House Natural Resources - Water, Wildlife and Fisheries Subcommittee
May 16, 2024 Oversight Hearing: *President's FY25 Budget Proposal for NOAA*
Questions for the Record Submitted to the Honorable Dr. Richard Spinrad

Questions from Rep. Westerman

1. *Earlier this year, the Services finalized three rulemakings related to the implementation of the ESA. The finalized Section 7 consultation regulation incorporates new potential requirements for developing the Reasonable and Prudent Measures (RPMs) necessary for an action agency or entity seeking a federal permit to employ in order to minimize the impacts of incidental take. In this final rule, the Services can consider and include measures in an RPM that offset any remaining impacts of incidental take that cannot be avoided. These measures to offset impacts can be required inside or outside the action area. These are significant changes, and the Section 7 Consultation handbook needs to be updated in order for action agencies and permit seekers to understand how this new process works.* **When will the handbook be updated, and will that process include public notice and comment so that the regulated community - and your fellow federal agencies - can provide input on the practical impacts?**

   NOAA Response:
   The Section 7 Consultation Handbook is currently being updated to reflect the 2019 and 2024 changes to the regulations. The Services are working toward providing the revised handbook to OMB in the 2025 calendar year. After the OMB interagency review process, the Services anticipate publishing a notice in the Federal Register making the draft handbook available for public comment.

2. **There is a lot of discussion of mitigation in the new ESA implementation rules.**

   A) **How many species "mitigation banks" are there in the country? Are there banks for all listed species?**

   NOAA Response:
   According to the U.S. Army Corps of Engineers Regulatory In-Lieu Fee and Bank Information Tracking System (RIBITS), there are 163 approved and 21 pending conservation banks in the country. RIBITS was established to track “mitigation banks,” which provide offsets for impacts to wetlands under section 404 of the Clean Water Act. The system now also tracks “conservation banks,” which provide offsets for impacts to ESA-listed species and their habitats and are approved by NOAA Fisheries and the U.S. Fish and Wildlife Service. Some of these conservation banks are for one species and some are for multiple species, including ESA-listed species. The majority of the banks are inland, having offsets for terrestrial listed species. Less than five percent of ESA-listed species are covered by the existing conservation banks.

   B) **Can you explain what an "in lieu fee" mitigation offset is?**

   NOAA Response:
   In-lieu mitigation offsets are a method of providing compensatory mitigation for an activity that has ecological impacts in another location. In-lieu fee programs are

sponsored by governmental or nonprofit entities, and involve collecting funds to establish in-lieu fee sites. In-lieu fee sites provide ecological functions and services expressed as "credits," that are conserved and managed for particular species or habitats and are used expressly to offset impacts occurring elsewhere to the same species or habitats. In-lieu fee program operators apply habitat restoration, creation, enhancement, and preservation techniques to generate credits on in-lieu fee sites. The establishment, operation, and use of an in-lieu fee program requires an agreement between regulatory agencies of applicable authority and the in-lieu fee program operator. Unlike mitigation or conservation banks, in lieu fee programs generally provide compensatory mitigation after impacts have occurred.

C) **How are any of these kinds of offsets reviewed and approved by the Service?**

NOAA Response:
An interagency review team (IRT) consisting of members from federal, state, and local agencies and tribal governments, and chaired by the U.S. Army Corps of Engineers and U.S. Fish and Wildlife Service (FWS) or NOAA Fisheries, reviews proposals for mitigation banks established under section 404 of the Clean Water Act and section 10 of the Rivers and Harbors Act of 1899, and conservation banks established under the Endangered Species Act, including adaptive management and long-term management plans. Some conservation banks may be proposed to provide offsets only for species, and those conservation banks would require approval from the FWS or NOAA Fisheries, but not from the U.S. Army Corps of Engineers. During this review, the IRT may comment and provide recommendations on the proposed mitigation or conservation bank project. Once the IRT review process is completed, FWS or NOAA Fisheries decides whether to issue the final approval for conservation banks, and the U.S. Army Corps of Engineers decides whether to issue the final approval for mitigation banks. After the conservation or mitigation bank is established, the IRT reviews annual progress reports and approves their credit release, depending on the bank's ecological performance. FWS and NOAA Fisheries anticipate using the existing system for review and approval of conservation banks, as well as existing conservation banks, for offsets.

3. **The new ESA Section 7 consultation rule just went into effect, and the Service has said that all consultations not yet completed will have to comply with them. How many ongoing consultations will now be delayed or have to be redone because of the new rules?**

NOAA Response:
NOAA Fisheries is not aware of any consultations that have been or will be delayed as a result of the new rule, which is prospective only. The new rule was published by FWS and NOAA Fisheries jointly on April 5, 2024 (89 FR 24268), and became effective on May 6, 2024. The rule does not require that consultations under ESA Section 7 completed before its effective date be revisited. The new rule applies to Section 7 consultations that were ongoing as of May 6, 2024. However, it is unlikely to affect the timing of any such consultation,

because the intent of the rule is primarily to clarify and align regulatory language with current practice.

4. *In a departure from their long-standing interpretation, the final rule allows the Services to require minimization and mitigation measures as reasonable and prudent measures when authorizing incidental take of species. The relevant statutory authorization (ESA Section 7(b)(4)(C)(ii)) only allows the Services to "minimize" the impact of incidental take. The Services have never interpreted this provision as allowing for mitigation of take.* **What is the statutory legal authority that allows the Services to now impose "mitigation," including compensatory mitigation that would fully offset all potential impacts or require restoration / protection of habitat, when it is not clearly authorized by the ESA?**

NOAA Response:
As explained in our responses to comments published on April 5, 2024 (89 FR 24268, 24283), the respective revisions to 50 C.F.R. § 402.02 and 402.14(i), which recognize the use of offsets as RPMs, are supported by the plain language of the ESA. ESA Section 7(b)(4)(C)(ii) states that the Secretary "shall" specify RPMs that she "considers necessary or appropriate" to minimize the "impact" of incidental take on the species, not just incidental take itself. Like measures that avoid or reduce incidental take, offsetting measures also "minimize[the] impact[s]" of incidental take on the species. Further, the statutory provision expressly requires the Secretary to specify RPMs she "considers necessary or appropriate" to minimize such impacts."

5. *The final rule deletes the regulatory provisions at 50 CFR 402.17. These were added in 2019 to establish when an activity is reasonably certain to occur and what consequences are caused by a proposed action for purposes of determining the effects of an action for consultation. The Services recognize that these criteria are relevant and applicable considerations.* **Why are the Services removing them from the regulations?**

NOAA Response:
The removal of § 402.17 does not change the Services' application of the "reasonably certain to occur" standard. However, in practice, some aspects of § 402.17 had created unintended and counterproductive confusion.

As explained in our responses to comments published on April 5, 2024 (89 FR 24268, 24280–81), we articulated three principal reasons for removing § 402.17 from the regulations. First, removing § 402.17 simplified the structural complexity of the "effects of the action" definition. Under the prior version of the regulations the term "effects of action" was defined in § 402.02, but that definition cross-referenced § 402.17. Removing § 402.17 made the "effects of the action" definition self-contained without requiring reference to a separate regulatory provision.

Second, ESA Section 7(a)(2) requires both the Federal action agencies and the Services to use "the best scientific and commercial data available." This requirement applies to all aspects of section 7(a)(2), including determining what activities or consequences are considered reasonably certain to occur when analyzing the "effects of the action" and any "cumulative effects." The requirement in § 402.17 that such analysis must also be based on "clear and substantial information" created an additional standard that could be read to limit what "best scientific and commercial data available" the Services may consider. Rather than focusing on the "best available" data, the "clear and substantial information" requirement appeared to circumscribe that data to only that which meets those heightened requirements.

Third, when read in combination with the preamble discussion in the 2019 final rule that emphasized a need for a "degree of certitude" in determining effects of the action that are reasonably certain to occur, § 402.17 could be construed as narrowing the scope of what constitutes the "best available scientific and commercial data." In other words, in light of the "degree of certitude" discussion in the preamble of the 2019 rule, § 402.17's "clear and substantial information" standard could be read to suggest that even if particular data were considered the best available, they potentially should not be relied upon if they lacked a heightened degree of certitude. The best available data will not always be free of uncertainty and often may be qualitative in nature, and, under the requirements of section 7(a)(2), are to be used by the Services in fulfilling their consultative role under the Act.

Additionally, as also explained in the responses to comments published on April 5, 2024 (89 FR 24268, 24280–81), the other factors previously identified in § 402.17 will be addressed and expanded upon in updates to the Services' Consultation Handbook, which will provide further explanation regarding when and how these factors should be considered as part of the analysis of the "effects of the action" and, where applicable, "cumulative effects".

6. **The ESA Consultation Handbook that the Services rely on for guidance was last published in 1998. The Services state that they are planning to update the Handbook to provide additional guidance on the ESA section 7 process. What is the timing for the new Handbook and what public review and comment process will be provided?**

NOAA Response:
The Services are currently working to update the Section 7 Consultation Handbook and anticipate submitting a draft to OMB during the 2025 calendar year. This submission will initiate a 90-day federal agency review process. After the conclusion of the OMB review, the Services will publish a notice in the Federal Register making the draft available for an anticipated 60-day public comment period.

7. **Can you please explain how the new ESA Section 4 regulations comply with the**

Supreme Court's decision in *Weyerhaeuser v US FWS*?

NOAA Response:
The revised Section 4 regulations that were promulgated on April 5, 2024 (89 FR 24300), are consistent with the Supreme Court's holdings in *Weyerhaeuser*. That ruling addresses two specific issues relating to the designation of critical habitat under the ESA. First, in *Weyerhaeuser*, the court held that an area is eligible for designation as a critical habitat under the ESA only if it is habitat for the particular listed species. As we stated in our 2024 final rule, the *Weyerhaeuser* ruling is sufficiently clear on this matter and stands on its own; thus, we found no need to build this ruling explicitly into the ESA implementing regulations. As we also explained in the 2024 rule, we will continue to adhere to the statutory requirement to identify critical habitat based on the best scientific information available, and we will provide clear explanations of those data and how areas qualify as habitat and critical habitat in each proposed designation, which are subject to public review and comment.

Second, *Weyerhaeuser* held that the Secretary's exercise of authority under ESA Section 4(b)(2) not to exclude particular areas from a critical habitat designation is subject to judicial review. The 2024 rule did not address exclusions under ESA Section 4(b)(2).

8. *In the 2024 final rule, the Services removed the more robust and detailed procedures for the designation of unoccupied areas as critical habitat that had been implemented in 2019. That 2019 final rule provided important standards detailing when property could be designated as critical habitat because it is essential to the conservation of species that do not currently occur on those lands or waters.* **How do the Services intend to designate unoccupied critical habitat going forward given their prior difficulties applying the relevant ESA statutory criteria and when there is no agreed upon regulatory definition of what is "habitat" for a species?**

NOAA Response:
NOAA Fisheries has not experienced prior difficulties in applying the relevant statutory criteria when designating unoccupied critical habitat. We will continue to designate unoccupied critical habitat in a manner consistent with the statutory definition of critical habitat and relevant standards. As required under ESA Section 4, we will continue to make determinations about what areas qualify as critical habitat and are essential for the species' conservation by applying the best scientific data available. The 2019 rule did not simplify or clarify the designation of unoccupied critical habitat, but rather confounded the two types of critical habitat defined under the statute. Removal of those requirements does not implicate NOAA Fisheries' compliance with the Supreme Court's ruling in *Weyerhaeuser*, as we will continue to only designate areas that are habitat for the listed species and, if designating unoccupied areas, make the statutorily required finding that the area is essential for the conservation of the listed species. Whether an unoccupied area constitutes habitat, and whether that area is essential for the conservation of a species, are case- and fact-specific findings that must be based on the best scientific data available for the listed species.

As we explained in 2022 when rescinding a 2020 regulatory definition of "habitat," any regulatory definition for the term "habitat" that is sufficiently generic to encompass the diverse set of taxa listed under the ESA as well as the two types of critical habitat defined under the ESA (occupied and unoccupied) would ultimately rely on subjective interpretations (87 FR 37757, June 24, 2022). It would therefore not achieve the goals of providing transparency, reproducibility of outcome, or regulatory certainty.

The required finding under the ESA that an area itself be "essential for conservation" remains a relatively high bar, and NOAA Fisheries has only very rarely designated unoccupied areas as critical habitat. Indeed, less than one percent of all critical habitat areas designated by NOAA Fisheries is unoccupied, and NOAA Fisheries has not designated any unoccupied critical habitat since 2016 (see 81 FR 9252, February 24, 2016).

9. The courts have said that it is the five criteria in ESA Section 4(a)(l) that dictate the status of the species and whether it should be listed, delisted, or downlisted. The courts have also said that recovery plans and recovery criteria are not binding and do not have to be satisfied before a species is delisted. The final rule adds a "recovery" component to delisting/downlisting considerations**. Can you explain how the Services intend to apply this new standard given that it seems contrary to the statute and case law?**

NOAA Response:
The 2024 final rule is consistent with applicable case law and statutory requirements and does not create new standards for downlisting or delisting species. As stated in the revised regulations, downlisting and delisting decisions must be made based on the best scientific and commercial data available after conducting a review of the species' status and by assessing the factors listed in ESA Section 4(a)(1). Accordingly, the standards and factors that apply to downlisting and delisting decisions are the same as those that apply to listing decisions. Re-insertion of the concept of "recovery" into these regulations is an explicit acknowledgement that recovery of species is a specific circumstance in which species should be removed from the list. Indeed, recovering species is a primary objective of the ESA and continues to be a priority for both NOAA Fisheries and FWS. The regulation specifically ties a species' status as recovered to the point in time where it no longer meets the statutory definition of an endangered or threatened species; it is not tied to recovery plan criteria. Therefore, reinsertion of this term into the regulations does not create a new requirement for recovery plan criteria to be met in order to downlist or delist species.

10. The Department of the Interior (DOI) requires that lessees and owners of operating rights decommission their facilities, pipelines and other equipment, in accordance with the governing DOI regulations and lease conditions. DOI has a robust review and approval process in place for the decommissioning of offshore platforms and facilities and the Bureau of Safety and Environmental Enforcement (BSEE) published its Record of Decision (ROD) in December 2023 to kick off this robust process for the first ever decommissioning of offshore platforms in the Pacific Ocean. At the same time, NOAA has proposed the Chumash

Heritage National Marine Sanctuary in the Pacific Ocean along the south-Central California coastline, which includes the same region of the Pacific where some of these platforms are located offshore. While the proposal allows for the continued production of oil and gas in the Sanctuary, it does not allow for the decommissioning of oil and gas platforms and facilities.

A) Given the robust permitting process that DOI is already undertaking to decommission these platforms and facilities in the Pacific, does it make sense to create an additional NOAA permitting process which could further delay or hinder the ability for companies to fulfill their obligation with DOI to decommission in the Pacific?

NOAA Response:
NOAA will work closely with BSEE and other federal agencies to integrate the national marine sanctuary review processes into existing requirements, including those under NEPA, the ESA, and the MMPA, to streamline the overall process. NOAA has been coordinating with BSEE in advance of these efforts, and has worked with BSEE as a Cooperating Agency on the Chumash Heritage National Marine Sanctuary designation.

B) Has NOAA considered making the decommissioning of oil and gas platforms and facilities an allowed activity in the Chumash Heritage National Marine Sanctuary once it's finalized?

NOAA Response:
The regulatory exceptions for offshore oil and gas activities occurring as part of pre-existing leases in the Chumash Heritage National Marine Sanctuary do not extend to future decommissioning activities. The future activities are not part of the pre-existing rights of the leaseholders. Thus, any future activities that might disturb the seabed or create discharges will likely involve sanctuary permitting actions and/or authorizations by the Office of National Marine Sanctuaries, in coordination with the other permitting agencies.