



**December 22, 2025**

Comments regarding:

**November 21, 2025 Endangered and Threatened Wildlife and Plants; Interagency Cooperation Regulations**

Submitted by:

**Energy and Wildlife Action Coalition**

Filed electronically to the attention of:

Public Comments Processing  
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Docket No. FWS-HQ-ES-2025-0044

The Energy and Wildlife Action Coalition (“EWAC”)<sup>1</sup> submits these comments in connection with the U.S. Fish and Wildlife Service’s (“USFWS”) and the National Marine Fisheries Service (“NMFS”) (collectively, “Services”) November 21, 2025 proposal to revise regulations concerning interagency cooperation (“Proposed Rule”)<sup>2</sup> to be more consistent with the best reading<sup>3</sup> of the Endangered Species Act (“ESA”) and to provide greater clarity for federal agencies and applicants subject to the ESA section 7 (“Section 7”) consultation process.<sup>4</sup>

EWAC appreciates the time and effort the Services have expended to review the agencies’ regulations implementing Section 7 of the ESA found at 50 C.F.R. Part 402 (“Consultation Regulations”). Consistent implementation of Section 7 benefits both the regulated community and federal agency staff tasked with carrying out the objectives of the ESA. The purposes of this letter are to provide support for aspects of the Proposed Rule that will result in greater efficiency, consistency, and clarity in the Section 7 process and to offer feedback on certain aspects of the Proposed Rule that may cause further confusion and/or delays for actions subject to consultation.

## **I. Comments in Support of the Proposed Rule**

EWAC previously provided comments on certain changes to the Consultation Regulations that were ultimately finalized by the Services in 2019 (“2019 Regulations”) and that were retained in regulations promulgated in 2024 (“2024 Regulations”). Under the Proposed Rule, each of these provisions, which are set forth immediately below, would remain unchanged. EWAC continues to support inclusion of these provisions in the Consultation Regulations.

- Services’ adoption through the 2019 Regulations of a causation standard to clarify the reach of the effects analysis required in connection with Section 7 consultation, and retention of a causation standard in the 2024 Regulations;<sup>5</sup>
- Services’ adoption through the 2019 Regulations a requirement that when the agencies consider whether a federal action will destroy or adversely modify designated critical habitat, that analysis must be applied to critical habitat “as a whole” rather than on a critical habitat unit-basis, and retention of that requirement in the 2024 Regulations;
- Services’ adoption of a provision providing for expedited consultations for actions with predictable or minimal effects through the 2019 Regulations, and retention of the same through the 2024 Regulations;

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<sup>1</sup> EWAC is a national 501(c)(6) trade association formed in 2014 whose members consist of electric utilities, electric transmission providers, and independent power producers, 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.

<sup>2</sup> 90 Fed. Reg. 52,600 (November 21, 2025) (“Proposed Rule”).

<sup>3</sup> *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024).

<sup>4</sup> Proposed Rule at 52,601.

<sup>5</sup> EWAC notes that retention of a causation standard is particularly appropriate in light of the U.S. Supreme Court’s decision in *Seven County Infrastructure Coalition vs. Eagle County, Colorado*, 541 U.S. 752 (2024) (finding that a mere “but for” causal relationship is “insufficient to make an agency responsible for a particular effect”).

- Services’ adoption through the 2019 Regulations of language making clear that the duty to reinstate 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 Management Policy Act or the National Forest Management Act, and retention of the same through 2024 Regulations; and
- Services’ adoption through the 2019 Regulations of a 60-day deadline for completion of informal consultation, and retention of the same through the 2024 Regulations.

The above provisions will continue to encourage efficient and consistent application of the Consultation Regulations, which benefits federal agencies, project proponents, and the Services.

## **II. Additional Supportive Comments**

In addition to EWAC’s continued support of the provisions set forth above, EWAC supports the following provisions that vary slightly from the 2019 Regulations and 2024 Regulations.

### **a. Effects Analysis**

Through the 2019 Regulations, the Services adopted 50 C.F.R. § 402.17, which provided further instruction on how the Services determine what is considered “effects of the action.”<sup>6</sup> The 2024 Regulations removed this provision. Through the Proposed Rule, the Services would reinstate 50 C.F.R. § 402.17, and expand on the language from the 2019 Regulations to provide additional clarification on whether a given activity or consequence should be considered an effect of the action under review. EWAC supports the proposed changes. EWAC appreciates the Services adding the following as a factor to consider when evaluating whether an effect is reasonably certain to occur: whether the action agency has “no ability to prevent the consequence due to its limited statutory authority.”<sup>7</sup> EWAC also appreciates the Services adding the following as a consideration in determining whether a consequence is caused by the action under review: where a consequence “would occur regardless of whether the proposed action goes forward.”<sup>8</sup> These two additions to 50 C.F.R. § 402.17 would reduce the likelihood that the Services charge project proponents for effects not, in fact, caused by the action under review. While the Services’ Consultation Handbook<sup>9</sup> has for years included helpful guidance, there have been some instances where the Services have expanded the analysis into areas or activities with a more attenuated causal chain. The Proposed Rule, therefore, would provide a specific and legally binding limitation on the breadth of the Services’ effects analyses. Additional examples and clarification in the forthcoming revised Consultation Handbook would also be welcome.

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<sup>6</sup> *Id.* at 52,601.

<sup>7</sup> *Id.* at 52,607. Consideration of this factor is particularly appropriate in light of the U.S. Supreme Court’s holding in *Seven County Infrastructure Coalition vs. Eagle County, Colorado*, 541 U.S. 752 (2024) (finding that a mere “but for” causal relationship is “insufficient to make an agency responsible for a particular effect”).

<sup>8</sup> *Id.* at 52,607.

<sup>9</sup> U.S. Fish & Wildlife Service and National Marine Fisheries Service, *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* (March 1998).

## **b. Removal of Provisions Authorizing Services to Require Compensatory Mitigation**

The 2024 Regulations, for the first time since the inception of the ESA and the Services' implementation of the same, adopted provisions authorizing the Services to unilaterally require federal agencies and project proponents to provide compensatory mitigation to "offset" impacts to listed species authorized pursuant to an incidental take statement ("ITS") in a no-jeopardy biological opinion, including providing offsets outside the action area.<sup>10</sup> This aspect of the 2024 Regulations represented a complete shift of the Services' stance regarding the propriety of compensatory mitigation in the context of Section 7 consultation. While EWAC recognizes that some of the Services' offices routinely request that project proponents provide mitigation in connection with ITSs and some project proponents do so voluntarily, the 2024 Regulations' inclusion of a mitigation requirement directly contradicted the plain language of the statute and the Services' longstanding guidance. Over the long-term, this change was likely to result in significant delays and costs to the regulated community. Unlike ESA section 10, wherein Congress required mitigation with respect to the issuance of incidental take permits, neither Section 7 nor any prior version of the Consultation 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 incidental take permit, 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."<sup>11</sup>

The changes to the Consultation Regulations that asserted authority to impose compensatory mitigation requirements were especially concerning in light of USFWS's 2024 update to its ESA Compensatory Mitigation Policy ("ESA Mitigation Policy"),<sup>12</sup> which was issued without opportunity for public notice and comment, and exponentially increased the burden of consultation on the regulated community.<sup>13</sup> No such mitigation limitation was provided when the 2024 Regulations added a mitigation requirement, and Section 7 makes no mention of mitigation at all. As EWAC noted in its comments on the proposed version of the 2024 Regulations, we believe adding a requirement for compensatory mitigation likely ran afoul of both the major questions doctrine and the principle of separation of powers.<sup>14</sup>

Further, following the U.S. Supreme Court's decision *Loper Bright Enterprises v. Raimondo* ("*Loper Bright*")<sup>15</sup> in July 2024, where a statute is ambiguous or contains gaps in reasoning, the implementing agency is no longer granted wide deference in how it interprets the relevant statute—as would have been the case if *Chevron* deference were still a valid construction.<sup>16</sup> Instead, under *Loper Bright*, a reviewing court is required to adopt the interpretation of the statute that, "after applying all relevant interpretive tools, [it] concludes is best."<sup>17</sup> Thus, following *Loper Bright*, the

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<sup>10</sup> 89 Fed. Reg. 24,268 (April 5, 2024).

<sup>11</sup> 16 U.S.C § 1539(a)(2)(B)(ii).

<sup>12</sup> See U.S. Fish & Wildlife Service, *Endangered Species Act Compensatory Mitigation Policy* (May 2023).

<sup>13</sup> The ESA Mitigation Policy serves as the Service's "comprehensive treatment of compensatory mitigation under the authority of the ESA." ESA Mitigation Policy, 88 Fed. Reg. 31,000 (May 15, 2023).

<sup>14</sup> See, e.g., *West Virginia v. EPA*, 597 U.S. 697, 723-24 (2022) (requiring agencies to point to "clear congressional authorization" when claiming a regulation is based in statute).

<sup>15</sup> *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024).

<sup>16</sup> *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984).

<sup>17</sup> *Loper Bright*, 603 U.S. at 400.

2024 mitigation requirement likely is not a permissible reading of Section 7. Section 7 makes no mention of mitigation (while other sections of the statute, such as ESA section 10, do reference mitigation) and decades of agency guidance and practice make it clear that mitigation cannot be required in the context of a no-jeopardy biological opinion. EWAC, therefore, believes rescinding the offset language from 50 C.F.R. §§ 402.02 and 402.14 most closely aligns with the statutory language.

### **III. Recommendations for Further Clarification**

As noted above, while EWAC is generally supportive of the Proposed Rule, we believe certain of the Services' Consultation Regulations could be made more efficient or effective with additional revisions. Below, EWAC provides its recommendations for refining and strengthening the consultation process.

#### **a. Allowing for Expansion of the Scope of Consultation When Requested**

The Services should consider adopting regulations clarifying that when determining the scope of agency review in the context of “small handle” consultations, the Services will allow a project proponent to request the scope of Section 7 consultation be expanded to all or a broader portion of the project as a means of procedural efficiency, including more efficient ESA permitting. Where federal agency jurisdiction applies to a small portion or portions of a larger project (e.g., the crossing of waters of the United States to support the construction of a larger pipeline or transmission line), the Services should make clear that the scope of consultation can be expanded, and such expansion in scope will be determined in close coordination with the action agency and project proponent.<sup>18</sup> Allowing for an expanded scope of consultation when requested by the applicant<sup>19</sup> provides a pragmatic process for addressing ESA compliance and enables efficient decision-making for complex infrastructure projects.

On the other hand, when a project proponent has not requested an expanded scope of a “small handle” consultation, taking an expanded view of the project for purposes of consultation when the portion of the project subject to federal authorization is minimal can have significant and long-term consequences. Decisions to federalize “small handle” projects should be considered carefully, and should be made in coordination with—and subject to the approval of or rejection by—the project proponent.

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<sup>18</sup> In such circumstances, any take authorization provided in an ITS included with a no-jeopardy biological opinion should apply not only to take resulting from the portions of the project within the action agency's jurisdiction, but also to take that is anticipated to result from aspects of the project that are not within the agency's jurisdiction. This approach is consistent with the principles agreed upon by the USFWS and U.S. Army Corps of Engineers during the first Trump Administration. *See* U.S. Fish & Wildlife Service, Memorandum re: “Consulting with the U.S. Army Corps of Engineers (USACE) under section 7 of the Endangered Species Act when the USACE's action is limited to making a permitting decision for a small component of a larger project (aka small Federal handle)” (November 3, 2017).

<sup>19</sup> Where an applicant requests that the scope of consultation be expanded per the above, the Services should not have the discretion to deny the request.

## **b. Further Clarifying Consideration of Environmental Baseline**

EWAC supported changes made pursuant to the 2019 Regulations that established a stand-alone 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.”<sup>20</sup> Additionally, EWAC supported the Services’ retention of the stand-alone definition in the 2024 Regulations, as well as the amendment of 50 C.F.R. § 420.14(g)(4), concerning formal consultation, to clarify that the effects of an action are *added to* the environmental baseline.<sup>21</sup> EWAC disagreed with the changes made pursuant to the 2024 Regulations that deleted the term “ongoing” from the definition of environmental baseline,<sup>22</sup> as it is EWAC’s view that any activity that is already occurring should be part of the environmental baseline. The environmental baseline should include past and present federal, state, local, and private activities (including existing structures), as well as private activities with federal components (e.g., federal permitting) that would continue in the absence of the action under consultation.

The Proposed Rule would reinstate the approach to analyzing the environmental baseline established by the 2019 Regulations, maintain helpful language from the 2024 Regulations, and make additional clarifications with respect to the timeframe by which the baseline should be examined. Specifically, the Proposed Rule would clarify that the environmental baseline is “evaluated at the time of the proposed action” and refers to the “current” condition of listed species and designated critical habitat in the action area “as would reasonably be expected to occur” without the consequences caused by the action under review.<sup>23</sup>

EWAC supports the approach taken in the Proposed Rule. However, EWAC recommends that the Services provide further clarity regarding what constitutes the “environmental baseline” by explicitly stating that the “current condition” includes future impacts of the current condition that are reasonably expected to occur absent the proposed action subject to consultation. This approach 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.”<sup>24</sup> The Consultation Handbook further explains that the environmental baseline “does not include the effects of the action under review in the consultation.”<sup>25</sup> 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 by the Federal Energy Regulatory Commission—where an existing structure is present. The impacts of that existing structure (both now and in the future) 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

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<sup>20</sup> 84 Fed. Reg. 44,976, 45,016 (Aug. 27, 2019) (emphasis added).

<sup>21</sup> 89 Fed. Reg. 24,268, 24,297 (April 5, 2025).

<sup>22</sup> *Id.* at 24,272.

<sup>23</sup> Proposed Rule at 52,606.

<sup>24</sup> Consultation Handbook at 4-22.

<sup>25</sup> *Id.*

[e]nvironmental [b]aseline and would not be considered an effect of the proposed action under consultation.”<sup>26</sup>

The inclusion of language in the Proposed Rule to clarify that the environmental baseline “is evaluated at the time of the proposed action” and includes the “current condition” of listed species or designated critical habitat, as well as the expected future impacts of the current condition, in EWAC’s view, is in step with the best reading of Section 7 and the Services’ historic view of how to analyze the environmental baseline. Codifying these changes will provide helpful direction to the Services, federal agencies, and the regulated community in the context of consultation.

#### **IV. Conclusion**

EWAC appreciates the opportunity to comment on the 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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<sup>26</sup> *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.