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Submitted via https://www.regulations.gov

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1315 East-West Highway
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RE: Proposed Rule – Interagency Cooperation - Section 7(a)(2) Consultation (Docket Number FWS–HQ–ES–2021–0104)

Dear Director Williams, Mr. Aubrey, and Ms. Dobrzynski,

The Desert Tortoise Council (Council) is a non-profit organization comprised of hundreds of professionals and laypersons who share a common concern for wild desert tortoises and a commitment to advancing the public's understanding of desert tortoise species. Established in 1975 to promote conservation of tortoises in the deserts of the southwestern United States and Mexico, the Council routinely provides information and other forms of assistance to individuals, organizations, and regulatory agencies on matters potentially affecting desert tortoises within their geographic ranges.

As of June 2022, our mailing address has changed to:

Desert Tortoise Council
3807 Sierra Highway #6-4514
Acton, CA 93510.

Our email address has not changed. Both addresses are provided above in our letterhead for your use when providing future correspondence to us.

We appreciate this opportunity to provide comments on the proposed changes to regulations on Federal interagency cooperation for threatened and endangered species. Because the proposed changes in the regulations may affect the survival and conservation of the Mojave desert tortoise (*Gopherus agassizii*) (synonymous with Agassiz's desert tortoise), our comments are based on our commitment to enhance protection of this species and provide for its conservation. Please accept, carefully review, and include in the administrative record, the following comments by the Council.

The Mojave desert tortoise is among the top 50 species on the list of the world's most endangered tortoises and freshwater turtles. The International Union for Conservation of Nature's (IUCN) Species Survival Commission, Tortoise and Freshwater Turtle Specialist Group, now considers the Mojave desert tortoise to be Critically Endangered (Berry et al. 2021) "… based on population reduction (decreasing density), habitat loss of over 80% over three generations (90 years), including past reductions and predicted future declines, as well as the effects of disease (upper respiratory tract disease/mycoplasmosis). *Gopherus agassizii* (sensu stricto) comprises tortoises in the most well-studied 30% of the larger range; this portion of the original range has seen the most human impacts and is where the largest past population losses had been documented. A recent rigorous rangewide population reassessment of *G. agassizii* (sensu stricto) has demonstrated continued adult population and density declines of about 90% over three generations (two in the past and one ongoing) in four of the five *G. agassizii* recovery units and inadequate recruitment with decreasing percentages of juveniles in all five recovery units."

This status, in part, prompted the Council to join Defenders of Wildlife and Desert Tortoise Preserve Committee (Defenders of Wildlife et al. 2020) to petition the California Fish and Game Commission in March 2020 to elevate the listing of the Mojave desert tortoise from threatened to endangered in California under the California Endangered Species Act.

Comments on Proposed Amendments for Interagency Cooperation

Background

On Thursday, June 22, 2023, the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) (collectively Services) published in the *Federal Register* a proposed rule to amend portions of the regulations that implement section 7(a)(2) of the Federal Endangered Species Act of 1973, as amended (FESA or Act)[1]. Title 50, part 402, of the Code of Federal Regulations (CFR) establishes the procedural regulations governing interagency cooperation under section 7 of the Act, which requires Federal agencies, in consultation with and with the assistance of the Secretaries of the Interior and Commerce, to insure that any action authorized, funded, or carried out by such agencies is not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species.

[1] https://www.federalregister.gov/documents/2023/06/22/2023-13054/endangered-and-threatened-wildlife-and-plants-revision-of-regulations-for-interagency-cooperation

The changes the Services are proposing are the result of two directives – Executive Order 13990 and a Federal court decision. The former document directed Federal agencies to immediately review agency actions taken between January 20, 2017, and January 20, 2021, and, as appropriate and consistent with applicable law, consider suspending, revising, or rescinding agency actions that conflict with important national objectives, including promoting and protecting public health and the environment, and to immediately commence work to confront the climate crisis. The Federal District Court decision, first vacated the Services' 2019 recent revisions (referred to as the 2019 rule) to the regulations on the FESA, and later remanded the 2019 rule to the Services without vacating it, as the Services agreed they would implement a rulemaking process to revise the 2019 rule.

Proposed Changes to 50 CFR Part 402—Interagency Cooperation

These regulations implement what is frequently referred to as the section 7 consultation process between a Federal agency and the USFWS or NMFS.

The Services are proposing the following changes:

- in section 402.02—Definitions, revise the definition of "effects of the action" and "environmental baseline;"
- revise Section 402.16—Reinitiation of Consultation;
- delete Section 402.17—Other Provisions;
- amend the regulatory provisions relating to the scope of reasonable and prudent measures (RPMs) in an incidental take statement (ITS);
- revise the definition of "reasonable and prudent measures;" and
- revise Section 50 CFR 402.14—Formal Consultation.

In addition, the Services requested the public to provide comments on specific sections of revisions to the regulations in 50 CFR 402.02 and 402.14 regarding the scope of RPMs in incidental take statements, and all aspects of the 2019 rule, including whether any of those provisions should be rescinded in their entirety (restoring the prior regulatory provision) or revised in a different way.

Definition of Effects of the Action and Environmental Baseline

We find the Services' desire to use terms that are different from those used in other Federal environmental statutes and regulations including those that preceded the FESA, such as the National Environmental Policy Act (NEPA), and the Services' inconsistent use of words or terms throughout the FESA regulations to be confusing and unclear. For example, current regulations restrict using the term "activities" to those changes that are caused by the proposed action but are not part of the proposed action. For example, for the construction of a transmission line project, the description of the proposed action could not use the word "activities" to describe building access roads, clearing laydown areas, installing transmission poles, pulling transmission lines, etc. These would not be activities but actions. Similarly proposing to change environmental consequences to a listed species or critical habitat to "environmental impacts" is aligned with NEPA but not with the use of the term "effects of the action." We suggest using consistent terminology (1) throughout all FESA regulations (e.g., do not use "effects" in some sections and "impacts" in others, etc.), and (2) that is aligned with other environmental laws and regulations such as NEPA (e.g., mitigation).

Section 402.16—Reinitiation of Consultation

The current text at § 402.16(a) states that "[re]initiation of consultation is required and shall be requested by the Federal agency or by the Service, where discretionary Federal involvement or control over the action has been retained or is authorized by law." The Services propose to delete the words "or by the Service."

The Council recommends the following wording for this section – "[r]einitiation of consultation is required and shall be requested by the Federal agency, where discretionary Federal involvement or control over the action has been retained or is authorized by law. The Service may recommend consultation when the Federal agency does not reinitiate consultation." Occasionally we have experienced situations when the Federal agency has not reinitiated consultation, as not all Federal managers are knowledgeable about all requirements of the FESA. In these situations, the USFWS has reminded the Federal agency of this requirement. Providing the Services with the latitude to remind a Federal agency of the requirement to reinitiate consultation would help the Federal agency to comply with the FESA and conservation of listed species.

In the proposed rule the Services say, "Our proposed alteration does not prevent the Services from notifying the Federal agency if we conclude that circumstances appear to warrant a reinitiation of consultation or engaging in a conversation with the Federal agency over that issue**."** We disagree with this conclusion. Many Federal regulators and judges interpret laws and regulations from the perspective of an action is not allowed unless the law or regulation authorizes it. An absence of this wording means that some Federal regulators or judges would conclude this action is not allowed under the FESA regulations. We are not aware that Federal regulators or judges reach conclusions about actions that are unwritten/not discussed in Federal laws or regulations. Consequently, we strongly recommend this wording, "The Service may recommend consultation when the Federal agency does not reinitiate consultation," be included in this section of the regulations to clarify that the Services are able to do this.

In addition, the Council strongly requests that section 402.16 (b) be removed from the regulations. This section was added in 2019 and is part of the 2019 rule. It states:

> "(b) An agency shall not be required to reinitiate consultation after the approval of a land management plan prepared pursuant to 43 U.S.C. 1712 or 16 U.S.C. 1604 upon listing of a new species or designation of new critical habitat if the land management plan has been adopted by the agency as of the date of listing or designation, provided that any authorized actions that may affect the newly listed species or designated critical habitat will be addressed through a separate action-specific consultation. This exception to reinitiation of consultation shall not apply to those land management plans prepared pursuant to 16 U.S.C. 1604 if:
>
> (1) Fifteen years have passed since the date the agency adopted the land management plan prepared pursuant to 16 U.S.C. 1604; and
> (2) Five years have passed since the enactment of Public Law 115–141 [March 23, 2018] or the date of the listing of a species or the designation of critical habitat, whichever is later."

The requirements in this section are not founded in science and do not support the conservation purposes of the FESA. Rather, they appear to be arbitrary times selected with no biological relevance to the conservation needs of listed species or critical habitat.

Section 402.17—Other Provisions

In the 2019 rule, the Service added this section. Its intent was to clarify several aspects of the process of determining whether an activity or consequence is "reasonably certain to occur."

The Council finds this entire section confusing. It added requirements to consider issues that are not biologically- or science-based (e.g., "any remaining economic, administrative, and legal requirements necessary for the activity to go forward;" "the consequence is so remote in time from the action under consultation that it is not reasonably certain to occur;" "the consequence is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur;" and, "the consequence is only reached through a lengthy causal chain that involves so many steps as to make the consequence not reasonably certain to occur." We support deleting this section because it has no biological basis and is not science-based in its determination.

In addition, the 2019 rule attempted to define "reasonably certain to occur." This phrase refers to a threshold that is constantly changing, as our knowledge of listed species, their habitats needed for survival and conservation including critical habitat, and the impacts of human activities on listed species and habitats, is continually changing. "Reasonably certain" is defined in the dictionary as "being in accordance with reason" such as a reasonable theory supported with data. The process should not be described in the regulations because of its complexity. The process should be science-based using the best data available at the time of the consultation. The Council recommends describing the process that is science-based in a separate guidance document such as a handbook or solicitor's opinion.

Scope of Reasonable and Prudent Measure in an Incidental Take Statement

The Services are proposing the following revisions to the regulations on Reasonable and Prudent Measures (RMPs). The Services would clarify that, after considering measures that avoid or reduce incidental take within the action area, the Services may consider for inclusion as RPMs measures that offset any remaining impacts of incidental take that cannot be avoided. For example, in instances where the impact to the species occurs as the result of habitat modifications or destruction within the action area and cannot be minimized within the project site or action area, offsetting measures could include restoring or protecting suitable habitat for the affected species (e.g., via a species conservation bank, conservation easement with endowment, in lieu fee program, restoration program, etc.). These additional measures do not modify the action subject to consultation and may occur inside or outside of the action area. The preamble will sometimes refer to "offsetting measures" or "offsets" as measures that address the remaining impacts of incidental take that cannot be avoided.

As currently implemented under section 7(a)(2), every time there is a Federal action that results in take, only minimizing take moves a listed species farther from recovery and closer to the extinction threshold. Implementing measures that offset the remaining impacts to the species from incidental

take has the potential to keep the status of the listed species unchanged. While this does not contribute to the conservation of a listed species, it is an improvement over contributing to the eventual extinction of a listed species.

The prosed revision clarifies that RPMs minimize the impacts of incidental take, not minimize incidental take itself. It also would require a mitigation hierarchy approach of avoiding impacts, and then addressing any remaining impacts that cannot be avoided. This approach is similar to the NEPA approach as the NEPA regulations describe mitigation in the following order – avoid, minimize, rectify, reduce, and compensate. We suggest the Services adopt this hierarchy. The Council supports these revisions as they are more aligned with the conservation intent of the Act and consistent with other Federal environmental laws and regulations.

Issues in the 2019 Rule

In the 2019 rule, the Services added "as a whole" language, along with the preamble interpretation of "appreciably diminish" when defining "destruction or adverse modification" and making destruction or adverse modification determinations for critical habitat. The public identified several concerns with respect to adding "as a whole" to the definition. Small losses would no longer be considered "destruction or adverse modification" because they would be viewed as small compared to the "whole" designation. "Destruction or adverse modification" determinations would only be made by the Services if an action impacted the entire critical habitat designation or a large area of it. This addition would ignore that the effects in small areas can have biological significance (e.g., a migration corridor), and that impacts in a small area could be significant to a small, local population or important local habitat features.

This wording would allow more piecemeal, incremental losses that over time would add up cumulatively to significant losses or fragmentation (i.e., "death by a thousand cuts"). The "as a whole" language would be difficult or burdensome to implement because the Services lacked sufficient capacity to track or aggregate losses over time and space.

Although the Services stated that these regulations "require the Services' biological opinion to assess the status of the critical habitat (including threats and trends), the environmental baseline of the action area, and cumulative effects" and therefore these concerns would be avoided, the Council's experience is this is not correct. The concerns identified by the public on the proposed changes implemented in the 2019 rule are occurring.

Unfortunately, the Services do not have the staff, data, or computer programs to analyze the changes in the condition of critical habitat (i.e., the changes in the physical and biological features that collectively provide the habitat needed by the listed species for conservation/recovery). Rather than making the effort to collect and analyze the data needed to make such determinations, they assume there are no adverse effects other than the direct effects reported by the action agencies. Nor do the land management agencies with critical habitat designations on their lands have the staff or data to measure the changes over time to the specific physical and biological features required by the species for conservation/recovery.

The Council asserts that for species with recovery plans that identify the geographic recovery units in which conservation goals must be met for all the recovery units to recover that species, then assessing critical habitat at the scale of the recovery unit would be appropriate rather than the critical habitat as a whole. This is a biological determination, not a universal "one size fits all" determination, which is what "as a whole" is.

The term "appreciably diminish" is another term that is not science-based and severely limits the ability to determine incremental changes in the physical and biological features of critical habitat units from one proposed action to the next. If the changes are small, then appreciably, which is defined as significantly, would never occur in the situations of "death by a thousand cuts," as no one action would result in a significant reduction in the physical and biological features of a critical habitat unit or critical habitat as a whole. Destruction or adverse modification determinations should rely on biological data that indicate that a critical habitat unit, when required with other units for conservation/recovery, is able to provide the identified support to successfully contribute to the conservation/recovery of the listed species. If the demographic data for a listed species in a critical habitat unit indicate an ongoing and substantial decline, and the decline is attributed to habitat changes and not direct removal of the species, then the Services should determine that adverse modification of the critical habitat has occurred

In the 2019 rule, the Services claimed that the "regulations require the Services' biological opinion to assess the status of the critical habitat (including threats and trends), the environmental baseline of the action area, and cumulative effects." The Services claim that their summary of the status of the affected species or critical habitat considers the historical and past impacts of activities across time and space. The effects of any particular action are thus evaluated in the context of this assessment, which incorporates the effects of all current and previous actions. This avoids situations where each individual action is viewed as causing only relatively minor adverse effects but, over time, the aggregated effects of these actions would erode the conservation value of the critical habitat." We contend that this is not happening in practice as the whole of critical habitat is being considered, not the value of each unit needed for survival and recovery of the species.

In summary, when these two phrases were added, they were not rooted in science. They do not require the use of the best available biological data or biological process/concepts that are unique to each listed species and their recovery requirements and critical habitat designation when the Services make their determinations about the effects of a proposed action to critical habitat. We strongly recommend that "as a whole" and "appreciably diminish" be removed from the regulations in section 402 as these terms are misleading and are contrary to the final rules of some critical habitat determinations (e.g., Mojave desert tortoise – USFWS 1994).

National Environmental Policy Act

In this section of the proposed rule, the Services say they will complete analysis of the proposed rule in compliance with NEPA, before finalizing the proposed regulations.

If the USFWS determines that to implement the proposed regulations an environmental assessment is needed to comply with NEPA, we request that this document be available for public review and comment. If the USFWS determines the changes are covered by a categorical exclusion, we request that the USFWS make this NEPA document available for public inspection prior to issuing the final regulations.

Clarity of the Rule

The Services requested feedback on whether certain requirements for writing and explaining the proposed changes to the regulations have been met. We offer the following suggestion for the requirement to use lists and tables wherever possible.

In 2019, the Services issued a final rule that revised 50 CFR 402 on interagency coordination. On January 20, 2021, the President issued Executive Order 13990 requiring all agencies to review agency actions issued between January 20, 2017, and January 20, 2021. This included the 2019 final rule. In July 2022, the U.S. District Court for the Northern District issued a decision vacating the 2019 4(d) rule. The USFWS advised the Court that it anticipated proceeding with a rulemaking process to revise the 2019 4(d) rule. In November 2022, the District Court issued orders remanding the 2019 4(d) rule to the Services without vacating it.

Because of this complicated history that includes the pre-2019 rule, the 2019 rule, and this proposed revised rule, we believe that providing the public with a table with the relevant pre-2019 rule, with the changes in the 2019 rule, and proposed 2023 rule listed side by side would have been helpful. This table would allow the public to compare the wording among the three rules and determine the extent of the changes the Services are proposing to the 2019 rule and how these changes compare to the pre-2019 rule.

Regarding the use of clear language, as mentioned earlier in our letter, the words or terms used by the Services should be consistent throughout all regulations that implement the FESA including 50 CFR 402. For example, the latest approved version of 50 CFR 402 refers to the U.S. Fish and Wildlife Service as "FWS" and the National Marine Fisheries Service as "NMFS" in section 402. 1(b). However, in the following section, 402.2 Definitions, for biological assessment, biological opinion, conference, and other terms, the word "Service" is used. Please correct these inconsistencies.

Request for Comments

The Services requested "public comment on all aspects of the 2019 rule, including whether any of those provisions should be rescinded in their entirety (restoring the prior regulatory provision) or revised in a different way." The Council recommends that if the changes implemented from the adoption of the 2019 rule changed requirements or imposed constraints that were not science-based or clearly intended by the Act, these changes should be removed.

Also in this section, the Services say, "[a]ll relevant information will be considered prior to making a final determination regarding the regulations for interagency cooperation."

The current version of the regulations for implementing the Act's section 7 section, Interagency Cooperation, contains the following information about section 7(a)(1):

> "Section 7(a)(1) of the Act directs Federal agencies, in consultation with and with the assistance of the Secretary of the Interior or of Commerce, as appropriate, to utilize their authorities to further the purposes of the Act by carrying out conservation programs for listed species. Such affirmative conservation programs must comply with applicable permit requirements (50 CFR parts 17, 220, 222, and 227) for listed species and should be coordinated with the appropriate Secretary."

Thus, the purpose of section 7(a)(1) is to help conserve listed species. Unfortunately, most Federal agencies do not have personnel with expertise on the biology, ecology, and threats to listed species and the effective conservation actions that could be implemented to help conserve these species and their designated critical habitat in the Federal agency's geographic area of responsibility. Most Federal managers know to follow regulations; they do not read and follow Federal statutes.

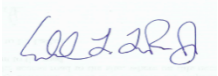
There are no regulations on how or when Federal agencies should consult with the Services to carry out conservation programs for listed species or how the programs should be developed. The regulations merely refer the Federal agency to the sections on obtaining permits for endangered and threatened wildlife and plants and intentional taking of marine mammals, if the Federal agency already has a conservation program they want to implement. In 2021, obtaining a permit from the USFWS took almost a year for endangered species.

The purpose of section 7(a)(2) is to ensure that Federal actions do not jeopardize the continued existence of listed species. However, there are pages of regulations on how Federal agencies should consult on proposed actions that may adversely affect listed species or designated critical habitat and time requirements (i.e., deadlines) for producing document and making decisions that adversely affect listed species. There are no time requirements for implementing conservation actions or obtaining permits to implement conservation actions. This absence of implementing regulations for conservation actions but presence of regulations with deadlines for allowing incidental take gives the impression that the Services place a higher priority on implementing projects that incidentally take listed species compared to projects that conserve listed species.

Because the Services oversee the implementation of the Act including ensuring that all Federal agencies are effectively implementing its conservation purpose, we strongly request that the Services develop and finalize regulations for implementing section 7(a)(1) of the Act. These regulations would include coordination meetings for the Services to provide their expertise to Federal agencies when they are considering developing conservation programs so they would result in effective design and implementation and deadlines for approval of conservations projects that require permits.

We appreciate this opportunity to provide comments on this proposed rule and trust they will help protect desert tortoises and other species during any activities that may result in take. Herein, we reiterate that the Desert Tortoise Council asks to be identified as an Affected Interest for this and all other proposed actions funded, authorized, or carried out by the USFWS that may affect species of desert tortoises directly or indirectly. As an Affected Interest, the Council requests that any subsequent environmental documentation for this proposed rule (e.g., NEPA compliance, etc.) is provided to us at the contact information listed above. In addition, we ask that you respond in an email that you have received this comment letter so we can be sure our concerns have been registered with the appropriate personnel and office for this project.

Respectfully,



Edward L. LaRue, Jr., M.S.
Desert Tortoise Council, Ecosystems Advisory Committee, Chairperson

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