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Public Comments Processing  
Attention: FWS–HQ–ES–2021–0104; NMFS-230607-0143

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Janet Coit  
National Marine Fisheries Service, Office of Protected Resources  
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Silver Spring, Maryland 20910

Re: Comments on Proposed Rulemaking on Endangered and Threatened Wildlife and Plants;  
Revision of Regulations for Interagency Cooperation, 88 Fed. Reg. 40,753 (June 22, 2023);  
RIN 1018–BF96; 0648–BK48

Dear Directors Williams and Coit:

Western Energy Alliance (the Alliance) offers the following comments on the U.S. Fish and Wildlife Service and National Marine Fisheries Service’s (collectively, the Services) proposed revisions to certain regulations that implement section 7 of the Endangered Species Act (ESA) at 50 C.F.R. part 402, 88 Fed. Reg. 40,753 (June 22, 2023) (proposed rule).

Western Energy Alliance is the leader and champion for independent oil and natural gas companies in the West. Working with a vibrant membership base for over 50 years, the Alliance stands as a credible leader, advocate, and champion of industry. Our expert staff, active committees, and committed board members form a collaborative and welcoming community of professionals dedicated to abundant, affordable energy and a high quality of life for all. The majority of independent producers are small businesses, with an average of fourteen employees.

#### Section 402.02 – Definitions

##### 1. Revised Definition of “Effects of the Action”

The proposed rule would revise the definition of “effects of the action” at section 402.02 as follows:

*Effects of the action* are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action **but that are not part of the action**. A consequence is

caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action. (~~See § 402.17~~).

*Compare* 88 Fed. Reg. at 40,763 with 50 C.F.R. § 402.02 (2022).

The Alliance commends the Services for largely retaining the revisions to the definition of “effects of the action” they adopted in 2019 that simplified and clarified this term. *See* 84 Fed. Reg. 44,976 (Aug. 27, 2019). Prior to 2019, the regulatory requirements for evaluating the effects of the action led to substantial confusion and inconsistent outcomes. *See id.* at 44,976–77. Although the pre-2019 regulations correctly recognized that agency actions can have either direct or indirect effects, and that agencies must consider both of these effects, the regulations adopted in 2019 reinforced that the test for evaluating these effects is the same. The Services’ removal of unnecessary references to direct and indirect effects from the definition of “effects of the action” has eliminated a significant source of confusion while preserving the existing test for evaluating the effects of an agency action. The Services should preserve these important and clarifying revisions.

The Alliance, however, opposes removing the reference to § 402.17 from the definition of “effects of the action.” The Services should maintain § 402.17 and the corresponding reference to § 402.17 in the definition of “effects of the action.”

## 2. Revised Definition of Environmental Baseline

The Proposed Rule would revise the definition of “environmental baseline” at section 402.02 as follows:

*Environmental baseline* refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action. The environmental baseline includes the past and present impacts of all 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 which are contemporaneous with the consultation in process. **The impacts to listed species or designated critical habitat from Federal agency activities or existing Federal agency facilities that are not within the agency’s discretion to modify are part of the environmental baseline.**

*Compare* 88 Fed. Reg. at 40,763 with 50 C.F.R. § 402.02 (2022).

The Alliance maintains its support for the Services’ revisions in 2019 that extricated the concepts of “environmental baseline” from the definition of “effects of the action” and established “environmental baseline” as a stand-alone definition. Credible environmental baselines are essential to the section 7 consultation process because they provide the status quo from which the Services will evaluate the potential impacts of a proposed action. Although the Alliance acknowledges that no regulatory revision can completely eliminate the difficulties associated with these baseline analyses, the Alliance continues to urge the Services to provide additional clarification regarding the types of actions and conditions that

must be included as part of baseline environmental conditions. The Services should maintain the definition of environmental baseline and provide additional clarification on these types of analyses.

Furthermore, the Alliance supports the proposed addition of the following sentence to the definition of “environmental baseline”: “The impacts to listed species or designated critical habitat from Federal agency activities or existing Federal agency facilities that are not within the agency’s discretion to modify are part of the environmental baseline.” This addition is consistent with the U.S. Supreme Court’s decision in *National Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667–71 (2007), in which the Court concluded that the Fish and Wildlife Service need not consult on actions over which a federal agency has no discretionary control. Moreover, this addition is consistent with, and a logical extension of, the 2019 definition of “environmental baseline.” See 84 Fed. Reg. at 44,978. The Alliance therefore encourages the Services to adopt this modification.

#### Section 402.14 – Formal Consultation

##### 1. Section 402.14(i)(2) – Revisions to Reasonable and Prudent Measures Parameters

The Proposed Rule would revise section 402.14(i)(2) as follows:

Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action, ~~and~~ may involve only minor changes, **and may include measures implemented inside or outside of the action area that avoid, reduce, or offset the impact of incidental take.**

*Compare* 88 Fed. Reg. at 40,763 with 50 C.F.R. § 402.14(i)(2) (2022).

The Alliance objects to the proposal that reasonable and prudent measures may be implemented outside of the action area and that they may include measures to “offset” the impact of incidental take because both proposals are inconsistent with the ESA.

##### a. Reasonable and Prudent Measures Are Limited to an Action Area.

The Alliance objects to the proposed revision to section 402.14(i)(2) that would allow “reasonable and prudent measures” to include measures “implemented inside or outside of the action area.” This revision is inconsistent with the ESA itself. The ESA provides that reasonable and prudent measures may only include those measures “the Secretary considers necessary or appropriate to **minimize**” the impact from a take. See 16 U.S.C. § 1536(b)(4)(C)(ii) (emphasis added). A well-established mitigation principle is that minimization measures occur within an action area.

The Fish and Wildlife Service’s own guidance recognizes that minimization measures occur within an action area. The Fish and Wildlife Service’s own policies describe minimization as “limiting the degree or magnitude of the action and its implementation”—i.e., adjustments to the action itself that are necessarily within the action area. See U.S. Fish & Wildlife Serv., *Mitigation Policy*, 501 FW 2, App. 1 at 19 (2023)<sup>1</sup>; U.S. Fish & Wildlife Serv., *Endangered Species Act Compensatory Mitigation Policy*, 501 FW

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<sup>1</sup> Available at <https://www.fws.gov/sites/default/files/policy/pdfs/FWS-Mitigation-Policy.pdf>.

3, App. 1 at 23 (2023)<sup>2</sup>. Because minimization measures only occur within an action area, the proposal that reasonable and prudent measures may include measures outside of an action area is inconsistent with the ESA.

Fundamentally, the proposal that reasonable and prudent measures may include measures outside of an action area opens the door for reasonable and prudent measures to include compensatory mitigation measures. The Alliance objects to this proposal. Compensatory mitigation can significantly increase mitigation burdens for project proponents by requiring them to secure offsite mitigation at undetermined costs. Moreover, because the universe of available compensatory mitigation measures can be broad, a compensatory mitigation requirement can result in project delays while the Service evaluates what it deems to be appropriate compensatory mitigation. For all of these reasons, the Services cannot and should not adopt the proposed revision to section 402.14(i)(2) that would allow “reasonable and prudent measures” to include measures “implemented inside or outside of the action area.”

b. Reasonable and Prudent Measures Cannot Include Measures to “Offset” Take.

The proposed revision to section 402.14(i)(2) that would allow “reasonable and prudent measures” to include measures that “offset” the impact of the incidental take is inconsistent with the ESA. The ESA provides that reasonable and prudent measures may only include those measures “the Secretary considers necessary or appropriate to **minimize**” the impact from a take. See 16 U.S.C. § 1536(b)(4)(C)(ii) (emphasis added). The ESA does not authorize the Secretary to specify reasonable and prudent measures that offset—i.e., mitigate entirely—the impacts of an incidental taking.

In the preamble to the proposed rule, the Services incorrectly equate offsets with minimization measures. See 88 Fed. Reg. at 40,759 (“clarifying that [reasonable and prudent measures] . . . may include offsets provides greater flexibility in meeting the statutory objective of minimizing the impact of take”). In fact, both the Services and the Council on Environmental Quality have consistently treated measures that compensate for, or offset impacts of, an action as independent and distinct from minimization measures. See, e.g., 40 C.F.R. § 1508.1(s)(2) and (5) (defining minimization and compensation as different steps in mitigation hierarchy); U.S. Fish and Wildlife Service Mitigation Policy and Endangered Species Act Compensatory Mitigation Policy, 88 Fed. Reg. 31,000 (May 15, 2023); U.S. Fish & Wildlife Serv., *Endangered Species Compensatory Mitigation Policy*, 501 FW 3, App. 1, at 23 (2023) (identifying minimization and compensation as different steps in the mitigation hierarchy); see also 33 C.F.R. § 332.2 (defining “compensatory mitigation” as a tool for “offsetting” impacts “after all appropriate and practicable avoidable and minimization has been achieved”). Moreover, the ESA itself considers minimization and mitigation to be distinct and independent concepts. See 16 U.S.C. § 1539(a)(2)(B)(ii) (requiring that habitat conservation plans “minimize and mitigate” the impacts of a taking). Therefore, the proposed rule’s proposal that reasonable and prudent measures may include measures to offset the impacts of incidental take is inconsistent with the plain language of the ESA itself. The Services may not adopt the proposed revision to section 402.14(i)(2) that would allow reasonable and prudent measures to include measures to “offset” the impact of incidental take.

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<sup>2</sup> Available at [https://www.fws.gov/sites/default/files/policy/pdfs/FWS-ESA-Compensatory-Mitigation-Policy-amend\\_1.pdf](https://www.fws.gov/sites/default/files/policy/pdfs/FWS-ESA-Compensatory-Mitigation-Policy-amend_1.pdf).

2. Section 402.14(i)(3) – Reasonable and Prudent Measures Priorities

The Proposed Rule would add a new section 402.14(i)(3):

(3) Priority should be given to developing reasonable and prudent measures and terms and conditions that avoid or reduce the amount or extent of incidental taking anticipated to occur within the action area. To the extent it is anticipated that the action will cause incidental take that cannot feasibly be avoided or reduced in the action area, the Services may set forth additional reasonable and prudent measures and terms and conditions that serve to minimize the impact of such taking on the species inside or outside the action area.

*Compare 88 Fed. Reg. at 40,763 with 50 C.F.R. § 402.14(i)(3) (2022).*

Because the Alliance opposes the proposed revisions to section 402.14(i)(2) that would allow reasonable and prudent measures to be implemented outside of the action area, it similarly opposes the proposed language in section 402.14(i)(3). Because reasonable and prudent measures cannot and should not be adopted outside of an action area, the Services need not prioritize reasonable and prudent measures within an action area.

Section 402.17 – Other Provisions

The Alliance opposes the proposed removal of section 402.17 in its entirety. This section clarifies how the Services should determine whether an activity or consequence caused by a proposed action is reasonably certain to occur. Specifically, subsection (a) clarifies the application of the “reasonably certain to occur” standard to activities included in the definitions of “effects of the action” and “cumulative impacts.” Subsection (b) clarifies what consequences caused by a proposed action are considered to be “effects of the action.”

The Alliance supports retention of these provisions to give the Services guidance when identifying “effects of an action.” Although the Services justify removal of these provisions under the rationale that they are better captured in guidance such as the Services’ Consultation Handbook, the Services can both retain these provisions in the regulations and provide additional guidance on their application through informal guidance.

The additional guidance provided by section 402.17 aids in determining the effects of an action and the scope of section 7 consultation. Section 7 consultation does not serve a beneficial role when effects cannot be reliably predicted or measured at the scale of a listed species’ current range, would result at most in an extremely small and insignificant impact to the listed species or critical habitat, or are such that the potential risk of harm to a listed species or critical habitat is remote. Section 7 consultation is similarly unnecessary when an action would 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. If effects are too small to reliably measure or if benefits are too speculative to calculate, then section 7 consultation does not result in more informed decision-making. As such, the Services should confine section 7 consultation to those situations where consultation can actually inform agency decisions and improve conservation outcomes. For these reasons, the Services should retain section 402.17 in any final rule.

Conclusion

The Alliance appreciates the opportunity to provide comments.

Sincerely,



Kathleen M. Sgamma  
President