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The Honorable Doug Burgum, Secretary
U.S. Department of the Interior
1849 C. Street, NW
Washington, DC 20240

The Honorable Howard Lutnick, Secretary
U.S. Department of Commerce
1401 Constitution Avenue NW
Washington, DC 20230

December 19, 2025

Submitted via regulations.gov

**Re: Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation
Docket No. FWS-HQ-ES-2025-0044
90 Fed. Reg. 52,600 (Nov. 21, 2025)**

Dear Secretary Burgum and Secretary Lutnick,

On behalf of Defenders of Wildlife (“Defenders”) and our nearly two million members and supporters, please accept the following comments regarding the proposed rule amending the implementing regulations under section 7 of the Endangered Species Act (“ESA”) proposed by the U.S. Fish and Wildlife Service and National Marine Fisheries Service (“FWS” and “NMFS,” and collectively “the Services”). See 90 Fed. Reg. 52,600 (Nov. 21, 2025) (“2025 Proposed Rule”).

Defenders is a national conservation organization focused solely on conserving wildlife and habitat and safeguarding biodiversity. Overall, Defenders is seriously concerned with the shortcomings of the 2025 Proposed Rule. The 2025 Proposed Rule is insufficient to protect and recover endangered and threatened species and their habitat as Congress envisioned when it passed the ESA. Defenders urges the Services to withdraw these harmful changes, as set forth in detail below.

INTRODUCTION

Human Well-Being Depends on Biodiversity, But Animals Are Under Threat

Biodiversity is the foundation of all life on Earth and is key to human well-being. Healthy, diverse wildlife and habitats pollinate crops, keep our waterways clean, and even buffer humans from diseases like Lyme and malaria. These critical services have wide-reaching impacts on our economies, food security, health, and more.

Today, however, we are facing an extinction crisis unprecedented in human history. Approximately one million species are at risk of extinction globally. The majority of Earth's lands and seas have been significantly modified by human activity. Populations of wild species continue to decline, putting many ecosystems at risk of collapse.

This devastating global loss of biodiversity also presents a grave threat to the United States. While Americans have long taken pride in our country's breathtaking natural resources, over one third of U.S. plant and animal species are at risk of extinction and land cover conversion continues at an estimated rate of two football fields per minute. We must shield our ecosystems from the threats of ongoing habitat loss, climate change, pollution, and invasive species. Without protective actions, we risk the degradation and eventual loss of our precious national heritage.

The Endangered Species Act is Critical to Conserving Biodiversity

The U.S. does, however, benefit from the strong protections of the Endangered Species Act, one of the world's most powerful laws for biodiversity conservation. When it passed the ESA, Congress sought to prevent extinction, recover imperiled species, and protect the ecosystems in which they live. See 16 U.S.C. § 1531(b) (the purposes of the ESA are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "to provide a program for the conservation of such endangered species and threatened species"). Now, more than ever, our government must uphold and strengthen the protections that the ESA affords.

The ESA has a strong track record. Approximately 99 percent of U.S. species listed under the Act are still with us—including our national symbol, the bald eagle—and hundreds of those species are on the road to recovery. But to continue working, the ESA has to be implemented appropriately, with strong regulations supporting the key features of the statute that make it so effective.

Section 7 Consultation is the Keystone for an Effective ESA

The consultation process under section 7 lies at the heart of the ESA's effectiveness. Under section 7, all federal agencies must ensure that their actions (including actions they fund

or authorize) are not likely to jeopardize the continued existence of listed species or destroy or adversely modify their critical habitat and must do so in consultation with the appropriate wildlife agency (either FWS or NMFS). See 16 U.S.C. § 1536(a)(2). The Services have interpreted both jeopardy and destruction/adverse modification of critical habitat as a diminishment of a species' ability not just to survive but also recover. See 50 C.F.R. § 402.02; *Nat'l Wildlife Fed'n. v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008) (“It is only logical to require that the agency know roughly at what point survival and recovery will be placed at risk before it may conclude that no harm will result [. . .]”) (“*NWF v. NMFS*”); *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 527 (9th Cir. 2010) (“even before a population is extinguished, it may reach a point at which it is no longer recoverable”). Congress intended recovery to be the primary focus of the ESA.

Consultation is inherently a collaborative process, creating dialogue between federal wildlife agencies, other federal agencies, and project proponents whose plans affect imperiled wildlife listed under the ESA. Section 7 consultations may be “formal” or “informal,” see generally 50 C.F.R. §§ 402.13, 402.14; in either case, they provide an important opportunity for wildlife experts at federal wildlife agencies to assess project impacts on imperiled species and provide measures to minimize and mitigate these harms. Sound section 7 implementing regulations guide this dialogue efficiently while honoring the bedrock principle that actions likely to cause extinction or destroy critical habitat must be avoided.

Consultation Has Been Critical to Saving Iconic Species

Virginia Northern Flying Squirrel

Consultation has been critical to the preservation of many species. One example is the Virginia northern flying squirrel, which recovered from endangered status after benefitting from section 7 consultations. The squirrel lives in Appalachia and has a unique and remarkable membrane that allows it to glide, or “fly,” from tree to tree. It almost went extinct as a result of logging and development in its native hardwood forests.¹ By 1985, when the squirrel was first listed as endangered, over a century of clear-cutting (and resulting wildfires and soil damage) had decimated the squirrel's essential habitat to the point that a survey by FWS found only eleven surviving animals.² Consultation under the ESA, however, played a significant part in addressing the threat of clear-cutting. In the Monongahela National Forest, which contains more than 90 percent of the squirrel's

¹ See *Partners Restore Habitat for West Virginia Northern Flying Squirrel*, U.S. FOREST SERV. (Mar. 6, 2025), <https://www.fs.usda.gov/r09/monongahela/newsroom/stories/partners-restore-habitat-west-virginia-northern-flying-squirrel>.

² See *id.*

known habitat,³ FWS began requiring consultation on all projects in any habitat suitable for the Virginia northern flying squirrel, consistent with ESA regulations requiring consultation whenever an action may affect listed species. See 50 C.F.R. § 402.14(a).⁴ Subsequent consultations on individual logging projects then resulted in the implementation of important mitigation measures to ensure the squirrels' survival and recovery within suitable habitat. The Service has noted that these changes "significantly removed the threat of habitat loss . . . across much of the squirrel's range."⁵ The Service delisted the Virginia northern flying squirrel in 2013. See *generally* 78 Fed. Reg. 14,022 (Mar. 4, 2013).

Northern Spotted Owl

As another example, FWS has recognized the section 7 consultation process as a crucial piece of protecting the Northern spotted owl from habitat loss due to timber harvests.⁶ The Northern spotted owl occupies older forests with large trees in the Pacific Northwest; they prefer to nest and roost in the tree cavities and broken tops.⁷ The owl was first listed as threatened in 1990 and, according to monitoring since then, owl populations have been steadily declining.⁸ Habitat loss due to timber harvests presents a severe threat to the owl's

³ See, e.g., W. VA. FIELD OFFICE, U.S. FISH & WILDLIFE SERV., APPALACHIAN NORTHERN FLYING SQUIRRELS RECOVERY PLAN UPDATE 1 (Aug. 2001).

⁴ See also W. VA. FIELD OFFICE, U.S. FISH & WILDLIFE SERV., WEST VIRGINIA NORTHERN FLYING SQUIRREL 5-YEAR REVIEW: SUMMARY AND EVALUATION 12 (2006).

⁵ *Id.*

⁶ See U.S. FISH & WILDLIFE SERV., SPECIES ASSESSMENT AND LISTING PRIORITY ASSIGNMENT FORM 28 (Aug. 12, 2022), https://ecosphere-documents-production-public.s3.amazonaws.com/sams/public_docs/publication/4117.pdf ("Through the section 7 consultation process, the Service reviews the management activities implemented under the NWFP and BLM RMPs and provides technical assistance to the USFS and BLM in making activities within or outside of reserves consistent with recovery actions 10 and 32 . . ."); *id.* at 56 ("Over the last two decades, the NWFP has reduced the threat of past and current habitat loss on Federal lands through the development of habitat in reserved areas, limitations on harvest in reserved areas, and the managed reduction of suitable habitat in the non-reserved matrix areas. Alternative harvest methods such as thinning have largely replaced high impact clearcutting, therefore the degree of impact from harvest on northern spotted owl habitat is lower than in the past, and the potential for future recruitment of habitat through forest succession is higher.").

⁷ See, e.g., Meghan Snow, *Whoo's Ready to Learn about Spotted Owls?*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/story/creature-feature-spotted-owls#:~:text=The%20northern%20spotted%20owl%20generally,Learn%20more%20about%20riparian%20habitats> (last visited Dec. 15, 2025).

⁸ See U.S. FISH & WILDLIFE SERV., SPECIES ASSESSMENT AND LISTING PRIORITY ASSIGNMENT FORM, *supra* note 6, at 2, 9–10. In fact, in 2020 the Service published a 12-month finding that

recovery.⁹ To help address this threat, FWS developed guidelines for section 7 consultations that included a 2.9 kilometer radius circle around spotted owl nests—the typical range for nesting, roosting, and foraging—within which FWS has required that project impacts be minimized.¹⁰ Section 7 consultations also implement the recovery actions from the owl’s Recovery Plan. For example, the consultation process has allowed the Service to ensure conservation of high-quality spotted owl habitat stands (e.g., by making sure these areas are not harvested), as well as currently occupied and historically occupied owl sites.¹¹ In 2022, the Service noted that improved management practices and alternative timber harvest methods like thinning had successfully reduced the degree of habitat loss for the owl, giving it a better shot at recovery.¹²

Marbled Murrelet

Section 7 consultations also facilitate coordination where multiple agencies are working to conserve a species that is spread across the landscape. This coordination has been especially helpful to the marbled murrelet’s distinct population segment (“DPS”) that extends through California, Oregon, and Washington. The marbled murrelet is a small seabird that forages in coastal waters and nests in coastal forests that contain older trees. (Because murrelets lay their eggs directly on the moss or debris covering the tree branch, they can only use larger trees.¹³) The murrelet was first listed as threatened in 1992. See 57 Fed. Reg. 45,328 (Oct. 1, 1992).¹⁴ Because murrelets depend on forested habitats to breed,

reclassifying the Northern spotted owl from “threatened” to “endangered” was warranted but precluded by “higher-priority actions.” See, e.g., *id* at 2 (citing 85 Fed. Reg. 81,144 (Dec. 15, 2020)).

⁹ See, e.g., Damon B. Lesmeister et al., *Chapter 4: Northern Spotted Owl Habitat and Populations: Status and Threats*, in SYNTHESIS OF SCIENCE TO INFORM LAND MANAGEMENT WITHIN THE NORTHWEST FOREST PLAN AREA, GEN. TECH. REP. PNW-GTR-966 255 (2018).

¹⁰ See *id.* at 257.

¹¹ See, e.g., U.S. FISH & WILDLIFE SERV., BIOLOGICAL OPINION ADDRESSING THE CALAPOOYA DIVIDE PROJECT PROPOSED BY UMPQUA NATIONAL FOREST (FWS REFERENCE NUMBER 01EOFW00-2017-F-0326) 13–14 (May 25, 2017); see also U.S. FISH & WILDLIFE SERV., REVISED RECOVERY PLAN FOR THE NORTHERN SPOTTED OWL (*Strix occidentalis caurina*) III-42 (2011), https://www.fws.gov/sites/default/files/documents/NSO_RevisedRP_2011.pdf (describing the recommendation to provide additional demographic support to the Northern spotted owl by conserving currently occupied as well as historically occupied sites).

¹² See U.S. FISH & WILDLIFE SERV., SPECIES ASSESSMENT AND LISTING PRIORITY ASSIGNMENT FORM, *supra* note 6, at 56.

¹³ See *Marbled Murrelet*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/species/marbled-murrelet-brachyramphus-marmoratus> (last visited Dec. 17, 2025).

¹⁴ See also WASH. FISH & WILDLIFE OFF., U.S. FISH & WILDLIFE SERV., MARBLED MURRELET (*BRACHYRAMPHUS MARMORATUS*) 5-YEAR REVIEW: SUMMARY AND EVALUATION 1 (2024). Although this

timber harvests present one of the biggest obstacles to species recovery.¹⁵ But because the DPS extends across three states, protections vary by state and exist alongside multiple federal management plans, like the Northwest Forest Plan. In fact, FWS observed early on, in 1997, that protecting marbled murrelet nesting and foraging habitats would require improved coordination among cooperating individuals and organizations.¹⁶

Section 7 consultation has helped with this. For example, consultation between BLM and FWS on BLM’s Western Oregon Resource Management Plans resulted in greater coordination between agencies on identifying occupied murrelet stands, allowing the agencies to collaborate on a workable definition of occupied habitat; in addition, consultation expanded protections for suitable habitat and required protections for forests within 300 feet of occupied stands.¹⁷ In fact, by 2024, the latest five-year review for the murrelet noted that “implementation of landscape management plans has substantially reduced the loss of nesting habitat.”¹⁸

Beluga Whale

Finally, section 7 consultations have allowed the Services to act on advances in scientific understanding of imperiled species. Alaska’s Cook Inlet population of beluga whale, for example, was first listed as endangered in 2008. See 73 Fed. Reg. 62,919 (Oct. 22, 2008).¹⁹ Beluga whales are a sociable species found throughout Arctic and sub-Arctic waters,

was prior to the implementation of the Services’ 1996 Distinct Population Segment Policy, the Service determined that the murrelet population in Washington, California, and Oregon was a valid DPS in 2009. See *id.*

¹⁵ See *id.* at 7.

¹⁶ See U.S. FISH & WILDLIFE SERV., RECOVERY PLAN FOR THE THREATENED MARBLED MURRELET (*BRACHYRAMPHUS MARMORATUS*) IN WASHINGTON, OREGON, AND CALIFORNIA 135 (1997) (“Improved coordination of marbled murrelet recovery efforts among cooperating individuals and organizations is needed to integrate protection of marbled murrelet nesting and foraging habitats.”).

¹⁷ See BUREAU OF LAND MGMT., BIOLOGICAL ASSESSMENT OF THE PROPOSED RESOURCE MANAGEMENT PLAN FOR WESTERN OREGON 16 (2016), https://eplanning.blm.gov/public_projects/lup/57902/85070/101800/terrba.pdf (last visited Dec. 17, 2025).

¹⁸ See U.S. FISH & WILDLIFE SERV., MARBLED MURRELET 5-YEAR REVIEW, *supra* note 14, at 14 (“Research and monitoring of marbled murrelet populations has been ongoing, and implementation of landscape management plans has substantially reduced the loss of nesting habitat.”).

¹⁹ See *also* NOAA FISHERIES & NAT’L MARINE FISHERIES SERV., BELUGA WHALE—COOK INLET DPS (*DELPHINAPTERUS LEUCAS*) 5-YEAR REVIEW: SUMMARY AND EVALUATION 7–8 (2022).

usually along coastal bays and inlets.²⁰ As NMFS has observed and studied this population, it has found that the Susitna River Delta, directly across Cook Inlet from Anchorage, functioned not only as core essential foraging habitat for Cook Inlet belugas during the summer months, but also an important calving area,²¹ making it a place of extreme importance to the whales' survival and recovery.²² That new information led NMFS to recognize the belugas' preferred summer-fall habitat near the Susitna Delta as the Susitna Delta Exclusion Zone—an area where human activity should be minimized.²³ To do so, NMFS gives special consideration to protecting the habitat in that area during section 7 consultations²⁴ and requires conservation measures for proposed projects in the area,²⁵ such as speed limits for vessels in the exclusion zone and a requirement for ships to train their crews to monitor for ESA listed species during all vessel movements.²⁶

Consultation is Efficient as Well as Effective

Consultation does not stymie progress or stop economic growth. Indeed, as mentioned, our wildlife and ecosystems are economic assets in their own right—they support tourism, help protect coastal communities from storm surges, and provide natural ecosystem services like pollination and water filtration.²⁷ Conversely, biodiversity loss goes hand in hand with the deterioration of human well-being: ecosystem collapse drives a hotter planet, more frequent pandemics, and increased human-animal conflict.

Fortunately, protecting our valuable wildlife does not unduly delay needed projects. According to 2023 Congressional testimony from Martha Williams, a former director of

²⁰ See *Beluga Whale*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/species/beluga-whale> (last visited Dec. 17, 2025).

²¹ See NOAA FISHERIES, RECOVERING THREATENED AND ENDANGERED SPECIES: FY 2019–2020 REPORT TO CONGRESS 31 (2022).

²² See NAT'L MARINE FISHERIES SERV., ENDANGERED SPECIES ACT (ESA) SECTION 7(A)(2) BIOLOGICAL OPINION: PORT OF ALASKA'S SOUTH FLOATING DOCK (NMFS CONSULTATION NO. AKRO-2021-01051) 43 (2021).

²³ See *id.*

²⁴ See NOAA FISHERIES, REPORT TO CONGRESS, *supra* note 21, at 31.

²⁵ See NAT'L MARINE FISHERIES SERV., PORT OF ALASKA BIOLOGICAL OPINION, *supra* note 22, at 43.

²⁶ See, e.g., Nat'l Marine Fisheries Serv., Letter of Authorization to the Alaska Gasline Development Corporation 4-5 [in PDF] (Sept. 15, 2020).

²⁷ See *ESA at 50: The Destructive Cost of the ESA: Hearing Before the Subcomm. on Water, Wildlife, & Fisheries of the H. Comm. on Nat. Res.*, 118th Cong. (2023) (prepared statement of Martha Williams, Director, U.S. Fish & Wildlife Serv.), <https://www.govinfo.gov/content/pkg/CHRG-118hrg52976/html/CHRG-118hrg52976.htm>.

FWS, section 7 consultations are essential to providing long-term conservation benefits but normally constitute only a small part of a project’s scope, timeline, and process.²⁸

Data from the past 15 years bears this out. A 2015 study by Jacob Malcom and Ya-Wei Li (both then with Defenders of Wildlife), published in the Proceedings of the National Academy of Sciences, analyzed the 81,461 informal and 6,829 formal consultations by FWS from January 2008 through April 2015.²⁹ It found that only *two* formal consultations (0.0023 percent) resulted in jeopardy³⁰ and that none of the 88,290 actions consulted on during the seven years the study examined had been stopped or extensively altered as a result of a jeopardy or destruction/adverse modification finding.³¹ In general, most informal consultations lasted, at longest, a couple weeks, and even most formal consultations lasted only up to a couple months (13 days and 62 days, respectively)³²—well under the 135 days agencies have to complete the consultation process.³³ Discussing that study, the authors also noted that, compared to prior decades, the number of consultations has increased—but the percentage of those consultations resulting in jeopardy findings had decreased.³⁴ These results suggest that the consultation process has, over time, helped agencies identify alternatives and modifications to projects early on that avoid potential harm to listed species or their critical habitats.

Defenders of Wildlife’s additional analysis³⁵ of Federal Highway Administration (“FHWA”) data from 2012 through 2021 also shows this trend. Between 2012 and 2022, the most time

²⁸ See *id.* (noting that, on average, the Fish and Wildlife Service completes about 1,002 formal consultations each year, with an average of 118 days for completion and 78 percent completed in 135 days or less; an average of about 11,123 informal consultations are completed each year, lasting an average of 35 days).

²⁹ See Jacob W. Malcom & Ya-Wei Li, *Data contradict common perceptions about a controversial provision of the US Endangered Species Act*, 112 PNAS 15,844, 15,845 (2015).

³⁰ See *id.*

³¹ See *id.* at 15,846.

³² See *id.* at 15,845 (median durations).

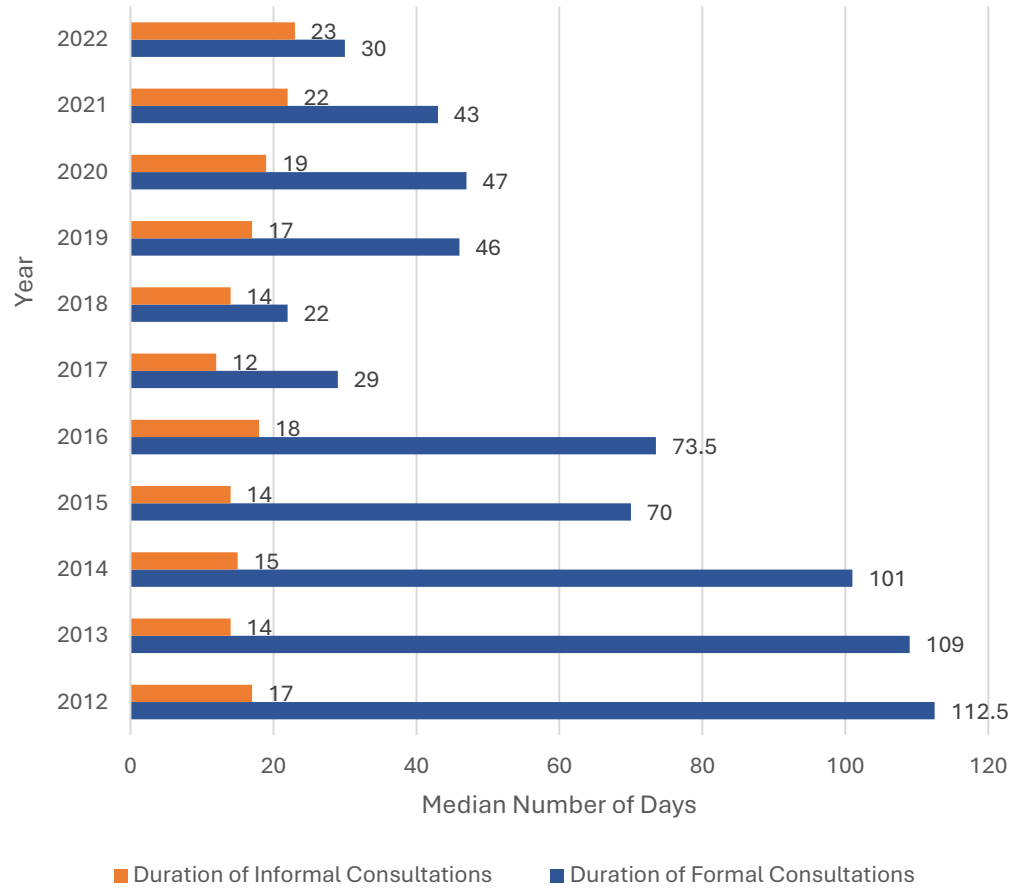
³³ The ESA sets a deadline of 90 days for the conclusion of consultation with FWS or NMFS. See 16 U.S.C. § 1536(b)(1)(A). In addition, the ESA’s implementing regulations specify that the Services must deliver a biological opinion to the federal action agency and any applicant within 45 days after concluding a formal consultation. See 50 C.F.R. § 402.14(e)(3).

³⁴ See Jacob W. Malcom & Ya-Wei Li, Letter to the Editor, *Reply to Weiland et al.: The point is to bring data to inform policy, not to rely solely on anecdotes*, 113 PNAS E1594 (2016).

³⁵ For this analysis, Defenders used data available from the Federal Highway Administration. See *ECOS Environmental Conservation Online System*, U.S. FISH & WILDLIFE

it took to complete the majority of formal consultations ranged from 22 to 112.5 days. Moreover, this time decreased over the years from 112.5 days in 2012 to 30 days in 2022 (see fig. 1, below). In fact, on average 70 percent of all formal consultations from 2012 to 2022 were completed before the statutory deadline. Most informal consultations during this period took, at most, 12 to 23 days depending on the year (all under a month).

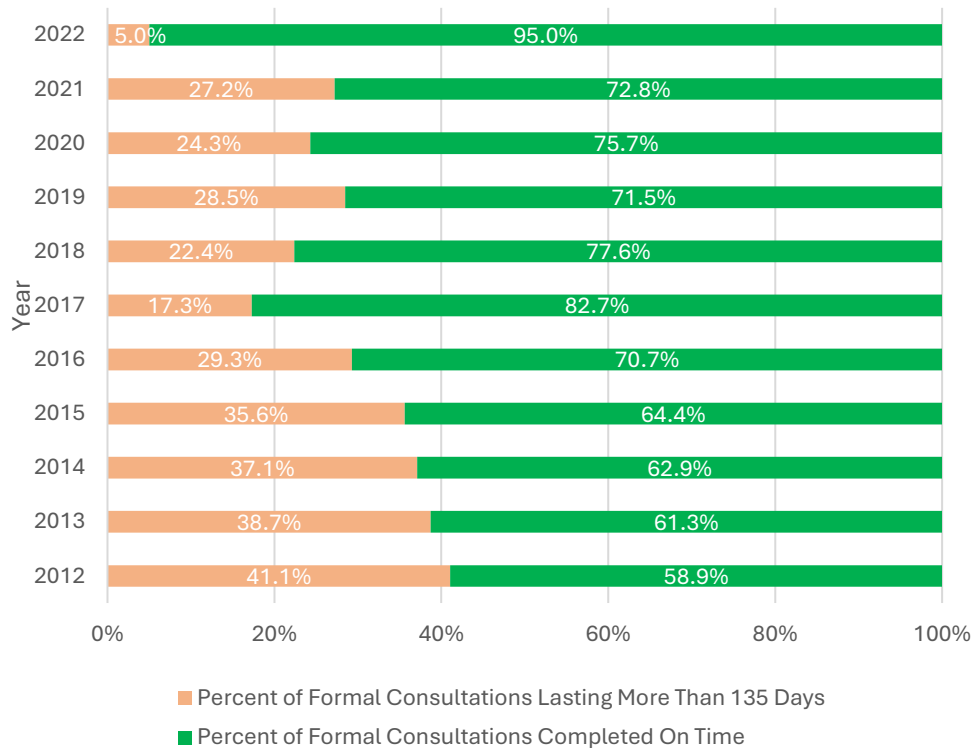
Fig. 1: FHWA-FWS Consultations (2012–2022)



SERV., <https://ecos.fws.gov/ecp/report/fhwa-section7> (last visited Dec. 5, 2025). The length of formal and informal consultations for each project listed in the data was determined by finding the difference in days between the date given for “Start (Received) Date” and “FWS Response/Conclusion Date.” For each year, some projects took much longer than most of the others; due to these outliers, the median length of time for consultations was used in this discussion instead of the average. Please also note that, as of writing, only two months of data were available for 2022.

Finally, Ms. Williams’ 2023 testimony confirms similar figures for subsequent years: the Service’s average formal consultation took 118 days for completion, and 78 percent of consultations were completed in 135 days or less.³⁶ Informal consultations lasted an average of 35 days.³⁷

Fig. 2: FHWA-FWS Formal Consultations Completed On Time (2012–2022)



Unless we can arrest and reverse extinction trends, hundreds of species listed under the ESA will continue to decline and creep towards extinction, and many hundreds of species not yet listed will continue to decline to the point that ESA protections may be required. There is no common interest more widely shared and inclusive than healthy natural systems founded on thriving, native biodiversity. Failure to prioritize this common interest will mean continued loss of our natural environment and its benefits to the detriment of all Americans.

³⁶ See Testimony of Martha Williams, *supra* note 27.

³⁷ See *id.*

Defenders calls on the Services to restore the pre-2019 regulatory framework to support science-based listing decisions, require full and honest assessment of agency action to prevent harm to species or habitat, and advance Congress’s goal of species recovery. The 2025 Proposed Rule, unfortunately, would impede these vital goals by failing to implement the ESA as the statute and longstanding precedent require.

COMMENTS

The 2025 Proposed Rule threatens serious harm to wildlife conservation—particularly when combined with other recent agency initiatives. Including the ESA regulatory proposals presently under consideration, the Services have now taken steps to:

- Weaken standards for listing, critical habitat designation, and interagency consultation (the 2025 Proposed Rule and companion proposals);
- Rescind a longstanding definition of “harm” such that—inconsistent with both the statute and decades of agency practice—destruction of listed species’ habitat may no longer be considered a prohibited “take” under the ESA, *see generally* 90 Fed. Reg. 16,102 (Apr. 17, 2025) (proposed rule); and
- Funnel numerous projects through rushed and inappropriate “emergency” consultations, in the name of a manufactured “energy emergency” that has been declared, ironically, at a time of record-setting American energy production. *See generally* DEP’T OF THE INTERIOR, ALTERNATIVE PROCEDURES FOR INFORMAL, EXPEDITED CONSULTATION UNDER SECTION 7 OF THE ENDANGERED SPECIES ACT FOR ENERGY PROJECTS AMID THE NATIONAL ENERGY EMERGENCY (Apr. 23, 2025), https://www.doi.gov/sites/default/files/documents/2025-04/alternative-procedures-section-7-consultation-2025-04-23-signed_1.pdf.

These initiatives call up two visions of wildlife conservation in America. In the first vision, the ESA is fully implemented. Consultations with wildlife agencies prevent the worst harms to imperiled wildlife from proposed projects, and when development threatens to harm species by destroying their homes, those harms are avoided and/or mitigated. In the second vision, despite the aims of Congress in the ESA, species inch closer to extinction. These regulatory proposals push our nation towards this second path.

Picture, for example, a newly proposed development in South Florida. The subtropical landscape there—rich with tropical hardwood species and, along the coasts, vast mangrove forests—supports a variety of imperiled wildlife. Florida panthers stalk the woods. American alligators swim the swamps and marshes. Manatees forage for seagrass in slow-moving salty waters. All of these species are listed under the ESA as either threatened or endangered, so when the Army Corps of Engineers receives an application

for a Clean Water Act permit to fill wetlands for a new, 20-acre housing development, the expert wildlife agencies assess how the new development will impact the imperiled wildlife of the area. Biologists prepare an ESA section 7 biological opinion that considers all project impacts—including the reality that a new housing development in a previously undeveloped area can be expected to lead to development of other new amenities in the area. Meanwhile, the incidental take statement accompanying the biological opinion recognizes destruction of species habitat that will actually kill or injure wildlife (because, for example, Florida panther forage in the area may be removed) and thus will constitute “harm,” or “take,” under ESA. Consequently, the biological opinion and take statement contain conditions and mitigation measures that minimize the ecological consequences of the development. Some of these measures are “offset” provisions—*i.e.*, protections for land outside of the project footprint—that allow the project to move forward while securing important protections elsewhere.

In the world that today’s regulatory proposals envision, the consultation process outlined above is far less effective. The agency personnel preparing the biological opinion consult the section 7 regulations and discover that they may exclude from consideration any project consequences that “would occur regardless of whether the proposed action goes forward.” 2025 Proposed Rule, 90 Fed. Reg. at 56,206 (proposed 50 C.F.R. § 401.17(b)(5)). The agency reasons that virtually all of the consequences of the project will happen eventually: development pressure will eventually expand housing into the project area, and sea level rise due to climate change will degrade or destroy much of the coastal habitat for local species anyway. Meanwhile, the incidental take statement—following the logic of the recent regulatory proposal regarding harm—reasons that none of the habitat destruction from the project is “take” under the ESA, so there is no need to include take minimization measures. All in all, instead of reckoning with the consequences of development, the biological opinion dodges many of those consequences and becomes something closer to an empty paper exercise.

To be meaningful, ESA implementation must fulfill the statute’s purpose—to conserve listed species and the ecosystems on which they depend. See 16 U.S.C. § 1531(b). These and other recent regulatory proposals move ESA implementation further from, not closer to, this goal.

The Services may respond that the 2025 Proposed Rule was compelled by the Executive and Secretarial Orders cited at the outset of the rule. See 2025 Proposed Rule, 90 Fed. Reg. at 52,600–01. Yet those orders do not, standing alone, justify any of the proposed regulatory revisions. These orders simply call for the review of the section 7 regulations. They cannot and do not change the bedrock statutory guardrails that apply to all

regulations: the regulations must be consistent with the Administrative Procedure Act (“APA”); they must adhere to the case law interpreting the APA; and they must be consistent with the ESA itself. As part of these requirements, agencies must recognize and explain changes in position. See *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515–16 (2009). Here, the Services are reconsidering virtually every change made to the ESA section 7 regulations just last year. The Supreme Court has held that, to satisfy the APA in such circumstances, agencies must not only “display awareness that [they are] changing position,” but must also “show that there are good reasons for the new policy” and, when “disregarding facts and circumstances that underlay or were engendered by [a] prior policy,” provide further justification. *Id.*

A similar principle holds for *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). *Loper Bright* merely affirmed that it is the role of the courts to determine the best meaning of a statute and to ensure that regulatory interpretations of statutory text conform to the best meaning. Nothing about *Loper Bright* requires agencies to embark on new regulatory revisions. Any ESA-implementing regulation must conform to the clear intent of Congress that the Services list species and designate critical habitat in accordance with the statute’s requirements; conserve and recover listed species; and establish procedures for federal agencies to meet their obligations to ensure that federal agency actions do not jeopardize the continued existence of listed species or destroy or adversely modify their designated critical habitat. See 16 U.S.C. §§ 1531(b), 1532(3), 1536(a)(2).

Proposed Revision to § 402.02, Definition of “Environmental Baseline”

Defenders opposes the proposed revision to the definition of “environmental baseline.”

The Services propose to change the definition of “environmental baseline” to read, in relevant part:

Environmental baseline is evaluated at the time of the proposed action and refers to the current condition of the listed species or its designated critical habitat in the action area as would reasonably be expected to occur, without the consequences to the listed species or designated critical habitat caused by the proposed action.

2025 Proposed Rule, 90 Fed. Reg. at 52,606. In addition, the Services propose to reinsert 2019 language folding certain “ongoing” agency activities into the environmental baseline. See *id.* The proposed definition of “environmental baseline” is confusing at best and, at worst, invites consultations that violate the statutory jeopardy standard. Defenders urges the Services to reinstate the pre-2019 meaning of this term.

Defining “baseline” to mean the “current condition” that “would reasonably be expected to occur” is internally contradictory and confusing. The “current condition” “at the time of the proposed action” refers to the present, while something that “would reasonably be expected to occur” refers to the future. It is therefore impossible to tell whether the Services intend that baseline analysis *describe* current conditions or *forecast* future conditions. The Services’ explanation does not clarify the matter. The Services emphasize that “the agency looks to the best available scientific information at the time of the consultation to inform its understanding of the condition for the listed species or its designated critical habitat.” *Id.* at 52,602. This does not resolve the apparent contradiction.

More concerning still, the Services risk violating the statutory jeopardy mandate by incorporating an analysis of future conditions into baseline-setting. Courts have made clear that the environmental baseline is supposed to capture *present* conditions, “at the time of consultation.” As the Ninth Circuit has stated, the baseline “is intended to form a basic ‘snapshot’ of the status of the species at a particular moment in time before the action is taken.” *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 1008 (9th Cir. 2014). That “snapshot” is then added to the effects of the action to determine whether, overall, the proposed action is likely to result in jeopardy or adverse modification of critical habitat. See 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(3). Folding future conditions into the baseline risks relegating preventable effects of the proposed action to the environmental baseline. As a result, it could become more difficult to determine when federal agency actions are likely to cause jeopardy—thwarting Congress’s clear command to prevent this result.

The Services’ proposal to insert “ongoing” agency activities into the environmental baseline heightens the above concerns—particularly in light of the Services’ refusal, over the years, to recognize “baseline jeopardy.” See 83 Fed. Reg. 35,178, 35,183 (July 25, 2018) (preamble for 2018 regulatory proposal, stating that “there is no ‘baseline jeopardy’ status even for the most imperiled species”) (“2019 Proposed Rule”); see *also* 84 Fed. Reg. 44,976, 44,987 (Aug. 27, 2019) (response to comments in 2019 final rule, taking same position) (“2019 Final Rule”).

Under the proposed “baseline” definition (as was true of the 2019 definition of this term), the impacts to listed species or critical habitat “from ongoing agency activities or existing agency facilities that are not within the agency’s discretion to modify” are part of the environmental baseline. 2025 Proposed Rule, 90 Fed. Reg. at 52,606; see *also* 50 C.F.R. § 402.02 (defining “environmental baseline”). This language invites agencies to modify or relicense ongoing activities and existing facilities that have caused serious harm to listed species or critical habitat while ignoring the existing degraded conditions. Specifically, the

harms caused by ongoing aspects of the exact action that is under review are moved into the environmental baseline and agencies are precluded from adequately considering all the effects of an action during consultation. This undermines the ESA for several reasons.

First, moving effects caused by an ongoing action into the baseline invites agencies to avoid reckoning with the *total* impacts to listed species and critical habitat. The Services are required to analyze whether the proposed action, when added to the existing baseline, will appreciably reduce the likelihood of survival and recovery of the species. However, the Services have repeatedly and improperly attempted to *compare* the effects of a proposed action to baseline conditions, rather than consider all of the impacts as a whole, as required. Under this approach, when an agency action is proposed, it can appear to cause only “minor” harm as compared to the severely degraded conditions that already exist. However, the ESA plainly prohibits federal agencies from taking an action that “deepens the jeopardy by causing additional harm” or “that will tip a species from a state of precarious survival into a state of likely extinction.” *NWF v. NMFS*, 524 F.3d at 930. In *National Wildlife Federation v. NMFS*, NMFS attempted to compare the effects of the action to the environmental baseline and evaluate the “net effect” on listed species, rather than “assessing whether the listed fish would be jeopardized by the aggregate of the proposed agency action, the environmental baseline, cumulative effects, and current status of the species.” *Id.* at 926. The court rejected this approach as “incompatible with the ESA.” *Id.* at 927. “Under this approach,” the court held, “a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest. This type of slow slide into oblivion is one of the very ills the ESA seeks to prevent.” *Id.* at 930.

Similarly, in *Turtle Island Restoration Network v. U.S. Department of Commerce*, the court rejected NMFS’s attempt to reach a no-jeopardy determination even though combined threats showed that listed sea turtles were already headed for extinction, because—NMFS reasoned—the proposed action itself added “proportionally low risk” to these existing threats. See 878 F.3d 725, 738 (9th Cir. 2017). The court rejected this reasoning, noting that instead “[t]he relevant inquiry” is “whether the ‘action effects, when added to the underlying baseline conditions,’ are such that they would cause jeopardy.” *Id.* at 738–39 (quoting *NWF v. NMFS*, 524 F.3d at 929); see also *Oceana, Inc. v. Pritzker*, 75 F. Supp. 3d 469, 491 (D.D.C. 2014) (“[I]f baseline conditions are already dire, then even a small additional impact due to [takes caused by the action under review] may require a jeopardy determination.”); *Am. Rivers v. Fed. Energy Reg. Comm’n*, 895 F.3d 32, 45–48 (D.C. Cir. 2018) (by viewing the effects of a new dam relicense in isolation, the Services improperly failed to consider whether baseline conditions already jeopardize the species and whether this new license would “deepen[] the jeopardy by causing additional harm”).

The Services' unlawful practice of "comparing" impacts instead of adding impacts to the baseline is closely tied to its 2019 rejection of the concept of "baseline jeopardy." See 2019 Proposed Rule, 83 Fed. Reg. at 35,183; see also 2019 Final Rule, 84 Fed. Reg. at 44,987. The "baseline jeopardy" concept simply requires that the Services acknowledge degraded baseline conditions for species and critical habitat and take those already-degraded conditions into account when determining whether new actions will jeopardize a species or adversely modify critical habitat. See *NWF v. NMFS*, 524 F.3d at 929. Nonetheless, in the preamble to the 2019 Rule, the Services asserted, wrongly, that the cases that recognize baseline jeopardy (and prohibit actions that increase that jeopardy) are "inconsistent with the statute and [the pre-2019] regulations." 2019 Proposed Rule, 83 Fed. Reg. at 35,182 (citing *NWF v. NMFS*, 524 F.3d at 930; *Turtle Island*, 878 F.3d at 735). The Services' inexplicable refusal to acknowledge the reality of existing baseline conditions, combined with an "environmental baseline" definition that allows agencies to move impacts from ongoing actions into that baseline, invites the Services to undermine statutory protections for listed species and critical habitat by viewing new impacts in isolation.

Second, the improper inclusion of ongoing effects in the baseline has in the past led action agencies and the Services to label an action's effects as "beneficial" as compared to a severely degraded baseline. The statute, however, sets a different and higher standard. "[T]he relevant inquiry is whether the action causes jeopardy or adverse modification *period*—not whether it provides 'incremental improvements' that make conditions 'slightly less harmful' to a species but still reduce the likelihood of survival and recovery for that species." *Cooling Water Intake Structure Coal. v. U.S. Env't Prot. Agency*, 905 F.3d 49, 81 (2d. Cir. 2018) (emphasis in original) (citing *Aluminum Co. of Am. v. Bonneville Power Admin.*, 175 F.3d 1156, 1162 n.6 (9th Cir. 1999)). This is particularly true where "the species already stands on the brink of extinction, and the incremental improvements pale in comparison to the requirements for survival and recovery." *Aluminum Co.*, 175 F.3d at 1162 n.6. A purportedly "beneficial" action, in other words, can absolutely still cause jeopardy. See, e.g., *Am. Rivers*, 895 F.3d at 47 (rejecting FWS's argument that because the federal agency "propose[d] to improve" degraded baseline conditions, the biological opinion need not take those degraded conditions into account); *Natl Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 888 (D. Or. 2016) (noting that "[a]n increasing population . . . does not necessarily equate to a 'no jeopardy' finding"); *Ctr. for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 998–1000 (D. Ariz. 2011) (rejecting biological opinion that failed to "analyze the effects on the improvement in the status of the species to the point at which it is no longer endangered"); *S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247, 1267 (E.D. Cal. 2010) (finding biological opinion unlawful where agency concluded that the action will "partially reduce" impacts to

listed fish without analyzing whether this reduction was sufficient to avoid causing jeopardy).

The result is gradual baseline degradation; even as species conditions worsen incrementally over time, each new agency action is declared to be neutral, or even an improvement. This facilitates long-term harm while avoiding jeopardy or adverse modification determinations that would require meaningful changes in agency actions and their effects.

Consultations on long-term dam operations are often used to illustrate this problem. The ongoing operation of dams (many built prior to the passage of the ESA) have been catastrophic for listed aquatic species and their habitats. Some of these effects could be mitigated or halted by significantly modifying the ongoing operations or by removing the dams altogether. For consultations on proposed modifications to these ongoing operations, it is essential that the ongoing impacts be considered as part of the action at issue. But under the current baseline definition (together with the Services' rejection of the "baseline jeopardy" concept, discussed above) the Services may sweep the "ongoing" impacts of the overall operations into the environmental baseline and assess the effects of the proposed modification in isolation. Once stripped of context, new management actions may appear minimally harmful or even helpful to species—and the dire underlying state of the species may never be addressed.

The resulting consultations thwart the ESA's underlying objectives. As mentioned, in enacting the ESA, Congress intended agencies to conserve threatened and endangered species, with conservation defined to include all methods necessary for recovery. See 16 U.S.C. §§ 1531(b), 1532(3). In turn, Congress required consultation to ensure action agencies comply with their substantive duty to avoid acting in ways likely to jeopardize listed species or destroy or adversely modify critical habitat. See *id.* § 1536(a)(2).

Contrary to these objectives, the Services' proposed "environmental baseline" definition paves the way for consultations that do not grapple with the past, present, and future impacts of ongoing activities that have already severely degraded the status of imperiled species. Indeed, under the confusing new language that arguably folds *future* conditions into the environmental baseline, the baseline may become so inflated as to make consultation entirely misleading. In addition, if consultation does not accurately identify the effects of a proposed action, action agencies may avoid implementing reasonable and prudent alternatives to ensure that they are not likely to jeopardize listed species or destroy or adversely modify critical habitat.

Finally, the Services propose to retain language, originally added in 2019, that includes impacts from “Federal agency activities or existing Federal agency facilities *that are not within the agency’s discretion to modify*” in the environmental baseline. 2025 Proposed Rule, 90 Fed. Reg. at 52,606; see also 50 C.F.R. § 402.02 (2019) (marginally different language specifying “ongoing agency activities or existing agency facilities that are not within the agency’s discretion to modify”). The Services seek to justify this language by relying on the Supreme Court’s decision in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007). See 2025 Proposed Section 7 Revisions at 52,602. *Home Builders*, however, is inapposite. *Home Builders* dealt with the question of what kinds of actions require consultation, not how to proceed with the consultation analysis. See *Home Builders*, 551 U.S. at 656–64. Once consultation starts, agencies must adequately assess jeopardy risks.

Courts have consistently supported this conclusion. In dam cases, for instance, agencies have often attempted to review only the narrow impacts of their proposed actions as part of consultation—ignoring the discretion they may have to significantly alter other parts of dam operations. Courts have rejected this approach. See, e.g., *NWF v. NMFS*, 524 F.3d at 928 (rejecting NMFS’s arguments that ongoing operations were nondiscretionary, and holding that “NMFS’s contention that competing mandates for flood control, irrigation, and power production create any immutable obligations that fall outside of agency discretion is not persuasive.”); see also *Pac. Coast Fed’n of Fishermen’s Assocs. v. Gutierrez*, 606 F. Supp. 2d 1122, 1177–78 (E.D. Cal. 2008) (in case involving Shasta dam and other features of federal water project, rejecting NMFS’s sole focus on incremental impacts). Nothing in *Home Builders* supports the agencies’ cramped view of their own discretion. Indeed, *NWF v. NMFS* explicitly rejected an agency argument based on *Home Builders* that the agency lacked the discretion to address the degraded baseline and therefore had no obligation to consider the baseline as part of consultation. See 524 F.3d at 928 (“[N]either the ESA nor *Home Builders* permits agencies to ignore potential jeopardy risks by labeling parts of an action nondiscretionary.”). As one court explained, there can be no question “that the ESA requires that *all* impacts of agency action—both present and future effects on species—be addressed in the consultation’s jeopardy analysis.” *Am. Rivers v. U.S. Army Corps of Eng’rs*, 271 F. Supp. 2d 230, 255 (D.D.C. 2003) (citing *Conner v. Burford*, 848 F.2d 1441, 1457–58 (9th Cir. 1988)) (emphasis added).

For all of these reasons, the Services should decline to adopt the proposed definition of “environmental baseline” and should restore the meaning of the term “environmental baseline” that existed before 2019.

Proposed Addition of § 402.17

Defenders opposes the proposed addition of § 402.17.

The proposed section 402.17, most of which was originally added to the section 7 regulations in 2019 and then removed from the regulations in 2024, purports to list “factors to consider” in determining whether activities are “reasonably certain to occur” and/or “caused by the proposed action.” 2025 Proposed Rule, 90 Fed. Reg. at 52,607. But, as the Services correctly noted in promulgating the last section 7 regulations, section 402.17 likely conflicts with the Endangered Species Act’s requirements. See 89 Fed. Reg. 24,268, 24,270, 24,280 (Apr. 5, 2024) (noting that directing agencies to disregard reasonably certain effects that may be based on less than substantial information could be inconsistent with the statute) (“2024 Final Rule”). The present regulatory proposal heightens, rather than ameliorates, this concern.

First, the requirement that agencies use “clear and substantial information” to determine whether activities are “reasonably certain to occur” conflicts with the ESA’s requirement that consultations be based on “the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2). The Services assert that “there is no actual tension” between these two requirements, since, in the proposed revisions, “[a] conclusion of reasonably certain to occur must be based on clear and substantial information, using the best scientific and commercial data available.” 2025 Proposed Rule, 90 Fed. Reg. at 52,603, 52,607. This justification merely repeats the two conflicting standards, however, and does nothing to resolve the tension between them. As the Services themselves have previously pointed out, “[t]he best available data are not always free of ambiguities and thus ‘clear,’ nor are they invariably quantifiable or ‘substantial’ in quantity.” 2024 Final Rule, 89 Fed. Reg. at 24,270. Thus, the “clear and substantial information” requirement in the proposed section 402.17 inappropriately restricts the scope of “the best available scientific and commercial data” by demanding a certain degree of certitude and quantification. See *id.*

This restriction is inconsistent with the text of the ESA, which requires every federal agency 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.” 16 U.S.C. § 1536(a)(2); 2024 Final Rule, 89 Fed. Reg. at 24,270.³⁸ To “insure” means to “make certain, to secure, to guarantee.” *Home Builders*, 551 U.S. at 667 (internal quotation marks omitted); see also 2024 Final Rule, 89 Fed. Reg. at 24,270 (discussing *Nat’l Ass’n of*

³⁸ See also Defenders of Wildlife, Comment Letter on Proposed Revision of Regulations for Interagency Cooperation, Docket No. FWS-HQ-ES-2021-0104-0001 12–13 (Aug. 21, 2023), <https://www.regulations.gov/comment/FWS-HQ-ES-2021-0104-100277>.

Home Builders, 551 U.S. at 667). Agencies cannot meet that statutory requirement if they must disregard any reasonably certain effects that have ambiguities in the underlying information or may be based on less than substantial information, and a rule requiring agencies to do so is inconsistent with the statutory text and thus unlawful. See 2024 Final Rule, 89 Fed. Reg. at 24,270 (“Accordingly, a regulation that impairs agencies’ ability to carry out that duty by requiring them to disregard any reasonably certain effects that have ambiguities in the underlying information or that may be based on less than substantial information could be inconsistent with the statute.”).³⁹

In the same vein, the proposed section 402.17 may also inappropriately limit the effects analysis by listing factors that cut against consideration of certain effects, such as remoteness in time or geography or attenuated causation. See 2025 Proposed Rule, 90 Fed. Reg. at 52,607 (listing these among the required considerations for “determining that a consequence to the species or critical habitat is not caused by the proposed action”). Inclusion of these examples, particularly without inclusion of factors that *support* a causation finding, risks inappropriately limiting the effects analysis, decreasing the likelihood of a jeopardy/adverse modification finding and thereby decreasing protections for species.⁴⁰ Limiting protections in this way is at odds with the purposes of the ESA, as discussed above.

Finally, while the proposed section 402.17 is largely identical to section 402.17 of the 2019 regulations, see 50 C.F.R. § 402.17 (2019), several additions make the section even more harmful to species, increase the tension between the regulations and the ESA’s text and conservation objectives, and threaten to severely constrict consultations.

First, under the proposed section 402.17(a)(4), agencies must consider “[t]he amount of State, tribal, territorial, or local administrative discretion remaining to be exercised” in deciding whether an effect of the proposed action is “reasonably certain to occur.” 2025 Proposed Rule, 90 Fed. Reg. at 52,607. The proposed language invites the Services to reason, in other words, that state or local decisionmakers may exercise their own independent discretion to reduce the ecological consequences of a proposed agency action, and therefore conclude that the effects of the federal approval decision are not “reasonably certain to occur.” This language invites speculation as to what these state or local measures will require. Absent any binding assurance that state or local measures will

³⁹ See also *id.*

⁴⁰ See *id.* at 13.

mitigate an effect, ignoring that effect in the consultation analysis risks violating the jeopardy standard.

Second, the proposed section 402.17(b) would require agencies to consider excluding an effect from the consultation analysis where “[t]he agency has no ability to prevent the consequence due to its limited statutory authority” and if “the consequence would occur regardless of whether the proposed action goes forward.” 2025 Proposed Rule, 90 Fed. Reg. at 52,607.

These alarming new additions contradict the ESA’s requirement to consider the cumulative and indirect effects of an action. The first addition invites a federal action agency to *assume* federal approval of the proposed action and ignore any follow-on consequences “due to its limited statutory authority.” Again, as outlined above, under this logic the consultation for a federal highway project might entirely ignore the effects of local development facilitated by the new federal project because the local development will be approved and permitted by non-federal authorities.

This logic might all but eliminate the cumulative and indirect effects analysis that courts have long required. For example, in *National Wildlife Federation v. Coleman*, the Court of Appeals for the Fifth Circuit found that, under the ESA, the agency constructing a highway had to not only consider the loss of habitat caused by the highway itself, but also the residential and commercial development expected to result from the construction. See 529 F.2d 359, 373 (5th Cir. 1976); see also *Conner*, 848 F.2d at 1454 (“In light of the ESA requirement that the agencies use the best scientific and commercial data available to insure that protected species are not jeopardized, 16 U.S.C. § 1536(a)(2), the FWS cannot ignore available biological information or fail to develop projections of oil and gas activities which may indicate potential conflicts between development and the preservation of protected species.”); *Middle Rio Grande Conservancy Dist. v. Babbitt*, 206 F. Supp. 2d 1156, 1172–74 (D.N.M. 2000) (discussing *Nat’l Wildlife Fed’n v. Coleman*); *Riverside Irr. Dist. v. Andrews*, 568 F. Supp. 583, 588–89 (D. Colo. 1983) (“The case law . . . is clear that federal agencies are to consider *many potential effects from a project* on an endangered species.”) (emphasis added).

Under the proposed sections 402.17(a) and (b), however, even if the new highway at issue in *Coleman* would cause—and indeed was intended to facilitate—new development along the highway, the action agency might pass on assessing this effect. If the new development was likely to jeopardize listed species or adversely modify critical habitat, the opportunity to avoid those effects would likely be lost. As a result, the agency will have facilitated jeopardy or adverse modification—a violation of the ESA’s flat statutory prohibition. See 16

U.S.C. § 1536(a)(2) (agencies are required to “insure” that their actions do not result in jeopardy).

The proposed language forgoing analysis for effects that “would occur regardless” of the proposed action also threatens to severely constrict consultations and invites harm to species most at risk of extinction. After all, where species face harm from multiple sources—say, development pressure plus climate change, or development pressure plus invasive species—there is even more cause to address the threats that can be managed through effective consultation. Yet the proposed regulations take precisely the opposite approach, writing off effects that are threatened by sources other than the exact proposed action under consideration. Many wetlands in south Florida, for example, will almost certainly be lost to sea level rise at some point in the future. These areas are home to iconic listed species like the Florida panther and the American alligator. Under proposed section 402.17(b)(5), a federal agency considering a proposal to fill federal wetlands and pave over habitat for those species might reason that the loss of this habitat “would occur regardless of whether the proposed action goes forward” because of sea level rise, and therefore might elect to ignore the effects of the proposed action almost entirely.⁴¹ Paradoxically, this requirement would *reduce* protections for America’s most vulnerable species, making it easier to approve projects that would harm listed species wherever their habitats are already at high risk.

Read alongside the rest of section 402.17 as proposed, the requirement to consider effects that “would occur regardless” arbitrarily skews the consultation process in favor of minimizing the analysis. On the one hand, the rest of the proposed section 402.17 painstakingly constricts the consultation analysis, excluding certain effects by stating that they may not be “reasonably certain” to occur. Agencies are now *required* to consider whether an effect is “remote” in time or geography from the proposed action and even must consider what completely separate decision-making bodies might choose to do; in addition, they can *only* consider “clear and substantial information.” See 2025 Proposed Rule, 90 Fed. Reg. at 52,607 (proposed language for section 402.17(a) and (b)). The proposed section 402.17(b)(5), on the other hand, seeks to achieve the same result (i.e., seeks to constrict the scope of consultation) by permitting the exact opposite approach with respect to species threats that are *not* part of the proposed action. With no guidance or guardrails as to timeframe, certainty, or the foreseeability of impacts to species, the

⁴¹ Across the U.S., developers are consistently building in places considered at high risk of climate-related disasters. See, e.g., Eva Xiao, *Why is America still building houses in climate danger zones?*, FINANCIAL TIMES (Feb. 26, 2025), <https://www.ft.com/content/f8c00c80-1c41-4796-8f74-9d6f8f87a713>.

language invites the reviewing agency to put forward anything that the agency feels would “occur regardless” so as to avoid further analysis. This discrepancy is not only itself arbitrary but also invites arbitrary, and ultimately harmful, decisions.

To return to the Florida wetlands example: if a developer were proposing to fill in the wetland and pave over habitat for a strip mall, the permitting agency might argue that it was *not allowed* to consider the imminent and near-certain effects of road building and increased traffic in the area because it lacked “the ability to prevent the consequence due to its limited statutory authority” (under proposed section 402.17(b)(4)) and/or because State and local authorities still had to make decisions about those effects (under proposed section 402.17(a)(4)). But under proposed section 402.17(b)(5), the agency *would* be able to point to sea level rise at some unspecified point in the future as a reason to entirely ignore the consequences of paving over the wetland. In this situation, the agency and Services could complete the consultation process with next to no analysis at all. Congress passed the ESA to prevent this kind of uninformed decision-making, not to enable it.

The Services rely on the Supreme Court’s decision in *Seven County Infrastructure Coalition v. Eagle County*, 605 U.S. 168, 189-90 (2025), to assert that “an agency’s action cannot be considered a cause of an environmental effect when the agency has no authority to prevent the effect.” 2025 Proposed Rule, 90 Fed. Reg. at 52,604; see also *id.* at 52,607. But that conclusion misapplies the reasoning in *Seven County*, which examined an agency’s responsibilities only under the National Environmental Policy Act (“NEPA”), a “purely procedural statute.” See *Seven County*, 605 U.S. at 180–81. The distinction matters a great deal: while NEPA does not compel substantive results, the ESA unquestionably does. *Seven County* addressed the narrow question of the scope of what agencies must address in environmental impact statements (“EIS”)—it did not conclude that an agency action “cannot be considered a cause” of other actions outside the agency’s jurisdiction, but rather that “the fact that other projects might foreseeably be built or expanded in the wake of the current project does not, by itself, make the agency responsible for addressing the environmental effects of those other projects” in an EIS. *Id.* at 189. The ESA, however, imposes a substantive duty to “*insure*” that federal agency actions do not “result” in harm to imperiled species or their critical habitats. 16 U.S.C. § 1536 (emphasis added). As the D.C. Circuit has noted, the caution the ESA requires “can only be exercised if the agency takes a look at all the possible ramifications of the agency action.” *North Slope Borough v. Andrus*, 642 F.2d 598, 608 (D.C. Cir. 1980).

Proposed Revisions to § 402.14, Reasonable and Prudent Measures

Defenders opposes removing offsets from reasonable and prudent measures.

In addition to the proposed revisions addressed above, the Services also propose to completely remove new language added in 2023 to 50 C.F.R. § 402.14 (“Formal consultation”). That language essentially does two things. First, it allows reasonable and prudent measures and the terms and conditions that implement them (collectively, “RPMs”) to expressly allow minimization of impacts through offsets. Second, and relatedly, it allows offsets and other types of RPMs to be implemented inside or outside of the action area. The relevant passage is below (the language with strikethrough is that proposed for rescission):

~~(2) Reasonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action, may involve only minor changes, and may include measures implemented inside or outside of the action area that avoid, reduce, or offset the impact of incidental take.~~

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

Defenders opposes these changes for the reasons set forth in more detail below.

Allowing Offsets in RPMs is Lawful and Promotes the Central Goal of the ESA

As described in more detail in the sections above, under the ESA all federal agencies must consult with the Services to ensure that actions they carry out, fund, or approve do not threaten the existence of listed species, or destroy or adversely modify their critical habitat.

In 1982 Congress amended the Endangered Species Act to (among other things) require that the Secretary include in incidental take statements “those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact.” 16 U.S.C. § 1536(b)(4)(C)(ii). Those RPMs “must be complied with by the Federal agency or applicant (if any), or both.” *Id.* § 1536(b)(4)(C)(iv). Though the amendment did not place such a limitation in the text of the Act, the Services would years later set forth in their consultation handbook that “[i]t is not appropriate to require mitigation [meaning

compensatory mitigation or offsets] for the impacts of incidental take. . .”⁴² The handbook does not provide any explanation as to why they limited the statutory language contained in ESA section 7(b)(4) to exclude offsets. Given the conservation goal of the ESA and its particular focus on species recovery, it seems inappropriate to restrict RPMs to on-site actions or exclude minimization through offsets.

The Services do not offer any detailed explanation as to why offsets cannot be used as minimization under section 7(b)(4). Modern mitigation practice typically follows a “mitigation hierarchy:” (1) avoidance, where impacts are removed or obviated completely; (2) minimization, where impacts that cannot be avoided are reduced in impact; and finally (3) offset, or compensatory mitigation, where residual impacts are addressed by restoring or protecting equivalent resources elsewhere. We assume that the Services now argue that since the word “mitigation” does not appear in the RPM provision of section 7(b)(4), the “best reading” of the statute would construe RPMs to only include what is sometimes categorized as the “minimization” portion of the hierarchy, which is often differentiated from offsets. See 2025 Proposed Rule, 90 Fed. Reg. at 52,601.

Self-imposing this restrictive reading would inappropriately constrain conservation of listed species. Though the mitigation hierarchy is a useful higher-level concept map for practitioners, in practice the boundaries between the three mitigation hierarchy categories (avoidance, minimization, and offset) are far more fluid and nebulous. Entirely excluding one of the three categories is therefore impractical.

Offsets can be a critically important and flexible tool that allows industry to coexist with biodiversity, and removing this tool from the Services’ toolbox would not necessarily reduce regulatory burden but increase it over the long term by hindering recovery of listed species. Indeed, much of the impetus for biodiversity offsets has come from industry, including extractive industries. For example, the federal government and conservation groups teamed up with numerous companies (including several American companies) to develop the Business and Biodiversity Offsets Program (BBOP), a global leader in the development of responsible offsets.⁴³ Companies like Chevron, Microsoft, and J.P. Morgan Chase have

⁴² U.S. FISH & WILDLIFE SERV. & NAT’L MARINE FISHERIES SERV., ENDANGERED SPECIES CONSULTATION HANDBOOK 4–53 (1998), <https://www.fws.gov/sites/default/files/documents/endangered-species-consultation-handbook.pdf>.

⁴³ See *generally* BBOP, THE BUSINESS AND BIODIVERSITY OFFSETS PROGRAMME: PLANNING POLICIES AND PROJECTS TO ACHIEVE A NET GAIN OF BIODIVERSITY (2016), [final-revised-bbop-strategy-20-1-16-pdf.pdf](https://www.biodiversity.org/sites/default/files/2016-11/final-revised-bbop-strategy-20-1-16-pdf.pdf) (last visited Dec. 17, 2025).

used offsets to minimize their impacts on biodiversity.⁴⁴ And in addition to offsets offering greater flexibility to allow economic activity to move forward, the offsets market has become economically important itself. Over the past few decades, biodiversity offset markets in the United States—including conservation banks serving industries whose activities impact threatened and endangered species—drive significant economic activity, generating approximately \$3.6 billion dollars in private investment a year.⁴⁵ Offsets can be a win-win for both industries and biodiversity.

There is also no legal requirement to disallow the use of offsets in RPMs. Congress mandated that all federal agencies should strive to conserve species, with “conserve” defined as “the use of *all methods and procedures* which are necessary to [recover] any endangered species or threatened species” (emphasis added). 16 U.S.C. § 1532(3). Given this broad objective and Congress’s command to use “all” methods to achieve recovery, the best reading of the statute is that the provisions of section of 7(b)(4) were intended to be interpreted expansively. See also *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Or.*, 515 U.S. 687, 708 (1995) (“When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary.”).

In fact, in promulgating the final section 7 regulations last year the Services noted that the inclusion of offsets “more fully effectuate[d] the intent of Congress and better serve[d] the conservation goals of the ESA.” 2024 Final Rule, 89 Fed. Reg. at 24,285 (citing 16 U.S.C. § 1531(b)). Specifically, section 7(b)(4)(C)(ii) of the ESA states that RPMs are to include measures that minimize the *impacts* of incidental take, not incidental take itself. See *id.* at 24,283. Thus, “offsets may minimize the impacts of incidental take on the species through measures that counterbalance the loss of individuals taken as a result of the action subject to consultation . . .” *Id.* The Services also noted that “Congress considered and rejected

⁴⁴ See, e.g., *Environment*, CHEVRON, <https://www.chevron.com/sustainability/environment> (“[Chevron’s] aim is to develop an understanding of potential risks and use mitigation to avoid, reduce, restore or offset potential impacts on biodiversity.”) (last visited Dec. 17, 2025); Mark Segal, *JPMorgan, Microsoft Back New Financing Model to Scale Nature-Based Carbon Removal Projects*, ESGTODAY (July 23, 2025), <https://www.esgtoday.com/jpmorgan-microsoft-back-new-financing-model-to-scale-nature-based-carbon-removal-projects/>.

⁴⁵ See GREEN FIN. INST. HIVE ET AL, REVENUES FOR NATURE GUIDEBOOK SERIES: WETLAND MITIGATION AND ENDANGERED SPECIES HABITAT BANKING, UNITED STATES 6 & fn.1 (2024), hive.greenfinanceinstitute.com/wp-content/uploads/2024/10/R4N-GUIDEBOOKS-US-WETLANDS.pdf (the U.S. wetland & stream and species markets together bring in \$3.6 billion each year; other offset programs that may benefit biodiversity, however, exist, such as the sales of voluntary and compliance carbon credits from nature-based solutions and water quality trading volume).

specific language that would have restricted reasonable and prudent measures to activities aimed at reducing incidental take,” indicating a “purposeful choice . . . in favor of the authority of the Services to select measures that address ‘impacts to the species’ from incidental take, rather than confining these measures to reducing incidental take levels only.” *Id.* at 24,284 (emphasis in original).

The Services’ justification for removing offsets from “reasonable and prudent measures” is also in tension with another closely related term that the ESA delineates in section 7(b): “reasonable and prudent alternatives.” The ESA gives the Secretary broad discretion to design “reasonable and prudent alternatives” if jeopardy or adverse modification is found. The only requirements the ESA states for those alternatives are: (1) that the Secretary “believes [they] would not violate [section 7(a)(2)],” and (2) that they “can be taken by the Federal agency or applicant in implementing the agency action.” 16 U.S.C. § 1536(b)(3)(A). In other words, as long as the alternatives themselves don’t harm listed species and either the agency or the applicant is capable of effectuating them, they are allowed. It would be illogical to read the ESA as allowing the Secretary almost unlimited discretion in suggesting alternatives to the action but not in minimizing an action’s effects.

The concept of “minimizing” as already used by the federal government supports this reading of the ESA. Though the term “minimize” or “minimization” is not defined in the ESA or its implementing regulations, the Council on Environmental Quality’s (“CEQ”) NEPA regulations (now rescinded⁴⁶) defined “mitigation measures” broadly to include, among other things, “minimizing the adverse effect by limiting the degree or magnitude of the action and its implementation.” 40 C.F.R. § 1508.1(y)(2) (2024). This language was adopted by both FWS and NOAA in their respective mitigation policies.⁴⁷ When carried out in the context of an agency action, offsets clearly “limit[] the degree or magnitude of the action and its implementation.” For example, if an agency action destroys a migratory stopover location for listed birds, then restores a waterbody in an adjacent area that can serve as a replacement stopover location, then the project’s overall impact has been minimized through an offset. Similarly, other offsets that are incorporated into the action through RPMs ultimately “limit[] the degree or magnitude of the action and its implementation” in the sense that the damage caused to the species or its critical habitat is limited with the

⁴⁶ On February 25, 2025, the Council on Environmental Quality published an interim final rule rescinding its regulations (40 C.F.R. §§ 1500–1508). See *generally* 90 Fed. Reg. 10,610 (Feb. 25, 2025).

⁴⁷ See *generally* U.S. FISH & WILDLIFE SERV., MITIGATION POLICY (APPENDIX 1, 501 FW 2) 1 (2023); NAT’L OCEANIC & ATMOSPHERIC ADMIN., NAO 216-123: NOAA MITIGATION POLICY FOR TRUST RESOURCES 1, 5 (2022).

addition of such RPMs. Ideally, offsets can offer a way to no net loss, where when the project has finished the gains provided by the offset/s cancel out the losses caused by the action itself.

The Services explain that, broadly, the proposed regulatory revisions were driven by concerns over compliance with the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*. See 2025 Proposed Rule, 90 Fed. Reg. at 52,601. As mentioned above, however, nothing in *Loper Bright* requires agencies to re-examine their regulations. Rather, *Loper Bright* ended the judicial practice of deferring to agencies' interpretations of ambiguous statutory terms. See *Loper Bright*, 603 U.S. at 385–86. *Loper Bright*'s ruling cannot apply here, as FWS asserts, because requiring offsets is consistent with the ESA's text for all of the reasons set forth above.

The Services are also reviewing whether offsets “are consistent with the regulatory requirement not to impose anything more than ‘minor changes’ to a proposed action through reasonable and prudent measures.” 2025 Final Rule at 52,601. There is no inconsistency here; offsets need not be expensive, extensive, or burdensome. The development of FWS-approved mitigation banks and in-lieu fee programs have made offsets broadly available. Indeed, the ESA and the current regulations do not mandate RPMs for every biological opinion, but give the Services the discretion to issue them when it makes sense. For offsets specifically, the Services have used them sparingly. During the period in which the explicit offset language has been in effect, FWS issued only one biological opinion that included RPMs with offsets, and that was after the agency undergoing consultation (U.S. Space Force) agreed to it. See Declaration of Gina Shultz at ¶ 11, *Nat'l Hydropower Ass'n v. U.S. Fish & Wildlife Serv.*, No. 1:24-cv-2285 (D.D.C. Apr. 14, 2025), ECF No. 19-2.

Finally, we note that allowing offsets in RPMs can help federal agencies meet their legal obligations under section 7(a)(1) of the ESA, which requires agencies across the federal government to “utilize their authorities in furtherance of . . . the conservation of endangered species and threatened species. . .” 16 U.S.C. § 1536(a)(1). While at the individual action level agencies are required to avoid carrying out activities that are likely to jeopardize the existence of listed species or adversely modify their critical habitat, agencies' responsibilities to listed species go further.

For these reasons, we recommend the Services keep the current language explicitly stating reasonable and prudent measures can include offsets.

Offsets and Other Forms of Minimization Should Not Be Restricted to the Action Area

The Services also seek to rescind language that clarifies that RPMs, including but not limited to offsets, may be implemented outside the action area. See 2025 Proposed Rule, 90 Fed. Reg. at 52,606–07. The Services do not offer an argument as to why this is appropriate, but simply propose to remove the relevant language.

Defenders opposes this change for the reasons provided above. In addition, Defenders notes that this proposed change may negatively affect the use of beneficial minimization measures other than offsets. For example, RPMs often involve research on a listed species, which frequently happens off-site in laboratories, in field sites outside the action area where the species is found, etc. There are numerous other conservation measures that make more sense off-site. Where a project may displace listed species, off-site fencing can ensure they do not move towards areas where additional threats may exist. Stormwater retention ponds can be built on properties adjacent to the action area to prevent pollution discharge to waters containing listed species. Temperature changes caused by new dam activities in the action area can be compensated by dam management further upstream. Given that removing this language may signal to Services staff that they can no longer use such beneficial off-site minimization measures, we recommend the language be retained—even if the Services decides to remove the offsets language of 50 C.F.R. § 402.14(i)(2).

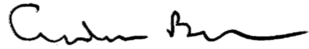
There is nothing in the ESA or its regulations restricting RPMs only to the “action area.” The current implementing regulations define the “action area” to include “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.” 40 C.F.R. § 402.02. In other words, the action area is simply where the federal action’s impacts are experienced; there is no legal or scientific reason to limit minimization measures only to things that can be done within that boundary. As noted above, CEQ’s former NEPA implementing regulations and the Services’ own mitigation policies describe minimization as “limiting the degree or magnitude of the action and its implementation.” 40 C.F.R. § 1508.1(y)(2). Limiting consulting agencies’ responsibilities to the action area itself even if actions outside the area can help minimize the impacts of the action makes no sense under the plain text of the law or the explicit goals set out by Congress when they passed it.

* * *

For the foregoing reasons, Defenders is gravely concerned about the harm the 2025 Proposed Rule may cause to imperiled species and their habitats. We urge the Services not to adopt the 2025 Proposed Rule.

We appreciate your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew Bowman". The signature is fluid and cursive, with a long horizontal stroke at the end.

Andrew Bowman
President & CEO
Defenders of Wildlife |