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Public Comments Processing
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U.S. Fish & Wildlife Service, MS: PRB/3W
5275 Leesburg Pike
Falls Church, VA 22041–3803

Re: Comments on Proposed Rules, “Regulations Pertaining to Endangered and Threatened Wildlife and Plants,” Docket No. FWS–HQ–ES–2023–0018; “Revision of Regulations for Interagency Cooperation,” Docket No. FWS–HQ–ES–2021–0104; “Listing Endangered and Threatened Species and Designating Critical Habitat,” Docket No. FWS–HQ–ES–2021–0107

On June 22, 2023, the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Services (NMFS; collectively, the “Services”) proposed revisions to the regulations that implement Sections 4 and 7 of the Endangered Species Act (ESA or Act) in two proposed rulemakings. Through the proposed revisions, the Services seek to change criteria and procedures for listing, reclassifying, and delisting species on the Lists of Endangered and Threatened Wildlife and Plant and designating critical habitat.¹ The Services also propose changes to clarify and improve the interagency consultation process and provide for continued conservation of species.² Additionally, the FWS, in its own proposed rulemaking, seeks to reinstate the “blanket rule” option for protecting newly listed threatened species under Section 4(d) of the Act.³ The Western Urban Water Coalition (WUWC or Coalition)⁴ appreciates this opportunity to comment on the Services’ proposals.

¹ 88 Fed. Reg. 40764 (June 22, 2023).

² 88 Fed. Reg. 40753 (June 22, 2023).

³ 88 Fed. Reg. 40742 (June 22, 2023).

⁴ WUWC consists of the following members: **Arizona** (Central Arizona Project, City of Phoenix and Salt River Project); **California** (East Bay Municipal Utility District, Eastern Municipal Water District, the City of 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); **New Mexico** (Albuquerque Bernalillo County Water Utility Authority); **Utah** (Salt Lake City Public Utilities and Washington County Water Conservancy District); and **Washington** (Seattle Public Utilities). Seattle Public Utilities does not participate in this comment letter.

I. Western Urban Water Coalition

WUWC was established in 1992 to address the West's unique water supply and water quality challenges that threaten the economic sustainability and growth of the western population centers. WUWC consists of the largest urban water utilities in the West, which together serve more than 40 million urban water consumers in 20 major metropolitan areas across seven states. Some of these utilities also operate wastewater, natural gas, and electric, including hydroelectric, facilities.

WUWC members are public utilities dedicated to providing a reliable, high-quality urban water supply for present and future generations. As operators of urban water supply systems, WUWC members serve the health, environmental, and economic needs of their communities around the clock. WUWC advocates for effective and practicable approaches to the implementation of environmental protection programs in a time when water sources are being impacted by climate change, drought, and other factors, and the development of sustainable supplies is vital. Their mission has proven more critical now than ever considering the essential role of clean water in combatting the spread of disease and maintaining public health, livelihoods, and sustenance during times of crisis. To fulfill this critical mission, WUWC members are involved in federal and nonfederal activities that are subject to regulation under the ESA.

Throughout its 31-year history, WUWC has been and will continue to be both a supporter of the goals of the ESA and 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 Department of the Interior and Commerce Secretaries since the 1990s to achieve meaningful regulatory and administrative policy reform. This includes improvements in the efficiency of the decision-making process and ESA review procedures, and the encouragement of greater participation by nonfederal entities in species conservation. WUWC looks forward to continued dialogue and collaboration on how the ESA can benefit water providers in the West and across the country. The comments set forth in this letter are in furtherance of these general goals.

II. Comments on Specific Proposals

In August 2019, the Services promulgated final rules implementing Sections 4, 7, and 9 of the Act. These final rules (1) interpreted aspects of listing and delisting of species and the designation of critical habitat under Section 4 of the Act;⁵ (2) retracted certain protections for threatened species by removing the Section 4(d) "blanket rule" provision;⁶ and (3) changed the interagency consultation process under Section 7 of the Act (hereinafter "the 2019 rules").⁷

⁵ 84 Fed. Reg. 45020 (Aug. 27, 2019).

⁶ 84 Fed. Reg. 44753 (Aug. 27, 2019).

⁷ 84 Fed. Reg. 44976 (Aug. 27, 2019).

WUWC submitted a substantive comment letter on the Services' proposed versions of these three final rules.⁸ Many of WUWC's substantive comments remain relevant to the three proposals published by the Services on June 22, 2023. WUWC also provides the specific comments below.

a. WUWC's Comment on the Services' Proposed Revisions to ESA Section 7

WUWC urges the Services to consider additional clarification of the two-part causation test as applied to "effects of the action."

The Services propose a revised definition of "effects of the action" under Section 7 of the ESA. While the Services largely maintain the definition promulgated in 2019, they propose to clarify that the reference to "activities" in the 2019 definition is to "those activities that are caused by, but that are not part of, the proposed action."⁹ The Services maintain, as they did in the preamble to the 2019 final rule, that "the proposed action receives a presumption that it will occur," and it, therefore, "would not be appropriate to apply the two-part causation test to the proposed action itself, especially the concept of reasonably certain to occur. However, activities that may be caused by the proposed action, but that are not part of the proposed action, are subject to the two-part causation test."¹⁰

WUWC supports this proposed revision and the Services' accompanying explanation. In the past, there has been confusion regarding applicability of the "but for" test, which at times has resulted in an over-inclusive determination of the scope of effects that are "caused by" the action. The "but for" test historically has not been used to determine the *effects* of a federal agency's action. Notably, the Section 7 Consultation 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."¹¹ Although this guidance assists in determining which other *activities* should be considered, it has been unclear to what extent the Handbook suggests employing a "but for" test in analyzing the "effects of the action." The Services' proposal answers that question: the "but for" test should only be applied to activities that are caused by, but are not a part of, the proposed action.

While the Services have provided some clarification regarding the applicability of the "but for" test, additional clarity regarding both parts of the two-part test would be beneficial. For certain water infrastructure consultations, an ongoing challenge has been properly defining the scope of the proposed action and its effects. The Section 7 Consultation Handbook offers some

⁸ WUWC Comments on Proposed ESA Regulation Revisions, Docket ID FWS-HQ-ES-2018-0006-55737 (Sept. 24, 2018).

⁹ 88 Fed. Reg. at 40755.

¹⁰ *Id.*

¹¹ Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act at 4-27 (March 1998) [hereinafter "Section 7 Consultation Handbook"].

explanation—including examples¹² related to water resources actions that have been relied upon by WUWC members and others—but it has been WUWC’s experience 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. Clear guidance about how to apply the two prongs of the test would ameliorate this issue.

Additionally, WUWC urges the Services to consider the additional factors provided in the Section 7 Consultation Handbook, which expressly employs a multi-factor test in analyzing the effects of a proposed action (and related 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 of a species’ life cycle,” the nature and duration of the effect, and disturbance frequency.¹³ 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.

WUWC encourages the Services to reconsider its proposal to eliminate the factors set forth in §-402.17 to determine whether an activity is “reasonably certain to occur.”

FWS had set forth provisions in § 402.17(a)(1) through (a)(3) and § 402.17(b) that it now proposes to eliminate. These provisions “were an attempt to identify non-exclusive factors that could be examined to determine whether an activity is reasonably certain to occur.”¹⁴ While FWS notes that “[t]hese are relevant considerations,” they “would be better suited for discussion in a guidance document rather than regulations because these factors do not necessarily apply in all cases, and further explanation is needed on when and how these factors may be appropriately considered.”¹⁵

WUWC believes § 402.17 should not be eliminated from the regulations. As explained above, the Services have not always consistently applied the two-part causation test (including the “reasonably certain to occur” portion of the test). The three limitations in § 402.17 on when a consequence is reasonably certain to occur could serve to partially address WUWC’s ongoing

¹² See, e.g., Section 7 Consultation Handbook at Figure 4-5.

¹³ Section 7 Consultation Handbook at 4-23–4-24.

¹⁴ 88 Fed. Reg. at 40758.

¹⁵ *Id.*

concern that the Services might include as effects activities of water supply and delivery projects that are merely speculative or projected to occur with or without the project.

Further, regarding the “reasonably certain” standard, the Supplementary Information of the final rule should include the following clarification adopted from page 4-28 of the Section 7 Consultation Handbook:

[F]or 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 Supplementary Information 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.

The Services have stated that, if the proposed elimination of § 402.17 is finalized, the Services expect to update the Section 7 Consultation Handbook to address and expand on these factors. However, the Services have not explained how and when they plan to complete those updates. While WUWC urges the Services not to eliminate § 402.17, if the Services ultimately decide to do so, the Services should develop a process to update the Handbook in accordance with applicable law through an appropriately structured series of workshops, listening sessions, or other interactive forums involving the public.

The Services should revise the definition of “environmental baseline” to provide for an adaptive and flexible approach for ongoing and future projects.

Where ESA § 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. Where, for example, a federal agency undertakes Section 7 consultation related to ongoing hydropower system operations, there has been inconsistent treatment of 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.

The Services indicate that, in their proposal to revise the definition of “environmental baseline,” they seek to clarify the term. Specifically, the Services propose to delete “ongoing” from the third sentence of the definition to “remed[y] a misperception that anything that was a continuation of past and present discretionary practice or operation would be in the environmental baseline.”¹⁶ The Services further explain that “[f]uture consequences of the *entire* discretionary

¹⁶ 88 Fed. Reg. at 40756.

operation would be evaluated as effects of the proposed action even if the proposed action does not contemplate changes to some aspects of past discretionary practices or operations.”¹⁷ The Services offer the following example:

[T]he Federal agency may propose to continue the operations of the dam’s flow regime with no changes from past practices, or with only minor changes. Regardless of their ‘ongoing’ nature, all of the consequences of the proposed discretionary operations of the structure are ‘effects of the action.’¹⁸

WUWC believes the Services’ proposal does not afford sufficient flexibility in determining the environmental baseline for proposed projects. First, the proposal goes too far by including in the effects of an action even those consequences that the action agency and project proponent do not intend to change. Second, the proposal does not consider the need for an adaptive approach in light of climate change, which has and will continue to impact the environmental baseline for existing and proposed projects. As we previously suggested in our comments on the 2019 proposed rules, we again urge the Services to 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.

The Services should reconsider their proposed expansion of RPMs to include measures occurring outside the action area.

The Services propose to revise the regulations governing reasonable and prudent measures (RPMs) in a manner that would allow the Services to consider not only reducing incidental take itself, but also measures to offset “residual impacts” to the species inside and *outside* the action area.¹⁹ The Services propose a preferred order for RPMs in which they would first consider measures within the action area to minimize the amount or extent of incidental take; they would then consider offset measures within the action area that would mitigate any remaining impacts; and, finally, they would consider offset measures outside the action area.²⁰

If finalized as written, the proposal would improperly expand the Services’ discretion to include mitigation measures as RPMs, contrary to the ESA. The concept of mitigation does not appear in Section 7 of the ESA. Instead, in Section 7, Congress focused on minimizing the impact

¹⁷ *Id.* (emphasis added).

¹⁸ *Id.*

¹⁹ 88 Fed. Reg. at 40758, 40759.

²⁰ 88 Fed. Reg. at 40759.

of incidental taking. The Services recognized as much in the Section 7 Consultation Handbook: “Section 7 requires *minimization* of the level of take. It is not appropriate to require *mitigation* for the impacts of incidental take.”²¹ The Handbook also makes clear that RPMs “can include only actions that *occur within the action area* . . . and *reduce the level of take* associated with project activities.”²² To remain consistent with the statutory language, WUWC urges the Services to maintain the approach established in the Handbook.

There are many avenues for mitigation of impacts to species outside of incidental take permits issued under Section 7 of the ESA. For example, under Section 10, where a non-Federal entity has met the statutory and regulatory requirements, the Services must issue an incidental take permit authorizing take that is incidental to otherwise lawful activities.²³ An incidental take permit is supported by a habitat conservation plan (HCP) that provides conservation actions to “monitor, minimize, and mitigate” the impacts of the authorized take.²⁴ Mitigation under an HCP may even include off-site protection of the listed species and its habitat. While HCPs are the most widely used incentives for stewardship of biodiversity on private land, there are also candidate conservation agreements with assurances (CCAAs) and safe harbor agreements, which encourage property owners to take beneficial actions for listed and candidate species.²⁵ In addition to these permittee-responsible mitigation tools, there are also third-party tools, such as species conservation banking, under which landowners and other private entities can earn conservation credits for protecting a listed, candidate, or otherwise at-risk species, or habitat of such species, and then sell those credits to project developers that need to disturb or destroy the species’ habitat in another location.

WUWC is concerned that the proposal to allow RPMs outside the project action area could reduce the availability and effectiveness of these mitigation tools for future projects. At its extreme, the Services’ proposal could override the purpose of incidental take permits as well as other mitigation tools, allowing for mitigation measures as RPMs where current regulatory authority does not. The proposal would increase the burden of action agencies and project proponents to not only reduce incidental take itself, but also employ additional offset measures as part of their RPMs. In the past, WUWC has witnessed agency offsets so extensive that they cumulatively exceeded the acreage of a species’ total habitat or even the total acreage of a given habitat type in a state. Such offsets can unduly burden project proponents who are otherwise receptive to creative and adaptive mitigation measures that advance species and habitat conservation while striking a balance with project development. We believe that the Services should be able to consider the beneficial effects of mitigation if voluntarily proposed as part of an agency action, but it would be inappropriate to broaden the reach of RPMs. Instead, mitigation can

²¹ Section 7 Consultation Handbook at 4-53 (emphasis added).

²² *Id.*

²³ 16 U.S.C. § 1539(a)(1)(B).

²⁴ 50 C.F.R. § 17.22(b)(1)(iii)(B) (emphasis added).

²⁵ 16 U.S.C. § 1539(a)(1)(A).

be applied, with the agreement of the action agency and project proponent, to reduce the likelihood or magnitude of incidental take and lessen, or eliminate, the need for RPMs.

We also note that the Section 7 regulations define RPMs as measures that “cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes” to the action. 50 C.F.R. § 402.14(i)(2). RPMs that occur off-site, as proposed by the Services, would contradict that definition.

WUWC is concerned by the Services’ proposal to expand their discretion when establishing RPMs beyond those measures that would directly reduce incidental take within the action area. As such, WUWC asks the Services to reconsider the proposed revisions to the regulations governing RPMs (1) to be consistent with Section 7 of the ESA, (2) in consideration of the mitigation tools already in existence and successfully utilized by project proponents, and (3) to prevent unduly burdensome or repetitive conservation measures.

b. WUWC’s Comment on the Services’ Proposed Revisions to the Section 4 Delisting Rule

The Services should provide additional guidance on the “reliable” standard included in the definition of “foreseeable future.”

WUWC believes that the requirement that the foreseeable future be reliable rather than speculative is consistent with court decisions and good policy. However, 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 since FWS published its 2009 memorandum interpreting “foreseeable future.” This has resulted in inconsistency, particularly in the context of the future downscaled effects of climate change. Although WUWC recognizes that it may not currently be 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.

WUWC generally supports the Services' proposed revisions to the regulations governing designating unoccupied areas as critical habitat.

The Services propose significant changes to the regulatory provision governing the designation of unoccupied areas as critical habitat.²⁶ In essence, these revisions streamline the Services' ability to designate unoccupied areas.

The Services also indicate that they will “continue to identify and consider areas that are occupied by the species *before* evaluating areas that are unoccupied by the species.”²⁷ WUWC has and continues to support prioritization of occupied habitat over unoccupied habitat in the Services' designation of critical habitat. However, WUWC does not believe that all occupied areas must be exhausted before considering whether any unoccupied areas may be essential for conservation of the relevant species. In some limited situations, unoccupied habitat may be less costly to protect than occupied habitat and may provide benefits, including more efficient conservation, for listed species. WUWC, therefore, supports the Services' proposal to “remove the requirement that the Secretary exhaust all occupied areas before considering whether any unoccupied areas may be essential for conservation of the particular species.”²⁸

c. WUWC's Comment on FWS's Proposed Revisions to the Blanket 4(d) Rule

WUWC understands that FWS intends to reinstate the “blanket rules” that apply many of the Section 9 protections to newly listed threatened species for two reasons. First, FWS explains that it wants “to prevent declines in the species' status.”²⁹ However, FWS does not demonstrate in its proposal that a blanket rule is more protective than those that are tailored to the needs of species. FWS's logic also improperly implies that, in contrast to FWS, NMFS is not committed to preventing declines in the status of species under their jurisdiction. FWS's second reason for reinstating the blanket rules is “practical” in that a blanket rule is easy to understand.³⁰ We believe that FWS overstates the ease of comprehension that would arise under the blanket rule, seeing as the blanket rule is not applied uniformly within or outside the agency. NMFS does not apply the blanket rule, so many species would not be subject to the blanket rule regardless of FWS's proposed reinstatement. Further, FWS promulgates tailored rules for roughly a quarter of the species under its jurisdiction. At best, the blanket rule is more convenient for FWS than the current regulatory scheme, but that convenience must be balanced against the needs of the species and the purposes of Section 4(d) of the ESA.

Under the 2019 Section 4(d) rule, FWS needed to consider what activities to regulate through a Section 4(d) rule if it wanted to offer any protections to a threatened species. That

²⁶ 88 Fed. Reg. at 40768.

²⁷ *Id.* at 40769 (emphasis added).

²⁸ *Id.* at 40769.

²⁹ 88 Fed. Reg. at 40744.

³⁰ *Id.* at 40744–45.

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approach created more opportunities for the public and stakeholders to collaborate with FWS in determining which specific activities FWS should exempt through a Section 4(d) rule, based on information about whether those activities were significant threats to species, which can be discerned from proposed listing rules and the Species Status Assessment that accompanies each listing decision. WUWC encourages FWS and NMFS to consider ways to involve the public and stakeholders in decisions regarding protections for threatened species. We also urge the Services to examine the benefits provided by having a uniform regulatory approach under Section 4(d) across the Services.

III. Conclusion

Based on this extensive background and our members' experience being on-the-ground partners with the Service, the WUWC is prepared to assist the Services in their efforts to both improve and encourage the goals of the ESA while continuing to support efforts of water providers in the West and across the country.

Thank you for the opportunity to provide these comments. If you have any questions, please contact me at (303) 739-7378 or mbrown@auroragov.org, or WUWC national counsel, Ted Boling, at (202) 661-5872 or TedBoling@perkinscoie.com.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'MPB', with a stylized flourish extending to the right.

Marshall P. Brown
Chairman