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Submitted via Federal eRulemaking Portal: http://www.regulations.gov
Docket No. FWS-HQ-ES-2018-0009

Re: NESARC Comments on Proposed Revisions of Regulations for Interagency Cooperation

Dear Ms. Tortorici and Mr. Aubrey:

The National Endangered Species Act Reform Coalition ("NESARC") respectfully provides the following comments and recommendations on the July 25, 2018, Notice of Proposed Rulemaking on Revisions of Regulations for Interagency Cooperation ("Proposed Rule").[1]

NESARC is the country's oldest broad-based, national coalition dedicated solely to achieving improvements to the Endangered Species Act ("ESA") and its implementation. As detailed in the membership list attached to these comments,[2] NESARC includes agricultural interests, cities and counties, conservationists, electric utilities, energy producers, farmers, forest product companies, home builders, landowners, oil and gas companies, ranchers, realtors, water and irrigation districts, and other businesses and individuals throughout the United States. NESARC and its members are committed to promoting effective and balanced legislative and administrative improvements to the ESA that support the protection of fish, wildlife, and plant populations as well as responsible land, water, and resource management.

[1] 83 Fed. Reg. 35,178 (Jul. 25, 2018).

[2] *See* Appendix A.

I. Overview

Under ESA Section 7(a)(2), federal agencies must consult with the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") (collectively, the "Services") regarding the potential effects of a discretionary federal action upon a listed species and any designated critical habitat.[3] The Section 7 consultation process is one of the portals through which governmental and private projects are subject to review under the ESA and may be modified or conditioned as part of the jeopardy, adverse modification and incidental take inquiries. The Services correctly acknowledge that the last comprehensive amendments to the ESA were adopted in 1988 and that the implementing regulations for Section 7 consultations have not been comprehensively examined and updated since 1986. Modernization of the ESA and the Section 7 consultation regulations is long overdue and warranted.

NESARC commends the Services on their effort to review and propose improvements to the existing consultation regulations. The consultation process has proven to be unwieldly—too complex for simple permits and inadequate for application to complex regulatory actions. Through numerous Administrations, NESARC has advocated for improvements to the Section 7 consultation process, including for measures that:

- streamline existing procedures;
- clarify key definitions, standards and consultation procedures;
- allow for more cost effective and reliable implementation of species and habitat protection measures;
- provide for greater collaboration with applicants so that reasonable, workable solutions can be identified and achieved; and
- ensure that consultations are timely initiated and concluded within the statutory deadlines.[4]

Improving and clarifying the consultation regulations are an important and necessary step to update and modernize the Services' implementation of the ESA.

[3] 16 U.S.C. §1536(a)(2).

[4] *See* NESARC Comments on Regulatory Reform and Reducing Regulatory Burdens (Nov. 1, 2017); NESARC Comments on the FWS/NMFS Proposed Rule on Definition of Destruction or Adverse Modification of Critical Habitat (Oct. 9, 2014); Comments on Improvements to the Section 7 Consultation Process (Aug. 3, 2009); and NESARC Comments on Proposed Rulemaking re Implementing Regulations for Interagency Cooperation Under the Endangered Species Act Section Consultations (Oct. 14, 2008).

II. Comments on Proposed Changes to the Section 7 Consultation Regulations

In furtherance of the Services' consideration of improvements to the Section 7 consultation process, NESARC provides the following comments.

A. "Adverse Modification" and Related Terms and Guidance

1. "Adverse Modification" Definition

The Services propose to revise the definition of "destruction or adverse modification" under 50 C.F.R. § 402.02 to: (i) clarify that the evaluation of effects focuses on whether there is an appreciable diminishment of the value of critical habitat "as a whole"; and (ii) strike, as unnecessary and confusing, a sentence attempting to explain when precluding or delaying the development of physical and biological features may rise to a level of adverse modification.[5] NESARC supports these changes.

In the Proposed Rule, the Services properly clarify that the adverse modification inquiry examines the effects of the action on the designated critical habitat "as a whole." As modified, the definition of "destruction or adverse modification" places the inquiry in its proper functional context. Simply, alteration of critical habitat is not a *per se* adverse modification. Critical habitat designations come in many shapes and sizes and with varied constituent elements. Further, the animating purpose of the critical habitat designation is species-specific. The courts have recognized that the measure of adverse modification is whether the action would significantly reduce the functionality of such critical habitat, or render it non-functional, in the context of the overall designation.[6] Likewise, the courts have held that a portion of critical habitat can be altered or even destroyed without appreciably diminishing the value of critical habitat for the species' survival or recovery.[7] Thus, the Services' proposal merely makes explicit the common understanding of the adverse modification inquiry in the first instance. Namely, adverse modification is to be measured within the functional context of the implications of the action for the critical habitat "as a whole."

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[5] 83 Fed. Reg. at 35,179-81.

[6] *Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1057 (9th Cir. 2013) (upholding no adverse modification determination when portion of critical habitat would be degraded but no reduction in functionality); *Rock Creek Alliance v. U.S. Fish & Wildlife Serv.*, 663 F.3d 439, 442-43 (9th Cir. 2011) (agreeing that a project's scope of habitat impacts did not constitute adverse modification when considered in the context of the relative size of the overall critical habitat designation).

[7] *Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 620 F.3d 936, 948 (9th Cir. 2010) (noting that the project would destroy only a very small percentage of each affected species' critical habitat, whether viewed on a unit or nationwide basis).

NESARC also supports the Services' determination that the second sentence of the present "adverse modification" definition should be removed as it is vague and confusing. To be clear, the reasons for deleting this sentence go well beyond its vague and confusing nature. Rather, removal of this sentence is warranted because the discussion of preclusion or delay of physical or biological features steps beyond the statute and Congressional intent. In the 1973 enactment of the ESA, the initial version of Section 7(a) provided that federal agencies take measures necessary to ensure that their actions do not "result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical."[8] In explaining the purpose of this formulation, reports from both the House and Senate stated that the focus of this provision was to prevent physical acts of "destruction of critical habitat of [listed] species."[9] In 1978, Section 7(a) was clarified to address "destruction or adverse modification."[10] If anything, the 1978 amendment narrowed the prohibition from "modification" to "adverse modification"—neither of which encompasses vague notions of precluding or delaying development of physical or biological features.

2. A Regulatory Definition of "Appreciably Diminish" is Warranted

In their regulatory preamble, the Services recognize that the term "appreciably diminish" is a key concept within the adverse modification inquiry.[11] Yet, to date, the Services have declined to adopt a definition of this key term. To provide regulatory certainty and consistency in application, the term "appreciably diminish" warrants definition within the implementing regulations.

In the regulatory preamble, the Services reference their prior discourse on "appreciably diminish" within the Services' prior 2016 rulemaking on the adverse modification definition.[12] Far from establishing clarity of the term, the Services' preamble discussion reinforces the need for a clear definition. For example, the Services first equate "appreciably diminish" to the word "considerably" in the Section 7 Consultation Handbook and suggest that the term "means 'worthy of consideration' and is another way of stating that we can recognize or grasp the quality, significance, magnitude or worth of the reduction in the value of critical habitat."[13]

[8] 87 Stat 892 (Dec. 28, 1973).

[9] H. Rep. No. 93-412 at 14 (July 27, 1973); S. Rep. No. 93-307 at 9 (July 1, 1973) (actions "do not . . . result in the destruction of its habitat.").

[10] H. Rep. 95-1625 at 3 (Sept. 25, 1978).

[11] 83 Fed. Reg. at 35,182.

[12] *Id.*

[13] *Id.* (quoting 81 Fed. Reg. at 7218 (Feb. 11, 2016)). This approach, i.e., equating appreciably diminish to a question of whether an effect can be perceived or recognized, has been rejected by the courts and should not be followed. For example, courts have stated that "[p]laintiffs' interpretation of 'appreciably' to mean any

Shortly thereafter, however, the Services put forward a slightly different interpretation of "appreciably diminish," explaining that "we must evaluate, based on the totality of the circumstances and the best available scientific information, the nature and magnitude of the proposed actions' effects, to determine whether such effects are consequential enough to rise to the level of 'appreciably diminish' or 'appreciably reduce.'" While touching on some of the same themes, they are decidedly different formulations of an appreciably diminish standard. In particular, the former (wrongly) conceives of "appreciably diminish" as merely a question of whether the diminishment is noticeable or capable of recognition. The latter (properly) emphasizes a quantitative assessment of the effect's nature and magnitude to determine if the consequences of the activity "rises to the level" of appreciable diminishment.

NESARC's Recommendation for a Proposed Definition of "Appreciably Diminish":

The term "appreciably diminish" is susceptible to multiple interpretations—as evidenced by the Services' own preamble. It is incumbent upon the Services to end this uncertainty and provide a clear and practical regulatory definition of "appreciably diminish." NESARC recommends that the Services recognize that "appreciably diminish" is a quantitative measure of significance and magnitude, not one of mere recognition. Therefore, NESARC recommends that the Services adopt, as part of 50 C.F.R. § 402.02, the following definition:

> *Appreciably diminish* means a measured or observed effect that, in the totality of the circumstances and using the best scientific and commercial data available, is of a nature and magnitude that it results in a consequential impact upon the ability of the critical habitat, as a whole, to support the conservation[14] of the listed species.

'perceptible' effect would lead to irrational results, making any agency action that had any effects on a listed species a 'jeopardizing' action." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, 606 F. Supp. 2d 1195, 1208 (E.D. Cal. 2008) (emphasis in original); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 875 (E.D. Cal. 2010) (same), *aff'd in part, rev'd in part sub nom. San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014). Consequently, the term "appreciably" must be interpreted to mean more than capable of being merely recognized or grasped. Specifically, the "appreciably diminish" inquiry requires an assessment as to both the magnitude and significance of the effect upon designated critical habitat as a whole.

[14] In a separate rulemaking docket addressing changes to regulations governing the process for listing and critical habitat determinations, NESARC has proposed a modification to the terms "conserve, conserving, and conservation" to delete the phrase "i.e., the species is recovered in accordance with § 402.02 of this chapter. *See* Comments of the National Endangered Species Act Reform Coalition, Docket No. FWS–HQ–ES–2018–0006 (Sept. 24, 2018).

3. The Adverse Modification Inquiry Must be Capable of Effective Administration and Remain Within the Bounds and Purposes of the Section 7 Consultation Process

The Services must ensure that the adverse modification inquiry remains consistent with its statutory purpose and, overall, allows for practical implementation. The courts have recognized that the "ESA [is] not [to] be implemented haphazardly, on the basis of speculation or surmise."[15] This basic principle applies to the adverse modification evaluation. Simply, the consultation process is not a license for the Services to attempt to re-design or re-engineer a proposed project. The purpose of the adverse modification inquiry is for the Services to advise action agencies on whether the proposed action will result in the destruction or adverse modification of designated critical habitat. Where adverse modification is determined, then, the Services must provide advice on reasonable and prudent alternatives ("RPAs") that will avoid such adverse modification.[16] RPAs must be: (i) capable of implementation in a manner consistent with the intended purpose of the action; (ii) consistent with the scope of the Federal agency's legal authority and jurisdiction; and (iii) economically and technologically feasible.[17] These standards, set forth in the statute and integrated into the consultation regulations, must always inform the determination of whether adverse modification will occur.

Further, the Services must continue to emphasize a practical approach to the adverse modification inquiry so that it can be effectively administered. A focus on functionality of habitat is central to this effort and consistent with existing court precedent.[18] For example, in explaining the appreciable diminishment of habitat values, the Ninth Circuit has stated that:

> Adverse effects on individuals of a species or constituent elements or segments of critical habitat generally do not result in jeopardy or adverse modification determinations unless that loss, when added to the environmental baseline, is likely to result in significant adverse effects throughout the species' range, or appreciably diminish the capability of the critical habitat to satisfy essential requirements of the species.[19]

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

[16] 16 U.S.C. §1536(b)(3)(A)..

[17] 50 C.F.R. §402.02.

[18] *Rock Creek Alliance*, 663 F.3d at 442-43 (upholding no adverse modification determination when all critical habitat elements would remain functional, although at a lower functional level, and the most significant impacts would only last five to seven years).

[19] *Butte Envtl. Council*, 620 F.3d at 948 (citing Consultation Handbook at 4-34).

Thus, degradation of a portion of a species' critical habitat is not a *per se* adverse modification. Rather, the measure of adverse modification is whether the action would significantly reduce the functionality of such critical habitat, or render it non-functional, in the context of the species' overall range.[20] Likewise, the courts have held that a portion of critical habitat can be destroyed without appreciably diminishing the value of critical habitat for the species' survival or recovery.[21]

B. Effects of the Action

The Services propose to modify the definition of "effects of the action" to: (i) eliminate the sub-categorization of direct effects, indirect effects, and interrelated or interdependent actions; and (ii) clarify that an effect or activity is caused by the proposed action "if it would not occur but for the proposed action and it is reasonably certain to occur."[22] As a related matter, the Services also propose a new regulatory provision (50 C.F.R. § 402.17) explaining when an activity is "reasonably certain to occur."[23] NESARC addresses each of these matters in turn.

1. Removal of Effects Categorization and Emphasis on "But-For" Causation

NESARC generally agrees that the categorization of "effects" often unnecessarily complicates and distracts from efficiently identifying those material effects that are caused by the proposed action and have a reasonable certainty of occurrence. In fact, members of NESARC have personally experienced delays in both informal and formal consultations because of misunderstandings and disputes as to how to categorize a particular effect. However, in addressing the matter, Services are proposing to end categorization of direct and indirect effects and "interrelated and interdependent actions." While categorization of effects is not necessary, differentiation and identification of interdependent and interrelated actions is still required. Retaining identification of interdependent and interrelated actions is necessary to ensure the proper overall scope of the consultation. Upon identification of interdependent and interrelated actions that are to be covered within the consultation, the "effects of the action" can capture, without categorization, the overall effects of the activities under review.[24]

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[20] *Conservation Cong.*, 720 F.3d at 1057 (upholding no adverse modification determination when portion of critical habitat would be degraded but no reduction in functionality); *Rock Creek Alliance*, 663 F.3d at 442-43.

[21] *Butte Envtl. Council*, 620 F.3d at 947-48 (noting that the project would destroy only a very small percentage of each affected species' critical habitat, whether viewed on a unit or nationwide basis).

[22] 83 Fed. Reg. at 35,183.

[23] *Id.* at 35,183-84.

[24] Within the Consultation Handbook, the Services characterize interdependent and interrelated actions as "other activities that are interrelated to, or interdependent with, [the proposed] action." *See e.g.*, FWS & NMFS, *Endangered Species Consultation Handbook, Procedures for Conducting Consultation and Conference Activities*

NESARC supports, with clarification, the identification of the "effects of the action" through application of basic principles of "but for" causation and confirmation that a particular effect is reasonably certain to occur. The Services' framework can be improved by adopting additional measures and clarifications to ensure the proper identification of effects of the action that then inform the various consultation inquiries. Specifically, the proper framework for identifying the effects of the action should be:

> (1) use of a "but for" evaluation to identify the potential effects of the action under review (i.e., effects of the proposed action and any interrelated or interdependent action that are included within the consultation scope);
>
> (2) application of a "reasonably certain to occur" standard to refine the effects identification to those that can be observed or measured and in which the occurrence of the effect is reasonably certain and not a matter of speculation or surmise; and
>
> (3) confirmation that there is a material, causal relationship between the action(s) under review and the potential effects as informed by the proximity, distribution, timing, nature, duration and frequency of the action and the identified effects.

The last element (#3, above), adapts the Services' existing approach to identifying indirect effects as set forth in the Consultation Handbook. Not only will this confirming step align with existing guidance, it also will provide a practical framework for evaluating the necessary causal relationship between the action and identified effects.

Identification of the effects of the action through the above framework will allow the Services to appropriately apply other elements of the consultation inquiry. For example, in the identification of any RPAs or reasonable and prudent measures ("RPMs"), the appropriate avoidance or minimization measures must stay within the authority of the action agency to impose or an applicant to implement.[25] Further, in the identification of take for purposes of any

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under Section 7 of the Endangered Species Act at 4-26 (1998) ("Consultation Handbook"). In the regulatory preamble to this NOPR, the Services discuss this interaction between action and activities—in the context of the proposal to end the categorization of direct and indirect effects and interdependent and interrelated actions. 83 Fed. Reg. at 35,183. NESARC has proposed the retention of interdependent and interrelated actions. To align with this retention and ensure consistent application of the reasonably certain to occur standard, NESARC also has proposed to revise the proposed 50 C.F.R. § 402.17 to refer to "actions, activities or affects" for purposes of applying the reasonably certain to occur standard.

[25] In Section III.A of these comments, NESARC is proposing that the Services adopt a regulatory framework that formally extends incidental take authorization to all non-federal persons or entities, irrespective of their jurisdictional status with the action agency, that undertake elements of the authorized project or activity that is the subject of the biological opinion. Such incidental take authorization would be conditioned upon compliance with all

incidental take statement under Section 7(b)(4)(iv), the Services must continue to apply principles of proximate causation and foreseeability in the identification of potential take under existing precedent.[26]

NESARC's Recommendation for Defining "Effects of the Action":

Consistent with the comments above, NESARC recommends that the Services further clarify the definition of "effects of the action" as follows (NESARC's suggested revisions are highlighted):

> *Effects of the action* are all ~~refers to the direct and indirect~~ effects ~~of an action~~ on the listed species or critical habitat~~, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline~~ that are caused by the proposed action, including the effects of interrelated or interdependent actions ~~other activities that are caused by the proposed action~~. An effect ~~or activity~~ is caused by the ~~proposed~~ action or activity under review within the consultation if it would not occur but for the ~~proposed~~ identified action, ~~and~~ it is reasonably certain to occur, and there is a material, causal relationship between the action under review and the potential effects as informed by the proximity, distribution, timing, nature, duration, and frequency of the action and the effect. Effects of the action may occur later in time and may include effects occurring outside the immediate area involved in the action.

2. Application of a "Reasonably Certain to Occur" Standard

The Services apply the concept of "reasonably certain to occur" to both the determination of "effects" and the identification of an "activity" whose effects are attributed to the proposed action for purposes of the consultation inquiry. With respect to identifying a relevant "activity," the Services explain that the "activity cannot be speculative, but does not need to be guaranteed."[27] Further, the Services clarify that factors identifying a relevant "activity" include past relevant experiences, existing relevant plans, and "remaining economic, administrative, and legal requirements necessary for the activity to go forward."[28]

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applicable RPMs and implementing terms and conditions within the incidental take authorization, including any necessary reporting of incidental take that occurs.

[26] *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.,* 515 U.S. 687, 690-708 (1995); *Aransas Project v. Shaw*, 756 F.3d 801, 817 (5th Cir. 2014).

[27] 83 Fed. Reg. at 35,193, proposed Section 402.17.

[28] *Id.*

As an initial matter, NESARC notes that the use of "activity" is not prevalent within the consultation inquiry—which typically addresses matters within the context of "actions" and evaluates "effects." Accordingly, the Services should clarify that their intention was to apply the "reasonably certain to occur" standard to actions and effects under review pursuant to Section 7. For example, this clarification ensures application of the "reasonably certain to occur" standard to the identification of interdependent or interrelated actions.

NESARC agrees with the Services that a "reasonably certain to occur" standard should apply in the identification of "effects of the action"—including identifying relevant effects or activities as addressed within that definition. However, we believe that clarifications and improvements are still warranted.

First, further clarification of how the "reasonably certain to occur" standard applies in the identification of effects would be useful. In particular, the regulatory preamble does not directly explain the Services' approach to discerning when a particular effect is reasonably certain to occur. This stands in direct contrast to the Services' proposal of a new Section 402.17 adopting specific regulatory language covering when an activity will be considered reasonably certain to occur. Clarity of application is warranted.

The term "reasonably certain" is often viewed as akin to "clear and convincing evidence."[29] Importantly, this is a clear step above reasonable foreseeability. In the present consultation regulations, the "reasonably certain to occur" standard is referred to within the treatment of indirect effects.[30] In practical application, the courts have looked to whether the Services have provided a rational explanation of their conclusion that a particular effect will occur as a matter of "reasonable certainty" with a particular emphasis on: (1) reliance upon the best scientific and commercial data available; (2) the level of established connection or causation between action and the measured effect; and (3) the point at which an effects analysis moves from known facts into speculation and surmise.[31] The Services have extensive experience in applying the reasonably certain to occur standard within the context of identifying effects of the proposed action. This experience should be drawn upon to articulate a core set of factors, within the proposed Section 402.17, that will inform a consistent application of the reasonably certain to occur standard.

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[29] See e.g., *Amgen, Inc. v. Hoechst Marion Roussel, Inc.*, 339 F.Supp.2d 202, 262 (D.Mass.2004) (same); *Blacks Law Dictionary* 577 (7th ed.1999) (defining "clear and convincing evidence" as "evidence indicating that the thing to be proved is highly probable or reasonably certain."); *Duffer v. Continental Holdings Inc.*, 173 F.Supp. 689, 709 (N.D. Ill. 2016) ("Reasonable" means '[s]ufficient, adequate, or appropriate for the circumstances or purpose; fair or acceptable in amount, size, number, level, quality, or condition. ["Reasonable" Oxford English Dictionary (3d ed. 2009).] Read together, 'reasonably certain' thus means 'sufficiently certain' or 'adequately certain.'")

[30] 50 C.F.R. § 402.02.

[31] *See, e.g., San Luis & Delta Mendota Water Auth. v. Jewell*, 747 F.3d 581, 628-34 (2014).

NESARC also recommends that the Services clarify the factors articulated for considering whether an activity or effect is "reasonably certain to occur" for inclusion in the analysis of an action's effects.[32] The Services have proposed to consider as factors: past relevant experiences; existing relevant plans; and remaining economic, administrative, and legal requirements necessary for an action to move forward.[33] While these factors are pertinent, the wording of Section 402.17 is unnecessarily confusing. First, the threshold for determining which experiences or plans are "relevant" will be susceptible to multiple interpretations. Second, there is no clear indication as to what might even be considered an "experience" or "existing plan." The Services must provide more meaningful and clear criteria for discerning whether an action or effect is "reasonably certain to occur."

NESARC's Recommendation for Improvements to the Application of the Reasonably Certain to Occur Standard:

NESARC recommends that the Services take two key steps: (1) identify a set of factors to apply in determining what effects are reasonably certain to occur from a proposed action; and (2) clarify their proposed factors for determining which actions or activities may be reasonably certain to occur along with the proposed action for purposes of considering their consequent effects in elements of the consultation analysis. We further believe these improvements can be made through modification of the proposed Section 402.17 as follows:

402.17 Other provisions.

(a) ~~*Activities*~~ *Actions, activities or effects that are reasonably certain to occur*. To be considered reasonably certain to occur, the evaluation must be based on the best scientific and commercial data available and the action, activity or effect cannot be speculative, but does not need to be guaranteed.

(b) For an action or activity, factors ~~Factors~~ to consider include, but are not limited to:

[32] NESARC also has proposed a clarification of the proposed 50 C.F.R. § 402.17 to clarify its application to the identification of "actions," particularly with respect to determination of interdependent and interrelated actions.
[33] 83 Fed. Reg. at 35,193.

(1) ~~Past relevant experiences~~ The extent to which a prior action that is similar in scope, nature, magnitude and location has caused a consequent action or activity to occur;

(2) Any existing ~~relevant~~ plans for the initiation of an action or activity by the consulting action agency, the permit or license applicant or another related entity that is directly connected to, and dependent upon, implementation of the proposed action; and

(3) The extent to which a potential action or activity has intervening or necessary ~~Any remaining~~ economic, administrative, and legal requirements that are prerequisites ~~necessary~~ for the action to be initiated and the level of certainty that can be attributed to the completion of such intervening or necessary steps. ~~go forward~~

(c) For an effect, factors to consider include, but are not limited to:

(1) The extent to which the effect is reasonably capable of specification and the Service has observed or measured the effect arising from an action that is similar in scope, nature, magnitude and location of the proposed action.

(2) In the application of any modeling of project impacts for discernment of the effects of the action, the level of accuracy and reliability in the modeling program and the extent to which modeling input data have been field-tested or otherwise independently verified; and

(3) The extent to which there are intervening events that may preclude the effect from occurring or prerequisite conditions that must be in place for the effect to occur.

(d) The provisions in paragraph (b) ~~(a)~~ of this section apply only to actions interdependent or interrelated with but not included in, the proposed action or considered under cumulative effects.

C. Environmental Baseline:

Presently, the Services include a definition of the "environmental baseline" as part of the definition for the "effects of the action."[34] Within the Proposed Rule, the Services segregate and establish the term "environmental baseline" as its own defined term—but without modification.[35] However, as part of the regulatory preamble, the Services seek comments on whether modifications to the "environmental baseline" definition should be made and pose specific changes for public comment.[36] In addition, the Services pose a series of questions on particular issues arising in establishing an environmental baseline for "ongoing" actions.[37]

NESARC supports the segregation of "environmental baseline" into a stand-alone definition. Further, we agree that clarifications to the definition are warranted—not only with respect to the treatment of ongoing activities but also to inform a more consistent and precise identification of the environmental baseline to be used within the consultation. To further inform the Services' deliberations on the treatment of the environmental baseline, we provide the following thoughts and recommendations.

1. Ensure That the Environmental Baseline Reflects Present Conditions at the Time of the Proposed Agency Action.

The environmental baseline acts as a "snapshot" of a species' health at the time of the consultation. Importantly, the baseline is the starting point for the Services' analysis as to the effects of the proposed action on the species and any designated critical habitat. Thus, the environmental baseline records the conditions within the action area "as is." The purpose of the environmental baseline is not to create a hypothetical environment in which certain features, projects or events have, or have not, occurred. In establishing the environmental baseline, the action agency and Services are not picking and choosing facts, they are observing and recording data on the present conditions. This does not mean that the baseline records only "static" conditions. For example, the environmental baseline can properly document known trends as of the date of the proposed action, such as an average growth rate for a common tree that may be affected by the proposed action. Likewise, the environmental baseline can document both the known population of a listed species within the action area and current trend data reflecting its overall species health.

[34] 50 C.F.R. § 402.02

[35] 83 Fed. Reg. at 35,184.

[36] *Id.*

[37] *Id*.

The Services have properly recognized that one of the more contentious issues within certain Section 7 consultations has been disputes regarding how to develop an environmental baseline for ongoing activities. First, NESARC believes some of these problems have been caused by inappropriate attempts to push the baseline back to pre-project conditions or some other hypothetical set of conditions. This approach is unequivocally wrong and inconsistent with the purposes of a Section 7 consultation. The fact that a project or facility has existed within the action area for some time period prior to the triggering federal agency action does not change the identification of the environmental baseline—it remains the evaluation of the baseline conditions in existence at the time of the proposed federal agency action. If the project or physical feature already exists, its existence is part of the environmental baseline.

2. An Action or Activity "Which is Under Review and Ongoing"

As a preliminary matter, NESARC recommends that the question of how to treat "ongoing actions" can be more clearly addressed within regulatory text by reference to an *action or activity "which is under review and ongoing*." This approach is more precise and specific to the matters being raised by the Services. In particular, the environmental baseline already addresses "other" ongoing actions through its identification of the types of projects, actions, and activities that are present in the action area—all of which are presumably ongoing and reflected in the environmental baseline.

3. Responses to Specific Questions

What constitutes an ongoing action? First, as noted above, the Services should clarify that their inquiry is how to properly define an action or activity that is under review and also is "ongoing." An action that is under review is also "ongoing" when the project, feature or activity is in present existence and its implementation or operation is proposed to, or will, continue in the future. The physical existence, implementation and present operations of the ongoing project are part of the environmental baseline.

If an ongoing action is changed, is the incremental change in the ongoing action the only focus of the consultation or is the entire action or some other subject reviewed? Under Section 7(a)(2), the scope of the consultation is co-extensive with the action agency's jurisdiction and the action under review. For example, where an entity has an existing permit or authorization, it may seek modification of a particular term or condition within its federal permit/authorization. In that scenario, the modification of the federal permit/authorization is of a limited, incremental nature and the consultation should be similarly structured to the nature of the agency action. There also are situations where an ongoing action is subject to a license or authorization with a set term of years, but can be renewed upon application to the action agency. At renewal, the applicant may also seek modifications of the project. There, the consultation covers the scope of the action agency's action, i.e., the renewal or extension of the ongoing

action, including any future modifications—as bounded by the applicable statutory provisions governing such renewal or extension. As a matter of clarification, the prior effects and existence of the ongoing action already are reflected in 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."[38]

Is the effects analysis different if the ongoing action has never been the subject of consultation as compared to if there is a current biological opinion for the ongoing action? If the ongoing action has been subject to prior review under Section 7 and there is a current biological opinion, the Services' reinitiation regulations should apply. In that instance, reinitiation is limited to those matters within the action agency's continued discretionary authority.[39] The environmental baseline for a reinitiation should reflect the conditions "as of" the re-initiation to appropriately examine the effect of the actions now under consultation review.

Where an ongoing action has not previously undergone Section 7 consultation, the action agency must undertake informal or formal consultation as warranted, using the proper environmental baseline. We anticipate that the Services would apply an evaluation framework (discussed above) for the appropriate identification of the effects of the action. This would include consideration of the scope of the action agency's authority regarding the proposed action for the purpose of applying the "but for" factors in the context of the federal action agency's authorities to review and authorize the continuation of the ongoing action.

The Services' question on this matter highlights an issue that should be addressed within any final Section 7 consultation rule. There are instances where a biological opinion is issued for a project as a result of a permitting action by one federal agency. However, in the future, a new federal authorization or approval of the project may be required from a different agency. Informally, the Services have sometimes allowed for an amendment to an existing biological opinion to add a new federal agency. However, the present consultation regulations do not clearly address this circumstance. The consultation regulations should include a clear process by which an existing biological opinion can be amended, without reinitiation, to add new federal agencies that have later federal actions or authorizations. Further, a permit or license applicant that is involved in the subject action must be consulted with, and agree to, the amendment of an existing biological opinion to incorporate later federal agency actions or approvals.

[38] Consultation Handbook at 4-28.

[39] 50 C.F.R. § 402.16. *See e.g., Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1080 (9th Cir. 2001); *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995).

If a change is made to the ongoing action that lessens, but does not eliminate, the harmful impact to listed species or critical habitat is that by definition a "beneficial action?" Yes, provided that the reduction in impacts is reasonably capable of specification by measurement and qualitative observation. In particular, this lessening of impacts will be an improvement in the conditions recorded within the environmental baseline. Thus, it constitutes a beneficial action.

Can a "beneficial action" ever jeopardize listed species or destroy or adversely modify critical habitat? No. To the extent a proposed action has a beneficial effect, it *per se* cannot jeopardize the continued existence of a listed species or result in adverse modification of designated critical habitat. Moreover, the effects of ongoing beneficial actions are incorporated into the environmental baseline and therefore cannot be the basis of a jeopardy/adverse modification determination.

If an action may have beneficial and adverse effects, the Section 7(a)(2) consultation inquiry examines whether the proposed agency action will jeopardize the continued existence of the species or result in the destruction or adverse modification of critical habitat. Further, as the Services have recognized in this Proposed Rule and regulatory preamble, both the jeopardy and adverse modifications require a causal relationship that examines only those effects that but for the proposed action would not occur and which are determined to be reasonably certain to occur. Moreover, the jeopardy and adverse modification inquiries examine the causal relationship between the proposed action, its effects, and the conditions at which jeopardy or adverse modification arises. Within this context, both beneficial and adverse effects of a proposed action are examined. It is the proposed federal agency action, not a subset of either beneficial or adverse effects, that is evaluated within the jeopardy and adverse modification inquiries.

NESARC's Recommendation for a Definition of "Environmental Baseline":

As reflected in the comments above, NESARC proposes the following improvements to the Services' proposed definition of "Environmental baseline" (Services' proposed additions in **bold**):

> Environmental baseline **is the state of the species, critical habitat and the** environment within the action area **~~world~~ absent the** specific effects of the proposed agency **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 section 7 consultation, and the impact of State or private actions in the action area which are

> contemporaneous with the consultation in process. A proposed agency action that is under review may involve an action or activity that is entirely new or an incremental change to an action or activity that is ongoing. An action or activity that is ongoing means one that is already in present existence, implementation or operation and is proposed to, or will, continue in the future, the effects of which already are reflected in the existing environmental conditions within the action area. **Ongoing ~~means~~ impacts** include adverse or beneficial effects. **~~or actions that would continue in the absence of the action under review~~**

D. Defining Programmatic Consultations

The Services propose to add a regulatory definition of "programmatic consultation" and to define such consultations as covering an agency's multiple actions "on a program, region, or other basis."[40] Further, the Services describe programmatic consultations as specifically focused on "multiple similar, frequently occurring or routine actions" within a particular geographic area as well as programs, plans, policies or regulations that provide a "framework for future actions."[41] This new definition is then reflected in the addition of a term within Section 402.14(c)(4) which allows for a request for formal consultation to encompass a "number of individual actions within a given geographical area, a programmatic consultation, or a segment of a comprehensive plan."[42]

NESARC supports the greater use and implementation of programmatic consultations. At present, the Services often are faced with multiple individual informal and formal consultation inquiries for similar activities. An effective programmatic consultation process could alleviate some of the inherent inefficiencies of the present consultation process.

The Services' addition of a programmatic consultation definition is a necessary first step—but more work is required. The Services must be more diligent in applying and meeting the statutory deadlines for the completion of formal consultations when undertaking programmatic consultations. Further, the Services should remove certain artificial limitations on the types of actions that may be covered. For example, the Services have limited programmatic consultations to those actions "within a particular geographic area." In addition, the present definition does not recognize the possibility that more than one federal agency may be involved within a set of actions that are still capable of programmatic review. These drafting oversights

[40] 83 Fed. Reg. at 35,814-85 & 35,191-92.

[41] *Id.*

[42] *Id*. at 35,192.

act as unnecessary restrictions to the effective use of programmatic consultations and ignore the practical realities of agency actions.

NESARC's Recommendation for Improvements to the Programmatic Consultation Definition and Procedures:

NESARC recommends that the Services modify the terms addressing programmatic consultations as follows:

- Modify the Programmatic Consultation definition to allow programmatic consultations that may involve more than one federal agency and remove artificial limitations to a particular geographic area:

  Programmatic consultation is a consultation addressing ~~an agency's~~ multiple actions on a program, region, or other basis undertaken by one or more agencies. Programmatic consultations allow the Services to consult on the effects of programmatic actions such as:

  (1) Multiple similar, frequently occurring or routine actions expected to be implemented in particular geographic areas (which may or may not be contiguous); and

  (2) A proposed program, plan, policy, or regulation providing a framework for future proposed actions.

- Clearly apply the statutory deadlines for consultations to programmatic consultations through modification of Section 402.14(c)(4):

  Section 402.14(c)…

  (4) Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area(s) (which may or may not be contiguous), a programmatic consultation or a segment of a comprehensive plan. This provision does not relieve the Federal agency of the requirements for considering the effects of the action or actions as a whole or the Director's obligation to timely complete the formal consultation pursuant to [Section 402.14(e) and (g)].

E. Exclusions From the Need to Consult Under Section 402.03

Within their Proposed Rule, the Services seek comment on whether it is necessary to modify the "applicability" provisions set forth in Section 402.03 for the purpose of clarifying the circumstances where an action agency is required to consult.[43] At present, Section 402.03 solely provides that the consultation requirements apply to all actions in which there is discretionary Federal involvement or control.[44] Through the Section 7 Consultation Handbook, the Services have articulated informal exclusions for certain activities that do not rise to the level of effects triggering an obligation to consult.[45] In particular, the Services have explained the discountable, insignificant or beneficial effects on a species or its critical habitat do not trigger consultation requirements. These, and other, exclusions should be formally promulgated within the consultation regulations.

NESARC's Recommendation on Potential Regulatory Exclusions From the Applicability of Section 7 Consultations:

NESARC recommends that the Services adopt regulatory text enumerating categories of actions that can be determinatively excluded from Section 7 consultations. Using the discussion from the regulatory preamble, NESARC proposes the following regulatory text:

> Section 402.03. Applicability.
>
> (a) Except as otherwise provided under paragraph (b), Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control; and
>
> (b) A Federal Agency is not required to consult under this Part, when the Federal Agency determines that it does not anticipate take of a listed species and the proposed action will:
>
> (1) ~~N~~not affect or have wholly beneficial effects upon listed species or critical habitat; or
>
> (2) have effects that are manifested through large-scale or global processes and
>
> (i) cannot be reliably predicted or measured at the scale of a listed species' current range, or

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

[44] 50 C.F.R. § 402.03.

[45] Consultation Handbook at 3-12.

(ii) would result at most in an extremely small and insignificant impact on a listed species or critical habitat, or

(iii) pose ~~the potential~~ a remote 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 discountable, insignificant or ~~are either wholly beneficial or~~ ~~are~~ not capable of being measured or detected in a manner that permits meaningful evaluation.

The Federal agency shall be responsible for retaining records regarding its determination that the proposed action is not subject to a requirement to consult and may, as warranted and within its discretion, request concurrence from the Service regarding the determination that no consultation is required pursuant to this paragraph.

F. Adopting Timelines for Initiation and Completion of Informal Consultations

For many federal agency actions, the Section 7 consultation obligation is met through informal consultation procedures and concludes with a determination, by the action agency, that the action will either have no effect or is not likely to adversely affect listed species or designated critical habitat. A decision that an action is not likely to adversely affect a listed species or critical habitat is subject to concurrence by the Services.[46] As a general matter, the informal consultation process has served as a useful vehicle for reviewing the potential effects of an action, and a majority of Section 7 consultations are completed through these informal consultations.

One of the key concerns with the informal consultation process has been the lack of formal timelines for its completion. In particular, the consultation regulations are silent as to the timeframe and deadlines for the Services to complete their concurrence reviews of a "not likely to adversely affect" determination. In the regulatory preamble, the Services explain that they have a "goal" of either issuing a letter of concurrence or requesting additional information, within 30 days of the submission of a biological assessment and not likely to adversely affect determination. [47] By the Services' own data, there is varied success in meeting this informal 30-day goal.[48]

[46] 50 C.F.R. § 402.13.

[47] 83 Fed. Reg. at 35,185.

[48] *Id*.

NESARC's Recommendation on Concurrence Review Deadlines:

NESARC supports the adoption of a realistic and enforceable deadline for the completion of concurrence reviews. Further, to be effective, the Services must provide for a more structured concurrence review process. NESARC recommends that several elements inform the development of applicable deadlines and a more specific concurrence review procedures:

- A "60 day or less" period should be set for the completion of any "concurrence" review.

- The Services should clarify the scope of action agency determinations that require concurrence review, including identifying appropriate exclusions for minor or inconsequential effects.

- The applicant or designated non-federal representative[49] should be expressly allowed to participate in all aspects of the informal consultation.

- The 60-day "clock" should be initiated upon the submission of a notice requesting concurrence review. This concurrence review notice may be submitted in parallel with, or after, the submission of a biological assessment and supporting information detailing the basis of the action agency's determination.

- Within 15 days of the concurrence review notice, the Services must request any additional information that they seek to inform their concurrence review.

- The Services cannot refuse to complete a concurrence review based on the lack of additional information. Consistent with existing guidance,[50] if the Service identifies data gaps, it must acknowledge those data gaps within its concurrence review and assess such matters within the context of its ability to concur or not concur with the action agency's determination.

- A written concurrence determination must be issued within 60-days of the action agency's request for review.

[49] NESARC also is proposing the participation of designated non-federal representatives in the formal consultation process. *See*, below, Section II.G.

[50] *See* Consultation Handbook at 1-7.

- Any extension of either the 15-day deadline for supporting information requests or the 60-day deadline for completion of a concurrence review must receive the consent of the applicant or designated non-federal representative.

- The Service may not refuse to concur with a "not likely to adversely affect" determination based on the time period allowed for the concurrence review.

G. Updating and Streamlining Formal Consultation Procedures

In the Proposed Rule, the Services propose a series of changes to improve and streamline the formal consultation process, including: (i) updating the information requirements for initiation of formal consultations under Section 402.14(c); (ii) clarification of the analytical steps undertaken by the Services in evaluation of the effects of the action and treatment of avoidance, minimization and offsetting measures under Section 402.14(g); and (iii) drafting of the biological opinion, including introduction of a "collaborative" process for adoption of an agency's information and analysis within the opinion under Section 402.14(h).[51] In addition, the Proposed Rule includes a general framework through which an action agency and the Services may enter into a mutual agreement to expedite consultations on an action or class of actions.[52]

NESARC's Comments and Recommendations on Additional Streamlining and Updating Improvements to the Formal Consultation Process:

NESARC supports the Services' efforts to update and streamline the formal consultation procedures. As the Services have noted, the Section 7 consultation regulations have not been comprehensively updated since 1986. Given the advances in available technology, analytical methods and the collective experience in consultations over three decades, updates to this process are long-overdue. To contribute to the Services' efforts, below, NESARC recommends additional revisions to the formal consultation procedures (as proposed to be amended) under Section 402.14. These changes include:

- Recognition of consultation exclusions under Section 402.03;

- Allowing full participation within the formal consultation process by an applicant or a designated non-federal representative (i.e., a non-federal party undertaking the activity or operation that is the subject of the agency action);

[51] 83 Fed. Reg. at 36,186-88 & 35,192.

[52] *Id.* at 35,188 & 35,192-93.

- Clarification that the action agency initiates the consultation "clock" by submission of a written request for formal consultation and certification that it has transmitted to the Services all of the relevant and available information upon which the action agency's request for consultation and opinion has been made; and

- Striking language implying that an additional information request by the Service under Section 402.14(f) may impose a study funding mandate or obligation upon an applicant or non-federal party.

In conjunction with the proposed changes to Section 402.14 (below), NESARC also recommends that the Services clarify the definition of "designated non-federal representative" to reflect their ability to fully participate in all aspects of the Section 7 consultation, including formal consultation. NESARC's recommendations are highlighted.

§402.14 Formal consultation.

[No proposed changes to § 402.14(a)]

. . .

(b) *Exceptions.* (1) A Federal agency need not initiate formal consultation if, (i) the action has been determined to be excluded from consultation under §402.03; or (ii) 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 or critical habitat.

(2) A Federal agency need not initiate formal consultation if a preliminary biological opinion, issued after early consultation under §402.11, is confirmed as the final biological opinion.

(c) *Initiation of formal consultation.*

(1) A written request to initiate formal consultation shall be submitted to the Director and shall include:

~~(1)~~(i) A description of the proposed action ~~to be considered;~~, including any measures intended to avoid, minimize, or offset effects of the action. Consistent with the nature and scope of the proposed action, the description shall provide sufficient detail to assess the effects of the action on listed species and critical habitat, including:

(A) The purpose of the action;

(B) The duration and timing of the action;

(C) The location of the action;

(D) The specific components of the action and how they will be carried out, including any proposed measures intended to avoid, minimize, or offset effects of the action;

(E) Maps, drawings, blueprints, or similar schematics of the action; and

(F) Any other available information related to the nature and scope of the proposed action relevant to its effects on listed species or designated critical habitat.

([new clause]) In the event that the proposed action includes measures that are intended to avoid, minimize or offset effects of the action which have been proposed by a designated non-federal representative or applicant, such measures shall be described as proposed by the designated non-federal representative or applicant, without modification by the action agency unless express consent to the modification has been given by the designated non-federal representative or applicant.

~~(2)~~(ii) A map or description of all ~~the specific~~ areas ~~that may~~ to be affected directly or indirectly by the Federal action, and not merely the immediate area involved in the action (i.e., the action area as defined at § 402.02)~~;~~.

~~(3)~~(iii) Information obtained by or in the possession of the Federal agency and any information submitted by an applicant or designated non-federal representative ~~A description of any~~ on the listed species ~~or~~ and designated critical habitat ~~that may be affected by~~ in the action area (as required by paragraph (c)(1)(ii) of this section), including available information such as the presence, abundance, density, or periodic occurrence of listed species and the condition and location of species' habitat, including any critical habitat~~;~~.

~~(4)~~(iv) A description of the ~~manner in which the~~ effects of the action ~~may affect any listed species or critical habitat~~ and an analysis of any cumulative effects~~;~~.

~~(5)~~(v) ~~A summary of any~~ Any other ~~R~~relevant information provided by the applicant or designated non-federal representative ~~if available.reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; and~~

~~(6)~~(vi) Any other relevant available information on the effects of the proposed action~~, the affected~~ on listed species~~,~~ or designated critical habitat, including any relevant reports such as environmental impact statements and environmental assessments.

(2) A Federal agency may submit existing documents prepared for the proposed action such as NEPA analyses or other reports in substitution for the initiation package outlined in this paragraph (c). However, any such substitution shall be accompanied by a written summary specifying the location of the information that satisfies the elements above in the submitted document(s).

(3) Formal consultation shall ~~not~~ be initiated by the Federal agency by the transmittal of a written request for formal consultation and certification that the Federal agency has submitted all relevant and available information upon which it is requesting the Service's consultation and opinion ~~until any required biological assessment has been completed and submitted to the Director~~ in accordance with §402.12 and §402.14(c) and (d).

(4) Any request for formal consultation may encompass, subject to the approval of the Director, a number of similar individual actions within a given geographical area, a programmatic consultation, or a segment of a comprehensive plan. This provision does not relieve the Federal agency of the requirements for considering the effects of the action or actions as a whole.

[No proposed changes to Section 402.14(d)]

(e) *Duration and extension of formal consultation.* Formal consultation concludes within 90 days after its initiation unless extended as provided below. If an applicant or designated non-federal representative is not involved, the Service and the Federal agency may mutually agree to extend the consultation for a specific time period. If an applicant or designated non-federal representative is involved, the Service and the Federal agency may mutually agree to extend the consultation provided that the Service submits to the applicant or designated non-

federal representative, before the close of the 90 days, a written statement setting forth:

(1) The reasons why a longer period is required,

(2) The information that is required to complete the consultation, and

(3) The estimated date on which the consultation will be completed.

A consultation involving an applicant or designated non-federal representative cannot be extended for more than 60 days without the consent of the applicant or designated non-federal representative. Within 45 days after concluding formal consultation, the Service shall deliver a biological opinion to the Federal agency and any applicant or designated non-federal representative.

(f) *Additional data.* When the Service determines that additional data is necessary and would provide a better information base from which to formulate a biological opinion, the Director may request an extension of formal consultation and request that the Federal agency obtain additional data to determine how or to what extent the action may affect listed species or critical habitat. If formal consultation is extended by mutual agreement according to §402.14(e), the Federal agency shall obtain, to the extent practicable, that data which can be developed within the scope of the extension. The responsibility for conducting ~~and funding~~ any studies belongs to the Federal agency and the applicant or designated non-federal representative, not the Service. The Service's request for additional data is not to be construed as the Service's opinion that the Federal agency has failed to satisfy the information standard of section 7(a)(2) of the Act. If no extension of formal consultation is agreed to, the Director will issue a biological opinion using the best scientific and commercial data available.

(g) *Service responsibilities.* Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant or designated non-federal representative.

(2) Evaluate the current status and environmental baseline of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Add the effects of the action and cumulative effects to the environmental baseline and in light of the status of the species and critical habitat, and ~~F~~formulate the Service's~~its biological~~ opinion as to whether the action~~, taken together with cumulative effects,~~ is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

(5) Discuss with the Federal agency and any applicant or designated non-federal representative the Service's review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Service will utilize the expertise of the Federal agency and any applicant or designated non-federal representative in identifying these alternatives. If requested, the Service shall make available to the Federal agency as well as any applicant or designated non-federal representative the draft biological opinion for the purpose of analyzing the reasonable and prudent alternatives. The 45-day period in which the biological opinion must be delivered will not be suspended unless the Federal agency secures the written consent of the applicant or designated non-federal representative to an extension to a specific date. The applicant or designated non-federal representative may request a copy of the draft biological opinion from the Federal agency. All comments on the draft biological opinion must be submitted to the Service through the Federal agency, although the applicant or designated non-federal representative may send a copy of its comments directly to the Service. The Service will not issue its biological opinion prior to the 45-day or extended deadline while the draft is under review by the Federal agency and applicant or designated non-federal representative. However, if the Federal agency submits comments to the Service regarding the draft biological opinion within 10 days of the deadline for issuing the opinion, the Service is entitled to an automatic 10-day extension on the deadline.

(6) Formulate discretionary conservation recommendations, if any, which will assist the Federal agency in reducing or eliminating the impacts that its proposed action may have on listed species or critical habitat.

(7) Formulate a statement concerning incidental take, if such take is reasonably certain to occur.

(8) In formulating its biological opinion, any reasonable and prudent alternatives, and any reasonable and prudent measures, the Service will use the best scientific and commercial data available and will give appropriate consideration to any beneficial actions as proposed or taken by the Federal agency or applicant or designated non-federal representative, including any actions taken prior to the initiation of consultation. Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action are considered like other portions of the action and do not require any additional demonstration of specific binding plans or a clear, definite commitment of resources.

[No proposed changes to Section 402.14 (h) – (m)]

Modification to definitions in Section 402.02[53]*:*

Designated non-Federal representative refers to a person designated by the Federal agency as its representative to participate in all aspects of consultation on the agency's action and that is either an applicant[54] or a non-federal person or governmental entity with legal rights or responsibilities relating to the project or activity that is the subject of the consultation. ~~conduct informal consultation and/or to prepare any biological assessment~~.

H. Treatment of Existing Land or Water Management Plans Under the Services' Reinitiation Procedures

The Services have proposed a series of updates to the reinitiation procedures to reflect common practices and address ambiguities that have been identified over the years of managing reinitiation requests. NESARC supports the proposed clarifications to Section 402.16 on these matters.

[53] If this definition is adopted, conforming changes may be required to Section 402.08.

[54] The Services also should adopt appropriate regulatory language to ensure that, when the Federal agency action involves an application or request for authorization from a private or non-federal party, the applicant is designated as the non-Federal representative or the applicant has affirmatively concurred in the designation of another party.

One of the changes proposed by the Services is the adoption of language clarifying whether the listing of a new species or designation of new critical habitat triggers a requirement for a federal agency to reinitiate consultation on an approved land management plan under the Federal Land Policy Management Act ("FLPMA") or the National Forest Management Act ("NFMA").[55] As proposed, a new listing or critical habitat designation would not trigger a reinitiation obligation, as long as authorized actions under the plan, which may affect the listed species or critical habitat, can be addressed through a separate, project-specific consultation.[56] NESARC agrees with this approach. Consultations on federal resource plans, such as FLPMA and NFMA land management plans, are often programmatic reviews that address the effects of the plan implementation—while accommodating future consultation on site-specific activities under the umbrella of such plan. Under this framework, there is no practical need for reinitiation on the federal resource plan, which establishes a programmatic framework and accommodates consultation on specific projects that arise through implementation of the resource management plan.

The Services also have requested input on whether the FLPMA and NFMA exclusion should be applied to other types of programmatic land or water management plans.[57] NESARC supports the broader application of this approach. The extension of this term will ensure comparable treatment of programmatic federal resource plans. As a practical matter, as long as the federal resource plan is programmatic in nature and allows for individual consultations on specific projects or activities undertaken pursuant to such plan, there is a similarity of regulatory framework that allows for comparable application of the reinitiation exclusion.

III. Additional Recommendations for Improvement of the Section 7 Consultation Implementing Regulations

In their regulatory preamble, the Services have requested public comments and recommendations on additional changes to the Section 7 consultation regulations.[58] Further, the Services explain that, based on comments received to the Proposed Rule, they may include revisions to the consultation regulations that are a "logical outgrowth" of the proposed regulations.[59] NESARC appreciates the opportunity to identify other elements of the consultation regulations that warrant review as well as other overarching considerations that

[55] 83 Fed. Reg. at 35,188-89 & 35,193.

[56] *Id*., proposed Section 402.16(b).

[57] *Id.* at 35,189.

[58] *Id.* at 35,179.

[59] *Id.*

should inform future Section 7 consultation improvements. Specifically, we recommend the following clarifications and improvements:

A. Confirm the Extension of Incidental Take Authorizations to Applicants and Non-Federal Entities With Responsibility for Implementing the Project or Activity That is the Subject of the Biological Opinion

One unique aspect of the Section 7 consultation is that the review of the proposed action encompasses the action or activity as described, and its potential effects, and may extend beyond the immediate area involved in the action. In particular, the application of a "but-for" causation standard for identifying effects of the action can extend the scope of reviewed effects beyond the jurisdictional boundaries of the action agency. In a similar vein, multiple parties may be engaged in the performance or undertaking of an "action" that is the subject of the consultation. While this circumstance is partially recognized through the acknowledgement of the role of an "applicant" within the regulations, the scope of responsible and engaged parties is much greater. These potential "gaps" are often cited as a question regarding the applicability of any incidental take authorization and the consequent responsibility to follow all identified RPMs and implementing terms and conditions that are a condition of the take authorization.

In a May 22, 2017 letter agreement between FWS and the U.S. Army Corps of Engineers ("USACE"),[60] FWS recognized that "[i]n some instances, the federal action that triggers the section 7 consultation is smaller in scope than the overall project, and the biological opinion and associated incidental take statement consider effects that occur outside the jurisdiction of the action agency."[61] This conclusion properly interprets the incidental take inquiry under ESA Section 7 to include the identification of potential take, and the granting of incidental take authority, associated with implementation of the overall project. The "Process for Section 7 Consultation in Small Federal Handle Situations" adopted by the FWS and USACE contemplates that the biological opinion will evaluate "all components of the larger project" and that take associated with the larger project will be addressed as part of the incidental take statement.[62] For impacts arising from the larger project, but that are outside of the USACE's jurisdiction, FWS explained that any reasonable and prudent terms that are applicable to the broader project "must be implemented directly by the applicant if the take exemption is to apply."[63] Further, FWS agreed to monitor the impacts of incidental take reports from the applicant during the progress of the action. Finally, FWS confirmed that, if the USACE has no further discretionary federal

[60] Letter of Gary Frazer, FWS to James C. Dalton, U.S. Army Corps of Engineers (May 22, 2017).

[61] *Id.* at 1.

[62] *Id.*, Attachment, Process for Section 7 Consultation in Small Federal Handle Situations, at 1.

[63] *Id.* at 1-2.

involvement or control over the activities that precipitate an incidental take of a listed species, but the applicant is carrying out the action in full compliance with the applicable incidental take statement and RPMs, then, "[FWS] will exercise its enforcement discretion and not seek section 11(e) enforcement against applicant."[64]

NESARC recommends that the Services build upon the ideas set forth in this November 22, 2017 letter agreement and the accompanying Process for Section 7 Consultation in Small Federal Handle Situations. Specifically, the Services should adopt a regulatory framework that formally extends incidental take authorization to all non-federal persons or entities, irrespective of their jurisdictional status with the action agency, that undertake elements of the authorized project or activity that is the subject of the biological opinion. Such incidental take authorization can be conditioned upon compliance with all applicable RPMs and implementing terms and conditions within the incidental take authorization, including any necessary reporting of incidental take that occurs.

B. Reduce Monitoring and Reporting Burdens and Accommodate Advancements in Technology

Reporting and monitoring requirements are often voluntarily adopted as avoidance and minimization measures within a proposed action or proposed by the Services as part of RPAs or RPMs within the formal biological opinion. While important tools for monitoring species status and project effects, monitoring and reporting requirements, in practice, can be overly burdensome and may be quickly outdated by technological improvements. This is of particular concern given the continuing advancement in information technology, data formats, and tools.

The Services do not have a consistent practice in handling administrative changes to the terms of their biological opinions or incidental take authorizations—particularly in relation to advancement in reporting and monitoring technologies that may have rendered an existing term or condition obsolete. Further, such administrative matters should not require a formal reinitiation of a consultation and its attendant bureaucracy. Accordingly, NESARC recommends that the Services adopt a streamlined process for review and adoption of changes to monitoring and reporting requirements within a formal biological opinion or an incidental take statement that can be initiated by an applicant or designated non-federal representative and completed within a discrete time frame (e.g., 30 days).

[64] *Id.* at 2.

C. Improve Data Transparency

Transparency of information and decisions can be a powerful tool for improving overall implementation of Section 7 consultations. One of the significant burdens faced by applicants in preparing for, and participating in, a Section 7 consultation is the lack of a central database on prior consultations and existing biological opinions. A central and available repository of species and habitat information would significantly help in the preparation of biological assessments and supporting information—and reduce the unnecessary duplication of data collection and analysis within individual consultations.

The Services receive a wealth of information on listed species and critical habitat conditions through their informal and formal consultations. With the understanding that some data may still require confidential protection, it would be beneficial to the Services, action agencies and applicants for common data to be made available for use in future consultations on the same species/habitat. Accordingly, NESARC recommends that the Services identify and implement data transparency measures including:

- Adopt procedures for identification and public dissemination of those resources, research, data and other information that are determined to be the best scientific and commercial data available, in particular for widely affected species/consultation types.

- Maintain a central database repository of GIS information that has been supplied to the Services as part of individual consultations, including measures by which a designated non-federal representative can access the database for the specific purpose of preparing data for inclusion in a biological assessment.

- Adopt and post a common protocol for the use of peer-reviewed data, statutorily mandated scientific reviews and other data in the conduct of Section 7 consultations. Specifically, the Services should establish ESA-specific guidance and protocols on the use of peer reviewed data, weighting of data sources and identification of other data compilations that can be relied upon during the consultation inquiry.

Overall, the Services must improve tracking and public availability of consultation determinations. A continuing concern with the consultation process is the lack of publicly available information on the status of individual consultations and the results of formal consultations, including measures ultimately adopted as part of RPAs or RPMs within final biological opinions.

D. Continue to Recognize that the Potential for Climate Change and its Potential Effects on Particular Species and Habitat Cannot Be Predicted at a Local Level and Cannot be Attributed as Effects of Individual Federal Actions or Underlying Activities

The Services must continue to recognize that the ESA was not constructed for the purpose of regulating greenhouse gas emissions.[65] The Section 7 consultation inquiry is focused on specific actions and the evaluation of effects that have a clear causal relationship with the proposed action and which are reasonably certain to occur. In promulgating the consultation regulations in 1986, the Services stated they "were not able to define specific spatial and temporal limits for the concept of indirect effects that would satisfy every conceivable situation, and believe[s] that sufficient understanding of the term exists so that confusion will not occur."[66] Over the past decade, the Services have grappled with the question of how to address changes in climate within the Section 7 consultation process and the related issue of the treatment of greenhouse gas emissions from a particular activity or action. To date, the Services have approached these matters with caution and the understanding that basic principles of causation cannot attribute global processes, such as climate change, to individual actions.

The best scientific information available consists primarily of large-scale modeling of potential climate change impacts. Such information and modeling does not provide the level of granularity required to show harm caused by a particular greenhouse gas emission to any specific species populations, much less individual populations or members of the species within a particular action area.

There is no scientific basis from which the Services can conclude that changes to greenhouse gas emissions from a particular facility, such as adding, expanding, or removing an individual facility like a power plant or paper mill (in any location), or revising its permit requirements, will have a detectable effect on the ambient carbon dioxide (CO_2) levels—much less species or critical habitat that may be within the project's action area. The level of data sets and models currently used in climate change research, as well as the fact that world-wide greenhouse gas emissions are so large, means that incremental effects cannot be attributed to a single action or inaction. At this point, the state of climate change science can only work on the

[65] *See e.g.*, Statement of the Secretary of the Interior, Kenneth Salazar, Press Release, "*Salazar Retains Conservation Rule for Polar Bears, Underlines Need for Comprehensive Energy and Climate Change Legislation*" (May 8, 2009) ("the Endangered Species Act is not the proper mechanism for controlling our nation's carbon emissions."); and Hearing Report, Statement of David Hayes, Deputy Secretary of the Interior to the Senate Committee on Energy and Natural Resources at p. 18 (Mar. 12, 2009) ("The Endangered Species Act is not well suited to deal with climate change which is a global phenomenon that has built up over decades.").

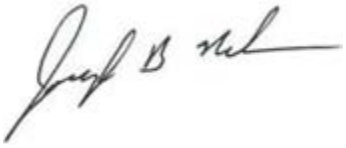
[66] 51 Fed. Reg. 19,926, 19,930.

hemispheric level and is not capable of modeling individual emission sources, much less determining how such action may ultimately affect a listed species in a particular region.

IV. Conclusion

NESARC greatly appreciates the opportunity to provide these comments to the Services. We respectfully request that you take these comments into full consideration when contemplating revisions to the Section 7 consultation regulations and any associated policies and procedures.

Sincerely,



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Southwestern Power Resources Association
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Sulphur Springs Valley Electric Cooperative
Willcox, Arizona

Teel Irrigation District
Echo, Oregon

Washington State Potato Commission
Moses Lake, Washington

Washington State Water Resources Association
Yakima, Washington

Wells Rural Electric Company
Wells, Nevada

Western Energy Supply and Transmission (WEST) Associates
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West Side Irrigation District
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