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Filed electronically at www.regulations.gov

September 24, 2018

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Cathy Tortorici
National Marine Fisheries Service
ESA Interagency Cooperation Division
Office of Protected Resources
1315 East-West Highway
Silver Spring, MD 20910

Re: "Endangered and Threatened Wildlife and Plants; Revision of Regulations for Interagency Cooperation," 83 *Fed. Reg.* 35,178 (July 25, 2018) **Docket ID No. FWS-HQ-ES-2018-0009**

Dear Mr. Aubrey and Ms. Tortorici:

The Associated General Contractors of America (AGC) appreciates the opportunity to comment on the U.S. Fish and Wildlife Service's (FWS) and National Marine Fisheries Service's (NMFS) (jointly, the Services) request for comment on the proposal¹ to amend portions of the regulations that implement section 7 of the Endangered Species Act.

In general, AGC of America supports the Services' efforts to improve the interagency consultation process to make it more efficient and consistent. The current process is unpredictable and adds delay and cost to the permitting and construction of infrastructure projects nationwide. AGC members have shared that many permit delays stem from related inter-agency permissions, authorizations, and/or certifications required before a "lead" agency will approve an application. These project delays can be addressed, in part, with the Services' proposal to streamline the section 7 consultation process and improve interagency coordination. The Services' proposal aligns with several of the steps AGC and its members have recommended to FWS and other federal agencies; AGC offers these comments in support and to further improve the process.

Introduction

AGC is the nation's leading construction trade association. It dates back to 1918, and today, the association represents more than 26,000 construction contractor firms, suppliers and service providers

¹ See 83 *Fed. Reg.* 35,178 (July 25, 2018), <https://www.gpo.gov/fdsys/pkg/FR-2018-07-25/pdf/2018-15812.pdf>.

across the nation, and has members involved in all aspects of nonresidential construction. Through a nationwide network of chapters in all 50 states, DC and Puerto Rico, AGC contractors are engaged in the construction of the nation's public and private buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing development.

The successful management of threatened and endangered wildlife and plants within the scope of a project is of great importance to the construction industry. AGC members perform many construction activities on land and water, which range from large infrastructure projects that require a breadth of lengthy environmental reviews to small projects that may be covered, in part or in full, by general permits. Even small projects (e.g., that disturb as little as one acre of land) must consider the impact of the construction activities on ESA-listed species (threatened or endangered), and the habitat of listed species. Project proponents need to assess the impacts on listed species as early as possible in the construction process to avoid project delays.²

The penalties for non-compliance with environmental rules, in general, are steep and can result in reputational damage, the inability to compete for certain projects, financial loss, or even risk of criminal or civil liability.

Summary of the Proposal

The ESA requires federal agencies to consult with the appropriate service (generally FWS for terrestrial species and NMFS for marine species) prior to taking or approving actions that could affect listed species or their designated critical habitat. ESA consult is part of the approval process for almost all federal permits and approvals.

"Title 50, part 402, of the Code of Federal Regulations 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 (the "Secretaries"), 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."³

² For example, EPA's Construction General Permit (CGP) for stormwater is applicable to sites that disturb an acre or more of land, including smaller sites part of a common plan of development. Eligibility procedures relating to threatened and endangered species are found in appendix D of the permit. (https://www.epa.gov/sites/production/files/2017-02/documents/2017_cgp_final_appendix_d_-_endangered_species_reqs_508.pdf) In addition, if a federal agency is funding (either fully or partially) a construction project, or if a federal permit (other than the CGP) is required for a construction project, the federal agency taking the action (i.e., funding or permitting) must fulfill the requirements of the ESA. If the agency determines that the project would impact listed species and/or critical habitat, and develops plans to mitigate these impacts, it likely will be the obligation of the contractor to implement these plans. If a construction activity is not covered by the CGP (e.g., if the stormwater permit is issued by a delegated state agency), and if no federal funding or other federal permits are associated with the construction activity, project proponent still must evaluate if the project will incidentally cause a take of a listed species and/or critical habitat. If the project will result in a take, an Incidental Take Permit under ESA section 10 is required to authorize the take.

³ See 83 *Fed. Reg.* 35,179 (July 25, 2018).

In this proposal, the Services look to amend the section 7 consultation process as well as address confusion surrounding terms that have been problematic for project proponents and for the Services to administer. The Act has not been amended since 1988. The proposal reflects the Services "experience of more than 40 years implementing the Act and several court decisions."⁴ The Services are seeking comment on clarifications and changes to 50 CFR Part 402 in the following areas (for details on the proposal, see AGC's response below):

- Section 402 Definitions
 - Definition of Destruction or Adverse Modification and Clarification of Environmental Baseline
 - Definition of Effects of the Action
 - Definition of Programmatic Consultation
- Section 402 Consult Process
 - Applicability
 - Deadline for Informal Consultation
 - Formal Consultation
 - Service Responsibilities
 - Biological Opinions
 - Expedited Consultation
 - Reinitiation of Consultation
 - Other Provisions

AGC's Response to the Services' Proposal

A. Section 402 Definitions

1. DEFINITION OF DESTRUCTION OR ADVERSE MODIFICATION AND CLARIFICATION OF ENVIRONMENTAL BASELINE

Proposed Definition: "Destruction or Adverse Modification" is a direct or indirect alteration that appreciably diminishes the value of critical habitat as a whole for the conservation of a listed species.⁵

The Services propose to add the phrase "as a whole" to the first sentence and remove completely the second sentence of the current definition. For decades, the regulated community has been confused⁶ by the definition for "destruction or adverse modification." Unfortunately, this confusion was not resolved in 2016 when the Services revised the definition, which remains in place today: "a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay

⁴ *Ibid.*

⁵ *Ibid* at 35,191.

⁶ Back in 1986, the Services first wrote a definition for "destruction or adverse modification" as follows: "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alternations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." The Services and the regulated community alike found the second sentence, meant to further elaborate on the first sentence, redundant and a source of confusion from the moment it was promulgated.

development of such features.”⁷ In now proposing to add “as a whole” to the first sentence of the 2016 definition, the Services note in the preamble to the proposal that they will look at the scale of the entire critical habitat designation in making a determination of destruction or adverse modification—and not solely at the action area, critical habitat unit, or other less extensive scale. By deleting the second sentence of the definition, the Services would remove language suggesting that presently unsuitable but potential future critical habitat could be considered in the destruction or adverse modification determination.

Importantly, the Services clarify in the preamble to the proposal that it is not correct to conclude that every diminishment of critical habitat should constitute destruction or adverse modification nor is it required that each proposed action improve the conservation value of critical habitat. The Services note that “the analysis must always consider whether such impacts are ‘appreciable,’ even where a species already faces severe threats prior to the action.”⁸

AGC generally supports the proposed changes to the definition of “destruction or adverse modification” to evaluate the effects on the whole and to remove the second sentence, which causes confusion over whether presently unsuitable but potential future critical habitat could be considered in the determinations. In the long run, AGC hopes this will make the consideration of unoccupied areas more reasonable.

Likewise, AGC acknowledges the explanation in the preamble of the term “appreciably diminishes” but requests the Services provide greater clarification on how and whether a project would “appreciably diminish” the value of critical habitat for a species.

Clarification of Environmental Baseline

When determining whether a given project is going to jeopardize a listed species, the agency must establish the “environmental baseline.” The Services clarify in the preamble that “there is no ‘baseline jeopardy’ status even for the most imperiled species,” therefore, the Services cannot make determinations about the “environmental baseline or about the pre-action condition of the species” — only about the effects of the actions.

AGC supports the clarification in the preamble that determinations of jeopardy or adverse modification determinations are made about the “effects of Federal agency actions” and are not determinations on the “environmental baseline.” The Services acknowledge that certain courts (including the Ninth Circuit and the D.C. Circuit) have suggested that project proponents must improve the status of the species or its habitat to avoid a jeopardy determination where the environmental baseline—which includes previously approved/existing projects—already indicates a jeopardy. AGC is aware that even the Services’ field offices can confuse the matter. AGC recommends that the Services clarify that there cannot be “baseline jeopardy” in the regulatory text. The Services’ explanation in the preamble alone may not sufficiently guard against misinterpretation of the two concepts of “jeopardy” and “environmental baseline.”

In order to reduce some of the confusion surrounding where the “environmental baseline” fits into the process, the Services are proposing to pull out the definition for “environmental baseline” so that it

⁷ See 81 Fed. Reg. 7,214 (February 11, 2016).

⁸ See 83 Fed. Reg. 35,182 (July 25, 2018).

stands alone. By making this a stand-alone definition, the Services call attention to the fact that establishment of an “environmental baseline” provides a foundation for analyzing the effects of the proposed action but does not in itself include the effects of the action being considered. At this time, the definition itself retains its current wording and: “includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions with are contemporaneous with the consultation in process.”⁹

AGC agrees that this distinction is important and supports having a stand-alone definition to further highlight the distinction. AGC recommends the Services add clarification in the regulatory language for this definition that the environmental baseline does not include the effects of the action under review.

2. DEFINITION OF EFFECTS OF THE ACTION

*Proposed Definition: “Effects of the Action” are all effects on the listed species or critical habitat that are caused by the proposed action, including the effects of other activities that are caused by the proposed action. An effect or activity is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur. Effects of the action may occur later in time and may include effects occurring outside the immediate area involved in the action.*¹⁰

The Services propose to simplify the definition of “effects of the action” by eliminating references to “indirect effects” and effects of “interrelated and interdependent” actions. Instead, the Services would analyze only those impacts that meet a two-pronged test, as described below:

- (1) *It would not occur, but for the proposed action.* “If an effect or activity would occur regardless of whether the proposed action goes forward, then that effect or activity would not satisfy the ‘but for’ test and would not be considered an effect of the action.”¹¹
AND
- (2) *It is reasonably certain to occur.* The Services would apply this test to *all* effects and activities of the proposed action—applying equally to beneficial effects. The Services again clarify that if an effect or activity is not “reasonably certain to occur” then the causation standard has not been met.¹²

The preamble states that the Services are clarifying the “reasonably certain to occur” standard for analyzing impacts of proposed actions to “avoid inclusion of activities whose occurrences would be considered speculative, but also to avoid requiring an expectation that the activity is absolutely certain to occur.” AGC supports these changes. They would result in fewer low-impact activities triggering Section 7 consultation, freeing up agency resources to focus specifically on actions that pose a risk to listed species and protected habitat.

⁹ See 50 C.F.R. 402.02 - Definitions.

¹⁰ See 83 Fed. Reg. 35,191 (July 25, 2018).

¹¹ See 83 Fed. Reg. 35,183 (July 25, 2018). The Services note that this “but for” causation principle applies to analyzing effects of an action under section 7 and does not necessarily extend to other sections of the Act, for example section 9 (the take prohibition). *Ibid.*

¹² See 83 Fed. Reg. 35,184 (July 25, 2018).

3. DEFINITION OF PROGRAMMATIC CONSULTATION

Proposed Definition: "Programmatic Consultation" is a consultation addressing an agency's multiple actions on a program, region, or other basis. Programmatic consultations allow the Services to consult on the effects of programmatic actions such as: (1) Multiple similar, frequently occurring or routine actions expected to be implemented in particular geographic areas; and (2) A proposed program, plan, policy, or regulation providing a framework for future proposed actions.¹³

The Services propose to codify the definition of programmatic consultations in order to promote its use as effective tools to improve efficiency in consultations. The Services identify two categories of programmatic consultations that address: (1) multiple similar actions in a particular geographic area and (2) the framework for future actions. The first type, commonly referred to as "batched" consultations, have generally well-known effects on resources listed under the act, for example, routine maintenance or general permitting programs. The Services do not usually have the same level of detail or information on the second type. These are cases where the Service would conduct a general review; and re-evaluate, in the future, when the site-specific information is known. The subsequent consultant may be referred to as a "step-down" or "tiered consultation."

AGC strongly supports the Services efforts to promote programmatic consultations, which can facilitate interagency coordination well in advance and provide significant time savings and certainty to the regulated community. Members report that programmatic consultations/biological opinions have helped to streamline the process related to the Indiana bat and northern long-eared bat (NLEB). Programmatic consultations have also helped with more routine maintenance such as noxious weed control along highways and aquatic areas. However, AGC members have expressed a concern that the data used to inform the programmatic consultation may at some point be perceived as old or outdated and impact the viability of programmatic approach. The Services should provide some guidelines for how long certain data retain their usefulness. It would be helpful for stakeholders involved in the programmatic consultation to understand and plan for when additional study may be warranted to fulfil their legal obligations. For example, permits may require pre-construction species-specific surveys prior to the initiation of construction activities, depending upon the species and habitats present within or near the project right-of-way.¹⁴

B. Section 402 Consult Process

1. APPLICABILITY

The Services seek comment on the "advisability of clarifying the circumstances upon which Federal agencies are not required to consult."¹⁵ Specifically, the Services have outlined three situations that

¹³ *Ibid* at 35,191.

¹⁴ AGC members have shared "chokepoints" in the federal permitting process related to species' surveys. If the project plan is not completed by a certain date, project proponents may need to redo threatened and endangered species surveys. In some cases, AGC members report that species' surveys are considered valid for only six months to a year. When redoing a survey, some are season dependent; meaning you must wait until a certain time of the year to perform the survey (e.g., Yellow-billed cuckoo bird – must complete three years of surveys during the summer months). This can lead to excessive project delays and cost.

¹⁵ See 83 *Fed. Reg.* 35,185 (July 25, 2018).

may preclude the need for a consult. In these situations, the proposed action is not anticipated to result in a take of a species and will:

- (1) Not affect listed species or critical habitat; or
- (2) Have effects that are manifested through global processes and
 - a. Cannot be reliably predicted or measured at the scale of a listed species' current range, or
 - b. Would result at most in an extremely small and insignificant impact on a listed species or critical habitat, or
 - c. Are such that the potential risk of harm to a listed species or critical habitat is remote, or
- (3) Result in effects to listed species or critical habitat that are either wholly beneficial or are not capable of being measured or detected in a manner that permits meaningful evaluation¹⁶

AGC supports excluding from consultation activities that are "far removed from any potential for jeopardy or adverse modification of critical habitat." AGC supports streamlining measures that allow the Services (and project proponents) to focus their resources on where they are most needed. The Services should be sure to reflect this exception in the regulatory language. Furthermore, this provision also would reduce the potential to speculate on effects that cannot be meaningfully evaluated.

The Services are also looking for comment on "whether the scope of consultation under section 7(a)(2) should be limited to only the activities, areas, and effects within the jurisdictional control and responsibility of the regulatory agency"¹⁷ seeking consultation. AGC recommends that the Services take this approach to avoid embroiling and delaying a proposed action in an inter-agency debate over jurisdiction as well as to avoid conflicting results. The Services should clarify this condition in the regulatory text. For example, AGC members have found that the scope of the analysis of the effects from permit activities on endangered species that is necessary for making Section 404 permit decisions is confusing and controversial. Generally, the Corps assesses permit activity effects only in the permit area. In AGC members' experiences, however, the Corps is being asked to assess such effects beyond the immediate permit area in certain situations (e.g., linear projects with multiple 404 permit authorizations).

2. DEADLINE FOR INFORMAL CONSULTATION

The Services are considering adding a 60-day deadline for informal consultations, for which no deadline currently applies. (Formal consultations have a 90-day deadline in the regulation, unless extended.) According to the statistics in the preamble, the NMFS ranges between one to three months for most informal consultations; and FWS completes approximately 80 percent of their informal consultations averaging between 26 and 39 days.

AGC supports a prescribed deadline for the informal consultation process. However, AGC recommends a 30-day timeline. A 30-day deadline is commensurate with the Services' current processing times. It is also necessary to facilitate compliance with the memorandum of understanding (MOU) on implementation of Executive Order 13807, executed by a dozen federal agencies—including FWS—in

¹⁶ *Ibid.*

¹⁷ *Ibid.*

April 2018.¹⁸ The MOU is significant because it outlines important commitments, such as a two-year permitting timetable to complete the environmental review process for major infrastructure projects.

The informal consultation should be a quick means by which Federal agencies and project proponents can receive early feedback on whether a proposed action is likely to need a formal consultation. It does not preclude the necessity of a formal consultation, yet helps identify specific project needs (e.g., time and commitment) moving forward and whether there are modifications up-front that may ultimately avoid adverse effects—and, if possible, before the process is too far along that such modifications are disruptive and require reworking large portions of the project proposal. AGC members frequently collaborate with their clients to suggest possible measures to reduce potential impacts to species or habitat that range from moderate to larger changes to the project—such as modifying the size or footprint of the work area, constructing a culvert instead of a small bridge, or changing access points.

The Services are also seeking comment on whether or not the “clock” for the deadline could be paused at any time to account for additional tasks, such as providing technical assistance or responding to requests for concurrence. AGC members have repeatedly stressed the importance of clear deadlines that keep the permitting process moving forward. On occasion, more time may be necessary to complete a step in the process, but the reason for delay should be transparent to improve accountability and to avoid the types of “stops and starts” that cumulatively can add months or even years to a project.

To use an example of another permitting program, members have indicated that an agency would send notice towards the end of the deadline that some minor information in the application was incomplete or in error; this would “reset the clock,” only to come back towards the end of the second round of review with another minor request/edit that reset the clock yet again. This would proceed through multiple cycles. However, for example, the FAST-41 Permitting Dashboard¹⁹ has seen success with its electronic dashboard that tracks participating projects currently in progress and the associated deadlines. An agency or project proponent can extend deadlines in that program, but only with valid reason/explanation that is noted on the dashboard to maintain accountability.

3. FORMAL CONSULTATION

AGC agrees with the Services that valuable time is lost due to a lack of clarity in what information the Services need to initiate a consultation. The Services propose to revise the regulations to describe the set of information, commonly called an “initiation package,” that is necessary to initiate consultation. The Services also are proposing to allow consideration of other documents as initiation packages, such

¹⁸ <https://www.whitehouse.gov/wp-content/uploads/2018/04/MOU-One-Federal-Decision-m-18-13-Part-2-1.pdf>. Pursuant to EO 13807, a dozen federal agencies signed a Memorandum of Understanding (MOU) committing to “a more predictable, transparent, and timely Federal review and authorization process for deliver major infrastructure projects.” These agencies are working to develop internal policies and procedures to outline how they will (1) come together collaboratively very early in the NEPA process, (2) establish permitting timetables with a two-year target deadline to get everything out, and (3) conduct federal enviro reviews concurrently (rather than sequentially), among other things.

¹⁹ The “dashboard” seeks to make federal infrastructure permitting more transparent. Projects listed on the online dashboard have a timetable for when permits will be approved. If federal agencies miss these deadlines, they are required to send monthly updates to a Federal Permitting Improvement Steering Council until permits are approved. This process was established by Title 41 of the Fixing America’s Surface Transportation Act (FAST Act), which reauthorized and funded federal highway programs for five years.

as a document that has been prepared under the National Environmental Policy Act or to another authority—as long as it contains all the necessary information to initiate consultation.

AGC supports these revisions as common-sense streamlining measures that would reduce the need for extensive correspondence between the action agency and the Service to get the process started, which could result in significant time savings for the regulated community. AGC has urged for infrastructure permitting reforms, such as this, that reduce the amount of time for critical projects to be completed. One of the efficiencies AGC has recommended is to reduce duplication between submittals to various agencies and during the main permitting steps of the process to obtain project approvals. It would be helpful for project proponents to be able to submit existing documentation that meet the qualifications for an “initiation package.”

4. SERVICE RESPONSIBILITIES

The Services clarify “whether and how the Service should consider measures included in a proposed action that are intended to avoid, minimize, or offset adverse effects to listed species or critical habitat.” The Services propose the necessary documentation the agency must submit to initiate consultation. The Services explain in the preamble that if provided information in enough detail in the initiation package, then they must consider the proposed action—which would include beneficial measures—during a consultation with the assumption that the agency will implement the actions and measures as proposed. The federal agency “retains independent obligations to insure that its action is not likely to jeopardize listed species or destroy or adversely modify critical habitat.”²⁰ Further, the Service is not required to “independently evaluate whether the Federal agency is likely to carry out its commitments.”²¹

The Services will “take into consideration the effects of the action as proposed, both beneficial and adverse.”²² AGC supports the codification that the Service will give “appropriate consideration to any beneficial actions as proposed or taken by the Federal agency or applicant, including any actions taken prior to the initiation of the consultation.”²³

5. BIOLOGICAL OPINIONS

The Services propose to include all or part of an agency’s initiation package as well as the Services’ own analysis and findings associated with issuing section 10(a) permits in its biological opinion. The Services note that the analyses undertaken related to issuing a permit under 10(a)(1)(A) or 10(a)(1)(B) contain many of the elements reviewed and analyzed in a section 7 consultation. The section 7 consultation could be streamlined to just those portions remaining necessary to present a complete finding. This approach would require collaboration between the federal agency and the Services, as well as an agreement that the “adoption process” is appropriate for the proposed action.

AGC supports the Services’ codification of the “adoption or incorporation by reference” approach. The proposed option would serve to streamline biological opinions by taking advantage of duplicative

²⁰ See 83 *Fed. Reg.* 35,178 (July 25, 2018).

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.* at 35,192.

processes between the section 10 permit and the section 7 consultation that currently add delay to the review of proposed actions that require both steps.

6. EXPEDITED CONSULTATION

AGC supports the Services' proposal of a new provision authorizing "expedited consultations" to "provide an efficient means to complete formal consultation on projects ranging from those that have a minimal impact to those with a potentially broad range of effects that are known and predictable, but that are unlikely to cause jeopardy or adverse modification of critical habitat."²⁴ The Services, agencies, and project proponents will benefit from a range of consultation options that serve to streamline the process so that resources can be focused on more complex or impactful actions. This expedited consultation will streamline projects or actions that would not typically be bundled with other like actions in a programmatic approach.

The Services note that for this option to be implemented, the Service and federal agency must agree that this type of consultation is appropriate for the proposed action and the Service must receive an initiation package that provides all the information necessary to move forward in an expeditious manner.

7. REINITIATION OF CONSULTATION

The Services propose two edits to the section that covers reinitiation of consultation. First, the Services remove the term "formal" from the title and text of this section, as informal consultations require reinitiation. Second, in response to case law, the Services propose to clarify that the duty to reinitiate does not apply to an existing programmatic land management plan developed under the Federal Land Policy and Management Act and the National Forest Management Act when a new species is listed or new critical habitat is designated. The existence of a plan is not "affirmative discretionary action" that would be subject to reinitiation. This clarification will reduce the regulatory burden on holders of these types of programmatic management plans. However, the Services state that "specific on-the-ground actions that implement the plan are subject to their own section 7 consultations if those actions may affect listed species or critical habitat."²⁵

With the exception of these two changes, the Services do not provide additional guidance on when reinitiation of consultation is required. This is a missed opportunity. FWS should finalize clear standards for determining what project changes warrant a re-evaluation of previously approved environmental documentation (i.e., what constitutes a material change). AGC members report that minor changes or adjustments to a project design or location—or even just changes to the construction means and methods (e.g., change in how diverting water flow)—can trigger another round of lengthy consultation. And as explained above, projects also are held up when environmental species' surveys become "stale" and agencies require new, updated information.

AGC urges the Services to provide additional guidance on which changes to an action would trigger the additional review and, if one is necessary, an expedited process for reinitiated consultations when the action/project change is minor. Likewise, if unforeseen, undisclosed listed species or critical habitat are

²⁴ *Ibid* at 35,188.

²⁵ *Ibid* at 35,189.

encountered during a construction project, the contractor should be allowed to manage and resolve the issue quickly through proactive mitigation efforts.

Other Considerations

As the Services are accepting comment on issues related to the implementation of the section 7 consultation process with a keen focus on streamlining measures, AGC offers these additional points specific to areas of concern that AGC members have raised in the past. The points below discuss inefficiencies and inconsistencies that can complicate the implementation of species or habitat conditions on a construction site. These problems mainly stem from lack of coordination between agencies, blanket acceptance of all suggestions in minimization and mitigation planning, or over-conditioning of permits.

- Agencies should coordinate on conditions/criteria for managing construction windows (i.e., timing restrictions) and mitigation measures for resources (e.g., the Corps' wetlands vs. FWS species concerns). Conflicts can arise between seasonal work windows, which can limit the time when construction is allowed due to species/habitat protection (like fish migration and spawning or bird nesting and foraging), or due to weather conditions that prohibit construction, or because of agency criteria on mitigation measures.
 - A member shared an example where a stormwater control measure needed repair, but they could not access it due to species restrictions in that area of the project. They had to choose between violating their stormwater permit or the conditions of their species plan.
 - In another scenario, the contractor was required to eliminate noxious weeds on a site, but could not because it was serving as habitat for an endangered species.
- Agencies' mitigation planning commitments that impose seasonal or environmental work restrictions, and other related construction best management practice requirements, should be detailed in record of decision (ROD) as part of the NEPA process to: streamline and provide transparency for permitting; facilitate agency coordination; and ensure that project limitations are realized by the owner and properly addressed by the contractor during bidding and scheduling.
 - One example in particular, the contractor could not perform work on the site for even eight hours during a day, which drastically prolonged the project schedule.
 - In another example, the project became infeasible because they could not work during high or low tides nor during certain seasons.
- Limit work restrictions on construction activities (e.g., tree clearing, in-stream activities and general earth disturbance) to instances where threatened and endangered species have been identified through the completion of an environmental impact review and survey. Work restrictions for non-threatened and non-endangered species delay projects and increase costs for *de minimis* benefit.
- Exempt temporary impacts from the requirement to provide compensatory mitigation, if the resource is restored, within a reasonable (predetermined) timeframe, to preconstruction conditions and functions.

Conclusion

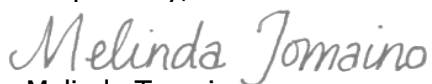
AGC is generally supportive of the provisions the Services have proposed to clarify terms, simplify definitions that currently cause confusion and add delay, and provide provisions to improve and streamline the section 7 consultation process. Of the proposed changes specific to streamlining, AGC supports programmatic consultations, clarification of the circumstances upon which federal agencies are not required to consult, adding a deadline for the informal consultation process, clarification of the information needed to initiate a consultation, codification of the "adoption or incorporation by reference" approach, and expedited consultations.

AGC requests further clarification in three areas of importance to construction contractors: how and whether a project would "appreciably diminish" the value of critical habitat for a species; how long certain data retain their usefulness for programmatic consultations; and when changes to an action would trigger reinitiation of consultation. AGC recommends the Services establish an expedited process for reinitiated consultations when the action/project change is minor.

Lastly, AGC has highlighted several areas in the proposal where the Services should incorporate into the regulatory language the provisions or clarifications contained in the preamble: The Services should include in the regulatory text appropriate language to clarify "baseline jeopardy" and "environmental baseline," the circumstances upon which federal agencies are not required to consult, and clarification that the Services will limit the scope of the consult with an agency to those areas where the agency in question has jurisdictional control.

AGC appreciates this opportunity to provide recommendations on behalf of its construction industry member companies. If you have any questions, please contact Melinda Tomaino directly at tomainom@agc.org or (703) 837-5415.

Respectfully,



Melinda Tomaino
Director, Environmental Services