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September 24, 2018

Comments regarding the Revision of Regulations for Interagency Cooperation

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

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The Energy and Wildlife Action Coalition ("EWAC")[1] submits these comments in connection with the U.S. Fish and Wildlife Service's ("USFWS") and National Marine Fisheries Service's ("NMFS") (collectively, "Services") July 25, 2018 notice ("Notice") of Proposed Revision of Regulations for Interagency Cooperation ("Proposed Regulations").[2]

EWAC appreciates the time and effort the Services have expended to undertake the Proposed Regulations, and generally believes that they will benefit the Services, the regulated community and, ultimately, species conservation efforts. The Proposed Regulations have the potential to greatly streamline the consultation process while still achieving the underlying purpose established by section 7(a)(2) of the Endangered Species Act ("ESA").[3] With that in mind, EWAC provides a select handful of recommendations we believe will further enhance and refine the Services' Proposed Regulations. 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. General Comments of Support

EWAC supports the Proposed Regulations, and believes that the proposed revisions will result in decreased consultation timeframes and attendant decreases in the cost of consultation for the Services, federal action agencies, and applicants for federal permits, licenses, and other federal approvals, without diminishing the Services' ability to fulfill their statutory mandate to conserve wildlife and their habitats. While the following comments do not address every aspect of the Proposed Regulations that will result in greater efficiency and fewer costs for the Services and regulated community, EWAC would like to commend several proposals in particular.

A. Destruction or Adverse Modification of Critical Habitat

EWAC also appreciates and supports the proposal by the Services to clarify their regulations governing determinations of whether a proposed federal action will result in destruction or adverse modification of critical habitat. Specifically, EWAC appreciates the Services' proposed clarification that, when undertaking destruction/adverse modification analyses, the Services will determine whether the proposed federal action subject to consultation will result in "an alteration that appreciably diminishes the value of critical habitat **as a whole** for the conservation of listed species."[4] EWAC agrees with the Services that, while "[s]maller scales [of critical habitat] can be very important analysis tools in determining how the impacts may translate to the entire designated critical habitat," when they make their ultimate decision as to whether the proposed action will destroy or adversely modify critical habitat, they

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[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.

[2] 83 Fed. Reg. 35,178 (July 25, 2018).

[3] Although federal action agencies have certain obligations concerning listed species pursuant to ESA section 7(a)(1), with one exception, the Proposed Regulations do not address section 7(a)(1) of the ESA. The Proposed Regulations indicate that reinitiation of ESA section 7(a)(2) consultation will not be required when the Bureau of Land Management ("BLM") and/or U.S. Forest Service ("USFS") revise programmatic land management plans to address newly listed species or newly designated critical habitat. *Id.* at 35,189. In those circumstances, the Services explain that they encourage BLM and USFS to develop "section 7(a)(1) conservation programs in consultation with the Services" to "enable [those agencies] to better synchronize their actions and programs with the conservation and recovery needs of listed and proposed species." Because the Services' discussion of federal action agency obligations under ESA section 7(a)(1) is limited to BLM and USFS programmatic land plans, which EWAC does not address herein, EWAC's comments on the Proposed Regulations, refer only to section 7(a)(2) of the ESA.

[4] *Id.* at 35,181 (emphasis added).

must do so based on "the scale of the entire critical habitat designation."[5] Applying the definition of destruction/adverse modification of critical habitat in this way may alleviate the need for a destruction/adverse modification determination for projects that may have an impact to all or a portion of a critical habitat unit, but would be insignificant when viewed against critical habitat with multiple units ("as a whole").

B. Adoption of Agency Initiation Package by the Services

EWAC supports the proposed revisions to 50 C.F.R. § 402.14(h)(3), which would allow the Services to fully adopt a federal action agency's consultation initiation package[6] or the Services' required analyses in connection with the issuance of a permit under ESA section 10.[7] The proposed revisions would effectively streamline the consultation process while providing the same conservation benefits to listed species, particularly in the context of the Services' processing of incidental take permit applications, where the Services must determine pursuant to ESA section 10 that issuance of the requested permit would not "appreciably reduce the likelihood of the survival and recovery of the species in the wild."[8]

C. Standard for Avoidance, Minimization, and Offsetting Measures

EWAC supports the Services' clarification that there is no heightened standard for considering measures that avoid, minimize, or offset adverse effects that are included as part of the proposed action, and that there is no requirement that any avoidance or minimization measures be accompanied by binding plans or a definite commitment of resources.[9] This clarification is important for projects with long-term permits or licenses authorizing their operations, as some measures may need to be implemented over a time period and the details may not be clear at the time of permitting.

D. Expedited Consultations

Finally, EWAC supports the Services' proposal to provide for expedited consultations for actions that will have predictable or minimal adverse effects on species or critical habitat (e.g., habitat restoration projects).[10]

II. Recommendations for Further Clarification

As noted above, while EWAC is supportive of the Proposed Regulations, 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. Effects Analysis

EWAC appreciates the Services' efforts to provide clear direction for the Services' staff, federal action agencies, and the regulated community concerning the reach of the effects analysis required under ESA section 7(a)(2). EWAC supports an approach that appropriately constrains the scope of the effects analysis, can be consistently applied, and is legally defensible. Pursuant to the test set forth by the Services in the Notice, an effect or activity will be found to be "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.[11] Multiple federal Circuit Courts of Appeals have upheld the Services' effects analyses based on

[5] *Id.*
[6] The Proposed Regulations describe the "initiation package" as "the information from the Federal agency necessary to initiate consultation." *Id.* at 35,186. The required elements of an initiation package are described in proposed 50 C.F.R. § 402.14(c). *Id.* at 35,192.
[7] *Id.* at 35,182.
[8] 16 U.S.C. § 1539(a)(2)(B).
[9] 83 Fed. Reg. at 35,183.
[10] *Id.* at 35,188.
[11] 83 Fed. Reg. at 35,183.

application of a "but for" test, and the U.S. Supreme Court has not taken up this precise issue.[12] With that in mind, EWAC recommends the Services further clarify, in making the determination as to whether an effect or activity is caused by the federal action subject to consultation, the Services will apply the best available science and consider whether an effect has a direct, rather than attenuated or speculative connection to the federal action under review. These considerations would provide the Services a framework for analysis that may be uniformly applied in the field, and would also ensure that neither federal action agencies nor project proponents are "charged" with effects that are not proximately caused by the federal action subject to consultation. The Services should also more clearly recognize the limitations on the jurisdiction of the federal action agency to lessen or prevent an effect and exclude any such effect from the Services' analysis.[13] In other words, in determining the reach of consultation, the Services would not consider as effects of the action those activities or effects that the federal action agency has no jurisdiction to influence. Finally, EWAC requests that the Services provide updated examples of how the agencies' ultimate causation test would apply in various contexts. EWAC believes that a more tightly constrained effects analysis, with EWAC's additional recommendations, is legally defensible and will result in consultations that are conducted more efficiently and effectively.

B. Clarifying the Appropriate Scope of Consultation

EWAC believes the Services, federal action agencies, and the regulated community would benefit from regulations clarifying the proper scope of consultation. Many of EWAC's members have experienced conflicting interpretations of the extent to which the Services' consultations and, importantly, incidental take statements ("ITS") issued in connection therewith, apply to linear projects or non-linear projects that are geographically expansive. EWAC believes that a recent "agreement in principle" ("Agreement") reached between USFWS and the U.S. Army Corps of Engineers ("USACE")[14] provides an excellent beginning framework for defining the appropriate scope of consultation where the Services and federal action agencies disagree on the reach of each agency's jurisdiction regarding ESA section 7(a)(2) consultations. The Agreement establishes that, in those instances where USACE is presented with a large, mostly non-federal, linear project with multiple crossings of waters of the United States ("WOTUS"), USACE will provide a biological assessment ("BA") to USFWS that evaluates the larger project as a whole, not just the portions of the project under USACE jurisdiction. That BA would include an analysis of all anticipated effects of the larger project to listed species and critical habitat, including cumulative effects; however, the BA would clearly distinguish those areas and activities that fall within USACE jurisdiction, and those that do not. Importantly, the BA must also clearly distinguish between effects to listed species and any designated critical habitat in areas under USACE jurisdiction, and effects to listed species and critical habitat that occur in areas outside USACE jurisdiction. Where formal consultation occurs, USFWS will issue a biological opinion ("BiOp") and ITS that apply to the entire project area. The ITS will identify reasonable and prudent measures ("RPMs") that apply to areas within USACE jurisdiction and RPMs that apply to areas outside of USACE jurisdiction. So long as the underlying project proponent implements as to the overall project the measures specified in the ITS that are applicable to areas within USACE jurisdiction, USFWS will exercise prosecutorial discretion to apply the ITS to take occurring in areas outside the jurisdiction of USACE. In other words, where the project proponent applies the RPMs to the entire project, regardless of whether or not an area falls within USACE jurisdiction, USFWS will not prosecute the project proponent for unauthorized take of listed species.

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[12] *See, e.g., Sierra Club v. Bureau of Land Management*, 786 F.3d 1219 (9th Cir. 2015); *Medina County Environmental Action Association v. Surface Transportation Board*, 602 F.3d 687, 699-701 (5th Cir. 2010); *Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987).

[13] For example, even though an underlying non-federal project could be built, maintained, or operated in some way without a federal permit, that underlying project is often considered as an effect of the action, forcing the Services and the project proponent to undergo consultation on potentially far-reaching "indirect" effects of the project.

[14] Letter from USFWS Assistant Director of Ecological Services to USACE Director of Civil Works (May 22, 2017) and letter from USACE Director of Civil Works to USFWS Assistant Director of Ecological Services (Oct. 2, 2017).

While EWAC believes the Agreement provides a good starting point, EWAC suggests that the approach would be further strengthened by making three important changes: (1) the applicant should have a significant role in participating in formulating the approach to various aspects of consultation, including formulating any RPMs; (2) the approach established under the Agreement, as augmented by applicant input, should be implemented only where the underlying project proponent ultimately consents to the approach; and (3) should the Services issue regulations codifying the approach, rather than relying on the Services' prosecutorial discretion, the regulations should state that a project proponent abiding by RPMs and other measures established in such a consultation is exempt from the "take" prohibition established by section 9 of the ESA. Such a regulation would provide much needed regulatory predictability that would benefit the Services, federal action agencies, and the regulated community.

C. Environmental Baseline and Scope of Effects Analysis

EWAC appreciates the approach set forth in the Proposed Regulations which seek to clarify the proper scope of consultation and the Services' approach to analyzing effects of the action in making jeopardy and adverse modification determinations.[15] Moreover, EWAC strongly supports the Services' proposed definition of the term "environmental baseline" in the preamble to the rule, which states:

> "Environmental baseline **is the state of the world absent the action under review and** includes the past, present **and ongoing** impacts of all **past and ongoing** 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 § 7 consultation, and the impact of State or private actions in the action area which are contemporaneous with the consultation in process. **Ongoing means impacts or actions that would continue in the absence of the action under review.**"[16]

Clarifying that ongoing actions are considered part of the environmental baseline is consistent with the Services' guidance in the Endangered Species Consultation Handbook ("Consultation Handbook").[17] As the Consultation Handbook explains, "environmental baseline" is "an analysis of the effects of past and ongoing human and natural factors leadings to the current status of the species.[18] "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.*"[19] 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 ("FERC")—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: "[o]ngoing 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."[20]

EWAC also supports the Services' proposal to provide the term "environmental baseline" with a stand-alone definition as well as the Services' proposal to amend 50 C.F.R. § 402.14(g)(4), concerning formal consultation, to clarify that the effects of the action are *added to* the environmental baseline.[21] These revisions will make clear that the environmental baseline is not included in the effect analysis, as

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[15] 83 Fed. Reg. at 35,184.
[16] 83 Fed. Reg. at 35,184 (Services' proposed new language in bold).
[17] Found at: https://www.fws.gov/endangered/esa-library/pdf/esa_section7_handbook.pdf.
[18] Consultation Handbook at 4-22.
[19] *Id.* (emphasis added).
[20] *Id.* at 4-28.
[21] 83 Fed. Reg. at 35,184, 35,192.

intended by the Services under the current regulations and Consultation Handbook. Similarly, EWAC appreciates the Services' clarification that baseline should not be subject to a jeopardy analysis. The Services explain that the phrases "jeopardize the continued existence of" and "destruction or adverse modification" are "determinations made about the effects of the agency actions," *not* "determinations made about the environmental baseline or about the pre-action condition of the species."[22] These distinctions are important as courts have sometimes misconstrued the scope of the effects and jeopardy analyses to include ongoing impacts, which are part of the environmental baseline. For example, in *American Rivers v. Federal Energy Regulatory Commission*,[23] the court concluded that "attributing ongoing project operations to the 'baseline' and excluding those impacts from the jeopardy analysis does not provide an adequate jeopardy analysis."[24] The Services' proposal will help to eliminate this confusion.

EWAC also appreciates and supports the Services' clarification that "there is no 'baseline jeopardy' status even for the most imperiled species," and no "tipping point" beyond which a species cannot recover *for purposes of the Services' ESA section 7(a)(2) determinations*.[25] The Services note that courts have mistakenly asserted that species may already be in "jeopardy" 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.'"[26] EWAC agrees with the Services that ESA section 7(a)(2) provides those agencies "discretion as to how [they] will determine whether the statutory prohibition is exceeded" and that "the state of science often does not allow the Services to identify a 'tipping point' for many species."[27]

While EWAC appreciates and supports these important clarifications, EWAC has a few additional recommendations. First, EWAC encourages the Services to provide additional clarification that existing 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. That is, these ongoing impacts would remain unaffected by issuance of a license or permit. However, if the ongoing action is changed, the incremental change in the ongoing action would be an "effect of the action" and should be the focus of the consultation.

Finally, EWAC recommends that the Services consider clarifying that the term "aggregate effects," which is used in the Consultation Handbook to assist in the Services' jeopardy and adverse modification analyses, means the total effects on the entire population of listed species and any designated critical habitat, after the "effects of the action" and "cumulative effects" are added to the "environmental baseline" and considered in light of the current status of the species or critical habitat. Clarifying the purpose and intent behind the phrase "aggregate effects" is important, as this term has been misconstrued by courts and interpreted to mean that baseline conditions should be included in the analysis of the effects of the action. As the Services are aware, such an interpretation is inconsistent with the Services' existing approach.

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[22] *Id.* at 35, 182.
[23] 895 F.3d 32, 47 (D.C. Cir. 2018).
[24] *Id.* (citing *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 929 (9th Cir. 2008) (concluding that "BiOp impermissibly failed to incorporate degraded baseline conditions into its jeopardy analysis.").
[25] 83 Fed. Reg. 35,183.
[26] *Id.* at 35,182 (citing *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008)); *see also American Rivers*, 895 F.3d at 47 (asserting that "even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm.").
[27] *Id.*

D. Programmatic Consultation

EWAC commends the Services for revising their consultation regulations to include the concept of programmatic consultation, which is defined by the Proposed Regulations as "a consultation addressing an agency's multiple actions on a program, region, or other basis."[28] According to the proposed revisions, programmatic consultations allow the Services to consult on such programmatic actions as: "(1) Multiple similar, frequently occurring or routine actions expected to be implemented in particular geographic areas; and (2) A proposed program, plan, policy, or regulation providing a framework for future proposed actions."[29] The Services' proposed revisions to 50 C.F.R. § 402.14(c)(4) further state that "[a]ny request for formal consultation may encompass…a number of similar individual actions within a given geographical area, a programmatic consultation, or a segment of a comprehensive plan."[30]

While EWAC appreciates the Services' inclusion of the programmatic consultation concept, in ESA section 7(a)(2), EWAC believes that the Proposed Regulations would benefit from additional specificity. For example, regulations governing programmatic consultations should require the Services to include all likely applicants in the development of the programmatic agreement. Similarly, the regulations should provide that a non-federal applicant may choose to decline coverage under a programmatic consultation under ESA section 7(a)(2) and proceed via alternate section 7(a)(2) consultation or ESA authorization mechanisms—including take avoidance, or may suggest conservation or other measures that differ from those analyzed under a programmatic consultation. Additionally, EWAC suggests that the proposed definition of "programmatic consultation"[31] be revised to incorporate the concept that multiple federal agencies may be involved in a federal action that is subject to the ESA section 7(a)(2) consultation requirement.

EWAC further recommends 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 ("ITP") that contemplate participation by entities other than the permittee thereunder. EWAC recognizes that ESA section 7(a)(2) 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 non-federal 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,[32] 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.[33] Moreover, because the Services view their issuance of ITPs as federal actions subject to the requirements of ESA section 7(a)(2) consultation, every ITP issued by the Services undergoes its own ESA section 7(a)(2) 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 habitat conservation plan ("HCP").

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[28] 83 Fed. Reg. at 35,191.
[29] *Id.* at 35,192.
[30] *Id.*
[31] *Id.* at 35,191.
[32] 16 U.S.C. § 1539(a)(2)()B)(iv).
[33] 50 C.F.R. § 402.02.

EWAC members have had significant infrastructure projects that have been substantially delayed due to the requirements of ESA section 7(a)(2) consultation, with attendant cost increases, because the projects have some federal nexus. This has been so despite the fact that in many cases, the project was within the permit area of a USFWS-approved ITP, the ITP had sufficient take authorization, and but for the federal nexus (e.g., nationwide permit requirement), the project would simply have "participated" 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 while the Services cannot require compensatory mitigation in the context of a non-jeopardy BiOp, mitigation is a statutorily-required component of any ITP; therefore, allowing project 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.

In light of the foregoing, EWAC recommends that the Proposed Regulations be revised to include a provision that would streamline ESA section 7(a)(2) consultations occurring within the permit areas of ITPs. Specifically, EWAC requests the Services adopt regulations providing for limited and expedited ESA section 7(a)(2) 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 habitat conservation plan associated with the existing ITP includes as "covered activities" actions that are substantially similar 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 comply with the terms of the existing ITP and HCP, including any minimization, mitigation, adaptive management, and monitoring obligations.

Where those criteria are met, the Services and the federal action agency could engage in expedited or limited consultation, that 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 ITP, and would request the Services' concurrence that 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 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 should not take more than two weeks, subject to the approval or other processes of the underlying ITP.

E. Increased Threshold for 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' Habitat Conservation Planning and Incidental Take Permitting Handbook states:

> Impacts to listed 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.[34]

Thus, the consultation requirements set forth in ESA section 7(a)(2) primarily exist to ensure against jeopardy.

To address this distinction, a new sentence could be added to the Services' regulations at 50 C.F.R. § 402.12(a) as follows:

> (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 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 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.*

50 C.F.R. § 402.13(a) could be revised in similar fashion, to read:

> (a)…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, and found at 50 C.F.R. § 402.14:

> (b) 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.*

Requiring a more accurate threshold for triggering consultation for listed plants would continue to serve the underlying purpose of ESA section 7(a)(2)—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. Indeed, the Services' Consultation Handbook explains that the provisions of ESA section 7(b)(4) do not apply to listed plants.[35] ESA section 7(b)(4) describes the Services' obligations regarding ITSs, and requires that such statements:

> (i) specif[y] the impact of such incidental taking on the species,
>
> (ii) specif[y] those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

[34] Habitat Conservation Planning and Incidental Take Permit Processing Handbook at 7-2. Found at: https://www.fws.gov/endangered/esa-library/pdf/HCP_Handbook.pdf.
[35] Consultation Handbook at 4-49.

> (iii) in the case of marine mammals, specif[y] those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and
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> (iv) set[] forth the terms and conditions…that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii)

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, as RPMs and terms and conditions to implement the same do not to apply to listed plants; therefore, revising the ESA section 7(a)(2) consultation regulations along the lines suggested above would greatly reduce the burden on the Services, federal action agencies, and the regulated community without reducing protections afforded plants by ESA section 7(a)(2).

F. Explicit Statement that Mitigation Cannot be Required Under ESA Section 7

EWAC recommends the Services adopt in the Proposed Regulations a specific statement prohibiting the Services from including compensatory mitigation as a RPM or term or condition of an incidental take statement. USFWS appeared to recognize that the Services do not have the authority to require mitigation in the context of ESA section 7(a)(2) consultation in USFWS's July 30, 2018 withdrawal of the Endangered Species Act Compensatory Mitigation Policy ("ESA Policy Withdrawal").[36] Specifically, in its ESA Policy Withdrawal, USFWS indicated the public had commented that the net gain conservation goal was "incompatible with the standards of ESA Sections 7 and 10."[37] In response, and with respect to ESA section 7(a)(2) consultations, USFWS simply restated the ESA section 7(a)(2) 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.[38] No further reference is made to mitigation in the context of ESA section 7(a)(2) consultations in the ESA Policy Withdrawal. By contrast, in response to the same comment concerning ITPs issued under ESA section 10, USFWS described at some length the parameters the ESA applies to mitigation under section 10 and how federal courts have interpreted the same.

Further, with the exception of USFWS' now withdrawn ESA Compensatory Mitigation Policy, the Services have long held that mitigation is not a component of ESA section 7(a)2) consultations. For example, the Services' Consultation Handbook, finalized in 1998, states: "Section 7[(a)(2)] requires minimization of the level of take. It is not appropriate to require mitigation for the impacts of incidental take."[39] The Consultation Handbook further states "…remember that the objective of the incidental take analysis under Section 7(a)(2) is minimization, not mitigation."[40] Thus, revising the Services' consultation regulations would simply reinforce the agencies' longstanding and correct position that mitigation is not a required component of ESA section 7(a)(2) consultations.

G. Additional Revisions to 50 C.F.R. § 402.03 Concerning "Applicability"

In the Notice, the Services request public comment on whether the agencies should "clarify the circumstances upon which Federal agencies are not required to consult"[41] and specifically request comment on the Services' proposal not to require ESA section 7(a)(2) consultation when:

> The Federal agency does not anticipate take and the proposed action will: (1) Not affect listed species or critical habitat; or (2) have effects that are manifested through global

[36] 83 Fed. Reg. 36,469, 36,471 (July 30, 2018).
[37] *Id.* at 36,470.
[38] *Id.*
[39] Consultation Handbook (1998) at 40-53 (emphasis in the original).
[40] *Id.*
[41] 83 Fed. Reg. at 35,185.

> processes and (i) cannot be reliably predicted or measured at the scale of a listed species' current range, or (ii) would result at most in an extremely small and insignificant impact on a listed species or critical habitat, or (iii) are such that the potential risk of harm to a listed species or critical habitat is remote, or (3) result in effects to listed species or critical habitat that are either wholly beneficial or are not capable of being measured or detected in a manner that permits meaningful evaluation.[42]

EWAC supports the Services' proposal to include a test for a federal action agency to apply in determining whether to consult on its action, and recommends that the proposal include an additional clarification. Current consultation regulations state clearly that ESA section 7(a)(2) and 50 C.F.R. § pt. 402 apply only to "actions in which there is discretionary Federal involvement or control."[43] As the Services and project proponents are keenly aware, however, whether an action agency has discretionary involvement in or control over a non-federal activity is often unclear.

In 2007, in *National Ass'n of Homebuilders v. Defenders of Wildlife* ("*Defenders*"),[44] the United States Supreme Court upheld 50 C.F.R. § 402.03 and USFWS' and the federal action agency's interpretation of that regulation. In that case, the Court noted the futility that would be associated with requiring an action agency without discretion to nevertheless complete the ESA section 7(a)(2) consultation process:

> The regulation's focus on "discretionary" actions accords with the commonsense conclusion that, when an agency is *required* to do something by statute, it simply lacks the power to "insure" that such action will not jeopardize endangered species.[45]

EWAC recommends that the Services add a provision in 50 C.F.R. § 402.03 adopting the Supreme Court's rationale as set forth in *Defenders*, namely that, where a statute provides enumerated standards by which an action agency must evaluate and approve a permit, license, funding, or approval decision, the action agency does not have the discretion that would otherwise trigger consultation obligations under ESA section 7(a)(2).[46] Examples of nondiscretionary federal actions that lower courts have found not to trigger a consultation obligation include federal agency approval of oil spill response plans under the Clean Water Act,[47] federal agency approval of annual dam operating plans pursuant to the Colorado River Basin Project Act,[48] and Bureau of Reclamation water allocations under the Colorado River Compact of 1922.[49]

H. Limiting the Scope of Re-initiated Consultation

EWAC supports the Services' proposed revisions to 50 C.F.R. § 402.16 to:

> [c]larify that the duty to reinitiate does not apply to an existing programmatic land management plan prepared pursuant to the Federal Land Policy Management Act…or the National Forest Management Act…when a new species is listed or new critical habitat is designated.[50]

In addition to the proposed clarification set forth above, EWAC recommends that the Services also consider revising their consultation regulations to specify that, where re-initiation of consultation is

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[42] *Id.*
[43] 50 C § 402.03.
[44] 551 U.S. 644 (2007).
[45] *Id.* at 667 (emphasis in the original).
[46] *Id.* at 669-71.
[47] *Alaska Wilderness League v. Jewell*, 788 F.3d 1212 (9th Cir. 2015).
[48] *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 691 F.3d 1008 (9th Cir. 2012).
[49] *Defenders of Wildlife v. Norton*, 257 F.Supp.2d 53 (D.D.C. 2003).
[50] 83 Fed. Reg. at 35,189.

required due to a new species listing or critical habitat designation, the re-initiated consultation shall only address effects to the newly listed species or designated critical habitat, and shall not reexamine effects to listed species and critical habitat covered by the prior consultation, unless one of the other conditions for triggering re-initiation, as set forth in 50 C.F.R. § 402.16, has been met.

III. Responses to Specific Request for Comment on Timeline for Informal Consultations

The Services request feedback on the agencies' proposal to include in their ESA section 7(a)(2) regulations a 60-day deadline for completion of informal consultation under ESA section 7(a)(2). The Services' Notice correctly points out that "[t]here is currently no deadline for the Services to complete an informal consultation, unlike formal consultations, which by regulation should be completed within 90 days unless extended under the terms at 402.14(e)."[51] The Services then provide the agencies' goal concerning informal consultation timelines: issuance of a letter of concurrence or a request for formal consultation within 30 days. The Notice explains that the NMFS completes approximately 1,200-1,500 informal consultations per year and USFWS completes an average of 11,344 informal consultations per year, and indicates that, while many of these informal consultations have been completed within that 30-day goal, many have not.

EWAC supports the Services' proposal to incorporate a deadline for completion of informal consultation, subject to extension by mutual consent, but believe that the deadline for completion of informal consultation should except in extraordinarily complex situations be 30 days, rather than the 60 days contemplated in the Proposed Regulations. Moreover, EWAC recommends the Services state clearly that the mutual consent required for an extension must include consent by the Services, the federal action agency, *and* the applicant. Further, EWAC recommends that the Services include in such regulations that the 30-day clock begins to run on the date the action agency provides to the Services a request for concurrence, along with appropriate documentation, which the Services should describe clearly and reasonably in regulations or guidance, that a proposed action is not likely to adversely affect listed species of fish or wildlife or their designated critical habitat and is not likely to jeopardize the continued existence of listed plant species or destroy or adversely modify critical habitat designated for the same.

IV. Summary

As noted above, EWAC believes the Proposed Regulations would result in greater efficiency and predictability in the consultation process. EWAC appreciates the opportunity to comment on the Services' Proposed Regulations, and looks forward to continuing to work with the Service in its efforts to improve the ESA section 7(a)(2) consultation process.

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[51] *Id.* at 35,185.