

September 24, 2018

U.S. Fish and Wildlife Service
Public Comments Processing
5275 Leesburg Pike
Falls Church, VA 22041-3803

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

RE: Comments on Proposed Revisions to Regulations on Interagency Consultation under Section 7 of the Endangered Species Act (Docket No. FWS-HQ-ES-2018-0009)

To the U.S. Fish and Wildlife Service and National Marine Fisheries Service:

The American Association of State Highway and Transportation Officials (AASHTO) appreciates the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) issued by the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) on July 25, 2018, announcing proposed changes to the Services' regulations implementing Section 7 of the Endangered Species Act (ESA). (See 83 Fed. Reg. 35178.)

AASHTO is a nonprofit, nonpartisan association representing the State transportation departments in the 50 states, the District of Columbia, and Puerto Rico. It represents all five transportation modes: air, highways, public transportation, rail, and water. Its primary goal is to foster the development, operation, and maintenance of an integrated national transportation system. Our members work closely with USDOT agencies to operate, maintain, and improve the nation's transportation system.

Overall, AASHTO supports the Services' efforts to clarify and simplify the Section 7 consultation regulations. We believe there are ways to make the Section 7 consultation process simpler to navigate and more efficient for all parties, while still maintaining protections for endangered and threatened species in accordance with the ESA. Our comments address changes contained in the proposed rule itself as well as several potential changes that are described in the NPRM.

1. Definition of "Adverse Modification or Destruction" (50 CFR 402.02)

The Services propose to modify the definition of "destruction or adverse modification" by inserting the phrase "as a whole" to make clear that this determination is made regarding the designated critical habitat area in its entirety. We support this change to the definition. The insertion of "as a whole" clarifies and confirms the Services' interpretation adopted by the

Services in a previous rulemaking.¹ Incorporating this phrase into the text of the rule should promote greater consistency in the application of this definition, without changing current practice.

The Services also propose to delete a sentence that was added as part of a final rule adopted in 2016: “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.” We agree that this sentence is not needed and is potentially confusing since it may imply that *any* alteration of the habitat constitutes adverse modification or destruction. Omitting this sentence will help to keep the focus on the core of the definition – namely, whether the activity “*appreciably diminishes* the value of critical habitat as a whole for the conservation of a listed species.” (emphasis added)

We also welcome the clarifications provided in the preamble to the proposed rule: (1) that “adverse modification or destruction” can be found only when the activity “appreciably” worsens the condition of the critical habitat, as stated in the definition itself; and (2) that the Services are not required to make a finding as to whether there is a “tipping point” beyond which a species can no longer recover.

2. Definition of “Effects of the Action” (50 CFR 402.02)

The Services propose to modify the definition of “effects of the action” to include “all effects on the listed species or critical habitat that are caused by the proposed action, including the effects of other activities that are caused by the proposed action.” The definition specifies a two-part test for causation: (1) the effect “would not occur but for the proposed action” and (2) “it is reasonably certain to occur.” The proposed definition omits the existing definition’s references to “direct and indirect effects” and “interrelated or interdependent” activities.

We support the proposed changes to the definition of “effects of the action,” with the understanding that it is solely a clarification and does not substantively alter the existing definition, nor does it increase documentation requirements. As the Services explain, the proposed definition will simplify the determination of effects by avoiding the need to categorize potential effects as direct or indirect, and the two-part test as articulated in the proposed rule is broadly reflective of current practice.

3. Definition of “Environmental Baseline” (50 CFR 402.02)

The Services propose to maintain the current definition of the term “environmental baseline” but move it into a stand-alone definition rather than defining this term as part of the definition of “effects of the action.” While this is not a substantive change, we believe it is beneficial as an improvement in clarity.

¹ See 79 Fed. Reg. 27060, 27063 (May 12, 2014) (proposed rule) (stating that “[t]he question is whether the ‘effects of the action’ will appreciably diminish the conservation value of the critical habitat as a whole, not just in the area where the action takes place”); 81 Fed. Reg. 7214 (Feb. 11, 2016) (final rule) (“The analysis thus places an emphasis on the value of the designated critical habitat as a whole for the conservation of a species, in light of the role the action area serves with regard to the function of the overall designation.”).

The Services also seek input on whether to modify this definition to clarify that “ongoing” federal actions are included as part of the baseline. The proposed definition would state that:

“Environmental baseline is **the state of the world absent the action under review and** includes the past, present and ongoing impacts of all past and ongoing Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions in the action area which are contemporaneous with the consultation in process. **Ongoing means impacts or actions that would continue in the absence of the action under review.**”

We are uncertain whether this proposed change would be beneficial. If this change is made, it is necessary at a minimum to clarify the concept of an “ongoing” action. Also, the Services should consider whether the distinction between “present” impacts and “ongoing” impacts is necessary; it may be clearer to remove “present” and replace it with “ongoing.” More generally, if this change is made, the Services should ensure that it does not add complexity by simply creating another category of impacts and actions that must be considered.

4. Definition of “Programmatic Consultation” (50 CFR 402.02)

The Services propose to add a new definition of the term “programmatic consultation” for the first time. The proposed definition would identify types of programmatic consultation as examples: “(1) Multiple similar, frequently occurring or routine actions expected to be implemented in particular geographic areas; and (2) A proposed program, plan, policy, or regulation providing a framework for future proposed actions.” The Services note that the proposed definition is intended to “codify an optional consultation technique” and to “promote the use of programmatic consultations as effective tools.”

We have strongly supported increased flexibility to use programmatic methods to satisfy environmental review and permitting requirements under the National Environmental Policy Act, the ESA, and other laws. We also note that programmatic consultation is already a well-established practice under the ESA, so the addition of a definition would be helpful in validating that established practice. Therefore, overall, we are in support of the proposed definition.

We do, however, recommend clarifying in the definition itself that the use of programmatic consultation is an “optional” method, as the Services recognize in the preamble to the proposed rule. Explicitly recognizing in the definition that this method is optional will help to ensure that agencies and project sponsors are not compelled to use programmatic methods when they conclude that a project-level approach is more efficient.

In addition, while the text of the proposed definition (“such as...”) makes clear that the two examples listed are not an exhaustive list of the circumstances where programmatic consultation can be used, we suggest clarifying that point in the preamble to the final rule. In addition, it would be helpful to recognize explicitly that programmatic consultation also can be used for a single large project, such as a project involving new construction in a lengthy corridor.

On a related note, the Services amended the Section 7 consultation regulations in 2015 to add definitions of “framework programmatic action” and “mixed programmatic action.” We question

whether those definitions have been widely used in practice, and whether they are really needed. If they are retained, the Services should more clearly explain in the preamble to the final rule how those terms relate to “programmatic consultation.”

5. When Consultation is Not Required (40 CFR 402.03)

The Services seek comment on whether to clarify the circumstances in which Federal agencies are able to determine on their own that Section 7 consultation is not required. Specifically, the Services ask for comment on whether to clarify that consultation is not needed when the proposed action would (1) have “no effect” on listed species or critical habitat, (2) have effects that are “manifested through global processes” and meet certain other criteria; 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.”

We agree that it would be helpful to provide greater clarity regarding the circumstances in which a federal action agency can determine on its own, without the need for Services’ concurrence, that Section 7 consultation is not required. Federal action agencies are often faced with circumstances in which a species list provided by the Services identifies one or more species as potentially present (e.g., in the county in which a portion of the project is located), but the federal agency determines based on surveys or other information that the species is not actually present in the vicinity of the project itself. The regulations should make clear that the federal lead agency has authority to make a finding of “no effect” in such circumstances, provided that the agency appropriately documents the basis for its determination.

We note, however, that some of the criteria proposed in the NPRM for making a finding of “no effect,” and thus avoiding Section 7 consultation, could be confused with the Services’ definition of “not likely to adversely affect” – a finding that is made *as part of Section 7 consultation* and requires the Service’s concurrence.² If changes such as those proposed in the NPRM are made, it will be essential for the final rule to distinguish clearly between (1) a “no effect” finding, which the federal action agency makes on its own and avoids the need for consultation, and (2) a “not likely to adversely affect” finding, which the federal action agency can make only as part of informal consultation with concurrence of the Service.

In addition, we are concerned that the reference to “global processes” is vague and could be misinterpreted. In the absence of any specific example or explanation, there could be confusion about what this term is intended to encompass. If that term is included in the final rule, we suggest including a definition or example of what it means.

The Services also seek comment on whether the scope of Section 7 consultation “should be limited to only the activities, areas, and effects within the jurisdictional control and responsibility of the regulatory agency.” We note that, from a project sponsor’s standpoint, limiting the scope of Section 7 consultation specifically to the areas within a permitting agency’s regulatory jurisdiction would not necessarily promote streamlining, because the sponsor may need to complete Section 7 consultation for a portion of the project and still obtain a Section 10 permit to

² USFWS and NMFS, Section 7 Consultation Handbook (1998), p. xv (defining “not likely to adversely affect” to mean “the appropriate conclusion when effects on listed species are expected to be discountable, insignificant, or completely beneficial”); see also p. 3-12.

authorize incidental take on the rest of the project. We recommend preserving the flexibility, when requested by a project sponsor, to engage in Section 7 consultation on the entire project.

6. Deadline for Informal Consultation (50 CFR 402.13)

The Services state that they are “considering whether to add a 60-day deadline, subject to extension by mutual consent” for completing informal consultation. The Services seek comment on whether to establish a deadline and if so, how the deadline should be implemented. The Services specifically seek comment on how much time should be allowed, which portions of informal consultation the deadline should apply to, when informal consultation begins, and the ability of the parties to extend or “pause the clock” on informal consultation.

We support the concept of establishing a deadline for informal consultation. While deadlines are not always met in practice, they can be helpful in setting expectations as to how long each stage of the process should take, which is especially important given the Administration’s increased emphasis on setting comprehensive project schedules. We recommend, however, that the Services establish a deadline of **30 days** for informal consultation, running from the date on which the lead agency submits a request for concurrence until the date on which the Service(s) grant or deny the requested concurrence. The final rule should allow for this time period to be extended by agreement of the Service(s), the federal action agency, and the applicant, if an applicant is involved. The final rule also should allow for different time periods to be agreed-upon in programmatic agreements between the Services and other federal agencies.

We recommend a 30-day deadline, rather than 60 days, because 30 days is currently the norm under existing agency practice and/or agreements in many States. We are concerned that setting a 60-day deadline in regulation could cause 60 days to become the new norm, which have the paradoxical effect of slowing down average completion times for informal consultation. We believe a 30-day deadline with flexibility to extend where necessary would be optimal.

7. Changes to Formal Consultation Procedures (50 CFR 402.14)

The Services propose several changes to formal consultation procedures. We offer the following comments on the proposed changes:

Initiation Package. The Services propose to clarify what is necessary to initiate formal consultation by specifying the required contents of what is normally called an “initiation package.” The Services emphasize that they do not intend to require more information than is currently required. We do not object to the proposed changes specifically, but urge the Services to make clear in the final rule that these wording changes do not require any increase in the level of detail provided in the initiation package.

Consideration of Environmental Baseline. The Services propose to clarify that when conducting formal consultation, the Service evaluates the environmental baseline first, and then adds the effects of the proposed action to the baseline. We concur with this change, which we consider to be consistent with current practice.

Consideration of Avoidance, Minimization, and Mitigation Measures. The Services propose to clarify that the Services will consider avoidance, minimization, and mitigation measures that the federal action agency has incorporated into the proposed action as commitments, without

independently considering whether those measures are likely to be implemented. We concur with this change, which we consider to be consistent with current practice.

Adoption of Initiation Package in BiOp. The Services propose to clarify that they may adopt all or part of the federal action agency’s initiation package in the Biological Opinion. We note that, even today, the Services often incorporate portions of text from the Biological Assessment or other documents into the Biological Opinion. We support a change to the regulations that would recognize and encourage this practice, while making clear that it is optional.

Expedited Consultation. The Services propose to establish an “expedited consultation process,” which could be used to complete formal consultation for projects with minimal impacts and for projects within broader impacts that are relatively known and predictable. We agree in concept that an expedited formal consultation process is appropriate for these types of projects, but note that the proposed regulations don’t provide much detail about what an “expedited consultation” would involve and how much time it would save. We suggest including specific parameters in the final rule, such as a streamlined initiation package and a shorter deadline for the Services to prepare a Biological Opinion.

8. Re-Initiation of Consultation (50 CFR 402.16)

The Services propose to revise the regulations to recognize that both informal and formal consultation can be reinitiated. This would be done by removing “formal” from the heading of Section 402.16 in the regulations. We recognize that informal consultation is, in practice, reinitiated from time to time based on new information or changed circumstances. We suggest making clear in the final rule that this change in wording is simply a recognition of existing practice and is not intended to expand the circumstances in which reinitiation is required. We also urge the Services to include language in the final rule confirming that this change would not expand the circumstances in which reinitiation is required.

9. “Reasonably Certain to Occur” (50 CFR 402.17)

The Services propose to add a new section, “Other Provisions,” which would provide factors to consider when determining whether activities or effects are “reasonably certain to occur.” The proposed regulations states that, for this finding to be made, the activity or effect “cannot be speculative but does not need to be guaranteed.” The proposed regulations also list several factors to consider in making this determination.

We support the concept of clarifying the meaning of “reasonably certain to occur,” which is central to the definitions of “effects” and “cumulative effects” under the Section 7 regulations. However, the proposed wording provides little additional clarity because it only dismissed the two extremes – “speculative” and “guaranteed” – without indicating more specifically where “reasonable certainty” falls on that spectrum. The proposed definition should make clearer that “reasonable certainty” means, at a minimum, that the outcome is “probable” or “likely” rather than merely “possible.”

On a more technical note, we suggest including this definition of “reasonably certain to occur” in the definitions section (402.02) rather than including it at the end of the regulations under the heading “Other Provisions.” This definition is less likely to be overlooked if it is included in the definitions section.

Thank you for the opportunity to provide comments regarding the proposed changes to the Services' regulations implementing Section 7 of the Endangered Species Act. If you have any questions or would like additional information, please contact Shannon Eggleston, Program Director for Environment, at (202) 624-3649 or seggleston@aaashto.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Schroer', with a long horizontal flourish extending to the right.

John Schroer
President, American Association of State Highway and Transportation Officials
Commissioner, Tennessee Department of Transportation