responsibilities may be fulfilled through a lead agency.

§ 402.06 Designation of non-Federal representative.

A Federal agency may, with the consent of the applicant, if any, designate a non-Federal representative for all matters pertaining to consultation. The ultimate responsibility for compliance with section 7 remains with the Federal agency.

§ 402.07 Irreversible or irretrievable commitment of resources.

The prohibitions in Section 7(d) are in force during the consultation process and continue until the procedural requirements of section 7(a)(2) are satisfied.

Comment [RS1]: FWS Team opposed to including the omitted text. Issue is an action agency concern.

Deleted: A commitment of resources which may be redeemed, reversed or entirely compensated for through mitigation is not irreversible or irretrievable.

Do we want to add in sec 402.12 h – k from existing regulations (permit requirements, completion time, submission of biological assessment and response within 30 days, use of the biological assessment)

402.09 Types of Consultation

The types of consultation procedures set forth in this part have general applicability but may be superseded for any Federal agency by agreement or joint counterpart regulations among the agency, the Fish and Wildlife Service, and/or the National Marine Fisheries Service. Any counterpart regulations shall be published in the Federal Register in proposed form and shall be subject to public comment for at least 60 days before final rules are published. The Secretary shall publish notice in the Federal Register of each agreement entered into under this section and solicit comments from interested parties for 30 days after the date of the notice.

(a) **Emergency Consultations** When emergency circumstances necessitate consulting in an expedited manner, consultation may be conducted through procedures that the **Service** determines to be consistent with the requirements of sections 7(a)(2)–(d) of the Act.

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(b) **Conference**

(1) Each Federal agency shall confer with the Service on any action which is likely to jeopardize the continued existence of any proposed species or result in the destruction or adverse modification of proposed critical habitat. The conference is designed to assist the Federal agency and any applicant in identifying and resolving potential conflicts with species proposed for listing and habitat proposed for designation at an early stage in the planning process.

State involvement?

(2) The Federal agency shall initiate the conference with the Director. The Service may request a conference if, after a review of available information, it determines that a conference is appropriate for a particular action. A conference between a Federal agency and the service shall consist of informal discussions concerning an action that is likely to jeopardize the continued existence of the proposed species or result in the destruction or adverse modification of the proposed critical habitat at issue. During the conference, the Service will make advisory recommendations, if any, on ways to minimize or avoid adverse effects. If the proposed species is subsequently listed or the proposed critical habitat is

designated prior to completion of the action, the Federal agency must review the action to determine whether further consultation is required.

(3) An opinion issued at the conclusion of the conference shall be adopted as the biological opinion when the species is listed or critical habitat is designated, if no significant new information becomes available (including that which becomes available during the rulemaking process on the proposed listing or critical habitat designation) and no significant changes to the Federal action are made that would alter the conclusions of the opinion. An incidental take statement shall be provided with a conference opinion but it does not become effective unless the Service adopts the opinion once the listing is final.

(4) The conclusions reached during a conference and any recommendations shall be documented by the Service and provided to the Federal agency and to any applicant

(c) **Early Consultations** - Pursuant to Section 7(a)(3), at the request of a federal agency, the Service shall coordinate with the agency on early consultation procedures. Such procedures may result in the issuance of a preliminary biological opinion.

(1) Confirmation of preliminary biological opinion as final biological opinion. A preliminary biological opinion may be confirmed as a biological opinion issued after formal consultation if the Service reviews the proposed action and finds that there have been no significant changes in the action as planned or in the information used during the early consultation. A written request for confirmation of the preliminary biological opinion should be submitted after the prospective applicant applies to the Federal agency for a permit or license but prior to the issuance of such permit or license. Within 30 days of receipt of the Federal agency's request, the Service shall either:

(a) Confirm that the preliminary biological opinion stands as a final biological opinion; or

(b) If the findings noted above cannot be made, request that the Federal agency initiate formal consultation.

(d) **Informal Consultations**

(1) Informal consultation is an optional process designed to assist a Federal agency who does not have an agreement pursuant to 402.04(c) in determining whether formal consultation or a conference is required. Informal consultation can only be initiated through a request by the action agency. The

request from the action agency must be accompanied by a written determination by an action agency that an action is not likely to adversely affect a listed species or critical habitat pursuant to 402.14(b). If the Service provides a written concurrence that the action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary.

(2) 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

(e) **Programmatic Consultations** – add a description from our current guidance

(f) **Low Effect Consultations** - This type of consultation is initiated when the federal action is anticipated to result in low effects that are inconsequential to the species and will not constitute jeopardy or adverse modification.

When low effects are anticipated, the federal agency initiates low effect consultation with the Service by providing the information required to initiate consultation (see....) and stating their opinion, with appropriate documentation, that the action will have low effects. If, after consultation, the Secretary concludes that:

(1)The impact of the incidental taking, if any, is inconsequential to the species; and

(2) that the action will not jeopardize the species; and

(3) that the action will not destroy or adversely modify critical habitat;

then the Service may sign the agency's initiation package, stating the above conclusions, as a low effect biological opinion, and may add an associated incidental take statement.

Note: should this be in guidance not regs: The RPMs and their associated terms and conditions may consist of standard best management practices that are known to minimize the adverse effects to the species involved and standard reporting procedures.

(g) **Alternative informal consultation procedures** Modified procedures for consultation may be implemented by agreements among the Service and federal agencies as long as the final procedures produce the functional equivalent of the

Comment [RS2]: FWS Team thinks this subsection is too open-ended and should be deleted.

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required analysis set forth elsewhere in this part. Such alternative procedures must as a minimum include descriptions of the Such alternative procedures may involve the action agency determining that their action is not likely to adversely affect a listed species without further concurrence from the Service.

Resolve the wording between these two paragraphs:

(d) (1) Notwithstanding the provisions of 402.13(a), the Service may enter into agreements with federal agencies to allow them to make determinations that actions are not likely to adversely affect listed species through an expedited process. Factors to be considered before entering into agreements include but are not limited to: species affected, type of activity, and expertise of the action agency.

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(1) Environmental baseline;
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(2) Direct and indirect effects of the action;

(h) **Alternative Formal Consultation Procedures.** If the action agency has made a finding pursuant to 402.08 (f) (6) and (7) and if the Service concurs that the finding meets the standards of the Act, the Service may adopt such finding as the written statement setting forth the Secretary's opinion pursuant to Section 7(b)(3)(A) and 7(b)(4) of the Act.

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(i) **Traditional Formal Consultations**

(j) **Incremental Step Consultations** When the action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action, the Service shall, if requested by the Federal agency, issue a biological opinion on the incremental step being considered, including its views on the entire action. Upon the issuance of such a biological opinion, the Federal agency may proceed with or authorize the incremental steps of the action if:

- (1) The biological opinion does not conclude that the incremental step would violate section 7(a)(2);
- (2) The Federal agency continues consultation with respect to the entire action and obtains biological opinions, as required, for each incremental step;
- (3) The Federal agency fulfills its continuing obligation to obtain sufficient data upon which to base the final biological opinion on the entire action;
- (4) The incremental step does not violate section 7(d) of the Act concerning irreversible or irretrievable commitment of resources; and

(3) A Federal agency need not initiate consultation if a preliminary biological opinion, issued after early consultation under §402.11, is confirmed as the final biological opinion.

(c) Biological Assessments.

(1) Purpose. A biological assessment shall evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action and is used in determining whether formal consultation or a conference is necessary.

(2) Preparation requirement: (i) The procedures of this section are required for all Federal actions that are “major construction activities”; provided that a contract for construction was not entered into or actual construction was not begun on or before November 10, 1978. Any person, including those who may wish to apply for an exemption from section 7(a)(2) of the Act, may prepare a biological assessment in cooperation with the Service consistent with the procedures and requirements of this section. An exemption from the requirements of section 7(a)(2) is not permanent unless a biological assessment has been prepared.

(ii) The biological assessment shall be completed before any contract for construction is entered into and before construction is begun.

(3) Request for information. The Federal agency or the designated non-Federal representative shall convey to the Director either (1) a written request for a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area; or (2) a written notification of the species and critical habitat that are being included in the biological assessment.

(4) Service's response. Within 30 days of receipt of the notification of, or the request for, a species list, the Director shall either concur with or revise the list or, in those cases where no list has been provided, advise the Federal agency or the designated non-Federal representative in writing whether, based on the best scientific and commercial data available, any listed or proposed species or designated or proposed critical habitat may be present in the action area. In addition to listed and proposed species, the Director shall provide a list of candidate species that may be present in the action area. Although candidate species have no legal status and are accorded no protection under the Act, their inclusion will alert the Federal agency of potential proposals or listings.

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Deleted: Candidate species refers to any species being considered by the Service for listing as endangered or threatened species but not yet the subject of a proposed rule.

(i) If the Service advises that no listed species or critical habitat may be present, the Federal agency need not prepare a biological assessment

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and further consultation is not required.) If only proposed species or proposed critical habitat may be present in the action area, then the Federal agency must confer with the Service if required under §402.10, but preparation of a biological assessment is only required if the proposed listing or designation becomes final.

(ii) If a listed species or critical habitat may be present in the action area, the Service will provide a species list or concur with the species list provided within 30 days. The Service will provide available information regarding these species and critical habitat and may recommend discretionary studies or surveys that may provide a better information base for the preparation of an assessment. Any recommendation for studies or surveys is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act.

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(5) Verification of current accuracy of species list. If the Federal agency or the designated non-Federal representative does not begin preparation of the biological assessment within 90 days of receipt of (or concurrence with) the species list, the Federal agency or the designated non-Federal representative must verify (formally or informally) with the Service the current accuracy of the species list at the time the preparation of the assessment is begun. The Service shall concur or provide an accurate species list within 30 days.

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(6) Contents. The specific contents of a biological assessment are at the discretion of the Federal agency and will depend on the nature of the Federal action. However, at a minimum, the following information should be supplied.

(i) A description of the action, including identifying any discretionary or non-discretionary portions of the action;

Deleted: (1) The results of an on-site inspection of the area affected by the action to determine if listed or proposed species are present or occur seasonally;

(ii) The results of an on-site inspection of the area affected by the action to determine if listed or proposed species are present or occur seasonally;

(iii) The views of recognized experts on the species at issue;

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(iv) A review of the literature and other information;

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(v) An analysis of the effects of the action on the species and habitat including any beneficial effects caused by the proposed action including consideration of the overall status of the species and effects arising from other Federal or non-Federal actions, and the results of any related studies;

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(vi) The action agency's analysis of whether or not the proposed action is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat and a description of any reasonable and prudent alternatives that may be available;

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(vii) A description of the impact of any anticipated incidental taking of such listed species resulting from the action, reasonable and prudent measures considered necessary or appropriate to minimize such impact, and terms and conditions necessary to implement such measures; and

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(viii) A summary of any information or recommendations from an applicant.

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(7) Incorporation by Reference. If a proposed action requiring the preparation of a biological assessment is identical, or very similar, to a previous action for which a biological assessment was prepared, the Federal agency may fulfill the biological assessment requirement for the proposed action by incorporating by reference the earlier biological assessment, plus any supporting data from other documents that are pertinent to the consultation, into a written certification that:

(i) The proposed action involves similar impacts to the same species in the same geographic area;

(ii) No new species have been listed or proposed or no new critical habitat designated or proposed for the action area; and

(iii) The biological assessment has been supplemented with any relevant changes in information.

Note: is there opposition to allowing this Incorporation by Reference?

Should we include a provision like S1180 that says applicants can request consultation?

(d) Initiation of consultation. If the procedures of §402.04 (IS THIS THE CORRECT CITATION?? or 402.13 (IS THIS THE CORRECT CITATION?) or 402.14 © were not used, then a written request to initiate consultation shall be submitted to the Director and shall include:

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(1) A description of the action to be considered, including identifying any discretionary or non-discretionary portions of the action;

- (2) A description of the specific area that may be affected by the action;
- (3) A description of any listed species or critical habitat that may be affected by the action;
- (4) A description of the manner and extent to which the action is likely to adversely or beneficially affect any listed species or critical habitat;
- (5) Relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and
- (6) Any other relevant available information on the action, the affected listed species, or critical habitat, including any actions the action agency may take to minimize the impact of the adverse effects.

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

(d) Responsibility to provide best scientific and commercial data available. The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation. The Service shall advise the action agency of any other existing data that is relevant to the consultation. If the Service concludes information is lacking in the written request to initiate consultation, the Service will describe deficiencies within 30 days. Consultation shall commence upon receipt of the information requested and acknowledgment by the Service or written confirmation from the action agency that no further information will be supplied. If the Service has not identified any deficiencies within 30 days from receipt of information, consultation commenced on the date the request for consultation was received by the Service.

(e) Duration and extension of formal consultation. Consultation shall be completed in accordance with Section 7(b)(1) of the Act.

(f) New data. When the Service determines that conducting additional studies will result in new data that would provide a better information base from which to formulate a biological opinion, formal consultation may be extended with the concurrence of the action agency. The action agency and the Service shall work

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to obtain, to the extent practicable, those new data that can be obtained within the scope of the extension. The Service's request for new data is not to be construed as the Service's opinion that the action agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Service will issue a biological opinion using the best scientific and commercial data available.

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(g) Service responsibilities. Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.

(2) We evaluate the status of the species into the future with and without the project (using a timeframe commensurate with the project) and determine whether the species' status will be different with the project. If so, does the difference in status mean that the continued existence of the species will be jeopardized?

(3) Evaluate also whether any effects to CH constitute AM.

(4) Anticipate incidental take and develop an ITS.

(5) change paragraph 5 And 6 back to current regs 402.14 g

(6) formulate discretionary conservation recommendations

(7) Formulate a statement concerning incidental take, if such take is likely to occur.

Deleted: Within 15 days after concluding consultation, the Service shall deliver a draft biological opinion and incidental take statement to the Federal agency and any applicant.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions taken by the Federal agency or applicant, including any actions taken prior to the initiation of consultation.

(h) Biological opinions. A biological opinion shall include:

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

(2) An appropriately detailed discussion of the effects of the action on listed species or critical habitat;

(3) An appropriately detailed analysis of whether and how the proposed action is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat, and a discussion of any reasonable and prudent alternatives available to avoid jeopardy or destruction or adverse modification of critical habitat. If the Service, in cooperation with the action agency and applicant, is unable to develop such alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

402.11 Incidental Take Statement

(1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and any resultant incidental take of listed species is in compliance with section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

- (i) Specifies the amount or extent of incidental take in qualitative or quantitative terms;
- (ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;
- (iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;
- (iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and
- (v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes and must be commensurate with the impacts on the species of the incidental take resulting from the action under consultation.

(3) In order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the terms and conditions.

(4) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

402.12 Conservation Recommendations

The Service may provide with the biological opinion a statement containing discretionary conservation recommendations. Conservation recommendations are advisory and are not intended to carry any binding legal force. In order to facilitate action agencies greater involvement in recovery of listed species, the Service will recommend tasks relevant to that agency that have been identified in recovery plans.

402.13 Termination of Consultation

(1) Consultation is terminated with the issuance of the biological opinion.

(2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.

(3) If during any stage of consultation a Federal agency determines, with the written concurrence of the Director, that its proposed action is not likely to adversely affect any listed species or critical habitat, the consultation is terminated.

§ 402.14 Responsibilities of Federal agency following issuance of a biological opinion.

(a) Following receipt of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service's biological opinion.

(b) If a biological opinion has found an agency's action is likely to jeopardize the continued existence of a listed species or destroy or adversely modify designated critical habitat, the Federal agency shall notify the Service of its final decision on the action.

(c) If the Federal agency determines that it cannot comply with the requirements of section 7(a)(2) after consultation with the Service, it may apply for an exemption. Procedures for exemption applications by Federal agencies and others are found in 50 CFR part 451.

§ 402.15 Reinitiation of consultation

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

(1) The impact of the taking specified in the incidental take statement is exceeded; or

(2) New information reveals effects of the action that may adversely affect listed species or critical habitat in a manner or to an extent not previously considered; or

(3) The identified action is subsequently modified in a manner that causes an adverse effect to the listed species or critical habitat that was not considered in the biological opinion; or

(4) A new species is listed or critical habitat designated that may be adversely affected by the identified action.

(b) Reinitiation of consultation may result in a letter amending the current opinion or the incidental take statement or in the issuance of a complete biological opinion, as warranted by the circumstances of reinitiation.

(c) During the course of any reinitiation of consultation, the existing biological opinion and incidental take statement remains valid and in effect until replaced by a new biological opinion and incidental take statement.

402.16 Minor amendments to biological opinions or incidental take statements

If reinitiation of consultation is not triggered under section 402.16, the Service, in coordination with the action agency and any applicants, may make minor amendments or administrative changes to either its biological opinion or the accompanying incidental take statement as are appropriate based on new information.

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Note: explain more in preamble