



REGULATORY SUMMARY

US FISH AND WILDLIFE SERVICE ENDANGERED SPECIES ACT RULEMAKINGS APRIL 2024

On April 5, 2024, the U.S. Fish and Wildlife Service (FWS) finalized three rules under the Endangered Species Act (ESA) regarding designation of critical habitat, threatened species, and interagency cooperation in upholding the Act. These revisions will be effective on May 6, 2024. Additional information and resources are available on the FWS [website](#).

FWS published three proposed rules (pertaining to [critical habitat](#), [interagency cooperation](#), and [threatened species](#)) on June 22, 2023, introducing significant changes to the existing regulations. The agencies asserted that many of these revisions reflect longstanding policies, and they are essentially reverting to them after rescinding the most recent 2019 modifications. Following a comment period that concluded in August 2023, during which over 150,000 comments were received on each of the three proposals, FWS finalized the rules with minimal alterations from the original proposals.

ARTBA members are affected by Endangered Species Act regulations because critical habitat designations require obtaining additional federal permits before initiating a particular transportation construction project. When misapplied, critical habitat designations can potentially impede or even halt projects without providing discernible benefits to the endangered species. ARTBA outlined several concerns in its [public comments to the agency](#).

Below are some aspects of the three final rules relevant to the transportation construction industry:

- A) **Removal of the critical habitat two-part test.** The final rule eliminates a longstanding two-part test used to determine when to designate areas outside the original habitat of a species as critical habitat. Instead, this discretion is broadly granted to the Secretary of the Interior. As mentioned by ARTBA in our comments, this raises concerns because it could lead to the creation of different tests for each species, lacking proper transparency and consistency.
- B) **Modification to determination of timeline for extinction.** The FWS regulation removes language specifying the timeframe used to assess the likelihood of a species becoming extinct. Instead of limiting the timeline to the extent of the Service's ability to reasonably evaluate threats to the species, it now extends as far as the Service can "reasonably rely on information" to inform its decisions.
- C) **Elimination of not prudent factors.** Historically, ESA regulations have considered threats to a species' habitat that are not caused by human activities. This final rule removes explicit language to this effect, replacing it with vague, discretionary language.

- D) **Reinstatement of the Blanket 4(d) policy:** This reinstated Section 4(d) policy stipulates that threatened species automatically receive the same protections as endangered species. Previously, the Service had to assess on an individual basis what protections were necessary.
- E) **Revisions to “reasonably prudent measures”.** Under the Endangered Species Act, federal agencies must consult with FWS when there is a possibility that an action they are approving may impact a protected species. These "Section 7 consultations" result in the issuance of a biological opinion that aims to minimize disruption to wildlife, provided the permit holder takes reasonably prudent measures to reduce harm. The final rule alters what is considered a reasonably prudent measure in two significant ways. First, FWS now requires not only the minimization of impacts to species but also the offsetting of these impacts. Second, offsets can occur either on-site or off-site in the form of mitigation. This may amount to a scenario in which mitigation becomes mandatory.

Please contact ARTBA’s Prianka Sharma at psharma@artba.org for more information.

ARTBA's REDLINE OF THE REGULATORY CHANGES

CRITICAL HABITAT RULE

§ 424.11

(b) The Secretary shall make any determination required by paragraphs (c), (d), and (e) of this section *solely* on the basis of the best available scientific and commercial information regarding a species' status **without reference to possible economic or other impacts of such determination.**

(d) In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The term foreseeable future extends **only so** as far into the future as the Services can **make** reasonably **reliable predictions about the threats to the species** and the species' responses to those threats **are likely**. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time.

(e) **Species will be delisted if the Secretary determines, based on consideration of the factors and standards set forth in paragraph (c) of this section, that the** ~~The Secretary shall delist a species if the Secretary finds that, after conducting a status review based on the~~ best scientific and commercial data available **substantiate that:**

(1) The species is extinct;

(2) The species **has recovered to the point at which it no longer meets** ~~does not meet~~ the definition of an endangered species or a threatened species. ~~In making such a determination, the Secretary shall consider the same factors and apply the same standards set forth in~~ **paragraph (c) of this section regarding listing and reclassification; or**

(3) **New information that has become available since the original listing decision shows the listed entity does not meet the definition of an endangered species or a threatened species; or**

(4) **New information that has become available since the original listing decision shows the listed entity does not meet the definition of a species.**

§ 424.12 Criteria for designating critical habitat.

(a) To the maximum extent prudent and determinable, we will propose and finalize critical habitat designations concurrent with issuing proposed and final listing rules, respectively. If designation of

critical habitat is not prudent or if critical habitat is not determinable, the Secretary will state the reasons for not designating critical habitat in the publication of proposed and final rules listing a species. The Secretary will make a final designation of critical habitat on the basis of the best scientific data available, after taking into consideration the probable economic, national security, and other relevant impacts of making such a designation in accordance with § 424.19.

(1) ~~The Secretary may, but is not required to, determine that a~~ Designation of critical habitat may ~~would~~ not be prudent in ~~the following~~ circumstances ~~such as, but not limited to, the following:~~

(i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;

(ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species; ~~or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;~~

(iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States; ~~or~~

(iv) No areas meet the definition of critical habitat.

(b) ***

(2) ~~The Secretary will designate as critical habitat, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area~~ After identifying areas occupied by the species only upon a determination that such areas are essential for the conservation of the species. When designating critical habitat, at the time of listing, the Secretary will, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species at the time of listing that the Secretary determines are essential for the conservation of the species. Such a determination must be based on the best scientific data available. ~~first evaluate areas occupied by the species. The Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species. In addition, for an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species.~~

Section 4 (d) Blanket Rule/Threatened Species

§ 17.3 Definitions

Convention means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, TIAS 8249 (see part 23 of this chapter).

§ 17.8 Import exemption for threatened, CITES Appendix-II wildlife.

(a) Except as provided in a **species-specific special** rule in §§ 17.40 through 17.48 or in paragraph (b) of this section, all provisions of §§ 17.31 and 17.32 apply to any specimen of a threatened species of wildlife that is listed in Appendix II of the Convention.

(b) **Import.** Except as provided in a **species-specific special** rule in §§ 17.40 through 17.48, any live or dead specimen of a fish and wildlife species listed as threatened under this part may be imported without a threatened species permit under § 17.32 provided all of the following conditions are met:

§ 17.21 Prohibitions.

(c) **Take.**

(1) It is unlawful to take endangered wildlife within the United States, within the territorial sea of the United States, or upon the high seas. The high seas **include shall be** all waters seaward of the territorial sea of the United States, except waters officially recognized by the United States as the territorial sea of another country, under international law.

(2) Notwithstanding paragraph (c)(1) of this section, any person may take endangered wildlife in defense of **his their** own life or the lives of others.

(3) Notwithstanding paragraph (c)(1) of this section, any employee or agent of the Service, any other Federal land management agency, the National Marine Fisheries Service, or a State conservation agency, who is designated by his agency for such purposes, may, when acting in the course of **his their** official duties, take endangered wildlife without a permit if such action is necessary to:

(i) Aid a sick, injured or orphaned specimen; or

(ii) Dispose of a dead specimen; or

(iii) Salvage a dead specimen **which that** may be useful for scientific study; or

(iv) Remove specimens **which that** constitute a demonstrable but nonimmediate threat to human safety, provided that the taking is done in a humane manner; the taking may involve killing or injuring only if it has not been reasonably possible to eliminate such threat by live-capturing and releasing the specimen unharmed, in an **remote appropriate** area.

(4) Any taking under paragraphs (c)(2) and (c)(3) of this section must be reported in writing to the Office of Law Enforcement, **via contact methods listed at <https://fws.gov>, at the address provided at 50 CFR**

2.1(b), within 5 calendar days. The specimen may only be retained, disposed of, or salvaged under directions from the Office of Law Enforcement.

(5) Notwithstanding paragraph (c)(1) of this section, any qualified employee or agent of a State Conservation Agency which that is a party to a Cooperative Agreement with the Service in accordance with section 6(c) of the Act, who is designated by his their agency for such purposes, may, when acting in the course of his their official duties take those endangered species which that are covered by an approved cooperative agreement for conservation programs in accordance with the Co cooperative Agreement, provided that such taking is not reasonably anticipated to result in:

- (i) The death or permanent disabling of the specimen;
- (ii) The removal of the specimen from the State where the taking occurred;
- (iii) The introduction of the specimen so taken, or of any progeny derived from such a specimen, into an area beyond the historical range of the species; or
- (iv) The holding of the specimen in captivity for a period of more than 45 consecutive days.

(6) Notwithstanding paragraph (c)(1) of this section, any person acting under a valid migratory bird rehabilitation permit issued pursuant to § 21.76 of this subchapter may take endangered migratory birds without an endangered species permit if such action is necessary to aid a sick, injured, or orphaned endangered migratory bird, provided the permittee is adhering to the conditions of the migratory bird rehabilitation permit.

(i) Notifies the issuing Migratory Bird Permit Office immediately upon receipt of such bird (contact information for your issuing office is listed on your permit and on the Internet at <http://offices.fws.gov>); and

(ii) Disposes of or transfers such birds, or their parts or feathers, as directed by the Migratory Bird Permit Office.

(7) Notwithstanding paragraph (c)(1) of this section, persons exempt from the permit requirements of § 21.12(c) and (d) of this subchapter may take sick and injured endangered migratory birds without an endangered species permit in performing the activities authorized under § 21.12(c) and (d) and consistent with § 21.76(a) of this subchapter:

(i) Any person who finds a sick, injured, or orphaned endangered migratory bird may, without a permit, take and possess the bird in order to immediately transport it to a permitted rehabilitator; and

(ii) Persons exempt from the permit requirements of § 21.12(b)(2) and (c) of this subchapter may take sick and injured endangered migratory birds without an endangered species permit in performing the activities authorized under § 21.12 (b)(2) and (c) of this subchapter.

(d) Possession and other acts with unlawfully taken wildlife.

(1) It is unlawful to possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any endangered wildlife which ~~that~~ was taken in violation of paragraph (c) of this section.

Example.

A person captures a whooping crane, **an endangered species**, in Texas and gives it to a second person, who puts it in a closed van and drives ~~thirty~~ **30** miles, to another location in Texas. The second person then gives the whooping crane to a third person, who is apprehended with the bird in his possession. All three **people** have violated the law: the first by illegally taking the whooping crane; the second by transporting an illegally taken whooping crane; and the third by possessing an illegally taken whooping crane.

(2) Notwithstanding paragraph (d)(1) of this section, Federal and State law enforcement officers may possess, deliver, carry, transport or ship any endangered wildlife taken in violation of the Act as necessary in performing their official duties.

(3) Notwithstanding paragraph (d)(1) of this section, any person acting under a valid migratory bird rehabilitation permit issued pursuant to § 21.76 of this subchapter may possess and transport endangered migratory birds without an endangered species permit when such action is necessary to aid a sick, injured, or orphaned endangered migratory bird, provided the permittee, **provided the permittee is adhering to the conditions of those permits.**

~~(i) Notifies the issuing Migratory Bird Permit Office immediately upon receipt of such bird (contact information for your issuing office is listed on your permit and on the Internet at <http://offices.fws.gov>); and~~

~~(ii) Disposes of or transfers such birds, or their parts or feathers, as directed by the Migratory Bird Permit Office.~~

(4) Notwithstanding paragraph (d)(1) of this section, **and consistent with § 21.76 (a) of this subchapter**, persons exempt from the permit requirements of § 21.12 **(b) (2) and (c)** ~~(c) and (d)~~ of this subchapter may possess and transport sick and injured endangered migratory bird species without an endangered species permit in performing the activities authorized under § 21.12 **(b) (2) and (c)** ~~and (d)~~ **of this subchapter.**

§ 17.31 Prohibitions.

(a) Except as provided in §§ 17.4 through 17.8, or in a permit issued **pursuant to § 17.32, the provisions of paragraph (b) of this section and** ~~under this subpart~~, all of the provisions of § 17.21 **(for endangered species of wildlife)**, except § 17.21(c)(3), ~~shall apply to threatened species of wildlife, that were added to the List of Endangered and Threatened Wildlife in § 17.11(h) on or prior to September 26, 2019,~~ unless the Secretary has promulgated species-specific provisions (see paragraph (c) of this section).

(b) **(1) Notwithstanding § 17.21 (c)(1), and unless otherwise specified, in addition to any other provisions of this part, any employee or agent of the Service, any other Federal land management agency, of the National Marine Fisheries Service, or of a State conservation agency, or a federally recognized Tribe,**

who is designated by their agency or Tribe for such purposes, may, that is operating a conservation program pursuant to the terms of a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by that agency for such purposes, may, when acting in the course of their official duties, take those threatened species of wildlife that are covered by an approved cooperative agreement to carry out conservation programs. Without a permit if such action is necessary to:

(i) Aid a sick, injured, or orphaned specimen; or

(ii) Dispose of a dead specimen; or

(iii) Salvage a dead specimen that may be useful for scientific study; or

(iv) Remove specimens that constitute a demonstrable but nonimmediate threat to human safety, provided that the taking is done in a humane manner; the taking may involve killing or injuring only if it has not been reasonably possible to eliminate such threat by a live-capturing and releasing the specimen unharmed in an appropriate area.

(2) Any taking under paragraph (b) (1) of this section must be reported in writing to the Office of Law Enforcement, via contact methods listed at <https://www.fws.gov>, within 5 calendar days. The specimen may only be retained, disposed of, or salvaged under the directions from the Office of Law Enforcement.

(3) Notwithstanding §17.21 (c)(1), and unless otherwise specified, any employee or agent of the Service, of the National Marine Fisheries Service, or of a State conservation agency that is operating a conservation program pursuant to the terms of an approved cooperative agreement with the Service that covers the threatened species of wildlife in accordance with section 6(c) of the Act, who is designated by their agency for such purposes, may, when acting in the course of their official duties, take those species.

(c) Whenever a species-specific rule in §§ 17.40 through 17.48 applies to a threatened species, none of the provisions of paragraphs (a) and (b) of this section will apply. The species-specific rule will contain all the applicable prohibitions and exceptions. For threatened species of wildlife that have a species-specific rule in §§ 17.40 through 17.48, the provisions of paragraph (b) of this section and § 17.32 apply unless otherwise specified, and the species-specific rule will contain all of the prohibitions and any additional exceptions that apply to the species.

§ 17.32 Permits—general.

Upon receipt of a complete application, the Director may issue a permit for any activity otherwise prohibited with regard to threatened wildlife. Such The permit shall be governed by the provisions of this section unless a species-specific special rule applicable to the wildlife, appearing and set forth in §§ 17.40 to 17.48, of this part provides otherwise. A permits issued under this section must be for one of the following purposes: Scientific purposes, or the enhancement of propagation or survival, or economic hardship, or zoological exhibition, or educational purposes, or incidental taking, or special purposes consistent with the purposes of the Act. Such a permits may authorize a single transaction, a series of

transactions, or a number of activities over a specific period of time.

§ 17.61 Prohibitions.

(a) *General Prohibitions.* Except as provided in a permit issued pursuant to § 17.62 or § 17.63, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit, or to cause to be committed, any of the acts described in paragraphs (b) through (e) of this section in regard to any **E**ndangered plant.

(b) *Import or export.* It is unlawful to import or to export any **E**ndangered plant. Any shipment in transit through the United States is an importation and an exportation, whether or not it has entered the country for customs purposes.

(c) *Remove and reduce to possession.* (1) It is unlawful to remove and reduce to possession any endangered plant from an area under Federal jurisdiction; **maliciously damage or destroy the species on any such area; or remove, cut, dig up, or damage or destroy the species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law.**

(2) Notwithstanding paragraph (c)(1) of this section, any employee or agent of the Service, any other Federal land management agency, or a State conservation agency, who is designated by **that** **their** agency for such purposes, may, when acting in the course of official duties, remove and reduce to possession endangered plants from areas under Federal jurisdiction without a permit if such action is necessary to:

(i) Care for a damaged or diseased specimen;

(ii) Dispose of a dead specimen; or

(iii) Salvage a dead specimen which may be useful for scientific study.

(3) Any removal and reduction to possession pursuant to paragraph (c)(2) of this section must be reported in writing to the **Office of Law Enforcement, via contact methods listed at <https://www.fws.gov>, within 5 calendar days.** **U.S. Fish and Wildlife Service, Division of Law Enforcement, P.O. Box 28006, Washington, DC 20005, within 5 days.** The specimen may only be retained, disposed of, or salvaged **in accordance with written** **under** directions from the **Office of Law Enforcement.** **Service.**

(4) Notwithstanding paragraph (c)(1) of this section, any qualified employee or agent of a State conservation agency **which that** is a party to a **C**ooperative **A**greement with the Service in accordance with section 6(c) of the Act, who is designated by **that** **their** agency for such purposes, may, when acting in the course of official duties, remove and reduce to possession from areas under Federal jurisdiction those endangered plants **that which** are covered by an approved cooperative agreement for conservation programs in accordance with the **C**ooperative **A**greement, provided that such removal is not reasonably anticipated to result in:

(i) The death or permanent damage of the specimens;

(ii) The removal of the specimen from the State where the removal occurred; or

(iii) The introduction of the specimen so removed, or of any propagules derived from such a specimen, into an area beyond the historical range of the species.

§ 17.71 Prohibitions.

(a) Except as provided in a permit issued pursuant to §17.72, the provisions of paragraph (b) of this section and under this subpart, all of the provisions of § 17.61, except §17.61(c)(2) through (c)(4), shall apply to threatened species of plants, unless the Secretary has promulgated species-specific provisions (see paragraph (c) of this section), with the following exception: Seeds of cultivated specimens of species treated as threatened shall be exempt from all the provisions of § 17.61, provided that a statement that the seeds are of “cultivated origin” accompanies the seeds or their container during the course of any activity otherwise subject to the regulations in this subpart.

(b) (1) Notwithstanding §17.61(c)(1) and unless otherwise specified, in addition to any provisions of this part, any employee or agent of the Service, any other Federal land management agency, federally recognized Tribe, or a State conservation agency, or of a State conservation agency that is operating a conservation program pursuant to the terms of a cooperative agreement with the Service in accordance with section 6(c) of the Act, who is designated by that agency for such purposes, may, when acting in the course of official duties, remove and reduce to possession threatened plants from areas under Federal jurisdiction those threatened species of plants that are covered by an approved cooperative agreement to carry out conservation programs.

Without a permit if such action is necessary to:

- (i) Care for a damaged or diseased specimen;
- (ii) Dispose of a dead specimen; or
- (iii) Salvage a dead specimen that may be useful for scientific study.

(2) Any removal and reduction to possession pursuant to paragraph (b)(1) of this section must be reported in writing to the Office of Law Enforcement, via contact methods listed at <https://www.fws.gov>, within 5 calendar days. The specimen may only be retained, disposed of, or salvaged under directions from the Office of Law Enforcement.

(3) Notwithstanding § 17.61(c)(1) and unless otherwise specified, any employee or agent of the Service or of a State conservation agency that is operating a conservation program pursuant to the terms of an approved cooperative agreement with the Service that covers the threatened species of plants in accordance with section 6(c) of the Act, who is designated by their agency for such purposes, may, when acting in the course of official duties, remove and reduce to possession from areas under Federal jurisdiction those species.

(c) Whenever For threatened species of plants that have a species-specific rule in §§ 17.73 through 17.78 the provisions of paragraph (b) of this section and § 17.72 applies unless otherwise specified, to a threatened species, and the species-specific rule will contain all the applicable prohibitions and any additional exceptions that apply to that species.

§ 17.72 Permits—general.

Upon receipt of a complete application, the Director may issue a permit authorizing any activity otherwise prohibited with regard to threatened plants. The permit shall be governed by the provisions of this section unless a species-specific special rule applicable to the plant and set forth is provided in §§ 17.73 through 17.78 of this part provides otherwise. A permit issued under this section must be for one of the following: scientific purposes, the enhancement of the propagation or survival of threatened species, economic hardship, botanical or horticultural exhibition, educational purposes, or other activities consistent with the purposes and policy of the Act. Such a permit may authorize a single transaction, a series of transactions, or a number of activities over a specified period of time.

Interagency Cooperation

§ 402.02 Definitions.

Effects of the action are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action **but that are not part of the action**. A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action. (See § 402.17).

Environmental baseline refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. The **impacts** consequences to listed species or designated critical habitat from ~~ongoing~~ Federal agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline.

Reasonable and prudent measures refer to those actions the Director **considers** ~~believes~~ necessary or appropriate to minimize the impacts, **i.e., amount or extent**, of incidental take **on the species**.

§ 402.14 Formal consultation.

(i) *Incidental take.*

(1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, ~~i.e., the amount or extent~~, of such the incidental taking **as the amount or extent of such 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.);

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact **of incidental taking on the species**;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraphs (i)(1)(ii) and (i)(1)(iii) of this section; and

(iv) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.

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

(4) If during the course of the action the amount or extent of incidental taking, as specified under paragraph (i)(1)(i) of this Section, is exceeded, the Federal agency must reinstate consultation immediately.

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

(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.

§402.16 Reinitiation of Consultation

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

~~§ 402.17 Other provisions.~~

~~(a) **Activities that are reasonably certain to occur.** A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available.~~

Factors to consider when evaluating whether activities caused by the proposed action (but not part of the proposed action) or activities reviewed under cumulative effects are reasonably certain to occur include, but are not limited to:-

- (1) Past experiences with activities that have resulted from actions that are similar in scope, nature, and magnitude to the proposed action;
- (2) Existing plans for the activity; and
- (3) Any remaining economic, administrative, and legal requirements necessary for the activity to go forward.

(b) **Consequences caused by the proposed action.** To be considered an effect of a proposed action, a consequence must be caused by the proposed action (*i.e.*, the consequence would not occur but for the proposed action and is reasonably certain to occur). A conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available. Considerations for determining that a consequence to the species or critical habitat is not caused by the proposed action include, but are not limited to:-

- (1) The consequence is so remote in time from the action under consultation that it is not reasonably certain to occur; or
- (2) The consequence is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur; or
- (3) The consequence is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur.

(c) **Required consideration.** The provisions in [paragraphs \(a\)](#) and [\(b\)](#) of this section must be considered by the action agency and the Services.