



NATIONAL ENDANGERED SPECIES ACT
REFORM COALITION

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Public Comments Processing
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**Re: NESARC Comments on Proposed Revisions to Regulations for Listing
Endangered and Threatened Species and Designating Critical Habitat**

Dear Ms. Galst and Ms. Somma:

On June 22, 2023, the U.S. Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) (collectively, the “Services”) issued a proposed rule to implement changes to the regulations for listing or delisting species and for designating critical habitat under Section 4 of the Endangered Species Act (“ESA”).¹ Pursuant to the Federal Register notice, the National Endangered Species Act Reform Coalition (“NESARC”) respectfully provides its comments and recommendations on the Services’ Proposed Rule.

NESARC is the country’s oldest broad-based, national coalition dedicated solely to achieving improvements to the ESA and its implementation. As detailed in the membership list attached to these comments, NESARC includes agricultural interests, cities and counties, conservationists, electric utilities, energy producers, farmers, forest product companies, home builders, 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.

The Services’ Proposed Rule would rescind or make revisions to regulatory provisions that were promulgated in 2019. As discussed in more detail below, NESARC generally opposes these proposals as they would undermine regulatory clarity and improved regulatory certainty

¹ FWS and NMFS, *Listing Endangered and Threatened Species and Designating Critical Habitat*, 88 Fed. Reg. 40,764 (June 22, 2023) (“Proposed Rule”). On July 28, 2023, the Services denied a number of requests for extension of the comment period, including requests submitted by NESARC, some of its members, and the U.S. Small Business Administration Office of Advocacy.

provided by the Services' prior regulatory revisions and, in some cases, are contrary to the requirements of the ESA. First, the ESA already prohibits the consideration of economic or other impacts when making a listing determination, and the Services' proposed regulatory revision could prevent the disclosure of information necessary to inform the appropriate areas of any designated critical habitat. Second, instead of rescinding the foreseeable future framework, the Services should make additional revisions to clarify that it is the ability to make "reliable predictions" of future threats and responses of the species that establishes the duration of foreseeability. Third, the ESA requires delisting of a species when it no longer meets the definition of being an endangered or a threatened species, which is not contingent on achieving a separate recovery standard. Fourth, because critical habitat only receives protection through the ESA Section 7 consultation process, the Services should clarify that it would not be prudent to designate critical habitat when the specific areas may not contribute to the conservation of the species. Finally, the Services fail to appreciate that Congress established a more onerous procedure for the designation of unoccupied critical habitat, and that regulatory provisions establishing when an area is "essential for the conservation of the species" should be retained.

I. Referencing Economic or Other Impacts of Listing Determinations

The Proposed Rule would restore the phrase "without reference to possible economic or other impacts of such determination" to 50 C.F.R. § 424.11(b).² This phrase was removed in 2019 to reflect that the Services could disclose potential economic and other impacts of species listing determinations, but not rely on or take such information into account during the listing process.³ Now, the Services propose to reverse course and reinstate the removed language to clarify that economic impacts and any other impacts that might flow from a listing decision must not be taken into account when making listing, reclassification, and delisting determinations. The Services' proposed change is not warranted.

Section 4 of the ESA specifies that listing determinations be made "solely on the basis of the best scientific and commercial data available."⁴ Restoring the regulatory provision is unnecessarily redundant and overly restrictive. While it is well established that listing decisions can only consider and rely on biological criteria, there is no statutory prohibition on other types of information or potential implications that can be provided and disclosed in a proposed or final listing rule. Indeed, in the Proposed Rule, the Services state that they can evaluate "economic data and information relevant to understanding the threats to the species that must be assessed under the statutory factors."⁵ If the Services believe that it is permissible to consider economic information relevant to threats, it is also permissible to identify, but not rely on, economic and other impacts associated with the listing.

² Proposed Rule at 40,765.

³ FWS and NMFS, *Regulations for Listing Species and Designating Critical Habitat*, 84 Fed. Reg. 45,020, 45,024 (Aug. 27, 2019) ("2019 Final Rule").

⁴ 16 U.S.C. § 1533(b)(1) (emphasis added).

⁵ Proposed Rule at 40,766 (emphasis in original). On its face, this rationale is inconsistent with the statutory provision that listing decisions are based "solely" on the best scientific and commercial data available and contradicts the Services' explanation for restoring the regulatory provision.

Furthermore, the ESA states that, to the extent prudent and determinable, critical habitat should be designated “concurrently” with a listing determination.⁶ As the Services are aware, critical habitat can only be designated “after taking into consideration the economic impacts, and any other relevant impact, of specifying any particular area as critical habitat.”⁷ Pursuant to the Services’ regulations, the economic and other impacts are determined and evaluated by “compar[ing] the impacts with and without the designation.”⁸ Thus, in the event of a designation of critical habitat concurrent with a listing determination, the Services are obligated to identify and disclose the economic and other impacts attributable to the listing itself versus those attributable to the critical habitat designation. Even when listing and critical habitat designations do not occur concurrently, the inclusion and disclosure of the economic and other impacts associated with a listing determination will promote transparency and proper accounting of the impacts associated with a subsequent critical habitat designation.

Finally, the Services should recognize that there are other benefits to including, without reliance on, information on economic and other impacts associated with a species listing. For example, when disclosed in a proposed listing rule, such information could provide an incentive for landowners and other entities to undertake voluntary conservation measures to potentially avoid the need to list a species. The inclusion of information on economic and other impacts could also inform subsequent land and other resource utilization and management decisions that may be affected by a species listing (such as the planning of proposed federal actions that may be subject to Section 7 consultation). In sum, when properly identified and safeguarded by the Services, the inclusion in a listing determination of information on economic and other impacts attributable to the species listing is not prohibited by the ESA, and such inclusion would serve to improve the transparency and implementation of a variety of ESA-related actions.

II. Revisions to the “Foreseeable Future” Framework

In their regulation regarding the determination of the “foreseeable future,” which informs whether to list a species as threatened, the Services propose to replace the second sentence of 50 C.F.R. § 424.11(d) with the following: “The term foreseeable future extends as far into the future as the Services can reasonably rely on information about the threats to the species and the species’ responses to those threats.”⁹ Alternatively, the Services are considering rescinding the paragraph at § 424.11(d) in its entirety.¹⁰ Neither of the Services’ proposed actions are warranted and, instead, the Services should revise the relevant sentence to clarify its role and implementation.

NESARC opposes the Services’ proposal to rescind § 424.11(d) in its entirety. This provision was promulgated in 2019 to provide the applicable regulatory framework for how the Services will consider the “foreseeable future” when determining whether a species qualifies as a

⁶ 16 U.S.C. § 1533(a)(3)(A)(i).

⁷ 16 U.S.C. § 1533(b)(2). *See, e.g., Nat’l Ass’n of Home Builders v. Norton*, 2001 WL 1876349, *2-3 (D.Ariz. 2001) (vacating designation of critical habitat for cactus ferruginous pygmy owl for failure to fully evaluate economic and other impacts that designation might have).

⁸ 50 C.F.R. § 424.19(b).

⁹ Proposed Rule at 40,766.

¹⁰ *Id.*

“threatened species” for purposes of listing under the ESA.¹¹ Prior to that time, the “foreseeable future” was undefined, and the Services looked to an opinion from the Department of the Interior, Office of the Solicitor (M-37021, January 16, 2009) (“M-Opinion”) for guidance on addressing what constitutes the foreseeable future for threatened species. Notwithstanding the existence of that M-Opinion, during this time, the determination of the foreseeable future proved controversial and engendered inconsistent applications across species by the Services (e.g., 45 years for polar bears versus 90 years for bearded and ringed seals based on same climate projections).¹² Retaining the regulatory framework for assessing the foreseeable future reduces uncertainty in the listing process, as it defines a central component of the definition of a threatened species.¹³ Returning to relying solely on the M-Opinion is insufficient because, as the Services acknowledge, it does not have the force of law and is not binding on NMFS.¹⁴ Doing so would increase regulatory ambiguity and corresponding litigation with respect to the listing of any threatened species going forward. Instead, the Services should retain the regulatory framework for establishing the foreseeable future in order to promote transparency, certainty, and consistency in threatened species determinations.

As proposed, the Services’ suggested sentence is flawed, as it is inconsistent with the guidance of the M-Opinion and places unnecessary emphasis solely on the ability to rely on certain types of information. While information utilized when implementing the ESA should be reliable, the Services’ obligation in that respect is already dictated by the requirement to use the “best scientific and commercial data available.”¹⁵ As the Supreme Court has stated, the best available science standard prevents basing decisions on “speculation or surmise.”¹⁶ Similarly, the Services cannot incorporate a presumption in favor of the species when there is competing

¹¹ 2019 Final Rule at 45,026 (noting that “including a foreseeable future framework in our joint implementing regulations gives the public more transparency, provides the Services with a shared regulatory meaning for this important term, and makes it clear that both agencies will adhere to the same framework”).

¹² FWS, *Determination of Threatened Status for the Polar Bear (Ursus maritimus) Throughout Its Range*, 73 Fed. Reg. 28,212, 28,229 (May 15, 2008) (foreseeable future extends to 2050); NMFS, *Threatened Status for the Arctic, Okhotsk, and Baltic Subspecies of the Ringed Seal and Endangered Status for the Ladoga Subspecies of the Ringed Seal*, 77 Fed. Reg. 76,706, 76,707 (Dec. 28, 2012) (foreseeable future extends to 2100 based on climate change projections); NMFS, *Threatened Status for the Beringia and Okhotsk Distinct Population Segments of the Erignathus barbatus nauticus Subspecies of the Bearded Seal*, 77 Fed. Reg. 76,740, 76,741 (Dec. 28, 2012) (same). This discrepancy in interpretation has continued in subsequent listing determinations. *E.g.*, FWS, *Threatened Species Status for Emperor Penguin With Section 4(d) Rule*, 87 Fed. Reg. 64,700, 64,707 (Oct. 26, 2022) (“we identified mid-century (2050) as the foreseeable future for the threat of climate change because that is the period over which we can make reliable predictions about the threats and the species’ response to those threats”).

¹³ A “threatened species” is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20) (emphasis added). An “endangered species” is “any species which is in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6).

¹⁴ Proposed Rule at 40,766.

¹⁵ 16 U.S.C. § 1533(b)(1); *e.g.*, *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 763–64 (9th Cir. 2014) (“The ESA’s requirement that agencies use ‘the best scientific and commercial data available’ . . . means that agencies must support their conclusions with accurate and reliable data.”).

¹⁶ *Bennett v. Spear*, 520 U.S. 154, 176 (1997).

analytical information.¹⁷ Thus, revising the framework to include a standard for information reliability is redundant with existing standards in the ESA and fails to address the relevant component of foreseeability.¹⁸

As stated in the M-Opinion, the relevant data for establishing the foreseeable future are those related to “future population trends and threats to the species, and the likely consequences of those threats and trends.”¹⁹ And, when evaluating the foreseeable future:

the Secretary must look not only at the foreseeability of threats, but also at the foreseeability of the impact of the threats on the species. In some cases, foreseeable threats will manifest themselves immediately; in others, it may be multiple generations before the foreseeable manifestation of the threat occurs. But in each case the Secretary must be able to make reliable predictions about the future. The further into the future that is being considered, the greater the burden to explain how the future remains foreseeable for the period being assessed.²⁰

As the M-Opinion reiterates, “[t]he Secretary’s analysis of what constitutes the foreseeable future for a particular listing determination must be rooted in the best available data that allow predictions into the future, and the foreseeable future extends only so far as those predictions are reliable.”²¹ Thus, contrary to the Services’ proposed revision, not only must the information be dependable, but the predictions derived from that information also must be reliable. This distinction and clarification must be captured in any regulatory revision to ensure that any future threats to species and the species’ responses to those threats are indeed “foreseeable.” Accordingly, the Services should make clear that reliability applies to both the underlying information and the predictions derived from that information.

To better reflect the guidance from the M-Opinion and the considerations relevant to establishing the foreseeable future when determining whether to list a species as threatened, NESARC suggests the following blacklined revisions to the Services’ proposed sentence. The entirety of 50 C.F.R. § 424.11(d) is included for context.

¹⁷ *Maine Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, 70 F.4th 582, 599 (D.C. Cir. 2023) (“Statutory text and structure do not authorize the Service to ‘generally select the value that would lead to conclusions of higher, rather than lower, risk to endangered or threatened species’ whenever it faces a plausible range of values or competing analytical approaches. . . . It requires the Service to use the best available scientific data, not the most pessimistic.”).

¹⁸ NESARC notes that the third sentence of § 424.11(d) already incorporates the requirement to use the best available data. *See* 50 C.F.R. § 424.11(d) (“The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species’ life-history characteristics, threat-projection timeframes, and environmental variability.”) (emphasis added). Thus, the Services’ apparent concern regarding reliability of information is already addressed in the existing regulation.

¹⁹ U.S. Department of the Interior, Office of the Solicitor, *The Meaning of “Foreseeable Future” in Section 3(20) of the Endangered Species Act* (M-37021) at 13 (Jan. 16, 2009) (“M-Opinion”).

²⁰ *Id.* at 10 (emphasis added).

²¹ *Id.* at 13 (emphasis added).

“In determining whether a species is a threatened species, the Services must analyze whether the species is likely to become an endangered species within the foreseeable future. The term foreseeable future extends as only so far into the future as the Services can ~~reasonably rely on information reliably predict the~~ threats to the species, future population trends, and the likely consequences of species’ responses to those threats and trends. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time.”

III. Factors for Delisting a Species

The Services propose to revise their regulations to clarify the factors that will be considered when determining whether to delist a species.²² The Services propose the following revisions: (1) replace “shall delist a species” with “it is appropriate to delist a species”; (2) clarify that one criterion for delisting is “the species is recovered or otherwise does not meet the definition of a threatened or endangered species”; and (3) remove the word “same” in two instances to clarify the appropriate delisting factors and standards. The Services should reconsider these proposed revisions, as they are inconsistent with the relevant provisions in ESA Section 4.

First, the Services should retain the existing regulatory phrase that “[t]he Secretary shall delist a species” upon a finding that one of the regulatory criteria is met.²³ The use of “shall” in this context is consistent with the statutory language in ESA Section 4(c)(2) which states that “[t]he Secretary shall ... determine on the basis of such [status] review whether any such species should [] be removed from such list...”²⁴ In addition to being consistent with the statute, the existing regulatory language requires that the Services conduct a status review at least every five years and take mandatory action to delist a species (if warranted) based on the results of that status review. While the Services suggest that their revision is necessary to address confusion regarding the timing of delisting in relation to the need for notice-and-comment rulemaking, this concern can be addressed through clarifications included in the preamble text, as the ESA already prescribes the applicable rulemaking procedures that must be followed.²⁵ It is inappropriate for the Services to give themselves discretion regarding the timing of delisting a species (i.e., “it is appropriate to delist”) when the statute imposes mandatory action.

Second, the Services should retain the existing regulatory phrase—“The species does not meet the definition of a threatened or endangered species”—to ensure consistency with the ESA

²² Proposed Rule at 40,767.

²³ *Id.*; see also 50 C.F.R. § 424.11(e).

²⁴ 16 U.S.C. § 1533(c)(2) (emphasis added).

²⁵ See 16 U.S.C. § 1533(a)(1) (“The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors...” (emphasis added)). Furthermore, consistency with other regulatory provisions in the section support the retention of “shall.” *E.g.*, 50 C.F.R. § 424.11(c) (“A species shall be listed or reclassified if the Secretary determines...” (emphasis added)).

statutory delisting criteria.²⁶ ESA Section 4(a)(1) requires that five factors be applied when the Secretary “determine[s] whether any species is an endangered species or a threatened species.”²⁷ These same statutory factors apply when determining whether to initially list a species, and when determining whether to delist or downlist a species on the Services’ initiative or in response to a third-party petition. As ESA Section 4(c)(2) specifies, decisions on removing, downlisting, or uplisting species must be made “in accordance with” the provisions of ESA Section 4(a).²⁸ While “recovery” can inform when a species no longer meets the statutory definition of being a threatened or endangered species,²⁹ it does not provide a separate standard to determine whether and when delisting a species is warranted. The Services’ proposed revision appears to impermissibly create this new regulatory standard (“recovered”) that applies unless the species “otherwise” no longer meets the definition of a threatened or endangered species. The ESA statutory regime predicates listing and delisting species on whether they meet the definition of an endangered species or threatened species, and this must be determined without reference to the species being “recovered.”

The Services also overstate the role of recovery plans when considering whether to delist or downlist a species.³⁰ Recovery plans are broad documents that include “site-specific management actions” to achieve a goal for the conservation and survival of the species, and “objective, measurable criteria” that would result in a determination that a species be removed from listing.³¹ However, it is well-established that “recovery plans are for guidance purposes only.”³² As the D.C. Circuit held, the ESA does not require “that the criteria in a recovery plan be satisfied before a species may be delisted pursuant to the factors in the Act itself.”³³ While satisfaction of the criteria in a recovery plan is not a necessary prerequisite for delisting a species, if such criteria are met, that should trigger the initiation of a status review of the species for purposes of a delisting determination.

Third, the Services propose to remove the word “same” in the two instances it is used in the second sentence of 50 C.F.R. § 424.11(e)(2)—“In making such a determination, the Secretary shall consider the ~~same~~ factors and apply the ~~same~~ standards set forth in paragraph (c) of this section regarding listing and reclassification.”³⁴ In support of this proposed revision, the Services should clarify that this revision does not expand or otherwise revise the criteria that may be considered when determining whether to delist a species. Alternatively, to ensure consistency

²⁶ Proposed Rule at 40,767; *see also* 50 C.F.R. § 424.11(e)(2).

²⁷ 16 U.S.C. § 1533(a)(1) (emphasis added).

²⁸ 16 U.S.C. § 1533(c)(2)(B); *Friends of Blackwater v. Salazar*, 691 F.3d 428, 432 (D.C. Cir. 2012) (“Section 4(a)(1) of the Act provides the Secretary ‘shall’ consider the five statutory factors when determining whether a species is endangered, and § 4(c) makes clear that a decision to delist “shall be made in accordance” with the same five factors.”); 2019 Final Rule at 45,034-35.

²⁹ *See* 50 C.F.R. § 402.02 (defining “recovery” as “improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.”) (emphasis added).

³⁰ Proposed Rule at 40,767.

³¹ 16 U.S.C. § 1533(f)(1)(B).

³² *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547 (11th Cir. 1996) (recovery plans are not documents with the force of law).

³³ *Friends of Blackwater v. Salazar*, 691 F.3d 428, 436 (D.C. Cir. 2012).

³⁴ Proposed Rule at 40,767-68.

with the statutory provisions of the ESA, NESARC suggests that the Services replace the second sentence of this regulatory provision with the language in 16 U.S.C. § 1533(c)(2), which states that “Such a determination shall be made in accordance with the provisions set forth in paragraph (c) of this section regarding listing and reclassification.”

IV. Not Prudent Determinations for Critical Habitat Designations

The Services propose to revise the criteria informing when a critical habitat designation may not be prudent. In part, the Services would delete: (1) the portion of § 424.12(a)(1)(ii), which states that a critical habitat designation may not be prudent when “threats to the species’ habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act”; and (2) the entirety of § 424.12(a)(1)(v), which states that “[t]he Secretary otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available.³⁵ The Services’ explanations in support of these proposed revisions misinterpret the relevant provisions of the ESA and, should the Services proceed with these proposals, NESARC suggests additional revisions to clarify the appropriate circumstances for finding that a designation of critical habitat is not prudent.

In support of their proposed revisions, the Services take issue with some of the justifications supporting the 2019 rulemaking, particularly the “suggest[ion] that the only conservation benefits of a critical habitat designation are through the section 7 process, a presumption not supported by the language of the Act or court decisions.”³⁶ However, apart from dicta in the referenced cases, the Services do not cite any ESA statutory provisions supporting their explanation in the Proposed Rule. Contrary to the Services’ interpretation, based on the plain language of the Act, other than ESA Section 4 (procedures for designating critical habitat) and ESA Section 3 (defining critical habitat), the only operative statutory provision regarding consideration of critical habitat is through ESA Section 7 (the obligation to ensure that a federal action is not likely to “result in the destruction or adverse modification of [critical] habitat”).³⁷ Indeed, the Services have acknowledged in multiple rulemakings designating critical habitat that “[c]ritical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat.”³⁸ Thus, within the ESA statutory structure, the conservation benefits of designated critical habitat are only effectuated through the Section 7 consultation process.

Recognizing that the Services do not want to “presuppose the scope and outcomes of future section 7 consultations” regarding their objections to the 2019 regulatory revisions, should the Services decline to retain the existing language, NESARC suggests the following revisions to the Services’ proposed revisions to § 424.12(1):

³⁵ *Id.* at 40,768.

³⁶ *Id.*

³⁷ See 16 U.S.C. §§ 1532(5), 1533(a)(3), 1536(a)(2).

³⁸ *E.g.*, FWS, *Designation of Critical Habitat for Pearl Darter*, 88 Fed. Reg. 20,410, 20,415 (Apr. 6, 2023).

“(1) Designation of critical habitat may not be prudent in circumstances such as, but not limited to, the following:

- (i) The species is threatened by taking or other human activity and identification of critical habitat can be expected to increase the degree of such threat to the species;
- (ii) The present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species;
- (iii) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States; or
- (iv) ~~No areas meet the definition of critical habitat~~ **Specific areas may not contribute to the conservation of the species.**”

In support, NESARC notes that it is unnecessarily redundant to state that it is not prudent to designate critical habitat when “no areas meet the definition of critical habitat”—that prohibition is already provided by the plain ESA statutory provision authorizing designation. Instead, recognizing that the statutory definition of critical habitat references either physical or biological features or specific areas that are essential to the conservation of the species for occupied and unoccupied critical habitat, the Services should revise their regulatory provisions to state that a designation of critical habitat is not prudent when “specific areas may not contribute to the conservation of the species.” This revision would obviate the Services’ concern about potentially disregarding “anticipated climate-change impacts” with respect to critical habitat designations while adhering to the statutory requirement that designated critical habitat must be comprised of those specific areas that “are” essential to the conservation of the species.

V. Procedures for Designation of Unoccupied Critical Habitat

The Services propose to significantly revise the procedures for the designation of unoccupied critical habitat. The Services would delete the existing provisions at 50 C.F.R. § 424.12(b)(2) and replace them with the following:

“After identifying areas occupied by the species at the time of listing, the Secretary will identify, at a scale determined by the Secretary to be appropriate, specific areas outside the geographical area occupied by the species at the time of listing that the Secretary determines are essential for the conservation of the species. Such a determination must be based on the best scientific data available.”³⁹

While the Services state that the intent is to ensure that the requirements for designating unoccupied critical habitat are consistent with those mandated by the language or structure of the Act,⁴⁰ the proposed revisions do not reflect this goal. The Services should retain the existing regulations or, in the alternative, further revise the proposed regulatory revisions as suggested below.

³⁹ Proposed Rule at 40,774.

⁴⁰ *Id.* at 40,768.

(A) Both the Structure of the Act and Congressional Intent Demonstrate that the Services Must be Exceedingly Circumspect When Designating Unoccupied Critical Habitat and Apply a More Demanding Standard

The designation of critical habitat on unoccupied areas is widely recognized as requiring a high threshold for determination prior to such action. As explained below, in defining critical habitat, the United States Congress (“Congress”) clearly distinguished between designations of occupied areas versus unoccupied areas, and directed that the Services be exceedingly circumspect when designating the latter. The courts have also recognized that the ESA imposes a “more onerous procedure” on the designation of unoccupied areas. In proposing revisions to § 424.12(b)(2), the Services must recognize these limitations on the designation of critical habitat in unoccupied areas and revise and clarify the Proposed Rule accordingly.

As originally enacted in 1973, the ESA did not contain a definition of “critical habitat” or specify how it was to be designated.⁴¹ In 1978, the Services promulgated regulations that defined critical habitat as:

“any air, land, or water area . . . and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. . . . Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion.”⁴²

Shortly thereafter, in *Tennessee Valley Authority v. Hill*, the Supreme Court enjoined the construction of the Tellico Dam to protect the snail darter and prevent the destruction of its critical habitat.⁴³ In response to these events, and the significant economic implications, Congress amended the ESA to explicitly define critical habitat and limit the scope of such designations.

Congress’s efforts demonstrate a clear intention that critical habitat designations are limited to areas that are habitat for the species and that unoccupied habitat should be designated sparingly based on heightened criteria. For example, H.R. 14104 – 95th Congress (1977- 1978) – defined unoccupied critical habitat as:

⁴¹ The only reference to critical habitat in the 1973 ESA was the prohibition on federal agencies taking action that “jeopardize the continued existence of such endangered and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.” Pub. L. No. 93-205 § 7 (Dec. 28, 1973). Congress intended that critical habitat would be acquired and protected by the Secretary of Interior pursuant to the land acquisition authority contained in ESA Section 5. *Id.* § 5; *see also* H.R. Rep. No. 93-470 at 25 (1973) (“Any effective program for the conservation of endangered species demands that there be adequate authority vested in the program managers to acquire habitat which is critical to the survival of those species.”) (emphasis added).

⁴² *Interagency Cooperation-Endangered Species Act of 1973*, 43 Fed. Reg. 870, 874-75 (Jan. 4, 1978) (emphasis added).

⁴³ *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (“[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.”).

“specific areas periodically inhabited by the species which are outside the geographic area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act (other than any marginal habitat the species may be inhabiting because of pioneering efforts or population stress), upon determination by the Secretary at the time it is listed that such areas are essential for the conservation of the species.”⁴⁴

The House Committee on Merchant Marine and Fisheries noted that efforts to define critical habitat were driven by the concern that “the existing regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat.”⁴⁵ Instead, the Committee directed the Secretary to “be exceedingly circumspect in the designation of critical habitat outside the presently occupied area of the species.”⁴⁶

The corresponding S. 2899 – 95th Congress (1977- 1978) – also included a definition of unoccupied critical habitat, which limited it to:

“specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this act, into which the species can be expected to expand naturally upon a determination by the Secretary at the time it is listed, that such areas are essential for the conservation of the species.”⁴⁷

Regarding unoccupied areas, the Senate Committee on Environment and Public Works stated that “[t]here seems to be little or no reason to give exactly the same status to lands needed for population expansion as is given to those lands which are critical to a species’ continued survival.”⁴⁸

The final bill passed by Congress included “[a]n extremely narrow definition of critical habitat, virtually identical to the definition passed by the House.”⁴⁹ That definition remains in effect today.

Similarly, the courts have consistently held that, when compared to occupied areas, a more demanding standard applies to the designation of unoccupied habitat. For example, the Ninth Circuit stated that “[t]he statute thus differentiates between “occupied” and “unoccupied” areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the

⁴⁴ *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980*, at 879 (1982) (amendment by Rep. Duncan) (emphasis added).

⁴⁵ H.Rept. 95-1625 at 25 (1978) (emphasis added). During floor debate on the House Bill, Representative Bowen explained “I believe the majority of the House is in agreement on that, that the Office of Endangered Species has gone too far in just designating territory as far as the eyes can see and the mind can conceive. What we want that office to do is make a very careful analysis of what is actually needed for survival of this species.” 124 Cong. Rec. 38,131 (1978) (emphasis added).

⁴⁶ H.Rept. 95-1625 at 18 (emphasis added).

⁴⁷ *A Legislative History of the Endangered Species Act* at 1065 (amendment by Sen. McClure) (emphasis added).

⁴⁸ S.Rept. 95-874, at 10 (1978) (emphasis added).

⁴⁹ *A Legislative History of the Endangered Species Act* at 1220-21 (Rep. Murphy).

species.⁵⁰ Similarly, district courts have also concluded that the designation of unoccupied habitat requires more than the standard for designation of occupied areas—it is a “more onerous procedure” with a “more demanding standard.”⁵¹ The Services’ proposed revisions disregard this Congressional intent, reflected in the ESA statutory provisions, and subsequent court interpretations constraining the Services’ ability to designate unoccupied areas as critical habitat.

(B) Additional Revisions to the Proposed Procedures for Designating Unoccupied Critical Habitat Are Necessary

Should the Services proceed with their proposed revisions, the Services should make several revisions to their proposed procedures for the designation of unoccupied critical habitat. While the Services assert that their proposed changes are necessary to be consistent with the language and structure of the ESA, the proposed regulatory provisions undermine that goal by removing needed criteria that inform the designation of unoccupied critical habitat. In their place, the Services propose to essentially reiterate the statutory requirement that the Secretary must determine that any unoccupied areas identified for designation are essential to the species’ conservation. Instead of clarifying, interpreting, and implementing the relevant provision of the ESA,⁵² the Proposed Rule would remove necessary provisions that dictate when it is appropriate to consider designating unoccupied habitat and how to determine if an unoccupied area is essential to the conservation of the species. NESARC suggests that the Services implement the following revisions to the Proposed Rule.⁵³

First, the Services should retain the requirement that they identify and consider areas that are occupied by the species before evaluating areas that are unoccupied by the species. As the Services acknowledge, this approach is consistent with their long-standing practice.⁵⁴ Notwithstanding, the Services should revise the phrase “[a]fter identifying areas occupied by the species at the time of listing” to provide further clarification and consistency with other regulatory provisions regarding the designation of critical habitat. The Services should state that they are identifying areas “of critical habitat that are within the geographical area” occupied by the species. The insertion of this language is for consistency with § 424.12(b)(1) which uses a similar formulation and clarifies that the sequential approach starts with identifying occupied critical habitat before evaluating areas that are unoccupied by the species.

⁵⁰ *Arizona Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (emphasis added); *see also Home Builders Ass’n of Northern Cal. v. USFWS*, 616 F.3d 983, 990 (9th Cir. 2010) (designation of unoccupied habitat “is a more demanding standard than that of occupied habitat”).

⁵¹ *E.g., Cape Hatteras Access Pres. All. v. U.S. Dep’t of the Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) (“with unoccupied areas, it is not enough that the area’s features be essential to conservation, the area itself must be essential”); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126 (D. Mont. 2010); *Ctr. For Biological Diversity v. Kelly*, 93 F.Supp.3d 1193, 1202 (D. Idaho 2015).

⁵² Proposed Rule at 40,764.

⁵³ In the following, NESARC explains its suggested substantive revisions to the Services’ Proposed Rule. NESARC also suggests additional changes (captured in black-line below) that are intended to further align with the relevant statutory language.

⁵⁴ Proposed Rule at 40,769.

Second, the Services should clarify that unoccupied areas that are considered for designation must be “habitat.” This revision would ensure consistency with the Supreme Court’s decision in *Weyerhaeuser*, which stated that “[e]ven if an area otherwise meets the statutory definition of unoccupied critical habitat because the Secretary finds the area essential for the conservation of the species, Section 4(a)(3)(A)(i) does not authorize the Secretary to designate the area as critical habitat unless it is also habitat for the species.”⁵⁵ The Services recognize this holding in the Proposed Rule,⁵⁶ and the prerequisite that an area must be habitat to be considered for designation as critical habitat should be included in the regulations.

Third, the Services should retain the existing regulatory provision stating that “[t]he Secretary will only consider unoccupied areas to be essential where a critical habitat designation limited to geographical areas occupied would be inadequate to ensure the conservation of the species.” This provision was promulgated in 1984 and, other than being removed in 2016 and reinstated in 2019, has been a fixture of the Services’ critical habitat procedures for almost 40 years. The Services state that the “proposed revision removes unnecessary constraints to the Secretaries’ duty to consider designation of unoccupied areas.”⁵⁷ However, this does not explain the Services’ proposed change in policy as the Proposed Rule contains no example or explanation regarding how this requirement constrains the Services in making an appropriate designation of critical habitat. The Services also claim that they have found nothing in the legislative history of the ESA to show that Congress intended the Services to exhaust occupied habitat before considering whether any unoccupied area may be essential.⁵⁸ But as the relevant legislative history demonstrates, Congress clearly intended that unoccupied habitat should be designated sparingly based upon heightened criteria—e.g., the Secretary must “be exceedingly circumspect in the designation of critical habitat outside the presently occupied area of the species.”⁵⁹ The 2019 regulation merely ensures that the Services consider the amount of habitat that adequately fulfills the purpose of the critical habitat designation, and prioritizes such designation to occupied habitat. This provision clearly is consistent with the Congressional concerns that led to the enactment of the present definition—restricting the overbroad designation of occupied and unoccupied habitat.

Fourth, the Services should include revisions to further inform when an area of unoccupied habitat will be considered essential for the conservation of the species. At a minimum, the Services should recognize that, in order to be essential, the specific area of unoccupied habitat must “contribute to the conservation of the species.” The legislative history supports including this clarification as Congress expected that unoccupied areas of critical habitat would support population expansion,⁶⁰ and directed the Services to make “a very careful analysis of what is actually needed for survival of [the] species” instead of “designating territory as far as the eyes can see and the mind can conceive.”⁶¹ Further, the Services should identify the

⁵⁵ *Weyerhaeuser v. USFWS*, 139 S.Ct. 361, 368 (2018) (emphasis in original).

⁵⁶ Proposed Rule at 40,771 (“we recognize the importance of the Supreme Court’s ruling in *Weyerhaeuser* and will ensure that the administrative record for each designation documents how the designated areas are in fact habitat for the particular species at issue”).

⁵⁷ *Id.* at 40,769.

⁵⁸ *Id.*

⁵⁹ HR Rep. No. 95-1625 at 18 (emphasis added).

⁶⁰ See S. Rep. No. 95-874, at 10 (1978).

⁶¹ 124 Cong. Rec. 38,131 (1978).

relevant factors that would inform an area's contribution to the conservation of the species. For example, because occupied areas can be designated as critical habitat based on the presence of essential physical or biological features, a designation of an unoccupied area should likewise consider the existence of the same physical or biological features to determine whether the *entire area* is essential for the conservation of the species (i.e., the area in its current condition contains those physical or biological features necessary to support future occupancy of the species). In addition, to ensure that an area will contribute to the conservation of the species, the Services must determine that, based on the best scientific and commercial data available, the species will occupy that area. Given that unoccupied critical habitat was intended to be areas "into which the species can be expected to expand naturally,"⁶² an area cannot contribute to conservation if the species is unlikely to establish occupancy.

Finally, the Services should delete the last sentence of their proposed § 424.12(b)(2)—“Such a determination must be based on the best scientific data available.” While accurate, in part, its inclusion here is redundant as the Services already state the applicable best scientific data available standard that applies to all critical habitat determinations as part of the existing provisions at 50 C.F.R. § 424.12(a). Furthermore, the Services' proposed addition here is incomplete, and thus could create confusion and conflicts with respect to implementation, as it does not account for the requisite consideration of probable economic, national security, and other relevant impacts that influence the final destination of critical habitat.

As discussed above, NESARC recommends the following revisions to the proposed procedures for the designation of unoccupied critical habitat at 50 C.F.R. § 424.12(b)(2):

After identifying areas **of critical habitat that are within the geographical area** occupied by the species at the time of listing, the Secretary will identify, at a scale determined by the Secretary to be appropriate, specific areas **of habitat** outside the geographical area occupied by the species at the time of listing **only upon a determination that such areas** ~~that the Secretary determines~~ are essential for the conservation of the species. **For unoccupied areas to be considered essential, the Secretary must determine that a designation limited to occupied areas would be inadequate to ensure the conservation of the species and that the specific areas of identified unoccupied habitat will contribute to the conservation of the species.** ~~Such a determination must be based on the best scientific data available.~~

⁶² 124 Cong. Rec. 21,355 (1978).

VI. Conclusion

NESARC greatly appreciates the opportunity to provide these comments to the Services. We respectfully request that you take these comments into full consideration and adopt NESARC's proposed revisions when finalizing the applicable regulatory language.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tyson Kade", written in a cursive style.

Tyson Kade
NESARC Counsel



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Submitted via Federal eRulemaking Portal: Docket No. FWS-HQ-ES-2021-0104

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

Dear Mr. Aubrey and Ms. Dobrzynski:

On June 22, 2023, the U.S. Fish and Wildlife Service (“FWS”) and National Marine Fisheries Service (“NMFS”) (collectively, the “Services”) issued a proposed rule to implement changes to the regulations for conducting interagency consultation pursuant to Section 7 of the Endangered Species Act (“ESA”).¹ Pursuant to the Federal Register notice, the National Endangered Species Act Reform Coalition (“NESARC”) respectfully provides its comments and recommendations on the Services’ Proposed Rule.

NESARC is the country’s oldest broad-based, national coalition dedicated solely to achieving improvements to the ESA and its implementation. As detailed in the membership list attached to these comments, NESARC includes agricultural interests, cities and counties, conservationists, electric utilities, energy producers, farmers, forest product companies, home builders, 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 FWS and NMFS, *Revision of Regulations for Interagency Cooperation*, 88 Fed. Reg. 40,753 (June 22, 2023) (“Proposed Rule”). On July 28, 2023, the Services denied a number of requests for extension of the comment period, including requests submitted by NESARC, some of its members, and the U.S. Small Business Administration Office of Advocacy.

NESARC agrees with the Services that most of the 2019 regulatory changes clarified and improved the ESA Section 7 consultation process. While NESARC supports some of the changes in the Proposed Rule, several of the proposed revisions would undermine clarity and consistent application of interagency consultation and are contrary to the plain language of the ESA. As explained in more detail below, the Services should not delete the provisions at 50 C.F.R. § 402.17 as they are necessary criteria by which to determine whether an activity or consequence is “reasonably certain to occur.” Instead, should the Services make revisions, these provisions should be incorporated into the “effects of the action” so that there is a “self-contained” definition. In the definition of the “environmental baseline,” regarding ongoing actions, the Services must clearly reflect that the scope of the proposed agency action (and not just the scope of federal agency discretion) informs what consequences and impacts are considered as effects of the action versus the environmental baseline, respectively. Finally, the Services’ proposal to expand the scope of reasonable and prudent measures (“RPMs”) to include measures that offset any impacts of authorized incidental taking on the species is contradicted by the plain language of ESA Section 7(b)(4) and the Services’ long history of prior interpretation and implementation.

I. Effects of the Action and 50 C.F.R. § 402.17

The Services propose to modify the definition of “effects of the action” to clarify that “activities” should be distinguished from the proposed action for purposes of applying the two-part causation test.² NESARC supports this revision. However, as discussed below, the Services should make additional revisions to the definition to ensure that both “activities” and “consequences” are evaluated in accordance with the causation test.

As a related matter, in a reversal from the 2019 Final Rule,³ the Services also propose to remove section § 402.17 in its entirety.⁴ This section provides necessary criteria for determining when and what activities and consequences are “reasonably certain to occur” for purposes of consideration as “effects of the action.” Instead of deleting this section, NESARC suggests that the Services make more modest revisions as described below.

(A) Revisions to “Effects of the Action” Definition

NESARC agrees with the Services’ proposed change to clarify the application of the causation test in the definition of effects of the action. However, additional revisions are needed to clarify that the two-part causation test also applies to activities that are caused by the proposed action, but that are not part of the proposed action—the activity would not occur “but for” the proposed action and “is reasonably certain to occur.” The Services explicitly recognize this point in the Proposed Rule,⁵ but it is not reflected in the contemplated definition. Thus, as delineated below, the Services should include a sentence in the regulatory definition that states

² Proposed Rule at 40,755.

³ FWS and NMFS, *Regulations for Interagency Cooperation*, 84 Fed. Reg. 44,976, 44,981 (Aug. 27, 2019) (“2019 Final Rule”).

⁴ Proposed Rule at 40,757.

⁵ *Id.*, and *id.* at 40,755 (“However, activities that may be caused by the proposed action, but that are not part of the proposed action, are subject to the two-part causation test.”) (emphasis added).

“An activity is caused by the proposed action if, using the best scientific and commercial data available, it would not occur but for the proposed action and it is reasonably certain to occur.”

(B) Revisions to the “Other Provisions” at 50 C.F.R. § 402.17

The Services propose to delete section 402.17 in its entirety. As justification, the Services state that there is “potential confusion” because: (1) the definition in § 402.02 should be self-contained and not reference additional sections of the regulations;⁶ (2) the introduction of the phrase “clear and substantial information” suggests that a different standard applies other than the statutorily-mandated “best scientific and commercial data available”;⁷ (3) the Services propose to add the phrase “but that are not part of the action” to the definition of “effects of the action”;⁸ and (4) the provisions in § 402.17 were an attempt to identify non-exclusive factors that would be better suited to include in a guidance document.⁹ None of these explanations provide a rational basis for the Services to fully rescind regulations that were promulgated fewer than four years ago,¹⁰ and NESARC opposes the rescission of § 402.17. Should the Services proceed with this proposed revision, as explained below, NESARC requests that the Services make more tailored revisions and modify the existing regulatory text to provide additional clarification.

Most of the Services’ stated explanations for deleting these regulatory provisions are superficial and not substantive. For example, the criteria from § 402.17 could be incorporated into the definition of “effects of the action” so that it is “self-contained.” Similarly, while the Services suggest moving these criteria to a guidance document, such as a revised Consultation Handbook, the Services recognize that the provisions in § 402.17(a)(1) through (a)(3) have been referenced in the 1986 final rule and in the Services’ 1998 Consultation Handbook.¹¹ The Services also recognize that the provisions in § 402.17(b) are “relevant considerations.”¹² Retaining these factors and considerations is necessary to address many issues and uncertainties that historically have occurred during the consultation process. Accordingly, NESARC requests that the Services retain these criteria in the regulations.

When the Services prepare updates to the Consultation Handbook, the criteria can be further addressed, and additional guidance can be provided on how the factors are to be applied and considered. NESARC requests that any updates to the Consultation Handbook be conducted through a public comment process. Should the Services continue to contemplate the deletion of the regulations at § 402.17, that should only occur following publication of the revised revision of the Consultation Handbook.

From a substantive perspective, the Services suggest that the use of the phrase “clear and substantial information” has caused potential confusion because of a misperception that it represents an additional, or different, standard for determining whether an activity is reasonably

⁶ *Id.* at 40,757.

⁷ *Id.*

⁸ *Id.* at 40,758.

⁹ *Id.*

¹⁰ 2019 Final Rule at 44,981.

¹¹ Proposed Rule at 40,758.

¹² *Id.*

certain to occur.¹³ Echoing the rationale provided in the 2019 Final Rule,¹⁴ in the Proposed Rule, the Services explain that the intent of this standard was to clarify that the reasonable certainty of any activities or consequences “needed to be solidly based on the ‘best scientific and commercial data available.’”¹⁵ In other words, the standard was intended to convey that “reasonably certain to occur” required a “degree of certitude.”¹⁶ Instead of deleting the entirety of § 402.17 based on this perceived issue, the Services can make more targeted revisions to the regulatory provisions to correct the perceived confusion. To retain the intent that consequences must have a “degree of certitude,” NESARC suggests that the Services add the word “likely” to denote that effects of the action are “all likely consequences.” Indeed, as the D.C. Circuit recently held, “the statute is focused upon ‘likely’ outcomes, not worst-case scenarios.”¹⁷

(C) NESARC’s Proposed Language

NESARC suggests the following revisions to the definition of “effects of the action” in 50 C.F.R. § 402.02:

Effects of the action are all **likely** consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action but that are not part of the action. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action.

- (a) **An activity is caused by the proposed action if, using the best scientific and commercial data available, it would not occur but for the proposed action and it is reasonably certain to occur. Examples of when an activity is reasonably certain to occur include, but are not limited to: (1) past experiences with activities that have resulted from actions that are similar in scope, nature, and magnitude to the proposed action; (2) existing plans for the activity; and (3) any remaining economic, administrative, and legal requirements necessary for the activity to go forward.**
- (b) A consequence is caused by the proposed action if, **using the best scientific and commercial data available,** it would not occur but for the proposed action and it is reasonably certain to occur. **Considerations for determining that a consequence to the species or critical habitat is not caused by the proposed action include, but are not limited to: (1) The consequence is so remote in time from the action under consultation that it is not reasonably certain to occur; or (2) The consequence is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur; or (3) The consequence is**

¹³ *Id.* at 40,757.

¹⁴ 2019 Final Rule at 44,977.

¹⁵ Proposed Rule at 40,757.

¹⁶ *Id.* at 40,758.

¹⁷ *Maine Lobstermen’s Ass’n v. Nat’l Marine Fisheries Serv.*, 70 F.4th 582, 599 (D.C. Cir. 2023) (“Statutory text and structure do not authorize the Service to ‘generally select the value that would lead to conclusions of higher, rather than lower, risk to endangered or threatened species’ whenever it faces a plausible range of values or competing analytical approaches.”).

only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur.

II. Definition of the “Environmental Baseline”

The Services propose to make additional clarifying edits to the definition of the “environmental baseline.” First, in the third sentence, the Services propose to replace the term “consequences” with the word “impacts.”¹⁸ Second and third, also in the third sentence, the Services would remove the word “ongoing” and add the term “Federal” in two locations.¹⁹ As discussed below, NESARC requests that the Services make additional revisions to this definition.

(A) Proposed Use of the Word “Impacts”

NESARC supports replacing “consequences” with “impacts.” While the Services note that they “consider ‘consequences,’ ‘impacts,’ and ‘effects’ to be equivalent terms,”²⁰ in the Section 7 regulatory procedures, those terms have difference functions. Notably, “consequences” is used within the definition of “effects of the action” to capture those effects to listed species or critical habitat that are caused by the proposed action. These “consequences” are not included within the evaluation of the environmental baseline. Instead, in that definition, the Services use the word “impacts” to capture the condition of the listed species or its designated critical habitat without consideration of the effects of the action. The Services proposed revision would ensure that consistent and appropriate terminology is used in the two definitions.

(B) Proposed Deletion of “Ongoing” and Addition of “Federal”

Regarding the Services’ second and third proposed changes, additional revisions and clarifications are necessary. As the Services state, the proposed removal of “ongoing” and addition of “Federal” are intended to address the “central question” of the federal agency’s discretion “over their own activities and facilities” in determining what impacts are included within the environmental baseline.²¹ The Services explain that “the action agency’s discretion to modify the activity or facility is the determining factor when deciding which impacts of an action agency’s activity or facility should be included in the environmental baseline, as opposed to the effects of the action.”²² This statement is incorrect and, unless modified, reflects an improper expansion of the scope of a proposed action for purpose of analyzing the effects of the action during the Section 7 consultation.

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

¹⁸ Proposed Rule at 40,755.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* (emphasis added).

²² *Id.* (emphasis added).

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; rather, 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 health.

Pursuant to ESA Section 7(a)(2), a federal agency is required to consult with the Services to insure that “any action authorized, funded, or carried out by such agency” is not likely to jeopardize a listed species or result in the destruction or adverse modification of its critical habitat.²³ While the Services recognize that non-discretionary federal actions (and the effects of those actions) are not subject to consultation,²⁴ that does not mean that the scope of the federal action, and the effects of the action that are evaluated during consultation, are coextensive with the full extent of the federal agency’s discretionary authority, involvement, or control. On the contrary, as the plain language of ESA Section 7 makes clear, the biological opinion is required, in part, to “detail[] how the agency action affects the species or its critical habitat.”²⁵ Thus, it is the proposed agency action that determines the scope of the corresponding effects of the action (which also must be within the extent of the federal agency’s discretionary authority), and not the general and broader scope of the “action agency’s discretion to modify the [action]” that informs the distinction between effects of the action and environmental baseline.

When “ongoing” actions are subject to consultation, the same analytical framework applies. For example, where an entity has an existing authorization (e.g., a permit), it may seek modification of a particular term or condition within its federal authorization. In that scenario, the modification of the federal authorization is of a limited, incremental nature and the consultation must be similarly structured to the scope 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 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. The Services should clarify that 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

²³ 16 U.S.C. § 1536(a)(2).

²⁴ Proposed Rule at 40,755 (“those components of [Federal actions] that are not within the discretionary control of the Federal agency are not subject to the requirement to consult, and as a result, the impacts of those non-discretionary [actions] to listed species and critical habitat are not a consequence of a proposed discretionary Federal action”); *National Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667-69 (U.S. 2007) (“§ 7(a)(2)’s no-jeopardy duty covers only discretionary agency actions and does not attach to actions . . . that an agency is required by statute to undertake”) (emphasis in original).

²⁵ 16 U.S.C. § 1536(b)(3)(A) (emphasis added).

included in the [e]nvironmental [b]aseline and would not be considered an effect of the proposed action under consultation.”²⁶ Accordingly, NESARC requests that the Services retain the use of the term “ongoing” and instead provide additional explanation consistent with the above to clarify the scope of the consultation and effects of the action when an ongoing action is proposed to be modified or renewed.

The proposed addition of the word “Federal” in two locations—“from Federal ongoing agency activities or existing Federal agency facilities that are not within the agency's discretion to modify”—is confusing and appears to improperly limit the scope of review of ongoing actions to only those related to federal activities and federal facilities and not the ongoing actions of non-federal project proponents that require Section 7 consultation.²⁷ Indeed, it is not just activities and/or facilities that are directly undertaken or owned/operated by federal agencies that are subject to the consultation obligation. Instead of the Services’ proposed additions, which would cause uncertainty and regulatory obfuscation, NESARC requests that the word “Federal” be added to clarify that it is “the Federal action agency’s discretion to modify” that should inform this component of the analysis.

(C) NESARC’s Proposed Language

NESARC suggests the following revisions to the definition of “environmental baseline in 50 C.F.R. § 402.02:

Environmental baseline refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action. The environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process. The **ongoing impacts consequences** to listed species or designated critical habitat from **existing facilities or activities** ~~ongoing agency activities or existing agency facilities~~ that are not **caused by the proposed action or that are not** within the **Federal action** agency's discretion to modify are part of the environmental baseline.

III. Reinitiation of Consultation

The Services propose to revise the text of § 402.16(a) to clarify that, when the obligation to reinitiate consultation arises, it is the federal action agency (and not the Services) that requests reinitiation.²⁸ NESARC supports this change as it is consistent with the requirements of ESA Section 7 and the long-standing practice of the Services. The Services should further clarify that their role is to provide technical assistance, when requested by the federal action agency or

²⁶ FWS and NMFS, *Endangered Species Consultation Handbook* at 4-28 (Mar. 1998).

²⁷ Proposed Rule at 40,756.

²⁸ *Id.*

project proponent, to aid in determining whether the obligation to reinitiate consultation has been triggered.

IV. Reasonable and Prudent Measures

The Services propose to make significant revisions to the scope of the RPMs that can be included in an incidental take statement (“ITS”). First, the Services would have the new discretionary ability to require additional measures that would “offset” any remaining impacts of authorized incidental take that could not be avoided or minimized.²⁹ Second, the Services would expand the locations where RPMs could be implemented to areas “inside or outside of the action area.”³⁰ As explained below, these proposed revisions are inconsistent with the plain language of ESA Section 7, Congressional intent informing application of Section 7, and the Services’ long-standing interpretation of these provisions of the ESA. Despite acknowledging that they are discarding an interpretation that has been consistent for almost 40 years, the Services provide no substantive justification nor reasoned explanation for this change in regulatory application. NESARC opposes this proposed revision.

(A) Discretion to Require Measures that “Offset” the Impacts of Incidental Taking

The proposed revision to allow the Services to impose measures that “offset” any remaining impacts of incidental take on the species, after the imposition of avoidance and minimization measures, is contrary to the plain language of the ESA, the relevant legislative history, the structure of Section 7, and the Services’ long-standing implementation. Notably, as purported justification and explanation for their proposed change in interpretation and practice, the Services state that they “conducted a careful review of the Act’s text, the purposes and policies of the ESA, and the 1982 ESA legislative history.”³¹ However, the Services do not disclose or reference any of the components of this “review” in the Proposed Rule, which is otherwise bereft of explanation justifying the proposed change. Contrary to the Services’ unsupported statement, as described below, the proposed revisions to the scope of RPMs are contrary to the ESA.

First, the proposed revision is contrary to the plain and unambiguous statutory language of ESA Section 7(b)(4). After conducting consultation under Section 7(a)(2), FWS or NMFS provides the federal action agency and any applicant with a biological opinion that, in part, “(i) specifies the impact of such incidental taking on the species” and “(ii) specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact.”³² Congress’ use of “minimize” clearly contemplates that some residual impact of the incidental taking will remain. Indeed, the statute does not direct the Services to “minimize all such impact.” As is evident from other sections of the ESA, Congress used different statutory terms to authorize the Services to require different measures when approving the incidental take of listed species. Notably, in ESA Section 10, in order to issue an incidental take permit, the

²⁹ *Id.* at 40,758.

³⁰ *Id.* at 40,763.

³¹ *Id.* at 40,758.

³² 16 U.S.C. § 1536(b)(4)(C)(i), (ii) (emphasis added).

Services must find, in part, that “the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking.”³³ While both statutory provisions authorize “minimization” measures, only Section 10 authorizes additional measures to “mitigate” the impacts of taking. Recognizing this distinction, the Services’ new interpretation is not supported by the statute because, absent additional terms, the use of “minimize” cannot be read to provide the ability to offset or mitigate any additional impacts of taking on the species.

Second, the Services’ proposed revisions are contrary to the structure and purpose of ESA Section 7. Pursuant to ESA Section 7(a)(2), the Services’ role is primarily focused on consulting with federal agencies to “insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical.”³⁴ Promptly after concluding consultation, the Secretary must provide a biological opinion to the federal agency, and any applicant, that details how the agency action affects the species or its critical habitat and, if jeopardy or adverse modification is found, “suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action.”³⁵ Following this consultation, and the Services’ conclusion that the agency action would not violate Section 7(a)(2) (or the offering of a reasonable and prudent alternative) and that any incidental taking of a listed species would not violate such subsection, the Secretary is directed to provide to the federal agency and any applicant a written statement that “specifies the impact of such incidental taking on the species.”³⁶

Thus, the clear focus of ESA Section 7 is on ensuring that any federal action, and the incidental take associated with that action, do not violate the prohibition on causing jeopardy to the species or adverse modification of its critical habitat. Once that determination has been made, the federal action proceeds as proposed with the potential for RPMs that the Services “consider[] necessary or appropriate to minimize such impact.”³⁷ The terms and conditions that implement any RPM must be complied with in order to avoid consideration of any take as a prohibited taking under ESA Section 9.³⁸ Accordingly, Section 7 focuses on the avoidance of jeopardy and/or adverse modification of critical habitat and provides for authorization of any incidental take that may result from the action. It explicitly does not provide discretion to the Services to impose measures to fully mitigate or offset the impacts of take for actions that otherwise do not jeopardize listed species or adversely modify their critical habitat.

Third, the relevant legislative history also demonstrates that Congress did not intend for the provisions of ESA Section 7(a)(4) to confer expansive authority to the Services to impose offsetting or mitigating measures as part of any RPMs. As Congress explained in 1982, they revised ESA Section 7 to address the:

³³ 16 U.S.C. § 1539(a)(2)(B)(ii) (emphasis added).

³⁴ 16 U.S.C. § 1536(a)(2).

³⁵ 16 U.S.C. § 1536(b)(3)(A).

³⁶ 16 U.S.C. § 1536(b)(4)(A)-(C).

³⁷ 16 U.S.C. § 1536(b)(4)(C)(ii), (iv).

³⁸ 16 U.S.C. § 1536(o)(2).

concern raised by industry . . . of resolving conflicts between Section 7 and Section 9. After complying with the rigorous demands of the Section 7 consultation process, the applicant or Federal agency receives no assurance that any incidental and unintentional takings contemplated under a Section 7 consultation will not be prosecuted under Section 9 which prohibits any taking.³⁹

In response to this concern, Congress revised ESA Section 7(b) and added a new paragraph (4) with the following intent, as explained in the House Committee on Merchant Marine and Fisheries report:

The purpose of Section 7(b)(4) and the amendment to Section 7(o) is to resolve the situation in which a Federal agency or a permit or license applicant has been advised that the proposed action will not violate Section 7(a)(2) of the Act but the proposed action will result in the taking of some species incidental to that action—a clear violation of Section 9 of the Act which prohibits any taking of a species. The Federal agency or permit or license applicant is then confronted with the dilemma of having a biological opinion which permits the activity to proceed but is, nevertheless, proscribed from incidentally taking any species even though the incidental taking was contemplated in the biological opinion and determined not to be a violation of Section 7(a)(2). The Committee intends that such incidental takings be allowed provided that the terms and conditions specified by the Secretary to minimize the impact of the taking are complied with.⁴⁰

Similarly, the Senate Committee on Environment and Public Works explained that:

Under the proposed amendment, the Secretary is required to specify the extent of incidental take that would not violate the Section 7(a)(2) standard.

...

The proposed amendment would also require the Secretary to specify those reasonable and prudent measures that must be followed to minimize takings of individuals or parts, products, eggs or offspring of individuals of the species concerned. Such measures shall be mandatory. The Secretary may use discretion in determining such measures, which may include reporting and monitoring requirements. The proposed amendments are not intended to provide a liberal exemption from the taking prohibitions of the Act for a large class of activities. Rather, only a narrow set of activities that are conducted in compliance with the specified reasonable and prudent measures shall be exempt from the taking prohibitions of the Act. Any agency or applicant taking a listed species that was not the subject of the biological opinion or taking any listed species by actions that, are not in compliance with the measures specified by the Secretary shall be liable for such takings under the Act. In enacting the ESA in 1973, Congress was

³⁹ H.R. Rep. No. 97-567 at 15 (1982).

⁴⁰ *Id.* at 26 (emphasis added).

well aware that one of the most effective tools for conserving endangered wildlife was a proscription on taking. The proposed amendment is not intended to weaken this tool; rather, it is intended to provide Federal agencies and applicants with some certainty as to whether they may be liable for violating the taking provisions of the Act if their activity complies with Section 7(a)(2) and the action agency or applicant has in good faith taken all reasonable and prudent steps necessary to minimize or avoid incidental takings.⁴¹

Thus, it is abundantly clear, based on the plain statutory text of ESA Section 7 and the Congressional intent supporting the 1982 amendments to add the relevant provisions in Section 7(b)(4), that any imposition of RPMs by the Services must be narrowly confined to minimizing the impact of take already acknowledged and accepted through the application of the jeopardy/adverse modification inquiry. There is no statutory or Congressional intent to allow the Services to expand the scope of potential RPMs beyond “minimization” to include measures that would further offset or mitigate the impacts of any take of listed species that does not violate the ESA Section 7(A)(2) prohibition on jeopardy to the continued existence of the species.

Finally, the Services themselves acknowledged and endorsed this interpretation of the scope of applicable RPMs pursuant to ESA Section 7(b)(4). In 1986, in a contemporaneous regulatory action to implement the statutory revisions to ESA Section 7(b)(4), the Services explained that:

The Service agrees with several commenters that reasonable and prudent measures are not the same as reasonable and prudent alternatives. Substantial design and routing changes-appropriate only for alternatives to avoid jeopardy-are inappropriate in the context of incidental take statements because the action already complies with section 7(a)(2). The commenter that advocated an "alternatives" approach for reasonable and prudent measures misapplied the legislative history of the 1982 Amendments. Reasonable and prudent measures were intended to minimize the level of incidental taking, but Congress also intended that the action go forward essentially as planned. Therefore, the Service believes that there should be minor changes that do not alter the basic design, location, duration, or timing of the action. The section 7 obligations of Federal agencies are not expanded by the application of reasonable and prudent measures, which strictly govern the scope of the section 9 exemption for incidental takings.⁴²

In their subsequent guidance document, when providing explanation and direction on the appropriate scope of any RPMs, the Services stated that:

Section 7 requires minimization of the level of take. It is not appropriate to require mitigation for the impacts of incidental take. Reasonable and prudent measures can include only actions that occur within the action area, involve only

⁴¹ S. Rep. No. 97-418 at 21-22 (1982).

⁴² FWS and NMFS, *Interagency Cooperation—Endangered Species Act of 1973, as amended*, 51 Fed. Reg. 19,926, 19,937 (June 3, 1986) (emphasis added).

minor changes to the project, and reduce the level of take associated with project activities. These measures should minimize the impacts of incidental take to the extent reasonable and prudent. For example, a measure may call for actions like education of employees about the species, reduction of predation, removal or avoidance of the species, or monitoring.⁴³

The Services have adhered to this interpretation of their limited authority to impose RPMs with certain confined scope regarding magnitude and geographic implementation for decades. The Proposed Rule provides neither legal justification nor reasoned explanation to support deviating from the plain requirements and long-stand interpretation of ESA Section 7(b)(4).

Notwithstanding the above, and in addition to those fundamental flaws, the Services' statements that the proposed revisions would "not modify the action subject to consultation" and would be limited by the existing "minor change rule" are both disingenuous and flatly contradicted by the proposed regulatory revisions.⁴⁴ As explained above, in accordance with statutory directives, if a proposed action is determined not to jeopardize the continued existence of a listed species or adversely modify its critical habitat, pursuant to ESA Section 7(a)(2), it is allowed to proceed with the issuance of an ITS to alleviate potential conflicts with the Section 9 prohibitions. Accordingly, any additional measures that extend beyond the statutorily authorized minimization of impacts effectuates a post hoc modification of the action that was subject to consultation.

Furthermore, the existing "minor change rule" states that "[r]easonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes."⁴⁵ While the Services insist in the preamble of the Proposed Rule that any future RPM would be "limited by the existing 'minor change rule,'"⁴⁶ the Services' proposed regulatory revisions bely this statement as they would explicitly expand the scope of the current regulations to allow for "measures implemented inside or outside of the action are that avoid, reduce, or offset the impacts of incidental take."⁴⁷ The Services fail to explain or reconcile this interpretational conflict with respect to their applicable regulatory authority. Taken at face value, it would appear to be self-evident that any RPM that would alter the "design, location, scope, duration, or timing" of the proposed action—such as one that would require the offset or mitigation of impacts—would run afoul of this regulatory prohibition that the Services intend to retain.

As their last purported justification for the revisions to the RPM provisions in the Proposed Rule, the Services state that the revisions are necessary to "allow the Services to adhere more effectively to the preferred sequence in the development of mitigation" pursuant to their other mitigation policies and guidance.⁴⁸ As the Services should be aware, guidance and policy

⁴³ ESA Consultation Handbook at 4-53 (emphasis in original).

⁴⁴ Proposed Rule at 40,759.

⁴⁵ 50 C.F.R. § 402.14(i)(2).

⁴⁶ Proposed Rule at 40,759.

⁴⁷ *Id.* at 40,763.

⁴⁸ *Id.* at 40,759. In their recent ESA Compensatory Mitigation Policy, FWS notes that "RPMs can include measures that minimize the impact of the incidental taking on the species" and does not interpret its

documents are not legally binding and, therefore, cannot provide independent authority for proposed regulatory revisions. Absent the requisite ESA statutory authority, which, as explained above, is lacking, the Services cannot unilaterally expand the scope of RPMs beyond what Congress intended and specified.

(B) Implementation of Measures Outside of the Action Area

Notwithstanding the aforementioned objections to the proposed expansion of measures that could be included as RPMs, NESARC believes that, in appropriate circumstances, the Services could include RPMs that would occur outside the action area in order to minimize the impact of incidental take on the species.⁴⁹ To be considered, any such RPMs to be implemented outside the action area must be limited to those “necessary or appropriate to minimize the impacts, i.e., amount or extent, of incidental take.” In addition, the Services must continue to apply the existing “minor change rule” to any RPMs considered for implementation outside the action area.⁵⁰ Finally, the federal action agency and any project proponent should be involved in any discussions with the Services to develop appropriate RPMs.⁵¹

V. Conclusion

NESARC greatly appreciates the opportunity to provide these comments to the Services. We respectfully request that you take these comments into full consideration and adopt NESARC’s proposed revisions when finalizing the applicable regulatory language.

Sincerely,



Tyson Kade
NESARC Counsel

authority to allow the imposition of RPMs that fully mitigate or offset all impacts of incidental taking on the species. FWS, *Endangered Species Act Compensatory Mitigation Policy*, 501 FW 3, at 4 (July 3, 2023).

⁴⁹ See Proposed Rule at 40,758.

⁵⁰ 50 C.F.R. § 402.14(i)(2) (“Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.”).

⁵¹ ESA Consultation Handbook at 4-7.



NATIONAL ENDANGERED SPECIES ACT
REFORM COALITION

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August 21, 2023

U.S. Fish and Wildlife Service
Public Comments Processing
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Falls Church, VA 22041-3803

Submitted via Federal eRulemaking Portal: <http://www.regulations.gov>

**Re: NESARC Comments on the Proposed Rule on the Revision of the Regulations
Pertaining to Prohibitions to Threatened Wildlife and Plants**

Dear Ms. Galst:

On June 22, 2023, the U.S. Fish and Wildlife Service (“FWS” or “Service”) issued a proposed rule to revise the regulations for prohibitions related to threatened wildlife and plants under Section 4(d) of the Endangered Species Act (“ESA”).¹ This Proposed Rule would prospectively reinstate the application of the “blanket rule” option to apply to species newly listed as “threatened” the same “take” prohibitions under Section 9 of the ESA that apply to species listed as “endangered” in the absence of a species-specific “Section 4(d) rule.” This approach will once again bring FWS out of alignment with the long-standing practice of the National Marine Fisheries Service (“NMFS”) in its implementation of “take” prohibitions for threatened species, needlessly expend agency resources on enforcing prohibitions that may be unnecessary to protect and recover threatened species, and bring greater uncertainty for regulated entities.

NESARC is the country’s oldest broad-based, national coalition dedicated solely to achieving improvements to the ESA and its implementation. As detailed in the membership list attached to these comments, NESARC includes agricultural interests, cities and counties, conservationists, electric utilities, energy producers, farmers, forest product companies, home builders, 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 88 Fed. Reg. 40,742 (June 22, 2023) (“Proposed Rule”). On July 28, 2023, the Services denied a number of requests for extension of the comment period, including requests submitted by NESARC, some of its members, and the U.S. Small Business Administration Office of Advocacy.

NESARC appreciates the opportunity to comment on the Proposed Rule and recommends that FWS reconsider its proposal to reinstate the “blanket rule” for newly listed threatened species.² Instead of a “blanket rule,” the Service should continue to promulgate species-specific Section 4(d) rules that tailor the application of ESA prohibitions to the circumstances of each threatened species and that account for voluntary conservation mechanisms or applicable best management practices. Finally, in addition to the proposed exceptions for federally recognized Tribes, FWS should promulgate exemptions for certain general categories of conservation-related or otherwise necessary activities that may “take” species that are listed as threatened.

I. NESARC Opposes FWS’s Proposal to Reinstate Its Regulatory Approach of Blanket Application of the “Take” Prohibitions to Threatened Species.

NESARC opposes FWS’s proposal to revert to its prior regulatory practice by reinstating its “blanket rule” automatically applying the ESA’s “take” prohibitions to all newly listed threatened species. Regulated entities require certainty and clear guidance on how to conduct activities in a manner that appropriately protects threatened species. NESARC strongly supported FWS’s 2019 final rule that required the Service to adopt species-specific rules that identified and applied appropriately targeted “take” prohibitions to threatened species on a species-by-species basis (“2019 rule”).³ The 2019 rule brought FWS’s regulations and practices into alignment with NMFS’s long-standing practice of requiring species-specific Section 4(d) rules for threatened species. NESARC is concerned that FWS’s proposal to revert to its prior “blanket rule” practice will result in inconsistency between it and NMFS and unnecessarily misalign how ESA Section 4(d) is implemented.

First, FWS will no longer be required to tailor its “take” prohibitions to the individual species based on the species’ status and actual threats. Prior to implementation of the 2019 rule, although the Service had the option to issue species-specific rules and provide appropriate exceptions to Section 9 “take” prohibitions for threatened species, it did so only 25% of the time.⁴ Though FWS will retain the option to issue species-specific rules, history shows that it is unlikely to do so. This will lead to overapplication of “take” prohibitions that are not necessary to provide for the conservation of the individual species at issue, and it will unnecessarily constrain otherwise lawful activities.

Next, requiring FWS to act with specificity within a Section 4(d) rule provides affected parties with certainty in application, an element that was often missing prior to issuance of the 2019 rule. Impacted parties cannot be assured that FWS will not revert to its uneven application and interpretation of prohibitions.

Finally, FWS would lose the benefits gained by requiring species-specific Section 4(d) rules when listing threatened species. Requiring species-specific rules allows FWS to more specifically direct its conservation-focused resources and personnel towards those activities that could actually take a threatened species, which benefits both the species and the Service. FWS is

² In addition to these comments, NESARC also is providing comments on the proposed revisions to the regulations implementing ESA Sections 4 and 7. Those comments are incorporated herein by reference.

³ 84 Fed. Reg. 44,753 (Aug. 27, 2019).

⁴ Proposed Rule at 40,744.

now proposing to lose these gains by returning to overly broad application of often unnecessary restrictions that do not benefit threatened species.

As noted above, reinstatement of the blanket application of Section 4(d) will once again misalign FWS with NMFS, which has long required species-specific rules for the management of species under its regulatory purview. One of the stated reasons FWS sought to amend its approach to the application of Section 4(d) in the 2019 rule was to bring its practice into alignment with NMFS's long-standing application. The Proposed Rule undermines the consistency in application of the ESA across agencies, and it contributes to uncertainty for regulated entities.

II. Should FWS Restore Its Blanket 4(d) Rule Approach, It Should Commit to Consistently Promulgating Species-Specific Rules Concurrent with Final Listing Rules When Appropriate.

The requirements of Section 4(d) are met by requiring the agency to promulgate species-specific rules, and NESARC maintains that FWS should not revert to its previous position that a blanket 4(d) rule is preferred by default. However, should FWS revert to its prior regulatory approach, even if FWS could rely on the "blanket rule" when listing or reclassifying threatened species, the agency should commit to promulgating species-specific rules concurrently with each final classification action, as it did for the 35 species listed or reclassified as threatened between September 2019 and May 2023.⁵ By applying the ESA take prohibitions in a targeted manner that accounts for the threats and needs of each threatened species, FWS promotes conservation of the species while reducing unnecessary regulatory implications for landowners and project proponents.

Should FWS reinstate the blanket 4(d) rule, NESARC agrees with FWS's intention to implement the Proposed Rule on a prospective basis. The prospective application to newly listed species will avoid any confusion as to the management of already listed species.

For species that were subject to blanket rule listings before September 2019, NESARC renews its request that FWS pursue opportunities to develop species-specific Section 4(d) rules for presently listed threatened species as opportunities arise so that the benefits of species-specific rules may be realized with regard to these species as well.

III. FWS Should Expand the Exceptions to Section 4(d) Regulations Beyond Those Proposed for Tribes.

FWS is proposing to expand certain exceptions to the Section 4(d) regulations to further include federally recognized Tribes. The Proposed Rule would authorize Tribes "to aid, salvage, or dispose of threatened species."⁶ FWS is also considering whether to extend exceptions to the prohibitions to certain individuals from Tribes for takes associated with conservation-related

⁵ See *id.*

⁶ *Id.* at 40,745.

activities.⁷ These exceptions to the take prohibition are already applied to other federal and State agencies under FWS's Section 4(d) regulations.

Given the proposed expansion of these provisions, NESARC requests that FWS consider including similar exceptions for entities engaged in similar activities or following voluntary conservation mechanisms, regardless of their sovereign status. For example, a similar authorization for regulated entities engaged in otherwise lawful activities to aid, salvage, or dispose of threatened species without a permit could result in cost savings for FWS in reducing permit application processing.⁸ It would also reduce the regulatory burden for regulated entities, as well as the potential legal risks for entities engaged in these activities.⁹

Similarly, FWS should exempt certain categories of conservation-related or otherwise necessary activities that may "take" species that are listed as threatened. For example, in prior 4(d) rules, FWS has generally exempted on a species-by-species basis: routine maintenance of airports, certain agricultural or horticultural practices, noxious weed and invasive species control activities, roadside and right-of-way maintenance activities, fire management actions, managed grazing activities to remove invasive annual grasses and restore native ecosystems, habitat restoration activities (including voluntary creation of habitat for candidate or threatened species), channel maintenance and restoration projects, forestry-related activities pursuant to best management practices, activities for the protection of human life and property (including the removal of species from human structures), and voluntary monitoring activities conducted by regulated parties for the benefit of threatened species.¹⁰ The prospective inclusion of such exemptions from prohibited take would reduce the current regulatory burden for FWS and entities pursuing these mutually beneficial activities, as well as the legal risk to entities engaging in such conservation activities.

IV. Conclusion

NESARC greatly appreciates the opportunity to provide FWS with these comments on its proposed revisions to the regulations governing the prohibitions applicable to threatened wildlife and plants. We respectfully request that FWS take NESARC's comments into consideration when finalizing the regulatory language.

Sincerely,



Tyson Kade
NESARC Counsel

⁷ *Id.* at 40,747-48.

⁸ *See id.* at 40,749.

⁹ *See id.*

¹⁰ *See generally* 50 C.F.R. §§ 17.40-17.47.



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Riverton, Wyoming

National Alliance of Forest Owners
Washington, DC

National Association of Counties
Washington, DC

National Association of Conservation Districts
Washington, DC

National Association of Home Builders
Washington, DC

National Association of Realtors

Washington, DC

National Cattleman's Beef Association

Washington, DC

National Rural Electric Cooperative Association

Washington, DC

National Water Resources Association

Washington, DC

National Waterways Conference

Arlington, Virginia

Nebraska Farm Bureau Federation

Lincoln, Nebraska

Northern Electric Cooperative, Inc.

Bath, South Dakota

Northwest Horticultural Council

Yakima, Washington

Northwest Public Power Association

Vancouver, Washington

Public Lands Council

Washington, DC

Renville-Sibley Cooperative Power Association

Danube, Minnesota

Salt River Project

Phoenix, Arizona

San Luis Water District

Los Banos, California

South Columbia Basin Irrigation District

Pasco, Washington

Southwestern Power Resources Association

Tulsa, Oklahoma

Sulphur Springs Valley Electric Cooperative

Willcox, Arizona

Teel Irrigation District

Echo, Oregon

Washington State Potato Commission

Moses Lake, Washington

Wells Rural Electric Company

Wells, Nevada

West Side Irrigation District

Tracy, California

Wheat Belt Public Power District

Sidney, Nebraska

Whetstone Valley Electric Cooperative, Inc.

Milbank, South Dakota

Wilder Irrigation District

Caldwell, Idaho

Wyrulec Company

Lingle, Wyoming

Y-W Electric Association, Inc.

Akron, Colorado