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Dear Ms. Fahey, Mr. Rauch, Mr. Aubrey, and Ms. Tortorici:

The National Waterways Conference (NWC) submits these comments in response to the above-noted proposals of the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (together, the Services). 83 Fed. Reg. 35,174, 35,178, 35,193 (July 25, 2018). We have provided comments on interagency cooperation, listings and critical habitat designations, and § 4(d) rules for threatened species. We appreciate this opportunity to share our views.

About NWC

NWC was established in 1960 and is dedicated to a greater understanding of the widespread public benefits of our Nation’s water resources infrastructure. Our mission is to effect common sense policies and programs, recognizing the public value of our Nation’s water resources and their contribution to public safety, a competitive economy, national security, environmental quality, and energy conservation. Conference membership is diverse and includes the full
spectrum of water resource stakeholders, including flood control associations, levee boards, waterways shippers and carriers, industry and regional associations, hydropower producers, port authorities, shipyards, dredging contractors, regional water supply districts, engineering consultants, and state and local governments. Some of our members are public entities, some are private corporations, and some are individuals.

1. Interagency Cooperation (Docket No. FWS-HQ-ES-2018-0009)

a. The Environmental Baseline Should Include Current Conditions, Including Existing Structures and Ongoing Operations.

The Services requested comments on whether the “environmental baseline” should be defined as “the state of the world absent the action under review,” to include various “ongoing” impacts, which are “impacts or actions that would continue in the absence of the action under review.” With one qualification, NWC supports language to ensure the starting point for environmental analysis, against which the impacts of the proposed action are measured, includes existing conditions, structures, and operations.

NWC’s members would typically encounter this issue in the context of a federal permit or license. Examples might include a proposal before the Federal Energy Regulatory Commission (FERC) to relicense an existing hydropower project; an application under § 10 of the Rivers and Harbors Act of 1899 to the U.S. Army Corps of Engineers (Corps) to build or modify a structure in or abutting a river, such as a dike or levee, an intake or discharge structure, port facilities, and piers; seeking § 408 approval from the Corps; an application under § 404 of the Clean Water Act to discharge dredged or fill material into a jurisdictional water of the United States; or a request to reallocate storage at a Corps’ reservoir for municipal and industrial water supply.

Section 7 of the Endangered Species Act (ESA) requires the federal agencies in these circumstances to “insure” that its act of approving the applicant’s proposed action “is not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification” of designated critical habitat. Where the proposed action may overlap with a threatened or endangered species or its critical habitat, it is necessary to determine the impact of the action. The environmental baseline provides the starting point for that analysis. The baseline should be defined in such a manner as to

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4 See id. § 408.
5 See id. § 1344.
demonstrate the effects of the proposed action compared to the status quo, which should be defined as existing conditions and any ongoing effects associated with existing conditions. That includes existing structures and other elements of the physical environment as well as current operations, such as flow parameters under an existing hydropower license.

Failure to define the environmental baseline appropriately to reflect existing conditions confuses the subsequent analysis. As one example, in the area of water resources, a federal agency may consider proposed changes to the operation of a dam, dike, or other facility. There, the important question is how the proposal could affect listed species or critical habitat compared to the status quo. In general, the agency or permittee should not be required to reconstruct actions and developments from the past, such as the original construction of a dam, and the impacts that resulted. If matters that predate current conditions are included in the baseline, then the agency’s subsequent analysis would inaccurately attribute to the proposed action impacts from past actions. Actions from the past are, by definition, beyond the control of the applicant or action agency. A proposed action is necessarily forward-looking. Thus, the only relevant question is how the proposal would affect listed species or critical habitat, compared to current conditions.

The ESA Handbook reflects a correct understanding of this issue. For example, the handbook states, “[o]ngoing effects of the existing dam are already included in the Environmental Baseline and would not be considered an effect of the proposed action under consultation.”8 The Handbook also correctly recognizes that the baseline should facilitate a “but-for” analysis, in which environmental effects are attributed to a proposed action only if those effects otherwise would not occur, but for the proposal.9 In a specific example provided by the Services, if an upgrade to an existing dam (installation of a fuse plug) is contemplated, “the test is not whether the fuse plug in some way assists or facilitates in the continued operation of the pre-existing project, but instead whether the water project could not exist ‘but for’ the fuse plug.”10 In that instance, the existence of the dam is independent of the proposed action, and thus the Service “would not consider the effects of the dam to be effects of the [proposed] action under consultation.”11

If the agency wishes to consider potential benefits to the species that could occur by incorporating additional conservation measures—those beyond current conditions or even the proposed action—then that is a different question. The agency’s analysis in that instance should begin by answering basic questions as to whether such a measure is

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9 Id. at 4-26.
10 Id. at 4-27.
11 Id.
possible in terms of the applicant’s capabilities and the action agency’s statutory authority. For example, if the applicant lacks the ability to implement a particular measure, or the applicant is unwilling to undertake an action and the action agency lacks authority to mandate it, there is no purpose served in further environmental analysis. In any event, the key point is that such matters are not part of the environmental baseline. Whatever value there may be in understanding the environmental impacts of historic actions, neither the action agency, nor FWS, nor NMFS should use the definition of the environmental baseline to attribute such impacts to the applicant or the action agency if the cause is something other than the proposed action.

For these reasons, NWC is generally supportive of the Services’ language quoted above. We offer one minor qualification. The suggested regulatory language included the phrase, “the state of the world absent the action under review.” We question whether the word “world” could suggest a broader scope of analysis than the Services intended. We urge the Services to be clear that any new language is not intended to extend the analysis beyond the geographic area that the proposed action could reasonably and discernibly affect.

b. The Services Should Not Expand Reinitiation Obligations Beyond Formal Consultations.

Current regulations addressing the reinitiation of consultation are limited to formal consultations. The Services propose to strike “formal,” thus broadening the application of this section to include informal consultations. The Services portray this action as a minor proposal required to conform the regulations to the case law and universal agency practice. That is incorrect.

The Services apparently assume that federal agencies are always required to initiate consultation after a federal action, if the agency retains “‘discretionary Federal involvement or control”’ over subsequent activity under that action. The Services cite ongoing activity under a management plan previously approved by the U.S. Forest Service or the Bureau of Land Management. That position, however, could be taken as contrary to the policy and practice of FERC. Upon issuance of a FERC license, the Commission does not view the licensee’s ongoing operations as a continuing federal action that absolutely triggers a consultation obligation based on new information concerning ESA resources. Rather, “[i]n FERC’s view, a definitive federal action, such as

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12 See 50 C.F.R. § 402.16.
14 Id.
Commission approval of a license amendment, is needed to trigger consultation.”

FERC is supported in this position by *California Sportfishing Protection Alliance v. FERC*. There, the Ninth Circuit found that FERC’s license re-openers do not give FERC the requisite “involvement or control” to require mid-license consultation.

This does not mean FERC (or a licensee) ignores new information about resources protected under the ESA. It is FERC’s practice to investigate such information when it becomes available, and that process could lead FERC to direct further proceedings, which could result in a reinitiation of consultation depending on the circumstances.

Further, the licensee remains subject to the “take” prohibition of ESA § 9 regardless. However, FERC’s position demonstrates there is not a consensus within the federal government that formal consultation is always required in response to ongoing nonfederal activity under a prior federal approval.

For the Services to proceed along these lines would disrupt the long-established expectations of FERC licensees and contradict the written position of a sister federal agency. Those are very important considerations, which the Services have not considered according to the proposed rule and its preamble. It would be arbitrary and capricious for a federal agency to finalize the proposal without demonstrating consideration of circumstances of this magnitude, explaining the Services’ response, and allowing the public an opportunity to review and comment on the Services’ response. Accordingly, NWC urges the Services to withdraw this proposal.

c. NWC Supports Revision of “Effects of the Action” to Clarify “But-For” Causation.

NWC supports the proposal of the Services to revise the definition of “effects of the action.” The proposal cuts language in the existing definition as to indirect, interrelated, and interdependent effects, in favor of language that emphasizes “but-for” causation. NWC supports this approach for the same reasons as described in Part 1.a above.

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16 472 F.3d 593 (9th Cir. 2006).
17 *Id.* at 599 (citation omitted); see also *W. Watersheds Project v. Matejko*, 468 F.3d 1099, 1110 (9th Cir. 2006).
20 83 Fed. Reg. at 35,191; see also id. at 35,183-84.
d. NWC Supports the “Reasonably Certain to Occur” Standard.

The Services propose to revise the definition of “effects of the action” to include actions reasonably certain to occur.\(^{21}\) Also proposed is a new standard and set of factors at § 402.17 expanding on the concept. NWC concurs in consideration of effects that are reasonably certain to occur.\(^{22}\) Codifying language to this effect will help keep the Services and action agencies focused on those effects that are reasonably certain, while avoiding unnecessary devotion of resources to the consideration of outcomes that are unlikely results of proposed actions.

2. Listing Species and Designating Critical Habitat (Docket No. FWS-HQ-ES-2018-0006)

a. NWC Supports Provisions to Focus Critical Habitat Designations on Occupied Areas and Areas that Contribute to the Conservation of the Species.

The Services propose to add language to § 424.12(b)(2) of the joint regulations to encourage a focus on occupied habitat and to limit designation of unoccupied habitat to areas where “there is a reasonable likelihood that the area will contribute to the conservation of the species.”\(^{23}\) NWC supports this requirement. Where the species of concern does not currently occupy a given area, any judgment that the area is essential for that species’ conservation\(^{24}\) is necessarily speculative to some extent. On the other hand, if it is not reasonably possible to restore an area for the benefit of a species due to damage, development, limits on regulatory authority, or other factors, then that area cannot be habitat. Under those circumstances, it certainly should not be designated as critical habitat.

We urge the Services to limit designation of unoccupied areas as critical to circumstances where (1) occupied habitat is insufficient for conservation of the species, and the unoccupied habitat is essential; and (2) there is a reasonable probability within some foreseeable time that the area could serve as habitat, taking into consideration such factors as the condition of the area, ownership, available resources, and the presence or absence of any regulatory mechanism to compel conversion of an area to suitable habitat. We also urge the Services in specific critical habitat designations to specify those areas or

\(^{21}\) Id. at 35,191; see also id. at 35,184.

\(^{22}\) Id. at 35,193; see also id. at 35,189.

\(^{23}\) Id. at 35,201; see also id. at 35,197-99.

\(^{24}\) See 16 U.S.C. § 1532(5)(A)(ii) (authorizing designation of unoccupied habitat only where “essential for the conservation of the species”); see also id. § 1532(3) (defining “conservation” as those measures “necessary to bring any [listed] species to the point at which the measures provided pursuant to this chapter are no longer necessary” (emphasis added)).
features that can be modified without triggering a consultation obligation due to the same kinds of factors.

b. NWC Supports Additional Guidance on “Foreseeable Future.”

The concept of the “foreseeable future” is important in the determination of a species’ status as threatened. The Services have proposed to clarify the meaning of this statutory term by explaining this period “extends only so far into the future as the Services can reasonably determine that the conditions potentially posing a danger of extinction . . . are probable.” This is an appropriate check to ensure the restrictions on private activity inherent in a listing are not imposed where the conditions of concern are so speculative as to be unreasonable.


Under current regulations of FWS, the § 9 “take” prohibition extends automatically to threatened species. That outcome is not, however, required by the statute. Rather, ESA § 4(d) envisions regulations for threatened species that may or may not incorporate the take prohibition. Because threatened species are at less risk compared to endangered species, it makes sense that Congress authorized FWS to apply a different standard of conservation.

FWS proposes new language intended to encourage the Service to issue “4(d) regulations” more regularly and not to impose the take prohibition indiscriminately as new species are listed as threatened. NWC supports language under which FWS would consider on a species-specific basis whether the take prohibition or some other form of regulation is in the best interest of a threatened species. We also encourage FWS to develop a schedule to issue 4(d) rules for species already listed as threatened.

See id. § 1532(20) (defining “threatened species” as one “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range”).


See 50 C.F.R. §§ 17.31, 13.71. These sections include limited exceptions.

See 16 U.S.C. § 1538(a) (applying the take prohibition only to endangered species).

See id. § 1533(d).

Compare id. § 1532(6) (defining “endangered species”) with id. § 1532(20) (defining “threatened species”).
Thank you for this opportunity to share our views. Please feel free to contact me if I may provide additional information.

Respectfully submitted,

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President