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Comments Regarding the June 22, 2023 Proposed Rule Regarding Revision of Regulations for Interagency Cooperation under Section 7 of the Endangered Species Act

Department of the Interior
U.S. Fish and Wildlife Service

Department of Commerce
National Marine Fisheries Service

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The Energy and Wildlife Action Coalition ("EWAC")[1] submits these comments in response to the United States Fish and Wildlife Service's ("USFWS") and the National Marine Fisheries Service's (collectively, the "Services") June 22, 2023 proposed rule to revise the regulations concerning interagency consultations under section 7(a)(2) ("Section 7") of the Endangered Species Act ("ESA") ("Proposed Rule").[2] The Services' regulations concerning interagency consultations under Section 7 ("Consultation Regulations") were last revised on August 27, 2019.[3]

EWAC appreciates the time and effort the Services have expended to review the agencies' existing Consultation Regulations and also appreciates Services' measured approach to proposing revisions rather than undertaking a wholesale rescission. Consistent implementation of Section 7 benefits both the regulated community and agencies' staff tasked with carrying out the objectives of the ESA, and better ensures that the Biden administration is able to realize its goals regarding the generation, transmission, and distribution of clean energy.

In this letter, EWAC provides a number of recommendations we believe will further enhance and refine the Services' Proposed Rule. The purposes of this comment letter are to:

- Provide support for aspects of the Proposed Rule that will result in greater efficiency, consistency, and clarity in the Section 7 consultation process;
- Offer feedback on certain aspects of the Proposed Rule that may cause further confusion and delays for actions subject to consultation; and
- Suggest additional changes the Services should consider making to the Consultation Regulations in order to make consultations more efficient and effective.

Where the Services have requested specific input from the public, and where those requests are relevant to EWAC's mission, we have provided responsive information.

I. Comments in Support of the Proposed Rule

EWAC commends the Services for retaining certain aspects of the existing Consultation Regulations that reduce consultation timeframes and attendant costs for the Services, federal action

[1] EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

[2] *Revision of Regulations for Interagency Cooperation*, 88 Fed. Reg. 40753 (June 22, 2023), available here: https://www.federalregister.gov/documents/2023/06/22/2023-13054/endangered-and-threatened-wildlife-and-plants-revision-of-regulations-for-interagency-cooperation.

[3] *Regulations for Interagency Cooperation*, 84 Fed. Reg. 44976, 45016 (Aug. 27, 2019), found at: https://www.federalregister.gov/documents/2019/08/27/2019-17517/endangered-and-threatened-wildlife-and-plants-regulations-for-interagency-cooperation.

agencies, and applicants for federal permits, licenses, and other federal approvals, without diminishing the Services' ability to fulfill their statutory mandate to conserve listed species and critical habitat. Additionally, EWAC supports some of the new provisions set forth in the Proposed Rule that we believe will further the efficiencies contained in the Consultation Regulations and should be included in any final rule.

A. Retaining certain provisions of the 2019 Consultation Regulations

1. The "but-for" and "reasonably certain to occur" causation standard applies in effects analyses.

The Consultation Regulations require the Services to analyze whether the effects of a federal action will result in jeopardy and/or adverse modification of critical habitat of a listed species.[4] Under current provisions, an effect or activity is "caused by the proposed action" when the effect or activity is both reasonably certain to occur and would not occur but for the proposed action subject to consultation. EWAC supports the Services' decision to maintain the two-part "but-for" and "reasonably certain to occur" causation standard, as it creates efficiency in the consultation process by appropriately limiting the scope of the effects analysis. This standard provides clear direction for the Services' staff, federal action agencies, and the regulated community concerning the reach of the effects analysis required under Section 7 and EWAC, therefore, supports its retention.

2. When undertaking destruction/adverse modification analyses, the Services must consider critical habitat "as a whole" rather than on a critical habitat unit-basis.

EWAC appreciates and supports the retention of language set forth in the Consultation Regulations clarifying that when a proposed federal action will result in destruction or adverse modification of critical habitat, the Services must determine whether the proposed action will result in an "alteration that appreciably diminishes the value of critical habitat ***as a whole*** for the conservation of a listed species."[5] This instruction—to look at critical habitat as a whole when determining whether a proposed federal action will result in destruction or adverse modification—should be retained in any final rule, as it provides clear direction to the Services' staff that adverse modification determinations should not be made at the critical habitat unit level, but instead should be determined at the scale of the entire critical habitat designation. This perspective is supported by case law.[6] The current Consultation Regulations are especially helpful for projects that may

[4] *See* 50 C.F.R. § 402.02; *see also* 16 U.S.C. § 1536(a)(2).
[5] 50 C.F.R. § 402.02 (emphasis added).
[6] *See, e.g.*, *Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1057-58 (9th Cir. 2013) (upholding "not likely to adversely affect" determination where project would impact 22 out of 408 acres total of critical habitat); *Butte Env't Council v. U.S. Army Corps of Engineers*, 620 F.3d 936, 948 (9th Cir. 2010) (upholding "no adverse modification" determination where project would destroy "very small percentage" of species' total critical habitat); *Save Our Cabinets v. United States Fish & Wildlife Serv.*, 255 F. Supp. 3d 1035, 1056 (D. Mont. 2017) (upholding "no adverse modification" determination where project was "likely to adversely affect" specific units of critical habitat but "would not impact critical habitat on a larger scale").

have an impact on all or a portion of a specific critical habitat unit, but the impact would be insignificant when viewed against critical habitat with multiple units (i.e., "as a whole").

3. Expedited consultations for actions that will have predictable or minimal effects.

EWAC supports the Services' decision to retain section 402.14(l) of the Consultation Regulations, which provides a mechanism for expedited consultations for actions that will have predictable or minimal adverse effects on species or critical habitat (e.g., habitat restoration projects).[7] This provision helps encourage efficient processing of consultations without compromising conservation of listed species.

4. Duty to reinitiate consultation does not apply to existing programmatic land management plans prepared pursuant to the Federal Land Policy Management Act or the National Forest Management Act.

EWAC supports the Services' retention of the language in section 402.16 which makes it clear that the duty to reinitiate consultation when a new species is listed or new critical habitat is designated does not apply to an existing programmatic land management plan prepared pursuant to the Federal Land Policy Management Act ("FLPMA") or the National Forest Management Act ("NFMA"). This provision improves clarity concerning federal agencies' consultation obligations under Section 7 and should be retained in any final rule.

5. Sixty-day deadline for informal consultation.

EWAC commends the Services on their preservation of the 60-day deadline for completion of informal consultations under Section 7. Delays in agency approvals are among the most significant challenges to industries of all types. While Section 7 contains a statutory limit on the timeframe for formal consultations,[8] it contained no deadline for completing informal consultations until the 2019 Consultation Regulations.[9] The 60-day deadline is useful to prevent unnecessary delays in completing the informal consultation process, and encourages efficiencies in that process. Therefore, EWAC encourages the Services to retain the 60-day deadline for completion of informal consultation in any final version of the Proposed Rule, as it provides certainty for the regulated community and agencies.

B. New provisions in the Proposed Rule

1. Proposed revision to the definition of "effects of the action."

EWAC supports language in the Proposed Rule that would revise the definition of "effects of the action" as follows (proposed additional language in underline, deletions in ~~strikethrough~~):

[7] 50 C.F.R. § 402.14(l).
[8] 16 U.S.C. § 1536(b)(1)(A).
[9] 84 Fed. Reg. at 45016.

> 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)~~

The Services have proposed the changes above to account for the removal of section 402.17, which provides further instruction on how the Services determine what is considered an "effect of the action."[10] As discussed further below, while EWAC supports the above additions to the definition of "effects of the action," we do not support the proposed removal of section 402.17 generally and, thus, also do not support the proposed removal of its reference in the definition of "effects of the action." As the Services noted in the preamble to the Proposed Rule, addition of the phrase "but that are not part of the action" to the definition is intended to reflect that the "reasonably certain to occur" standard applies not to the proposed action itself, but to the activities that are caused by the proposed action.[11] EWAC agrees with the Services that adding this language helps reinforce the notion that the "effects of the action" include those activities that are caused by, but are not part of, the proposed action.

2. Proposed revision regarding reinitiating consultation.

EWAC supports the Services' proposal to further clarify that the Services are not responsible for reinitiating consultation and that the reinitiation obligation rests solely on the shoulders of the federal action agency. Changes made in the 2019 Consultation Regulations included an attempt to clarify that it is an action agency's—and not the Services'—obligation to reinitiate consultation where applicable criteria are met.[12] Current regulations governing reinitiation of consultation state that "[r]einitiation 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."[13] However, as the Services explained in the preamble to the Proposed Rule, inclusion of the phrase "or by the Service" at the end of the definition could potentially create confusion as to where the responsibility for reinitiation of consultation lies.[14] Thus, the Services have proposed deleting the phrase "or by the Service" in section 402.16(a) to clarify that there is no affirmative obligation on the Services to reinitiate consultation, and that the Services lack the authority to unilaterally require reinitiation of consultation, but may recommend reinitiation if they have information indicating reinitiation is warranted. As such, this proposed alteration resolves confusion surrounding federal agencies'

[10] 88 Fed. Reg. at 40755.
[11] *Id*. at 40758.
[12] 84 Fed. Reg. at 44980.
[13] 50 C.F.R. § 402.16(a).
[14] 88 Fed. Reg. at 40756-57.

responsibilities under Section 7, while preserving the cooperative nature of interagency consultation, and should be retained in any final rule.

3. Proposed revision allowing off-site minimization measures as reasonable and prudent measures where risk of jeopardy exists.

The Services have proposed adding a provision to the Consultation Regulations that would allow the Services to consider off-site minimization measures as reasonable and prudent measures ("RPMs") in association with an incidental take statement ("ITS").[15] EWAC supports the Services' proposal to allow consideration of measures outside the action area that would "minimize" the impacts of take on a species where there could be a risk of jeopardy to the species were such measures not considered. The Services' proposal to allow off-site minimization measures as RPMs would add flexibility for project proponents. However, EWAC does not support the proposed language that would establish a requirement for compensatory mitigation (see discussion in Section II.A below).

II. Concerns Regarding the Proposed Rule

While EWAC supports some aspects of the Proposed Rule, as noted above, certain aspects of the Services' proposal may prove especially problematic for the regulated community, including those responsible for the development and operation of renewable energy generation and electric transmission and distribution.

A. Compensatory mitigation should not be a requirement of RPMs

For the first time since the Consultation Regulations were first adopted in 1980, the Services have proposed to codify a requirement that federal action agencies and project proponents could be required to provide compensatory mitigation to "offset" impacts to listed species authorized pursuant to an ITS.[16] While EWAC recognizes that some of the Services' offices routinely request project proponents provide mitigation in connection with ITSs, the Proposed Rule represents a complete shift of the agencies' stance regarding the propriety of compensatory mitigation in the consultation context. Under the Proposed Rule, if finalized, the Services would be able to consider for inclusion as RPMs in an ITS, mitigation measures that offset any remaining impacts of incidental take that cannot be avoided—whether inside or outside the action area—after considering measures that avoid or reduce incidental take within the action area. As further described below, requiring compensatory mitigation directly contradicts the Services' longstanding guidance, has no apparent basis in statute, and would potentially result in significant delays and costs to the regulated community.

[15] *Id*. at 40759-60.

[16] The Services refer to compensatory mitigation as "offsetting measures" or "offsets" in the Proposed Rule and the preamble to the Proposed Rule. *Id*. at 40758-59, 40763.

Moreover, the proposal is especially concerning in light of USFWS's recent update to its ESA Compensatory Mitigation Policy ("ESA Mitigation Policy"),[17] which was issued without opportunity for public notice and comment,[18] and would exponentially increase the burden of consultation on the regulated community. When read together, the Proposed Rule and USFWS's ESA Mitigation Policy suggest the Services may be moving toward including compensatory mitigation as a standard component of the Section 7 consultation process rather than an exception to the rule.[19] In the ESA Mitigation Policy, USFWS describes an overly expansive view of its authority to require compensatory mitigation under Section 7, going so far as to explain that where compensatory mitigation provided in the context of Section 7 does not meet certain performance standards (which are not described in the ESA Mitigation Policy), USFWS could require replacement mitigation.[20] EWAC is troubled that the ESA Mitigation Policy was not released for public notice and comment, particularly given the effect when coupled with changes to the Consultation Regulations contemplated by the Proposed Rule. As explained below, Section 7 does not explicitly authorize the Services to require compensatory mitigation in the consultation process.

1. Requiring compensatory mitigation exceeds the Services' statutory authority.

The changes relating to RPMs in the Proposed Rule would codify the improper practice of including mitigation in consultation documents despite the agencies' lack of statutory authority to do so.[21] Unlike ESA section 10, wherein Congress has required mitigation with respect to the issuance of incidental take permits, neither Section 7 nor any prior version of Section 7 implementing regulations includes a requirement that a project proponent or federal agency provide mitigation for impacts to listed species or critical habitat. Additionally, not only does ESA section 10 explicitly require mitigation in connection with an ITP, it also includes a limit on the amount of mitigation the Services can require—stating that the applicant will mitigate impacts of the taking "to the maximum extent practicable."[22] No such limitation would apply to the mitigation requirement in the Proposed Rule because the Services have not proposed a bounding limitation and Section 7 makes no mention of mitigation at all. EWAC believes this change could run afoul of both the major questions doctrine and the principle of separation of powers.[23]

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[17] See U.S. Fish & Wildlife Service, *Endangered Species Act Compensatory Mitigation Policy* (May 2023), available at: https://downloads.regulations.gov/FWS-HQ-ES-2021-0014-0003/content.pdf.

[18] The ESA Mitigation Policy serves as USFWS's "comprehensive treatment of compensatory mitigation under the authority of the ESA." *U.S. Fish and Wildlife Service Mitigation Policy and Endangered Species Act Compensatory Mitigation Policy*, 88 Fed. Reg. 31000, 31000 (May 15, 2023), available at: https://www.federalregister.gov/documents/2023/05/15/2023-10341/us-fish-and-wildlife-service-mitigation-policy-and-endangered-species-act-compensatory-mitigation.

[19] *See* ESA Mitigation Policy at 3-6.

[20] *Id*. at 10.

[21] As noted above, the Services refer to mitigation measures as "offsets" in the Proposed Rule and the preamble to the Proposed Rule. 88 Fed. Reg. at 40758, 40759, 40763.

[22] 16 U.S.C. § 1539(a)(2)(B)(ii).

[23] *See, e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587, 2607-08 (2022) (requiring agencies to point to "clear congressional authorization" when claiming a regulation is based in statute).

USFWS also appeared to recognize that the Services do not have the authority to require mitigation in the context of Section 7 in USFWS's July 30, 2018 withdrawal of a previous version of its ESA Compensatory Mitigation Policy ("ESA Policy Withdrawal").[24] In that action, USFWS indicated that the public had commented that the agency's net gain conservation goal was "incompatible with the standards of ESA Sections 7 and 10."[25] In response, and with respect to Section 7 consultations specifically, USFWS simply restated the Section 7 requirement—that federal action agencies must ensure that actions authorized, funded, or carried out by them are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of designated critical habitat.[26] No further reference was made to mitigation in the context of Section 7 in the ESA Policy Withdrawal, indicating USFWS's awareness that requiring compensatory mitigation in the context of Section 7 is not, in fact, statutorily authorized.

EWAC recognizes that under current judicial precedent, if a statute is ambiguous or contains gaps in reasoning, then the implementing agency (here, the Services) is granted wide deference in its statutory interpretation.[27] In such circumstances, the agency's interpretation need only be reasonable to be considered a "permissible construction of the statute."[28] However, in any final rule, EWAC encourages the Services to provide regulatory revisions that are not based on a merely permissible interpretation of the statute, but rather reflect the most accurate and reasonable interpretation of the statutory language and legislative intent. The Proposed Rule's assertion of authority to require compensatory mitigation is not a reasonable interpretation of the statutory language.

As demonstrated above, the Services' proposal to require compensatory mitigation in connection with an ITS has no basis in statute, is not supported by Section 7's legislative history, and lacks any practical limitation as to the extent of the mitigation the Services may require. And, when considered in conjunction with USFWS's new ESA Mitigation Policy, for which the public was not afforded an opportunity to provide comments, the Services' apparent trend toward requiring compensatory mitigation as part of Section 7 consultation is particularly concerning, especially given the increased burden imposed on the regulated community. In light of the Services' lack of statutory authority to require compensatory mitigation in the context of Section 7 consultations, EWAC recommends that the Services exclude the proposed changes relating to the Services' authority to require compensatory mitigation ("offset")from any final rule.

2. <u>Requiring compensatory mitigation is contrary to the Services' existing guidance.</u>

As the Services' noted in the preamble to the Proposed Rule,[29] requiring compensatory mitigation in RPMs contradicts the position taken in the Services' ESA Section 7 Consultation

[24] 83 Fed. Reg. 36469, 36471 (July 30, 2018).
[25] *Id.* at 36470.
[26] *Id.*
[27] *See Chevron v. U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984) (applying the two-pronged test).
[28] *Id.* at 843.
[29] 88 Fed. Reg. at 40759.

Handbook ("Consultation Handbook"), which was finalized in 1996.[30] The Consultation Handbook expressly notes that the Services are prohibited from requiring compensatory mitigation in the context of Section 7, stating: "Section 7 requires minimization of the level of take. It is not appropriate to require mitigation for the impacts of incidental take."[31] The Consultation Handbook further states, "remember that the objective of the incidental take analysis under [S]ection 7 is minimization, not mitigation."[32] It is EWAC's view that the Services have not provided sufficient information detailing why the agencies are reversing course after nearly 30 years of Section 7 implementation. Therefore, EWAC suggests that the Services decline to adopt mitigation requirements in any final rule.

Based on the foregoing, EWAC urges the Services to exclude the proposed revisions relating to RPMs from any final rule, as they introduce requirements not expressly discussed in the statutory language, represent a departure from the Services' guidance, and could have significant adverse consequences for the regulated community, posing a litigation risk to the agency.

B. The Services should not require mitigation sequencing

The new paragraph added at section 402.14(i)(3) in the Proposed Rule sets forth a preferred sequence (or "mitigation sequence") for the Services' consideration of what RPMs to include in an ITS. Pursuant to the mitigation sequence laid out in the Proposed Rule, the Services would first consider measures within the action area to minimize the impact of incidental take, such as measures to reduce or avoid incidental take. Second, the Services would consider measures within the action area that use offsets to further minimize any of the remaining impacts of incidental take. Finally, after considering measures within the action area, the Services would then be able to consider additional measures outside the action area that use offsets of take to further minimize any remaining impacts of incidental take (i.e., compensatory mitigation).

In the previous section, EWAC explained why the proposed changes suggesting RPMs include compensatory mitigation requirements is unsupported and inappropriate. Should the Services choose to continue forward with its proposed language regarding compensatory mitigation as RPMs, it also is inappropriate for the Services to include preferences for mitigation sequencing in context of Section 7 consultations. Even where the statutory section of the ESA expressly contemplates compensatory mitigation (i.e., ESA section 10), federal courts have rejected the notion that minimization must be exhausted before considering mitigation. For instance, in *Union Neighbors United, Inc. v. Jewell*, the D.C. Circuit Court of Appeals was critical of mitigation sequencing in the context of incidental take permitting under ESA section 10, making it clear that the plain language of ESA section 10 does not require sequencing.[33] EWAC suggests that in the context of Section 7, where the statute does not even contemplate mitigation in the first place, mitigation sequencing also would be inappropriate.

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[30] U.S. Fish and Wildlife Service and National Marine Fisheries Service, *Consultation Handbook* (Mar. 1998) at 4-53, available at: https://www.fws.gov/sites/default/files/documents/endangered-species-consultation-handbook.pdf.
[31] *Id*. (emphasis in the original).
[32] *Id*. at 4-19.
[33] *See* 831 F.3d 564, 583 (D.C. Cir. 2016) (holding that the phrase "minimize and mitigate the impacts" should be read jointly in determining whether it has been done to the maximum extent practicable and "not as a sequence.").

EWAC recommends that to the degree any final rule authorizes the Services to require mitigation in the context of Section 7 consultations, the final rule should exclude any mitigation sequencing requirements.

C. The Services should retain factors assisting agencies' determinations on whether effects of an action are reasonably certain to occur

As noted previously, the Services have proposed to delete section 402.17, titled "Other provisions," in its entirety from the Consultation Regulations, apparently due to stated concerns regarding potential confusion as to the section's intent and structure. Currently, this section provides language elucidating what factors the Services should consider in determining whether activities or effects of an action under review are "reasonably certain to occur" and, therefore, subject to analysis as part of the Section 7 consultation process. In light of the proposed removal of section 402.17, the Services stated that they may, at some point in the future, issue guidance addressing the factors relevant for determining if a consequence is reasonably certain to occur.[34] However, the Services did not specify when the updated guidance will issue or whether the guidance will be subject to public notice and comment prior to finalization.

EWAC recommends that the Services retain the illustrative factors assisting agencies' determinations on whether effects of an action are reasonably certain to occur in section 402.17. These factors provide a clear and specific framework to the Services and action agencies in preparing effects analyses which may be uniformly applied in the field and were previously subject to public notice and comment. Removing these factors may create confusion in future consultations. Further, the Services' "expectation" that they will develop guidance at some point in the future is problematic for several reasons: (a) the Services may be unable to issue the updated guidance in a timely manner; (b) there is no guarantee that such guidance would be published for review and comment ahead of finalization; and (c) even if the Services were to adopt relevant guidance, guidance is less durable than regulation and is easily rescinded or revised by a future administration. Further, such guidance would likely not be subject to public notice and comment, depriving the regulated community of the ability to provide meaningful feedback to the agencies, which would otherwise be available through formal rulemaking procedures.

EWAC supports an approach that appropriately constrains the scope of the effects analysis, can be consistently applied, and is legally defensible. Section 402.17 currently provides a specific and legally binding limitation on the breadth of the Services' effects analyses, and helps dissuade the occasional tendency on the part of some of the Services' staff to expand the analysis into areas or activities with a more attenuated causal chain. Therefore, the Services should revisit and remove their proposal to delete section 402.17 from any final rule.

[34] 88 Fed. Reg. at 40758.

D. The Services should be cautious in revising the definition of "environmental baseline"

EWAC supported changes to the 2019 Consultation Regulations that revised the definition of "environmental baseline" to clarify that the environmental baseline includes "consequences to listed species or designated critical habitat from ***ongoing*** agency activities or existing agency facilities that are not within the agency's discretion to modify."[35] EWAC disagrees with the Services' current proposal to delete the term "ongoing" from the definition of environmental baseline. In EWAC's view, any activity that is already occurring should be part of the environmental baseline. The definition of environmental baseline should thus continue to include past and present federal, state, and private activities, including private activities with federal components (e.g., federal permitting), that would continue in the absence of the action under consultation. Where an ongoing structure or action is changed by the issuance of a federal permit or license subject to consultation, the incremental change in the ongoing action should be considered an effect of the action and, therefore, the focus of consultation.

Considering ongoing actions part of the environmental baseline is consistent with the Services' longstanding guidance outlined in the Consultation Handbook. As the Consultation Handbook explains, "environmental baseline" is "an analysis of the effects of past and ongoing human and natural factors leading to the current status of the species."[36] "The environmental baseline is a 'snapshot' of a species' health at a specified point in time. *It does not include the effects of the action under review in the consultation.*"[37] This distinction is particularly important in the context of federal licensing for infrastructure projects, where the action under review may be federal agency issuance of a new license—such as that issued by the Federal Energy Regulatory Commission—where an existing structure is present. The impacts of that existing structure would continue in the absence of the action under review and are therefore properly considered as part of the environmental baseline. For example, as the Consultation Handbook explains with respect to an existing hydropower dam: "Ongoing effects of the existing dam are already included in the [e]nvironmental [b]aseline and would not be considered an effect of the proposed action under consultation."[38]

EWAC is concerned that the Services' proposed removal of the term "ongoing" from the definition of environmental baseline could create an increased risk that the Services could interpret the Consultation Regulations as allowing the agencies to assume a "jeopardy baseline" for species which may be particularly imperiled. That is, under the Proposed Rule, the Services may improperly assert during a consultation that an imperiled species is already in "jeopardy" due to

[35] 50 C.F.R. § 402.02 (emphasis added).
[36] Consultation Handbook at 4-22.
[37] *Id*. (emphasis added).
[38] *Id*. at 4-28. The Consultation Handbook further provides: "The total effects of all past activities, including effects of the past operation of the project, current non-Federal activities, and Federal projects with completed section 7 consultations, form the environmental baseline[.] To this baseline, future direct and indirect impacts of the operation over the new license or contract period, including effects of any interrelated and interdependent activities, and any reasonably certain future non-Federal activities (cumulative effects), are added to determine the total effect on listed species and their habitat." *Id*. at 30.

degraded baseline conditions, and that any additional adverse impacts must be found to meet the regulatory standards for a jeopardy determination.

Additionally, removal of the term "ongoing" as a modifier of "agency activities" would not narrow the scope of the environmental baseline, but would instead increase it. Without the term "ongoing," the environmental baseline would seemingly include any agency activities, ongoing or otherwise, that the agency does not have discretion to modify.

With that in mind, EWAC recommends that the Services retain the term "ongoing" in the definition of "environmental baseline," so that project proponents are not inappropriately penalized for already degraded baseline conditions. In the alternative, should the Services move forward with the proposed removal of "ongoing," EWAC encourages the Services to provide additional clarification that existing activities or structures and impacts therefrom should be specifically considered as part of the baseline. For example, the future effects of continued, unchanged operations of an infrastructure project over the period of a new license or permit term would be zero when compared to the baseline, because these ongoing impacts would remain unaffected by issuance of a license or permit. However, if the ongoing action is changed, only then would the incremental change in the ongoing action be considered as an "effect of the action" and that change itself, would be the focus of the consultation.

Further, the definition of environmental baseline should be modified to clarify that (1) the question of federal agency discretion applies both to ongoing facilities and ongoing activities, and (2) the question of discretion relates only to ongoing facilities and activities of the federal *action* agency. The Services' current proposal to add the word "Federal" before the two instances of the term "agency" does not appropriately limit the environmental baseline to include only those facilities and activities over which the federal action agency has no discretion to modify. A federal agency's action that is the subject of a Section 7 consultation may be interrelated to or interdependent with the actions of other federal agencies. Typically, the federal action agency will not have the discretion to modify these interrelated or interdependent activities, which are subject to the jurisdiction of other federal agencies. Nevertheless, the Services have treated the effects of such activities as "effects of the action under consideration" during Section 7 consultations.

In consideration of the above, EWAC recommends revising the definition of environmental baseline as follows (suggested additional language in underline, deletions in ~~strikethrough~~):

> *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 activities or existing

> facilities of the Federal action agency ~~activities or existing agency facilities~~ that are not within the Federal action agency's discretion to modify are part of the environmental baseline.[39]

These suggested revisions would clarify that the focus of the discretion inquiry concerns the ongoing facilities and activities of the federal action agency, and not all federal facilities or activities in general.

III. Recommendations for Further Clarification

In addition to EWAC's comments above on changes to the Consultation Regulations set forth in the Proposed Rule, we also identify a number of changes the Services should consider making in order to make consultations more efficient and effective.

A. Clarifying the appropriate scope of consultation

The Services should consider adopting regulations clarifying that in determining the scope of agency review in the context of "small handle" consultations, the Services should give significant weight to the desires of the project proponent. Where federal agency jurisdiction applies to a small portion or portions of a larger project (e.g., a nationwide permit, limited overlap with federal lands), the Services should make clear that the scope of consultation will be determined in close coordination with the action agency and project proponent. Federalizing a project with minimal federal involvement can have significant and long-term consequences for a project proponent. Decisions to federalize "small handle" projects should be considered carefully, and should be made in coordination with—and subject to the approval of—the project proponent.

B. Programmatic consultations

EWAC appreciates that the Consultation Regulations recognize the concept of programmatic consultation, which is defined as "a consultation addressing an agency's multiple actions on a program, region, or other basis."[40] EWAC also is pleased that the Proposed Rule did not withdraw the Services' previous clarification that analyses contained in habitat conservation plans ("HCPs") prepared in connection with ESA section 10 can be adopted by the Services into their biological opinions.[41] These clarifications allow the Services to expedite consultations or develop programmatic consultations for multiple similar, frequently occurring, or routine actions expected to be implemented in similar geographic areas or settings, and expand the options available to the agencies' to meet their obligations under Section 7. Programmatic consultations have been used effectively in a number of instances (e.g., the Western Area Power Administration's Programmatic Biological Assessment for Wind Energy, and the Federal Highway Administration's Programmatic Biological Opinion for Road Projects in the Midwest), and having express treatment within the Consultation Regulations encourages their continued use. Congress recently endorsed and encouraged use of programmatic documents for National

[39] EWAC supports the Services' proposal to replace the term "consequences" with "impacts" in this definition.
[40] 50 C.F.R. § 402.02.
[41] 84 Fed. Reg. at 45007.

Environmental Policy Act reviews in its passage of the Fiscal Responsibility Act of 2023. The Services should ensure that programmatic consultations are similarly endorsed and encouraged.

However, EWAC believes that the Consultation Regulations could benefit from additional specificity concerning programmatic consultations. For example, the Consultation Regulations should expressly allow a non-federal applicant to elect to decline coverage under a programmatic consultation, and instead proceed via an alternate Section 7 consultation or ESA authorization mechanism—including take avoidance. The Consultation Regulations should also allow non-federal applicants relying on a programmatic consultation to suggest conservation or other measures that differ from those analyzed under a programmatic consultation. Additionally, EWAC suggests that the definition of "programmatic consultation" be revised to expressly state that multiple federal agencies may be involved in a federal action that is subject to consultation under Section 7.

EWAC further recommends that the Services consider revising the definition of "programmatic consultation" to authorize the Services to streamline consultations addressing federal activities that occur within the permit areas of programmatic incidental take permits ("ITPs") that contemplate participation by entities other than the permittee. EWAC recognizes that Section 7 requires federal agencies to ensure that their actions do not jeopardize listed species or result in destruction or adverse modification of designated critical habitat, but EWAC can discern no legal reason why otherwise nonfederal activities (e.g., development of an energy project or construction and operation of energy infrastructure) that happen to have a federal nexus (e.g., federal funding or need for one or more Clean Water Act section 404 nationwide permit authorizations) should not be able to streamline consultation by receiving take authorization from fully-functioning ITPs that contemplate incorporating and providing take coverage for the very same type of projects. Indeed, one of the criteria set forth in ESA section 10,[42] which establishes the requirements that must be met in order for the Services to issue an ITP, mirrors the definition of "jeopardize the continued existence of" set forth in the Services' existing Consultation Regulations.[43] Moreover, because the Services view their issuance of ITPs as federal actions subject to Section 7, every ITP issued by the Services undergoes its own Section 7 consultation, which ensures that jeopardy of listed species and destruction or adverse modification of designated critical habitat will not occur as a result of the issuance of the ITP, the take that will occur under the ITP, or the implementation of the provisions of the related HCP.

EWAC members have had significant infrastructure projects that have been substantially delayed due to the requirements of Section 7 consultation, with resulting cost increases, because the projects have a federal nexus, however tenuous. This has been the case despite the fact that in many circumstances, the project in question was within the permit area of a USFWS-approved ITP, the ITP contemplated enrolling additional projects, the ITP had sufficient take authorization, and but for the federal nexus (e.g., nationwide permit requirement), the project would simply have "enrolled" in the ITP to comply with the ESA. The delays and related costs are a source of frustration to EWAC members and, ultimately, to the American public, who must pay more for energy production and delivery due to these delays. EWAC also notes that, as stated previously,

[42] 16 U.S.C. § 1539(a)(2)(B)(iv).
[43] 50 C.F.R. § 402.02.

while the Services are not authorized under Section 7 to require compensatory mitigation in the context of a non-jeopardy biological opinion, mitigation is a statutorily-required component of any ITP; therefore, allowing projects with a federal nexus to receive take authorization from an existing ITP and avoid lengthy consultation delays would likely be of greater benefit to the species since those projects would be required to mitigate when enrolling in a programmatic ITP.

Accordingly, EWAC recommends that the Proposed Rule be revised to include a provision that would streamline Section 7 consultations occurring within the permit areas of already-existing ITPs. Specifically, EWAC requests that the Services adopt regulations providing for limited and expedited Section 7 consultation procedures where the following circumstances exist: (1) the federal action subject to consultation will occur within the permit area of an existing ITP; (2) the existing ITP contemplates extending take authorizations to persons or entities other than the permittee, or specifically contemplates coverage of projects by the permittee, regardless of whether such projects have a federal nexus; (3) the existing ITP authorizes take of the same listed species that may be adversely affected by the consultation at issue and coverage under the ITP would not exceed the amount of take authorized thereunder; (4) the HCP associated with the existing ITP includes as "covered activities" actions that are substantially similar to or the same as those subject to consultation; (5) the types of adverse impacts potentially caused by the federal action subject to consultation were considered and addressed in the existing ITP and related HCP and intra-Services consultation; and (6) the federal action agency agrees to incorporate the terms of the existing ITP and HCP, including any minimization, mitigation, adaptive management, and monitoring obligations. Notably, these recommendations are consistent with the Services' Habitat Conservation Planning and Incidental Take Permit Processing Handbook ("HCP Handbook"), which already provides for this integrated compliance approach.[44]

Where those criteria are met, the Services and the federal action agency could engage in expedited or limited consultation, which could include a simple exchange of letters between the Services and the federal action agency, whereby the federal action agency would demonstrate that the above criteria have been satisfied, would agree to comply with the terms and conditions of the existing ITP (including minimization and mitigation measures), and would request the Services' concurrence that, with implementation of those measures, the action is "not likely to adversely affect" listed species or critical habitat. The Services, in turn, would provide a letter indicating that, as a result of the federal action agency's agreement to comply with the terms of the existing ITP, the Services concur in the federal action agency's determination that the proposed action is not likely to adversely affect listed species or critical habitat. The exercise could be completed in a matter of weeks, subject to the approval or other processes of the underlying ITP.

C. Limiting the scope of reinitiation of consultation

As noted above, EWAC appreciates that the Consultation Regulations include a provision indicating that where reinitiation is required for land management plans prepared pursuant to the FLPMA or NFMA due to a new listing or critical habitat designation, such consultation will be a

[44] U.S. Fish & Wildlife Service and National Marine Fisheries Service, *Habitat Conservation Planning and Incidental Take Permit Processing Handbook* (Dec. 21, 2016) ("HCP Handbook") at 14-31 to 14-32, available at: https://www.fws.gov/sites/default/files/documents/habitat-conservation-planning-handbook-entire_0.pdf.

separate, action-specific consultation. However, any final rule should also include language explaining that, even outside of the FLPMA and NFMA contexts, where reinitiation of consultation is required due to a new species listing or critical habitat designation, the reinitiated consultation should only address effects to the newly listed species or designated critical habitat, and should not reexamine effects to species and critical habitat covered by the prior consultation, unless one of the other conditions for triggering reinitiation, as set forth in 50 C.F.R. § 402.16, has been met.

D. Increased threshold for listed plants

EWAC recommends that the Services consider revising the Consultation Regulations to clarify that consultation concerning listed plants is required only where a federal action is likely to cause jeopardy and/or destruction or modification of critical habitat for listed plant species, except in the limited circumstances where ESA section 9(a)(2)(B) applies. Such a change makes sense particularly given the distinct treatment listed plants receive under the ESA. ESA section 9 does not prohibit incidental take of listed plants. Indeed, the Services' HCP Handbook states:

> Impacts to plants do not fall under the definition of "take," therefore, we cannot authorize incidental take of plants. However, the Services cannot issue a permit that would jeopardize the continued existence or aversely modify the designated critical habitat of any listed species, including plants, so addressing listed plants in [an] HCP may be prudent.[45]

Thus, the consultation requirements set forth in Section 7 primarily exist to ensure against jeopardy. Furthermore, the Consultation Handbook explains that the provisions of ESA section 7(b)(4),[46] which describes the Services' obligations regarding ITSs, associated RPMs, and the terms and conditions to implement the same, do not apply to listed plants.[47]

To address the distinction between the application of Section 7 to listed plant versus animal species, a new sentence could be added to the Services' regulations at 50 C.F.R. § 402.12(a) as follows (suggested additional language in underline):

> (a) Purpose. A biological assessment shall evaluate the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determine whether any such species or habitat are likely to be adversely affected by the action and is used in determining whether formal consultation or a conference is necessary. Notwithstanding the foregoing, with respect to species of plants that are listed or proposed for listing, and for habitat for plant species that has been designated or proposed to be designated by the Services as critical, a biological assessment

[45] HCP Handbook at 7-2.
[46] 16 U.S.C. § 1536(b)(4).
[47] Consultation Handbook at 4-49.

> shall evaluate whether the potential effects of the action are likely to jeopardize such plant species or destroy or adversely modify designated and proposed critical habitat.

In addition, 50 C.F.R. § 402.13(c) could be revised in similar fashion, to read (suggested additional language in underline):

> If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the action is not likely to adversely affect listed species of fish or wildlife or critical habitat for the same, and is not likely to jeopardize the continued existence of listed plant species or destroy or adversely modify critical habitat of the same, the consultation process is terminated, and no further action is necessary.

Further, the Services could also revise the regulations governing formal consultation found at 50 C.F.R. § 402.14(b) as follows (suggested additional language in underline):

> A Federal agency need not initiate formal consultation if, as a result of the preparation of a biological assessment under § 402.12 or as a result of informal consultation with the Service under § 402.13, the Federal agency determines, with the written concurrence of the Director, that the proposed action is not likely to adversely affect any listed species of fish or wildlife or critical habitat of the same, and is not likely to jeopardize the continued existence of listed plant species or result in the destruction or adverse modification of critical habitat designated for the same.

As demonstrated above, during consultation, the obligations of the Services with respect to listed plants essentially are limited to ensuring against jeopardy and destruction or adverse modification of critical habitat. Requiring a more accurate threshold for triggering consultation for listed plants would continue to serve the underlying purpose of Section 7—to ensure federal actions do not jeopardize listed species or destroy or adversely modify critical habitat—while preserving the resources of the Services, federal action agencies, and the regulated community by reducing the overall number of consultations.

IV. Conclusion

EWAC appreciates the opportunity to comment on the Services' Proposed Rule, and looks forward to continuing to work with the Services in their efforts to improve the Section 7 consultation process.

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