December 22, 2025

U.S. Fish and Wildlife Service, Division of Conservation and Classification
U.S. Department of the Interior
5275 Leesburg Pike
Falls Church, VA

National Marine Fisheries Service, Office of Protected Resources
National Oceanic and Atmospheric Administration
U.S. Department of Commerce
1315 East-West Highway
Silver Spring, MD 20910

RE: **Endangered and Threatened Wildlife and Plants: (1) Interagency Cooperation Regulations, 90 Fed. Reg. 52,600 (Nov. 21, 2025); Docket Nos. FWS–HQ–ES–2025–0044, 251105–0167; (2) Listing Endangered and Threatened Species and Designating Critical Habitat, 90 Fed. Reg. 52,607 (Nov. 21, 2025); Docket Nos. FWS–HQ–ES–2025–0039, 251105–0168; (3) Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 90 Fed. Reg. 52,587 (Nov. 21, 2025); Docket No. FWS–HQ–ES–2025–0029; and (4) Regulations for Designating Critical Habitat, 90 Fed. Reg. 52,592 (Nov. 21, 2025); Docket No. FWS–HQ–ES–2025–0048**[1]

Dear Secretary Burgum and Secretary Lutnick:

The U.S. Chamber of Commerce, American Gas Association, American Road and Transportation Builders Association, Associated General Contractors of America, Energy and Wildlife Action Coalition, GPA Midstream Association, Interstate Natural Gas Association of America, National Mining Association, National Rural Electric Cooperative Association, and National Stone, Sand & Gravel Association (collectively "the Associations") appreciate the opportunity to submit these comments in support of the U.S. Fish and Wildlife Service's (FWS) and National Marine Fisheries Service's (NMFS) (collectively, "the Services") proposed revisions to regulations that implement Sections 4, 4(b)(2), 4(d), and 7 of the Endangered Species Act (ESA).[2] These proposed

[1] The Associations are submitting comments on all four proposed rules in a single, consolidated document. These combined comments will be filed in each respective docket. We direct you to the relevant sections within this document that correspond to each proposal.

[2] Endangered and Threatened Wildlife and Plants; Interagency Cooperation Regulations, 90 Fed. Reg. 52,600 (Nov. 21, 2025) [hereinafter Section 7 Proposed Regulations]; Endangered and Threatened Wildlife and Plants; Listing

revisions largely would revert back to prior versions of the regulations with some modest changes. In so doing, the proposed changes largely continue the Services' longstanding practices and approaches while providing needed clarifications to improve ESA implementation consistent with the Act.

The Associations and their members represent a diverse group of industries that are critical to the American economy and support communities. This includes leading companies both large and small involved in, among other industries, critical infrastructure and transportation development, homebuilders, manufacturers, energy producers and suppliers, and agriculture and food producers. Projects and other activities carried out by the Associations' members are often directly subject to the requirements of the ESA, especially in the context of Section 7 interagency consultation process. Thus, ESA listings, critical habitat designations and consultations under the ESA can have substantial implications for various projects and activities of the Associations' members. The Associations and their members are dedicated to environmental stewardship and support the ESA's objectives to protect and recover imperiled species and the ecosystems they depend on. At the same time, too often delays and associated costs arising from regulatory uncertainty, or unnecessary or overly broad environmental reviews can result in higher costs for consumers, the cancellation of critical projects, or long delays in their implementation. The Associations believe that the Proposed Regulations will assist in diminishing these pitfalls by providing greater regulatory certainty and limiting unnecessary, overly broad, or costly requirements that do not further the conservation needs of species or are otherwise not required by the ESA.

The Associations support the Services' proposals and offer the following comments to further improve the proposals. The Associations believe that these revisions, if finalized, would make the implementation of the ESA more transparent and efficient, reduce costs, and provide the regulated community with increased certainty in a manner that is fully consistent with the letter and intent of the ESA.

I. ESA Regulatory History Leading Up to the 2025 Proposals

The Services first issued implementing regulations under the ESA in the mid-1970s, updating them in the 1980s. These rules remained largely unchanged for the next several decades. Only recently have the Services undertaken a series of significant revisions to the ESA regulations governing the procedures and standards for implementing Sections 4, 4(b)(2), 4(d), and 7. In 2019, the Services issued

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Endangered and Threatened Species and Designating Critical Habitat, 90 Fed. Reg. 52,607 (Nov. 21, 2025) [hereinafter Section 4 Proposed Regulations]; Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 90 Fed. Reg. 52,587 (Nov. 21, 2025) [hereinafter Section 4(d) Proposed Regulations]; Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 90 Fed. Reg. 52,592 (Nov. 21, 2025) [hereinafter Section 4(b)(2) Proposed Regulations].

comprehensive revisions to these regulations governing implementation of ESA Sections 4, 4(d), and 7 ("2019 Regulations").[3] In 2020, FWS issued a Final Rule amending the regulations governing its approach to the ESA Section 4(b)(2) exclusion analysis.[4] In 2022, the Services rescinded the ESA Section 4(b)(2) 2020 Rule (2022 Regulations).[5] The Services again issued new regulations in 2024 revising Sections 4, 4(d), and 7 (2024 Regulations).[6] The 2024 Regulations altered some, but not all, of the changes adopted in the 2019 Regulations.

In the 2025 proposed rules, the Services, either jointly or individually, are proposing once again to revise the ESA's implementing regulations governing: (1) Section 4 listing of species as endangered or threatened and critical habitat designation; (2) Section 4(b)(2) exclusions from critical habitat designations; (3) Section 4(d) rules applicable to the take of threatened species; and (4) Section 7 interagency consultation.[7] The Associations offer the following comments on each proposed rule, respectively.

II. Comments on the Proposals

The Services propose revisions to the procedures and standards for implementing ESA Sections 4, 4(b)(2), 4(d), and 7. These proposed revisions largely restore the regulatory frameworks that governed ESA Sections 4, 4(d), and 7 from the 2019 implementation to 2024 revision, and ESA Section 4(b)(2) from its 2020 implementation to 2022 rescission. During that period, FWS and NMFS listed approximately 55 species, undertook 76 critical habitat designations, and issued more than 2,000 biological opinions under ESA Section 7.[8] The Services gave no indication

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[3] Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44753, 44760 (Aug. 27, 2019); Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, 84 Fed. Reg. 45020, 45053 (Aug. 27, 2019); Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 84 Fed. Reg. 44976, 45018 (Aug. 27, 2019).

[4] Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 85 Fed. Reg. 82,376 (Dec. 18, 2020). The 2020 Rule largely codified a nonbinding Policy document issued jointly by FWS and NMFS in 2016 that provided guidance on how the Services exercise discretion under ESA section 4(b)(2) to exclude areas from critical habitat designations. *See* Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act, 81 Fed. Reg. 7,226 (Feb. 11, 2016).

[5] Endangered and Threatened Wildlife and Plants; Regulations for Designating Critical Habitat, 87 Fed. Reg. 43433, 43447 (July 21, 2022).

[6] Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 89 Fed. Reg. 23919, 23941 (Apr. 5, 2024); Endangered and Threatened Wildlife and Plants; Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 89 Fed. Reg. 23919, 44760 (Apr. 5, 2024); Endangered and Threatened Wildlife and Plants; Regulations for Interagency Cooperation, 89 Fed. Reg. 24268, 24298 (Apr. 5, 2024).

[7] The ESA Section 4 and 7 proposed rules are joint between the Services, while ESA Section 4(b)(2) and 4(d) proposed rules are specific to the U.S. Fish and Wildlife Service.

[8] U.S. Federal Endangered and Threatened Species by Calendar Year, USFWS, https://ecos.fws.gov/ecp/report/species-listings-by-year-totals (last visited Dec. 5, 2025); USFWS Threatened & Endangered Species Active Critical Habitat Report, USFWS, https://ecos.fws.gov/ecp/report/critical- habitat (lst visited Dec. 5, 2025); ESA Threatened & Endangered, NOAA, https://www.fisheries.noaa.gov/species- directory/threat

in either the 2022 Regulations or the 2024 Regulations that the prior regimes were undermining the ESA's implementation or purposes. This track record demonstrates that these regulatory provisions can be implemented consistent with the ESA while at the same time providing for effective administration of the Act.

A. ESA Section 4- Endangered and Threatened Wildlife and Plants; Listing Endangered and Threatened Species and Designating Critical Habitat [Docket Nos. FWS–HQ–ES–2025–0044, 251105–0168]

Section 4 directs the Services to determine whether to list any species as "endangered" or "threatened" based on five statutorily enumerated factors.[9] An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range" and a "threatened species" is one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[10] The Services must make these determinations "solely on the basis of the best scientific and commercial data available . . . after conducting a review of the status of the species."[11] If a listed species no longer meets the definition of an endangered or threatened species, the Services shall remove the species from the ESA list (delisting) and monitor that species for at least five years.[12]

Section 4 also directs the Services to designate critical habitat for any species listed as endangered or threatened, "to the maximum extent prudent and determinable."[13] "Critical habitat" is defined in relevant part as:

> (i) 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 management considerations or protections . . . (ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species.[14]

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ened- endangered?oq=&field_species_categories_v ocab=All&field_species_details_status=All&field_region_vocab=All&items_per_page=100&page=1 (last visited Dec. 5, 2025); Critical Habitat, NOAA, https://www.fisheries.noaa.gov/national/endangered-species-conservation/critical-habitat#critical-habitat-designations-maps-and-gis- data; ECOSPHERE – SECTION 7 CONSULTATION ISSUED BIOLOGICAL OPINIONS, 50 C.F.R. 402.14(c), https://reports.ecosphere.fws.gov/FWSPublicReports/Reports/Index?reportname=BiologicalOpinionReport ; NOAA Institutional Repository, NOAA, https://repository.library.noaa.gov/ (last visited Dec. 5. 2025).

[9] 16 U.S.C. § 1533(a)(1).

[10] *Id.* § § 1532(6), (20).

[11] *Id.*§ 1533(b)(1)(A).

[12] *Id.*§ 1533(g).

[13] *Id.*§1533(a)(3)(A).

[14] *Id.*. § 1532(5)(A).

The Services must designate critical habitat on the basis of the "best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat."[15] However, except in circumstances determined by the Services, "critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species."[16]

i. Factors for Listing, Delisting, or Reclassifying Species

The Services propose three principal changes to 50 C.F.R. § 424.11 governing the listing, delisting, or reclassifying of species under the Act:

1. Remove the phrase, "without reference to possible economic or other impacts of such determination," from the regulatory language;[17]

2. Clarifies the Service's interpretation of the term "foreseeable future" when assessing whether a species is threatened;[18] and

3. Clarifies that the standard for the listing and delisting of a species is the same and the situations when it is appropriate to delist a species.[19]

The Associations believe each of these proposed changes fully align with the ESA and generally support the measures.

a. Economic Impacts

The Associations support the Services' proposal to remove the phrase, "without reference to possible economic or other impacts of such determination," from 50 C.F.R. 424.11(b) and return the language of the regulation to "[t]he Secretary shall make any determination required by paragraphs (c), (d), and (e) of this section solely on the basis of the best available scientific and commercial information regarding a species' status."[20] This change more closely aligns the regulation with the ESA's statutory text, which provides that listing determinations must be made "solely on the basis of the best scientific and commercial data available . . . after conducting a review of the status of the species" and makes no reference to economic or impacts in making the determination.[21] Because the Services' revised regulatory language effectively tracks

[15] *Id.*§ 1533(b)(2).
[16] *Id.*§ 1532(5)(C).
[17] Section 4 Proposed Regulations at 52,609
[18] *Id.* at 52,609-10.
[19] *Id.* at 52,610.
[20] *Id.* at 52,614.
[21] 16 U.S.C. § 1533(b)(1)(A).

the statutory language, the removal of this language does not change the Services' obligation to make listing determinations solely on the basis of the five enumerated statutory factors.

The preambles to the proposed and final 2019 Regulations set forth the Services' view that the ESA makes clear that listing determinations must be based on the five statutory factors on the basis of the best scientific and commercial data available without consideration of economic impacts.[22] However, the Services also acknowledged that the ESA does not preclude the Services from compiling information regarding economic costs or other impacts associated with listing determinations, and presenting that information to the public, provided that such information does not influence or factor into the listing determination.[23] As the Services noted then, in certain circumstances providing such information could be informative to the public and stakeholders and enhance transparency.[24] An understanding of the economic and other impacts would better inform stakeholders as they work to comply with regulatory requirements. Compiling and making public such information solely to better inform the public does not change the requirement that the five statutory factors remain the sole basis for listing determinations. It does, however, provide a public benefit by enhancing transparency and informing the public and stakeholders of the implications of the Services' regulatory actions.

b. Foreseeable Future

The Associations agree with the Services' addition in 2019 of a provision in the regulations to provide further granularity regarding the statutory term "foreseeable future" in the definition of threatened species. That provision built on a widely applied 2009 guidance and codified the Services' then current case-by-case practice regarding "foreseeable future".[25] The 2024 Regulations largely retained the 2019 provision except that it revised the second sentence of the regulation from "[t]he term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely" to "[t]he foreseeable future extends as far into the future as the Services can make reasonably reliable predictions about the threats to the species and the species' responses to those threats."[26] While this revision was modest, the language as changed in 2024 is more vague and provides more opportunity to rely on speculative information and unbounded foreseeable future.

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[22] Endangered and Threatened Wildlife and Plants; Regulations for Listing Species and Designating Critical Habitat, Proposed Rule, 83 Fed. Reg. 35,193, 35,194-95 (July 25, 2018); 84 Fed. Reg. at 45,024.
[23] *Id.* at 45,025.
[24] *Id.* at 45,034.
[25] The Meaning of "Foreseeable Future" in Section 3(20) of the Endangered Species Act, United States Department of the Interior Office of the Solicitor Memorandum (Jan. 16, 2009).
[26] *Compare* 2019 Regulations, , 89 Fed. Reg. at 24,335 2019 Regulations, 84 Fed. Reg. at 45052.

The Associations support the Services' proposal to revert the language to the 2019 "foreseeable future" regulation. The proposed regulation tightens the language to avoid some of the vagueness created by the 2024 regulation, thereby providing the public and regulated community with more predictability. Tightening the "foreseeable future" language to extend "only so far into the future" as the Services can "reasonably determine" ensures such judgments are not based on speculation, and is consistent with the ESA's requirement that listing determinations must be based on the "best available scientific and commercial data."[27]

c. Factors Considered in Delisting Species

The Associations support the Services' proposal to revert the 2024 Regulation addressing the factors the Services consider when delisting a species back to the 2019 formulation. The 2019 Regulation constituted a long overdue update and revision to better clarify the procedure and standards that the Services apply when making delisting decisions. The 2019 Regulations identified that delisting is appropriate when a determination is made that: (1) the species is extinct, (2) the species does not meet the definition of an endangered species or a threatened species, and (3) the listed entity does not meet the definition of a species.[28] The 2019 Regulations also included a provision making clear, consistent with the statute and judicial precedent,[29] that the criteria for the listing and delisting of species are the same.[30]

The Associations agree that, as with the 2019 Regulations, the 2025 proposal provides increased certainty and clarity to the public on the standards applicable to delisting and that the proposal is fully consistent with the ESA. The Associations also agree that, as addressed in the preamble, that specific inclusion of "recovery" as an enumerated factor is not required by the ESA and would likely create confusion if added.[31]

ii. Criteria for Designating Critical Habitat

The Associations support the Services' proposed changes to the regulatory criteria for designating critical habitat. The Services propose to restore one of the circumstances, originally identified in 2019 and removed in 2024, under which it may be appropriately determined that designating critical habitat is not prudent.[32] The

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[27] *Bennett v. Spear*, 520 U.S. 154, 176 (1997) (the "obvious purpose of the [ESA's] requirement to use 'the best scientific and commercial data available' is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise.").
[28] 84 Fed. Reg. at 45,052.
[29] *Friends of Blackwater v. Salazar*, 691 F.3d 428, 432 (D.C. Cir. 2012).
[30] 84 Fed. Reg. at 45,053.
[31] Section 4 Proposed Regulations at 52,610.
[32] *Id.*

Services also propose to revise the regulations to restore language from the 2019 Regulations that would require the Services to follow a two-step process that prioritizes the designation of occupied areas over unoccupied areas (i.e., the Services would consider designating unoccupied areas as critical habitat only if designating just the occupied habitat would be inadequate for conservation of the species).[33] Lastly, the proposal would restore the language from 2019 clarifying when the Services may determine that unoccupied areas are essential for the conservation of a species.[34] Critical habitat designations can restrict or even prohibit the provision of critical services, including electricity, to areas in and around the designated areas, thereby jeopardizing lives, livelihoods, and national security for entire regions. Ensuring that critical habitat designations are limited only to those areas and environmental characteristics critical for species survival helps ensure that the Associations members can continue to provide foundational services across the nation while balancing species interests. The Associations agree with these actions.

d. Not Prudent Determinations

The Associations support the Services' proposal to revise the regulation addressing the circumstances under which a designation of critical habitat would be "not prudent" by reverting the regulation back to the 2019 formulation. The principal proposed change is to reinsert "threats to a species' habitat that lead to endangered-species or threatened-species status stem solely from causes that cannot be addressed by management actions identified in a section 7(a)(2) consultation" as a specific circumstance that could give rise to a not-prudent determination.[35]

Critical habitat is defined as those geographical areas that, among other things, are "essential to the conservation" of the species.[36] Under the Act, critical habitat is only relevant in the context of consultation under ESA Section 7(a)(2).[37] If the threats to a species' habitat that led to its listing stem solely from causes that cannot be addressed by a Section 7(a)(2) consultation, the designation by definition does not provide conservation benefits to the species.

e. Designating Unoccupied Areas

The ESA defines critical habitat to include both areas currently occupied by the species and areas not currently occupied by the species but that are essential for the species conservation ("unoccupied habitat"). The 2019 Regulations set forth a stepwise approach to designating critical habitat under which the designation of occupied areas

[33] *Id.* at 52,610-12.
[34] *Id.*
[35] *Id.* at 52,611.
[36] 16 U.S.C. 1532(5)(A).
[37] *Id.* § 1536(a)(2); *See Weyerhaeuser Co. v. United States Fish & Wildlife Serv.,* 586 U.S. 9, 15 (2018).

is prioritized over unoccupied areas.[38] Under this approach, the Services first evaluate occupied habitat for designation and then consider designating unoccupied areas as critical habitat only if designating just the occupied habitat would be inadequate for conservation of the species.[39] This 2019 Regulations returned the Services to the same regulatory approach that had been the governing standard for more than 30-years from 1984 to 2016.[40] The 2024 Regulations changed this process to allow simultaneous consideration of occupied and unoccupied habitat, rather than first considering if designation of occupied areas was sufficient for conservation of the species.

The Associations support the proposal's return to the 2019 Regulations and the approach that had been in effect for more than 30-years. As the preamble notes, determining whether unoccupied habitat will be essential for the conservation of the species is necessarily informed by first determining whether a critical habitat designation limited to occupied areas would be inadequate to conserve the species.[41] The priority on occupied habitat also is consistent with the ESA's statutory definition, which sets a more demanding standard for designation of unoccupied habitat than occupied habitat[42] and provides that except in circumstances determined by the Services, critical habitat shall not include the entire geographical area "which can be occupied" by the species.[43] This approach also helps ensure that the Services do not inappropriately designate overly expansive areas of unoccupied critical habitat and thereby impose unnecessary regulatory burdens.

The Associations also support the Services' proposal to reinstate the requirement that to designate unoccupied areas as critical habitat, the Services must determine that there is reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species. As noted in the preamble, an area cannot be deemed "essential for conservation" if there is not a reasonable certainty that the area is suitable habitat and will contribute to conservation of the species.[44] Consistent with the Act, this avoids designations of unoccupied land and the attendant costs associated with such designations premised on the potential or speculation that the area could aid in conservation.

2. Additional Proposals

[38] 2019 Regulations , 84 Fed. Reg. at 45,043-45,45,053..
[39] 2019 Regulations, 84 Fed. Reg. at 45,053 .
[40] *Id.* at 45,023.
[41] Section 4 Proposed Regulations, 90 Fed. Reg. at 52,612.
[42] See *Home Builders Ass'n v. U.S. Fish & Wildlife Serv.*, 616 F.3d 98, 990 (9th Cir. 2010) (stating that, "essential for conservation" standard for unoccupied habitat is more demanding than standard for occupied critical habitat).
[43] 16 U.S.C. § 1532(5)(C).
[44] Section 4 Proposed Regulations, 90 Fed. Reg. at 52,612.

i. Consistency Between FWS and NMFS 4(b) Rules [45]

The Associations recommend that NMFS adopt the same regulations and language addressing implementation of ESA Section 4(b)(2) that FWS has proposed in its November 21, 2025 4(b)(2) proposal. For the reasons detailed below in Section II.B, the Associations support FWS' 2025 4(b)(2) proposal because it is consistent with Congress' intent under the ESA, provides greater predictability and certainty to the public and stakeholders, and will assist with avoiding the imposition of unnecessary regulatory burdens and costs. As FWS noted in its 2022 Regulations, having different 4(b)(2) regulations between the two Services could result in different outcomes in analogous circumstances between the two agencies or multiple possible analyses for species over which the Services share jurisdiction (e.g., sea turtle species, Atlantic salmon).[46] This difference poses a significant risk of confusing other Federal agencies, Tribes, States, other potentially affected stakeholders and members of the public, and agency staff responsible for drafting critical habitat designations. At the time of the 2022 Regulations, FWS stated that it had not identified a science- or mission-based reason for separate regulations between the Services for exclusions from critical habitat that would outweigh that risk.[47] The Associations agree and urge NMFS to move forward with adopting 4(b)(2) regulations that are consistent with FWS' 2025 proposed 4(b)(2) regulation.

ii. Other Considerations

The Services should modify the definitions of "geographical area occupied by the species" and "physical or biological features" to align them with the text of the ESA. The implementing regulations define "geographical area occupied by the species" as "an area that may generally be delineated around species' occurrences, as determined by the Secretary (i.e., range)," which may include those areas used throughout all or part of the species' life cycle, even if not on a regular basis.[48]

The implementing regulations also define "physical or biological features" as "the features that support the life-history needs of the species, including but not limited to, water characteristics, soil type, geological features, sites, prey, vegetation, symbiotic species, or other features."[49] These may be a single habitat characteristic, or a more complex combination of characteristics.[50] These features may also include

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[45] The Services seek comment here on the specific proposed revisions to 50 CFR part 424 and the regulatory revisions made in the 2019 and 2024 Rules. All three sets of revisions address implementation of the ESA provisions critical habitat requirements and procedures under ESA Section 4(b) and therefore the Associations submit this comment here.

[46] 2022 Regulations, 87 Fed. Reg. at 43,435.

[47] *Id.*

[48] 50 C.F.R. § 424.02.

[49] *Id.*

[50] *Id.*

characteristics that support ephemeral or dynamic habitat conditions, and may be expressed in terms relating to principles of conservation biology, such as patch size, distribution distances, and connectivity.[51]

The Act constrains critical habitat designations to "specific areas within the geographical area occupied by the species…on which are found those physical and biological features…essential to the conservation of the species."[52] Given those constraints, the implementing regulations should not go beyond what the statute requires.]

As such, the Associations support revisions to the regulatory definitions of "geographical area occupied by the species" and "physical or biological features." In regard to "geographical area occupied by the species," the regulatory definition should only account for an area that a species regularly or consistently inhabits to the maximum extent prudent and determinable by the Secretary, including such portions of the range used throughout all or part of the species' life cycle. As for "physical or biological features," the Services should consider removing reference to habitat characteristics that support ephemeral or dynamic habitat conditions, or, in the alternative, return to the pre-2016 definition that relies on "principal biological or physical constituent elements within the defined area that are essential to the conservation of the species."

B. Section 4(b)(2) - Regulations for Designating Critical Habitat, 90 Fed. Reg. 52,592 (Nov. 21, 2025); Docket No. FWS–HQ–ES–2025–0048

ESA Section 4 directs the Services to designate critical habitat for any species listed as endangered or threatened, "to the maximum extent prudent and determinable."[53] As directed by ESA Section 4(b)(2), the Services' designation shall be "based on the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact of specifying any particular area as critical habitat."[54] Section 4(b)(2) then authorizes the Services to "exclude any area from critical habitat if the [Service] determines that the benefits of such exclusion outweigh the benefits of designating such area as part of the critical habitat, unless the Services' determine that such exclusion will result in the extinction of the species concerned.[55] This is one of the few places in the ESA where Congress expressly mandated the consideration of nonbiological factors such as economic and other impacts to be considered and allowed for determinations to be based on a weighing of economic and other impacts with the conservation needs of a

[51] *Id.*
[52] 16 U.S.C. § 1532(5)(a)(i).
[53] *Id.* § 1533(b)(3)(A)(i).
[54] *Id.* § 1533(b)(2).
[55] *Id.*

species. The provision clearly evinces Congress' intent to ensure that critical habitat designations are undertaken in manner that does not cause needless economic dislocation or imposed at the unquestioned expense of other important societal impacts.[56]

Once an area is designated as critical habitat, ESA Section 7(a)(2)'s requirement that each Federal agency must consult with the Service to ensure that its actions do not adversely modify designated critical habitat can be triggered. Thus, the designation of critical habitat often can have significant consequences for the Association members. Association members often require Federal authorizations or approvals to conduct their activities and participant including but not limited, to permits from the U.S. Army Corps of Engineers under CWA 404, easements or special use permits for activities on Federal lands and national forests, and FERC licenses. Such consultations can be resource intensive, lengthen review times, and impose costly delays and requirements for development and other essential projects undertaken by Association members. This often results ultimately in higher costs for the American public. Utility companies, for example, must often consult even to replace a power pole in an existing right-of-way or to trim a hazardous tree. It can take months or even years and ultimately increases electricity rates and decreases electric reliability. It is thus important for FWS to exercise its authority under 4(b)(2) to balance the conservation goals against the economic and other impacts of critical habitat designation with the negative consequences those designations can have in a careful, consistent and predictable manner.

In 2013, the Services issued joint regulations governing the process and standards for implementing Section 4(b)(2).[57] Thereafter, in 2016, the Services issued a joint policy that provided further guidance on implementing their exclusion authority under Section 4(b)(2) (2016 Policy").[58] In 2020, FWS alone issued a regulation setting forth its process for approaching 4(b)(2) exclusions that largely codified the 2016 Policy with some modest revisions (2020 Rule).[59] Then in 2022, FWS rescinded those

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[56] *Bennett* at 176-77 (noting that the one objective of certain provisions of the ESA is to ensure that the Act is implemented in manner that avoids needless economic dislocation). *Bennett* made this statement in the context of ESA §7(a)(2)'s requirement that agencies use "the best scientific and commercial data available" in ESA consultations. *Id.* The principle is equally, if not more, applicable here. ESA 4(b)(2) also requires FWS to use the "best scientific data available" in critical habitat designations. *Vanda Pharms., Inc. v. United States Food & Drug Admin.*, 150 F.4th 563, 571 (D.C. Cir. 2025) stating that the court "generally 'give[s] ... consistent meaning' to the same or similar terms when they are used 'throughout [an] Act.'" (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995)). Indeed, in contrast to ESA §7(a)(2), ESA § 4(b)(2) expressly directs the FWS to consider economic impacts and authorizes exclusions of areas if benefits of exclusion outweigh the benefits of inclusion except in the limited circumstance where exclusion "*will* result" in extinction. 16 U.S.C. § 1533(b)(2) (emphasis added).

[57] Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Impact Analyses of Critical Habitats, 78 Fed. Reg. 53,058 (Aug. 28, 2013).

[58] Policy Regarding Implementation of Section 4(b)(2), 81 Fed. Reg. 7226 (Feb. 11, 2016).

[59] 85 Fed. Reg. 82,376 (Dec. 18, 2020).

regulations and instead indicated that both FWS and NMFS would revert to following the 2013 Regulation as complemented by the 2016 Policy (2022 Regulations).[60]

In the 2025 proposal, FWS proposes to reinstate elements of the 2016 Policy/2020 Rule back into the regulations and to add some additional provisions to improve upon the earlier Policy.[61] The Associations support the 2025 proposal because it is consistent with Congress' intent under the ESA, provides greater predictability and certainty to the public and stakeholders, and helps avoid the imposition of unnecessary regulatory burdens and costs. The proposed rule clarifies the circumstances under which FWS will undertake an exclusion analysis, the type of information it will evaluate in an exclusion analysis, and the weight the Service will give to the relevant factors. Providing regulatory guideposts like these ensures disciplined application of the agency's authority, prevents conflict between agencies, gives certainty to stakeholders, improves efficiency, and reduces litigation risk. We address some of the specific proposals further below.

The proposed rule would require FWS to identify known national security and other relevant impacts of the proposed designation and identify any areas that the Secretary has reason to consider for exclusion and explain why, and to include a non-exhaustive list of categories of potential impacts that FWS has identified, when known, at the proposed rule stage.[62] The proposed rule also identifies with greater granularity a non-exhaustive list of what economic and other relevant impacts may encompass.[63] Providing such information serves to enhance transparency and allows the public and stakeholders to more constructively participate in public comment thereby improving agency decision making. This also will enhance the Service's administrative record for judicial review for any specific exclusions if needed.[64]

The proposal provides the two circumstances when FWS will conduct an exclusion analysis for a particular area: (1) when a proponent of excluding the area has presented credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for that particular area; or (2) when the FWS otherwise exercises its discretion to evaluate any particular area for potential exclusion.[65] This proposal appropriately allows the public and stakeholders to present relevant information that could give rise to an exclusion analysis including in circumstances where FWS itself might not be aware of the existence or the extent of an impact. This provision serves to enhance meaningful public participation and ensure

[60] 87 Fed. Reg. 43,433 (July 21, 2022).
[61] *See generally* Section 4(b)(2) Proposed Regulations.
[62] *Id.* 90 Fed. Reg. at 52,598-99.
[63] *Id.* at 52,594.
[64] In *Weyerhaueser v. FWS*, 568 U.S. 9 (2018), the Supreme Court held that FWS' 4(b)(2) exclusion determinations are subject to arbitrary and capricious review. Accordingly, it is important for FWS to ensure that its decisions are supported by the administrative record and well-reasoned and explained.
[65] 90 Fed. Reg. at 52,595.

that FWS has not overlooked an important factor that might militate in favor of exclusion.[66]

The proposed rule also would reinstate factors guiding how FWS would consider benefits of including or excluding any particular area that may be outside the scope of FWS's expertise.[67]The proposal identifies a non-exhaustive list of categories of impacts that may be outside the scope of FWS's expertise and provides that the Service would give weight to benefits consistent with expert or firsthand information, unless the Secretary has knowledge or material evidence that rebuts that information.[68] Examples of the type of non-biological information for which the rule favors others' expertise include non-biological impacts to Tribal resources; nonbiological impacts identified by state or local governments, national security concerns, impacts to permittees, and economic impacts.[69] The Associations support this commonsense approach, which simply recognizes that in appropriate circumstances other sources of information may be better positioned to provide the best information available regarding impacts outside of FWS' expertise. This also accords with the ESA's directive that FWS use the best information available in making its determinations.

In rescinding the 2022 Regulation, FWS suggested these provisions somehow unduly constrained its ability to use its expert judgment and its mandate to base designations on the best scientific data available.[70] To the contrary, applying proper weight to economic and other non-scientific analyses from those with more expertise than the Service ensures reliance on the best available science, fully accords with reasoned decision making under the Administrative Procedure Act, and has no impact on the Service's evaluation of the biological/scientific data.

The proposal also would remove the presumption that Federal lands will not be excluded from critical habitat designation and instead treats such lands as equally eligible for exclusion as private or other lands.[71] The Associations support this change because it is more consistent with ESA and FWS should have the unencumbered flexibility to exclude Federal lands from a designation where the benefits of excluding the Federal lands outweigh the benefits of including them. Neither Section 4(b)(2) nor

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[66] In the preamble to the 2002 Regulations, FWS suggested that allowing outside parties to submit information that might trigger an exclusion analysis might improperly encroach on the FWS' discretion in conducting an exclusion analysis. However, while FWS has discretion under 4(b)(2), that discretion is not boundless. See *Weyerhaueser,* 568 U.S. at 24-25.. FWS must still exercise is discretion in a reasoned manner. If FWS is presented with credible information regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion of an area, it has an obligation to address that information. It also would be counter to the intent of ESA section 4(b)(2) to suggest that FWS could decide not to undertake such an analysis it has been presented with credible information that an exclusion may be warranted.

[67] 90 Fed. Reg.at 52,594.

[68] *Id.*

[69] *Id.* at 52,599.

[70] *Id.* at 52,593.

[71] *Id.* at 52,595.

the definition of critical habitat, mentions or identifies federal lands as subject to disparate treatment for purposes of either designating critical habitat or evaluation whether such lands should be excluded from a designation. Given that critical habitat only has relevance where there is a federal nexus in the context of ESA Section 7 consultation, such designations have their highest degree of impact on federal, not private, state or tribal lands.[72] Congress therefore must have anticipated that federal lands would be subject to potential exclusion with some regularity. Thus, consideration of federal lands for exclusions is necessarily consistent with the Act's design.

The Associations also support proposed 50 C.F.R § 17.90(d)(3) and (d)(4) revisions, which address how conservation plans, agreements, or partnerships, are addressed in the exclusion analysis. These proposed regulations generally follow the Services' practices from the 2016 Policy. Association members often participate in such programs for the conservation of species. Exclusion of areas from critical habitat designations can incentivize private entities to promote and enter into such agreements, plans or partnerships. Such tools contain actions designed to provide for the conservation needs of a species and its habitat and may include actions to minimize or mitigate negative effects on the species caused by activities on or adjacent to the area covered by the plan. Conservation plans or agreements can be developed by private entities with no involvement of the FWS, or in partnership with the FWS, State or Tribes, and often provide a cost-effective way to maximize conservation benefits to species on the ground.

As noted in the preamble, the benefits of excluding lands with conservation plans or agreements include relieving landowners, communities, and counties of any additional regulatory burdens that might be imposed as a result of the critical habitat designation.[73] A related benefit of exclusion is the unhindered, continued ability to maintain existing partnerships, as well as the opportunity to seek new partnerships with potential plan participants, including States, counties, local jurisdictions, conservation organizations, and private landowners. Together, these entities can implement conservation actions that the FWS would be unable to accomplish without their participation. These partnerships can lead to additional conservation efforts for listed species. This is particularly important because conservation plans or agreements often cover a wide range of species, including listed plant species and species that are not federally listed.

The inclusion of these provisions also provides greater transparency and predictability for the public and stakeholders as to what elements might be needed for a conservation plan or agreement to serve as a basis for an exclusion. This roadmap further allows stakeholders to develop successful conservation agreements that further

[72] 16 U.S.C. §1536(a)(2)
[73] *Id.* at 52,596.

the purposes of the ESA without the attendant costs and regulatory burden that might come if the same areas were to be designated as critical habitat.

C. Section 4(d) - Regulations Pertaining to Endangered and Threatened Wildlife and Plants, 90 Fed. Reg. 52,587 (Nov. 21, 2025); Docket No. FWS–HQ–ES–2025–0029

ESA section 9 prohibits the unauthorized "take" of species listed as *endangered* under the ESA.[74] On its face, the Section 9 prohibition on unauthorized "take" does not extend to species listed as *threatened*. ESA section 4(d), however, provides that whenever a species is listed as threatened, the Services shall issue protective regulations as they deem "necessary and advisable" to provide for the conservation of threatened species and may issue regulations prohibiting the "take" of threatened species.[75] If FWS issues a "4(d) Rule" extending take protection to a threatened species, the prohibition is enforceable to the same extent and on the same terms applicable to species listed as endangered.[76]

Historically, FWS, but not NMFS, relied on a "blanket" 4(d) regulation ("Blanket 4(d) Rule") that automatically extended ESA section 9's take prohibition to every species listed as threatened unless otherwise specified.[77] In so doing, species listed as threatened by FWS were treated for purposes of the ESA take prohibition in the same manner as if the species had been listed as endangered. Conversely, NMFS did not rely on a "blanket" 4(d) regulation, meaning that instead it issued tailored species-specific 4(d) rules for each species listed as threatened.[78] NMFS often has exercised this authority to tailor any take prohibitions to the needs of the threatened species.

The 2019 Regulations rescinded the FWS' "Blanket" 4(d) Rule" and instead, consistent with NMFS' practice, provided that FWS would issue species-specific take rules for threatened species upon listing consistent with NMFS' practice.[79] For the five years that the 2019 Regulations were in place, FWS listed or reclassified 44 threatened species and issued species-specific 4(d) Rules in each case.[80] The 2024 Regulations re-imposed the FWS' "Blanket 4(d) Rule" for threatened species. The 2025 Proposal

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[74] 16 U.S.C. § 1538(a)(1)(B). The term "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* at § 1532(19). In addition to "take," Section 9 also prohibits other forms of conduct including the unauthorized import, possession, sale, and transport of endangered species. 16 U.S.C. § 1538(a)(1)(A)-(G).

[75] Section 4(d) Regulations at 52,588.

[76] 16 U.S.C. § 1538(a)(1)(G). Violations of the prohibitions can subject entities to both civil and criminal enforcement and penalties, or citizen suit enforcement. *Id.* at §§ 1540(a), (b), (g).

[77] 89 Fed. Reg. 23919.

[78] Section 4(d) Proposed Regulations at 52,588.

[79] Endangered and Threatened Wildlife and Plants; Regulations for Prohibitions to Threatened Wildlife and Plants, 84 Fed. Reg. 44753, 44,757 (Aug. 27, 2019).

[80] U.S. Federal Endangered and Threatened Species by Calendar Year, USFWS, https://ecos.fws.gov/ecp/report/species-listings-by-year-totals.

would rescind the 2024 revision and again require FWS to issue species-specific take rules for threatened species upon listing consistent with NMFS' practice. The 2025 proposal also proposes to amend the regulations to require FWS to include a necessary and advisable determination (including consideration of conservation and economic impacts) to accompany each species-specific 4(d) Rule it issues.[81] Finally, the proposal requests comment on whether the rules should include regulatory text requiring FWS to finalize species-specific rules concurrently with the issuance of final rule or reclassification determination listing a species as threatened.

The Associations support FWS' proposed rescission of the "Blanket 4(d) Rule" and a return to a species-specific 4(d) Rule regime because it represents the best reading of the ESA and is a better approach from a policy and conservation perspective. NMFS has utilized a species-specific approach for decades and has a proven track record of successful implementation of section 4(d). For its part, even when the Blanket 4(d) Rule was in place, FWS itself on occasion utilized species-specific 4(d) Rules to tailor protections to the needs of the species without imposing unnecessary regulatory burdens.[82] Similarly, in the five years that the 2019 FWS 4(d) Rule was in place, FWS either listed or reclassified 44 species as threatened and issued effective species-specific 4(d) rules for each of those species.[83] There is no reason that the two agencies charged with administering the same statutory provision should have different regulatory approaches. For the reasons detailed below, NMFS' framework is the more legally defensible and better approach.[84] Realigning FWS's 4(d) regulation with NMFS' rule ensures consistency in implementation of the Act. It also ensures that the regulated community and stakeholders are not subjected to differing regulatory schemes based on the fortuity of whether a species is under FWS' or NMFS' jurisdiction.

The species-specific approach best comports with ESA's statutory text, structure, and context. Congress' intentional decision to expressly prohibit take *only* of endangered species in ESA section 9 yet afford threatened species such protection only by regulation at FWS' discretion clearly evinces its intent to apply differing regimes and levels of protection between the two categories of species classifications. Congress knew how to provide a "blanket" take prohibition to protect listed species when it believed it appropriate. It did just that for endangered species in ESA Section 9; it did not do so for threatened species. FWS' "blanket 4(d) Rule" approach – at least without some individualized findings on why such prohibitions are needed - eliminates the distinction Congress enacted into the statute. It is an odd reading at best to

[81] Section 4(d) Regulations at 52,588.
[82] *See e.g. In re Polar Bear Endangered Species Act Listing*, 818 F. Supp. 2d 214, 233 (D.D.C. 2011) (upholding § 4(d) rule based, in part, on the Services' "reasonabl[e] conclu[sion] that a complementary management regime encompassing [specific treaties and statutes] ... provide[d] for the conservation of the polar bear").
[83] 89 Fed. Reg. at 23,934.
[84] NMFS' approach and interpretation of § 4(d) has been upheld by the courts. *See, e.g.*, *Trout Unlimited v. Lohn*, 559 F.3d 946, 962 (9th Cir. 2009).

conclude that Congress intended the permissive authority it provided FWS in ESA Section 4(d) to presumptively extend the same take treatment to the entire classification of threatened species that Congress itself did not include in ESA Section 9.

FWS' blanket 4(d) approach also allows FWS to avoid determining that the take prohibition is necessary and advisable to provide for the conservation of the threatened species as is required of all 4(d) regulations. FWS appears to read the first and second sentences of section 4(d) as separate, independent fonts of authority, such that FWS need not determine that a blanket 4(d) rule (or even a species-specific 4(d) rule) is necessary and advisable for conservation of the species.[85] This runs counter to Congress' design, --which clearly did not provide for the automatic extension of take prohibitions to threatened species, -- but instead envisioned that this would occur only after a considered determination by FWS that such regulation is "necessary and advisable" for conservation. If the second sentence of section 4(d) is a freestanding font of authority untethered to the first sentence of 4(d), it is not clear what criteria or limiting principles apply to FWS' determination to extend section 9 take prohibitions to threatened species. Under its reading, FWS could presumably extend the take prohibition for any reason of its choosing without relation to whether aided species conservation all. Congress could not have intended to extend such unbounded authority, especially when Congress itself clearly made a deliberate choice not to have "take" protection automatically attach to threatened species upon listing.[86]

Even if the second sentence of ESA section 4(d) is not tied to the first sentence, the Blanket Rule approach turns the language of that sentence on its head. The sentence provides that FWS "may by regulation prohibit with respect to any to threatened species, any act prohibited under [ESA Section 9(a)(1)]". The clear default presumption under the plain language is that ESA section 9 take prohibitions do *not* apply to a threatened species unless and until FWS issues a regulation to extend the prohibitions. Under the blanket rule approach, however, the presumption is reversed -- the take prohibitions apply unless and until FWS issues a regulation withdrawing such

[85] FWS has not been clear in this regard. In the 2024 Regulations, FWS stated that the second sentence in ESA § 4(d) is not bounded by the provision's first sentence and therefore it has no obligation to determine that a regulation extending take prohibitions to threated species is necessary and advisable for conservation. 89 Fed. Reg. at 23,922 (we are not required to make a ''necessary and advisable'' determination when we apply or do not apply specific § 9 prohibitions to a threatened species"). FWS then nonetheless goes on to state that the blanket 4(d) rule is "necessary and advisable" for the conservation of threatened species. Even then, such a finding is not supportable. The threats facing any given species vary widely as does the conservation needs for any particular species. An advance determination that a blanket take prohibition is needed for conservation for any species listed as threatened sometime in the future without any advance knowledge of the species involved, much less the specific threats it may face or conservation needs it may have, does not constitute reasoned decision making.

[86] Such an unbounded reading also lacks intelligible principles to guide FWS' exercise of discretion that would amount to an unconstitutional delegation of authority. *Kennedy v. Braidwood Management, Inc.,* 606 U.S. 748 775-776 (2025) (even if a statute is susceptible to two readings, a reading of the statute that make it unconstitutional should be avoided if the statute can reasonably be read otherwise).

protections either in whole or part. Under this approach, the sentence would more properly read "the Service may by regulation exempt with respect to any to threatened species any act prohibited under [ESA Section 9(a)(1)]". However, that is not the sentence that Congress wrote in ESA Section 4(d).[87]

The proposed rule states that whenever FWS issues a species-specific 4(d) rule, it will include an explicit determination that the rule is "necessary and advisable," taking into account both conservation benefits and economic impacts. The Associations support this new regulatory text.[88] This requirement enhances transparency as well as bolsters the Service's administrative record for judicial review if any specific 4(d) rule were challenged. The Associations also agree that inclusion of consideration of economic impacts is required by the "necessary and advisable" language.[89] The Supreme Court has held that materially similar language ("appropriate and necessary") in the context of setting public health standards for hazardous air pollutants required consideration of costs.[90] The result should be the same here.

In the 2024 Regulations, FWS stated that it did not ascribe any separate meaning to the words "necessary" and "advisable" and instead interpreted the phrase to establish a single standard that obviated any need to evaluate ''necessary'' and ''advisable'' separately.[91] However, a cardinal principle of statutory construction is that statutes are to be read to give effect, if possible, to every clause and word of a statute. FWS' interpretation gives "advisable" no effect but instead reads it out of the statute. However, Congress' clearly intended "advisable" to add a broader consideration of factors beyond a finding of necessity. Economic costs are clearly a factor that informs whether something is advisable.[92]

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[87] The D.C. Circuit upheld FWS' blanket 4(d) Rule approach in *Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 1 F.3d. 1, 8 (D.C. Cir. 1993), modified on other grounds on reh'g, 17 F.3d 1463 (D.C. Cir. 1994), rev'd on other grounds, 515 U.S. 687 (1995)). The Court there found that ESA § 4(d) was ambiguous on this point and FWS' then interpretation of the statute was a permissible one entitled to deference under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Chevron has since been overruled by *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which indicates that statutes should read to have single best reading. As detailed above, the species-specific 4(d) rule approach embodies the best reading of the statute. Regardless, at a minimum, as NMFS' longstanding practice has demonstrated, a species-specific interpretation of ESA § 4(d) is certainly a permissible reading of the statute.

[88] Section 4(d) Proposed Regulations, 90 Fed. Reg. at 52,590.

[89] See *Kansas Natural Resources Coalition v. FWS*, 780 F. Supp. 3d 650, 660-661 (W.D. Texas 2025) (phrase "necessary and advisable" in ESA section 4(d) requires consideration of economic costs).

[90] *Michigan v. EPA,* 576 U.S. 743, 753 (2015) (construing the Clean Air Act's hazardous air pollutant provision directing that EPA "shall regulate electric utility steam generating units under this section, if [EPA] finds such regulation is *appropriate and necessary*" to require some attention to cost).

[91] 87 Fed. Reg. 23,922.

[92] Id.; see also Kansas Natural Resources Coalition, 780 F. Supp. 3d at 660-661.

The 2025 proposal also requests comment on whether FWS should include a requirement in the regulations setting a timeframe that species-specific 4(d) rules should be done concurrent with final listing rules.[93] The Associations favor such an approach. Providing such rules at the outset of a listing promotes certainty and allows regulated entities and stakeholders to adjust their conduct and plan efficiently. Delaying such rules until sometime later could require course changes in planning that can result in delays and added costs.

D. Section 7 - Endangered and Threatened Wildlife and Plants: (1) Interagency Cooperation Regulations, 90 Fed. Reg. 52,600 (Nov. 21, 2025); Docket Nos. FWS–HQ–ES–2025–0044, 251105–0167

ESA Section 7(a)(2) requires each Federal agency, "in consultation with" FWS or NMFS, to "insure that any action authorized, funded, or carried out by such agency... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat.[94] Once the consultation process contemplated by Section 7(a)(2) has been completed, the respective Service is to provide to the Federal agency and the applicant, if any, with a "biological opinion" "detailing how the agency action affects the species or its critical habitat."[95] If the Service concludes that the agency action likely would result in jeopardy or adverse modification of critical habitat, the Service must outline "reasonable and prudent alternatives" which it "believes would not violate subsection Section 7(a)(2) and can be taken by the Federal agency or applicant in implementing the agency action."[96] In addition, if the consulting agency determines that the action will not violate Section 7(a)(2) but might result in the incidental take of a listed species, it must provide an incidental take statement (ITS) that sets forth reasonable and prudent measures (RPMs) as well as terms and conditions the Federal agency or applicant must comply with to implement any RPMs.[97] If the action agency or applicant, as relevant, complies with the terms and conditions of the incidental take statement, ESA Section 7(o)(2) exempts the specified level of take from the ESA Section 9 take prohibition.[98]

The Services first jointly promulgated regulations in 1986 setting forth the procedures for conducting consultations and furnishing a structure for assessing the effects of proposed federal actions on listed species for the purpose of rendering an opinion on whether the action is likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of designated critical

[93] Section 4(d) Proposed Regulations at 52,589.
[94] 16 U.S.C. § 1536(a)(2).
[95] *Id.*1§ 1536(b)(3)(A).
[96] *Id.*
[97] *Id.*. § 1536(b)(4).
[98] *Id.* § 1536(o)(2).

habitat.[99] The Services issued revisions to these regulations in 2019 and then again in 2024.[100] The 2025 proposed rule proposes to rescind the 2024 changes and revert back to the 2019 version of the regulations with some modest changes. The Associations support each of these proposed revisions and address each in turn below.

1. Removal of RPM Allowing for Imposition of Offsetting Measures

The 2024 Regulations expanded the definition of RPM to include measures that offset or compensate for the impact of incidental take.[101] This allows the Services to include RPMs in the Incidental Take Statement to require the agency or project applicant to offset or compensate for the impact of incidental take of listed species, which could include offsite mitigation. Neither this language nor concept had been in any of the previous versions of the regulations dating back to the original 1986 regulations. The 2025 Proposal would rescind this language entirely and reinstate the definition from the 2019 Regulations, which itself simply carried forward the definition of RPMs from the 1986 regulations.[102] The Associations support this proposed rescission.

First, the 2024 language is not supported by the ESA text which limits RPMs to measures necessary or appropriate to minimize the impact of incidental take. The terms offsets, compensation, or mitigation do not appear in the statute. And while offset, compensation, or mitigation may be beneficial to a species, they are not measures to limit or reduce (i.e. minimize) the anticipated incidental take resulting from an action, which is the purpose of the statutory provision. Nor can this reading be supported by a longstanding interpretation of the Services. To the contrary, this language was added to the regulatory definition for the first time despite a nearly 40-year regulatory history.

Offsets, compensation, or mitigation often can be useful tools in ensuring ESA compliance and the preservation of species. However, the appropriate way to address this is by considering whether to include such measures as part of the proposed action when it is suitable. It should not be accomplished by inserting language into the definition of RPM that is inconsistent with the ESA.

2. Environmental Baseline

The 2025 Proposal proposes modest revisions to the regulatory definition of the term "environmental baseline."[103] These revisions reflect the Services' existing practice

[99] See 50 C.F.R. § 402; Interagency Cooperation – Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19,926 (Jun. 3, 1986).
[100] *Compare* 2024 Regulations, 89 Fed. Reg. 23,919 *with* 2019 Regulations, 84 Fed. Reg. at 45,052.
[101] *See generally* 2024 Regulations, 89 Fed. Reg. 23919 (Apr. 5, 2024).
[102] Section 7 Proposed Regulations at 52,602.
[103] *Id.*

but are intended to provide improved clarity regarding the contours of the "environmental baseline" inquiry. The Associations support these revisions as they remove potential ambiguity and enhance predictability concerning application of the regulation.

3. Effects of the Action

Consistent with the Services' longstanding interpretation, the 2019 regulatory definition of the term "effects of the action" maintained the requirement that for an effect on a species to be attributed to an agency action, the impact on the species has to be "caused by the proposed action" and be "reasonably certain to occur." The 2019 Regulations also added a new provision (50 CFR 402.17) that included a non-exhaustive list of factors to guide the assessment of "reasonably certain to occur." In so doing, the regulation provided a higher level of predictability and needed detail to assist the Services and regulated community alike in making the often-complicated determination of whether an effect on a species is reasonably certain to occur. The 2024 Regulations maintained the standard that for an effect on a species to be attributable to an agency action the effect had to be one "caused by the proposed action" and be "reasonably certain to occur." Nonetheless, the 2024 Regulation removed the provision (402.17) that further elucidated "reasonably certain to occur." The 2025 Proposal: (1) would maintain the 2019 regulations definition of "effects of the action"; (2) would restore with added detail, what constitutes "reasonably certain to occur" and "caused by the proposed action," by stating that the assessment is to be based on "clear and substantial information;" (3) would reinstate the 2019 provision identifying the factors to consider in assessing whether an effect is "reasonably certain to occur"; and (4) add two new factors to be considered: (a) whether the agency has the ability to prevent the consequence due to its limited statutory authority, and (b) whether the consequence would occur regardless of whether the proposed action goes forward.[104]

The Associations support the reinstatement of the prior 50 CFR 402.17 regulation as well as the addition of the two new factors to the non-exhaustive list of factors that can help inform the inquiry. In many project developments or other activities with a Federal nexus, the determination of whether effects to a species – especially those that may be indirect, downstream, or removed in time or geography from the Federal action itself – are properly attributable to the agency action can be difficult, time-consuming, and at times result in agencies and applicants conducting unnecessary overboard reviews. Providing clarity and predictability in the regulations on how to conduct this assessment conserves both agency and private resources, properly focuses conservation measures, and avoids imposition of unnecessary regulatory hurdles and burdens.

[104] *See generally* Section 7 Proposed Regulations.

The Associations also support the addition of two new factors to be considered in the reasonably certain to occur assessment: (a) whether the agency has the ability to prevent the consequence due to its limited statutory authority, and (b) whether the consequence would occur regardless of whether the proposed action goes forward. These factors are fully consistent with normal proximate causation principles consistent with the ESA statutory text, relevant case law, and longstanding agency practice.

On its face, the obligations imposed by ESA section 7 are focused on the effects of the agency's action, not actions of others.[105] This follows from ESA Section 7 itself, which is plainly directed to the conduct of the agency.[106] Similarly, "to jeopardize" obviously connotes a causal link between the agency's own decisions and jeopardy to listed species and does not require federal agencies to protect listed species from harms caused by other actors. Rather, a federal agency's duty under that provision is simply to ensure that the species is not jeopardized by actions attributable to the agency itself.

This conclusion also is consistent with the Services' longstanding interpretation. While there have been some changes in formatting and emphasis across regulatory revisions, the Services' interpretation of the Act since the first ESA section 7 implementing regulations in 1986 has been that for an effect on a species to be attributed to an agency action, the impact on the species has to be "caused by the proposed action" and be "reasonably certain to occur."[107] Likewise, the regulations have included a provision since the inception (and still do) that provides that "Section 7 and the requirements of this part apply to all actions in which there is discretionary Federal involvement or control."[108] This regulation recognizes that effects of an agency action cannot be the legally relevant cause of an effect if the agency does not have statutory authority or discretion to act otherwise.[109]

This conclusion is also dictated by the Supreme Court's recent decision in *Seven County Infrastructure Coalition vs. Eagle County, Colorado,* which recently confirmed that "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally

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[105] 16 U.S.C. §§ 1536(a)(2) (agencies shall insure that "any action authorized, funded or carried out by *such agency*" is not likely to jeopardize the existence of a listed species); (b)(3)(A) (Services must provide a biological opinion "detailing how the *agency action affects* the species or its critical habitat.") (emphasis added).
[106] 16 U.S.C. 1536(a)(2) (emphasis added).
[107] *See* 50 C.F.R. § 402 (definition of "effects of the action"); Interagency Cooperation – Endangered Species Act of 1973, as Amended; Final Rule, 51 Fed. Reg. 19926 (Jun. 3, 1986).
[108] 50 CFR 402.03.
[109] *See NAHB v. Defenders of Wildlife*, 551 U.S. at 667 (402.03's focus on "discretionary" actions accords with the commonsense conclusion that, when an agency is required to do something by statute, it simply lacks the power to "insure" that such action will not jeopardize endangered species").

relevant 'cause' of the effect."[110] Rather there must be "a reasonably close causal relationship" between the environmental effect and the pertinent agency conduct.[111] These same principles apply here and support the Services' reinsertion of 50 CFR 402.17 as well as the proposed two new additions to the regulatory text.

E. Conclusion

The Associations appreciate the Services' consideration of these comments and urges them to act in an expeditious and thorough manner. If you have questions regarding these comments, please contact Ruth Demeter Hayes at rdemeter@uschamber.com.

American Gas Association
American Road and Transportation Builders Association
Associated General Contractors of America
Energy and Wildlife Action Coalition
GPA Midstream Association
Interstate Natural Gas Association of America
National Mining Association
National Rural Electric Cooperative Association
National Stone, Sand & Gravel Association
US Chamber of Commerce

[110] *Seven Cnty. Infrastructure Coal. v. Eagle Cnty., Colorado*, 605 U.S. 168 (2025).
[111] *Id.* ("The effects from a separate project may be factually foreseeable, but that does not mean that those effects are relevant to the agency's decision making process or that it is reasonable to hold the agency responsible for those effects. In those circumstances, "the causal chain is too attenuated"); see also *Public Citizen*, 541 U.S. at ("where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect"). While *Seven County* and *Public Citizen* were both NEPA cases, the underlying causation principle applies equally to the ESA. See *NAHB v. Defenders of Wildlife*, 551 U.S. at 668 (despite differences between NEPA and the ESA, the basic principle announced in *Public Citizen*—that an agency cannot be considered the legal "cause" of an action that it has no statutory discretion not to take—applied to the ESA).