September 24, 2018

Attn: Docket Nos. FWS-HQ-ES-2018-0006, FWS-HQ-ES-2018-0007, FWS-HQ-ES-2018-0009

Public Comments Processing
U.S. Fish & Wildlife Service, MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

Re: Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 83 Fed. Reg. 35174 (July 25, 2018); Revision of the Regulations for Interagency Cooperation, 83 Fed. Reg. 35178 (July 25, 2018); Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35193 (July 25, 2018)

Dear Sir or Madam:

The Independent Petroleum Association of America ("IPAA") and the Petroleum Association of Wyoming ("PAW") (together "the Associations") submit the following comments in response to the U.S. Fish and Wildlife Service and National Marine Fisheries Service's (together, "the Services") jointly-proposed Revision of the Regulations for Interagency Cooperation, 83 Fed. Reg. 35178 (July 25, 2018) ("Section 7 Regulations") and Revision of the Regulations for Listing Species and Designating Critical Habitat, 83 Fed. Reg. 35193 (July 25, 2018) ("Critical Habitat Regulations"), as well as the U.S. Fish and Wildlife Service's ("FWS") proposed Revision of the Regulations for Prohibitions to Threatened Wildlife and Plants, 83 Fed. Reg. 35174 (July 25, 2018) ("Blanket 4(d) Rule").

IPAA is a national trade association representing the thousands of independent crude oil and natural gas explorers and producers in the United States. It also operates in close cooperation with 44 unaffiliated independent national, state, and regional associations, which together represent thousands of royalty owners and the companies that provide services and supplies to the domestic industry. IPAA is dedicated to ensuring a strong, viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy developed in an environmentally responsible manner is essential to the national economy.

PAW is Wyoming's largest and oldest oil and gas organization dedicated to the betterment of the state's oil and gas industry and public welfare. PAW members, ranging from independent operators to integrated companies, account for approximately ninety percent of the natural gas and eighty percent of the crude oil produced in Wyoming.

INTRODUCTION AND SUMMARY OF COMMENTS

The Associations appreciate the opportunity to comment on FWS's proposed modifications to the Blanket 4(d) Rule and the Services' jointly-proposed revisions to their Critical Habitat Regulations and Section 7 Regulations. We submit these comments based on the information provided in the three regulatory proposals, the experience of IPAA, PAW and our respective members operating under the Endangered Species Act ("ESA") and the regulatory programs currently under consideration, and the additional information cited in this submission.

The Associations represent a major segment of the nation's energy sector, which provides the foundation for this country's ability to grow the economy and provide jobs in an environmentally-sustainable and energy-efficient manner. When it comes to the ESA, one of our main objectives is to ensure that the Services use sound science to implement the statute within the legislative framework that Congress designed, and that they balance the protection of endangered species with the logistics of compliance and the rights of property owners. It is with these goals that we provide the comments below.

Our comments on the three proposed rules are summarized immediately below. Detailed explanations of these comments follow this summary section.

Proposed Blanket 4(d) Rule

- The U.S. Fish and Wildlife Service should finalize its proposed revisions to the Blanket 4(d) Rule so that newly-listed threatened species' needs are addressed only on a species-specific basis.

- FWS should enhance the Blanket 4(d) Rule by:

    - Requiring FWS to evaluate each newly-listed threatened species for a special 4(d) rule only at the time it finalizes its listing decision for that species unless previously unavailable information shows that a special 4(d) rule is needed for the species at a later date; and

    - Requiring FWS to evaluate, within two years, all threatened species that remain subject to the original Blanket 4(d) Rule to determine whether any of those species warrants a special 4(d) rule.

Proposed Critical Habitat Regulations

- The Services correctly recognize that they may not designate any unoccupied areas as critical habitat for a species unless designation of all occupied areas would be insufficient to provide for the conservation of the species. The Services therefore should revise their regulations, as proposed, to codify this understanding.

- The Services correctly recognize that any unoccupied areas that they designate as critical habitat for a species must be "essential to the conservation of" that species. The Services therefore should revise their regulations, as proposed, to codify this understanding.

Proposed Section 7 Regulations

- The Services must correct their incorrect description of the scope of intra-Service consultations on Section 10 take permits to make clear that the consultation is limited to the effects of the agency action (*i.e.*, the take permit itself), not any underlying projects or activities for which that take permit may be used.

- The Services should streamline the consultation process by:

    - Identifying all circumstances in which Section 7 consultation is not required and clarifying that consultations are limited to the activities, areas, and effects within the jurisdictional control and responsibility of the action agency;

    - Specifying what agencies must include in an initiation package to trigger formal consultation and incorporating by reference or relying on analyses from those initiation packages in their biological opinions; and

    - Developing and instituting an expedited consultation process available for activities with known or predictable effects.

- The Services should revise their Section 7 Regulations to improve effects analyses performed during consultations by:

    - Revising the definition of "destruction or adverse modification" to ensure that effects determinations consider impacts to critical habitat "as a whole";

    - Simplifying the definition of "effects of the action" by eliminating the unnecessary categories of different types of effects and instead focusing on any effects and activities that would not occur "but for" the proposed action and that are "reasonably certain" to occur;

    - Clarifying that identification of the "environmental baseline" is an independent step in the effects analysis; and

    - Codifying their longstanding position that jeopardy analyses must focus on the anticipated effects from the proposed action itself without performing unauthorized "baseline jeopardy" or "tipping point" analyses.

In line with these comments, and subject to several exceptions discussed below, the Associations urge the Services to finalize the proposed revisions to the regulatory provisions discussed here.

DETAILED COMMENTS

I. Comments on FWS's Proposed Revisions to the Blanket 4(d) Rule

The Associations support FWS's proposal to revise the Blanket 4(d) Rule. In particular, we agree with FWS that it is inappropriate to continue the practice of automatically extending to threatened species the same heightened protections that Congress created under the ESA for species that are listed as endangered. In addition, we urge FWS to promulgate binding requirements to help accomplish the agency's stated objectives in revising the Blanket 4(d) Rule.

A. FWS Should Finalize Its Proposed Modifications to the Blanket 4(d) Rule.

FWS proposes to revise the Blanket 4(d) Rule to align it with the National Marine Fisheries Service's ("NMFS") approach for conserving threatened species by establishing specific protections for those species on an as-needed basis. Beyond providing important consistency in the implementation of the ESA, as discussed below, this proposal would conform to Congress' plain intent for FWS to prioritize the protection of species that are endangered over those that are threatened, make efficient use of taxpayer money, and reduce unnecessary regulatory burden on landowners and industry stakeholders.

When enacting the Endangered Species Act, Congress recognized that certain at-risk species were at the brink of extinction and in need of urgent conservation action. Congress defined such "endangered species" in the ESA as "any species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). The legislature sought to protect these species by establishing sweeping prohibitions on any activity causing the unauthorized "take" of any endangered species. *Id.* § 1538(a). Congress also recognized the importance of identifying and selectively protecting less vulnerable "threatened species," which it defined as "any species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20). Congress chose not to extend the broad take prohibition to every threatened species, however. Instead, it authorized the Services to issue regulations "[w]henever any species is listed as a threatened species" that they consider "necessary and advisable to provide for the conservation of such species," up to and including extending the take prohibition to any threatened species if warranted. *Id.* § 1533(d).

By differentiating between "endangered" species and "threatened" species, Congress intended to create "two levels of protection" under the ESA so that conservation efforts can be readily adapted to every species' needs. *See* S. Rep. 93-307 (July 1, 1973) (explaining the legislative rationale for covering threatened species under the ESA). Congress intended for endangered species to be the top conservation priority and receive the highest level of protection. As Senator Tunney, the floor manager of the bill that became the ESA, explained at the time, Congress designed the statute to "minimiz[e] the use of the most stringent prohibitions," which would "be absolutely enforced only for those species on the brink of extinction." Cong. Research Serv., A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, 1979, and 1980, at 357 (1982) (statement of Sen. Tunney).

NMFS's approach of protecting threatened species on a case-by-case basis with special 4(d) rules only when "necessary and advisable" aligns perfectly with this legislative design. Conversely, FWS's blanket approach of treating all threatened species as though they are endangered absent a special 4(d) rule ignores it. By elevating threatened species to the same high priority as endangered species, FWS has drained its budget, strained its staffing resources beyond capacity, denied the species truly at risk of extinction the attention they need, and unnecessarily impeded economic growth. The impacts of this are difficult to overstate given that FWS regulates over 90% of all species that have been listed under the ESA.

FWS's proposed revisions to the Blanket 4(d) Rule would help to address many of these problems. The proposal would restore the careful conservation program that Congress envisioned when it created two distinct categories of protection for endangered species and threatened species. It would enable the agency to focus its attention and limited resources on the species with the greatest conservation need. And it would remove unnecessary regulatory restrictions on economic activities that do not impact species at risk of extinction. The Associations therefore fully support the proposal and urges FWS to finalize the revised rule as soon as possible.

B. FWS Should Incorporate Binding Requirements into the Revised Blanket 4(d) Rule.

In its notice regarding the proposed revisions to Blanket 4(d) Rule, FWS specifically requests stakeholder input on "our stated intention of finalizing species-specific rules concurrent with final listing rules, including whether we should include any binding requirement in the regulatory text to do so, such as setting a timeframe for finalizing species-specific rules after a final listing or reclassification determination. 83 Fed. Reg. at 35175. The Associations believe it is necessary not only to impose a mandatory timeframe for finalizing special 4(d) rules concurrently with listing/reclassifying a species as threatened, but also to establish mandatory criteria and timeframes for developing special 4(d) rules for threatened species listed/reclassified after the effective date of this regulation but for which FWS did not finalize a special 4(d) rule at the time of the listing decision. In addition, we recommend that FWS set a mandatory deadline for reviewing the list of threatened species covered by the original Blanket 4(d) Rule to determine whether special 4(d) rules are warranted for any of those species.

1. *For any species listed as threatened after the effective date of the revised Blanket 4(d) Rule, FWS should finalize a special 4(d) rule for that species concurrent with the final listing decision and only promulgate a special 4(d) rule later on if new information warrants doing so.*

In its proposal to revise the Blanket 4(d) Rule, FWS explained that there are numerous benefits to adopting NMFS's species-by-species approach to conserving threatened species under the ESA. For example, FWS highlighted that species-specific rules remove redundant permitting requirements, facilitate implementation of beneficial conservation actions, and make better use of limited personnel and fiscal resources by focusing prohibitions on the stressors that contribute to the threatened status of a particular species. 83 Fed. Reg. at 35175. FWS could enhance these

benefits even further by imposing express timing requirements and criteria on developing special 4(d) rules for newly-listed threatened species.

For example, when evaluating a proposed new listing decision or reclassification for a threatened species, FWS should determine, based on the best information currently available, whether that species warrants a special 4(d) rule if the decision or reclassification is finalized. If the best available science demonstrates that developing a special 4(d) rule is "necessary and advisable for the conservation of such species," as required by Section 4 of the ESA (16 U.S.C. §1533(d)), then FWS should be required to promulgate that special 4(d) rule concurrently with the final decision. Conversely, if the best available science does not demonstrate that a special 4(d) rule is warranted at that time, FWS should expressly say so in the final listing or reclassification decision. In the same vein, FWS should be precluded from developing a special 4(d) rule after a new species has been listed or reclassified as threatened unless the agency identifies new information that was not available at the time of the listing/reclassification decision *and that independently warrants* issuance of such a rule.

These requirements would function together to achieve FWS's stated intent for revising the Blanket 4(d) Rule. In doing so, they would benefit species conservation, FWS, and the regulated community alike. Specifically, they would ensure that FWS fully considers and utilizes the best available science when evaluating each new species' listing status. That will benefit conservation efforts by addressing the stressors to threatened species at the earliest possible time. In addition, they will improve administrative efficiency and create synergies by requiring agency biologists to identify and focus on all aspects of a species' stressors and conservation needs simultaneously. That, in turn, will help to conserve agency resources, allowing FWS to allocate additional staffing and budget for the protection of species that need it most. And they will benefit the regulated community by increasing predictability without sacrificing species conservation.

2. *Within two years, FWS should review each species listed as threatened before the effective date of the revised Blanket 4(d) Rule to determine whether a special 4(d) is warranted.*

The Associations also urge FWS to take the steps necessary to extend the benefits of the revised Blanket 4(d) Rule to species that were listed as threatened before the rule was revised. FWS should do that by codifying a mandatory two year deadline for evaluating each of those threatened species to determine whether a special 4(d) rule is "necessary and advisable for" its conservation. As part of this process, FWS should publish notice in the Federal Register within sixty (60) days after finalizing the rule requesting public comment on any species for which continued regulation under the original Blanket 4(d) Rule is no longer appropriate. If the agency determines that any of those species warrants a special 4(d) rule, it then should identify a schedule, not to exceed two additional years, for proposing and reaching a final decision on that rule.

A requirement of this sort will help to achieve FWS's goals by reducing wasteful expenditures of agency time and resources on unnecessary protections and creating conservation programs that are tailored directly to the needs of each species. It also will help to reduce

redundant permitting requirements and remove unnecessary restrictions on the regulated community.

II. Comments on the Critical Habitat Regulations: Designating Unoccupied Areas as Critical Habitat

A primary concern of the regulated community with the recent administration of the ESA has been the Services' expansion of their discretion to list species and designate critical habitat. That concern deepened considerably in 2016 when the Services revised their regulations for designating critical habitat because the Services granted themselves new power to make those designations in a way that Congress never intended. In particular, the Services eliminated the distinction between areas occupied by a species and unoccupied areas for purposes of designating critical habitat. That marked a major and unauthorized change by allowing the Services to designate critical habitat in areas where listed species do not live and, for the first time, in areas where listed species have never lived. As explained below, the Associations believe that those new provisions are contrary to law and urge the Services to restore reasonable restraint on the scope of critical habitat designations by finalizing their proposed revisions in the Critical Habitat Regulation on this issue.

A. The Services May Not Designate Any Unoccupied Areas Unless Designation of All Occupied Areas Would Be Inadequate.

Before revising their regulations in 2016, the Services had recognized for nearly 35 years that the authority to designate critical habitat in areas where listed species do not live is far more limited than the authority to designate critical habitat in areas where they do. The Services first codified that understanding in their regulations in 1980, explaining that "the Director shall designate as Critical Habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(f) (1980). Each time they amended their joint regulations over the subsequent years, the Services reaffirmed that understanding by carrying forward that provision virtually unchanged. *See id.* § 424.12(e) (2013) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). In 2016, however, the Services abandoned that longstanding interpretation based on a newfound belief that it "is both unnecessary and unintentionally limiting" and replaced it with a provision designed to increase critical habitat designations in unoccupied areas. *See* 79 Fed. Reg. at 27073. That change was contrary to law.

Congress drafted the ESA's definition of "critical habitat" carefully to ensure that the Services designate occupied areas and consider the benefits of those designations before designating any unoccupied area as critical habitat. In that definition, Congress made clear that occupied areas and unoccupied areas are not on equal footing by segregating the two and attaching different standards to each:

- Occupied critical habitat is "the specific areas within the geographical area occupied by the species, at the time it is listed . . ., on which are found those physical or biological

features (I) essential to the conservation of the species and (II) which may require special management considerations or protection." 16 U.S.C. § 1532(5)(A)(i).

- Unoccupied critical habitat is "specific areas outside the geographical area occupied by the species at the time it is listed . . ., upon a determination by the Secretary that such areas are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii).

Several aspects of these definitions demonstrate that Congress intended, as the Services had understood for over three decades, that the Services may designate unoccupied habitat only if occupied habitat designations would be inadequate to conserve a species.

As a preliminary matter, by defining occupied critical habitat and unoccupied critical habitat differently, Congress signaled a plain intent to treat the two differently. Congress then instructed the Services how to do that. It began by defining occupied critical habitat first within that provision, making clear that the occupied habitat definition informs and contextualizes the unoccupied critical habitat definition. *Bailey v. United States*, 516 U.S. 137, 145 (1995) (explaining the importance of "placement and purpose" to statutory interpretation because "[t]he meaning of statutory language, plain or not, depends on context"). It then defined occupied critical habitat so that occupied areas constitute critical habitat (pending official designation by the Services) simply by exhibiting necessary "physical or biological features." 16 U.S.C. § 1532(5)(A). Conversely, Congress drafted the definition for unoccupied areas so that they are not considered critical habitat unless the Services make an affirmative "determination" that they "are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii).

Because Congress drafted the ESA to require a single designation of critical habitat for a species, rather than separate designations for occupied and unoccupied areas, the Services must make that determination against the backdrop of the occupied areas that already would qualify as "critical habitat" by virtue of their containing the requisite "physical or biological features." In other words, the occupied areas that already meet the "critical habitat" definition provide the baseline for the Services' determination of whether any unoccupied areas "are essential for the conservation of the species." And if that baseline of occupied critical habitat already is sufficient to conserve a species, the Services may not then find that any unoccupied areas "are *essential to*" that species' conservation as the ESA requires.[1] Thus, the Services may not designate unoccupied critical habitat unless occupied habitat is inadequate to conserve the species – exactly as the Services had recognized in the regulations they eliminated in 2016.

The ESA's legislative history further supports this conclusion. Both houses of Congress spoke to this issue when drafting the ESA's current critical habitat provisions, inarguably communicating that designations in unoccupied areas should be done sparingly, if at all. In the U.S. Senate, lawmakers explained that unoccupied habitat and occupied habitat are not equal:

[1] Congress's use of the definite article "the" to describe "*the* specific areas" occupied by a species but omission of a similar definite article when describing "specific areas" unoccupied by the species further supports this conclusion. "The definite article 'the' particularizes the subject which it precedes. It is a word of limitation …." *American Bus Ass'n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000). Thus, in this context, Congress's use/omission of definite articles makes clear that critical habitat includes *those specific* occupied areas that contain the requisite "physical or biological features" and then *any additional* specific unoccupied area that would be essential for conserving the species.

> It has come to the committee's attention that under present regulations the Fish and Wildlife Service is now using the same criteria for designating and protecting areas to extend the range of an endangered species as are being used in the designation and protection of those areas that are truly critical to the continued existence of a species. There 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.

The Senate Committee on Environment and Public Works Report on S. 2899, S. Rep. No. 95-874, at 947-48 (1978). Lawmakers in the U.S. House of Representatives went even further, admonishing the Services that "the Secretary *should be exceedingly circumspect* in the designation of critical habitat outside of the presently occupied area of the species." The House Committee on Merchant Marine and Fisheries Report on H.R. 14104, H.R. Rep. No. 65-1625, at 742 (1978) (emphasis added). Together these statements further demonstrate that Congress intended the Services to consider critical habitat designations in occupied areas first and then in unoccupied areas only when biologically necessary.

For these reasons, the Services' critical habitat regulations adopted in 2016 are arbitrary and capricious and contrary to law. They inject too much discretion into the critical habitat designation process and allow the Services to designate areas that do not meet the statutory definitions. They impermissibly blur the lines between critical habitat designations for occupied and unoccupied areas and allow designations to extend far beyond the bounds that Congress contemplated in the ESA. The Associations therefore support the Services' plan to revise their critical habitat regulations and believe that the proposal is an appropriate and lawful way to do so.

B. Designations of Unoccupied Areas as Critical Habitat Should Be Limited to Areas "Essential to the Conservation of a Species."

In promulgating their 2016 regulatory revisions, the Services introduced a separate concerning new policy that allows them to freely designate critical habitat in areas where a species has never before lived based on possible climate change and other macro environmental effects. *See* 79 Fed. Reg. at 27073. Such designations exceed the Services' authority. As a result, the Associations support the Services' proposal to correct this problem by incorporating into their regulations the concepts of "efficient conservation" and "reasonable likelihood that the [designated] area will contribute to the conservation of the species." 83 Fed. Reg. at 35198, 35201.

The Services should adopt these two concepts in their revised regulations because the ESA allows them to designate unoccupied areas as critical habitat only when those areas "are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Because the statute refers to areas that "are essential" (*i.e.*, currently), rather than to areas that "may be" or "will be essential" (*i.e.*, in the future), the Services should not designate unoccupied areas that it predicts may become essential to a species' recovery at some unknown future date. The agencies'

proposed "essential conservation" standard would avoid that impermissible outcome by requiring them to conclude that designating an unoccupied area would be "effective, [that] societal conflicts [would be] minimized, and [that] resources expended [would be] commensurate with the benefit to the species." *See* 83 Fed. Reg. at 35198. Put simply, if a species have never lived in an area, and it is uncertain if or when it might live in the area in the future, these criteria would not be met.

Similarly, the Services' proposed "reasonable likelihood" standard would prevent speculative designations of unoccupied areas premised on hypothetical future benefits. The proposal would accomplish this by reiterating the Services' obligation to rely on the "best available science" and requiring them to consider, among other things, whether the area "is currently or *likely to become* usable habitat for the species" and "how valuable the potential contributions of the area *are* to the conservation of the species." *See id.* (emphasis added). As the Services recognize in their proposal, this standard would require them to consider "the current state of the area" and the extent to which the area must change "to become usable." *Id.* Again, areas that have never been occupied by a species could not satisfy this standard if its utilization of the area depends on predicted future events like climate change or shifts in the species' range or migration patterns if the timing and extent are uncertain.

The Associations support the Services' plan to incorporate these concepts under the proposed Critical Habitat Regulations to ensure that unoccupied areas truly are "essential to the conservation of [the] species," as the ESA requires. 16 U.S.C. § 1532(5)(A)(ii). These revisions also will help to ensure that the Services comply with the ESA's requirement to designate critical habitat based on the "best scientific data available." *Id.* § 1533(b)(2). If the best science does not demonstrate that an area is essential to a species' survival or recovery or show that a species is likely to use the area in its present condition, even the best inference-backed prediction cannot meet that standard. *See Bennett v. Spear*, 520 U.S. 154, 176 (1997) (observing that the ESA requires agencies to use the best available science "to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise").

III. Comments on the Proposed Section 7 Regulations

The Associations' members and affiliates represent about 95 percent of American oil and natural gas wells, produce about 54 percent of American oil, and are responsible for more than 85 percent of American natural gas. Many of their activities require federal permits or other federal authorization (e.g., activities on federal lands), and therefore trigger the requirements of Section 7 of the ESA. We have constant exposure to federal agencies' conduct of the Section 7 program, and we have witnessed both the benefits to be gained from efficient, organized consultations and the damage that can result from undisciplined consultations. As a result and as discussed below, the Associations strongly support the Services' efforts to streamline the Section 7 process and to clarify several aspects of the effects analyses performed during consultations. Before addressing the aspects of the proposal that we support, however, we are compelled to respond to the Services' surprising discussion of the scope of intra-Service consultations on Section 10 permits, which is both misplaced and misinformed.

A. The Services Must Correct Their Incorrect Description of the Scope of Intra-Service Consultations on Section 10 Permits.

Notwithstanding the Associations' support for the Service's proposed streamlining provisions in the Section 7 Regulations, we object to the description in the proposal of the scope of intra-Service consultation on Section 10 permits. In discussing the proposed revisions to 50 C.F.R. § 402.14(h) regarding streamlining formal consultations for Section 10 permits (e.g., incidental take permits issued for habitat conservation plans), the notice states that "the Service issuing the permit would have to ensure that its determination regarding jeopardy and destruction or adverse modification is not limited to the species for which the permit is authorizing take, but that it covers all listed species and all designated critical habitat under the Service's jurisdiction affected by the proposed action." 83 Fed. Reg. at 35188. While it is unclear why the Services chose to discuss this extrinsic topic in the proposed revisions to the Section 7 Regulations, their statement is contrary to law and now must be corrected.

Section 7(a)(2) of the ESA provides that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that *any action authorized, funded, or carried out by such agency* . . . is not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification of [critical] habitat." 16 U.S.C. § 1536(a)(2) (emphasis added). In the context of a Section 10 permit, the agency action is the issuance of the permit to take the listed species identified by the permit applicant. *See id.* § 1539(a) (requiring the Services to issue a permit for the take of listed species if specific permit issuance criteria are met). That specific "take" is the action that the Services authorize, not the projects or activities for which the Section 10 permit may be used. The Services have no jurisdiction over those projects or activities themselves, and they cannot authorize or withhold authorization for them. *See generally id.* §§ 1531-1544. In fact, those projects and activities regularly occur without Section 10 permits. As a result, under the express terms of Section 7, the scope of intra-Service consultations on Section 10 permits is limited to the impacts of the permit authorization – *i.e.*, take of the listed species covered under the permit. No other activities are authorized by Section 10 permits, and Section 7 does not allow the Services to consult on actions they do not authorize.[2]

Because the description in the proposed Section 7 Regulations of the scope of intra-Service consultations on take permits is wrong, it would be vulnerable to an immediate facial challenge as arbitrary and capricious and contrary to law under the Administrative Procedure Act if the Services included it as part of their final revisions. The Associations therefore request that the Services expressly correct this mistake for purposes of the record and, further, include in the final revised regulations a description of the appropriate scope of intra-Service consultations on Section 10 permits as described above. To assist the Services with this, we request that they include the following language in 50 C.F.R. § 402.14(h)(3)(ii): "For intra-Service consultations on the issuance of permits under Section 10(a) of the Act, the scope of the Service's opinion

[2] To be clear, potential effects to non-covered listed species and critical habitat from any activity or project for which a Section 10 permit is used likewise should not be analyzed under Section 7 as "cumulative effects." That is because there would be no effects to those species and habitat that would occur but for the Services' issuance of the Section 10 permit, and therefore no effects to those resources to aggregate with the impacts from future State or private activities in the action area. *See* 50 C.F.R. § 402.02.

should be commensurate with the scope of the agency action, which is limited to authorizing take of the species covered under the permit."

B. The Services Should Incorporate Appropriate Streamlining Measures into their Section 7 Consultations.

IPAA and PAW appreciate the Services recognizing that the Section 7 consultation process can be improved and made more efficient. We support the proposals to (1) eliminate the requirement to consult on federal actions from which take is not anticipated, (2) encourage adoption of federal agency initiation packages in biological opinions ("BOs"), and (3) establish an "expedited consultation" process. Taking these important steps will help to save agency time and resources by focusing attention on activities with appreciable impacts to species and critical habitat, reduce redundancy and gratuitous reviews by federal agencies, and decrease cost overruns and schedule delays for critical energy projects.

While the Associations support these proposals, we are concerned that in some cases they lack sufficient detail. We therefore ask that the Services provide additional explanation in the final revisions on several points. In addition, we believe that the Services should include additional categories of activities for which consultation should not be required or that should be eligible for expedited consultation.

1. *The Services should identify all circumstances in which Section 7 consultation is not required and clarify that consultations are limited to the activities, areas, and effects within the jurisdictional control and responsibility of the action agency.*

The Associations agree with the Services that it is important to clarify in 50 C.F.R. § 402.03 of the Section 7 Regulations that consultation is unnecessary when an agency action is not expected to result in take of a listed species or destruction or adverse modification of designated critical habitat, would "have effects that are manifested through global processes," or result in either wholly beneficial effects or effects that cannot be "measured or detected in a manner that permits meaningful evaluation." 83 Fed. Reg. at 35185.

The Services should make clear that federal agencies should not consult under Section 7 on agency actions that are not expected to result in impacts that rise to the level of take or adversely affect critical habitat. Put simply, such actions should never trigger consultation with the Services because they do not present a risk of jeopardizing the continued existence of a listed species or destroying or adversely modifying critical habitat as Section 7 contemplates. *See* 16 U.S.C. § 1536(a)(2). Fortunately, some federal agencies already recognize this and do not initiate consultation in "no effect" situations, but it is important that the Services explain this in their regulations to achieve greater consistency among all federal agencies and conserve administrative resources.

The Services likewise should explain that federal agencies should not request consultation when the effects of a federal action result from global processes. This is particularly important when those effects (1) cannot be reliably predicted or measured at the scale of a listed species' current range *or upon designated critical habitat*, or (2) would result in a small or

insignificant impact *within the action agency's control* on any listed species and critical habitat (emphasis reflects additional clarification recommended by the Associations). Making these changes, as further modified by the Associations in the italicized text above, is fully in line with the requirements of Section 7 and would provide needed assurances to federal agencies that are uncertain of the limits on their duty to consult with the Services. To provide the necessary level of guidance to prospective consulting agencies and receive deference from a reviewing court in the event of litigation over compliance with this provision, however, the Services should define the "global processes" that this provision contemplates. To that end, we suggest that the Services define "global processes" to mean "global phenonema on which the proposed federal action has no more than an incremental effect that cannot practicably be measured using available technology."

The Associations also agree that the Services should explain that action agencies should not request consultation on actions for which the expected effects cannot *practicably* be measured or detected *using available methods* in a manner that allows for meaningful evaluation (emphasis reflects additional clarification recommended by the Associations). Such a clarification would be help to harmonize the Service's regulatory statement of applicability with the "reasonably certain" standard that they have incorporated into the Section 7 effects analysis under 50 C.F.R. § 402.14(g)(7). That said, it is important to include both practicability and availability standards in such a provision to ensure that it is implemented in a reasonable way.

Finally, the Services requested comment on "whether the scope of a consultation under Section 7(a)(2) should be limited to only the activities, areas, and effects within the jurisdictional control and responsibility of the regulatory agency." 83 Fed. Reg. at 35185. The Associations support the Services including such a clarification in the Section 7 Regulations to ensure that consultations comport with the requirements of the ESA. Section 7(a)(2) expressly limits the scope of consultations in this way: "Each Federal agency shall, in consultation with and with the assistance of the Secretary, *insure that any action authorized*, funded, or carried out *by such agency . . . is not likely to* jeopardize the continued existence of any [listed] species *or result in* the destruction or adverse modification of [critical] habitat." 16 U.S.C. § 1536(a)(2). By its plain language, Section 7 limits consultations to only those things that the action agency can control. Accordingly, the Services should clarify that consultations should only address the activities, areas, and effects within the action agency's statutory authority.

2. *The Services should specify what is necessary to initiate formal consultation and encourage reliance on initiation packages in BOs.*

Completion of Section 7 consultation is a key requirement of the federal permitting process for the majority of energy development projects. As a result, delays in the consultation process translate into delays in those projects receiving their permits. Unfortunately, these delays happen all too often. In many cases they result from action agencies stalling the submission of a complete initiation package to accommodate internal scheduling and other issues that are unrelated to the proposed action or from the Services finding that a robust initiation package submitted by an agency is insufficient to initiate consultation. And when the Services initiate consultations, the process frequently is inefficient because they spend time performing

analyses that already are provided in the initiation package. IPAA and PAW therefore agree that it is important to revise the Section 7 Regulations to address these problems.

The Associations support the Services' proposed revisions to 50 C.F.R. § 402.14(c) to clarify what is necessary to initiate consultation. We also support the Services' proposal to affirm that other documents, such as those prepared as part of NEPA and/or equivalent state environmental review processes, grant applications, and documents supporting permit applications, may serve as a substitute for more "traditional" initiation packages when they contain the information necessary to satisfy Section 7. For both "traditional" initiation packages and the new proposed substitute submissions, the Services correctly recognize that consultation should be initiated only if the provided information describes the proposed action (including any measures for avoiding, minimizing, or offsetting impacts), the action area, any species or designated critical habitat in the action area, and any expected effects and cumulative impacts on protected species or critical habitat. *See* 83 Fed. Reg. at 35186, 35192. Nevertheless, we are concerned that too much ambiguity remains in the proposed revisions, particularly in the proposal for 50 C.F.R. § 402.14(c)(1)(i)(F), which will serve as a catch-all category of "[a]ny other available information related to the nature and scope of the proposed action relevant to its effects on listed species or designated critical habitat." *Id.* at 35192. As a result, we urge the Services to define specifically what must be included to satisfy this criterion. In addition, the Associations request that the Services explain in § 402.14(c)(1) that the project proponent may submit the "written request to initiate consultation" in the event the action agency has not submitted that request in a timely manner.

IPAA and PAW also endorse the Services' proposal to amend 50 C.F.R. § 402.14(h) by adding new paragraphs setting forth procedures for adopting, in whole or in part, an action agency's initiation package in their BOs. As the Services' note, some of their offices already employ this streamlining measure in their opinions, and it therefore makes sense to codify the practice officially. We believe that the proposed procedures for accomplishing this need improvement, however. For example, while it is reasonable to require that the action agency and the Service agree that using the adoption process is appropriate, this condition is overly broad. To correct this, this Services should identify specific bases on which use of the adoption process may be deemed "inappropriate," such as the available information is insufficient to inform a required component of the initiation package. In addition, rather than suggesting that action agencies and the Services "may develop coordination procedures that would facilitate adoption" on a case-by-case basis, the Services should work to develop programmatic coordination procedures with each agency to increase efficiency and consistency. Making such improvements to the proposal will greatly enhance the usefulness of the adoption process.

3. *The Services should adopt expedited consultation procedures.*

The Associations support incorporating expedited consultation procedures into the Section 7 Regulations. It is important for these expedited consultations to cover both low-effect activities and projects that will cause a variety of known and predictable effects that are unlikely to cause jeopardy to species or result in destruction or adverse modification of critical habitat. As the Services acknowledge, they have gained considerable experience over the more than 30

years that they have performed Section 7 consultations and readily can identify those activities for which the standard consultation process is unnecessary.

As part of the proposal, the Services identify habitat restoration projects as one example of activities that would be appropriate for expedited consultation. We urge the Services to identify other examples based on their experience to provide further guidance on the use of expedited consultation. For example, the Services should employ expedited consultations on the issuance of Section 10 permits. As explained in our comments in Section III.A above, such consultations are limited to the authorization of incidental take of the covered species. As a result, the specific take authorization (*i.e.*, analysis of the permit issuance criteria), permit term, and permit area make the effects of the action fully known and predictable. In addition, FWS should perform expedited consultations on projects that require tree clearing within the range of the listed tree-roosting bats. Given that FWS has performed thousands of consultations on these activities over the last decade alone, it should have sufficient information to identify categories of these projects (such as those below a certain acreage threshold and those that occur outside of established bat buffers) that are appropriate for expedited consultation. Likewise, both of the Services have decades of experience with consulting on maintenance dredging activities, which should enable them to identify categories of dredging projects for which the impacts either are minimal or are known and predictable. IPAA and PAW request that the Services add additional examples of this sort to the revised regulations.

Over the longer term, the Associations believe that the Services should continue to identify additional categories of activities (e.g., tree clearing) and categories of projects (e.g., pipelines, nonlinear projects less than 10 acres) that will meet the eligibility criteria for expedited consultation. Doing so would enable the Section 7 Regulations evolve and reduce inconsistent and haphazard use of expedited consultations. We recommend that the Services specifically codify these categories in future rulemakings, similar to categorical exclusions under NEPA, to ensure that use of expedited consultation receives deference from a reviewing court if challenged by a project opponent.

C. The Services Should Revise the Section 7 Regulations to Clarify and Improve Effects Analyses Performed During Consultations.

Effects analyses under Section 7 are the linchpin of the Services' consultations on federal actions. They determine whether an action is eligible for informal consultation or whether more detailed formal consultation is required. *See* 16 U.S.C. § 1536(b)-(c). In the case of formal consultation, effects analyses determine whether there is a risk of jeopardy to listed species or destruction or adverse modification of critical habitat and therefore whether the Services must identify reasonable and prudent alternatives. *See id.* § 1536(b)(3)(A). As a result, it is imperative that the Services' effects analyses both comply with the standards that Congress prescribed under Section 7 and are performed efficiently in a consistent and predictable manner. To that end, the Associations offer the following comments on the Services' proposed revisions to the Section 7 Regulations governing analysis of effects during consultation.

1. *The Services should revise the definition of "destruction or adverse modification" to clarify that effects determinations must consider impacts to critical habitat "as a whole."*

In 2016, the Services revised the definition of "destruction or adverse modification" of critical habitat in the Section 7 Regulations to address two federal court rulings that invalidated their previous definition and ostensibly to modify and streamline their regulations to reflect "lessons learned" from their administrative experiences. IPAA commented on those proposed revisions, explaining that the new definition was simultaneously too broad and too vague. *See* Comments of IPAA, Docket No. FWS-R9-ES-2011-0072 (Oct. 9, 2014). One issue of particular concern to us was that, in trying to clarify the term "appreciably diminish," the Services had clearly stated in the preamble to their proposal 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," but then they failed to carry forward that concept into the revised regulations. *See id.* at 6. While we were disappointed that the Services did not expressly incorporate that "as a whole" concept into the final 2016 revisions, we are encouraged that the agencies now are revisiting this issue, and we again urge them to codify this language in the Section 7 Regulations.

In the preamble to the new proposed definition of "destruction or adverse modification," the Services state that they did not add "as a whole" to the 2016 definition because they believed at the time that the Section 7 Regulations "already ensure[] that the determination is made at the appropriate scale." 83 Fed. Reg. at 35180. As the Services now acknowledge and as the Associations' members have experienced firsthand, however, that is not the case. Notwithstanding the Services' clear informal articulations of the appropriate scale of critical habitat evaluations, agency staff continue to base "destruction or adverse modification" determinations on impacts at far narrower scales, such as the action area and affected critical habitat unit. The Associations therefore urge the Services to correct this issue by finalizing the revised definition of "destruction or adverse modification" as proposed.

2. *The Services should simplify the definition of "effects of the action" to focus on "but for" causation and effects and activities that are "reasonably certain" to occur.*

As the Services recognize, Section 7 effects analyses regularly are encumbered by the numerous categories of "effects" identified in the current regulations, a problem that is compounded by a lack of guidance on which *potential* effects to analyze. The Services are in the unenviable position of having to parse their analyses according to slight and subjective differences between direct and indirect effects, as well as distinguish between the effects of the action and effects from interrelated and interdependent activities, while making judgment calls about whether a potential effect or activity is likely to materialize or is only hypothetical. This immethodical approach overcomplicates the analysis and leads to inconsistent results. It also goes well beyond what is necessary to comply with the ESA's requirement to "insure that" an agency action "is not likely to" result in jeopardy of a species or destruction or adverse modification of critical habitat. *See* 16 U.S.C. §1546(a)(2). The Associations therefore agree that the Services should simplify and clarify the definition of "effects of the action" and support the three principal proposed revisions for doing so.

The Services' proposal to refine the definition of "effects of the action" by subsuming the various categories of "effects" within a single comprehensive category would significantly simplify consultations without sacrificing their quality. The first proposed revision would accomplish this using the familiar "but for" standard. Redefining "effects of the action" to encompass any effects or activities that would not occur "but for" the proposed action would fully cover the current concepts of direct effects, indirect effects, and effects from interrelated and interdependent activities. Moreover, as the Services acknowledge, they have unofficially relied on this "but for" test in practice when conducting their consultations, and federal courts have endorsed the standard for effects analyses. *See* Section 7 Consultation Handbook at 4-47 (Mar. 1998); *Sierra Club v. BLM*, 786 F.3d 1219, 1225 (9th Cir. 2015). Codifying this standard will allow the Services to focus their attention on analyzing the "effects of the action" rather than spending time deciding how to categorize the effects being analyzed.

Second, the Services' proposal to revise their definition of "effects of the action" by explicitly stating that such effects must be "reasonably certain to occur" likewise is a helpful way to simplify the consultation process without altering the requisite scope of consultations. As the Services correctly explain, the "reasonably certain" standard already informs their analyses of indirect and cumulative effects under the current Section 7 regulations. This revision will simply make clear that the Services should not analyze *any* effect that is merely speculative. Accordingly, the Associations request that the Services adopt the revision as proposed.

Third, IPAA and PAW concur that the Services should add a new provision (50 C.F.R. § 402.17) to specify which *activities* are "reasonably certain to occur." Including a new provision of this sort would be consistent with and provide the same benefits as the proposed revisions to the definition of "effects of the action" discussed immediately above. Nevertheless, we recommend augmenting the language of the proposed provision to more particularly describe the factors to consider when evaluating whether an activity is "reasonably certain to occur." For example, it is uncertain what the first factor ("Past relevant experiences") refers to and what its scope might include. We therefore request that the Services strike that factor from the provision or clarify their intent and provide another opportunity for comment. Similarly, the second factor ("Any existing relevant plans") requires further definition to make clear that conceptual, inchoate, or aspirational plans are not "reasonably certain to occur." In addition, we are concerned that the non-exclusive nature of the listed factors, as currently proposed, will create further confusion and inconsistency.

To provide the needed specificity for determining when an activity is "reasonably certain to occur," the Associations request that the Services require that the activity be "definitely planned and concretely identifiable." Adding such a requirement would achieve the Services' stated goal of evaluating activities that are more than speculative but not necessarily guaranteed to occur.

3. *The Services should clarify that identification of the "environmental baseline" is an independent step in the effects analysis.*

IPAA and PAW agree with the Services that it is appropriate to add a standalone definition for the term "environmental baseline" in the revised Section 7 Regulations. While a

definition for this term already appears in the Services' regulations, its current location within the definition of "effects of the action" has caused agency staff to interpret the baseline incorrectly to include the effects of the action that is the subject of the consultation. In addition to relocating the definition, the Associations believe that the Services should underscore this point by revising the definition to clarify that the "environmental baseline" represents "the state of the world absent the action under review."

4. *The Services should focus jeopardy inquiries on the anticipated effects from the proposed action itself.*

In the Services' discussion about applying the proposed definition of "destruction or adverse modification," they provide important direction about how the "appreciably reduce" standard should be evaluated in their jeopardy analyses. *See* 83 Fed. Reg. at 35182. The Services note that "[i]t is sometimes mistakenly asserted that a species may already be in a status of being 'in jeopardy,' 'in peril,' or 'jeopardized' by baseline conditions, such that any additional adverse impacts must be found to meet the regulatory standards for 'jeopardize the continued existence of' or 'destruction or adverse modification.'" *Id.* The Services explain "[t]hat approach is inconsistent with the statute and our regulations," and reiterate that "the analysis must always consider whether such impacts are 'appreciable' even where a species already faces severe threats prior to the action." *Id.* In other words, "there is no 'baseline jeopardy' status even for the most imperiled species." *Id.* at 35183.

While the Associations concur with the Services' explanation and appreciate the clarification, we recommend that the Services expressly codify their position in the Section 7 Regulations. As the preamble recognizes, the U.S. Court of Appeals for the Ninth Circuit previously has read "baseline jeopardy" and "tipping point" status requirements into the ESA and the Services' implementing regulations governing jeopardy analyses. Without codifying the correct interpretation, however, it will be more difficult for future courts to give the appropriate level of deference to that interpretation and rely on it in their rulings.

CONCLUSION

Thank you for considering these comments. IPAA and PAW look forward to continuing to work with the Services to resolve these issues in accordance with the requirements and limitations of the Endangered Species Act.

Sincerely,

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IPAA

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