WUWC
WESTERN URBAN WATER COALITION

September 24, 2018

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Public Comments Processing
Attn: FWS–HQ–ES–2018–0006, 0007, 0009
U.S. Fish & Wildlife Service, MS: BPHC
5275 Leesburg Pike
Falls Church, VA 22041–3803

Re: Comments on Proposed FWS Rulemaking: Proposed Rules for Endangered and Threatened Wildlife and Plants, Docket No. FWS–HQ–ES–2018–0006; Docket No. 180202112–8112–01; 4500030113; Docket No. FWS-HQ-ES-2018-0007; 4500030113; Docket No. FWS–HQ–ES–2018–0009; FXES11140900000–189–FF09E300000; Docket No. 180207140–8140–01; 4500090023

The Western Urban Water Coalition ("WUWC") appreciates the opportunity to comment on the U.S. Fish and Wildlife's ("FWS") and the National Marine Fisheries Service's ("NMFS") (collectively, the "Services") proposed revision of the regulations implementing portions of the Endangered Species Act ("ESA"): (1) revision of the regulations for prohibitions to threatened wildlife and plants, 83 Fed. Reg. 35174 (July 25, 2018); (2) revision of regulations for interagency cooperation, 83 Fed. Reg. 35178 (July 25, 2018), and (3) revision of the regulations for listing species and designating critical habitat, 83 Fed. Reg. 35193 (July 25, 2018).

Established in 1992 to address the West's unique water supply and water quality challenges, WUWC consists of the largest urban water utilities in the West, serving more than 40 million western water consumers in major metropolitan areas in six western states. For purposes of this letter, the WUWC includes the following urban water utilities:

- *Arizona* – Central Arizona Project, City of Phoenix and Salt River Project;
- *California* –Eastern Municipal Water District, Los Angeles Department of Water and Power, The Metropolitan Water District of Southern California, San Diego County Water Authority, Santa Clara Valley Water District and City and County of San Francisco Public Utilities Commission;
- *Colorado* – Aurora Water, Colorado Springs Utilities, and Denver Water;
- *Nevada* – Las Vegas Valley Water District, Southern Nevada Water Authority, and Truckee Meadows Water Authority; and
- *New Mexico* –Albuquerque Bernalillo County Water Utility Authority

WUWC is committed to presenting a new and different perspective on the management of water resources in the modern West. WUWC articulates the needs and values of Western cities to

provide a reliable, high quality urban water supply for present and future generations. As operators of public water supply systems, WUWC members serve the health, environmental, and economic needs of their communities around the clock and every day of the year. WUWC advocates for effective and practicable approaches to the implementation of environmental protection programs in a time when water is becoming more scarce and critical to the West's sustainability.

Throughout its 26-year history, WUWC has been an active participant in ESA administrative and regulatory improvement measures. WUWC does not believe sweeping legislative reform is needed, but instead supports a continuation of the actions taken by all Departments of the Interior and Commerce Secretaries since the mid-1990s to achieve meaningful regulatory and administrative reform. This includes improvements in the efficiency of the decision-making process and ESA review procedures, and the encouragement of greater participation by non-federal entities in species conservation.

I. Overall comments on ESA proposals.

Before WUWC offers detailed comments on the proposed rules, we will make two overarching points. First, WUWC generally supports all three proposed revisions. Many make minor but useful clarifications to the consultation process, and a number of the proposals, including efforts to streamline informal consultations and further programmatic consultations, should result in more efficient and consistent implementation of the ESA across the many field and regional offices of the Services. The Services have asked for comment on the merit and authority for the Services to conduct a single consultation, resulting in a single biological opinion. This is something that we support and believe is authorized by the existing statutory text. This would further the goal of making the consultation process more efficient while continuing to recognize the important species conservation goals of the ESA.

Second, the Services should establish a stakeholder outreach process to continue to gather input on the proposed rules before they are finalized. The proposed rules are extensive in scope and would change some fundamental principles of ESA implementation. It is very challenging for stakeholders, many of whom have extensive experience with the ESA, to understand fully and respond to the proposed regulations within a 60-day comment period. Finalizing the proposals without adequate input is likely to be counterproductive to the goal of ensuring that the proposals are thoughtfully crafted and legally defensible. Indeed, we believe that the Services would greatly benefit from an ongoing dialogue on the proposed rules, after the comment period closes and key issues are identified. This is particularly true for some of the complex and far-reaching section 7 proposals. If finalized, many of the proposals will require updates to the section 7 Consultation Handbook, but the Services have not explained whether they plan to complete those updates and, if so, by when. We believe such a process can be undertaken in accordance with applicable law through an appropriately structured series of workshops, listening sessions, or other interactive forums. WUWC would be pleased to help design and participate in such a program.

II. Comments on specific proposals.

a. The Services should clarify how to properly interpret "the effects of the action."

For certain water infrastructure consultations, one challenge has been properly defining the scope of the proposed action and its effects. WUWC supports the Services' proposed definition of "effects of the action," to the extent that it clarifies that any activities and effects are "caused by" a proposed action only if they would not occur "but for" the proposed action *and* are "reasonably certain" to occur.

As an initial matter, the Services should adequately explain how to apply the two-part, "but for" and "reasonably certain to occur" test. Although the Services' Endangered Species Consultation Handbook (Handbook) offers some explanation, our experience has been that the Services have at times applied the tests inconsistently and expansively. For example, the scope of effects has included activities that are related to a proposed action but not necessarily caused by it. Specifically, the Services sometimes include population growth and development as an indirect effect of water supply and delivery projects, even when such growth is speculative or projected to occur with or without the project. Offering clear guidance about how to apply the two prongs of the test would ameliorate this issue.

Second, we suggest that the Services make clear that while a "but for" test may be a useful starting point in examining causation, the "but for" test has limitations, which at times may result in an over-inclusive determination of the scope of effects that are "caused by" the action. Contrary to what is suggested in the proposed rule, the "but for" test has not used to determine the *effects* of a federal agency's action. Notably, the Handbook states only that analyzing "whether other activities are interrelated to, or interdependent with, the proposed action under consultation should be conducted by applying a 'but for' test." Although this may assist in determining which other *activities* should be considered, it is unclear to what extent the Handbook suggests employing an unrefined "but for" test in analyzing the "effects of the action."

In fact, the Handbook suggests otherwise, as it expressly employs a multi-factor test in analyzing the effects of a proposed action (and its interrelated and interdependent activities) on a species and/or critical habitat. This multi-factor test includes consideration of the proximity of the action in relation to the effect, geographical distribution of effects, timing of the effect in relation to "sensitive periods in a species' life cycle," the nature and duration of the effect, and disturbance frequency. This consideration may be better suited to--and result in a more accurate and precise definition of--effects that are "caused by" the action under review. Accordingly, the Services should consider regulatory language allowing for the consideration of these additional factors, as doing so would more accurately describe effects that are the logical result of the action under review, further clarify or elucidate the proposed regulatory language, and ensure that consultations on water projects are not unduly broad.

Third, regarding the "reasonably certain" standard, the background of the final rule should include the following clarification adopted from page 4-28 of the Section 7 Handbook:

> for an activity or effect to be caused by an action, it must be reasonably certain to occur, as evidenced by appropriations, work plans, permits issued, or budgeting; they follow a pattern of activity undertaken by the agency in the action area; or they are a logical extension of the proposed action.

The background should also underscore that in determining whether population growth and development are reasonably certain, there are a multitude of economic, administrative, and legal hurdles to those outcomes and varying factors that drive development.

Fourth, in streamlining their section 7 regulations, the Services should ensure that terms used in the regulations serve a clear and useful purpose. To that end, the Services should clarify the proposed rule's use of the terms "effects" and "activities" in describing the "effects of the action." Neither the proposed rule nor the accompanying background explains the distinction, if any, between the "activities" "caused" by an action and the "effects" of an action. The background to the proposed rule states that activities "caused" by the proposed action would have been considered "interrelated or interdependent" actions under the current regulations. In our view, "interdependent and interrelated" actions cannot be effects of the proposed action; rather, each federal action is subject to the section 7(a)(2) "duty to insure" requirement.

Further, the action agency must satisfy its section 7(a)(2) duty considering any statutory constraints on its authority to act or its authority to limit or restrain the occurrence of certain actions. The background to the proposed rule appears to misconstrue or overlook the purpose of the terms "interrelated or interdependent" actions, which are intended to include other federal actions that are interconnected with the proposed action, and, therefore, must be considered in the same consultation. The Services should clarify that discretionary federal actions currently characterized as "interrelated and interdependent" remain subject to the consultation requirement. For this reason, WUWC suggests retaining these terms.

To the extent that the proposed rule intends to create a distinction between non-federal "activities" and "effects" that are caused by the proposed action, the nature of the distinction is not clear from the text. The Handbook does not provide a cogent explanation, so the Services should clarify this point. WUWC suggests that, for purposes of determining the "effects" of the action, distinguishing between "effects" and non-federal "activities" does not serve a useful purpose. At present, the definition of "effects" expressly includes "effects of other activities that are caused by the proposed action," and the two-part "but for" test for causation applies equally to "effects," which include effects from other "activities," and other "activities," themselves. If the distinction between non-federal "activities" and "effects" is maintained, the background to the final rule should more clearly explain the purpose and meaning of the distinction. Alternatively, if the distinction is unnecessary, the Services should eliminate it.

b. The Services appropriately eliminated the distinction between direct and indirect effects.

In the proposed rule, the Services propose revising and simplifying the term "effects of the action," by combining categories of effects and making clear the term applies to the "entire range

of potential effects." If implemented correctly,[1] the proposal could simplify consultations by eliminating the effort of trying to distinguish between direct and indirect effects. The ultimate objective of the effects analysis is to determine how a proposed action affects a species' survival and recovery, and agency time spent distinguishing between direct and indirect effects was not clearly necessary to advancing that goal. Further, in simplifying the term "effects of the action," the Services are not proposing a new standard for effects—they are largely applying the existing standard for indirect effects and extending it to all effects.

c. The Services should retain the current definition of "environmental baseline," and add additional regulatory language clarifying the applicability of Section 7 to the operations of existing project facilities.

ESA regulations currently define the "environmental baseline" to which the proposed action is compared as:

> 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.

See 50 C.F.R. § 402.02. The Services' Endangered Species Consultation Handbook describes the environmental baseline as "the effects of past and ongoing human and natural factors leading to the current status of the species, its habitat (including designated critical habitat) and ecosystem." Handbook at 4-22. Thus, the baseline includes "State, tribal, local and private actions already affecting the species or that will occur contemporaneously with the consultation in progress." *Id*.; *see* Handbook 4-27 ("Ongoing effects of [an] existing dam are … included in the Environmental Baseline and would not be considered an effect of the proposed action under consultation").

As WUWC has previously discussed, where ESA section 7(a)(2) consultation involves the ongoing operation of an existing federal project, Courts and the Services have struggled with correctly defining the environmental baseline and the scope of the discretionary agency action under consultation. *See* Attachment 1, July 3, 2018 letter and attached ESA Issue Paper. Where, for example, a Federal agency undertakes section 7 consultation related to ongoing hydropower system operations, there has been inconsistent treatment over the continued effects of the existing dam and related facilities (including blockage of upstream areas) and past operations and maintenance activities (including effects of past changes in flows). At times, these are properly considered part of the environmental baseline; in other consultations, they have improperly been attributed to the proposed action.

[1] As we noted in subsection a., the terms "interdependent and interrelated" actions serve an important purpose and should be retained as concepts distinct from the "effects" of the action (or actions) subject to consultation. Moreover, whether or not the definitions of direct and indirect effects are combined, application of the "but for" test to determine such effects should be cabined by or informed by additional considerations, including application of the multi-factor test in the Handbook, as well as any legal constraints on the agency's authority to address an effect.

WUWC agrees with the Services' statement that it "has been challenging … to determine the appropriate baseline for … consultations involving ongoing agency actions," and supports the proposal to separate the environmental baseline from the effects of the action, as doing so should simplify the task of identifying the latter.

To provide further clarity in the context of consultation involving the ongoing operation of an existing federal project, WUWC recommends that the Services include new standalone language regarding the applicability of section 7 to actions related to the operation of existing project facilities. As previously suggested, *see* Attachment 1 at 4-5, the Services should define the parameters of actions and effects for ongoing federal project operations such that: (1) the proposed action should be the future discretionary actions related to the operation of the existing facilities in the existing environment; (2) the effects of the action should focus on the manner in which the current status of the species and existing condition of its habitat will be affected by the proposed future discretionary actions; and (3) the examination of effects of the discretionary proposed action does not include the baseline effects of or from the original construction of the facilities or the past operations and maintenance activities that have occurred. For proposed language revising 50 C.F.R § 402.03, *see* Attachment 1 at 5.

d. Alternatively, if the Services adopt the proposed definition of "environmental baseline," they should explain how "ongoing" will be applied.

The Services also seek comment on whether to add to the environmental baseline definition to address how the effects of "ongoing actions" are treated. The Services have requested comment on whether to describe the baseline as "the state of the world absent the action under review," and would include "the past, [and] present and ongoing impacts of all past and ongoing Federal, State and private actions." The Services also ask for comment on defining "ongoing impacts" as "impacts or actions that would continue in the absence of the action under review."

We believe that the approach suggested in subsection c. is preferable and may have a greater likelihood of long-term success. But some of the revisions to the definition of environmental baseline could play a positive role toward clarifying how the baseline will be determined for ongoing actions. New language defining "ongoing impacts" as "impacts that would continue in the absence of the action under review," for instance, would assist in clarifying that the environmental baseline includes the ongoing effects of a facility in situations where the action agency lacks the ability to modify the action to address those impacts.

That said, the proposed revisions also raise questions that require clarification. For example, the existing rules make clear that future impacts of "State or private activities, not involving Federal activities, that are reasonably certain to occur" are considered cumulative effects, and not the environmental baseline. The proposed rule does not suggest any changes to the definition of this term. Consequently, if the concept of "ongoing impacts" is retained in the final rule, the Services should clarify that this term does not include "cumulative effects."

The Services should also clarify the purpose of including "past and ongoing" in the proposed reference to "the past, present and ongoing impacts of all past and ongoing Federal, State, or private actions…." Other than impacts from past and ongoing actions, when would the Services ever consider impacts from actions? Impacts arising from future actions presumably would not be considered, because the baseline is intended to be "the state of the world absent the action under review." Thus, it appears that the inclusion of "past and ongoing" (with respect to actions) may be superfluous and confusing.

e. The proposed revisions to the definition of "destruction or adverse modification" should clarify several aspects of how the definition is applied.

WUWC supports the proposal to clarify that the "destruction or adverse modification" standard applies across the entire range of a species, because that is the geographic scale at which recovery occurs. We do not view this proposal as changing current practice. We do recommend, however, that the Services develop a better method of evaluating how a proposed project affects the conservation of a species. In particular, the "appreciably diminishes" standard remains elusive for the regulated community and the public to interpret objectively, and the Services' explanation that they use their "best professional judgment" to determine how much is "appreciable" offers little comfort to WUWC. The Services' current practice, as evidenced in biological opinions, provides the public with only a limited understanding of the relationship between the effects of a proposed project and the conservation of a species. In practice, it is also unclear how the Services apply the "adverse modification" prohibition differently from the jeopardy prohibition. The agencies' continued reluctance to clarify this distinction despite multiple requests from the public runs contrary to their stated desire to "improve and clarify the interagency consultation processes…." We recommend that, as a starting point, the Services propose a detailed definition of "appreciable."[2]

WUWC also recommends that the Services expressly incorporate the concept of "net effects" in the definition of "destruction or adverse modification," so that adverse impacts can be offset by protective measures and habitat restoration associated with a proposed action. Our suggested additions to the proposed definition are italicized as follows:

> Destruction or adverse modification means *the net effect of* a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species, *after consideration of offsetting improvements in habitat or protection for replacement habitat associated with the proposed action*.

By expressly incorporating this concept, the Services can facilitate the use of upfront conservation measures to reduce the likelihood of a destruction or adverse modification finding.

[2] If the Services were to consider employing quantitative thresholds, such as a five percent diminishment in the abundance or distribution of the affected species in the action area, the Services should first thoroughly consider whether such standards could be effectively applied as a practical matter. Where the habitat that is lost is "occupied," for example, it may have much more value, even if it is less than the quantitative threshold established. Likewise, geographical location may play a role that would not be captured by the "quantitative" approach.

f. The Services should augment their proposal on "foreseeable future" with more objective standards to help interpret this phrase.

The Services propose defining the term "foreseeable future" (which is part of the definition of "threatened species") to make clear that the meaning of this term "extends only so far into the future as the Services can reasonably determine that both the future threats [*i.e.*, the conditions potentially posing a danger of extinction] and the species' responses to those threats are probable." The Services further state that the "foreseeable future … extends only so far as predictions about the future are reliable."

WUWC supports the proposal to put into regulation the key elements of the FWS's 2009 memorandum interpreting the foreseeable future. We agree that the requirement that the foreseeable future be reliable rather than speculative is consistent with court decisions and good policy. We offer two recommendations on the proposal.

First, the Services should consistently use "reliable" rather than "probable." The background to the proposal appears to use these terms interchangeably, but "probable" typically involves a statistical analysis, and some members of the public have interpreted the reference to "probable" as suggesting a stricter standard for what constitutes foreseeable than under the 2009 memorandum. We do not believe the Services intended this outcome.

Second, the Services should offer better guidance on how to interpret the "reliable" standard, as it is subjective and has been applied in a variety of ways over the past nine years. This has resulted in inconsistency, particularly in the context of the future downscaled effects of climate change. Although WUWC recognizes that it may not be currently possible to identify a single timeframe that corresponds to the foreseeable future for all species, it is possible to identify timeframes over which certain threats (*e.g.*, wind energy development) or certain population trends for specific taxonomic groups (*e.g.*, salmonids) are foreseeable. Indeed, the Services have already quantified the foreseeable future in dozens of listing and delisting decisions. We believe that the Services can evaluate those decisions and identify trends and consistent patterns in the time horizons used for certain types of threats or taxon, and then appropriately apply those horizons in future listing decisions.

WUWC recognizes that the Services are likely reluctant to reduce their discretion by providing more objective standards for concepts like foreseeable future. Greater confidence in the credibility and consistency of ESA decisions, however, reduces the hesitation of agencies, developers, and the public to participate in the process, and speeds implementation of ESA decision-making and recovery initiatives. Species conservation and ecosystem preservation efforts based on sound technical information and objective decision-making provide the most cost-effective use of limited resources.

g. To improve critical habitat designations, the Services should clarify the meaning of "efficient conservation."

WUWC generally supports the proposals to prioritize designation of occupied habitat over unoccupied habitat. A key part of this proposal is the exception that the Services will consider

designating unoccupied areas as critical when a designation limited to occupied areas would "result in less-efficient conservation for the species." WUWC believes this exception is important because, in some situations, unoccupied habitat may be less costly and controversial to protect than occupied habitat and may be important as rising sea levels or other factors affect currently occupied habitat.

We recommend that the Services explain how they would apply their proposed definition of "efficient conservation," particularly the factors the agencies would consider to identify "situations where the conservation is effective, societal conflicts are minimized, and resources expended are commensurate with the benefit to the species." We recognize that the Services have few economists or sociologists on staff to assess factors like societal conflict and resource optimization. As a result, the agencies should provide as much explanation and examples as feasible in the background to the final rule to provide the public with greater predictability about how to interpret "efficient conservation."

h. The Services should consider allowing for the designation of critical habitat for certain species to be postponed until after a recovery plan is completed.

Although the Services did not propose delaying critical habitat designations in their proposed regulations, WUWC recommends the agencies evaluate this issue for a future rulemaking. We believe that designating critical habitat at or around the time of listing can result in designations that do not align well with the recovery strategy for a species, because there is little context for understanding the recovery needs of a species at that time. Postponing designations until a recovery plan is completed is sensible, provided the Services can finalize plans in a reasonable timeframe (*e.g.*, within several years of listing). In their next round of ESA rulemakings, the Services should explore whether it is possible to delay certain critical habitat designations until after a recovery plan is completed based on a finding that designation is not "prudent and determinable" at the time of listing under section 4(a)(3)(A) of the ESA. Specifically, the Services should consider whether a combination of factors—including the significant costs of an initial designation, the rarity of revisions to those designations, and the frequent absence of adequate information about the conservation needs of a species at the time of listing—could collectively support a finding to postpone the initial designation until a recovery plan is finalized.

III. Other Areas for ESA Reform

The WUWC commends the Services for taking the initiative on this proposal. As we have consistently noted over many years, there are additional actions that are needed under the ESA to achieve important administrative reform that will make the law work more efficiently and effectively. Among top priorities for additional consideration are revisions to the recently revised HCP Handbook to address the insufficient comment period provided in 2017; development of standardized guidance for determining and evaluating economic impacts associated with critical habitat designations and exclusions; guidance for, and increased use of, reimbursable agreement with project applicants for section 7 compliance; guidance on calculation time frames for section 7 consultation to avoid delays associated with frequent requests by the Services for more data before activating the statutes, time frames; and undertaking critical habitat designations in conjunction with recovery plans to ensure better information and more precise designations.

WUWC has consistently recognized the importance of comprehensive and detailed ESA regulation, especially for the kind of projects its members are involved in. Such regulation results in better decisions and better projects and is especially important at a time when the resources to implement the ESA cannot keep pace with the Services' growing workload. As a result, our comments are intended to maintain and improve the ESA regulations, as established and clarified by the proposed ESA regulation revisions, while making them more efficient, timely, and effective.

Thank you for the opportunity to provide comments on the proposed rules. If you have any questions regarding these comments, please contact Don Baur of Perkins Coie, LLP at (202) 654-6234, dbaur@perkinscoie.com or me at (415) 934-5787, mcarlin@sfwater.org.

Sincerely,

Michael P. Carlin
Chairman

cc: Donald C. Baur
Perkins Coie LLP
700 Thirteenth St., NW, Suite 600
Washington, D.C. 20005

Attachment 1

WUWC
WESTERN URBAN WATER COALITION

July 3, 2018

The Honorable Ryan Zinke
Secretary of the Interior
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

The Honorable David Bernhardt
Deputy Secretary
Department of the Interior
1849 C Street, N.W.
Washington, DC 20240

Re: Proposed Revisions to Section 7 Regulations

Dear Secretary Zinke and Deputy Secretary Bernhardt:

Enclosed with this letter is an issue paper from the Western Urban Water Coalition ("WUWC") concerning proposed revisions to regulations implementing section 7 of the Endangered Species Act ("ESA").

Created in June 1992 to address the West's unique water issues, WUWC consists of the largest urban water utilities in the West, serving over 40 million western water consumers in major metropolitan areas in the western states. WUWC is committed to presenting a new and different perspective on the management of water resources in the modern West. WUWC articulates the needs and values of Western cities to provide a reliable, high quality urban water supply for present and future generations. WUWC advocates for effective and practicable approaches to the implementation of environmental protection Programs in a time when water is becoming more scarce and critical to the West's sustainability. WUWC members would like to see Section 7 regulations revised to bring greater clarity and certainty to ESA regulatory processes. We have participated extensively in ESA reforms through our history and previously provided comments to the Department on this subject as part of its regulation reform initiative.

Thank you for your consideration of our issue paper. If you have any questions regarding the content of the paper, please contact our counsel, Donald C. Baur at (202) 654-6234 or dbaur@perkinscoie.com.

Sincerely,

Michael P. Carlin
Chairman

Enclosure

WUWC
WESTERN URBAN WATER COALITION

Issue Paper

Proposed Revisions to Section 7 Regulations

I. Provide A Regulatory Definition Of Jeopardy That Recognizes That Actions Causing Insignificant Or *De Minimis* Impacts To Listed Species Can Proceed Without Violating Section 7(A)(2) Of The Endangered Species Act.

The Endangered Species Act (ESA) is a powerful tool to conserve and protect listed species. But it was not intended to prevent all agency actions that will negatively affect listed species. Rather, the ESA obligates federal agencies to consult with the U.S. Fish and Wildlife Service (FWS) or the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS) (collectively "the Services") to ensure that any action "authorized, funded, or carried out" by the agency is not likely to jeopardize the continued existence of an endangered or threatened species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2).

Implementing regulations provide that an action "jeopardizes" a species if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. To determine if an action "jeopardizes" a species, the consulting agency (FWS/NMFS) must consider the action's direct, indirect, and cumulative impacts measured against the environmental baseline. 50 C.F.R. §§ 402.02; 402.14(g)(4); *see National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917, 926 (9th Cir. 2008) (*NWF*) (consulting agency "assessing whether the listed [species] would be jeopardized by the aggregate of the proposed agency action, the environmental baseline, cumulative effects, and current status of the species."). In *NWF*, the Ninth Circuit explained that an agency:

> only "jeopardize[s]" a species if it causes some new jeopardy. An agency may still take action that removes a species from jeopardy entirely, or that lessens the degree of jeopardy. However, an agency may not take action that will tip a species from a state of precarious survival into a state of likely extinction. Likewise, even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm.

Id. at 930. Thus, the agency action must cause *new* adverse effects and those effects, considered in the proper context, must *appreciably* reduce the species' likelihood of survival and recovery.

Recently, however, courts have erred in applying this standard in situations where existing environmental conditions (the "baseline") are significantly degraded and the species at issue is highly imperiled. In some ESA consultations arising under these circumstances, courts have relied on this language of NWF to conclude that, where the baseline conditions are significantly

degraded because of distinct and unrelated activities, any action that may exacerbate a species' already "imperiled" existence, no matter how *de minimis* the impact, is likely to jeopardize species.

But the ESA allows actions to go forward – to a point – even when it is possible that that there will be a minimal impact to a species. While "an agency may not take action that will tip a species from a state of precarious survival into a state of likely extinction," the focus must be on whether the agency action "deepens the jeopardy by causing additional harm." This is true even where existing baseline conditions already threaten the recovery of a species. *Id.* Of course, what will "tip the species ... into a state of likely extinction," or "deepen the jeopardy," is necessarily a matter of degree.

The salient question remains whether an agency action appreciably reduces a species' likelihood of survival or renders recovery out of reach. *Id.* (the operative inquiry is whether the action will "cause[] some new jeopardy").

Recommendation: The Services should amend their regulations to provide clarity for the courts and the agencies regarding the statutory language of the ESA and deference to how it is implemented by the agencies. Specifically, the Services should expressly define "appreciably reduce" and make it clear that the agency's jeopardy inquiry is not whether the action is harmful, but whether, even if adverse effects may occur, the action appreciably reduces the species' likelihood of survival and recovery. Proposed language follows:

> 50 C.F.R. § 402.02
>
> ***Reduce appreciably*** **means cause a discernible adverse impact that is quantitatively or qualitatively significant**.
>
> *Effects of the action* refers to the direct and indirect effects of an action on the species or critical habitat, **including measures provided in the action that are intended to benefit listed species or critical habitat or mitigate impacts of the action on listed species or critical habitat**, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. 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. Indirect effects are those that are caused by the proposed action and are later in time, but still are reasonably certain to occur. Interrelated actions are those that are part of a larger action and depend on the larger action for their justification. Interdependent actions are those that have no independent utility apart from the action under consideration....

Jeopardize the continued existence ***of listed species*** means to engage in **or undertake** an action that **causes new adverse effects that, when considered in the context of the environmental baseline, the status of the listed species, and cumulative effects**, reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.

50 C.F.R. § 402.14 Formal consultation.

(g) Service responsibilities. Service responsibilities during formal consultation are as follows:

(1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant **and should include an evaluation of information provided by the applicant**.

(2) Evaluate the current status of the listed species or critical habitat.

(3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.

(4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

...

(h) Biological opinions. The biological opinion shall include:

(1) A summary of the information on which the opinion is based;

(2) A detailed discussion of the effects of the action on listed species or critical habitat; and

(3) The Service's opinion on whether the action**, considering the effects of the action, taken together with cumulative effects,** is**: (i)** likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "jeopardy biological opinion"); or **(ii)** the action is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat (a "no jeopardy" biological opinion). A "jeopardy" biological opinion shall include reasonable and prudent alternatives, if any. If the Service is unable to develop such

alternatives, it will indicate that to the best of its knowledge there are no reasonable and prudent alternatives.

II. Define the parameters of actions and effects subject to consultation under Section 7(a)(2) of the ESA for ongoing federal project operations.

As noted above, a Federal agency must ensure that any action "authorized, funded, or carried out" by the agency is not likely to jeopardize the continued existence of an endangered or threatened species or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(a)(2). ESA regulations define the "environmental baseline" to which the proposed action is compared as:

> 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.

See 50 C.F.R. § 402.02. The Service's Endangered Species Consultation Handbook describes the environmental baseline as "the effects of past and ongoing human and natural factors leading to the current status of the species, its habitat (including designated critical habitat) and ecosystem." Handbook at 4-22. Thus, the baseline includes "State, tribal, local and private actions already affecting the species or that will occur contemporaneously with the consultation in progress." *Id.*; *see* Handbook 4-27 ("Ongoing effects of [an] existing dam are ... included in the Environmental Baseline and would not be considered an effect of the proposed action under consultation").

Where ESA section 7(a)(2) consultation involves the ongoing operation of an existing federal project, however, Courts and the Services have struggled with correctly defining the environmental baseline and the scope of the discretionary agency action under consultation. Where, for example, a Federal agency undertakes section 7 consultation related to ongoing hydropower system operations, there has been inconsistent treatment over whether the continued effects of the existing dam and related facilities (including blockage of upstream areas) and past operations and maintenance activities (including effects of past changes in flows) are properly considered part of the environmental baseline or attributed to the proposed action.

Recommendation: The Services should define the parameters of actions and effects subject to consultation under section 7(a)(2) of the ESA for ongoing federal project operations, such that: (1) the proposed discretionary action should be the future operation of the existing facilities in the existing environment; (2) the effects of the action should focus on the manner in which the current status of the species and existing condition of its habitat will be affected by the proposed future operations or any other proposed discretionary actions; and (3) the examination of effects of the discretionary proposed action does not include the baseline effects of the original construction of the facilities or the past operations and maintenance activities that have occurred. Proposed language follows:

50 C.F.R. § 402.03 Applicability

(a) Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control.

(b) Section 7 and the requirements of this part apply to proposed discretionary federal actions. When consulting on an action related to the operation of existing project facilities where there is continuing federal discretionary involvement or control, section 7 and the requirements of this part apply to the future operation of existing facilities in the existing environment. The effects of the action are the future impacts of the proposed discretionary action on the species or critical habitat. Section 7 and the requirements of this part shall not apply to previous approvals or actions, including the original construction of existing facilities, the existing facilities themselves, or past operations and maintenance activities that have already occurred.

III. Encourage More Efficient Consultation Procedures To Expedite Determinations Where The Consulting Agency Acquiesces In The Federal Action Agency's Determination That An Action Is "Not Likely To Adversely Affect" A Listed Species.

As noted above, ESA section 7(a)(2) requires a Federal agency that carries out, permits, licenses, funds, or otherwise authorizes activities that may affect a listed species to ensure that its actions are not likely to jeopardize the continued existence of any listed species. If the Federal agency (also called the action agency), determines that its proposed action will have no effect on protected species, its obligations under the ESA are discharged. 50 C.F.R. § 402.12. If it determines that its actions "may affect" listed species, it either enters "formal consultation" with FWS or NMFS or engages in "informal consultation" to determine whether formal consultation is necessary. *See* 50 C.F.R. §§ 402.13; 402.14(a)-(b). If the action agency determines that its action is not likely to adversely affect listed species (e.g., the effects are beneficial, insignificant, or discountable), and the consulting agency concurs in writing, the consultation process is terminated, and no further consultation is necessary. *See* 50 C.F.R. § 402.13(a); 402.14(l).

Two issues arise from this procedure. First, the two provisions dealing with the action agency's "not likely to adversely affect" determination (50 C.F.R. §§ 402.13(a); 402.14(l)) are not consistent regarding the type of concurrence required by the consulting agency. In addition, litigants have successfully challenged inter-agency section 7 consultation because a consulting agency has failed to provide adequate "written concurrence" with an action agency's determination. Indeed, even where it is otherwise clear that the consulting agency is aware of the action agency's determination and has voiced no concern over it, litigants have successfully challenged the adequacy of ESA consultation because no "written concurrence" has been provided to properly terminate consultation. Having agency actions remanded or slowed on this basis has real world consequences to those affected or reliant on agency

actions, and appears to elevate form over substance, without any corresponding benefit to listed species.

Recommendation: To provide greater flexibility to the agencies in carrying out and discharging their consultation obligations, the ESA section 7 regulations should be amended to allow consultation to conclude in those instances where the action agency has provided its determination to the consulting agency, and the consulting agency does not object, or provides its concurrence verbally. In those circumstances, there should be an expedited means of concluding or terminating the consultation. Proposed amended language follows:

> 50 C.F.R. § 402.13 Informal consultation.
>
> (a) Informal consultation is an optional process that includes all discussions, correspondence, etc., between the Service and the Federal agency or the designated non-Federal representative, designed to assist the Federal agency in determining whether formal consultation or a conference is required. If during informal consultation it is determined by the Federal agency, with the written concurrence of the Service, that the its proposed action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated, and no further action is necessary. **If the Service concurs but does not do so in writing, consultation may still be terminated if the Federal agency, after conferring with any designated non-federal representative or applicant, provides the Service with written documentation memorializing the Service's concurrence and the Service either accepts the Federal agency's determination in writing within 30 days or does not respond within this period. Once such written documentation has been provided, and in the event the Service does not respond within the 30-day period described in this subsection, the Service will be deemed to have concurred with the Federal agency determination and the written documentation of the Federal agency may be used to establish this concurrence.**
>
> ...
>
> 50 C.F.R. § 402.14 Formal consultation.
>
> (l) Termination of consultation. (1) Formal consultation is terminated with the issuance of the biological opinion.
>
> (2) If during any stage of consultation a Federal agency determines that its proposed action is not likely to occur, the consultation may be terminated by written notice to the Service.
>
> (3) If during any stage of consultation a Federal agency determines, with the concurrence of the ~~Director~~ **Service**, that its proposed action is not likely to adversely affect any listed species or critical habitat, the

consultation is terminated. **If the Service concurs but does not do so in writing, consultation may still be terminated if the Federal agency, after conferring with any designated non-federal representative or applicant, provides the Service with written documentation memorializing the Service's concurrence and the Service either accepts the Federal agency's determination in writing within 30 days or does not respond within this period. Once such written documentation has been provided, and in the event the Service does not respond within the 30-day period described in this subsection, the Service will be deemed to have concurred with the Federal agency determination and the written documentation of the Federal agency may be used to establish this concurrence.**

IV. Allow Agency Applicants To Provide And Review The Scientific And Commercial Data Used In Conducting An ESA Consultation.

Existing regulations provide a limited role for applicants who are not participating as a designated non-federal representative in a consultation. But these regulations stop short of recognizing the valuable role that non-federal agencies, particularly municipal water agencies and public utilities, can play in assembling the best available scientific and commercial data regarding species and the actions that are impacting species conditions and habitat.

Recommendation: The regulations should be revised to better address the way applicants can participate in the consultation process and assist in reviewing and improving the science used in developing biological assessments and biological opinions. Proposed amended language follows:

402.14 Formal Consultation

(d) Responsibility to provide best scientific and commercial data available. The Federal agency requesting formal consultation shall provide the Service with the best scientific and commercial data available or which can be obtained during the consultation for an adequate review of the effects that an action may have upon listed species or critical habitat. This information may include the results of studies or surveys conducted by the Federal agency or the designated non-Federal representative **or applicant**. The Federal agency shall provide any applicant with the opportunity to submit information for consideration during the consultation and **shall solicit input from the applicant regarding all studies or surveys on which the Federal agency is relying**.

(g)(5) Discuss with the Federal agency and any applicant the Services review and evaluation conducted under paragraphs (g)(1) through (3) of this section, the basis for any finding in the biological opinion, and the availability of reasonable and prudent alternatives (if a jeopardy opinion is to be issued) that the agency and the applicant can take to avoid violation of section 7(a)(2). The Services will utilize the expertise of the Federal

agency and any applicant **in developing the review under (g)(1) - (4)** and identifying these alternatives. . . .

V. Reopen Regulations Defining Adverse Modification Of Critical Habitat And Establishing The Procedures For Designating Critical Habitat, As Well As The Policy For Determining Exclusions From Critical Habitat.

In addition to ensuring their actions do not jeopardize a listed species, Federal agencies are also required to ensure that any activity funded, carried out or authorized by that agency is not likely to "result in the destruction or adverse modification" of designated critical habitat. The ESA defines "critical habitat" as "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 considerations or protection." 16 U.S.C. § 1532(5)(A). The ESA further states that "critical habitat shall not include the entire geographical area which can be occupied" by the species, "[e]xcept in those circumstances determined by" the Services to be appropriate. *Id.* § 1532(5)(C). Unoccupied areas may be included as critical habitat only where the Services determine "that such areas are essential for the conservation of the species." *Id.* § 1532(5)(A).

On February 11, 2016, the Services issued: revised criteria for the designation of critical habitat, 81 Fed. Reg. 7414 (Feb. 11, 2016); a revised definition of "destruction or adverse modification" of critical habitat, 81 Fed. Reg. 7214 (Feb. 11, 2016); and they adopted (iii) a final policy regarding the exclusion of areas from critical habitat designation. 81 Fed. Reg. 7226 (Feb. 11, 2016). These changes became effective on March 14, 2016.

The final rules and policy broadly impact all aspects of ESA implementation, including jeopardy determinations and the development of species conservation plans. Ultimately, private activities are subject to increased scrutiny by federal agencies, and obtaining permits and other approvals can be costlier and more time consuming. More specifically, the Services amended the definition of "destruction or adverse modification" under Section 7(a)(2) of the ESA for the stated purpose of formalizing agency guidance issued after the Fifth and Ninth Circuits invalidated an earlier version of the definition. *See Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434 (5th Cir. 2001), and *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059 (9th Cir. 2004). The Services state in the final rule that the revised definition "clarify[ies]" the Services' intent, yet "do[es] not alter the overall meaning of the proposed definition." 81 Fed. Reg. 7214, at 7226.

In practice, however, the revised definition permits a finding of destruction or adverse modification even in areas that do not contain physical or biological features essential to the conservation of a species. The final rule thus broadens the definition "to encompass all potential types of alterations if they reduce the value of the habitat for conservation." *Id.* at 7219. Moreover, the final rules do not allow adequate consideration of the "net effects" of conservation activities outside of the area of designated critical habitat, stating that such activities "should not be considered when evaluating effects to critical habitat." *Id.* at 7222. The absence of an appropriate "net effects" analysis could serve as a disincentive to mitigation efforts.

The Services' amended regulatory definitions, procedures and criteria for designating critical habitat under Section 4 of the ESA, 81 Fed. Reg. 7414 (Feb. 11, 2016), are also problematic. The most noteworthy—and controversial—definitional changes are the addition of two new definitions for "geographical area occupied by the species" and "physical or biological features." The Services note that these terms are referenced in the statutory definition of "critical habitat" at section 3(5)(A)(i) and (ii) of the ESA, but are not defined in the ESA or regulations. *Id.* at 7429, 7430. As defined, "geographical area occupied by the species" is broad and can include areas occupied by the species after the species is listed, as well as areas that are "used only periodically or temporarily by a listed species during some portion of its life history." *Id.*

In addition, under the final rule, "to the maximum extent prudent and determinable," the agencies must finalize critical habitat designations concurrently with the issuance of proposed and final listing rules. *Id.* at 7439. The rule identifies specific situations in which a designation of critical habitat is not prudent, but states that only in "rare circumstances" will a designation of critical habitat not be prudent or determinable. *Id.* at 7432. Despite the Services' claim that the amended rule "do[es] not substantially change the manner in which critical habitat is designated," *id.* at 7416, the rule represents a complete overhaul of the designation procedures and criteria. Under this new regime, the Services can designate not only areas within the geographical area occupied by the species at the time of listing but also specific areas outside the geographical area occupied by the species. *Id.* at 7439. The scale of the areas to be designated is left to the Services discretion. This change is likely to significantly broaden designations of critical habitat.

Finally, the Services issued a non-binding policy to address the agencies' process for identifying exclusions from critical habitat under Section 4(b)(2) of the ESA. 81 Fed. Reg. 7226. The policy explains that exclusion decisions are discretionary, that areas covered by conservation plans or agreements will be considered but not necessarily excluded, and that the focus of exclusions will be on non-federal lands. *Id.* at 7247-48. The Services state that the purpose of the policy is to "provide greater predictability and transparency regarding how the Services generally consider exclusions under section 4(b)(2)." *Id.* at 7227. In practice, however, the lack of clear guidance on when exclusions will apply could result in inconsistent applications of the policy and confusion among the regulated community. Specifically, the absence of clear criteria for the exclusion of areas covered by conservation agreement with assurances, safe harbor agreements, habitat conservation plans or other initiatives may discourage these initiatives, or at least make such agreements more costly and time-consuming to achieve.

In sum, the final rules and policy represent a significant change in the implementation of the processes and criteria for critical habitat designations and adverse modification findings. Although one of the stated purposes of the final rules and policy is to clarify these issues and provide greater predictability and transparency, the final rules and policy may in fact result in new issues and areas of controversy. The likely effect is increased and broader critical habitat designations—an expectation that even the Services acknowledge and correlate with the impacts of global climate change on species habitat and range. *Id.* at 7435. Legal challenges to the rules and policy are likely, suggesting that the future of ESA implementation is anything but clear

Recommendation: The final regulations and policy should be revised because the rules are too expansive in their treatment of habitat in areas "unoccupied at the time of listing," and in their determination of what is "essential to the conservation of the species." In addition, the policy for exclusion from critical habitat does not provide sufficient flexibility for areas subject to conservation plans developed under other laws. The current regulations should remain in place pending the release of revised and superseding final regulations and policy.

V. Encourage Use Of Reimbursable Agreement For Environmental Reviews And Related Processes For "Gray" Infrastructure Projects.

Although not a regulatory issue, we encourage FWS to adopt a practice of making use of reimbursable agreements whenever requested to do so by project applicants. One of the principal concerns for water resource use and infrastructure rehabilitation and development is the potential for delays in decision-making. These problems often arise because of insufficient staffing and lack of federal agency resources to conduct the necessary procedures. Delays caused by insufficient federal staff and resources are likely to increase with budget cuts. A partial solution to this problem would be to make agency review procedures more efficient and expeditious by adopting uniform policy guidance that allows non-federal parties to cover the costs of these reviews through the hiring of federal staff and other support by the involved agencies. Similar procedures exist in a few Department of the Interior programs, and a uniform policy should be established for all federal environmental review procedures.

In addition, developing and using standard form agreements as the basis for allowing project sponsors to assume the cost of permitting procedures, including, *inter alia*, ESA section 7 consultations, ESA section 7 consultations undertaken pursuant to the section 10(a)(1)(B) incidental take permit process, and Environmental Impact Statements (EIS) under the National Environmental Policy Act, for "gray" infrastructure projects (i.e. human engineered, new construction or upgrading dams, pipelines, roads etc.), would expedite decision-making and make procedures more reliable and certain. A standard form (such as the standard template attached as Attachment 1) could easily be adjusted to apply to an Environmental Assessment as needed. Reimbursable agreements could contain elements necessary to expedite the permitting process via the project applicant paying for a full-time agency project manager and other personnel as well as EIS and other contractor consultants. These can also provide at least in basic general terms for Service coordination with other consulting/cooperating agencies to meet timelines, and they can be adapted to or paired with an interagency agreement for the project.

Recommendation: The Services should develop comprehensive and uniform guidance that encourages the use of reimbursement agreements through which applicants can pay for permit processing costs. Such agreements must ensure the objectivity of the reviews and agency actions made pursuant to reimbursement programs.

The Services should also develop and use standard form agreements as the basis for allowing project sponsors to assume the cost of permitting procedures. Reimbursable agreements should contain elements necessary to expedite the permitting process via the project applicant paying for a full-time agency project manager and other personnel as well as EIS and other contractor consultants. Agreements can also provide for coordination with other

consulting/cooperating agencies to meet timelines, and they can be adapted to or paired with an interagency agreement for the project.

ATTACHMENT 1

DRAFT March 2018

REIMBURSABLE AGREEMENT
Between
UNITED STATES DEPARTMENT OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE,
and [APPLICANT NAME]

THIS AGREEMENT is made and entered into by and between the United States Fish and Wildlife Service (FWS), and [Applicant Name] (the Applicant) to facilitate streamlined and expedited environmental review for the [Project Name] (the Project) with the goal of achieving timely Project approval while also assuring the Project is sensitive to the protection of fish and wildlife environmental resources.

A. RECITALS

1. WHEREAS, pursuant to the Endangered Species Act of 1973 (as amended) (ESA), FWS is responsible for reviewing and providing comment on actions which may affect Federal-trust fish and wildlife environmental resources;

2. WHEREAS, all parties have determined that it would be mutually beneficial to supplement FWS staffing above current levels to enable FWS to provide the Applicant with priority project review, so that the Project can be designed and implemented more efficiently, in a manner that is responsive to fish and wildlife environmental resources and public interests;

3. WHEREAS, all parties have determined that any supplemental staffing above current levels would provide expedited review by FWS of the Project, which would be quicker than the customary time necessary for such review; and, WHEREAS, the Applicant is willing to reimburse FWS for supplemental staffing required to provide priority project review;

4. WHEREAS, the Appropriations Act for the Department of the Interior and Related Agencies, 2000 (Public Law 106-113) provides authority to FWS to credit the Resource Management account for advance payments received under reimbursable agreements with private entities; and

5. WHEREAS, information associated with this Agreement may be released to the public, except where such records are labeled as confidential by FWS or the Applicant and are exempted from disclosure pursuant to Freedom of Information Act regulations (5 U.S.C. § 552).

C. AGREEMENT

In consideration of the foregoing, the parties agree as follows:

1. Purpose. The Applicant and FWS have entered into this Agreement, under which the Applicant will provide resources to FWS for the provision of enhanced environmental technical assistance, consultation and coordination services related to the Project's environmental review

under the ESA, as well as other statutes as appropriate, such as the Migratory Bird Treaty Act (MBTA), Bald and Golden Eagle Protection Act (BGEPA) and [other applicable statutes]. The purpose of this Agreement is to define the respective services that will be provided by the parties, and to establish the responsibilities and procedures of the parties relative to the priority development and permitting of the Project. This Agreement is intended to:

a. Enable the Applicant to reduce Project start up and delivery time by allowing FWS to provide for more focused and predictable FWS staffing and coordination for the development and review regarding Section 7 consultation under the ESA, as detailed in the attached Scope of Work (**Attachment A**);

b. Support FWS in its efforts to assist the Applicant through the provision of technical assistance in developing documents related to the statutes mentioned above, such as: the identification of species that may incur significant adverse impacts from the Applicant's construction, operation, and maintenance activities; the analysis of the effects to listed species; and the identification of appropriate avoidance, minimization, and mitigation measures;

c. Maximize the effective and efficient use of FWS personnel resources by providing a dedicated, increased, and predictable level of FWS personnel resources to the preparation of biological opinions and other documents; and

d. Avoid conflicts and, where possible, expedite the planning and development of the documents through more frequent communication and coordination among FWS, the Applicant and other parties.

2. Regulatory Compliance. By entering into this Agreement, neither FWS nor the Applicant abrogate or assign their respective obligations and duties to comply with the ESA, the MBTA, BGEPA, or any other environmental statutes addressed through this Agreement, and regulations promulgated thereunder. Nothing in this Agreement is to be construed as providing a guarantee that any application for an incidental take permit or other authorization regarding the Project under the ESA will be approved, nor that any other permits or authorizations related to other statutes will be approved.

3. FWS Responsibilities.

a. Supplement staffing in order to assign qualified and experienced staff to participate in the Project review under the National Environmental Policy Act (NEPA) and ESA consultation/concurrence processes.

b. Ensure that the staff keeps time records identifying the hours spent on each specific task relative to this Agreement.

c. Provide the Applicant with a [quarterly/monthly] statement of expenditures for work performed on the Project pursuant to this Agreement. The statement will include all costs

billed to the Project for the period covered, as well as cumulatively for the duration of the Project. The statement shall include a summary of hours, by individual.

d. Complete tasks included in the Scope of Work (**Attachment A**) by the dates specified in the Scope of Work.

e. Otherwise provide expedited document review and project coordination. Specifically, NEPA documents, such as Draft Environmental Impact Statements, will be reviewed within a maximum review period of 15 business days. Other project related documents will be acted upon within 5 business days upon receipt of complete project documentation.

f. Provide informal review of draft Biological Assessment(s) as they are developed by the [applicable agency].

g. Provide a written indication as to whether the Biological Assessment(s) contain all of the information needed to initiate and complete consultation. The consulting agencies will complete this written indication within 15 business days of receipt of the Biological Assessment(s).

h. Meet the 135-day formal consultation timeframe, acknowledging there will be multiple levels of review of the draft Biological Opinion(s).

i. Provide draft Biological Opinion(s) for [applicable agency] and Applicant review no later than 30 days before the end of any agreed upon consultation period.

j. Discuss any reasonable and prudent measures and terms and conditions for incidental take with the Applicant and [applicable agency] prior to issuance of final Biological Opinion(s).

4. Applicant Responsibilities.

a. Meet with FWS after submitting the Project application to ensure the application is complete and, if necessary, provide information necessary to complete the application.

b. Provide advance payment to FWS in the amount of $[_____] over the term of this Agreement for the costs contemplated by this Agreement, including staff support, travel and per-diem at federal government rates as needed to support this Agreement. This Agreement shall not be interpreted to require the Applicant to pay FWS any amount in excess of $[_____].

c. Review FWS' [quarterly/monthly] statements of expenditures for work performed on the Project pursuant to this Agreement.

d. Approve or dispute FWS expenditures in [quarterly/monthly] statement of expenditures and negotiate with FWS in good faith toward reconciliation of any disputed amount.

5. Period of Performance. This Agreement commences and is effective as of the date of the last signature herein and expires on the final date that all work activities under this Agreement are completed.

6. Allowable Costs and Payments.

a. The Applicant will advance payment to FWS for work performed by dedicated staff, in accordance with the attached Cost Estimate (**Attachment B**). In addition, the Applicant will advance payment to FWS for direct and indirect costs, other than salary costs, as identified in the attached Cost Estimate (**Attachment B**).

b. FWS will invoice the Applicant in advance for an initial payment of $ [_____], and on a yearly basis thereafter, in accordance with the payment schedule listed in the Cost Estimate (**Attachment B**). In no case shall FWS invoice in advance for more than one year. FWS will also not be reimbursed for actual costs that exceed the estimated wage rates and other estimated costs set forth in the FWS' Cost Estimate (**Attachment B**) without prior written agreement between the Applicant and FWS.

c. The Cost Estimate (**Attachment B**), all proposed rates, and the allowability of all items included in the Cost Estimate will be audited consistent with applicable federal law following execution and final approval of this Agreement.

d. FWS shall annually [and/or at the conclusion of this Agreement] provide a financial statement from the agency's accounting system to the Applicant reporting costs incurred under this Agreement. After receipt of a financial statement, the Applicant may audit, at the Applicant's expense, the books, documents, papers, and records directly pertinent to the financial statement.

e. If FWS does not expend the full amount of an advance during the year, the remaining amount may, at the Applicant's sole discretion, be used to reduce the amount of advance payment for the subsequent year or to augment the subsequent year's budget. In addition, any unused funds not used to reduce the amount of advance payment for the subsequent year or to augment the subsequent year's budget, per the discretion of the Applicant, will be returned to the Applicant, within 30 days of the Applicant's request.

f. The total amount payable by the Applicant under this Agreement shall not exceed $ [_____].

7. Cost Principles.

a. Allowable costs issued under this Agreement must be necessary, reasonable, and allowable. A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost. A cost is allowable to a particular cost objective if the goods or services involved are chargeable or assignable to such cost objective in accordance with relative benefits received.

b. Costs which are prohibited under state or federal laws and regulations are not allowable under this Agreement.

c. Allowable costs must be accorded consistent treatment. A cost may not be assigned as a direct cost if any other cost incurred for the same purpose in like circumstances has been allocated as an indirect cost.

d. Allowable costs must be adequately documented.

e. Any costs for which payment has been made to FWS that are determined by subsequent audit to be unallowable under this Agreement, may be subject to repayment by FWS to the Applicant.

8. Dispute Resolution. In the event a dispute arises out of any term or condition of this Agreement, the Applicant and FWS shall then attempt to negotiate a resolution of such dispute. Notwithstanding the above provision, neither the Applicant nor FWS waive any rights or duties it may have pursuant to federal and state laws, rules, or regulations.

9. Amendment. Modifications to this Agreement shall be made in writing and shall be signed and dated by both parties.

10. No Third Party Beneficiaries. This Agreement shall not be construed to create any right or cause of action by any third party.

11. Suspension. The Applicant may temporarily suspend the work activities under this Agreement by providing FWS reasonable advance written notice. Suspension of the work activities under this section does not affect the expiration date of this Agreement.

12. Termination. The Applicant may terminate the Agreement by providing 30 days advance written notice. FWS may terminate the Agreement if: (1) the Applicant fails to make the advance payments required under this Agreement following 30-day notice of missed payment; or (2) the Project application is withdrawn. If the Applicant terminates the Agreement or withdraws the Project application, FWS may collect costs incurred prior to the date of its receipt of the notice of termination or the application withdrawal plus any termination costs. Upon termination, FWS shall refund to the Applicant advanced funds not expended or committed as of the date of receipt of the notice of termination or application withdrawal, less any termination costs FWS is entitled to collect.

13. Principal Point of Contact. The Project representatives and all inquiries, notices and payments during the term of this Agreement will be directed to:

[Applicant Name]	**U.S. Fish and Wildlife Service**
	Section/Unit
Contract Manager:	Project Manager:
Address:	Address:
Phone:	Phone:
Fax:	Fax:
Email:	Email:

This Agreement is accepted subject to all terms and conditions.

_____ _____

[name of Applicant] Date

[title of Applicant]

_____ _____

[name of authorized officer] Date

[title of authorized officer]

ATTACHMENT A

FWS Scope of Work

Task	Required Completion Date
Review NEPA Documents	
Coordinate with Cooperating Agencies	
Provide Informal Review of and Comments on Biological Assessment(s) (BA)	
Review Final BA(s) and Provide Revisions [if required]	
Letter of Concurrence or Further Consultation regarding Completed BA(s) [if required]	
Prepare Biological Opinion(s) (BiOp) [if required]	
Issue BiOps [if required]	

ATTACHMENT B
Cost Estimate

Estimate for Fiscal Year _____

Personnel Needed for Processing	**Estimated Hours**	**Estimated Wage Rate**	**Estimated Labor Costs**
Project Manager	_____	$_____	$_____
Administrative Support	_____	$_____	$_____
[Wildlife Biologist]	_____	$_____	$_____
[Fisheries Biologist]	_____	$_____	$_____
Other _____	_____		$_____
Other _____	_____		$_____
	TOTAL HOURS _____	**TOTAL LABOR**	**$_____**

Estimated Operating Costs

Travel: Estimated Trips _____ @ $_____ per trip	$_____
Vehicle mileage	$_____
Misc. Supplies	$_____
Printing/Publication	$_____
Total Operating Costs	**$_____**

Calculation

Total Labor Costs	$_____
Total Operating Costs	$_____
Total Direct (Labor and Operating) Costs	**$_____**

Total Direct Costs (all offices) $_____

Indirect Cost Rate _____% $_____

PROCESSING GRAND TOTAL $_____ rounded to **$_____**