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Public Comments Processing
Attn: FWS-HQ-ES-2018-0009
U.S. Fish and Wildlife Service
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Falls Church, VA 22041-3803

National Marine Fisheries Service
Office of Protected Resources
1315 East-West Highway
Silver Spring, MD 20910

Submitted electronically at: regulations.gov

Re: Proposed Rule Revising Regulations for Interagency Cooperation under ESA Section 7 (Interagency Consultation); *FWS-HQ-ES-2018-0009*.

Dear Secretaries Zinke and Ross:

On behalf of Trout Unlimited (TU) and our more than 300,000 members and supporters across the country, we offer the following comments on Proposed Rule Revising Regulations for Interagency Cooperation under ESA Section 7; (*FWS-HQ-ES-2018-0009)*. TU's mission is to conserve, protect and restore North America's coldwater fisheries and their watersheds. The Endangered Species Act (ESA) is and has been a critical tool in protecting and supporting the recovery of numerous populations of fish and wildlife, including populations of trout and salmon that are so important to our members.

This proposed rule would amend portions of regulations implementing section 7 of the ESA related to interagency consultations in ways inconsistent with the statutory language of the Act. For this reason, the proposed rule must be withdrawn and revised to be consistent with the statute. We offer specific comments below.

Background

Interagency consultation, the subject of this Proposed Rule, is a core pillar of the protections crafted by Congress to protect listed species. Section 7 of the ESA requires federal agencies to proactively work toward the conservation of listed species and to refrain from taking action that would jeopardize listed species or degrade their habitat. This section of the Act requires all federal agencies considering a project or action to consult with the relevant species management agency

(Secretaries of Interior and or Commerce) to ensure that any action authorized, funded, or carried out by such agencies is "not likely to jeopardize the continued existence" of any listed species or result in the "destruction or adverse modification" of critical habitat of such species. Title 50, part 402, of the Code of Federal Regulations establishes the procedural regulations governing this interagency cooperation.

Comments: Proposed changes to 50 CFR 402

Definitions: Environmental Baseline and Effects of the Action

The proposed rule would revise the definition of "effects of the action" to make the definition of environmental baseline a stand-alone definition within Sec. 402.02, and to collapse the various concepts of direct and indirect effects, and the effects of interrelated and interdependent actions, into a single definition including "all effects caused by the proposed action." 83 Fed. Reg. 35178 at 35183-35184 (July 25, 2018).

The proposed definitions alter the scope of effects considered by the Services in contradiction to the goals of the Act. In redefining these terms, the Services could authorize actions that harm species, so long as the harm from the action alone, viewed in isolation from existing conditions and impacts caused by other ongoing actions, would not result in jeopardy. In other words, actions that have occurred in the past and will continue into the future—e.g., a renewal of an operational permit at a dam—would not be subject to the Services' jeopardy review. As a result, harm to species caused by projects previously authorized would be exempted from the jeopardy analysis. Ignoring baseline conditions faced by a species during consultation is inconsistent with the precautionary principle of the Act and its goal of coordinating agency actions to move species toward recovery.

These proposed changes would undermine the consultation process by permitting the Services to ignore forces driving species to extinction simply because they existed prior to the newly proposed federal action. The proposed definition changes are inconsistent with the ESA's jeopardy standard at 16 U.S.C. 1536(a)(2); *see also, American Rivers v. Fed. Energy Regulatory Comm'n,* 895 F.3d 32, 47 (D.C. Cir. 2018) ("[A]ttributing ongoing project impacts to the 'baseline' and excluding those impacts from the jeopardy analysis does not provide an adequate jeopardy analysis.").

The proposed changes are not only inconsistent with the ESA, but they also fail to simplify or clarify the consultation process. For example, the proposed rule change to separate the environmental baseline from consideration of the action—the simplification of the "effects of the action" definition--is likely to increase costs and impose delays over time for at least two important reasons. First, with the elimination of consideration of some indirect effects, the cost of future Section 7 consultations will increase. This is because it is typically an order of magnitude cheaper to prevent harm to habitat than it is to restore degraded habitat, or reverse harmful processes once

set in motion. Second, with the simplified environmental baseline analysis, there will be less opportunity for the Services to prevent and minimize cumulative adverse effects. This will delay and constrain the Services' recommendations for early interventions which will likely be cheaper, faster, and easier to implement than more dramatic measures taken when the degradation of critical habitat reaches a larger scale. These proposed changes must be withdrawn.

As an alternative approach to simplify the process while still meeting the goals and objectives of the Act, the Services could consider providing an "overcompensation off-ramp" for permit applicants and project proponents faced with complexity in a cumulative effects analysis during consultation. Such an off-ramp to complexity can be had through taking steps to restore critical habitat or provide long-term or permanent protection of critical habitat. Substituting clear steps to restore and protect critical habitat for complex analysis of indirect effects could be a cleaner and faster way to achieve timely and helpful Section 7 consultations.

<u>Definitions: Destruction or adverse modification of critical habitat "as a whole"</u>

The proposed rule would modify the definition of "destruction or adverse modification" of critical habitat by adding the phrase "as a whole" and deleting the second sentence:

> Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species *[as a whole]*. ~~Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features~~.

83 Fed. Reg. 35178 at 35181 (July 25, 2018). This proposed change would minimize consideration of harmful impacts and beneficial mitigation needs in the action area. This change would de-emphasize the importance of critical habitat in the Section 7 consultation process, proposing to clearly indicate that the final destruction or adverse modification determination is made at the scale of the entire critical habitat designation as a whole, *not* at the action area, critical habitat unit, or other less extensive scale. The result of this proposed rule change would be unmitigated damage in a project-by-project level that adds up to significant loss overall - a death by a thousand cuts. This is inconsistent with the Act's requirement that the federal agencies "insure" that their actions do not result in the "destruction or modification" of critical habitat. 16 U.S.C. 1536(a)(2). *See also, Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service,* 378 F.3d 1059, 1075 (9th Cir. 2004) ("Focusing solely on a vast scale can mask multiple site-specific impacts that, when aggregated, do pose a significant risk to a species.").

The single largest driver of extinction is habitat loss. The Services should look to strengthen habitat and avoid additional loss or damage in every action. Protecting and improving habitat is one of the

best investments against further decline and is critical to advancing recovery and moving species off the ESA list. For these reasons, the proposed rule change should be withdrawn.

A reconsideration of the definition of critical habitat degradation can be improved by providing clear direction to restore degraded critical habitat and provide long-term or permanent protection of intact critical habitat, in response to any habitat loss stemming from a proposed action. This will simplify the consultation process by not having to determine the relationship of a particular loss of some critical habitat elements to the functioning of "critical habitat as a whole," or the "overall value of the critical habitat" which is likely to be a difficult and time-consuming analysis for which there are not obvious metrics. The lack of standard metrics for relating a small or isolated harm to some portion of critical habitat to the "overall value of the critical habitat" is likely to lead to delay and increased costs in section 7 consultations.

The Services note that deletion of the second sentence is an effort to reduce confusion and clarify the meaning of what types of actions or impacts may result in destruction or adverse modification. However, the second sentence is necessary to help clarify by example how the scope of impact will be quantified. Deleting is likely to cause more confusion. A better way to reduce confusion and add clarity would be to further elaborate how "destruction or adverse modification" may be determined and provide pathways to effectively mitigating any harm to critical habitat.

Mitigation Actions Require a Specific Plan and Commitment of Resources

The proposed rule removes the requirement that proposed mitigation to avoid, minimize, or off-set the adverse effects of a federal action should have a specific plan or commitment of agency resources. 83 Fed. Reg. 35178 at 35187 (July 25, 2018). This proposal is inconsistent with the ESA which requires that "no-jeopardy" determinations be based only on mitigation measures that are reasonably certain to occur, consistent with Section 7's directive to the Services to "insure" that federal agency actions do not jeopardize listed species. 16 USC 1536(a)(2). *See also, Nat. Res. Defense Council v. Kempthorne,* 506 F. Supp. 2d 322, 356 (E.D. Cal. 2007); *Oregon Wild v. U.S. Forest Service,* 193 F. Supp. 3d 1156, 1167 *(*D. Or. 2016)("The ESA prohibits biological opinions from relying on the mitigating effects of actions that are not reasonably certain to occur."). The proposed rule is inconsistent with clear statutory directives and must be withdrawn.

Definitions: Programmatic Consultation

The proposal to add a definition of programmatic section 7 consultation ("programmatic consultation") holds promise to simplify and speed the consultation process over time. As defined, programmatic consultations could be used to evaluate the effects of multiple routine or small actions anticipated within a particular area, or to evaluate and guide federal agency programs as they are implemented in the future. 83 Fed. Reg. 35178 at 35184-35185 (July 25, 2018). These programmatic consultations could be effective in lowering the costs associated with section 7

consultations, with the addition of a directive to take actions to increase the environmental baseline over time.

Programmatic consultations appear particularly well suited to planning an increasingly favorable environmental baseline for a species, by aggregating actions over a geography or taking a long-view of multiple actions over an extended period of time. By examining and planning the kinds of habitat restoration, protection, and reversal of damaging processes to improve environmental baseline, these programmatic consultations could link actions to improve conditions for a threatened or endangered species with the proposed program implementation. A gradual increase in environmental baseline, obtained through multiple actions over the time and scale of a programmatic consultation, is consistent with section 7's directive to increase the likelihood of both the survival and recovery of a listed species in the wild.

Comments: Changes considered, but not proposed

There are a number of references to possible regulatory changes considered or discussed, but not proposed in this rulemaking. We offer feedback on several of those concepts below. While we appreciate the opportunity to comment on these conceptual changes, should the Services elect to pursue any of these conceptual revisions, the Services must conduct a new rulemaking process to identify proposed language and solicit feedback directly on those changes. The broad concepts presented as potential avenues for agency rulemaking, and providing general notice that the regulations governing section 7 consultation are being "comprehensively reconsider[ed]," 83 Fed. Reg. at 35,179, does not provide adequate notice of specific, proposed rule changes. *See, CSX Transp., Inc. V. Surface Transp. Bd.,* 584 F.3d 1076, 1082 (D.C. Cir. 2009) (broad notices of proposed rulemaking insufficient to justify a final rule that lacks specific reference in the notice).

<u>Deadline for Informal Consultation (Section 402.13)</u>

The Services are considering whether to add a 60-day deadline, subject to extension by mutual consent, for informal consultations. 83 Fed. Reg. 35178 at 35186 (July 25, 2018). Currently, there is no express deadlines for the Services to complete informal consultation, unlike formal consultations, which must be completed within 90 days (unless extended under terms at 402.14(e)). The Services propose to amend the informal consultation process to add a 60-day deadline, subject to extension by "mutual consent."

While we support efficient review processes, adding a 60-day deadline is not likely to improve the timeliness of review during informal consultations. Delay can result from underfunding or lack of staff resources or the need for additional study or data collection for complicated applications. If the Services proceed with implementing a deadline, we recommend adding additional funding to support timely completion of reviews. Similarly, any deadline should include opportunity for extension when necessary, as contemplated by the preamble of the proposed rule. Finally, we

suggest that the "clock" should only begin to run once the consulting agency has a complete application with supporting information necessary to make the required determinations.

Without adequate funding, opportunity to extend if necessary and the assurance that the deadline clock will only run from the date the consulting agency determines they have the necessary information to complete their review, we recommend against a deadline. Without these components in place, it is possible that adding a deadline could increase the speed of review at the expense of quality review and evaluation. Similarly, it is possible that adding a deadline to the informal process could have the unintended result of increasing process by pushing consultations toward formal consultation as a safety precaution where informal timelines cannot be met.

Scope and Applicability of Consultations (Section 402.03)

Actions precluded from consultation. The Services seek comment on the advisability of clarifying the circumstances upon which Federal agencies are not required to consult. Similarly, the Services propose to preclude consultation or consideration of harms caused by federal action if those harms are manifested through "global processes."

More specifically, the Services seek comment regarding revising § 402.03 to preclude the need to consult when the Federal agency does not anticipate take and the proposed action will: (1) Not affect listed species or critical habitat; or (2) have effects that are manifested through global processes and (i) cannot be reliably predicted or measured at the scale of a listed species' current range, or (ii) would result at most in an extremely small and insignificant impact on a listed species or critical habitat, or (iii) are such that the potential risk of harm to a listed species or critical habitat is remote, or (3) result in effects to listed species or critical habitat that are either wholly beneficial or are not capable of being measured or detected in a manner that permits meaningful evaluation. 83 Fed. Reg. 35178 at 35185 (July 25, 2018).

Scope of consultation and "jurisdiction of the regulatory agency." The Services also request feedback on whether the scope of a consultation should be limited to only the activities, areas, and effects within the jurisdictional control and responsibility of the regulatory agency, noting that in prior consultations under section 7(a)(2), agencies with regulatory authority have consulted on actions that include effects to listed species or designated critical habitat that occur outside of the specific area over which they have regulatory jurisdiction.

We recommend against all the described limitations as each one would shrink the Services' toolbox during consultation and constrain evaluation of actions and impacts by forcing a blind eye toward known or predicted impacts or harm caused by an action. Such limitations are counter-productive and will lead to more expensive and more time-consuming consultations in the future. Because it is much less expensive to prevent harm to habitat than it is to restore degraded habitat, or reverse harmful processes once set in motion, addressing likely harms when they are small is faster and

cheaper than waiting to address larger harms. Early interventions are likely to be cheaper, faster, and easier to implement. Removing or limiting early interventions to support critical habitat health through section 7 consultations will increase costs and force longer delays in the future.

Particularly under the proposal to limit the scope of consultation to the scope of the action agency's jurisdiction, impacts to species would continue, but would no longer be considered as factors during consultations if the harm happened to fall outside of that agency's jurisdiction. This is counterintuitive to effective administration of the Act as it would result in unmitigated harm that would reduce the pace of survival and recovery of listed species. The Services should look for and embrace opportunities for cross-jurisdictional engagement and leadership to promote species conservation, in furtherance of the ESA's Section 7(a) directive.

Moreover, the ESA does not allow the Services to create consultation exemptions. Section 7 requires that all federal agencies "*shall*, in consultation with . . . the Secretary," ensure that their actions do not jeopardize listed species, 16 U.S.C. 1536(a)(2)(emphasis added); "each Federal agency *shall . . . request of the Secretary* information whether any species which is listed or proposed to be listed may be present in the area of such proposed action," 16 U.S.C. 1536(c)(1)(emphasis added); and, "if the Secretary advises . . . that [a listed] species may be present, such agency *shall conduct* a biological assessment . . .. 16 U.S.C. 1536(c)(1)(emphasis added). Congress left no discretion to either the action agency or the Services to avoid consultation when an imperiled species is present.

Summary

In summary, TU is concerned that the proposed rule undermines the intent of ESA and lacks important detail necessary to constitute valid public notice of all the proposed changes. We request that the Services withdraw the proposed rule and republish a revised rule that is consistent with the statutory language of ESA. Additionally, we request that these comments inform that effort. Thank you for considering our comments on the proposed rule.

Sincerely,

Kate Miller
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Trout Unlimited