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Kimberly Damon-Randall
Director, Office of Protected Resources
National Marine Fisheries Service
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Re: Endangered and Threatened Wildlife and Plants; Interagency Cooperation Regulations; Docket No. FWS–HQ–ES–2025–0044, FXES11140900000–256–FF09E23000; Docket No. 251105–0167

Dear Mr. Tirpak and Ms. Damon-Randall:

The undersigned organizations and our millions of members and activists nationwide write to oppose the proposed regulations governing interagency consultation procedures under the Endangered Species Act (ESA or the "Act"), 16 U.S.C. § 1531 *et seq.* Endangered and Threatened Wildlife and Plants; Interagency Cooperation Regulations, 90 Fed. Reg. 52,600 (Nov. 21, 2025) [hereinafter "Proposed Rule"]. This proposal would undermine the ESA consultation process, which is the heart of the ESA's protections for listed species. The proposed changes narrow the consultation process that is central to Section 7 of the ESA (Section 7). This could leave species without the protections they need to survive and recover. And it would make the ESA's overall goal of species recovery more costly and difficult to carry out in the future.

BACKGROUND

The Endangered Species Act is the nation's most important wildlife protection law. Since its enactment in 1973, the ESA has prevented the extinction of over 2,000 foreign and domestic plant and animal species. The purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened Species." 16 U.S.C. § 1531(b).

Interagency consultation, the subject of this Proposed Rule, is a central pillar of the protections crafted by Congress to protect listed species. Section 7 of the ESA requires all federal agencies to analyze, in consultation with FWS and NMFS (collectively, the "Services"), the impacts of their actions on listed species and their critical habitat. This consultation process is designed to "insure" that any such action "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification

of [critical] habitat of such species .....” 16 U.S.C. § 1536(a)(2).

ANALYSIS

I. The proposed changes to the definition of “environmental baseline” fail to clarify the meaning of this term.

The Services propose several changes to the definition of “environmental baseline” in 50 C.F.R. § 402.02, purportedly to clarify the definition and align it more closely with section 7. Most notably, the proposal specifies that the environmental baseline is “evaluated at the time of the proposed action” and refers to the “current condition” that would be “reasonably expected to occur” in the absence of the proposed action. 90 Fed. Reg. at 52,602. It would also re-insert the word “ongoing” to describe agency activities that are appropriately considered as part of the environmental baseline. *Id.* These changes serve only to obscure the meaning of “environmental baseline.” They are arbitrary and capricious and must be withdrawn or revised.

The proposal that the environmental baseline “refers to the *current condition* of the listed species or its designated critical habitat in the action area *as would reasonably be expected to occur*” is confusing and possibly contradictory. The phrase “expected to occur” seems to reference a time in the future, and yet the definition states that the environmental baseline “refers to the current condition” of the species or habitat. The Services’ meagre explanation of the proposed change fails to clarify or explain the proposal.

The Services then fail to explain adequately their basis for re-inserting the word “ongoing” to describe agency activities that should be considered as part of the environmental baseline. The Services explained in 2023 and explain again in the Proposed Rule that a “Federal agency’s discretion over their own activities and facilities” is the central question when “determining what is properly categorized as falling within the environmental baseline.” 89 Fed. Reg. at 40,755; 90 Fed. Reg. at 52,602. This applies whether or not an agency action is “ongoing.” The 2023 proposed rule appropriately deleted the word from the third sentence because its inclusion “has resulted in misinterpretation and distracted from the intended focus on Federal agency discretion.” 89 Fed. Reg. at 40,755. The Services now propose to reverse that change based on the unsubstantiated claim that those changes “were unnecessary as they do not meaningfully clarify or change the definition.” 90 Fed. Reg. at 52,602.

Both proposed changes—insertion of timing language in the first sentence and deletion of “ongoing” in the third sentence—lack any rational basis and are unlawful. *See Motor Vehicle Manufacturers Assoc. of the U.S., Inc. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (June 24, 1983).

II. The proposed resurrection of section 402.17 could eliminate consideration of important harms in violation of the ESA

Current regulations require that “effects of the action” that are considered as part of the consultation process would not occur “but for” the proposed action and must be “reasonably certain to occur.” 50 C.F.R. § 402.02. The Services propose to re-issue additional rules governing whether an activity caused by a proposed action is “reasonably certain to occur” in section 402.17—which

was added in 2019 and removed in 2024. The added section contradicts the rationale of the Services to "prevent confusion and provide more clarity" and narrows the scope of consultation in violation of the ESA.

The proposed revisions inject additional uncertainty into the consultation process. Current regulations already require the Service and stakeholders to navigate a nesting doll of definitions and standards. "Effects of the action" are all "consequences . . . caused by the proposed action," including "consequences of other activities that are caused by the proposed action." 50 C.F.R. § 502.02. These consequences, in turn, must "not occur but for the proposed action" and must be "reasonably certain to occur." *Id.* The ESA already requires that all these determinations must be made according to the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2). Now, the Services propose to also require that a "conclusion of reasonably certain to occur must be *based on clear and substantial information*." 90 Fed. Reg. at 52,603 (emphasis added).

The Services acknowledge that this additional standard was previously removed because "of confusion and tension between the phrase 'clear and substantial information' and the statutory requirement to use the best scientific and commercial information available." 90 Fed. Reg. at 52,603. They go on to explain that "this confusion and tension stemmed from the appearance that the phrase added a second and potentially higher standard for the information and supporting basis used to determine if a consequence or activity was 'reasonably certain to occur.'" *Id.* But the Services now assure the public that there "is no tension" between these standards, that "the standard *does not* limit what information and data the Services will consider in making that determination," and that "inclusion of § 402.17 *would neither raise nor lower the bar* on application of the 'effects of the action' test." 90 Fed. Reg. at 52,603 (emphases added). Notably, however, the Services do not explain what the new standard *does* mean or what effect it *does* have the definition of "effects of the action." The unexplained addition subverts the Services' attempt to "prevent confusion and provide more clarity" and is arbitrary and capricious.

Contrary to the Services' explanation, logic dictates that the addition of the "clear and substantial information" standard raises the bar for determinations that a consequence is reasonably certain to occur. This would also narrow the scope of the effects of the action and weaken the consultation process. The best available science standard already describes information to be used when analyzing the effects of the action. Adding an additional standard with distinct language can *only* further narrow the scope of evidence that is sufficient to support a causal relationship between the proposed action and the consequence at issue. Accordingly, the new standard both unlawfully modifies the best available science standard chosen by Congress and contradicts the Services' vague assurances that the new standard has no substantive effect at all.

The new, mandatory considerations proposed at section 402.17(a) and (b) confirm that the Services are narrowing the definition of "effects of the action." *See* 90 Fed. Reg. 52,607. This is especially true of 402.17(b), which describes considerations for determining whether a harm should *not* be "considered an effect of the action." *Id.* By explicitly outlining these considerations, the Services bias their determinations in favor of narrowing the scope of "effects of the action." The proposed considerations "raise . . . the bar on application of the 'effects of the action' test" in conflict with the Services' justification, section 7's mandate to ensure against jeopardy to species, and the overall conservation purposes of the ESA.

CONCLUSION

We oppose the Proposed Rule in its entirety because it would erode the interagency consultation process and drive threatened and endangered species closer to extinction. Through it, the Services propose to cast aside their statutory mandate to ensure their actions do not jeopardize the continued existence of listed species or adversely modify their designated critical habitat. Interagency consultation, however, is not a procedural formality; it is a core element of Congress's prudently crafted response to an extinction crisis. The ill-reasoned Proposed Rule undermines and violates the ESA and should be withdrawn.

Respectfully submitted,

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On behalf of:

Alliance for Sustainability
American Bird Conservancy
Animal Welfare Institute
Center for Food Safety
Conservancy of Southwest Florida
Endangered Species Coalition
Endangered Habitats League
Environmental Defense Center
Environmental Protection Information Center
Friends of Minnesota Scientific and Natural Areas
Friends of the Mississippi River
International Marine Mammal Project, Earth Island Institute
Kettle Range Conservation Group
Klamath Forest Alliance
Los Angeles Audubon Society
Maine Audubon
Massachusetts Audubon
Massachusetts Pollinator Network
Minnesota River Valley Audubon Chapter
National Wolfwatcher Coalition
Natural Resources Defense Council
New Jersey Audubon
People & Pollinators Action Network
Pollinator Friendly Alliance
Prairie Hills Audubon Society
Save the Sound
South Carolina Aquarium
Starry Skies North
The Urban Wildlands Group
Vote Climate