

Draft Environmental Assessment
for the
Proposed Modifications to Regulations Implementing
Interagency Cooperation Under the Endangered Species Act

(published at 73 Fed. Reg. 47868, Aug. 15, 2008)

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Co-Lead Agencies

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I. Introduction

The U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) (jointly referred to as “Services”) are evaluating the potential environmental effects of amending regulations governing interagency cooperation under section 7(a)(2) of the Endangered Species Act of 1973, as amended (Act), as proposed in a Federal Register notice dated August 15, 2008 (73 Fed. Reg. 47868). The Services are proposing these changes to clarify several regulatory definitions, to clarify when the section 7 regulations are applicable, to clarify the appropriate standard for determining effects for section 7(a)(2) consultations, and to establish time frames for the informal consultation process.

This Draft Environmental Assessment (EA) has been prepared to facilitate compliance with the National Environmental Policy Act of 1970 (NEPA), as amended, and the implementing regulations promulgated by the President’s Council on Environmental Quality (CEQ) that are codified at 40 C.F.R. 1500, *et seq.*

As defined by NEPA, one purpose of an EA is to determine whether significant environmental impacts could result from a proposed action. CEQ’s regulations allow an agency to prepare an EA as an initial level of analysis if the agency’s proposed action is not categorically excluded¹ from preparation of a NEPA document (see 40 C.F.R. §§ 1501.3, 1508.4, 1508.9) and would not normally require preparation of an Environmental Impact Statement (EIS). See 40 C.F.R. §§ 1501.4(b), 1508.9. Based on an EA, an agency either finds that an EIS is required or that a “Finding of No Significant Impact” (FONSI) is appropriate based on the analysis and evidence presented in the EA. In addition to CEQ’s regulations implementing NEPA, each federal department and agency also have adopted additional procedures to comply with the CEQ regulations and implement NEPA within their respective program areas. The procedures for compliance with NEPA that are applicable to the Services do not normally require preparation of an EIS as the initial level of NEPA analysis for this type of proposed regulatory change, therefore, the Services have initially prepared this Draft EA to consider the potential environmental effects of the proposed action.²

The Services are circulating this Draft EA for public review and comment. At the conclusion of this EA process, the Services will determine whether it is appropriate for the agencies to prepare an EIS or to finalize the EA and prepare a finding of no significant impact (FONSI) with respect to the proposed action. 40 C.F.R. § 1508.9.

¹ In accordance with 40 C.F.R. §§ 1501.3(b), the Services are preparing this EA to assist agency planning and decision-making, and therefore did not analyze whether existing NEPA categorical exclusions applicable to each agency might be appropriate for this proposed action.

² In order to involve and provide information to the general public to the greatest extent practicable, the Services have chosen to proceed with the preparation and circulation for public review of this Draft EA. While public review of a Draft EA is neither required by CEQ regulations, nor by the statutory provisions of NEPA, the Services have concluded that it would facilitate the Services’ decision-making process to provide for such review in this instance

This Draft EA provides the public and the officials who are reviewing and considering the proposed regulatory changes with an analysis of the potential environmental effects of the proposed action in order to facilitate making an informed decision regarding the proposed action. No decision has been made or will be made with respect to the proposed action until the public comment periods for the proposed regulations and this Draft EA have concluded and the Services have reviewed the information submitted by members of the public or other Federal, tribal, state, or local agencies.

Following review of the comments, the Services will assess the proposed regulatory changes and the content of this Draft EA, and will inform the public of their decision.

II. Statutory and Regulatory Setting

Section 7(a)(2) of the Endangered Species Act addresses interagency cooperation, and provides the statutory framework for analysis of Federal agency actions and consultations. In its entirety, this provision of the ESA provides that:

Each Federal agency shall, in consultation with and with the assistance of the Secretary,³ insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an “agency action”) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

The regulations implementing this provision of law require that Federal agencies consult with the Secretary of the Interior or the Secretary of Commerce regarding discretionary actions that may affect listed species or adversely modify or destroy designated critical habitat. These regulations are codified at 50 C.F.R. Part 402.

III. Proposed Action – Purpose and Need

³ The Services explained the jurisdiction and roles of the Services, the Secretary of the Interior and the Secretary of Commerce in the August 15, 2008 Federal Register notice:

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.

Fed. Reg. 47868 (Aug. 15, 2008) (col. 3).

The proposed regulatory changes are designed to improve the effectiveness and efficiency of the section 7(a)(2) consultation process. In recent years there have been many studies and recommendations suggesting the need for improvements to inter-agency cooperation and consultation.

For example, the proposed regulations respond to recommendations from the General Accounting Office contained in a March 2004, detailed study regarding the effectiveness of the ESA section 7(a)(2) consultation process entitled, *More Federal Management Attention Is Needed to Improve the Consultation Process* (GAO 04-93). The GAO study recommended that the Services and other Federal agencies “resolve disagreements about when consultation is needed ...” by clarifying the consultation process established in 50 C.F.R. Part 402.

Subsequent to the GAO report, and as a follow up to the President’s 2005 Conference on Cooperative Conservation, Interior Secretary Dirk Kempthorne and other Federal officials including the FWS Director and NMFS officials participated in a series of 25 public meetings across the nation, known as “Listening Sessions.” These meetings were conducted to provide citizens an opportunity for public input on ways to enhance environmental conservation and protection through improved governmental and non-governmental cooperation. During these sessions, there were far more public comments regarding the ESA than any other topic. With respect to the section 7(a)(2) consultation process, recommendations that are relevant to this proposed action included:

- reducing or eliminating consultation on Federal actions that are not likely to adversely affect endangered or threatened species
- adopting firm regulatory time limits on section 7 consultations
- adopting streamlined consultation procedures for minor projects and projects that have already undergone extensive review; and
- clarifying agency roles to minimize problems and inconsistencies in the consultation process.

Most recently, on May 15, 2008, Secretary Kempthorne announced that he would propose common sense modifications to the existing regulations that implement this section of the ESA in order to provide greater clarity and certainty to the inter-agency consultation process. In the Federal Register notice proposing the regulatory modifications analyzed in this EA, the Services noted the importance of refining the ESA section 7(a)(2) consultation process to better set forth certain regulatory definitions and the applicability of this important interagency process. There will likely continue to be an increase in the number of section 7 consultations given the emerging challenge of global climate change. Addressing these likely increases in section 7 consultations is one component of the basis for the proposed regulatory modifications.

Additionally, the Services face new challenges with regard to global warming and climate change. Specifically, the Services believe it is appropriate to address the manner in which consultation is appropriate for individual federal actions involving specific emissions of greenhouse gasses.

Therefore, the purpose and need for these proposed revisions to the ESA section 7(a)(2) implementing regulations is twofold:

First, the proposed revisions were developed to respond to a need to improve the efficiency of the regulatory process by (a) ensuring that the interagency section 7(a)(2) consultation process, and the resources of the Services, are focused on those actions in which the knowledge and expertise of the Services is most needed - i.e., on actions that are likely to adversely affect listed species or designated critical habitat, and (b) reducing the number of unnecessary consultations and the costs and delays associated with such consultations.

Second, the proposed revisions were developed to respond to a need to improve the clarity of certain existing regulatory provisions where the Services have found that there is confusion and inconsistent application in section 7(a)(2) consultations. Specifically, the Services see a need for more clarity of the regulatory standard for “indirect effects” in order to better assist the Services and action agencies as they assess and determine whether a proposed action will “cause” effects that are “reasonably certain to occur.”

IV. Description of Alternatives

The purpose of this section is to describe the alternatives analyzed, as well as the alternatives that were considered but not analyzed, in this Draft EA.

A. Alternative A: No Action Alternative

Under the No Action Alternative, there would be no changes to the existing regulations for interagency consultation pursuant to section 7(a)(2) of the ESA, codified at 50 C.F.R. Part 402. Accordingly, there would be no change to the current section 7(a)(2) consultation procedures applicable to Federal agencies proposing discretionary Federal actions. Table 1 below sets forth a comparison of the No Action Alternative (existing regulations) and the proposed regulatory changes.

B. Alternative B: Proposed Action

The proposed action is to implement, via rulemaking, clarifying changes to the interagency consultation regulations pursuant to section 7(a)(2) of the ESA (50 C.F.R. Part 402).

The proposed action contains three clarifying changes to the definitions of the following terms:

- “Biological Assessment”
- “Cumulative Effects”
- “Effects of the Action”

The existing ESA section 7 regulations require an action agency to enter into consultation with the Services for any proposed discretionary action that may affect a listed species or

designated critical habitat. If an action agency determines that a proposed action “may affect” but is not likely to adversely affect listed species or designated critical habitat, the action agency and the appropriate Service engage in informal consultation. Informal consultation is completed when the Service concurs with the action agency’s determination. The proposed revisions also would set out specific limited criteria under which this informal consultation and concurrence process need not occur.

The existing regulations do not include any timeframes for the completion of informal consultation. The proposed regulations establish time frames for completion of informal consultations. The proposed action also amends the discussion of formal consultation to cross-reference and reflect the proposed modification to the informal consultation timeframes and completion of informal consultation.

Nothing in the proposed regulations alters any existing responsibilities that action agencies have to comply with the ESA. The Proposed Action alternative, containing the six proposed changes to the existing section 7(a)(2) consultation regulations, are set forth in Table 1.

Table 1: Comparison of No Action and Proposed Action Regulatory Provisions

ESA Regulation	Existing Regulation (No Action)	Proposed Regulation (Proposed Action) (additional language noted in <i>italics</i>)
50 C.F.R. § 402.02	“Biological Assessment refers to 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.”	“Biological assessment” <i>means</i> 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 of potential effects of the action on such species and habitat. <i>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.</i>
50 C.F.R. § 402.02	“Cumulative effects” are those effects of 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.	“Cumulative effects” <i>means</i> 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. <i>Cumulative effects do not include future Federal activities that are physically located within the action area of the particular Federal action under consultation.</i>

ESA Regulation	Existing Regulation (No Action)	Proposed Regulation (Proposed Action) (additional language noted in <i>italics</i>)
50 C.F.R. § 402.02	<p>“Effects of the action” refers to 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 that are caused by the proposed action and are later in time, but still are reasonably certain to occur. 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.</p>	<p>“Effects of the action” <i>means</i> 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 <i>for which the proposed action is an essential cause</i>, and that are later in time, but still are reasonably certain to occur. <i>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.</i> 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.</p>
50 C.F.R. § 402.03	<p>“Applicability”</p> <p>Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.</p>	<p>“Applicability”</p> <p><i>(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.</i></p> <p><i>(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:</i></p> <p><i>(1) Such action has no effect on a listed species or critical habitat; or</i></p> <p><i>(2) Such action is an insignificant contributor to any effects on a listed species or critical habitat; or</i></p>

ESA Regulation	Existing Regulation (No Action)	Proposed Regulation (Proposed Action) (additional language noted in <i>italics</i>)
		<p><i>(3) The effects of such action on a listed species or critical habitat:</i></p> <p><i>(i) Are not capable of being meaningfully identified or detected in a manner that permits evaluation;</i></p> <p><i>(ii) Are wholly beneficial; or</i></p> <p><i>(iii) Are such that the potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat is remote.</i></p> <p><i>(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) of this section.</i></p>
50 C.F.R. § 402.13	<p>“Informal consultation”</p> <p>(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, with the written concurrence of the Service, 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.</p> <p>(b) 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.</p>	<p>“Informal Consultation”</p> <p>(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, <i>or a number of similar actions, an agency program, or a segment of a comprehensive plan</i>, 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. <i>For all requests for informal consultation, the Federal agency shall consider the effects of the action as a whole on all listed species and critical habitats.</i></p> <p><i>(b) If the Service has not provided a written statement regarding whether it concurs with a Federal agency's</i></p>

ESA Regulation	Existing Regulation (No Action)	Proposed Regulation (Proposed Action) (additional language noted in <i>italics</i>)
		<p><i>determination provided for in paragraph (a) of this section within 60 days following the date of the Federal agency's request for concurrence, the Federal agency may, upon written notice to the Service, terminate consultation. 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.</i></p> <p>(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.</p>
50 C.F.R. § 402.14 (b)(1)	<p>“Formal consultation”</p> <p>(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.</p> <p>(b) Exceptions. (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under Sec. 402.12 or as a result of informal consultation with the Service under Sec. 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species</p>	<p>“Formal Consultation”</p> <p>(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.</p> <p>(b) Exceptions. (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under Sec. 402.12 or as a result of informal consultation with the Service under Sec. 402.13, the Federal agency determines that the proposed action is not likely to adversely affect any listed species or critical habitat, <i>and the Director concurs in writing or informal consultation has terminated under</i></p>

ESA Regulation	Existing Regulation (No Action)	Proposed Regulation (Proposed Action) (additional language noted in <i>italics</i>)
	or critical habitat.	<i>Sec. 402.13(b) without a written determination by the Service as to whether it concurs; ...”</i>

C. Alternative C: Proposed Regulatory Changes with an Additional Role by Services

Alternative C would implement, via rulemaking, the same changes as described in Alternative B, and would add an additional role for the Services that might increase confidence in the action agencies’ determinations where they choose to rely on the applicability provisions of section 402.03(b) without entering informal or formal consultation.

An additional role for the Services could include:

- Detailed guidance, including templates for use by the action agencies in documenting their determinations regarding the potential effects of their actions
- Training, including on-line training modules, for use by action agencies.
- Periodic sampling of agency use of the new applicability standard.

Based on public comment on this Draft EA and continued interagency discussions, the Services may revise and more specifically describe the mechanism and functions of any additional role for the Services as described here.

D. Alternatives Considered but Not Analyzed

Three additional alternatives were considered by the Services but were not analyzed in this Draft EA:

1. *Propose Broad Revisions to Entire Scope of ESA Part 402 Regulations*

An alternative that was considered would be to propose a comprehensive revision to all aspects of the regulations which implement section 7(a)(2) of the ESA. This approach would entail a much more extensive and broad range of regulatory modifications to the existing ESA regulations, which were adopted in 1986.

This alternative was considered but not analyzed in this EA. The Services concluded that a more limited set of regulatory changes were needed at this time to address several specific issues under the existing ESA section 7(a)(2) regulations as outlined in the purpose and need statement (see Section III above). Given the complexity, controversy

and range of issues addressed by the Part 402 regulations, a broader range of regulatory modifications would likely delay consideration and potential implementation of needed and prioritized regulatory clarifications. Accordingly, the Services chose to focus on a more limited set of regulatory priorities as opposed to addressing each and every issue that is addressed by the existing section 7 regulations. Moreover, this alternative would not meet the purpose and need for the proposed action.

2. *Propose Revisions to ESA Part 402 Regulations that would limit Applicability (50 C.F.R. 402.02) to Exclude Consultations on Wholly Beneficial Actions*

A second alternative that was considered would be to propose a modification only to the current regulatory provision regarding the “applicability” of the ESA section 7(a)(2) regulations. This approach would entail a much more limited regulatory modification to the existing ESA regulations. Under this alternative, the “applicability” provision would be limited so as to exclude consultations on actions which “may affect” listed species but would be “wholly beneficial” to listed species.

The policy rationale for this alternative is that it would slightly reduce the number of ESA section 7(a)(2) consultations and allow the Services to forego spending time and agency resources on actions that are predicted to be wholly beneficial to listed species. This approach is similar to, but narrower in scope than, the set of proposed regulatory changes found in the Services’ August 15, 2008 Federal Register notice.

This alternative was considered but not analyzed in this EA. The Services concluded that a broader set of regulatory changes was needed at this time to address several specific issues under the existing ESA section 7 regulations. A more limited single regulatory modification was believed to be insufficient in scope to address the goals for regulatory clarification and improvement to the section 7(a)(2) consultation process as outlined in the purpose and need statement (see Section III above). Moreover, this alternative would not meet the purpose and need for the proposed action.

3. *Non-Regulatory Clarifications of Existing Regulations.*

The Services also considered pursuing non-regulatory approaches. The Services have at times produced policy statements or other guidance with respect to specific issues, including some of the issues addressed in the proposed regulation. The Services concluded that regulatory changes were needed in this instance to provide authoritative and consistent interpretations of the ESA. Non-regulatory guidance would not carry the same weight or be entitled to the same level of deference as regulatory modifications. For these reasons, non-regulatory guidance would not meet the purpose and need for the proposed action to clarify the Services’ interpretation and ensure effective implementation of the ESA.

V. Affected Environment

The geographic area of applicability of the proposed action is the United States, including its territorial seas, and the high seas. The proposed action would however, only address the process for consultation under section 7(a)(2) of the ESA and would not change the affected environment that is the subject of Section 7(a)(2) consultation under the current 1986 consultation regulations. The proposed regulations affect only the section 7(a)(2) consultation process and do not affect in any manner the processes for any other provision of the ESA.

The section 7(a)(2) consultation process addresses proposed discretionary federal actions that may affect listed species or designated critical habitat. There are currently 1355 species listed as threatened or endangered in the United States, and another 574 overseas, for a total number of 1929 listed species. In addition, there are currently 281 species classified as candidate species by FWS, with determinations that listing is warranted, but precluded due to higher priority listing actions for other species, and 13 species considered candidate species by NMFS on the basis that they are petitioned species that are being actively considered for listing or that NMFS has initiated an ESA status review that it has announced in the Federal Register.

The Services have seen steady increases in section 7 consultations since adoption of the 1986 section 7 regulations. For example, the number of consultations completed by the FWS doubled between FY 1996 and FY 2002. Although NMFS' workload has increased due to new listings and court decisions; it has not collected these statistics. As the number of section 7 consultations has increased, the workload for the Services has also grown. For example, requests to the Services for technical assistance or section 7 consultations increased from 41,000 requests in 1999 to over 68,000 requests in FY 2006. In 2006, 39,346 requests were for technical assistance, 26,762 were for informal consultations, and 1,936 were for formal consultations.

VI. Environmental Consequences

The CEQ regulations implementing NEPA specify that agencies are to examine whether a proposed action will have direct, indirect, or cumulative effects on the quality of the human environment. The regulations define "human environment" as including "the natural and physical environment and the relationship of people with that environment." 40 C.F.R. § 1508.14. "Effects" are defined generally as including ecological, aesthetic, historic, cultural, economic, social, or health effects. 40 C.F.R. § 1808.8. More specifically, the CEQ regulations define the three types of effects as follows:

"Direct effects" are defined as those effects "which are caused by the action and occur at the same time and place." 40 C.F.R. § 1508.8(a).

"Indirect effects" are defined as those effects "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8(b).

“Cumulative impact” is defined 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 regardless of what agency (Federal or non-federal) or person undertakes such other actions.” 40 C.F.R. § 1508.7.

This Draft EA examines whether the proposed regulatory changes will have any direct, indirect, or cumulative impacts on the quality of the human environment. As explained in more detail below, the proposed action is not expected to result in significant effects within the meaning of NEPA and the CEQ regulations. This is because the proposed limited regulatory modifications change neither the obligations of agencies to comply with section 7(a)(2) nor any substantive standard related to the protection of listed species or designated critical habitat. Rather, the proposed regulatory changes provide clarifications consistent with the state of current law and agency practice and are proposed with the intent and goal of providing for more clarity and efficiency in the section 7(a)(2) consultation process. And while some may believe that one or more of the proposed regulatory changes will somehow result in substantive changes in the level of species protection, the Services do not believe this is the case. Moreover, because the changes focus on consultation processes, to the extent that any of the proposed changes could result in environmental effects, no such effects have been identified that would rise to the level of significance requiring the Services to prepare an environmental impact statement.

A. Alternative A: No Action Alternative

Adoption of the no action alternative would result in no change to the current regulations that implement section 7(a)(2) of the ESA, including those described above (see Table 1 above). Therefore, the Services do not anticipate any additional significant effects to the environment from continued implementation of the existing regulations (i.e., no action alternative).

However, implementation of the no action alternative would not lead to the most effective implementation of the ESA. For example, the Services are experiencing workload increases and agency costs associated with the current implementation of the regulations, although there is no precise basis for calculating the nature of such increases. For this reason, the No Action alternative would not meet the purpose and need for the proposed action.

Such increased workloads and costs would continue to divert the Services’ limited resources from either more rapid responses to requests for informal and formal consultations, thus delaying the projects in question, or from actions aimed at on-the-ground conservation efforts for listed species. In either case, the resources used for carrying out the current consultation process, as opposed to the one that would result from implementation of the proposed action, would be expended largely on review of projects that are unlikely to adversely affect listed species.

B. Alternative B: Proposed Action Alternative

The proposed action consists of the specific changes to existing regulations as set forth above in Table 1. These proposed regulatory modifications are described and their potential environmental effects are identified and analyzed in this section.

Proposed modifications to 50 C.F.R. § 402.02 Definitions

“Biological Assessment”

The first proposed regulatory change would modify the regulatory definition of the term "Biological assessment."

ESA Regulation	Existing Regulation (No Action)	Proposed Regulation (Proposed Action) (additional language noted in <i>italics</i>)
50 C.F.R. § 402.02	“Biological Assessment refers to 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.”	“Biological assessment” <i>means</i> 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 of potential effects of the action on such species and habitat. <i>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.</i>

The only difference between the proposed definition and the existing one is the second sentence of the proposed new definition, which clarifies the term to make it clear that a biological assessment need not be especially prepared for the consultation, or be a document that can only be used for the purposes of the consultation. This is an administrative change designed to save time and money, allowing Federal agencies to integrate the information necessary for section 7 consultation in documents prepared for other environmental documentation purposes. The substantive information presented by Federal agencies to the Services to conduct section 7 consultations is not modified in any manner by this proposed regulatory change. It likely will result in a more efficient consultation process.

There exists a potential for some administrative inefficiencies for the Services, if biologists would have to spend more time finding the necessary information in the pre-existing documents provided to them than they would in reviewing assessments specifically prepared for the consultation. However, this potential concern has been addressed in the preamble to the proposed regulations, which provides: “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.” See 73 Fed. Reg. 47869 (Aug. 15, 2008) (col. 2). The Services propose to insist that this is adhered to by Federal agencies during future consultations under the proposed action alternative. Accordingly, there should not be any noticeable increase in reviewing time by the Services under the proposed action.

The Services conclude that the proposed change to the definition of “Biological Assessment” codified at 50 C.F.R. § 402.02 will not result in any environmental consequences.

“Cumulative Effects”

The second proposed regulatory change would modify the regulatory definition of the term “cumulative effects.”

ESA Regulation	Existing Regulation (No Action)	Proposed Regulation (Proposed Action) (additional language noted in <i>italics</i>)
50 C.F.R. § 402.02	“Cumulative effects” are those effects of 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.	“Cumulative effects” <i>means</i> those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the <i>particular</i> Federal action subject to consultation. <i>Cumulative effects do not include future Federal activities that are physically located within the action area of the particular Federal action under consultation.</i>

The proposed regulatory changes are designed to make it clear that the definition of “cumulative effects” under section 7 of the Act is not the same as the use of “cumulative impacts” in the National Environmental Policy Act context. The current ESA regulatory definition of cumulative effects, and this proposed definition, are both narrower than the NEPA regulatory definition of cumulative impacts. The phrase “not involving Federal activities” and the concept set forth in the second sentence of the proposed new definition are taken from the regulatory preamble to the existing ESA section 7 regulations. 51 Fed. Reg. 19933 (June 3, 1986) (col. 1). Thus, this proposed regulatory change is intended to both clarify and fully implement the existing regulatory framework. Moving explanatory language from the regulatory preamble to the regulatory definition should improve the understanding and clarity of the term “cumulative effects.” This repositioning of language does not represent a change in policy for determination of cumulative effects. Any future proposed discretionary Federal actions remain subject to compliance with section 7(a)(2) (and any required consultation), which is why they are excluded from consideration under both the existing ESA regulations and under the proposed revised definition of the term “cumulative effects.” The addition of the term “particular” in the first sentence is not intended to bring about a substantive change in meaning.

The Services conclude that the proposed change to the definition of “cumulative effects,” codified at 50 C.F.R. § 402.02, will not result in any environmental consequences.

“Effects of the action”

The third proposed regulatory change would modify the regulatory definition of the term “Effects of the action.”

ESA Regulation	Existing Regulation (No Action)	Proposed Regulation (Proposed Action) (additional language noted in <i>italics</i>)
50 C.F.R. § 402.02	“Effects of the action” refers to 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 that are caused by the proposed action and are later in time, but still are reasonably certain to occur. 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.	“Effects of the action” <i>means</i> 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 <i>for which the proposed action is an essential cause, and</i> that are later in time, but still are reasonably certain to occur. <i>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.</i> 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.

The proposed changes to the definition of “effects of the action” clarify the current regulatory standard for indirect effects. The current regulation requires that an indirect effect must be “caused by” the action under consultation and “reasonably certain to occur.” The proposed changes to the definition of the term “effects of the action” definition do not alter those basic concepts. That is, the proposed changes do not modify the requirement that the indirect effect must still be “caused by” the action under

consideration and “reasonably certain to occur.” Rather, the proposed changes are intended to capture the appropriate – but not universally-applied - practice of the Services.

First, with regard to the appropriate causation standard, the current regulations are silent as to what causation standard should be used to define the phrase “caused by.” The preamble to the current regulations, however, notes that “but for” causation is the appropriate standard for analysis of interrelated and interdependent activities. 51 Fed. Reg. 19932 (June 3, 1986) (col. 2). Further, the Joint Consultation Handbook issued by the Services, notes that the Services “use the simple causation principle, i.e. ‘but for’” as the appropriate causation standard for direct and indirect effects. Joint Consultation Handbook, Chapter 4, Formal Consultation, p 4-47 (1998). Further, in 2003, a joint memorandum was issued to explain that with regard to indirect effects for section 7 consultations one has to examine whether an action is “essential” to causing the effect in question.⁴ On July 1, 2005, this memorandum was clarified by the Director, U.S. Fish and Wildlife Service. In that policy clarification, the Director again reiterated that the correct standard to determine if an indirect effect is caused by an action is whether that action is “essential” for the effect to occur. (See Appendix). This policy clarification represents the current guidance for appropriate implementation of the § 7(a)(2) regulations.

However, as noted above, there has not been consistent application of that policy. In order to better synchronize the current consultation practice with the text of the section 7 regulations, the Services are proposing the addition of the term “essential” in the proposed regulations, as well as the supplemental language regarding whether the indirect effect would occur without the action, to help clearly explain what “caused by” means in the context of an ESA section 7 consultation. In light of the language provided in the 1986 regulatory preamble, the Joint Consultation Handbook, and the 2003 and 2005 policy memoranda, the Services do not foresee any environmental consequences from this clarification of the causation standard.

Second, with regard to the “reasonably certain to occur” standard, the current regulations provide no definition or guidance about what that term means. The 1986 preamble to the existing regulations, however, notes that one has to “bear in mind the economic, administrative, or legal hurdles which remain to be cleared” and that “reasonably certain to occur” is more stringent than the NEPA standard (reasonably foreseeable). 51 Fed. Reg. 19933 (June 3, 1986) (col. 2). The proposed regulations identify that “reasonably certain to occur” is related to the “requisite confidence” that an effect will occur. The Services’ intent in this regulatory change is that there has to be a certain level of confidence that the effect will occur – it cannot be speculative and must be based on an evaluation of clear and substantial information. Nothing in the proposed action is intended to alter the existing section 7(a)(2) requirements for “best available scientific

⁴ See Memorandum signed by Chief, Forest Service, Director, Bureau of Land Management, Director, Fish and Wildlife Service, Assistant Administrator for Fisheries, National Marine Fisheries Service, entitled “Application of the Endangered Species Act to proposals for access to non-federal lands across lands administered by the Bureau of Land Management and the Forest Service, (January 2003). This Memorandum is attached as Appendix.)

and commercial information.” The Services do not foresee any environmental consequences from this regulatory change, as it elucidates the standard that is contained in the current regulatory framework.

The Services conclude that the proposed change to the definition of “Effects of the Action,” codified at 50 C.F.R. § 402.02, will not result in any significant environmental consequences.

Proposed Modification to 50 C.F.R. § 402.03 - Applicability

The fourth proposed regulatory change in the Proposed Action would modify 50 C.F.R. § 402.03, the regulatory provision governing when section 7(a)(2) consultation must occur.

ESA Regulation	Existing Regulation (No Action)	Proposed Regulation (Proposed Action) (additional language noted in <i>italics</i>)
50 C.F.R. § 402.03	<p>“Applicability”</p> <p>Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.</p>	<p>“Applicability”</p> <p><i>(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.</i></p> <p><i>(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:</i></p> <p><i>(1) Such action has no effect on a listed species or critical habitat; or</i></p> <p><i>(2) Such action is an insignificant contributor to any effects on a listed species or critical habitat; or</i></p> <p><i>(3) The effects of such action on a listed species or critical habitat:</i></p> <p><i>(i) Are not capable of being meaningfully identified or detected in a manner that permits evaluation;</i></p> <p><i>(ii) Are wholly beneficial; or</i></p> <p><i>(iii) Are such that the potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat is remote.</i></p> <p><i>(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) of this section.</i></p>

Under the current regulations, the action agency makes the initial determination as to whether a proposed discretionary action “may affect” listed species or adversely affect critical habitat and then, upon such a finding, makes a further determination whether the proposed action is or is not “likely to adversely affect” a listed species or critical habitat. If the action agency determines that its action is “not likely to adversely affect,” the action agency can place the burden of endorsing that determination on the Services by requesting their written concurrence. The proposed change to 50 C.F.R. § 402.03 does not change any standards related to the protection of species; rather, it establishes limited criteria that would allow action agencies to determine that a proposed discretionary agency action will not result in take of listed species or adverse effects to critical habitat without concurrence from the Services.

Although there is likely to be some reduction in the number of informal consultations undertaken if the proposed regulation is adopted, there is no basis to quantify the potential scope of that reduction. Regardless, federal agencies will still have to meet the substantive standards of section 7(a)(2) and the consultations regulations. As such, the proposed action will have no effect on the physical environment. However, action agencies may still wish to obtain the input of the appropriate Service and the benefit of their expertise or a concurrence in their “not likely to adversely affect” determination.

Under the proposed regulations, the action agency is still required to determine if each of its actions “may affect” a listed species. Moreover, under the proposed regulation, an action agency is still required to consult and receive written incidental take authorization from the Services for *any* incidental take of listed species to be authorized. However, under the proposed regulations, the action agency has the option to choose whether or not to seek the Services’ concurrence with the action agency’s documented determination that no take is anticipated and one of more of the findings set out in 402.03(b)(1)-(3) applies. An action agency that makes the decision to forgo concurrence does so with the understanding that all the protections to species and critical habitat under the ESA are still in place. Under the proposed regulatory modification to 402.03:

- action agencies would still not be able to take any action that would likely result in take of a listed species without written authorization from one or both of the Services;
- action agencies would still not be able to take action that would jeopardize the continued existence of a listed species or adversely modify its critical habitat;
- action agencies could still be subject to lawsuits challenging the agency’s determinations pursuant to Section 7 and/or this provision of the regulations;
- action agencies could still choose to consult informally with the Service to obtain the Service’s expertise and concurrence;
- action agencies are still required to consider interrelated and interdependent activities as part of the effects of the action; and,
- the Services could still request that an action agency consult on a particular action, as provided under current regulations at 50 C.F.R. § 402.14(a).

There is likely to be some reduction in the number of informal consultations undertaken if the proposed regulation is adopted. As a result, the Services will be able to better focus their limited resources on those consultations in which an adverse effect to listed species or critical habitat is anticipated. This should, in turn, direct consultation and conservation efforts to the most important subset of section 7 consultations -- those that are likely to adversely affect listed species or designated critical habitat.

The Services conclude that the proposed change to 50 C.F.R. § 402.03, “Applicability” will not result in any significant environmental consequences.

Proposed Modification to 50 C.F.R. § 402.13 - Informal consultation

The fifth proposed regulatory change in the Proposed Action would modify 50 C.F.R. § 402.13, the regulatory provision governing informal consultations pursuant to section 7(a)(2) of the ESA. The proposed action would preserve the option for action agencies to enter informal consultation even where they could make a non-applicability determination pursuant to proposed § 402.03(b).

ESA Regulation	Existing Regulation (No Action)	Proposed Regulation (Proposed Action) (additional language noted in <i>italics</i>)
50 C.F.R. § 402.13	<p>“Informal consultation”</p> <p>(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, with the written concurrence of the Service, 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.</p> <p>(b) 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.</p>	<p>“Informal Consultation”</p> <p>(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, <i>or a number of similar actions, an agency program, or a segment of a comprehensive plan</i>, 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. <i>For all requests for informal consultation, the Federal agency shall consider the effects of the action as a whole on all listed species and critical habitats.</i></p> <p><i>(b) If the Service has not provided a written statement 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 concurrence, the Federal agency may, upon written notice to the Service, terminate consultation. 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.</i></p> <p>(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.</p>

There are three differences between the current and proposed regulations in this section.

First, the proposed language in subsection (a) is revised to expand the type of activities eligible for informal consultation. This element of the proposed action adds groups of

actions, entire programs or elements of a comprehensive plan as activities eligible for informal consultation when no take of species is anticipated.

Second, modifications have been proposed to add a new last sentence to 402.13(a) that requires federal action agencies to consider the effects of the action “as a whole.”

Third, a new subsection related to timeframes for informal consultation has been added, designated as subsection 402.13 (b).⁵ The first change in the proposed language of 50 C.F.R. § 402.13(a) is similar to, and based on, language found in the existing ESA regulations for formal consultation at 50 C.F.R. § 402.14(c). This change would allow action agencies to informally consult on a number of similar actions, an agency program or a segment of comprehensive plan at the same time, in a single consultation. This change should promote efficiency in the consultation process, consistent with the purpose and need for the proposed action.⁶

The new concluding sentence of subsection (a) clarifies that the action agency must look at the effects of the project as a whole, thus eliminating risk that an action agency might split its proposed action into segments that would somehow avoid a comprehensive analysis of the anticipated effects of the overall project. Again, this language is based on language found in the current regulations at 50 C.F.R. § 402.14(c).

The proposed addition of a new subsection (b) allows action agencies to terminate informal consultation if the Service has not acted on their written request for concurrence within 60 days. The proposed new provision also allows the Service to respond to the action agency that additional time is needed to review the request for concurrence, in which case the Service would receive an additional 60 days to review the request. If no response is received from the Service with respect to the original request, or prior to the end of the second 60-day period if the Service requests more time, the new regulation would allow the action agency to terminate the informal consultation, through written notice to the Service.

The number of informal consultations that would be terminated, with a corresponding reduction in the Services’ workloads cannot be predicted with certainty. The ability to terminate informal consultation does not confer any exemption from any of the Act’s substantive prohibitions on take, jeopardy or adverse modification of critical habitat. The action agency would have to be fully confident of its biological determination that its activity would not result in take, adverse modification, or otherwise violate the Act prior to proceeding.

⁵ Note that the contents of the existing provision of regulations found at 50 C.F.R. § 402.13(b) has been redesignated – without any changes – as 50 C.F.R. § 402.13(c).

⁶ There is one aspect of the existing provisions of 402.14(c) that has not been incorporated into the proposed action. The additional language contained in the proposed action does not include a requirement for the Director’s approval for the grouping of actions under informal consultation, because informal consultation, even for grouped actions, would never be appropriate for actions that are expected to result in take or in the destruction or adverse modification of critical habitat.

These three proposed changes are not expected to have any significant impact on listed species or designated critical habitat, as they only apply to requests for informal consultation, which applies to proposed discretionary actions for which no take, let alone jeopardy or adverse modification, is anticipated.

The Services conclude that the proposed change to 50 C.F.R. § 402.13 - Informal consultation will not result in any significant environmental consequences.

Proposed Modification to 50 C.F.R. § 402.14(b)(1) - Formal consultation

The sixth proposed regulatory change in the Proposed Action would modify 50 C.F.R. § 402.14(b)(1), governing formal consultations pursuant to ESA section 7(a)(2).

ESA Regulation	Existing Regulation (No Action)	Proposed Regulation (Proposed Action) (additional language noted in <i>italics</i>)
50 C.F.R. § 402.14 (b)(1)	<p>“Formal consultation”</p> <p>(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.</p> <p>(b) Exceptions. (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under Sec. 402.12 or as a result of informal consultation with the Service under Sec. 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species or critical habitat.</p>	<p>“Formal Consultation”</p> <p>(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.</p> <p>(b) Exceptions. (1) A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under Sec. 402.12 or as a result of informal consultation with the Service under Sec. 402.13, the Federal agency determines that the proposed action is not likely to adversely affect any listed species or critical habitat, <i>and the Director concurs in writing or informal consultation has terminated under Sec. 402.13(b) without a written determination by the Service as to whether it concurs; ...</i>”</p>

The only change proposed in this provision is to make a conforming modification to 50 C.F.R. § 402.14(b)(1) that cross-references and adds the process for termination of

informal consultation proposed in the proposed modification to 50 C.F.R. § 402.13 (discussed above). This regulatory modification would be required for internal regulatory consistency if the Services decide to make the proposed modification to 402.13 described above. The proposed modification would expand the existing exemption from the requirement to formally consult when the action agency receives written concurrence from the Services that the project is not likely to adversely affect listed species or critical habitat, to also include an exemption where consultation has been concluded in conformance with the proposed provisions of section 402.13.

As noted above in the discussion of the proposed changes to section 402.13, this change is unlikely to have any impact on listed species because it applies only to projects for which informal consultation was requested, and because it grants no exemption from the ESA's prohibitions on take, jeopardy or adverse modification of critical habitat.

As discussed above, an action agency is unlikely to initiate a request for informal consultation if it appears that the project might result in take, let alone jeopardy or adverse modification, and in such circumstance the action agency would appropriately make a request for formal consultation. If the action agency did begin with a request for informal consultation for such a project, it is far more likely to move to formal consultation than to terminate the informal consultation process and proceed with the action once analysis of the project begins and impacts become clearer. At this point in the evolution of the ESA, it is not reasonable to expect that an action agency would seek to flout the law in such a manner.

The Services conclude that the proposed change to 50 C.F.R. § 402.14 - Formal consultation will not result in any significant environmental consequences.

C. Alternative C: Proposed Regulatory Changes with an Additional Role for the Services.

The Services have developed Alternative C to consider whether any additional role for the Services would be appropriate in cases where action agencies do not choose to enter consultation with the appropriate Service pursuant to § 402.03(b).

The proposed regulations would allow action agencies to proceed without entering informal consultation or obtaining the concurrence of the Service where the action agencies determine the proposed applicability criteria apply. Despite this change in procedure, there is no intent to change the nature of effects that could occur in the environment regardless whether the determination is made by the action agency or the Services. Alternative C would provide some further assurances that the implementation of the regulatory modifications is consistent with our intent by:

- providing a role of the Services in tracking action agencies' implementation of the revised applicability standards,
- allowing the Services to engage prior to an agency decision to act,

- facilitating consistency across agencies in implementation of the proposed regulatory revisions, and/or
- providing Service and agency awareness of the number and type of agency actions that proceed via the revised applicability criteria.

The Services will need to consider the potential administrative burdens of taking on an additional role and weigh them against the purpose and need for the action.

VII. Conclusion

As discussed above in the context of each of the proposed regulatory modifications, the Services have concluded that none of the individual proposed changes are anticipated to have any significant environmental impacts. The Services have also concluded that the proposed changes collectively will not have any significant environmental impacts.

Because the substantive standards that protect listed species and designated critical habitat proposed by these regulations are not changed by the proposed action, as the Services do not foresee any additional cumulative impacts as compared with the No Action alternative.

The changes identified in the Proposed Action all involve process modifications to implementation of section 7 of the ESA. As discussed above, these proposed limited regulatory changes are administrative and are not anticipated to have any significant environmental impacts on listed species or designated critical habitat. Moreover, while this Draft EA is appropriately focused on potential impacts to listed species and designated critical habitat processes pursuant to the ESA, the Services likewise do not anticipate any impacts on other environmental resources such as air quality, water quality, recreation, wilderness, aquatic plants and animals, riparian and terrestrial communities, wildlife, cultural resources, hydropower, Indian Trust Assets, National Park Service resources, or Environmental Justice considerations.

VIII. Public Review and Comment

The Services are making this Draft EA available for public review and comment for a ten (10) day period from October 27, 2008 to November 6, 2008. Interested parties may provide information on this Draft EA for consideration by the Services by submitting written comments as follows:

- 1) Through the Federal eRulemaking Portal at www.regulations.gov. Follow the instructions on the Web site for submitting comments.
- 2) By U.S. mail or hand-delivery to Public Comment Processing, Attention: 1018-AT50, Division of Policy and Directives Management, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Suite 222, Arlington, VA 22203. We will not accept e-mail or faxes. All comments either through eRulemaking or mailed must

be received by close of business at 4:15 pm EST on November 6, 2008.
Comments received after the comment period may not be considered.