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Dated: May 5, 2015.

Sue Swenson,

Acting Assistant Secretary for Special Education and Rehabilitative Services.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 402

[Docket No. FWS–R9–ES–2011–0080; NOAA–120106024–5048–02; FF09E–31000–156–FXES–1122–0900000]

RIN 1018–AX85; 0648–BB81

Interagency Cooperation—Endangered Species Act of 1973, as Amended; Incidental Take Statements

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

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the Services), are amending the incidental take statement provisions of the implementing regulations for section 7 of the Endangered Species Act of 1973, as amended (ESA). The two primary purposes of the amendments are to address the use of surrogates to express the amount or extent of anticipated incidental take and to refine the basis for development of incidental take statements for programmatic actions. These changes are intended to improve the clarity and effectiveness of incidental take statements. The Services believe these regulatory changes are a reasonable exercise of their discretion in interpreting particularly challenging aspects of section 7 of the ESA related to incidental take statements.

DATES: This final rule is effective on June 10, 2015.

ADDRESSES: This final rule is available on the internet at *http://www.regulations.gov* at Docket No. FWS–R9–ES–2011–0080. Comments and materials we received on the proposed rule, as well as supporting documentation we used in preparing this rule, are available for public inspection at *http://www.regulations.gov.* The comments, materials, and documentation that we considered in this rulemaking are also available by appointment, during normal business hours at: U.S. Fish and Wildlife Service, Headquarters office, 5275 Leesburg Pike, Falls Church, Virginia 22041, (703) 358–2171, (703) 358–1800 (facsimile); National Marine Fisheries Service, Headquarters office, 1315 East-West Highway, Silver Spring, Maryland 20910, (301) 427–8405, (301) 713–0376 (facsimile).

FOR FURTHER INFORMATION CONTACT: Craig Aubrey, Chief, Division of Environmental Review, U.S. Fish and Wildlife Service, Department of the Interior, Washington, DC 20240 (telephone: 703–358–2171); or Cathryn E. Tortorici, Chief, Endangered Species Act Interagency Cooperation Division, Office of Protected Resources, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce, Washington, DC (telephone: 301–427–8400). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

Section 9 of the ESA prohibits the take of fish or wildlife species listed as endangered with certain exceptions. Pursuant to section 4(d) of the ESA, the Services may prohibit the take of fish or wildlife species listed as threatened. Under section 3 of the ESA, the term ''take'' means to ''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.'' Section 7 of the ESA provides for the exemption of incidental take of listed fish or wildlife species caused by Federal agency actions that the Services have found to be consistent with the provisions of section 7(a)(2). The Services jointly administer the ESA via regulations set forth in the Code of Federal Regulations (CFR). This rule deals with regulations found in title 50 of the CFR at part 402.

Under 50 CFR 402.14, Federal agencies must review their actions at the earliest possible time to determine whether any action may affect species listed under the ESA or their designated critical habitat. If such a determination is made, formal consultation with the appropriate Service is required, unless one of the exceptions outlined at § 402.14(b) applies. Within 45 days after concluding formal consultation, the Service delivers a biological opinion to the Federal agency and any applicant. The biological opinion states the opinion of the Service 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 their critical habitat. If a proposed action is reasonably certain to cause incidental take of a listed species, the Services, under 50 CFR 402.14(i), issue along with the biological opinion an incidental take statement that specifies, among other requirements: The impact of such incidental taking on the listed species; measures considered necessary or appropriate to minimize the impact of such take; terms and conditions (including reporting requirements) that implement the specified measures; and procedures to be used for handling or disposing of individuals that are taken.

The current regulations at § 402.14(i)(1)(i) require the Services to express the impact of such incidental taking of the species in terms of amount or extent. The preamble to the final rule that set forth the current regulations discusses the use of a precise number of individuals or a description of the land or marine area affected to express the amount or extent of anticipated take, respectively (51 FR 19954, June 3, 1986).

Court decisions rendered over the last decade regarding the adequacy of incidental take statements have prompted the Services to clarify two aspects of the regulations addressing incidental take statements: (1) The use of surrogates to express the amount or extent of anticipated incidental take, including circumstances where project impacts to the surrogate are coextensive with at least one aspect of the project's scope; and (2) the circumstances under which providing an incidental take statement with a biological opinion on a programmatic action is appropriate.

Through this final rule, the Services are establishing prospective standards regarding incidental take statements. Consistent with the regulatory language set forth in the proposed rule, we are clarifying that the Services formulate an incidental take statement if such take is reasonably certain to occur. Nothing in

these final regulations is intended to require reevaluation of any previously completed biological opinions or incidental take statements. Additionally, this final rule revises only those portions of the joint consultation regulations of 50 CFR part 402 set forth in the ''Regulation Promulgation'' section below. All other provisions remain unchanged. These revisions to the incidental take statement regulations addressing surrogates, programmatic actions, and the applicable standard for anticipating take are independent revisions that are fully severable from each other.

Proposed Rule

On September 4, 2013, the Services published a proposed rule addressing the incidental take statement provisions of the implementing regulations for section 7(a)(2) of the ESA (78 FR 54437). The proposed rule addressed the use of surrogate take indicators and issuance of an incidental take statement for programmatic actions. The proposed rule requested that all interested parties submit written comments on the proposal by November 4, 2013. The Services also contacted appropriate Federal and State agencies, scientific experts and organizations, and other interested parties and invited them to comment on the proposal. The Services received comments from 64 individuals and organizations.

For surrogates, the proposed rule endorsed the use of surrogates to express the amount or extent of anticipated incidental take and set forth three requirements for their use in an incidental take statement. This final rule adopts the approach of the proposed rule for surrogates with no significant changes.

For programmatic actions, the proposed rule addressed the subset of Federal actions that are designed to provide a framework for the development of future, site-specific actions that are authorized, funded, or carried out and subject to the requirements of section 7 at a later time. Development of incidental take statements for ''framework'' programmatic actions is problematic because they generally lack the site-specific details of where, when, and how listed species will be affected by the program. The Services rely on such information to inform the amount or extent of take in the incidental take statement that serves as a trigger for reinitiation of consultation pursuant to the requirements of 50 CFR 402.16(a).

The Services proposed to distinguish programmatic actions and programmatic incidental take statements for framework actions in the regulations to clarify the basis for development of an incidental take statement for this type of Federal program. The proposed rule stated that the key distinguishing characteristics of programmatic actions for purposes of the rule are: (1) They provide the framework for future, site-specific actions that are subject to section 7 consultations and incidental take statements, but they do not authorize, fund, or carry out those future site-specific actions; and (2) they do not include sufficient site-specific information to inform an assessment of where, when, and how listed species are likely to be affected by the program. In lieu of quantifying a traditional amount or extent of take, the Services proposed to develop programmatic incidental take statements that anticipate an unquantifiable amount or extent of take at the programmatic scale in recognition that subsequent site-specific actions authorized, funded, or carried out under the programmatic action will be subject to subsequent section 7 consultation and incidental take statements, as appropriate. The Services proposed to express reinitiation triggers as reasonable and prudent measures that adopt either specific provisions of the proposed programmatic action, such as spatial or timing restrictions, to limit the impacts of the program on listed species or similar restrictions identified by the Services that would function to minimize the impacts of anticipated take on listed species at the program level.

After further consideration of relevant court rulings, the Services' national section 7 policy, and public comments, the Services are revising the approach described in the proposed rule to address incidental take statements for programmatic actions. The revised approach relies more appropriately on the distinction that a framework programmatic action only establishes a framework for the development of specific future action(s) but does not authorize any future action(s). Under those particular circumstances, the programmatic action in and of itself does not result in incidental take of listed species. Under this final rule, the Services are defining the term *framework programmatic action* in the regulations and recognizing the Services' authority not to provide an incidental take statement with a biological opinion addressing the proposed adoption of a program establishing a framework for the development of future actions. As discussed in more detail below, the Services believe this approach is fully consistent with the statutory purposes of an incidental take statement and the language of section 7 of the ESA. It also advances the policy goals of the Services to focus the provision of incidental take statements at the action level at which such take will result.

The approach taken in the proposed rule was predicated on the assumption that a framework programmatic action could cause take. Given the particular nature of framework programmatic actions discussed above, the Services have altered their view and now affirm that a framework programmatic action in and of itself does not result in incidental take of listed species. This altered view as to incidental take for framework programmatic actions, however, does not undermine the duty to consult under section 7(a)(2) of the ESA. Framework programmatic actions will trigger formal consultation if the action may affect listed species or their designated critical habitat. Additionally, the Services also reconsidered the approach taken in the proposed rule because an incidental take statement for a framework programmatic action may not be practical to implement. In particular, the Services are concerned that it may be difficult to identify measures at a program scale that are specific enough to serve as valid take-related reinitiation triggers in an incidental take statement given that such measures are often described in the proposed program in a qualitative rather than a quantitative manner. Additionally, the Services are concerned that program-based measures may not serve as consistently effective reinitiation triggers because reinitiation would occur only when the action agency deviated from the terms of its own program. The additional burden of monitoring and reporting requirements for such measures in many instances would outweigh the limited functionality such measures would provide in terms of minimizing the impacts of anticipated take. The limited functionality of this approach is also raised by the fact that a similar reinitiation trigger for changes to the proposed action is already set forth in the existing regulations at 50 CFR 402.16(c) where discretionary Federal involvement or control over the action has been retained or is authorized by law.

The proposed rule set forth a definition of *programmatic incidental take statement* that, among other things, indicated the Services would issue an incidental take statement where take was ''reasonably certain to occur.'' While the Services are not including this definition in the final rule, we are

clarifying that the ''reasonable certainty'' of take is the applicable standard for when the Services formulate an incidental take statement.

Use of Surrogates

The Services acknowledge congressional preference for expressing the impacts of take in incidental take statements in terms of a numerical limitation with respect to individuals of the listed species. However, Congress also recognized that a numerical value would not always be available and intended that such numbers be established only where possible. H.R. Rep. No. 97–567, at 27 (1982). The preamble to the final rule that set forth the current regulations also acknowledges that exact numerical limits on the amount of anticipated incidental take may be difficult to determine and the Services may instead specify the level of anticipated take in terms of the extent of the land or marine area that may be affected (51 FR 19926 [19953–19954]; June 3, 1986). In fact, as the Services explained in the preamble to that rule, the use of descriptions of extent of take can be more appropriate than the use of numerical amounts ''because for some species loss of habitat resulting in death or injury to individuals may be more deleterious than the direct loss of a certain number of individuals'' (51 FR at 19954).

Over the last 25 years of developing incidental take statements, the Services have found that, in many cases, the biology of the listed species or the nature of the proposed action makes it impractical to detect or monitor take of individuals of the listed species. In those situations, evaluating impacts to a surrogate such as habitat, ecological conditions, or similar affected species may be the most reasonable and meaningful measure of assessing take of listed species.

The courts also have recognized that it is not always practicable to establish the precise number of individuals of the listed species that will be taken and that ''surrogate'' measures are acceptable to establish the impact of take on the species if there is a link between the surrogate and take. *See Arizona Cattle Growers' Ass'n* v. *U.S. Fish and Wildlife Service,* 273 F.3d 1229 (9th Cir. 2001). It is often more practical and meaningful to monitor project effects upon surrogates, which can also provide a clear standard for determining when the amount or extent of anticipated take has been exceeded and consultation should be reinitiated. Accordingly, the Services adopted the use of surrogates as part of our national policy for preparing incidental take statements:

> Take can be expressed also as a change in habitat characteristics affecting the species (*e.g.,* for an aquatic species, changes in water temperature or chemistry, flows, or sediment loads) where data or information exists which links such changes to the take of the listed species. In some situations, the species itself or the effect on the species may be difficult to detect. However, some detectable measure of effect should be provided. . . . [I]f a sufficient causal link is demonstrated (*i.e.,* the number of burrows affected or a quantitative loss of cover, food, water quality, or symbionts), then this can establish a measure of the impact on the species or its habitat and provide the yardstick for reinitiation. (*Endangered Species Consultation Handbook,* U.S. Fish and Wildlife Service and National Marine Fisheries Service, March 1998, at 4–47–48 ([Services' Section 7 Handbook])

For example, under a hypothetical Clean Water Act permit, the U.S. Army Corps of Engineers would authorize the fill of a quarter-acre of wetlands composed of three vernal pools occupied by the threatened vernal pool fairy shrimp *(Branchinecta lynchi)* to construct a road-crossing. The wetland fill is likely to kill all of the shrimp occupying the three vernal pools. A single pool may contain thousands of individual shrimp as well as their eggs or cysts. For that reason, it is not practical to express the amount or extent of anticipated take of this species or monitor take-related impacts in terms of individual shrimp. Quantifying the habitat area encompassing the three vernal pools supporting this species as a surrogate for incidental take would be a practical and meaningful alternative to quantifying and monitoring the anticipated incidental take in terms of individual shrimp caused by the proposed Federal permit action. It is a practical alternative because effects to vernal pool fairy shrimp habitat are causally related to take of the fairy shrimp, these effects can be readily monitored, and the extent of impacts to occupied habitat provides a clear standard for when the anticipated extent of take has been exceeded.

The Ninth Circuit Court's holding in *Oregon Natural Resources Council* v. *Allen,* 476 F.3d 1031 (9th Cir. 2007) could be read to suggest that such surrogates cannot be coextensive with the project's scope for fear that reinitiation of consultation would not be triggered until the project is complete. However, even under circumstances of a coextensive surrogate (such as in the above example), the action agency or applicant will be required under the incidental take statement to monitor project impacts to the surrogate during the course of the action (*e.g.,* required monitoring to confirm the action does not exceed fill of three vernal pools in the quarter-acre wetland), which will determine whether these impacts are consistent with the analysis in the biological opinion. This assessment will ensure that reinitiation of formal consultation will be triggered if the extent of the anticipated taking specified in the incidental take statement is exceeded during the course of the action where discretionary Federal involvement or control over the action has been retained or is authorized by law in accordance with 50 CFR 402.16. In the above example, reinitiation of formal consultation would be triggered in the event a fourth vernal pool was discovered during wetland fill or it was determined that the total amount of vernal pool habitat modified by the project exceeded the identified one-quarter of an acre of wetland habitat. Thus, although fully coextensive with the *anticipated* impacts of the project on the vernal pool fairy shrimp, the surrogate nevertheless provides for a meaningful reinitiation trigger consistent with the purposes of an incidental take statement.

In addition to discussing the use of habitat surrogates for expressing the extent of anticipated take, the Services' Section 7 Handbook also discusses (on page 4–47) the use of impacts to non-listed species as a surrogate for expressing the amount of anticipated take of a listed species:

> In some situations, the species itself or the effect on the species may be difficult to detect. However, some detectable measure of effect should be provided. For instance, the relative occurrence of the species in the local community may be sufficiently predictable that impacts on the community (usually surrogate species in the community) serve as a measure of take, *e.g.,* impacts to listed mussels may be measured by an index or other censusing technique that is based on surveys of non-listed mussels. In this case, the discussion determining the level at which incidental take will be exceeded (reinitiation level) describes factors for the non-listed mussels indicating impact on the listed species, such as an amount or extent of decrease in numbers or recruitment, or in community dynamics.

We are amending § 402.14(i)(1)(i) of the regulations to clarify that surrogates may be used to express the amount or extent of anticipated take, provided the biological opinion or the incidental take statement: (1) Describes the causal link between the surrogate and take of the listed species; (2) describes why it is not practical to express the amount of anticipated take or to monitor take-related impacts in terms of individuals of the listed species; and (3) sets a clear standard for determining when the amount or extent of the taking has been exceeded. Such flexibility may be

especially useful in cases where the biology of the listed species or the nature of the proposed action makes it impractical to detect or monitor take-related impacts to individual animals. This use of surrogates to express the amount or extent of incidental take is consistent with Federal court decisions addressing the issue of surrogates as reinitiation triggers in incidental take statements.

Provision of an Incidental Take Statement With a Biological Opinion for Programmatic Actions

The section 7 regulatory definition of Federal ''action'' includes Federal agency programs. *See* 50 CFR 402.02. Such programs may include a collection of activities of a similar nature, a group of different actions proposed within a specified geographic area, or an action adopting a framework for the development of future actions. Those future actions may be developed at the local, statewide, or national scale, and are authorized, funded, or carried out and subject to section 7 consultation requirements at a later time as appropriate. Examples of Federal programs that provide such a framework include land management plans prepared by the Forest Service and the Bureau of Land Management and the U.S. Army Corps of Engineers' Nationwide Permit Program.

As discussed above, the Services are modifying the section 7 regulations to address incidental take statements for framework programmatic actions in a way that revises the approach described in the proposed rule. The revised approach reflects our further consideration of relevant court rulings, the Services' national section 7 policy, and public comments on the proposed rule. Under this final rule, we are establishing regulatory provisions specific to framework programmatic actions that require section 7 consultation and adopt a framework for the development of future actions but do not authorize those future actions. This rule change will clarify the circumstances under which the Services will not provide an incidental take statement with a biological opinion addressing a framework programmatic action because adoption of a framework will not itself result in the take of listed species. Any take resulting from subsequent actions that proceed under the framework programmatic action will be subject to section 7 consultation and an incidental take statement, as appropriate. However, this regulatory change does not imply that section 7 consultation is required for a framework programmatic action that has no effect on listed species or critical habitat. The Services believe that this approach is fully consistent with the statutory purposes of an incidental take statement and the language of section 7 of the ESA.

As an initial and elementary matter, section 7 of the ESA directs the provision of an incidental take statement only where take is anticipated to result from the proposed Federal agency action. If take is not anticipated, then logically no incidental take statement would be provided. *See* 16 U.S.C. 1536(b)(4). Because a framework programmatic action does not itself authorize any action to proceed, no take is anticipated to result, and, therefore, the statute does not require the provision of an incidental take statement.

To read the statute otherwise to require the provision of incidental take statements for framework programmatic actions would not meaningfully further the statutory purposes of incidental take statements. The primary purpose of an incidental take statement is, when consistent with protection of the species, to exempt the incidental take of listed species that is anticipated to result from the agency action and impose conditions on that exemption intended to minimize the impacts of such take for the species' benefit. *See* 16 U.S.C. 1536(b)(4); H.R. Rep. 97–567, at 26–27 (1982). As provided in the legislative history and reflected in the Services' regulations, an additional purpose is to identify reinitiation triggers that provide clear signals that the level of anticipated take has been exceeded and would, therefore, require reexamination through a reinitiated consultation (H.R. Rep. 97–567, at 26–27 (1982); 50 CFR 402.14(i)).

Due to the nature of the action, no take results when a framework programmatic action is adopted. Adoption of the program itself, by definition, only establishes a framework for later action. ESA consultations will occur when subsequent actions may affect listed species and are consistent with the terms of the authorized program. If incidental take is reasonably certain to occur and the proposed action is compliant with the requirements of section 7(a)(2), then an action-specific incidental take statement will be provided that ensures any incidental take from the subsequent action under the program is addressed. The primary purpose of an incidental take statement (exemption of take and minimization of take-related impacts for the benefit of the listed species) would also not be advanced, because any incidental take statement provided at the program level and the resulting exemption would necessarily be incomplete since a second consultation and an action-specific incidental take statement still need to be provided when later actions are authorized under the program. Additionally, the level of detail available at the program (framework) level is often insufficient to identify with particularity where, when, and how the program will affect listed species. Without such detail, it is difficult to write sufficiently specific and meaningful terms and conditions intended to minimize the impact of the taking for the benefit of the listed species. Given this lack of specificity and information, providing the amount (*e.g.,* the number of individuals of the species taken) or extent (*e.g.,* the number of acres of the species' habitat disturbed) of take in many instances would be speculative and unlikely to provide an accurate and reliable trigger for reinitiation of consultation, thus undermining the additional purpose of an incidental take statement.

As discussed above, the modified approach for addressing incidental take statements for framework programmatic actions advances the policy goals of the Services to focus the provision of incidental take statements at the action level where such take will result. Consistent with that focus, if a decision adopting a framework also includes decisions authorizing actions (that is, actions for which no additional authorization will be necessary), then an incidental take statement would be necessary for those actions, provided the action is compliant with section 7(a)(2) and take is reasonably certain to occur. The Services have included recognition of this circumstance in the regulatory definition of the term ''mixed programmatic action'' in this final rule. For other types of programmatic actions not falling within the definitions provided in the rule, incidental take statements will be formulated by the Services to accompany biological opinions where incidental take is reasonably certain to occur and the proposed Federal action is compliant with the requirements of section 7(a)(2).

If, as discussed above, an incidental take statement is not provided with a biological opinion on a framework programmatic action on the basis that no take will result at the program stage, questions arise about how the associated biological opinion can nevertheless address indirect effects of the program's implementation. Put another way, if indirect effects amount to killing, harming, harassing, etc., how can no take occur? The explanation turns on the differing purposes of a biological

opinion as compared with an incidental take statement.

Unlike the purposes of an incidental take statement, the analysis in a biological opinion is used to determine whether an agency action is likely to jeopardize a listed species or adversely modify designated critical habitat. *See* 16 U.S.C. 1536(b)(3)(A); 50 CFR 402.14(h); H.R. Rep. 97–567, at 10 (1982). Conducting an effects analysis on a framework programmatic action that examines the potential effects of implementing the program is fully consistent with the purposes of a biological opinion. The analysis in a biological opinion allows for a broad-scale examination of a program's potential impacts on a listed species and its designated critical habitat—an examination that is not as readily conducted when the later, action-specific consultation occurs on a subsequent action developed under the program framework. The provisions of an incidental take statement, including the amount and extent of take and the terms and conditions, necessarily must be specific to ensure they can be followed and allow for a determination of when they have been exceeded. *See* 16 U.S.C. 1536(b)(4); 50 CFR 402.14(i). In contrast, a meaningful effects analysis within a biological opinion may appropriately rely upon qualitative analysis to determine whether a program and its set of measures intended to minimize impacts or conserve listed species are adequately protective for purposes of making a jeopardy determination. Programmatic biological opinions examine how the parameters of the program align with the survival and recovery of listed species. This approach reflects the different statutory purposes that the two related but separate documents were intended to address.

Distinctions between ''effects'' and ''take'' at the programmatic scale support analyzing potential program implementation as part of the ''effects'' of the framework programmatic action but not providing an incidental take statement at the program level. The ESA itself uses different terms in specifying the contents of a biological opinion for jeopardy purposes (''detail[] how the agency action affects the species'') and an incidental take statement (focused on ''take''). *See* 16 U.S.C. 1536(b)(3)(A), (b)(4). The ESA also does not define ''affects'' in any way.

For purposes of a biological opinion on a framework programmatic action, the Services typically evaluate the potential implementation of the program as ''effects of the action.'' The Services can legitimately draw a distinction between ''effects'' of the program and the purpose of a biological opinion on that program and ''take'' and the purpose of an incidental take statement in the subsequent consultation on later actions carried out under the program. Given that no actions that would lead to take are authorized when the framework program itself is adopted, the Services' position is that take is not anticipated from the adoption of the program in and of itself. As a result, the Services find that it is appropriate not to provide an incidental take statement at the program level and to address take during subsequent steps when specific actions are authorized under the program and subsequent consultation occurs. As mentioned above, if, however, a decision adopting a program framework also includes decisions authorizing actions that will not be subject to further Federal authorization or section 7 consultation and take is reasonably certain to occur, then an incidental take statement would be necessary for those portions of the programmatic action that will result in incidental take. The Services have included recognition of this circumstance in the regulatory definition of the term ''mixed programmatic action'' in this final rule.

Action agencies often seek to engage in consultation on programmatic actions to gain efficiencies in the section 7 consultation process. The Services anticipate this rule will afford action agencies and the Services with substantial flexibility to efficiently and effectively conduct consultation, while ensuring compliance with responsibilities under the ESA. For example, if an action agency designs a programmatic action and provides adequate information to inform the development of a biological opinion with an incidental take statement covering future actions implemented under the program, the Services anticipate they will be able to provide such an opinion and incidental take statement to the action agency under this rule. Action agencies may request assistance from the Services to help determine how a program could best be addressed pursuant to this rule. The Services also encourage action agencies to consider how any section 7 consultation on a programmatic action is consistent with the action agency's other environmental review processes.

Standard for Issuance of an Incidental Take Statement

In this final rule, the Services are clarifying that the standard for issuance of an incidental take statement is ''reasonable certainty'' that take will occur. The Services are amending 50 CFR 402.14(g)(7) to implement this clarification. The Services do not consider this change to be substantive, but rather a clarification of the existing standard for issuance of an incidental take statement.

Expressly including the standard of reasonable certainty in this final rule at 50 CFR 402.14(g)(7) is consistent with the ESA, existing section 7 regulations, the Services' current practice, the Services' Section 7 Handbook, and applicable case law. The three requirements that must be met under section 7 of the ESA before an incidental take statement is issued implicitly suggest that a finding of take is required. *See* 16 U.S.C. 1536(b)(4)(B) (''*the taking* of an endangered species or a threatened species incidental to the agency action will not violate such subsection'') (emphasis added). The statute does not set forth the standard by which incidental take is to be determined, however, leaving room for the Services to offer their interpretation.

As for the regulations, the section 7 regulations expressly apply the ''reasonable certainty'' standard to ''indirect effects'' that are defined as part of the ''effects of the action.'' *See* 50 CFR 402.02. The existing provision governing the contents of an incidental take statement at 50 CFR 402.16(i)(1) reflects the requirement that at least some level of incidental take be anticipated to meaningfully include the required contents of an incidental take statement, *e.g.,* the impact of the take (amount or extent of take), and the reasonable and prudent measures considered ''necessary or appropriate to minimize such impact.''

The Services' Section 7 Handbook, issued in 1998, identifies a similar standard of ''reasonably likely'' to determine when to issue an incidental take statement. The Handbook predates the Ninth Circuit's decision in *Arizona Cattle Growers' Ass'n* v. *U.S. Fish and Wildlife Service,* 273 F.3d 1229 (9th Cir. 2001). In that case, the Ninth Circuit provided a lengthy discussion of when the Services must issue an incidental take statement. Examining the statute and the regulations, the court held that there must be a reasonable basis to conclude that incidental take will occur in order to issue an incidental take statement. Although not definitively resolving the issue, the court cited favorably to the lower court's application of the standard of ''reasonable certainty'' for issuance of an incidental take statement. The court particularly expressed concern about the imposition of conditions on otherwise lawful land use absent

reasonable certainty of incidental take. In 2002, following the *Arizona Cattle Growers'* decision, the Fish and Wildlife Service expressly recognized ''reasonable certainty'' as the standard that applies to determine if incidental take will occur.

The language currently in 50 CFR 402.14(g)(7) is not inconsistent with the Services' application of the ''reasonable certainty'' standard. This provision requires the Services to ''formulate a statement concerning incidental take, if such taking *may occur''* (50 CFR 402.14(g)(7) (emphasis added)). While some courts have read this language to potentially suggest a lower standard applies for the issuance of an incidental take statement, *see, e.g., Public Employees for Environmental Responsibility* v. *Beaudreu,*—F.Supp.2d —,2014 WL 985394 (D.D.C. 2014), that is not the Services' interpretation. The language of § 402.14(g)(7) cannot be read in isolation. The Services implement § 402.14(g)(7) together with the more particular requirements of § 402.14(i).

For all the reasons discussed above, the ''reasonable certainty'' standard governs the threshold issue of whether to formulate an incidental take statement. Once the Services determine that incidental take is reasonably certain to occur, then the specific provisions of 50 CFR 402.14(i) govern (*e.g.,* amount or extent of take, terms and conditions) and are applied consistent with the best scientific and commercial data available. Where formal consultation results in a determination that take is not ''reasonably certain,'' then consistent with § 402.14(g)(7) and the Services' Section 7 Handbook, the Services provide a section entitled ''incidental take statement'' along with a short paragraph explaining that incidental take is not anticipated. Thus, the statement does not go on to provide an amount or extent of take, reasonable and prudent measures, or the other components of an incidental take statement. To avoid any confusion about the standard for anticipating incidental take of listed species, the Services have modified the text of § 402.14(g)(7) to reflect the ''reasonably certain to occur'' standard.

As a practical matter, application of the ''reasonable certainty'' standard is done in the following sequential manner in light of the best available scientific and commercial data to determine if incidental take is anticipated: (1) A determination is made regarding whether a listed species is present within the area affected by the proposed Federal action; (2) if so, then a determination is made regarding whether the listed species would be exposed to stressors caused by the proposed action (*e.g.,* noise, light, ground disturbance); and (3) if so, a determination is made regarding whether the listed species' biological response to that exposure corresponds to the statutory and regulatory definitions of take (*i.e.,* kill, wound, capture, harm, etc.). Applied in this way, the ''reasonable certainty'' standard does not require a guarantee that a take will result, rather, only that the Services establish a rational basis for a finding of take. While relying on the best available scientific and commercial data, the Services will necessarily apply their professional judgment in reaching these determinations and resolving uncertainties or information gaps. Application of the Services' judgment in this manner is consistent with the ''reasonable certainty'' standard. The standard is not a high bar and may be readily satisfied as described above. *See, e.g., Arizona Cattle Growers',* 273 F.3d at 1244 (noting that the standard the court applies in reviewing whether the Services may issue an incidental take statement is a ''very low bar to meet'').

Summary of Changes From the Proposed Rule

In response to public comments and internal review, the Services made the following changes compared to the proposed rule:

The term and definition for *programmatic action* and the proposed text of §§ 402.02 and 402.14(i)(6) are modified in this final rule. The term *programmatic action* is changed to *framework programmatic action.* The term *mixed programmatic action* and its definition are also added to the final rule. The proposed term and definition for *programmatic incidental take statement* at § 402.02 are removed; however, the standard set forth in the definition (reasonable certainty) is included in the final rule as explained below. These changes define, for purposes of incidental take statements under section 7 of the ESA, the subset of Federal agency actions to which this rule applies. The new definitions draw distinctions between these types of programmatic actions based on the extent to which those programs do or do not require subsequent Federal approvals and section 7 consultation for the terms of the program to be carried out. The new § 402.14(i)(6) added to the regulations under this final rule establishes when an incidental take statement is and is not required for these two categories of programmatic action.

The approach relied upon in this final rule for programmatic actions is fully consistent with the identified purpose of the proposed rule, which, among other things, was to clarify development of incidental take statements for programmatic actions. While this approach modifies the approach of the proposed rule for programmatic actions, the public was specifically asked for comment on whether the approach relied upon in this final rule would be more appropriate to address the issue of incidental take statements for programmatic actions. *See* 78 FR 54437, 54441 (Sept. 4, 2013).

As discussed above, the Services are modifying the text in § 402.14(g)(7) to clarify that ''reasonable certainty'' is the standard that applies to determine when the Services issue an incidental take statement. The proposed rule did not propose this specific change, but the proposed rule definition of *programmatic incidental take statement* included the concept of ''reasonable certainty'' as the applicable standard for incidental take, and commenters specifically requested the Services to clarify the applicable standard, including many commenters that specifically asserted that ''reasonable certainty'' is the applicable standard. The Services, therefore, are taking this opportunity to clarify the regulatory language in § 402.14(g)(7) from ''if such take *may* occur'' to ''if such take *is reasonably certain* to occur'' (emphasis added). As explained above, the Services do not consider this change to be substantive, but rather a clarification of the existing standard for issuance of an incidental take statement.

The proposed rule included adding a sentence to § 402.14(i)(3) intended to clarify that monitoring project impacts to a surrogate meets the requirement for monitoring the impacts of incidental take on the listed species. Upon further consideration, the Services concluded this sentence is unnecessary as the requirement is already reflected in the existing regulatory language. *See* 50 CFR 402.14(i)(1)–(3) (monitoring and reporting ''impacts on the species'' includes amount or extent of take and therefore surrogates). The Services are making a technical change to § 402.14(i)(3) to update the citations to the NMFS regulations at the end of that provision from ''50 CFR 220.45 and 228.5'' to ''50 CFR 216.105 and 222.301(h)''. These provisions were moved within the Code of Federal Regulations but never updated in § 402.14(i)(3).

Response to Public Comments

As noted above, the Services received a total of 64 public comments in response to the proposed rule. For the

reasons discussed above, the Services withdrew the proposed regulatory definition of *programmatic incidental take statement* in this final rule. On that basis, we are not responding to public comments on this aspect of the proposed rule except as they relate to the standards for development of an incidental take statement. We also are not responding to public comments beyond the scope of the proposed rule, including those comments that addressed other portions of the section 7 consultation regulations not related to the formulation of incidental take statements. The following responses to public comments are segregated under four categories: (1) General; (2) the standards for anticipating take; (3) incidental take statements for programmatic actions; and (4) the use of surrogates to express the amount or extent of take.

General

Issue 1: Several commenters requested an extension of the public comment period.

Response: The Services believe the 60-day public comment period provided adequate opportunity for the public to review and comment on the proposed regulations.

Issue 2: One commenter stated that the proposed changes to the section 7 regulations are not within the Services' regulatory authority.

Response: The Services regard the proposed changes as fully consistent with their discretionary authority to address ambiguous aspects and challenging issues that arise under section 7 of the ESA.

Congress included the incidental take statement provisions in the 1982 amendments to the ESA to resolve the situation in which a Federal action agency or an applicant has been advised by the Services that the proposed action is not likely to jeopardize the continued existence of listed species but is anticipated to result in the taking of listed species incidental to that action, which would otherwise violate the take prohibition of section 9. *See* H.R. Rep. 97–567, 26–27 (1982). According to the legislative history of the ESA, by requiring the Services to specify the impact of take on the listed species, Congress also intended reinitiation triggers (amount or extent of take) to be required as part of the incidental take statement. *See id.*

The ESA is sufficiently ambiguous to allow the Services to adopt a statutory interpretation that supports not providing an incidental take statement for a framework programmatic action, as appropriate. *See Chevron USA, Inc.* v. *Natural Resources Defense Council,* 467 U.S. 837, 865–66 (1984). First, the definition of ''take'' itself contemplates immediate actions that would potentially injure a listed species (''harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect'' (16 U.S.C. 1532(19)). The programmatic (framework) action by itself and by definition under this rule does not authorize any actions that would result in these sorts of immediate injuries to a listed species. No take will occur at the programmatic level, and any take that results will result only from a second (or subsequent) authorization under the programmatic action. As discussed above, framework programmatic actions may include authorization for actions that will not be subject to further Federal authorization or section 7 consultation and are reasonably certain to cause take. Under those circumstances, an incidental take statement would be necessary for that portion of the framework programmatic action. The Services have included recognition of this circumstance in the regulatory definition of *mixed programmatic action* in this final rule.

Given the step-wise nature of such programmatic actions, sections 7(b)(4) and 7(o)(2) of the ESA can be read to support not providing an incidental take statement at the programmatic level under these circumstances. If incidental take is anticipated to result at this stage, section 7(b)(4) appears to require the Services to issue an incidental take statement (''the Secretary *shall* provide the Federal agency and applicant . . . with a written statement'') (16 U.S.C. 1536(b)(4) (emphasis added). Although section 7(b)(4) does not expressly require a finding that incidental take is anticipated to result from the agency action, the three requirements that must be met before an incidental take statement is issued implicitly suggest this. *See* 16 U.S.C. 1536(b)(4)(B) (''*the taking* of an endangered species or a threatened species incidental to the agency action will not violate such subsection'') (emphasis added). These provisions provide room for the Services to adopt the position that take will not result at the programmatic (framework) level in and of itself since no specific action is authorized when the program is adopted. Any take that will result from the program will be addressed, as appropriate, when a subsequent specific action(s) is authorized and the resulting action-specific consultation occurs. Because of the framework nature of the programmatic actions at issue, the Services are not avoiding the duty to provide an incidental take statement—any take resulting from the subsequent actions under program will be addressed in the later action-specific consultation. Not providing a take-related reinitiation trigger under an incidental take statement for the framework programmatic action is supportable given the Services' position that take is not anticipated at the program (framework) level in the particular circumstance where no specific action is authorized until a subsequent action developed under the framework is taken and subsequent ESA consultation occurs. Also, for decisions adopting framework programmatic actions that also authorize actions to proceed without any further Federal authorization or section 7 consultation anticipated, an incidental take statement is required under this rule where the action is determined to be compliant with section 7(a)(2) and take is reasonably certain to occur. An example of such actions might include Federal programs in which subsequent approval for actions proceeding under the program are delegated to States.

As defined in this rule and discussed above, a mixed programmatic action may include authorization for actions that will not be subject to further Federal authorization or section 7 consultation and are reasonably certain to cause take. Under those circumstances, an incidental take statement would be necessary for that portion of the programmatic action. The Services have included recognition of this circumstance in the regulatory definition of *mixed programmatic action* in this final rule. Examples of mixed programmatic action would include land management plans in which particular actions, such as establishment of campgrounds or off-road vehicle use, are approved to proceed directly, while the plan itself provides a framework for the development of future actions occurring in the action area that are authorized, funded, or carried out at a later time and subject to section 7 consultation requirements, as appropriate.

Section 7(o)(2) of the ESA supports the Services' interpretation because it appears to contemplate only a single incidental take statement to fully exempt take. The language of section 7(o)(2) provides ''any taking that is in compliance with the terms and conditions [of an incidental take statement] . . . shall not be considered to be a prohibited taking.'' (16 U.S.C. 1536(o)(2)). If the Services were to provide an incidental take statement for a framework programmatic action where any take will result only from future

authorizations under the programmatic (framework) action, the Services would still require a second incidental take statement for those subsequent actions because that is the point at which adequate information typically would be available to identify amount or extent of take and to provide action-specific terms and conditions. Requiring an incidental take statement for the framework programmatic action to fully exempt the take associated with implementing the program or framework, however, may be inconsistent with section 7(o)(2), which exempts ''any taking'' that complies with the terms and conditions of the incidental take statement (emphasis added). Thus, not providing an incidental take statement at the program (framework) level avoids a potential inconsistency with the language of section 7(o)(2).

Additionally, as discussed above, the language of the ESA leaves sufficient room to draw a distinction between ''effects'' and ''take'' at the programmatic scale, and thus to allow for an analysis of program implementation as part of the ''effects'' of a framework programmatic action but not to provide an incidental take statement at the program (framework) level. The ESA itself uses different terms in specifying the contents of a biological opinion for jeopardy purposes (''detail how the agency action *affects* the species'') and an incidental take statement (focused on ''*take*''). *See* 16 U.S.C. 1536(b)(3)(A), (b)(4) (emphasis added). The ESA also does not define ''affects'' in any way. Thus, it is up to the Services to fill in these statutory gaps in the ESA in a reasonable way. *See National Cable & Telecommunications Ass'n.* v. *Brand X Internet Services,* 545 U.S. 967 (2005).

Likewise, the use of surrogates in an incidental take statement is an exercise of the Services' reasonable discretion in carrying out their responsibilities under section 7 of the ESA. The statutory language associated with reinitiation triggers is quite general, providing that as part of an incidental take statement the Services shall ''specif[y] the impact of such incidental taking on the species'' (16 U.S.C. 1536(b)(4)(i)). This language leaves substantial room for statutory interpretation on the part of the Services, including the use of surrogates.

The legislative history of the 1982 amendments to the ESA, which added the incidental take statement provisions, reflects congressional support for the use of surrogates as well. Congress recognized that a numerical value would not always be available and intended that such numbers be established only where possible (H.R. Rep. No. 97–567, at 27).

In practice, over the last 25 years of developing incidental take statements, the Services have found that in many cases the biology of the listed species or the nature of the proposed action makes it impractical to detect or monitor take of individuals. In those situations, evaluating impacts to a surrogate such as habitat, ecological conditions, or similar affected species may be the most reasonable and meaningful measure of assessing take of listed species and is fully consistent with the language and purposes of the ESA.

The courts have also recognized that it is not always practicable to establish the precise number of individuals that will be taken. Thus under a *Chevron* analysis, the ESA permits the Services to rely upon surrogate measures to establish the impact of take on the species if there is a link between the surrogate and take. *See Arizona Cattle Growers' Ass'n* v. *U.S. Fish and Wildlife Service,* 273 F.3d 1229 (9th Cir. 2001); *see also Oregon Natural Resource Council* v. *Allen,* 476 F.3d 1031, 1041 (9th Cir. 2007). It is often more practical and meaningful to monitor project effects upon surrogates, which can also provide a clear standard for determining when the amount or extent of anticipated take has been exceeded and consultation should be reinitiated. Accordingly, the Services have already exercised their discretionary authority to adopt the use of surrogates as part of our joint national policy for preparing incidental take statements in the Section 7 Handbook (Services 1998).

Issue 3: Commenters noted that the proposed rule is subject to the requirements of the National Environmental Policy Act (NEPA), including the requirements applicable to environmental impact statements, that must be satisfied before a final decision is made on the proposed regulatory changes.

Response: The categorical exclusions at 43 CFR 46.210(i) and NOAA Administrative Order 216–6, section 6.03c.3(i) apply to this joint rule. Among other things, the exclusions apply to regulations that are of an administrative, financial, legal, technical, or procedural nature and whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process either collectively or case by case. 43 CFR 46.210.

The Services have determined that this final rule will not result in any reasonably foreseeable effects to the environment and, therefore, that further NEPA review is not required. First, the rule codifies existing practices and case law with respect to use of surrogates and this codification of the status quo does not result in foreseeable environmental effects. Second, the timing of issuance of the incidental take statement will not change the substantive protections afforded to species and therefore the Service's regulations do not change the on-the-ground effects of incidental take statements. Finally, the update to the regulations does not result in environmental impacts because it merely clarifies the Services' longstanding position since the Ninth Circuit's decision in *Arizona Cattle Growers' Ass'n.* that an incidental take statement may be issued only when there is ''reasonable certainty'' that take of listed species will occur.

To the extent the rule would result in reasonably foreseeable environmental effects, the Services have determined that the rule is categorically excluded from further NEPA review and that no extraordinary circumstances are present. The rule qualifies for two categorical exclusions listed at 43 CFR 46.210(i) and NOAA Administrative Order (NAO) 216–6, section 6.03c.3(i). Among other things, the exclusions apply to regulations that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case by case. 43 CFR 46.210. *See also* NAO section 216–6 6.03c.3(i) (substantively the same exclusion).

First, the rule is of a legal, technical, or procedural nature. For surrogates, the rule clarifies when the Services may use a surrogate to establish the amount or extent of take. This clarification is consistent with the Services' existing national policy and applicable case law. For programmatic actions, the rule clarifies the procedural timing of when the Services will issue an incidental take statement. It does not alter substantive protections. Finally, the rule codifies the Services' longstanding interpretation of their existing regulations post *Arizona Cattle Growers' Ass'n.* that an incidental take statement can be issued only if there is ''reasonable certainty'' that take will occur.

Second, any potential impacts of this rule are too broad, speculative, and conjectural to lend themselves to meaningful analysis and will be examined as part of any NEPA analysis conducted by the Federal action agency.

As explained above, the changes in the rule generally constitute clarifications that are consistent with existing practices as well as case law. As such, it would be speculative to try to analyze the effects of the codification of these practices. Furthermore, these changes apply to the nationwide implementation of section 7 consultations, which take place in a wide variety of contexts, for various activities, for and with numerous action agencies. This application allows analysis only at the broadest level and would not permit meaningful analysis. Furthermore, before any action is taken, the responsible action agency will be required to conduct any necessary NEPA analyses, including impacts to listed species and critical habitat. For these reasons, the second categorical exclusion applies to this rule.

Additionally, none of the extraordinary circumstances listed at 43 CFR 46.215 and NAO 216–6 section 5.05c are triggered by the final rule. This rule does not involve a geographic area with unique characteristics, is not the subject of public controversy based on potential environmental consequences, will not result in uncertain environmental impacts or unique or unknown risks, does not establish a precedent or decision in principle about future proposals, will not have significant cumulative impacts, and will not have any adverse effects upon endangered or threatened species or their habitats for the reasons identified above.

In making this determination, the Services have considered whether adequate opportunities for public comment on the rule, including its potential environmental effects, have been provided. Our review of the proposed rule and the comments received on that proposal demonstrated that preparation of an Environmental Assessment is not necessary to obtain public input on this rule. Commentators had the opportunity to weigh in on the various aspects of this final rule and the final rule has been shaped, in part, by those comments. We conclude that preparation of an Environmental Assessment would not result in meaningful additional opportunities for comment, nor would it be likely to provide the Services with significant additional information to guide their decisionmaking process.

Issue 4: One commenter requested that the Services include the concept of a ''cumulative'' incidental take statement in the incidental take statement rulemaking.

Response: The statutory purposes and features of incidental take statements are discussed above in the preamble. As reflected in that discussion, incidental take statements are proposed-action specific. While biological opinions examine aggregate or cumulative impacts as part of the jeopardy and adverse modification analyses consistent with the best scientific and commercial data available (*see, e.g.,* Services' Section 7 Handbook, at 4–33), incidental take statements do not, nor are they required to, include such analyses. Additionally, an incidental take statement may be issued only if the proposed action avoids jeopardizing the species or adversely modifying its critical habitat. *See* 16 U.S.C. 1536(b)(4).

The Standards for Anticipating Take

Issue 1: Several commenters requested the Services to clarify the standards for issuing an incidental take statement.

Response: As noted above, in accordance with the ESA, the Services must provide an incidental take statement in a biological opinion in cases where we have concluded that a proposed Federal action will not violate section 7(a)(2) and take of listed species caused by the action is reasonably certain to occur. As discussed above, the Services are clarifying 50 CFR 402.14(g)(7) to clarify that reasonable certainty is the standard. Additionally, for framework programmatic actions, the Services are also clarifying that an incidental take statement is not required at the program (framework) level for those actions falling within the definition of *framework programmatic action.*

In general, the standards for incidental take statements in the current regulations at 50 CFR 402.14(i) continue to apply as well as the standards associated with national policy for incidental take statements found on pages 4–43 through 4–58 of the Services' Section 7 Handbook (Services 1998).

In accordance with those standards and consistent with governing case law and our regulations, the Services' general approach to incidental take statements is summarized below:

Take is specifically defined in the regulations. For example, the terms ''harm'' and ''harass'' have specific meanings, and they are not synonymous (*i.e.,* FWS harm and harass at 50 CFR 17.3; NMFS harm at 50 CFR 222.102). The effects analysis in a biological opinion should discuss, as appropriate, the anticipated effects of an action on listed species in biological terms that relate to the regulatory definitions of take. Similarly, the incidental take statement portion of a biological opinion should reflect the proper use of take terminology.

If a proposed action includes a reasonable certainty of take, the biological opinion needs to make a rational connection between the effects of the action and the take considered in the incidental take statement. The terms and conditions must have a rational connection to the taking of a species and must give clear guidance to the recipient of the incidental take statement of what is expected and how the conditions (including those for monitoring of take-related impacts caused by the action) can be met.

Issue 2: One commenter requested the Services to clarify if an incidental take statement for a program-level action can include an amount or extent of take if the analysis of the effects of the action supports such a finding.

Response: Yes, if the Services have determined that incidental take is reasonably certain to occur and that such take will not violate section 7(a)(2) of the ESA.

Issue 3: One commenter noted that if a jeopardy determination can be made for a programmatic action, then quantification of anticipated take in an incidental take statement should also be possible.

Response: As discussed in the preamble above, a meaningful effects analysis within a biological opinion may appropriately rely upon qualitative analysis to determine whether a framework programmatic action, inclusive of any proposed measures to minimize adverse impacts or conserve listed species, is adequately protective for purposes of making a jeopardy determination. Biological opinions on such programs often examine how the parameters of the program align with the survival and recovery of listed species. These assessments are often qualitative and do not provide the sort of specificity required for the purposes of incidental take statements. See the related discussion above in the section entitled ''Provision of an Incidental Take Statement with a Biological Opinion for Programmatic Actions.''

Issue 4: Several commenters requested the Services to affirm that reasonable and prudent measures in an incidental take statement must respect the ''minor change'' rule.

Response: The Services find that the text in the current regulations under § 402.14(i)(2) is clear and sufficient in this regard, and no changes are warranted. Reasonable and prudent measures and 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.

Programmatic Actions

Issue 1: Several commenters requested the Services to more clearly express the regulatory definition of *programmatic action* and to more clearly explain why this term needs to be defined in the regulations.

Response: After considering public comments and internal review, the Services are modifying the term and definition of *programmatic action* in this final rule. The term *framework programmatic action* is added to 50 CFR 402.02 and includes, for purposes of an incidental take statement, a Federal action that approves a framework for the development of future actions that are authorized, funded, or carried out and subject to section 7 requirements at a later time. The term *mixed programmatic action* and its definition are also added to 50 CFR 402.02 in this final rule to further distinguish the forms of programmatic actions that may be developed by Federal agencies. See discussion above for further detail regarding *framework* and *mixed programmatic actions* in the section entitled ''Inclusion of an Incidental Take Statement in a Biological Opinion for Programmatic Actions.''

Issue 2: Several commenters requested the Services to more clearly define key phrases in the proposed rule, including those for *programmatic action* and *site-specific.*

Response: For *programmatic action,* see the response to Issue 1 above. The regulatory language of the rule no longer uses the term ''site-specific.'' In the Services' view, that term unnecessarily narrowed the definition of the types of programmatic actions to which this rule is intended to apply.

Issue 3: One commenter requested the Services to clarify if programmatic actions covered under a Habitat Conservation Plan (HCP) permit issued under section 10(a)(1)(B) of the ESA fall within the scope of the proposed regulatory definition of *programmatic action.*

Response: The Services anticipate that an HCP covering programmatic actions by non-Federal parties (*e.g.,* States, local governments, private citizens) generally would not fall under the definition of framework programmatic action established by this rule. The Federal action involved in an HCP is the issuance of a section 10(a)(1)(B) permit, and it is this action that is the subject of a biological opinion and incidental take statement. Such a permit generally is not expected to fall under the definition of framework programmatic action discussed herein since it is the underlying State/local/private action that is programmatic in nature, not the Federal permit itself, which is subject to consultation.

Issue 4: Several commenters noted that the proposed rule fails to establish clear standards for programmatic actions and creates an ''enormous loophole in the consultation process that will harm listed species.''

Response: Based on the revisions and clarifications of the proposed rule in this final rule, the Services endeavor to articulate more clearly when an incidental take statement is required for programmatic actions. Additionally, as noted above in the response to Issue 1 in the subsection titled ''The Standards for Anticipating Take,'' an incidental take statement can be provided only where the Services have concluded in a biological opinion that a proposed Federal action and the resultant incidental take will not violate section 7(a)(2). This scenario is the same for both programmatic actions and project-specific actions that fall under such programs, which ensures that no loophole is created.

Issue 5: One commenter requested the Services to clarify the standards that will be applied to develop incidental take statements for site-specific actions authorized under a programmatic action, especially those related to monitoring of take-related impacts.

Response: The Services note that we are no longer using the term ''site-specific actions'' in our definitions for programmatic action. In general, for actions proceeding under a program that are anticipated to be subject to a subsequent section 7 consultation, the standards for incidental take statements in the current regulations at 50 CFR 402.14(i) would continue to apply as well as the standards associated with national policy for incidental take statements found on pages 4–43 through 4–58 of the Services' Section 7 Handbook. For a more detailed discussion of these standards, see the response to Issue 1 under ''The Standards for Anticipating Take'' above.

Use of Surrogates

Issue 1: One commenter suggested that the Services not require an incidental take statement to explain the causal link between the effects of an action to a surrogate and take of listed species under the proposed changes to § 402.14(i)(1)(i) but rather use the agency record of decision to explain how those standards are met. At the very least, the commenter requested the Services to delete reference to ''clear'' in relation to setting a standard for determining when the level of anticipated take in terms of a surrogate has been exceeded because the word ''clear'' ''implies an extra burden on the agency to provide particular detail about the standard'' that may make the Services vulnerable to assertions that a take reinitiation trigger is not clear enough.

Response: The requirement for the Services to explain the causal link is consistent with the Services' current national section 7 policy (*see* page 4–47 of the Services' Section 7 Handbook) and current case law. Additionally, in the section 7 context, the Services do not issue a record of decision; we issue a biological opinion and incidental take statement, which is the appropriate place to address the causal link between anticipated take and an identified surrogate. The Services have retained the word ''clear'' in § 402.14(i)(1)(i) of the regulations because that term best conveys the intent to ensure the standard is understandable to the holder of the incidental take statement.

Issue 2: Several commenters were concerned about the Services' proposed regulatory criteria for the use of surrogates to characterize the amount or extent of anticipated take and requested the Services to better define clear standards for the use of surrogates and subsequent monitoring. Some commenters suggested that these standards be less specific, and others suggested that they be more specific.

Response: The standards for the use of surrogates, as finalized in this rule, are consistent with relevant case law and the Services' national policy on the use of surrogates (*see* page 4–47 of the Services' Section 7 Handbook), which has been in effect since 1998.

Issue 3: One commenter objected to the Services' proposed regulatory authorization for the use of surrogates to address habitat surrogates that are fully coextensive with any aspect of the proposed project's impacts on habitat because such a provision is at odds with the Ninth Circuit's decision in *Oregon Natural Res. Council* v. *Allen,* 476 F.3d 1031 (9th Cir. 2007).

Response: The Services consider a ''coextensive'' surrogate to be a surrogate that adopts a portion of a proposed action as a trigger for reinitiation. Coextensive surrogates allowed for by this rule adequately fulfill their role as independent reinitiation triggers because the monitoring and reporting requirements of the incidental take statement will be structured to ensure timely reporting of project impacts to a surrogate to ensure timely reinitiation of formal consultation, as appropriate, in the same

way as for non-coextensive surrogates. The preamble provides additional discussion illustrating how a coextensive surrogate may fulfill its intended function as an independent trigger for reinitiation. A surrogate that did not fulfill this role would not meet the requirements of this rule.

Issue 4: Several commenters requested the Services to more clearly describe the meaning of ''not practical,'' ''clear standard,'' and ''causal link'' as these terms are applied in the use of surrogates.

Response: The Services considered this comment in finalizing the preamble discussion on the use of surrogates and believe each of these terms is clearly described in a manner that is consistent with existing case law and the Services national policy on the use of surrogates (*see* page 4–47 of the Services' Section 7 Handbook), which has been in effect since 1998.

Issue 5: Several commenters requested the Services to clarify that take of a surrogate is not a violation of section 9 of the ESA.

Response: The Services affirm that take of a surrogate is not, in and of itself, a violation of sections 9(a)(1)(B), (C), or (G) of the ESA. Any efforts to prosecute a violation of the take prohibitions would be based on applying the appropriate evidentiary standards to support either a civil or criminal action. A surrogate functions to provide a trigger for reinitiation of consultation under § 402.16(a). If the amount or extent of take is represented by a surrogate and the level of anticipated impact to that surrogate is exceeded, reinitiation may be required consistent with the terms of § 402.16. The availability of the take exemption afforded by the incidental take statement is governed by compliance with the reasonable and prudent measures and terms and conditions contained in the statement. Provided the holder of the incidental take statement is in compliance with all terms and conditions, the take exemption remains in place even if the extent of take as described by a surrogate is exceeded (16 U.S.C. 1536(o)(2); 50 CFR 402.14(i)(5)). However, if the extent of take is exceeded, the regulations require the action agency to immediately reinitiate consultation (50 CFR 402.14(i)(4)).

Issue 6: Several commenters recommended the Services to replace the ''not practical'' standard in the proposed change to § 402.14(i)(1)(i) with a ''scientifically impractical'' standard.

Response: The Services decline to make this change. The Services consider the best scientific and commercial data available in determining whether it is not practical to express the amount of take in terms of individuals of the listed species. In making this determination, the Services must take into account relevant considerations, some of which may be considered broader than ''scientifically impractical,'' such as the scope and scale of the proposed action relative to the costs of any monitoring necessary to determine take of individuals of the listed species from the action.

Issue 7: One commenter recommended that the Services delete reference to examples of surrogates in the proposed change to § 402.14(i)(1)(i) because it may be interpreted as an unnecessary limit on the types of surrogates that may be used in an incidental take statement. Another commenter suggested that reference to examples of surrogates should be done only in the preamble section of the rule.

Response: The use of examples in this rule is not intended to limit use of surrogates, and any surrogate that meets the standards set forth in this rule would be available.

Issue 8: One commenter noted that the use of surrogates in incidental take statements should be done sparingly and under very narrow circumstances to avoid misapplication.

Response: As discussed in the preamble, the use of surrogates is fact-pattern specific and dependent on meeting the standards set forth in this rule.

Issue 9: One commenter requested the Services to further condition the proposed regulatory standards for the use of surrogates to include a requirement under an incidental take statement to gather data during the term of the Federal action to confirm that effects to the surrogate and the listed species that conform to take are highly likely to correspond.

Response: Pursuant to this final rule, use of a surrogate in an incidental take statement is predicated on a finding that measuring take impacts to a listed species is not practical and on establishing a link, based on best available scientific information, between effects of the action to a surrogate and take of the listed species. The Services acknowledge that the body of science relied upon to make that link is likely to vary on a listed species-specific basis. To the extent that a link can be reasonably established, but more information would be helpful, the Services can request the Federal agency or an applicant to collect additional information in the ''Conservation Recommendations'' section of a biological opinion (*see* pages 4–62 and 4–63 in the Services' Section 7 Handbook). Implementation of the suggested requirement for such information as part of an incidental take statement, if appropriate, would need to comply with the regulatory requirement under § 402.14(i)(2) for the scope of reasonable and prudent measures and terms and conditions to involve only minor changes to the proposed Federal action.

It should also be noted that, in many cases, the surrogate used by the Services in an incidental take statement is habitat or a component of the habitat of the listed species. In those situations, the science related to the habitat requirements and behavior of the listed species informs the analytical basis for findings by the Services that a proposed action is reasonably certain to cause take of the listed species and establishes a causal link between effects to habitat and take of the listed species. For these reasons, quantifying and monitoring take impacts via project effects to the habitat of the listed species is a scientifically credible and practical approach for expressing and monitoring the anticipated level of take for situations where use of a surrogate meets the criteria set forth in this rule. In those instances where insufficient information exists to confirm the causal link, the surrogate would not meet the standard for its use in an incidental take statement. As noted above, the Services can request additional information on such a link in the ''Conservation Recommendations'' section of a biological opinion (*see* pages 4–62 and 4–63 in the Services' Section 7 Handbook).

The Services intend to prepare implementation guidance for the use of surrogates to supplement the discussion in the Services' Section 7 Handbook and will consider the recommendations provided in public comments as well as in a recent commentary by Murphy and Weiland (2014) on our proposed rule.

Issue 10: Several commenters requested the Services clarify if effects to habitat, including designated critical habitat, could be used as a surrogate measure for the amount or extent of anticipated take in an incidental take statement.

Response: Effects to habitat can be used as a surrogate for expressing the amount or extent of take of a listed species if the criteria set forth in this final rule are met.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory

Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has reviewed this rule and has determined that this rule is significant.

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

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

Under the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996; 5 U.S.C. 601 *et seq.*), whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare, and make available for public comment, a regulatory flexibility analysis that describes the effect of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of an agency, or his or her designee, certifies that the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. We are certifying that this rule will not have a significant economic effect on a substantial number of small entities. The following discussion explains our rationale.

Incidental take statements describe the amount or extent of incidental take that is anticipated to occur when a Federal action is implemented. The incidental take statement conveys an exemption from the ESA's take prohibitions provided that the action agency (and any applicant) complies with the terms and conditions of the incidental take statement. Terms and conditions cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes (50 CFR 402.14(i)(2)). The regulatory changes addressed in this rule will neither expand nor contract the reach of terms and conditions of an incidental take statement. As such, we foresee no economic effects from implementation of this final rule.

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

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

(a) This final rule will not ''significantly or uniquely'' affect small governments. We have determined and certify under the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.,* that this rulemaking will not impose a cost of $100 million or more in any given year on local or State governments or private entities. A Small Government Agency Plan is not required. As explained above, small governments would not be affected because the revised regulations will not place additional requirements on any city, county, or other local municipalities.

(b) This rule will not produce a Federal mandate of $100 million or greater in any year (*i.e.,* it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act). This regulation would not impose any additional management or protection requirements on the States or other entities.

Takings (E.O. 12630)

In accordance with E.O. 12630, we have determined that the final rule does not have significant takings implications. A takings implication assessment is not required because this rule (1) will not effectively compel a property owner to suffer a physical invasion of property and (2) will not deny all economically beneficial or productive use of the land or aquatic resources. This rule would substantially advance a legitimate government interest (conservation and recovery of listed species) and would not present a barrier to all reasonable and expected beneficial use of private property.

Federalism (E.O. 13132)

In accordance with E.O. 13132, we have considered whether this final rule has significant Federalism effects and have determined that a Federalism assessment is not required. This rule would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. No intrusion on State policy or administration is expected; roles or responsibilities of Federal or State governments would not change; and fiscal capacity would not be substantially directly affected. Therefore, this rule does not have significant Federalism effects or implications to warrant the preparation of a Federalism Assessment under the provisions of E.O. 13132.

Civil Justice Reform (E.O. 12988)

This final rule will not unduly burden the judicial system and meets the applicable standards provided in sections (3)(a) and (3)(b)(2) of E.O. 12988.

Government-to-Government Relationship with Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with affected Federally recognized Tribes on a government-to-government basis. We have determined that there are no tribal lands affected by this rule, and, therefore, no such communications were made.

Paperwork Reduction Act

This final rule does not contain collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

The Services have determined that this final rule will not result in any reasonably foreseeable effects to the environment and, therefore, that further NEPA review is not required. First, the rule codifies existing practices and case law with respect to use of surrogates and this codification of the status quo does not result in foreseeable environmental effects. Second, the timing of issuance of the incidental take statement will not change the substantive protections afforded to species and therefore the Service's regulations do not change the on-the-ground effects of incidental take statements. Finally, the update to the

regulations does not result in environmental impacts because it merely clarifies the Services' longstanding position since the Ninth Circuit's decision in *Arizona Cattle Growers' Ass'n.* that an incidental take statement may be issued only when there is ''reasonable certainty'' that take of listed species will occur.

To the extent the rule would result in reasonably foreseeable environmental effects, the Services have determined that the rule is categorically excluded from further NEPA review and that no extraordinary circumstances are present. The rule qualifies for two categorical exclusions listed at 43 CFR 46.210(i) and NOAA Administrative Order (NAO) 216–6, section 6.03c.3(i). Among other things, the exclusions apply to regulations that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case by case. 43 CFR 46.210. *See also* NAO section 216–6 6.03c.3(i) (substantively the same exclusion).

First, the rule is of a legal, technical, or procedural nature. For surrogates, the rule clarifies when the Services may use a surrogate to establish the amount or extent of take. This clarification is consistent with the Services' existing national policy and applicable case law. For programmatic actions, the rule clarifies the procedural timing of when the Services will issue an incidental take statement. It does not alter substantive protections. Finally, the rule codifies the Services' longstanding interpretation of their existing regulations post *Arizona Cattle Growers' Ass'n.* that an incidental take statement can be issued only if there is ''reasonable certainty'' that take will occur.

Second, any potential impacts of this rule are too broad, speculative, and conjectural to lend themselves to meaningful analysis and will be examined as part of any NEPA analysis conducted by the Federal action agency. As explained above, the changes in the rule generally constitute clarifications that are consistent with existing practices as well as case law. As such, it would be speculative to try to analyze the effects of the codification of these practices. Furthermore, these changes apply to the nationwide implementation of section 7 consultations, which take place in a wide variety of contexts, for various activities, for and with numerous action agencies. This application allows analysis only at the broadest level and would not permit meaningful analysis. Furthermore, before any action is taken, the responsible action agency will be required to conduct any necessary NEPA analyses, including impacts to listed species and critical habitat. For these reasons, the second categorical exclusion applies to this rule.

Additionally, none of the extraordinary circumstances listed at 43 CFR 46.215 and NAO 216–6 section 5.05c are triggered by the final rule. This rule does not involve a geographic area with unique characteristics, is not the subject of public controversy based on potential environmental consequences, will not result in uncertain environmental impacts or unique or unknown risks, does not establish a precedent or decision in principle about future proposals, will not have significant cumulative impacts, and will not have any adverse effects upon endangered or threatened species or their habitats for the reasons identified above.

In making this determination, the Services have considered whether adequate opportunities for public comment on the rule, including its potential environmental effects, have been provided. Our review of the proposed rule and the comments received on that proposal demonstrated that preparation of an Environmental Assessment is not necessary to obtain public input on this rule. Commentators had the opportunity to weigh in on the various aspects of this final rule and the final rule has been shaped, in part, by those comments. We conclude that preparation of an Environmental Assessment would not result in meaningful additional opportunities for comment, nor would it be likely to provide the Services with significant additional information to guide their decisionmaking process.

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

E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not expected to significantly affect energy supplies, distribution, and use. Because this action is not a significant energy action, no Statement of Energy Effects is required.

Authority

We are taking this action under the authority of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

List of Subjects in 50 CFR Part 402

Endangered and threatened wildlife, Fish, Intergovernmental relations, Plants (agriculture).

Regulation Promulgation

Accordingly, we amend subpart B of part 402, subchapter A of chapter IV, title 50 of the Code of Federal Regulations, as set forth below:

PART 402—[AMENDED]

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

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

■ 2. Amend § 402.02 by adding definitions for *Framework programmatic action* and *Mixed programmatic action* in alphabetical order to read as follows:

§ 402.02 Definitions.

* * * * *

Framework programmatic action means, for purposes of an incidental take statement, a Federal action that approves a framework for the development of future action(s) that are authorized, funded, or carried out at a later time, and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation.

* * * * *

Mixed programmatic action means, for purposes of an incidental take statement, a Federal action that approves action(s) that will not be subject to further section 7 consultation, and also approves a framework for the development of future action(s) that are authorized, funded, or carried out at a later time and any take of a listed species would not occur unless and until those future action(s) are authorized, funded, or carried out and subject to further section 7 consultation.

* * * * *

■ 3. Amend § 402.14 by:

■ a. Revising paragraphs (g)(7) and (i)(1)(i);

■ b. Revising the second sentence of paragraph (i)(3); and

■ c. Adding paragraph (i)(6).

The revisions and additions read as follows:

§ 402.14 Formal consultation.

* * * * *

(g) * * *

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

* * * * *

(i) * * *

(1) * * *

(i) Specifies the impact, *i.e.,* the amount or extent, of such incidental taking on the species (A surrogate (*e.g.,* similarly affected species or habitat or ecological conditions) may be used to express the amount or extent of anticipated take provided that the biological opinion or incidental take statement: Describes the causal link between the surrogate and take of the listed species, explains why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and sets a clear standard for determining when the level of anticipated take has been exceeded.);

* * * * *

(3) * * * The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 216.105 and 222.301(h) for NMFS.

* * * * *

(6) For a framework programmatic action, an incidental take statement is not required at the programmatic level; any incidental take resulting from any action subsequently authorized, funded, or carried out under the program will be addressed in subsequent section 7 consultation, as appropriate. For a mixed programmatic action, an incidental take statement is required at the programmatic level only for those program actions that are reasonably certain to cause take and are not subject to further section 7 consultation.

* * * * *

Dated: December 23, 2014.

Michael J. Bean,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks, U.S. Department of the Interior.

Dated: April 30, 2015.

Samuel D. Rouch, III,

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

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