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Re: Docket Numbers: FWS-HQ-ES-2018-0006, Revision of the Regulations for Listing Species and Designating Critical Habitat

FWS-HQ-ES-2018-0007, Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants

FWS-HQ-ES-2018-0009, Revision of Regulations for Interagency Cooperation

Dear Ms. Fahey, Mr. Rauch, Mr. Aubrey, and Ms. Tortorici:

The National Hydropower Association ("NHA") and the Northwest Hydroelectric Association ("NWHA") (together, the "Associations") appreciate the opportunity to provide comments on the above-referenced U.S. Fish and Wildlife Service's ("USFWS") and National Marine Fisheries Service's ("NMFS") (collectively the "Services") proposed revisions to the Endangered Species Act ("ESA") regulations to improve the efficiency and effectiveness of the ESA. The Associations recognize that the Services have gained significant experience and knowledge from implementing the ESA and from numerous judicial decisions related to the ESA since the Services' last comprehensive revision of the rules in 1986. The Associations support the Services' efforts to improve and clarify the ESA's implementation requirements and processes. The hydropower industry understands the importance of protecting threatened and endangered species and their habitats and commits tremendous resources to those goals each year through enhancement, restoration, and fish passage measures, among other things. The proposed rules would not reduce the substantive protections for threatened and endangered species but should result in meaningful benefits by improving the efficiency and effectiveness of the ESA's implementation.

I. Background.

NHA is a national non-profit association dedicated to advancing the interests of the U.S. hydropower industry, including conventional, pumped storage and new marine and hydrokinetic technologies. NHA's membership consists of over 240 organizations, including consumer-owned utilities, investor-owned utilities, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys.

NWHA is dedicated to the promotion of the Northwest region's waterpower as a clean, efficient energy while protecting the fisheries and environmental quality that characterize our Northwest region. NWHA's membership represents all segments of the hydropower industry: public and private utilities; independent developers and energy producers; manufacturers and distributors; local, state, and regional governments including water and irrigation districts; consultants; and contractors.

Many of the Associations' members hold licenses issued by the Federal Energy Regulatory Commission ("FERC"). Under the Federal Power Act ("FPA"), FERC has exclusive authority to license nonfederal hydropower projects.[1] FERC licenses include measures to protect, mitigate, and enhance ("PM&E measures") resources affected by a hydropower project, including threatened and endangered species and their habitats. The Services have opportunities to submit recommended license terms under Section 10(j) of the FPA, and to submit fishway prescriptions under Section 18 of the FPA.[2] FERC typically issues licenses with monitoring and reporting requirement for threatened and endangered species as well as substantive measures to protect species and enhance their habitats.

In addition to incorporating PM&E measures for threatened and endangered species and their habitats under the FPA, FERC consults with NMFS and USFWS, as appropriate, under Section 7 of the ESA prior to issuing a new or original license whenever operation under the proposed license "may affect" ESA-listed species or their critical habitats. FERC licensees therefore have a significant interest in Section 7 both from an efficiency perspective and because licensees often provide significant benefits to species and habitats in implementing license-required PM&E measures. As a result, the Associations' comments are primarily focused on the Section 7 consultation process because of the significance of that process to the Associations' members. However, the Associations also comment below in support of the Services' listing, de-listing, critical habitat, and "4(d) rule" modifications, which will bring a more thoughtful approach to listing and de-listing decisions and provide USFWS with the necessary flexibility under Section 4(d) of the ESA to apply take prohibitions and exclusions in consideration of the best available science on a case-by-case basis.

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[1] 16 U.S.C. § 817(1).

[2] *Id.* §§ 803(j)(1), 811.

II. Detailed Comments.

A. Proposed Section 7 consultation revisions will provide clarity and make consultation processes more efficient.

The Associations appreciate the Services' efforts to provide greater clarity and efficiency for Section 7 consultations. FERC licensees have significant experience with both the "informal" and "formal" consultation process at relicensing, as well as in the original licensing of hydropower, pumped storage and marine hydrokinetic projects. Under the ESA, FERC is required to consult with NMFS and the USFWS on actions that "may affect" threatened and endangered species or their critical habitats within their respective purviews. Although it is FERC's responsibility to consult with the Services under Section 7, licensees, as applicants, are integrally involved in consultations. Between 2008 and 2015, FERC issued 122 licenses of which almost half (49 percent) required Section 7 consultation.[3] Of the licenses that required consultation, approximately 60 percent were informal consultations and 40 percent were formal consultations. As more species have become listed, the number of ESA consultations have and will continue to increase, particularly given the extensive ranges of some listed species. As a result, the Associations' members have significant experience and interest in assisting the Services in improving the clarity and efficiency of the Section 7 consultation process.

The following sections provide the Associations' comments on many of the Services' proposed modifications to the Section 7 consultation regulations.

1. The Associations support a stand-alone environmental baseline definition that clearly articulates existing structures and their ongoing impacts are part of the baseline.

The Services propose to create a stand-alone definition for "environmental baseline" to clarify that the baseline is a separate consideration that provides the context for analyzing the proposed action, but is not part of the proposed action.[4] The Services propose to retain the current environmental baseline definition, but request feedback on opportunities to revise the definition to avoid confusion and better distinguish the baseline from other components of the Section 7 consultation.[5] The Associations agree that it is important to thoughtfully define the environmental baseline, and that doing so should help clarify the analytical framework for effects analyses in Section 7 consultations. The Services' suggested language would be helpful, but would not provide sufficient clarity, however, and should be further refined.

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[3] "Endangered Species Consultation, Licensing under the Endangered Species Act," Alan Mitchnick (FERC), NHA Annual Conference, Washington, D.C. (Apr. 2015) (hereinafter, "Mitchnick Presentation").

[4] 83 Fed. Reg. 35,178, 35,184, 35,191 (July 25, 2018).

[5] *Id.* at 35,184.

As a preliminary matter, the Associations agree with the Services' suggested language clarifying that the baseline is "the state of the world absent the action under review" and that it includes "ongoing impacts of past and ongoing" activities.[6] This language underscores an important baseline concept that can sometimes be misunderstood or overlooked: the baseline is not a theoretical alternative based on an agency's discretion, to which the proposed action is *compared*. Rather, it comprises all actions that have and are continuing to impact a species or habitat, to which the proposed action is *added* to determine whether it is likely to have unacceptable (*i.e.*, jeopardizing) impacts to species or habitats.[7] As such, the baseline properly encompasses past and ongoing impacts that would continue in the absence of the action under review.

The Associations request that the Services further clarify in the regulatory text that *existing structures* are part of the environmental baseline and that the *ongoing impacts of a structure's existence* are also properly considered part of the baseline. For example, in conducting a Section 7 consultation on FERC's relicensing of a hydropower project, the environmental baseline should include the existing dam as well as any ongoing impacts that the dam or reservoir created by the dam might have on ESA-listed species.[8] The proposed action, in turn, would be the operation of that dam in the future (including flows, ramping, and spill), and the Services would consider the proposed operation of the dam in the context of those baseline impacts.[9] To ensure this distinction is clear—and to avoid situations in which the Services' staff include ongoing impacts from existing structures in their analyses of proposed actions—the Associations request that the definition of environmental baseline state explicitly that *existing dams and other structures and any impacts from their continued physical existence* are part of the environmental baseline and are not part of the proposed action or an appropriate subject of reasonable and prudent measures, which should be focused solely on the proposed future action. This revision would clarify the proper legal framework for purposes of complying with Section 7 of the ESA.

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[6] *Id.* Although this phrase captures the appropriate intent, the Associations believe it would be more accurate to remove the reference to the "world" and instead state in the regulatory text that the baseline is the "state of the environment in the action area absent the effects of the proposed action under review."

[7] *See* 50 C.F.R. § 402 (defining "effects of action" as those that are "added to" the environmental baseline); USFWS & NMFS, Endangered Species Consultation Handbook at 4-30 (Mar. 1998), https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf) (hereinafter "ESA Handbook") (future hydropower impacts "are added [to the baseline] to determine the total effect"), 4-36 (adverse effects to individuals rise to the level of jeopardy or adverse modification only if, "when added to" the baseline, it results in significant impacts).

[8] The ongoing impacts of the physical presence of a dam would include, among other things, ongoing fish migration impacts and any impacts from the existence of a reservoir above the dam.

[9] *See, e.g.*, ESA Handbook at 4-30 (describing proposed action as "future direct and indirect impacts of the operation over the new license or contract period"). A Section 7 consultation on a proposed license amendment would take a narrower view, focusing on the potential effects of the changes to the license. In that case, the ongoing operation of the dam under the existing license would be part of the environmental baseline.

To be clear, the Services have an existing avenue to raise concerns or issues related to the impact of existing dams or reservoirs through the FPA. Specifically, under FPA Section 10(j), the Services and state fish and wildlife agencies may recommend PM&E measures related to fish and wildlife resources for inclusion in a new license. Similarly, under FPA Section 18, the Services have authority to impose fishways subject to a trial-type hearing process intended to resolve disputed issues of material fact pertaining to such conditions. To the extent that agency recommendations or fishway prescriptions lead to a FERC staff alternative that includes fishways or reservoir measures that address the impacts of a dam's presence, those measures would be part of the *proposed action* upon which the Services later consult under Section 7. The Services' final rule should confirm, however, that the ESA Section 7 consultation process is not an alternative tool to impose new measures to address the ongoing impacts of existing structures.[10]

The Services' Endangered Species Consultation Handbook ("ESA Handbook")[11] specifically addresses this issue in the context of hydropower projects and states that an existing dam is considered part of the baseline when the Services consult on a later, related action. The ESA Handbook explains that the baseline includes activities "already affecting the species or that will occur contemporaneously with the consultation in progress."[12] As an example, the ESA Handbook discusses adding a turbine at an existing dam and concludes: "Ongoing effects of the existing dam are already included in the Environmental Baseline and would not be considered an effect of the proposed action under consultation."[13] In a second example, the ESA Handbook discusses how mandatory upgrades to an existing dam do not cause the dam to become part of the proposed action, stating: "the test is not whether the fuse plug in some way assists or facilitates in the continued operation of the pre-existing project, but instead whether the water project could not exist 'but for' the fuse plug." Because the dam would exist independent of the federally mandated upgrades, "the biologist would not consider the effects of the dam to be effects of the [proposed] action under consultation …."[14]

Federal courts have consistently confirmed that existing dams are part of the environmental baseline.[15] For example, in *National Wildlife Federation v. NMFS*,[16] the Ninth Circuit held that

[10] Furthermore, any attempt to address concerns regarding fish migration at existing dams through ESA Section 7 would unlawfully circumvent important FPA processes and in particular the trial-type hearing process for fishway prescriptions.

[11] *See* ESA Handbook, *supra*, note 7.

[12] *Id.* at 4-22 to 4-23.

[13] *Id.*

[14] *Id.* at 4-28.

[15] Indeed, the ESA expressly exempts from the Section 7 consultation requirements construction projects that began prior to November 10, 1978, which includes most dams in existence in the U.S. today. *See* 16

existing dams "must be included in the environmental baseline," and clarified that the appropriate question in a Section 7 consultation is whether dam operations cause "some *new* risk of harm."[17] The Eastern District of California found similarly in *Friends of River v. NMFS*,[18] explaining that, "[d]ecades before the ESA's enactment, the California Debris Commission 'authorized, funded, or carried out' construction of [the dams], such that the past and present impacts flowing from the dams' existences fall within the definition of 'environmental baseline.'"[19] Other courts have agreed.[20] Even in the recent *American Rivers v. FERC*,[21] in which the D.C. Circuit found significant fault with USFWS's effects analysis, the court also underscored that historic impacts of existing facilities are properly considered *as part of the baseline*, and that proposed actions must be evaluated in that context.[22]

Notwithstanding the ESA Handbook and case law's clear guidance, in practice there has been confusion at the Services' regional level in how existing dams and reservoirs should be treated, sometimes leading to effects analyses that attribute such ongoing effects to a relicensing action. As a result, the Associations recommend that the Services take the opportunity to clarify that

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U.S.C. § 1536(c); *see Idaho Dep't of Fish & Game v. NMFS*, 850 F. Supp. 886, 894 (D. Or. 1994) (the ESA "exempts any construction projects predating November 10, 1978 from consultation requirements under § 7(a)(2)").

[16] 524 F.3d 917 (9th Cir. 2008).

[17] *Id*. at 930 (emphasis added); *see also id.* ("Agency action can only 'jeopardize' a species' existence if that agency action causes some deterioration in the species' pre-action condition.")

[18] 293 F. Supp. 3d 1151 (E.D. Cal. 2018).

[19] *Id.* at 1166 (citations omitted).

[20] *See, e.g., Idaho Dep't of Fish & Game v. NMFS*, 850 F. Supp. at 894 (overturning NMFS's Federal Columbia River Power System biological opinion but noting "there is no dispute that dam existence is properly part of the 'environmental baseline,' as defined by 50 C.F.R. 402.02"); *Confederated Tribes & Bands of the Yakama Nation v. McDonald*, No. CY-02-3079-AAM, 2003 WL 1955763, at *14 (E.D. Wash. Jan. 24, 2003) (unpublished) (sustaining NMFS's treatment of an existing dam as part of the baseline when considering dam modifications and stating "there is no 'new' dam. There is an existing dam and an existing problem which is part of the 'environmental baseline' …."), *10 (quoting NMFS's biological opinion, which stated: "'The dam has already been constructed…. The ongoing effects of this dam will continue regardless of the proposed SOD Act project and therefore, do not satisfy the "but for" test.'").

[21] *Am. Rivers v. FERC*, No. 16-1196 (D.C. Cir. July 6, 2018) (finding that the biological opinion did not give sufficient weight to the environmental baseline, including the historic impacts of the dam).

[22] *Id.* at slip op. 22 (holding that USFWS "acted arbitrarily in establishing the environmental baseline without considering the degradation to the environment" caused by past dam operations and continuing impacts).

existing structures and any impacts that result from their continued physical existence are part of the environmental baseline. Consistent with the ESA, the scope of the Services' evaluation of the proposed action and any reasonable and prudent measures should be focused on future operations of an existing structure like a hydropower dam, not on any ongoing impacts from a structure's prior construction and continued existence.[23]

2. The Services should address delays in formal consultation and provide timelines for informal consultation to improve the efficiency of the consultation processes.

The Associations are concerned that there are ongoing, significant delays in formal consultations for hydropower relicensings despite the requirement that formal consultation be completed within 135 days.[24] In 2015, FERC staff indicated that formal consultations for actions under FERC's purview averaged 441 days.[25] Some FERC projects have been delayed for several years or even over a decade waiting on biological opinions to complete formal consultation.[26] And yet, the Services rarely if ever follow the process outlined in 50 C.F.R. § 402.14(e) for asking the action agency and applicant for consent to extend the consultation timeline.[27] The Associations ask that the Services investigate internal processes and ensure that, going forward, Service staff complete biological opinions in a timely manner and in compliance with the requirements of the Services' regulations. Additionally, the Services should not delay initiation or completion of Section 7 consultations on the basis of waiting for other regulatory processes such as the 401 Clean Water Act certification or final National Environmental Policy Act ("NEPA") document. The Services must initiate consultation on the basis of FERC's proposed action, which is articulated as the staff alternative and is embodied in FERC's biological assessment. Nothing in the ESA or the Services' regulations allow the Services to delay initiation of consultation pending the completion of other reviews.

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[23] Some Service staff have advanced a concept called "perpetuating the baseline" to move existing structures from the baseline to the proposed action when repairs or upgrades are made, in contradiction of the ESA Handbook's fuse plug example and the ESA's explicit Section 7 exemption for construction projects that began prior to November 10, 1978. ESA Handbook at 4-28; 16 U.S.C. § 1536(c). The final rule should explicitly reject the concept of "perpetuating the baseline," which is simply another way of improperly moving the ongoing effects of existing structures from the baseline to the proposed action.

[24] 16 U.S.C. § 1356(b)(1) (providing 90 days to consult); 50 C.F.R. § 402.14(g)(5) (providing an additional 45 days to prepare a biological opinion).

[25] Mitchnick Presentation.

[26] *See, e.g.*, FERC, Projects Delayed by Water Quality Certifications and Endangered Species Act Consultation (updated Aug. 9, 2018), https://ferc.gov/industries/hydropower.asp?csrt= 12552312646208798790.

[27] The Service's existing regulations are clear that a consultation involving an applicant "cannot be extended for more than 60 days without the consent of the applicant." 50 C.F.R. § 402.14(e).

The hydropower licensing processes and requirements are already lengthy and for some projects are taking more than a decade to complete. The additional delay from ESA consultations is a significant concern to the hydropower industry and prevents licensees from timely implementing beneficial environmental improvements as part of a new license's PM&E measures. The Associations recognize that there are a number of reasons for delay in the consultation process and support the Services' efforts to improve the clarity and efficiency of the Section 7 regulations generally, which should allow the Services to complete formal consultations within prescribed timelines.

Although formal consultations have exceeded the regulatory timeframes, the Associations still support inclusion of time frames for informal consultations. The Services have requested comments on whether a 60-day deadline for completion of informal consultation, subject to an extension, would be helpful and appropriate.[28] Informal consultation under 50 C.F.R. § 402.13 is an optional process used to determine whether formal consultation should occur. Under the current rules, in contrast with the formal consultation provisions, there is no timeframe within which the Services must complete informal consultation. Informal consultations regarding actions under FERC's purview have lasted up to 589 days with an average period of 74 days.[29] The Associations support the Services' suggestion of providing a 60-day time frame for informal consultations that could help ensure consistent and timely resolution of informal consultations and provide efficiencies for FERC licensees. The Associations recommend that the Services' final rule provide the action agency, or the designated nonfederal representative, the ability to "trigger" the clock by providing notice to the Services in writing. In hydropower relicensing proceedings, this would allow the applicant to have robust early coordination with the Services regarding appropriate PM&E measures for ESA-listed species and habitat pursuant to the FPA's licensing requirements without prematurely triggering the ESA's separate informal consultation process.

3. Clarifying the requirements to initiate formal consultation will improve the consultation process and reduce delays.

The proposed rules would clarify the categories of information required to start the formal consultation process, including a description of the proposed action; measures intended to avoid, minimize, or offset effects; a description of the action area; species and critical habitat information; and a description of potential effects of the action.[30] The articulated information in the proposed rule is consistent with the Services' existing regulation and FERC practice, and should assist the parties in providing necessary information.

Importantly, the existing Section 7 consultation regulations allow the Services to request additional information of an action agency but do not require that information for purposes of

[28] 83 Fed. Reg. at 35,185-86.

[29] Mitchnick Presentation.

[30] 83 Fed. Reg. at 35,186, 35,192.

completing formal consultation.[31] Similarly, in the hydropower context, the Services may also submit study requests to FERC pursuant to the FPA and FERC's regulations that FERC may not require the applicant to undertake. This can lead to inappropriate challenges if the Service conflates its purported study needs under the FPA with information requirements under the ESA, potentially resulting in delays in both proceedings. The Associations request that the final rule emphasize that FERC's decision not to require a study under the FPA shall not be construed as a failure to meet the information requirements to initiate consultation under the ESA.

4. The proposed revisions to the "effects of the action" definition are appropriate and will reduce confusion.

The proposed rule would modify the definition of "effects of the action" in the context of Section 7 consultations.[32] Specifically, the Services currently categorize possible effects of a proposed action as direct, indirect, interrelated, and interdependent and require consideration of each of these potential categories of effects. The Associations agree that this can sometimes lead to confusion about which effects are in which category. The proposed rules eliminate these categories in favor of a two-prong causation test pursuant to which the Services would analyze whether an effect would not occur *but for* the proposed project or activity.[33] The Services would then analyze whether the effect is reasonably certain to occur based on the best available scientific and commercial information. The Associations support this approach and believes that it will help reduce confusion related to labeling of effects, thus allowing applicants, action agencies, and the Services to focus on the effects determination in the context of the best available information.

5. Defining "reasonably certain to occur" will provide appropriate clarity around the scope of analysis.

The proposed rule would define the standard for determining whether a possible activity should be considered in an effects analysis, using the standard "reasonably certain to occur."[34] The Associations support this clarification because the effects analysis should focus on those effects that are reasonably certain, as defined in the proposed rules, to avoid attributing effects that are possible but unlikely to proposed actions. To further clarify this standard, the Associations request that the final rule underscore that possible but unlikely conjectural events do not meet the "reasonably certain" standard.

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[31] 50 C.F.R. § 402.14(f) (the Service may request additional information, but ultimately the action agency may request that the Service proceed with consultation on the information already provided).

[32] 83 Fed. Reg. at 35,183-84, 35,191.

[33] *Id.*

[34] *Id.* at 35,184, 35,193.

6. Clarifications regarding critical habitat evaluations and jeopardy evaluations will provide consistency across the Services' regions.

The Services clarify in the proposed rule that the definition of "destruction or adverse modification" of critical habitat is something that alters or diminishes the value of critical habitat "as a whole" for the conservation of a listed species.[35] The Associations support this clarification, which confirms that the critical habitat evaluation is made at the scale of the *entire* critical habitat designation, not just the immediate area. The Services' determinations of critical habitat are made at the scale of the entire critical habitat designation. Evaluating impacts on a smaller scale could result in an overestimation of the impacts of a proposed action. The clarification is also consistent with the jeopardy analysis, which is made at the scale of the entire listed entity.

7. Changes to agency responsibilities regarding proposed avoidance, minimization, and mitigation measures are important and appropriate.

The proposed rule would clarify the Services' responsibilities in developing a biological opinion during formal Section 7 consultations.[36] In particular, with regard to proposed measures to avoid, minimize, or offset adverse effects, the rule would clarify that the Services will not evaluate the likelihood of specific measures being implemented, but will rely on the information presented by the action agency and applicant in the consultation process and consider these measures as part of the proposed action.[37] The Associations believe this is an important clarification that is consistent with the ESA Handbook[38] and appropriately defers to the action agency and the applicant with respect to defining what the "proposed action" is, as they are in the best position to determine what actions are proposed and will occur over the life of a proposed action. In addition, the Associations recommend that the Services clarify that formal consultation should be commenced in response to the action agency and applicant's proposed action and, as noted in Section 2 above, should not be delayed to wait for the completion of other regulatory processes.

The hydropower process provides a good example of why deference to an action agency and applicant with respect to defining the "proposed action" is appropriate. FERC licensees are the most familiar with their hydropower projects and their proposed PM&E measures that may extend for up to 50 years. As such, it is essential and appropriate that they maintain the ability to describe license proposals and measures for the protection and benefit of listed species, and that the Services consider those proposals as described. Licensees typically make extremely meaningful contributions to the conservation of species under the FPA and may negotiate and

[35] *Id.* at 35,181-82.

[36] *Id.* at 35,187, 35,192.

[37] *Id.*

[38] *See* ESA Handbook at 4-33 ("The Services can evaluate only the Federal action proposed, not the action as the Services would like to see that action modified.").

enter into agreements to resolve critical issues for licensing, including issues related to threatened and endangered species and their habitats. This may include innovative conservation technologies intended to improve species protection. The licensee has the capability of committing to long-term measures, and FERC will monitor compliance over the license term to ensure those measures have desired results. Clarifying that the Services will evaluate the action *as proposed*, and will not separately evaluate the sincerity of the commitment or likelihood of its enforcement, should ensure that the applicant's knowledge of its project and its proposal, including potential innovative conservation proposals, are fully considered

8. Allowing Services to adopt action agency's initiation package can create efficiencies in some circumstances.

The Services propose to revise the ESA regulations to explicitly allow the Services to adopt all or part of an action agency's initiation package in the biological opinion.[39] The Associations support the Services' proposal as one that should provide efficiencies for hydropower consultations. For example, the Associations recognize that, in some circumstances, it may be appropriate for action agencies like FERC to utilize a draft NEPA analysis for purposes of requesting a Service's concurrence with a "not likely to adversely affect" determination. Although the ESA and NEPA serve different purposes and their components vary, the Services are capable of utilizing the description of the action, current environment, and potential impacts to ESA species and habitat in action agencies' NEPA documents to develop a concurrence under 50 C.F.R. § 402.14(b)(1). Allowing the use of draft NEPA analysis for purposes of obtaining concurrences would simplify the ESA process for circumstances where adverse effects are not likely.

In addition, the Services are proposing to allow adoption of all or part of their own analyses and findings required under Section 10(a) of the ESA in their biological opinions. *Id.* However, it is not clear how this might apply in cases where direct take is related to a federal action already undergoing Section 7 consultation. In the Associations' experience, NMFS's current practice for hydropower relicensing proceedings is to issue biological opinions and incidental take statements that cover all take associated with a project including, for example, take associated with broodstock collection. The final rule should clarify that the Services intend to formalize their existing practice of providing incidental take statements for all take associated with the proposed project.

9. Expedited and programmatic consultations provide useful options for efficient ESA compliance.

The Services propose a new rule that would expedite consultation for actions that have minimal adverse or predictable effects.[40] The Associations support the use of this type of tool to expedite

[39] 83 Fed. Reg. at 35,187-88.

[40] *Id.* at 35,188.

consultation on routine matters with predictable impacts that can be designed with minimization measures in place. Examples might include in-stream restoration or enhancement projects that require U.S. Army Corps of Engineers permitting and thus trigger Section 7 consultation. The Associations would welcome the opportunity to work with the Services to identify activities that may not have been the subject of a biological opinion for a hydroelectric project, and that might fit within the expectations for expedited consultations.

The Services also propose adding a definition of "programmatic consultation" consistent with their current practice of grouping similar activities together in one ESA Section 7 consultation. The definition clarifies that programmatic consultations could be undertaken for multiple similar, frequently occurring, or routine actions in a particular geographic area. Additionally, programmatic consultations could be efficiently utilized for a proposed program or plan. The Associations support the Services' efforts to further streamline ESA compliance through the use of expedited or programmatic consultations.

10. Reinitiation should only apply to "formal" consultations for consistency with case law and to ensure triggers are well defined.

The Services' existing reinitiation triggers explicitly apply to formal consultations.[41] The proposed rule would eliminate the word "formal" with the intent of applying reinitiation to both formal and informal consultations.[42] The Services cite *Forest Guardians v. Johanns*.[43] In that case, however, without explaining why it was reading the word "formal" out of the regulatory text, the court appears to simply presume that the formal consultation reinitiation regulations apply to informal consultations.[44]

In the hydropower context, however, FERC does not have the obligation to consult with the Services mid-license. In *California Sportfishing Protection Alliance v. FERC*,[45] the Ninth Circuit found that FERC's license re-openers do not give FERC the requisite "involvement or control" to require mid-license consultation.[46] The Services' proposal is at odds with that established case law because it could require FERC to initiate formal consultation mid-license, notwithstanding that there is no affirmative action triggering ESA consultation and no previously issued biological opinion maintaining continued ESA oversight.

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[41] 50 C.F.R. § 402.16.

[42] 83 Fed. Reg. at 35,188-89, 35,193.

[43] 450 F.3d 455 (9th Cir. 2006).

[44] *Id.* at 458 (stating without analysis that "[i]nformal consultation must be re-initiated" under 50 C.F.R. § 402.16 when a trigger for reinitiating *formal* consultation is met).

[45] 472 F.3d 593 (9th Cir. 2006).

[46] *Id.* at 599 (citation omitted); *see also W. Watersheds Project v. Matejko*, 456 F.3d 922, 930 (9th Cir. 2006) (ESA consultations stem from "affirmative actions").

Moreover, without a biological opinion and incidental take statement that clarifies the anticipated extent of an activity's impact, it will not be possible for the Services, action agencies, applicants, or others to know when impacts have met a threshold to reinitiate. There will be no measurable standard or take level that is exceeded, and the description of the action and potential effects will not be sufficiently robust to allow parties to reasonably determine that those anticipated impacts have been exceeded. This will create confusion and inconsistency across all ongoing, previously approved federal actions. Indeed, requiring reinitiation when formal consultation was never conducted in the first instance is the equivalent of creating an ever-open ESA proceeding that will hang over ongoing federally approved activities forever, notwithstanding a prior "not likely to adversely affect" finding. This is entirely inconsistent with the intent of the ESA and the Services' regulations.

The Services should not broaden the circumstances under which reinitiation is required. The Services should instead take this opportunity to confirm that reinitiation should apply only where the action agency retains discretion to re-open the proceeding, a biological opinion has already been issued that clearly describes anticipated project impacts and the amount and extent of anticipated incidental take, and it appears that the take limit has or likely will be exceeded.

B. Proposed revisions to Section 4 listing, de-listing, and critical habitat regulations provide necessary clarity and will ensure consistency.

The Associations' members have an interest in ensuring that Section 4 listing and de-listing decisions and critical habitat designations are conducted consistently and in accordance with the best available science. The Services' proposed revisions to these procedures will provide necessary clarity around these processes, resulting in more efficient, common sense decisions without reducing important protections for species and habitats.

1. Defining the "foreseeable future" will ensure use of the best available science in evaluating potential future threats to listed species.

The proposed rule would provide greater clarity regarding the definition of "foreseeable future" in the definition of a threatened species, which the Services define as "any species which is likely to become endangered within the *foreseeable future* throughout all or a significant portion of its range."[47] Current lack of clarity has resulted in confusion about the length of time over which the Services must analyze a species' chance of survival, particularly when considering the potential and often unknown impacts of climate change on habitat over hundreds of years. The proposed rule appropriately provides some boundaries on the scope of the "foreseeable future" by requiring the Services to look "only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction in the foreseeable future

[47] 83 Fed. Reg. 35,195, 35,200-01 (emphasis added; citation omitted).

are probable."[48] This is consistent with the requirement to use the best scientific and commercial data available.

2. Clarifications to de-listing standards will ensure consistency in consideration of petitions.

The proposed rule clarifies that the Services will use the same standard when determining whether to de-list a species as they do when determining whether to list a species in the first instance.[49] The rule would also require de-listing if the species is no longer endangered or threatened, is extinct, or no longer meets the definition of a species.[50] The Associations support this clarification to provide consistency across the Services in considering de-listing petitions.

3. Critical habitat designation revisions will reduce unnecessary regulatory processes that provide no benefit to listed species.

The ESA requires the Services to designate critical habitat to the maximum extent "prudent and determinable" concurrently with making a listing decision.[51] The Services propose a non-exhaustive list of circumstances in which a Service may find it is not "prudent" to designate critical habitat.[52] The Associations support the Services' effort to better define when it is not prudent to designate critical habitat. In particular, we agree it is not prudent to create a layer of unnecessary regulatory process where threats to a species are caused by something that cannot be addressed through Section 7 consultations, or when the species occurs primarily outside of U.S. jurisdiction and no areas under the U.S. jurisdiction contain features that are essential to conservation of the species. These revisions should reduce the burden of unnecessary regulation in those rare circumstances. However, the revised regulations would provide that the Secretary "may, but is not required to," make a "not prudent" determination if one or more of the circumstances described occur. The Associations request that the Services retain the existing introductory language which states that designation "is not prudent when any" of the listed situations exist. This language is important to ensure consistency across the Services' critical habitat designations.

The Associations further urge the Services to include in the final rule that critical habitat designation is not prudent where threats are already being addressed through long-term commitments to protect and enhance a species' habitat. For example, settlement agreements and Habitat Conservation Plan terms that are incorporated as binding conditions of 30- to 50-year

[48] *Id.* at 35,195.

[49] *Id.* at 35,196, 35,200-01.

[50] *Id.*

[51] 16 U.S.C. § 1533(a)(3)(A).

[52] 83 Fed. Reg. 35,196-97, 35,201.

FERC licenses may include significant habitat improvement measures that the Services should consider, particularly given both the duration of those commitments and their enforceability through a FERC license. Explicitly providing for the exclusion of areas from critical habitat on the basis of such long-term, binding measures would be consistent with existing Service policy,[53] and would further encourage the Services to exclude areas from critical habitat where long-term, enforceable PM&E measures provide important conservation benefits.

4. Changes to the standards on designation of unoccupied habitat would reduce unnecessary process where habitat is not essential.

The Services propose to make a significant change to the critical habitat regulations by restoring the requirement that the Services first evaluate areas that are *occupied* by species when designating critical habitat, before considering areas that are *unoccupied*.[54] In addition, the proposed rule would provide clarity on when unoccupied habitat is essential for conservation and therefore should be designated.[55] The Associations support this proposal as a commonsense approach that would subject geographic areas to significant regulatory proceedings only when needed to protect and recover a species based on the best available science.

The Services' proposed rule also states that for "an unoccupied area to be considered essential, the Secretary must determine that there is a reasonable likelihood that the area will contribute to the conservation of the species."[56] The Associations recommend that the Services clarify this statement by indicating that an area cannot be designated critical habitat if it does not, at the very least, have the kind of habitat that is essential to that species' conservation at the time of the designation.

C. USFWS's proposal to use species-specific Section 4(d) rules will create regulatory efficiencies and flexibility to address species needs.

The Associations support USFWS's proposal to rescind the blanket rule that automatically extends the ESA's Section 9 take prohibition to threatened species under USFWS's management, and instead allows USFWS to decide on a species-by-species basis whether to apply the take prohibition.[57] When establishing the ESA, Congress applied a blanket prohibition against the take of endangered species but did not extend the prohibition to threatened species. Section 4(d) of the ESA provides the Services with the ability to protect threatened species

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[53] *See* USFWS & NMFS, Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 Fed. Reg. 7,226 (Feb. 11, 2016).

[54] 83 Fed. Reg. at 35,197-98, 35,201.

[55] *Id.*

[56] *Id.* at 35,201.

[57] *Id.* at 35,174-78.

through (1) the promulgation of regulations deemed "necessary and advisable" to conserve a threatened species, and (2) the application of the Section 9 take prohibitions to a threatened species.[58] Section 4(d) authorizes the Service to extend any or all of the take prohibitions, as well as any necessary protective measures, to a threatened species. NMFS has implemented Section 4(d) on a species-specific, case-by-case basis as part of its listing determinations. The USFWS's proposal to eliminate the blanket take prohibition for threatened species will align USFWS's practice with NMFS's longstanding and effective approach.

The Associations support this change, which will allow USFWS to provide critical species-specific protections where appropriate, and provide exceptions for efficiency where, for example, an activity has been designed to meet previously articulated USFWS protection standards and would not have significant impacts to the species. For instance, USFWS could design a Section 4(d) rule to extend the take prohibition to a species with the exception of artificial propagation programs, scientific research, or habitat restoration activities conducted in accordance with USFWS-approved protocols. Such "limits" on the extension of the take prohibition would create regulatory efficiencies while addressing the specific needs of each species. Additionally, such limits could assist project proponents in designing activities from their inception to avoid and minimize impacts to ESA-listed species. Species-specific Section 4(d) rules would provide both species protections and regulatory efficiencies, thus allowing USFWS to devote its limited resources to conservation programs and Section 7 consultations.

III. Proposed Additional Modifications.

While the Associations appreciate the Services' efforts in developing the proposed rules, there are several additional changes that the Services could implement to provide meaningful procedural relief to applicants and action agencies, and to ensure that the ESA is being carried out consistent with the intent of Congress, particularly with regard to the "best science" requirement.

A. Applicant should be able to request draft biological opinions directly from the Service, and should be provided an opportunity for applicant review and comment.

The Services' regulations allow an applicant to request a copy of a draft biological opinion from the *action agency* and submit comments through the *action agency*.[59] This opportunity for applicant participation reflects the unique role of the applicant in ESA consultations. However, the requirement that the draft opinion and all comments come and go through the action agency is problematic in the hydropower context. This is because communications with FERC are generally posted by FERC to the public docket. Rather than providing the applicant with an

[58] 16 U.S.C. § 1533(d); *see Sweet Home Chapter of Communities for Great Or. v. Babbitt*, 1 F.3d 1, 7-8 (D.C. Cir. 1993) ("[T]he two sentences of § 1533(d) represent separate grants of authority."), *rev'd on other grounds*, 515 U.S. 687 (1995).

[59] 50 C.F.R. § 402.14(g)(5).

opportunity to preview a draft opinion to ensure its accuracy *prior* to its public unveiling,[60] the current regulatory process results in applicants being forced to choose between reviewing the draft along with members of the public who can view it on the docket, or declining to review a draft at all. To the Associations' knowledge, applicants generally favor the latter option to avoid confusing stakeholders with a draft opinion for which there is no public comment process.

Applicants have a unique perspective and deep knowledge of the proposed action that can be helpful in the Section 7 process. Applicants often have significant prior experience implementing the type of action being proposed, have specific knowledge of the geographic area in which the action will occur, and have monitored or studied the species and kept other records regarding past species interactions. Applicant review of a draft biological opinion can help ensure that the proposed action is properly described and that the Services have accurately anticipated how the action will interact with listed species and their habitats. Facilitating applicant review of draft opinions is also consistent with Service policy. For example, in issuing the ESA consultation regulations in 1986, the Services stated that release of draft opinions to the applicant facilitates "a more meaningful exchange of information" and may result in "preparation of more thorough biological opinions."[61]

Consistent with the Services' policy, the Associations request that the Services modify the regulatory text at 50 C.F.R. § 402.14(g)(5) to allow applicants to request draft biological opinions directly from the applicable Service, and to require the Service to provide a minimum 30-day period for applicant review. This will reduce the bureaucratic steps currently required to obtain a draft opinion, reducing delays and unnecessary process requirements. The regulatory text should be clear that the Service must provide the entire draft opinion and incidental take statement to the applicant regardless of whether the draft opinion reaches a "jeopardy/adverse modification" or "no jeopardy/no adverse modification" determination.

Furthermore, to effectuate the collection of applicant comments, the Associations request that the regulations allow applicants to submit comments by the close of the review period directly to the Service, rather than *through* the action agency. Applicants should also be provided the opportunity to modify their proposed action, in consultation with the action agency, to address concerns noted in the draft biological opinion. This would reduce the incidence of "jeopardy" or "adverse modification" opinions because applicants could modify their actions to reduce the perceived jeopardizing effects. Finally, the Service should include a description of the changes made in response to such comments, including what changes were not made, and why not. This level of transparency is important to allow applicants, the action agency, and the public to understand how the applicant's comments were incorporated or not.

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[60] As the Services have recognized, "[n]othing in section 7 authorizes or requires the Service to provide for public involvement (other than that of the applicant) in the 'interagency' consultation process." 51 Fed. Reg. 19,926, 19,928 (June 3, 1986).

[61] *Id.* at 19,952.

B. The final rule should define "minor change" to give meaning to that restriction.

The regulations currently require that any reasonable and prudent measures, and any terms and conditions to implement those measures, "cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes."[62] In reality, such conditions regularly impose vast new substantive and procedural requirements. In the hydropower context, the Services regularly impose measures requiring future planning, adaptive management (including open-ended requirements to take whatever future actions might be required by the Service), the development of new plans and mitigation, and implementation of studies. In addition, the Services frequently adopt the proposed action's components itself as reasonable and prudent measures in order to make those components enforceable under the ESA. In many cases, the Services add that each of these actions must be undertaken under the Service's direct supervision or with its approval—the granting of which may result in the imposition of additional requirements. In short, there is nothing "minor" about typical Section 7 conditions.

To address this problem, the Associations urge the Services to define reasonable and prudent measures as akin to best management practices, and not an opportunity to revise the action to something the Services would have proposed if they were the applicant or action agency. The regulations should clarify that conditions may not restate the action in order to make every action enforceable under the opinion; instead, the Services should rely on the reinitiation provisions to re-open a consultation if the action is modified in the future in a manner that impacts species or habitat in a manner not previously considered. Furthermore, reasonable and prudent measures should not include studies or open-ended future requirements to implement yet-undefined Service requirements, or to obtain additional Service approvals. Finally, the Services should be clear that new requirements to pass fish upstream or downstream of a project are properly imposed under FPA Section 18, and are not appropriate subjects of ESA terms and conditions.

C. The Services should include regulatory text clarifying that there is no legal state of jeopardy or adverse modification.

The Associations appreciate that the Services clarify that there is no legal state of jeopardy or adverse modification. Specifically, the Services state:

> It is sometimes mistakenly asserted that a species may already be in a status of being "in jeopardy," "in peril," or "jeopardized" by baseline conditions, such that any additional adverse impacts must be found to meet the regulatory standards for "jeopardize the continued existence of" or "destruction or adverse modification." That approach is inconsistent with the statute and our regulations.[63]

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[62] 50 C.F.R. § 402.14(i)(2).

[63] 83 Fed. Reg. at 35,182 (citations omitted).

This is an important clarification that the Associations recommend be explicitly included in the regulatory text to avoid unnecessary conflicts in Section 7 consultations. The Associations' members have experienced consultations in which a species is already in decline or the critical habitat is already degraded and, as a result, Service staff assume that the new proposed action must necessarily result in a jeopardy or adverse modification determination. The Associations agree with the Services that such an approach is inconsistent with the ESA and believe the regulatory text should be clarified accordingly to ensure consistent application across every region of both Services.

D. The final rule should clarify that the best science requirement does not mandate a worst-case analysis or unreasonably conservative assumptions.

The Associations recommend that the Services take this opportunity to clarify that ESA Section 7 does not mandate a worst-case evaluation or support the layering of unreasonably conservative assumptions. The Services are required to use the best scientific and commercial data available in drafting biological opinions.[64] In amending the ESA to include this "best science" requirement, Congress explained that its purpose was to free the Services to issue "no jeopardy" opinions even in the face of data gaps, not to require conservative assumptions that are not indicated by the science:

> As currently written … the law could be interpreted to force [the Services] to issue negative biological opinions whenever the action agency cannot guarantee with certainty that the agency action will not jeopardize the continued existence of the listed species or adversely modify its critical habitat. The [best science] amendment will permit the wildlife agencies to frame their Section 7(b) opinions on the best evidence that is available or can be developed during consultation.[65]

The Supreme Court has similarly clarified that the "best science" requirement is intended "to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise."[66] This requirement both advances "the ESA's overall goal of species preservation," and serves to "avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives."[67]

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[64] 16 U.S.C. § 1536(a)(2).

[65] H.R. Conf. Rep. No. 697, 96th Cong., 1st Sess. 1979, at 12 (1979 WL 10224).

[66] *Bennett v. Spear*, 520 U.S. 154, 176 (1997).

[67] *Id*. at 176-77.

To ensure that Service practice aligns with Congress' intent and the Supreme Court's warning, the Associations recommend that the final rule stress that nothing in the ESA requires Service staff to utilize worst-case scenarios or unduly conservative modeling or assumptions. Instead, Service staff may rely on the science available to reach reasonable conclusions regarding anticipated project impacts. Nothing more was required or authorized by Congress.

IV. Conclusion.

The hydropower industry recognizes the critical importance of protecting threatened and endangered species and their habitats and takes its stewardship responsibilities seriously. Each year, the Associations' members commit significant resources toward the protection and recovery of ESA-listed species. The Associations appreciate the Services' efforts to revise the ESA implementing regulations to maintain protections and conservation benefits while making the regulations more efficient by providing clarity and consistency across their regulatory programs.

The Associations ask that the Services provide the additional clarifications described in its comments above. In particular, the Associations request that the Services further clarify in their final ESA consultation regulations that existing structures and their ongoing impacts are part of the baseline, and should not be analyzed as part of the proposed action or be the subject of reasonable and prudent measures. The Associations also urge the Services not to broaden the circumstances under which reinitiation is required to include informal consultation, as doing so would be inconsistent with established case law and would lead to significant confusion and open-ended requirements. Finally, the Associations request that the Services take additional steps outlined in Section III, above, to provide meaningful procedural relief to applicants and action agencies, and to ensure that the ESA is being carried out consistent with the intent of Congress.

Thank you for your consideration of these comments.

Sincerely,

Linda Church Ciocci

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