NWHA
NORTHWEST HYDROELECTRIC ASSOCIATION

We **unite passionate hydropower leaders** through **knowledge sharing** and **collaborative networking,** so that **together** we are the **recognized authority** on **hydropower** for our **Northwest communities**.

December 22, 2025

Via Federal eRulemaking Portal: http://www.regulations.gov

Craig Aubrey
U.S. Fish and Wildlife Service
Ecological Services
Division of Environmental Review
5275 Leesburg Pike
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Tanya Dobrzynski
National Marine Fisheries Service
Office of Protected Resources
Endangered Species Interagency Coop. Div.
1315 East-West Highway
Silver Spring, MD 20910

Re: Docket Number: FWS-HQ-ES-2025-0044, Interagency Cooperation Regulations

Dear Mr. Aubrey and Ms. Dobrzynski:

Thank you for the opportunity to provide comment on the November 21, 2025 proposal to revise the Endangered Species Act ("ESA") regulations governing the Section 7 consultation process.[1] The Northwest Hydroelectric Association ("NWHA") supports the proposal of the U.S. Fish and Wildlife Service ("FWS") and National Marine Fisheries Service ("NMFS") (collectively, the "Services") to remove the language in 50 C.F.R. § 402.02 and 50 C.F.R. § 402.14 that unlawfully expanded the Services authorities to allow them to impose offsets as Reasonable and Prudent Measures ("RPMs") in no-jeopardy biological opinions. NWHA supports the inclusion of a stand-alone definition of "environmental baseline," but requests that the Services revise the definition found at 50 C.F.R. § 402.02 because it does not adequately address existing structures. These two issues are critical to providing regulatory certainty to hydropower licensees.

NWHA agrees with and supports the comments filed by the National Hydropower Association (NHA). Additionally, NWHA reiterates the suggestions for further revisions to the ESA

[1] 92 Fed. Reg. 52,600 (Nov. 21, 2025).

regulations provided in our July 21, 2025 letter in response to the Department of the Interior Request for Information on Regulatory Reform.[2]

Background

NWHA is dedicated to the promotion of the Northwest region's waterpower as a clean, efficient energy while protecting the fisheries and environmental quality that characterize our Northwest region. NWHA's membership represents all segments of the hydropower industry: public and private utilities; independent developers and energy producers; manufacturers and distributors; local, state and regional governments including water and irrigation districts; consultants; and contractors.

The hydropower industry commits significant resources to protecting natural resources, including threatened and endangered species and their habitats, through on-site and off-site enhancement, restoration, and fish passage measures, among other things. Many NWHA members hold licenses issued by the Federal Energy Regulatory Commission ("FERC"), which are subject to the ESA Section 7 consultation requirements. Additionally, as part of the licensing process our members seek to address potential impacts to listed species through protection, mitigation and enhancement measures, participation in conservation benefit agreements, and, in some cases, by obtaining ESA section 10 take permits to implement conservation actions, including habitat enhancement.

NWHA has been actively involved in reviewing and commenting on the 2019 and 2024 revisions to the ESA regulations, and joined NHA in challenging the revisions to RPM provisions issued in 2024.[3] Our comments stem from that historic participation, and our industry's ongoing efforts to coordinate with the Department of the Interior to ensure that hydropower licensing is efficient, effective, and protective of natural resources.

NWHA also recognizes that this proposal follows on the heels of several executive orders[4] directing the Services to align regulatory provisions with the plain language or best reading of the underlying statute. As part of that effort, the Department of the Interior sought input from stakeholders on regulatory provisions that may be revised, clarified or rescinded.[5] Additionally, recent decisions of the United States Supreme Court provide guidance on the scope of agency authority and the interpretation of statutory provisions. *See, e.g., Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024) (courts should determine the "best reading" of statutory

[2] Docket No. DOI-2025-0005.

[3] *National Hydropower Ass'n. v. USFWS*, No. 1:24-cv-02285 (D.D.C). The challenge was stayed on June 6, 2025 pending completion of this interagency consultation rulemaking.

[4] Exec. Order No. 14,219, 90 Fed. Reg. 10,583 (Feb. 19, 2025) ("Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative"); Exec. Order No. 14,181, 90 Fed. Reg. 8747 (Jan. 24, 2025) ("Emergency Measures To Provide Water Resources in California and Improve Disaster Response in Certain Areas").

[5] Docket No. DOI-2025-0005.

language to effectuate the will of Congress); *Seven County Infrastructure Coalition v. Eagle County, Colorado*, 605 U.S. ____ (2025).

Thus, our comments are grounded in our members' experience with ESA implementation coupled with the legal framework provided by the statutory text of the ESA.

Support for Removal of 2024 Offset Provisions (50 C.F.R. § 402.02 and 50 C.F.R. § 402.14)

The Services' proposal to remove the provisions authorizing the Services to impose offsets as RPMs in no-jeopardy opinions aligns with the ESA's express language. The ESA provides only for RPMs that "minimize" the impact of incidental take in no-jeopardy biological opinions.[6] The terms offset and mitigate are not present in ESA Section 7. Instead, mitigation is required by Section 10, which governs the incidental take permitting process, rather than the ESA consultation process that applies to projects with a federal nexus.

This distinction is reflected in the Services' previous regulations, guidance and application of RPMs. It is reflected in the Endangered Species Act Consultation Handbook and all versions of the regulations prior to 2024. In fact, when promulgating regulations implementing the ESA shortly after it was enacted, the Services clearly recognized and distinguished between the Section 10 mitigation requirement as compared to the Section 7 RPM provisions. In 1985, in its Section 10 ITP regulations, FWS restated Section 10's requirement to "minimize and mitigate" the impact of the incidental taking.[7] Conversely, in 1986, in the Section 7 context, the Services stated that "[RPMs] were *intended to minimize the level of incidental taking*, but Congress also intended that the action go forward essentially as planned."[8] These regulatory actions, which took place shortly after Congress's enactment of the 1982 ESA amendments, clearly demonstrate that the Services recognized that Congress distinguished between "minimize" in Section 7(b)(4) and "minimize and mitigate" in Section 10(a)(2).

NWHA supports this proposed change because it returns the RPM provisions to the scope authorized by the plain language of the ESA.

Request for Additional Revision to Definition of Environmental Baseline (50 C.F.R. § 402.02)

Under ESA Section 7, the Services assess the potential impacts of a proposed project. In order to make this assessment, the Services must first establish the current baseline. Although the term

[6] 16 U.S.C. § 1536(b)(4)(C)(ii) (requiring Services to provide a written statement that specifies the impact of incidental taking and those RPMs "necessary or appropriate to minimize such impact").

[7] 50 Fed. Reg. at 39,682. NMFS promulgated its Section 10 ITP regulations in 1990. 55 Fed. Reg. 20,603 (May 18, 1990). NMFS explained that applicants "must use the best scientific and commercial data available to identify potential impacts to the endangered species and . . . *monitor, minimize and mitigate such impacts*." *Id*. at 20,605 (emphasis added).

[8] 51 Fed. Reg. at 19,937 (emphasis added).

"environmental baseline" is not used in the ESA, it is fundamental that there must be a good understanding of current conditions – the baseline – in order to assess the potential impacts of the proposed action.

The term "environmental baseline" was used in the ESA regulations from the outset, although initially the term was included in the definition of "effects of the action."[9] The 2019 ESA regulations established a stand-alone definition of "environmental baseline," and included language that intended to make clear that existing federal agency infrastructure is part of the environmental baseline.[10] The 2024 ESA regulations retained the stand-alone definition but tweaked it further, and muddied the waters by suggesting in the preamble that "an effects analysis may need to assess the future and extended life of a structure."[11] Now, in the 2025 proposal, the Services provide additional tweaks.

The problem is that all three of these definitions (2019, 2024, and proposed 2025) (1) fail to expressly recognize that past, present and ongoing effects of existing non-federal infrastructure must be part of the environmental baseline, and (2) tie the question of whether existing infrastructure is part of the baseline to the assessment of whether the action agency has the discretion to make modifications to the structure. The 2025 proposed rule language in the definition of environmental baseline provides that the baseline includes "ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify…."[12]

This language is confusing, particularly with respect to how it applies to existing structures such as non-federal dams that are subject to the FERC licensing process for hydropower generation. It also conflicts with the purpose of determining the environmental baseline, which is to understand the status of the species and habitat based on projects and approvals that exist – not to speculate about actions that may or may not happen in the future. It also has the indirect effect of converting the proposed action being assessed into the equivalent of an alternatives analysis.

The plain language of Section 7 provides that consultations assess the effects that flow from a specific *proposed action* as compared to the environmental baseline. But including language in the definition of environmental baseline excluding activities or facilities that an agency has discretion to modify opens the door to speculation about all the various actions an agency *could* take rather than the action the agency *is* taking. In the hydropower licensing context, this has resulted in NMFS taking the position that existing non-federal dams (that in most cases have been in place for many decades) are not part of the environmental baseline – but instead are part of the proposed action – because theoretically FERC could require their removal.[13]

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[9] 51 Fed. Reg. 19,957 (June 3, 1986).

[10] 84 Fed. Reg. 44,976 (Aug. 27, 2019).

[11] 89 Fed. Reg. 24,268.

[12] 90 Fed. Reg. at 52,602, 52,606 (proposing to include "ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify").

[13] *See, e.g.*, NMFS, Endangered Species Act Biological Opinion, Issuance of a New License to the Ellsworth Hydroelectric Project (P-2727-092), at 38 (Feb. 27, 2020) (GARFO-2019-02030); NMFS, Endangered Species Act

The determination of environmental baseline should not turn on the question of all of the various options available to regulatory agencies. The ESA consultation process does not include a comparison of alternative actions, or consideration of theoretical future project scenarios, such as future dam removal. Rather, as the statutory language makes clear, the purpose of the ESA is to assess whether a specific proposed agency action is likely to jeopardize the continued existing of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat.[14] As the Services explained in 2019, "a request for consultation on one aspect of a Federal agency's exercise of discretion does not de facto pull in all of the possible discretionary actions or authorities of the Federal agency."[15]

To avoid this confusion and make clear that existing structures belong in the environmental baseline, NWHA respectfully requests that the Services add the following language in the definition of "Environmental Baseline":

> *Existing structures and the past, present, and future effects of their physical existence are part of the environmental baseline.*

This additional language maintains the focus of the effects of the action analysis on the action being proposed, avoids overstating the potential impacts of a proposed action and properly considers existing federal and non-federal dams and their physical effects as part of the environmental baseline, to which the proposed action (*e.g.*, continued operation of the dam) is added.

Thank you for your consideration of these comments.
Sincerely,

Brenna Vaughn
Executive Director, NWHA

Biological Opinion, Proposed Relicensing of the Barker's Mill Project (P-2808), at 5 (Aug. 12, 2019) (GAR-2019-00002).

[14] ESA Section 7(a)(2).

[15] 84 Fed. Reg. 44976, 44978 (Aug. 27, 2019). *See also Seven County*, 605 U.S. at p. 16 (explaining that the scope of a "proposed action" to be assessed in the NEPA context that the analysis is "the project at hand—not other future or geographically separate projects that may be built (or expanded) as a result of or in the wake of the immediate project under consideration.").