



October 9, 2008

Via Overnight Mail

Public Comment Processing
Attention: 1018-AT50, Division of Policy
and Directives Management
U.S. Fish and Wildlife Service
4401 North Fairfax Drive
Suite 222
Arlington, VA 22203

**Re: Proposed Rules, Interagency Cooperation Under the Endangered Species Act
Federal Register Docket ## FWS-R9-ES-2008-0093 and 0808011023-81048-01**

To whom it may concern:

These comments are filed by Earthjustice on behalf of Conservation Northwest, the Endangered Species Coalition, Oregon Wild, Pacific Coast Federation of Fishermen's Association, Institute for Fisheries Resources, Sierra Club, the Conservation Law Foundation, The Mountaineers, and the Washington Toxics Coalition ("Organizations"). On Friday, August 15, 2008, your offices published notice of proposed rules to amend regulations governing interagency cooperation under the Endangered Species Act of 1973 ("ESA"). [73 Fed. Reg. 47858 et seq.] The Organizations each work to protect and preserve the environment, including the preservation of species. Each of the Organizations submits these comments in order to ensure the continued effectiveness of the ESA and continued protections to species and habitat long-afforded by the ESA, one of the most comprehensive, important environmental laws ever passed by the nation.

The proposed changes purport to streamline the consultation process required under § 7 of the ESA, 16 U.S.C. § 1536(a), in all cases and purport to address the "problem" of consultation when it comes to impacts on species from global warming. The § 7 consultation provisions of the ESA are at the heart of the ESA and are critical to protection of already-imperiled species. Section 7 implements the precautionary approach necessary for those protections with multiple checks and important scientific oversight. This approach is appropriate as the stakes for the species are high—extinction is forever.

The Organizations are opposed to the proposed rule change as it is clearly intended to limit the reach of ESA protections for species and habitat, especially from the most significant environmental threat of our time, global warming. The proposed changes are likely to result in

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more species put in jeopardy. The changes violate the requirements of the ESA and run counter to the evidence of existing failures by federal agencies to adequately identify and address potential effects to threatened and endangered species.

INTRODUCTION

Under existing statute and rule, a federal agency, to ensure that its actions will not jeopardize a listed species or adversely modify its critical habitat, must consult with either the Fish and Wildlife Service (“FWS”) or National Marine Fisheries Services (“NMFS”) (the “Services”). 16 U.S.C. § 1536; 50 C.F.R. § 402.02. Current rules require consultation with the Services whenever an agency action “may affect” a listed species or habitat. 50 C.F.R. § 402.14.

Under existing regulations, an action agency can make one of two determinations: either its action will have “no effect” on listed species or critical habitat, in which case consultation is not required, or the agency action “may affect” a listed species or its critical habitat. “No effect” determinations are “only appropriate if the proposed action will *literally have no effect whatsoever* on the species and/or critical habitat, not a small effect or an effect that is unlikely to occur.” Making Endangered Species Act Determinations of Effect for Individual or Grouped Actions at the Watershed Scale, National Marine Fisheries Service, August, 1996, at p. 6 (emphasis added), (citing Common Flaws in Developing an Effects Determinations, Olympia Field Office, USFWS.) The threshold requiring a “may effect” determination is exceedingly low and “[a]ny possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement” 51 Fed. Reg. 19,926, 19,949 (June 3, 1986); (“may affect” is “the appropriate conclusion when a proposed action may pose any effect on listed species” Final ESA Section 7 Consultation Handbook (Mar. 1998) at xvi) (emphasis in original). Even indirect effects (such as the private development that might be expected to occur after a new federal highway is built) must be evaluated through the § 7 consultation process. See National Wildlife Federation v. Coleman, 529 F.2d 359, 373 (5th Cir. 1976); Consultation Handbook at 4-18, 4-26; 50 C.F.R. § 402.02.

If a federal agency determines that its action may affect a listed species or critical habitat, it must consult the Services. The existing regulations provide a short cut “informal consultation” for actions that the federal agency determines may affect, but are not likely to adversely affect (“NLAA”) species and habitat, which informal consultation must culminate in a written concurrence by the Services. 50 C.F.R. §§ 401.13(a) and 401.14(b)(1). “May affect, not likely to adversely affect” is defined to encompass “discountable, negligible, or insignificant effects”. Discountable effects are those extremely unlikely to occur. Making Endangered Species Act Determinations of Effect for Individual or Grouped Actions at the Watershed Scale, at p. 6 (citing NMFS/FWS, Draft ESA Consultation Handbook (1994).) When there is “more than a

negligible potential to have adverse effects on the species or critical habitat”, the proper conclusion is “may affect, likely to adversely affect.” Id.

The proposed rules will now convert many agency actions, with no input or oversight from the scientific experts with the Services, from “may affect” situations to “no effect” situations, excusing many agency actions from consultation with the Services based entirely on the stroke of a pen and the unilateral decision-making by the action agencies.

THE PROPOSED RULES

The proposed rules allow an action agency to disregard certain effects when the agency is gauging the need to consult under § 7. An effect on species or critical habitat can be disregarded in deciding whether consultation is required:

- if the agency action is not an essential¹ cause of the effect, or
- the effect is not reasonably certain to occur,² or
- the effect and the certainty of its occurrence cannot be proven by clear and substantial information.

(proposed) 50 C.F.R. § 402.02, 73 Fed. Reg. 47874. Once the effects subject to consideration by the action agency have been so narrowed, the action agency is excused entirely from consultation if:

- Direct and indirect effects (as more narrowly-defined) of an action are not anticipated to result in a “take”³ of a listed species, and
- The agency action has no effect (as more narrowly-defined) on a listed species or critical habitat; *or*
- The agency action is an insignificant contributor to any effects (as more narrowly-defined); *or*
- The effects of the agency action,
 - i) are not capable of being meaningfully identified/detected in a manner that allows evaluation, or

¹ The preamble to the proposed rules explains that the term “essential” is added to modify cause in order to ensure that more than “technical but for” analysis is employed in determining whether an agency action will have an effect on a listed species. In the examples, an agency action is an “essential cause” of an effect subject to consultation only if the agency action is the core of the project at issue.

² The preamble explains that “reasonably certain to occur” based upon “clear and substantial information” means something more than “just likely to occur”.

³ Note that the “take” prohibition in § 9 of the ESA, 16 U.S.C. § 1538, applies only to fish and wildlife, not plants. Presumably, this means that for all listed plant species, federal agencies will now automatically clear the first requirement for skipping § 7 consultation.

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- ii) are wholly beneficial,
- iii) are such that or the potential risk of jeopardy or habitat modification/destruction is remote.

(proposed) 50 C.F.R. § 402.03, 73 Fed. Reg. 47874.

The proposed rules also make changes to the informal consultation process under 50 C.F.R. § 402.13. The Services will now be required to provide a written statement regarding concurrence within 60 days of the action agency's request for a concurrence, regardless of the adequacy of the agency's assessment and information provided and regardless of the complexity of the effects or the species at issue. If the information provided by the action agency is inadequate, the Services may, in writing made within the 60 day response period, obtain an additional 60 days, but no more. Should the Services not act within 60 days of the request, the action agency, *at its sole option*, may terminate and be excused from, consultation regardless of whether there are adverse effects on listed species or critical habitat.

DISCUSSION

The ESA's primary purpose of protecting species and their habitat is grounded in precautionary measures and directives. ESA consultations are the Act's mechanism for making sure that action agencies understand the full impact of their actions and discharge their duty to avoid contributing to extinction. Consultation with the Services serves three essential purposes: (1) the wildlife agencies make certain that the best available science is used; (2) the independent scientific review serves as a check on action agencies that might seek to advance their primary mission rather than protect endangered species; and (3) the wildlife agencies develop alternatives and mitigation to protect species and their habitat. All three of these essential attributes are lost under the proposed rules because the Services will be removed from the equation on many more projects

The action agency self-consultation that is the result of this proposed rule has already been soundly rejected by a federal district court in Washington Toxics Coalition v. Secretary of Interior, 457 F.Supp.2d. 1158 (W.D. Wash. 2006). As set forth in more detail below, the WTC court recognized that consultation requires "two to tango" and consultation under the ESA is adequately concluded only with a written opinion by the experts with the Services. The consultation provisions are integral to substantive protections for species and their critical habitat. Yet, the proposed rules allow for agencies to skip consultation with the experts in the Services in an increased number of instances where there are effects to species and critical habitat. Consequently, the proposed rules violate the ESA for all of the same reasons as the "alternative consultation agreement" at issue in the WTC v. Interior case.

I. THE PROPOSED AMENDMENTS ARE INCONSISTENT WITH THE ESA'S PLAIN LANGUAGE.

A. The Plain Meaning Of, and Congressional Intent Behind, "Consultation With" Requires Including The Services In Agency Determinations Regarding Effects To Listed Species And Critical Habitat.

As the U.S. Supreme Court found in Tennessee Valley Authority v. Hill, 437 U.S. 153, 173 (1978), [o]ne would be hard-pressed to find a statutory provision whose terms were any plainer than those of § 7 of the [ESA]." That plain language directs that every federal agency *shall*, in consultation with and with the assistance of the Secretary insure that any action that the federal agency authorizes, funds, or carries out is not likely to jeopardize listed wildlife or adversely modify critical habitat. 16 U.S.C. § 1536(a)(2). As can be seen from the language itself, consultation is not just a "study", but an integral and necessary part of the substantive protections afforded species and designated critical habitat by the ESA. Congress correctly recognized that in the pursuit of their primary missions, agencies do not always properly consider, understand, or protect endangered species and their habitats; that institutional pressures can make it impossible for action agencies to satisfy their statutory duty to protect species if the action agency perceives that doing so may conflict with or simply affect their primary missions. Further, the action agencies often lack the expertise particular to an affected species or habitat.⁴

The Ninth Circuit Court of Appeals has repeatedly affirmed that strict enforcement of the § 7 procedural requirements is critical to ensure the substantive protections afforded by the ESA:

[T]he strict substantive provisions of the ESA justify *more* stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions...If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter is, of course, impermissible.

Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985) (emphasis in original.) See, also Greenpeace v. NMFS, 106 F.Supp.2d 1066, 1074 (W.D.Wash. 2000). The consultation provisions are an integral part of the protection of species, not simply a review or study without legal and substantive import.

⁴ Even Justice Scalia has noted that the action agencies generally lack expertise in protecting species and critical habitat and that an action agency "runs a substantial risk if its (*inexpert*) reasons [for disagreeing with a biological opinion's recommendations] turns out to be wrong". Bennett v. Spear, 117 S.Ct. 1154, 1164 (1997). (emphasis added).

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Citing the strong position of the importance of § 7 consultation, the court in WTC v. Interior found that an agency's obligation to consult is in aid of, not independent of, its substantive obligation to protect species. WTC v. Interior, 457 F.Supp.2d at 1178, (citing Thomas v. Peterson, Conner v. Burford, 848 F.2d 1441 (9th Cir. 1988), Defenders of Wildlife v. EPA, 420 F.3d 946 (9th Cir. 2005), and Forest Guardians v. Johanns, 450 F.3d 455 (9th Cir. 2005)). In WTC v. Interior, the Services and the Environmental Protection Agency ("EPA") had entered into alternative consultation agreements allowing the EPA to bypass consultation procedures if the EPA unilaterally determined that a pesticide registration was "not likely to adversely affect" a listed species or its habitat. EPA was no longer required to obtain a concurrence in the NLAA determination from the Services. The stated rationale was that the Services had reviewed the EPA's pesticide registration procedures and had found them generally adequate for the protection of listed species. The WTC court rejected the alternative "self-consultation" agreement, finding that the plain language of § 7 provides that a § 7(a)(2) determination "is not to be unilaterally made." Id. at 1179. The court found the meaning of consultation to be clear, requiring inclusion of, and oversight by, the Services for pesticide registrations. The court found that the ESA's plain direction that agencies "shall...in consultation with" the Services, insure that their actions will not jeopardize listed species or modify critical habitat, could not be read as allowing no consultation or self-consultation on actions EPA deemed "not likely to adversely affect". Id.⁵

The ESA's legislative history is replete with evidence that Congress intended to require consultation for all agency actions and that such consultation is a critical and necessary part of substantive species protections.

In addition to requiring federal agencies to ensure that their actions do not adversely impact endangered species, [§7] also *requires* all federal agencies to consult with the Department of the Interior (Department of Commerce in the case of marine species) when any of their actions may affect endangered species. *This consultation process is central to the resolution of conflicts under the Act.*

H.R. Rep. No. 1625, 95th Cong., 2d Sess. 1978 (emphasis added), in A Legislative History of the Endangered Species Act, as Amended in 1976, 1977, 1987, 1979, and 1980, at 735,(1982)

⁵ The proposed rules differ significantly from the situation in Defenders of Wildlife v. Norton, (unpublished) 2006 WL 2844232, (D.D.C. Sept. 29, 2006), where the district court upheld the fire plan counterpart regulations allowing the Forest Service and the Bureau of Land Management to engage in § 7 analysis under new procedures. The Defenders court found it significant that the Services had provided extensive certification and training to the action agencies, and importantly, would continue to play a role in negotiating the fire plan alternative consultations, periodically sampling actions taken pursuant to it, recommending changes, and retaining the power to terminate, id. *18 and * 19. Here, the Services simply sign over their authority and obligation to protect species, to inexperienced agencies with no examination of agency procedures and no ability to place a check on the actions of the agencies in favor of species protection in the future.

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(“Legis. History”). Congress left no doubt as to the importance and mandatory nature of consultation, whenever any agency action “may affect” a listed species. Legis. History, at 744 (“If the federal action agency or the secretary determines that a proposed action may affect a listed species or its habitat, immediate consultation shall be undertaken.”) *id.* at 743; (“Federal agencies have a responsibility to identify activities or programs which they undertake that may affect listed species or their critical habitat and to request consultation with the Services concerning those activities or programs.”) (S. Rep. No. 874, 95th Cong., 2d Sess.) *id.* at 944; (“Consultation is the key to this process as it is to the entire act.”) Rep. Murphy, *id.* at 824.

In particular, Congress recognized that unilateral decisions by federal agencies regarding the potential for their actions to affect species, must not be permitted, because such unilateral decisions are likely to lead to less protections for imperiled species. Sen. Chafee aptly noted that allowing agencies to unilaterally determine whether a project complies with the ESA and protected species would be “like putting the fox in charge of the henhouse.” Legis. History at 995. Moreover, during debates on the 1978 amendments to the ESA, Congress defeated an amendment that, foreshadowing the impact of the proposed rules here, would have exempted many agency actions from the consultation requirements based upon those agencies meeting certain criteria:

Conflicts between the [ESA] and other federal activities are being resolved through the administrative process. The result of consultation is that in almost all cases Federal agencies have found that for both proposed and ongoing projects, modification or alternatives can be designed which avoid conflict with the Act. Senator Stennis’ amendment fails...to recognize this fact. It seeks to avoid conflicts by outright exemption from the act for large classes of projects. This appears to me stopping the consultation effort before it even has a chance to begin. Senator Stennis’ approach has a number of shortcomings which will almost certainly result in unnecessary destruction of endangered species and habitats critical to their existence.

Legis. History at 994-995.

The proposed rules create the very situation against which Congress warned and which the court in WTC v. Interior found invalid. As set forth below, the proposed rules will allow action agencies, through cramped definitions of effects and constrained analysis, to unilaterally declare their actions exempt from consultation requirements escaping any and all input and oversight by the wildlife experts at the Services. This is analogous to the impermissible “self-consultation” rejected by the court in WTC v. Interior. In fact, the unilateral decision-making sanctioned and encouraged by the proposed rules is even more problematic than the alternative process at issue in WTC v. Interior. In WTC v. Interior, the Services had examined EPA’s pesticide registration

process in detail and retained the authority to revoke the delegated consultation. The proposed rule takes the Services out of the process entirely whenever an agency unilaterally determines an action has “no effect” under the new standards of determining effects. The proposed rule should be discarded as impermissible self-consultation contrary to the plain language and intent of the ESA.

B. In Promulgating The Proposed Rules The Services Have Failed, And In Their Application Will Fail, To Use The Best Scientific And Technical Information Available To Ensure Against Jeopardy To Listed Species In Violation Of ESA’s Plain Language.

As discussed above, the primary purpose of § 7’s procedural consultation requirements is to ensure that the substantive protections afforded by the statute are guaranteed. To that end, it is incumbent upon the Services to oversee and ensure that the best science and technical information available is being used to assess whether agency actions may affect species and their habitat and to ensure that no jeopardy occurs. In the WTC v. Interior case, the court found that the self-consultation, or unilateral decision-making approved by the Services for EPA’s pesticide registration process, failed to meet this explicit requirement of the ESA. The Services had never consulted on the alternative plan and regulations to allow EPA to consult with itself on pesticide registrations, signing off on EPA’s modeling and risk assessment processes despite undisputed findings by the Services’ scientists that EPA’s process failed to capture all effects on species. WTC v. Interior, 457 F.Supp.2d, at 1182-85; 1188.

The rules proposed here are even less protective and uncertain than the EPA procedures the court rejected in WTC v. Interior. The Services have now broadened agency unilateral determinations regarding potential effects on listed species and critical habitat to include all agencies with a myriad of missions and processes. Unlike the case with EPA pesticide registrations, the Services have conducted no examination of the processes by which the various agencies will assess their potential impacts on listed species and their habitats.⁶ The Services, in promulgating the proposed rules have failed and will fail to ensure that agencies are using the best scientific and technical information available.

The proposed rules also fail to use the best scientific and technical information available (e.g. science regarding exact effects of global warming) by completely changing the way that uncertainty is addressed in assessing the effects of agency actions. As noted by the Services and highlighted by the court in WTC v. Interior, the Services, during consultation, must treat uncertainties in the science and evidence in a way that minimizes risks to listed species and to

⁶ The proposed rules are also less protective than the program approved in the Defenders of Wildlife case where the Services retained authority to review consultations and provided training and certification to the action agencies.

avoid false negative conclusions. The proposed rules seek to reverse this caution and define away uncertainties as having no effect, thereby likely leading to “false negative” findings of no effects and no harm to species and habitat. The preamble to the rules baldly admits such intent when it notes that some of the science of global warming is uncertain and therefore, the rules are rewritten to ignore and negate such uncertainties. Allowing risks of uncertainty to be borne by the species and placing species in jeopardy with false negative conclusions is directly contrary to the plain statutory directive to use the best scientific and technical information to *ensure* agency actions will not jeopardize listed species and to *ensure* agency actions will not adversely modify critical habitat.

II. BY DEFINING AWAY MANY EFFECTS ON LISTED SPECIES AND HABITAT AND IMPOSING HIGHER, OFTEN ARTIFICIAL THRESHOLDS TO CONSULTATION, THE PROPOSED RULES PROMOTE UNILATERAL AGENCY DETERMINATIONS OF EFFECTS IN VIOLATION OF THE ESA.

The new proposed rules substantially redefine when federal agencies must consult the Services in order to ensure no jeopardy to listed species and their critical habitat. The proposed amendments do so by rerouting many of the agency actions into newly-created “no effects” categories, entirely bypassing any oversight or consultation from the Services or assistance from the Secretary that would come under the existing rules with NLAA determinations. Many of these effects and actions would, under the existing rules, have at least required an informal consultation process followed by a NLAA written concurrence by the Services. Now, federal agencies will unilaterally, with no input or oversight from the Services, make their own determinations on whether their actions are likely to jeopardize listed species or their habitat, using the new constrained definitions of what can be considered an effect and new narrow applicability of the consultation rules. As set forth above, such unilateral determinations violate § 7.

A. The Risk Of Jeopardy Can Only Be Determined With Consultation.

The proposed rule wholly exempts from consultation, actions where the action agency unilaterally, and without input or oversight from the scientific experts with the Services, believes the *risk of jeopardy* to a species is remote, whereas under the existing rules, actions where the *risk of impacts* (not just the much more serious jeopardy) was remote could be found to be NLAA, *with the review and concurrence of the Services*. The proposed rules’ delegation of a jeopardy determination is an outright violation of the requirements of § 7. Jeopardy determinations can only be made in consultation with the Services. 16 U.S.C. § 1536.

B. The Proposed Rules Impose New Causation Thresholds For Consultation That Will Allow Agency Actions That Affect Listed Species Or Critical Habitat To Avoid Consultation.

The proposed rules require that the agency action be an “essential cause” of effects (effects being narrowly-defined, see below), on listed species, before consultation with the Services is required. “Essential cause” is a wholly-new phrase that has never played a role under the ESA and has no clear meaning (but appears geared toward reducing the number of agency actions for which consultations must occur and eliminating the concept of contribution to an effect on species). The proposed rule further provides “[i]f an effect will occur whether or not the action takes place, the action is not a cause of the direct or indirect effect.” 73 Fed. Reg. 47874. The Preamble to the proposed rules elaborates that for the action to be an “essential cause”, the action must be necessary for the effect to occur—there must be a “close causal connection” between the specific effect and the agency action. 73 Fed. Reg. at 47870.

These requirements (especially when combined with some discussed below) suggest that an action agency will not have to consult with the Services where its actions are one of many, or a contributor to, effects on listed species or critical habitat. The Ninth Circuit Court of Appeals recently rejected an attempt by NMFS to disregard effects to listed species in a biological opinion when NMFS claimed that the effects attributable to the specific action under consideration would not alone push a species the last increment into jeopardy. National Wildlife Federation v. National Marine Fisheries Service, 524 F.3d 917, 930 (9th Cir. 2008) (“[E]ven where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm.”) Id. The court correctly recognized that species are often imperiled due to numerous causes and that the ESA does not allow for the slow destruction of a species simply because it comes in small increments.

Two examples set forth in the FWS Consultation Handbook also illustrate how the proposed rule will allow certain actions to now avoid consultation, increasing jeopardy to species and loss of critical habitat. On a large reclamation project in the San Joaquin Basin of California, FWS determined that distribution of water for agricultural use on the higher east side of the valley allowed groundwater on the west side to remain at a level making it economical to pump. This in turn fostered the conversion of more land to agriculture resulting in losses of 10,000 to 30,000 acres of habitat per year, a situation revealed through the consultation process. Section 7 Consultation Handbook at 4-27 to 4-28. The other example cited in the Handbook resulted in litigation, National Wildlife Federation v. Coleman, 529 F.2d 359 (5th Cir.) cert. denied, 429 U.S. 979 (1976) where the court ruled that indirect effects on listed species and critical habitat from private development made possible by construction of a highway interchange had to be considered as part of consultation on the interchange. The court so held even though the new

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developments were not yet planned. It is likely that the effects in these examples would escape consultation and analysis by the FWS under the proposed rules.

Finally, the proposed rules limit an action agency's analysis of its obligation to consult to only those effects on species or critical habitat that occur or are caused by the agency within the area of the "particular" action, whereas before it was recognized that the effects could and often did extend beyond the action area. The rule artificially redefines any effect that is outside the action area as not an effect that is caused by the agency action and it does so entirely divorced from science or technical information about the action under consideration. This rule change apparently targets effects to species from global warming, removing them from consideration by experts familiar with the extent of global warming effects and their causes. This change also appear inconsistent with past practices and case law as set out in the Handbook examples.

C. The Proposed Rules Impose Evidentiary Thresholds For Consultation That Will Allow Agency Actions That Affect Listed Species Or Critical Habitat To Avoid Consultation.

The proposed rules equate "uncertain" effects with no effects allowing the action agency to unilaterally determine, with no input or oversight from the scientific experts in the Services, that their actions will have no effect on listed species or critical habitat. Consultation with the Services is in fact designed to address just this situation where the wildlife experts are to examine what is known and to what degree of certainty and weigh that against the obligation to be precautionary and protective. Moreover, as noted above, this threshold violates the requirement that the best scientific and technical information be used in consultation to ensure no jeopardy to listed species.

The proposed rules require that effects will be "reasonably certain" to occur meaning "more than just likely to occur" whereas under the existing rule, consultation is required if the project may affect the species, defined as any possible effect, whether beneficial, benign, adverse or of an undetermined character. Effects of an undetermined character will now escape the further examination of experts and possible mitigation because such effects will no longer be subject to consultation.

The proposed rules now require "clear and substantial information" of effects (again, using the newly-constrained definition of what effects must be considered). "Clear and substantial information" appears to be a new legal standard at direct odds with the statutory standard of using the "best scientific and technical information available".

Finally, the proposed rules insist that the reasonably certain, not insignificant effects must be capable of being "meaningfully identified" and "detected" in a manner that permits evaluation.

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Again, this appears to impose a standard different from using the best scientific and technical information available. Further, “meaningfully identified” is both undefined and subjective, calling for expertise in judgment that an action agency generally will lack. The action agency will be judging whether the effects to a listed species or critical habitat are capable of being “meaningfully” identified and “detected” in a manner that permits evaluation, without the oversight or assistance of the Services in making a scientific or technical evaluation of the action agency’s ability to identify and detect such effect. This is contrary to the very purpose and intent of § 7 consultation.

D. The Proposed Rules Impose Significance Thresholds For Consultation That Will Allow Agency Actions That Affect Listed Species Or Critical Habitat To Avoid Consultation.

The proposed rules exempt “insignificant contributors” to effects on listed species or habitat whereas currently, any contribution to impacts on the species or habitat called for consultation. This rule change also apparently targets effects to species from global warming and again does so without the aid and benefit of expert consultation and advice. This is improper application of the law, See discussion of NWF v. NMFS above. It is conceivable that no single action rises to the requisite level of significance on its own (as determined by the action agency with no input or oversight from the Services), but that several actions together would. Nonetheless, under this requirement, all the actions escape consultation and jeopardy could occur.

E. The Proposed Rules Mix “Take” Concepts Into The Consultation Process Creating Conflicts And Ambiguity Within The Law.

In the proposed rules, the first step in excusing an agency from consultation with the Services is whether the agency anticipates a “take” of a species. If the answer is no, the agency has cleared the first hurdle to skipping consultation altogether. This provision means that threatened and endangered plant species will now receive less protection from the consultation requirements of § 7 than afforded under existing rules. As the Services know, the take provisions of the ESA, § 9, only apply to wildlife species, not to plants. 16 U.S.C. § 1538. Therefore, a federal agency that anticipates affecting plant species only, has already automatically been able to clear the first hurdle to entirely avoiding consultation.

Under the regulations for what constitutes a take of a listed species, only habitat modification that actually injures or kills a species, is considered a take. 50 C.F.R. § 222.102. However, consultation requirements apply under the ESA to ensure that agency actions are not likely to result in the destruction or adverse modification of habitat of any listed species, plant or animal, clearly a lower threshold than destroyed critical habitat in a manner that actually injures or kills wildlife. 16 U.S.C. § 1536(a)(2). Again, if the first threshold of whether an agency can skip the

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consultation requirement is whether the agency does not anticipate a take of a wildlife species, the different processes of the ESA and the different thresholds become confused.

Finally, as noted above, the proposed rules call for consideration of only effects that are “reasonably certain to occur” (not those that are “merely” reasonably foreseeable), based on “clear and substantial information and for which the agency action is the essential cause, not just a proximate cause. This creates confusion with the way the proposed rule links the § 7 consultation threshold to whether a take is anticipated to occur. Concepts applicable to demonstrating liability for a take of a species require, in accordance with ordinary common law principles, that the take was “merely” reasonably foreseeable and the offenders’ actions were a proximate cause of the take. Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687, 700, fn. 13 115 S. Ct. 2407, 2414, fn 13 (1995) If the take prohibition is violated when harm to a species is reasonably foreseeable and the proximate cause of an action, then no greater evidentiary burden should serve as a trigger, or part of the trigger, for consultation.⁷ It is clear from the ESA scheme that consultation is intended to be the more protective measure and is intended to avoid a take by its very application.

F. The Proposed Rules Allow And Encourage The Action Agency To Parse Each Action’s Effects Separately, Contrary To The Plain Language Of The ESA And Case Law.

In addition to impermissibly allowing the agencies to make their own determinations about the effects of their actions, the proposed new rules suggest that an agency may break a single action into its component effects and consult only on those *effects* that fall outside the categories used to define the characteristics of actions that are not likely to adversely affect listed species, creating multiple opportunities for agencies to skip consultation. Specifically, the proposed revisions to 50 C.F.R. § 402.03 state that “[i]f one or more but not all of the *effects* of an action fall within paragraph (b) of this section, then consultation is required only for those *effects* of the action that do not fall within paragraph (b) of this section.” 73 Fed. Reg. at 47874 (emphasis added). It is clear from the statute, the regulations, and the case law that an “agency action” cannot be parsed into its component effects, some of which will be scrutinized through the consultation process, and some of which will not. The ESA requires agencies to consult on “actions,” not on some subset of leftover “effects.”

⁷ The district court in Greenpeace v. National Marine Fisheries Service, 106 F.Supp.2d 1066, 1073-75 (W.D.Wash.2000) also recognized and discussed the important purposes and burden differences between the take provisions of § 9 and the consultation provisions of § 7. The court pointed out that § 9 is prohibitory in nature with a requisite burden on the person or entity claiming a take has occurred. Conversely, § 7 imposes a “rigorous affirmative duty on federal agencies” to insure that their actions do not result in jeopardy and prescribes precise procedural steps for compliance. In that instance, the burden is on the agency to meet those duties through application of the procedural steps, a wholly difference analysis than applied to § 9.

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Section 7 unambiguously states that “any *action* authorized, funded, or carried out” by a federal agency must avoid jeopardy to the continued existence of any threatened or endangered species. 16 U.S.C. § 1536(a)(2) (emphasis added). A biological opinion issued at the end of this consultation process must detail “how the *agency action* affects the species or its critical habitat.” 16 U.S.C. § 1536(b)(3)(A) (emphasis added). These requirements embody a presumption in favor of defining a proposed federal action broadly in the manner that best protects species.

The ESA’s implementing regulations (which the Services have not proposed to change) confirm that “agency action” cannot be split apart into component effects, some of which would undergo formal consultations and some of which would not. The implementing regulations define “action” for purposes of consultation as:

all *activities or programs* of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas.

Examples include, but are not limited to:

- (a) actions intended to conserve listed species or their habitat;
- (b) the promulgation of regulations;
- (c) the granting of licenses, rights-of-way, permits, or grants-in-aid; or
- (d) actions directly or indirectly causing modifications to the land, water, or air.

50 C.F.R. § 402.2 (emphasis added).

Congress designed the ESA to ensure the broadest possible look at federal actions to serve its overriding goal of protecting and recovering listed species. TVA v. Hill, 437 U.S. 153, 187, and n.32 (1978) (agency action is broadly defined term encompassing “any action” that “remain[s] to be authorized, funded, or carried out” by a federal agency); id. at 173 (“This language admits of no exception.”); Lane County Audubon Soc’y v. Jamison, 958 F.2d 290, 294 (9th Cir. 1992); Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1054 (9th Cir. 1994) (emphasizing that “agency action” is to be construed broadly); Sierra Club v. Marsh, 816 F.2d 1376, 1386 (9th Cir. 1987) (holding that risk must be “borne by the project, not by the endangered species” because “Congress clearly intended to give the ‘benefit of the doubt’ to preserving endangered species.”). To fulfill the ESA’s goals it is the “action” which must undergo consultation, not its component “effects.” In the most recent example, the Ninth Circuit rejected the National Marine Fisheries Service’s attempt to exclude from consideration in a consultation the effects stemming from parts of the action that it deemed to be “nondiscretionary.” National Wildlife Federation v. NMFS, 524 F.3d 917, 928-929 (9th Cir. 2008) (amended opinion). The Court rejected this

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attempt to parse an otherwise single action into component discretionary and nondiscretionary parts and consult only on the effects of the former and held that “NMFS may not . . . exclude from the proposed actions’ impacts the effects of related operations NMFS deems ‘discretionary.’” Id. at 928. See also id. at 929 (holding that NMFS cannot “immunize discretionary agency actions simply because they are taken in pursuit of a non-discretionary goal.”).

Further, Courts have long emphasized the critical importance of considering the entire agency action, not just a subset of its parts or effects, as the proposed regulations would urge. See, e.g., Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1054 (9th Cir. 1994) (“there is little doubt that Congress intended to enact a broad definition of agency action in the ESA”); Conner v. Burford, 848 F.2d 1441, 1453 (9th Cir. 1988) (“[T]he scope of the agency action is crucial because the ESA requires the biological opinion to analyze the effect of the *entire* agency action.”) (emphasis in original). While an action agency’s request for formal consultation may encompass several similar individual actions within a given geographical area, “[t]his does not relieve the Federal agency of the requirements for considering the *effects of the action as a whole*.” 50 C.F.R. § 402.14(c)(6) (emphasis added). Courts have held repeatedly that “[a] biological opinion [that] does not address the full scope of the agency action is arbitrary and capricious because it necessarily fails to consider important aspects of the problem.” Greenpeace, 80 F. Supp.2d at 1147; see also Conner, 848 F.2d at 1458 (“[B]iological opinions must be coextensive with the agency action”); American Rivers v. U.S. Army Corps of Engineers, 271 F. Supp.2d 230, 254 (D.D.C. 2003) (the agency “is required to consider the Corps’ proposed action [of managing the reservoirs] in the context of its overall management of the Missouri River Basin”). Agencies may not “engage in a series of limited consultations without ever undertaking a comprehensive assessment of the impacts of their overall activity on protected species.” American Rivers, 271 F. Supp.2d at 255; Pacific Rivers, 30 F.3d at 1056 n.12. Section 7 has simply never been interpreted to allow federal agencies to select only individual aspects or effects of a larger federal action for consultation.

The proposed rules’ limitation of consultation to effects, coupled with the proposed rules’ many off-ramps for effects such as the causation and significance factors outlined above, will likely result in agencies breaking their actions into smaller pieces in an attempt to minimize effects, dilute causation and avoid consultation. Carving up an action that may affect imperiled species and their habitat into individual effects components strays far from the purpose and intent of the ESA to proactively protect imperiled species from the many creeping, sometimes insidious and not obvious way that decisions and actions may harm them. It is often those multiple small, but collectively large, or synergistic effects, from our actions as a whole, than can jeopardize species or habitat. The consultation requirements are an important “look before you leap” requirements that serves the aims of the ESA and the proposed rules should be discarded as contrary to those aims.

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III. THE TIME LIMIT PLACED ON INFORMAL CONSULTATIONS RESULTING IN AUTOMATIC CONCURRENCE IN NLAA DETERMINATIONS, PROMOTES AGENCY SELF-CONSULTATION IN VIOLATION OF THE ESA.

The proposed rules set a very short deadline of 60 days for the Services to issue a final decision on whether they concur with an action agency NLAA determination. The time starts running at the option of the action agency when it requests concurrence in an NLAA determination. Should the Services fail to concur within the now-truncated period of time, the action agency may declare consultation terminated. The net result is that the rules will allow an action agency to skip consultation with the experts on an action that may affect a species or that may modify critical habitat. This is an outright violation of the ESA and entirely outside the Services' authority in rulemaking.

In practice, the extraordinarily short timeline will result in many self-consultations ending in unreviewed NLAAs with likely jeopardy to species. The time limit is wholly unrealistic in that the scientific analysis required for a complete and protective consultation is often complex involving analysis of intricate biological systems and evaluations. It cannot and should not be rushed. The proposed rules will start the clock running when the action agency requests concurrence, whereas now the clock starts only after the wildlife agency has received sufficient information to conduct the consultation.⁸ Consultation delays often arise when the agencies disagree over what information is required or when the information supplied by the action agency is inadequate. Such disagreements led to 5-6 year delays in pesticide consultations. Consultations also become protracted when the agencies are negotiating changes in the project to avoid a jeopardy call. A 2004 GAO report found that 30-40 % of the consultations completed in one field office in fiscal years 2001-2003 exceeded the established time frames.

The proposed rule will put the Services in the position of either allowing consultation to terminate due to an inability to obtain information for a concurrence, or to issue a nonconcurrence on the basis of inadequate information (the correct choice for fulfilling the ESA's goals to be precautionary and protective.) See Desert Rock power plant example, part VII below. Ironically, the latter route may lead to more "unnecessary" consultations—a result the Services supposedly seek to avoid with the proposed rules.

⁸ While there is currently no timeline for informal consultations, the ESA's timelines for formal consultation are 60-150 days, and they are routinely extended. Importantly, missing the ESA's timelines does not result in an automatic decision of no effect, but that is the result of the proposed rules.

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IV. THE PROPOSED RULES ATTEMPT TO WHOLLY EXEMPT GLOBAL WARMING FROM THE ESA BY FIAT.

The proposed rules seek to codify “the Service’s current view that there is no requirement to consult on greenhouse gas (GHG) emissions’ contribution to global warming and its associated impacts on listed species (e.g., polar bears).” Preamble, 73 Fed. Reg. 47872. The proposal makes this pronouncement regardless of the type or magnitude of the action involved, such as, for example, a regulation impacting GHG emissions from the largest emitters, like coal-fired power plants. Under the proposed rules, global warming could be ignored because GHG emissions cause impacts that:

- Occur beyond the immediate area of the particular action
- Occur later in time without clear and substantial information that they are reasonably certain to occur
- Have so many causes that any particular action cannot be deemed an essential cause or a significant contributor
- Cannot be meaningfully identified or detected.

The ESA makes the best science, not politicians’ desires, the determinant of whether an action must undergo consultation, or is likely to cause jeopardy or degrade critical habitat. 16 U.S.C. § 1563(a)(2). The courts have repeatedly turned back attempts to focus only on immediate, local, or certain impacts. There also is no provision in the ESA allowing for an entire category of effects to species or habitat to be exempted from application of the ESA. The proposed rules exceed the Services authority in this regard.

The ESA and § 7 consultation also have an essential role to play as habitats and ranges shift or change as a result of global warming. Consultation brings expert analysis and advice to bear on how to adapt agency programs to avoid contributing to extinctions considering the added pressures of global warming.

Further, the Services, in promulgating these rules, cannot know what the science and scientists can or cannot discern regarding global warming impacts to species from a particular agency action if the rule change removes the scientists from the equation. The ESA has always assessed impacts to species from the existing "best science and technical information available" whatever that might be at a particular point in time. Part of the role of the consultation is to identify known impacts and account for uncertainties. See discussion of precautionary approach to consultation and need to protect against “false negatives” in WTC v. Interior.

In truth, the Services are using global warming as an "excuse" for this much more far-reaching attack on the ESA. The preamble to the proposed rules makes claims that global warming is too

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big of a problem and the causes too diffuse for the ESA to be useful for addressing global warming and the administration makes these claims in the preamble to this rule. The example used by the Services to illustrate its intent in exempting global warming effects to species with proposed revisions such as this one, is disingenuous and misleading. The preamble uses the construction of a highway interchange to highlight how global warming impacts from increased traffic are too remote to be properly considered in consultation between the action agency and the Services. 73 Fed. Reg. at 47872. Unfortunately, the example is used as the basis for sweeping changes that will exempt a broad range of agency actions from consultation with the experts in the Services, including those of much larger magnitude such as rules for greenhouse gas emissions for entire industries such as coal-fired electrical generation or automobile emission standards.

The rules reach much further than anything connected to those (specious) claims and simply excuses many government actions from the oversight and input of experts on all kinds of effects to species, not just global warming effects. All too often, it is aggregated and somewhat uncertain impacts along with degraded conditions and multiple threats that put species in peril.

V. THE TIMING OF, AND PERIOD FOR, COMMENT ON THE PROPOSED RULES EVIDENCE AN INTENT TO SLIP MAJOR RULE CHANGES THROUGH A RUSHED AND LIMITED PROCESS.

This major rule change, affecting the very heart of the ESA with far-reaching consequences, is proposed on a limited, rushed schedule in the waning days of the Administration. The intent can only be to improperly cut public examination and input short in an effort to railroad changes that have been rejected when proposed in a more open and orderly fashion.

Under both application of provisions of the Small Business Regulatory Enforcement Fairness Act ("SBREFA"), and of Executive Order 12866, § 6(a) (58 Fed. Reg. 51735 (October 4, 1992)), longer periods of publication and consideration apply to these proposed rule changes. The proposed change is a major rule as defined by SBREFA based upon the magnitude of its impact on the economy and upon state, local and tribal governments. 5 U.S.C. § 804. As such, a major rule takes effect later than the time period indicated in your notice for the amendments at issue here. A major rule takes effect on the latest of the later of the date occurring 60 days after the date on which (1) Congress receives the report referenced above or (2) the rule is published in the Federal Register, if so published. 5 U.S.C. § 801(a)(3). Therefore, major rules are not effective until at least 60 days after publication of the final rule in the Federal Register. Under Executive Order 12866, § 6(a), agencies should provide a 60 day comment period for draft federal rules. In this case, the Services initially provided a scant 30 days for public comment (extending it to 60 days after public outcry and pressure) and the rule is being treated as one that

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will take effect upon publication of the final rule in the federal register. This is improper under the applicable law and order.

Moreover, on May 9, 2008, the Administration issued a memorandum providing that “[e]xcept in extraordinary circumstances, regulations to be finalized in this Administration should be proposed no later than June 1, 2008 and final regulations should be issued no later than November 1, 2008.” Memorandum from Joshua B. Bolten, White House Chief of Staff, May 9, 2008. The Services published the proposed changes on August 15, 2008, a full 2 ½ months after the deadline.

The combined impact of the Services brushing past the law, executive order and executive memorandum is a major change to the application of and protections afforded by the ESA with little time (or apparently tolerance) for public review and input. The Services should not allow the ticking political clock to panic them into sweeping changes that will negatively impact species and the environment for years to come.

VI. EXAMPLES: THE ACTION AGENCIES ARE OFTEN WRONG IN ASSESSING THE IMPACT OF THEIR ACTIONS.

In the preamble to the proposed rules, the Services suggest that § 7 consultation is less necessary now and possibly duplicative because federal agencies have “gained significant experience” over the years and are fully capable of carrying out the obligation of ensuring no jeopardy to listed species and habitat. While that argument is legally faulty in that there is nothing in the plain language of the ESA that suggests consultation is only necessary until the Services determine agencies have gained a measure of expertise, it is also factually faulty in that there are numerous examples of action agencies failing to make the proper precautionary assessment and judgments about effects to species.

1. In Pacific Rivers Council v. Thomas, 936 F. Supp. 738, 741-43 (D. Idaho 1996), the Forest Service tried to authorize grazing in areas designated as critical habitat for listed salmon, based on its unilateral NLAA determination. In a letter, NMFS expressly did not concur in the NLAA determination because of direct salmon mortality from cows trampling on the redds (salmon nests) and streambank damage from grazing in important salmon spawning areas. Emphasizing the essential oversight role played by the Services, the Court held that an agency, like the Forest Service, cannot unilaterally authorize an action to proceed before completion of consultation:

Can the Forest Service, after consultation on the Elk Creek allotment has been initiated with the NMFS under § 7(a)(2) but before its completion, proceed to turn out livestock on two of the three pastures without a NMFS biological opinion or

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concurrence, if the Forest Service makes a unilateral determination that the action is not likely to adversely affect a listed species? After a thorough review of the requirements of the ESA and the relevant case law, this court must answer this question in the negative.

Id. at 748.

2. In 2002, the Army Corps of Engineers initially made an NLAA call when a developer sought an Army Corps permit to demolish a wharf and build a development with over 1000 residential units and retail facilities in the upland portion of the site. NMFS sent a letter indicating that it did not concur with the Corp's NLAA finding because of the potential for contaminants from the removal of thousands of creosote pilings to move downstream and harm salmon and because the Corps had conducted no analysis of the development's stormwater runoff on salmon, which NMFS believed would be significant. Letter from NMFS to Army Corps (March 12, 2003) (requesting formal consultation on remainder of the demolition and development).

3. The positive role served by informal consultation has been illustrated by the consultations ordered by the court in Washington Toxics Coalition v. Environmental Protection Agency, 413 F.3d 1024, 1035 (9th Cir. 2005), for the registration of pesticides that may affect listed salmon. When EPA made "may affect" determinations, as required by court order in the case, it asked NMFS to initiate formal and informal consultations on the pesticide uses. NMFS found EPA's effects determinations and consultation packages inadequate because, e.g., they did not describe the full range of effects, including sublethal, cumulative, and habitat effects, or compile the full literature and other relevant science. See, e.g., NMFS 33-34, 27-32, 108-12, 185-87, 219-27, 1621-24, 1656-70. NMFS informed EPA that the consultation packages did not supply the information necessary for a consultation and identified essential missing information. See, e.g., id.; FWS 030508a-d; NMFS 1581-96. Early on, NMFS believed some of the pesticides for which EPA had made NLAA determinations would warrant formal consultation. NMFS 401. After further review of the packages for EPA's NLAA determinations, NMFS staff concluded (and produced a draft letter indicating) that NMFS "does not concur with EPA's effects determinations" because the pesticides could "have greater than discountable or insignificant effects on listed species." NMFS 5184-85, 5189.

NMFS then issued a new draft biological opinion for three agricultural pesticides on July 31, 2008. http://www.nmfs.noaa.gov/pr/pdfs/pesticide_biological_opinion_draft.pdf. In the draft biological opinion, NMFS has found that three commonly-used agricultural pesticides are increasing the chance of extinction for 28 different threatened and endangered salmon and steelhead stocks. Specifically, NMFS found "overwhelming evidence" that three pesticides -- chlorpyrifos, diazinon, and malathion -- interfere with the ability of salmon to swim, find food,

reproduce, and escape bigger fish preying upon them. If these pesticides are used as currently authorized, they are "likely to jeopardize the continued existence" of all 28 threatened and endangered salmon populations. The assessment concludes that three of the most dangerous pesticides still on the market are "jeopardizing" salmon and steelhead stocks. NMFS made jeopardy findings for 14 pesticides uses EPA had deemed NLAA, thereby demonstrating the obvious inadequacy of EPA's pesticide registration process as a substitute for consultation with the Services under the ESA. NMFS found that EPA had missed key effects (of pesticide ingredients and combinations), had failed to adequately account for peer reviewed scientific studies showing impairment of salmon life functions at a fraction of lethal doses, and had given short shrift to the pesticide's impacts on habitat and prey.

4. The Army Corps of Engineers and a Washington diking district found that replacement of a tidegate—a structure that affects the flow of salt and fresh water in estuary areas, was not likely to adversely affect listed salmon. The analysis focused solely on the isolated act of replacing the tidegate and the impacts during construction in the very immediate area where the structure itself is physically located. NMFS viewed the action area as the area impacted by the tidegate, not just the act of replacing it and limited physical location of its replacement. Because it blocks fish access to productive habitat, the lack of such habitat is the obstacle to recovery for this salmon population, and the tidegate degrades water quality, NMFS made a jeopardy call and proposed a different type of tidegate that would allow fish passage and improve water quality.

5. The U.S. Navy prepared a BA related to Explosive Ordinance Disposal in Puget Sound. The Navy's BA made a NLAA finding as to possible effects on listed salmon species and listed bull trout. In a joint letter dated April 18, 2002, the Services disagreed with the NLAA finding stating that the agency action had a *high likelihood of mortality* for the subject species and for their prey species. The resulting consultation has led to mitigation to lessen mortalities and habitat impacts including modification of the size of explosions used during salmon migration times, pre-explosion surveys to ensure the absence of species, post-explosions monitoring and reporting of kills, and two salmon habitat restoration projects to offset losses.

6. In consultation on the Desert Rock coal-fired power plant (very large new coal plant in New Mexico on Navajo lands), the Bureau of Indian Affairs ("BIA") prepared a Biological Assessment ("BA") for the proposed coal plant with a NLAA finding. In January of this year, the Supervisor of the New Mexico FWS field office wrote a lengthy letter to the BIA disagreeing with the finding of NLAA, finding the coal plant is likely to affect listed species and their habitat, and taking the BIA to task for doing such a poor and incomplete job of analysis that the submission could not properly be considered a BA. Of particular note relative to the Services' attempts to exempt global warming from § 7 consultation in these proposed rules, FWS raised a number of failures of BIA to assess the impacts of the coal plant and attendant global warming issues on precipitation, water availability, flow and temperature and in turn, the impacts on two

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endangered fish species in the immediate area of the plant. The letter closes with the following (referencing the BIA's statement in the BA that cumulative effects to listed species from global warming would be negligible): "This statement is without any supporting analysis [in the BA]." The proposed rules attempt to override this expert oversight and allow the plant to skip consultation on the serious effects on endangered fish species.

The Desert Rock example is also relevant to the constrained time limits put on the Services in review and concurrence on NLAA determinations. The BIA has been told repeatedly that the BA is inadequate and what is expected of the BIA in the process. *See* July 2007 and January 2008 letter from FWS to BIA. FWS has pointedly informed the BIA that consultation is not commenced unless and until FWS receives a completed, adequate BA containing the information FWS finds necessary to a full consultation on the effects to species and habitat from the coal plant. Under the proposed rules, BIA could, at this point and despite being repeatedly told that the assessment is inadequate, declare consultation "done" and move on with the project, regardless of effects to imperiled species. Alternatively FWS would be forced to refuse concurrence on a record it considers less than adequate and initiate consultation.

7. At Makua Military Reservation in Hawai'i, the Army concluded in its BA that mitigation would adequately offset potential harm to listed species and habitat from live-fire training. FWS came back with a draft jeopardy call for 30 species, resulting in substantially more minimization and mitigation measures. Notably, of the 30 critically endangered species FWS determined were at risk of jeopardy absent substantial additional mitigation measures, 29 were endangered plant taxa.

8. In January 2005, Consolidation Coal Company ("CONSOL") applied to the Army Corps of Engineers for coverage under a nationwide permit for its #1 Mine, P-11 Shaft and Slope Project, in Tazewell County, Virginia. According to FWS's February 8, 2005 memo to the Corps, the project boundary lies only two and one-half miles upstream from the only known breeding ground of the "extremely rare" endangered tan riffleshell, as well as federally designated critical habitat of the endangered purple bean. Additionally, the endangered rough rabbitsfoot is present approximately four miles from the project boundary. In its memo of March 4, 2005, the FWS identified a number of other protected species that would be potentially harmed by the project including: Virginia spiraea, fluted kidneyshell, Indiana bat, Virginia big-eared bat, Cumberlandian combshell, and oyster mussel. FWS identified a number of potential risks posed by the project, necessitating further investigation, including: subsidence and resulting dewatering of surface waters; lateral breakthrough of water from adjacent mined voids into the proposed mine; addition to the sediment load from road construction, stream diversions, valley fills, and long term use of the facilities; and toxicity of pooled mine water and any water treatment chemicals to be discharged from the proposed mine to listed species, their food

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sources, and host fish for listed mussels. FWS recommended that the Corps initiate formal consultation due to the potential impacts of the proposed project.

The Corps asked FWS to reconsider its “may affect” designation, but on April 1, 2005, FWS responded by reaffirming its determination that the proposed permit would likely have an adverse affect on federally listed species and critical habitat and “strongly recommend[ing]” that the Corps initiate formal consultation. Despite a Corps directive that “[d]istrict engineers must initiate Section 7 consultation if requested to do so by FWS or NMFS,” the Corps has ignored FWS’s request to initiate formal consultation and the matter remains in controversy.

9. By letter on February 11, 2008, FWS informed EPA that FWS did not concur in EPA’s NLAA determination for registration of the pesticide atrazine and effects on endangered Alabama sturgeon and the endangered dwarf wedgemussel. FWS noted a number of documented adverse effects of atrazine on fish, amphibian and shellfish species and found that EPA’s process of making the NLAA had improperly excluded analysis of mixtures including atrazine, and other inert ingredients within manufacturers’ products. FWS also noted that EPA’s definitions of the “action” and action area were too constrained and that EPA had failed to look at other stressors in the environment that could heighten or contribute to the effects from atrazine. FWS found that the actions of EPA relative to atrazine were likely to adversely affect the subject species.

10. In January 2008, the Services reviewed the fire plan consultation counterpart regulations⁹ and found performance by the Bureau of Land Management (“BLM”) and Forest Service (“FS”) wanting. <http://nmfs.noaa.gov/pr/pdfs/laws/fireplanreview.pdf>. The joint Report issued as a result of the review, found that more than half of the evaluations conducted by the FS and BLM were inadequate to support the conclusion that the agency action in question was not likely to adversely affect a listed species or its habitat. *Id.* at p. 22.

Specifically, of the FS and BLM biological assessments reviewed by NMFS, 100% (10 of 10) failed to use the best scientific and technical information available, even on basic considerations such as proper identification of the agency action’s direct and indirect environmental effects,

⁹ As discussed above, in *Defenders of Wildlife v. Norton*, (unpublished) 2006 WL 2844232, (D.D.C. Sept. 29, 2006), the district court upheld the fire plan counterpart regulations. The court distinguished *WTC v. Interior* in a footnote because the two cases concerned different counterpart regulations and because of different jurisprudence in the two Circuits. *Id.* at *19 n.15. Because the Services play a role in negotiating the fire plan alternative consultations periodically sampling actions taken pursuant to it, recommending changes, and retaining the power to terminate, *id.* *18, the court “cannot find that the Counterpart Regulations are inconsistent with the ESA’s ‘consultation’ requirement.” *Id.* at *19

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proper identification of all listed species and critical habitat that may be exposed to the action, and comparison of the distribution of potential effects. Id. at pp. 12, 14 and 18-20.¹⁰

Interestingly, this dismal performance came after FS and BLM training conducted under the fire plan counterpart regulations. The Services recognized that ordinarily, in the standard informal section 7 process, if questions arise regarding adequacy of the action agency's assessment, interaction and discussion between the action agencies and the Services usually results in shortcomings being identified and corrected. Id. at p. 21. The fire plan counterpart regulations eliminates this important check and the result has clearly been a failure.

11. Not only does the Services' concurrence serve as a check on an erroneous NLAA determination, but the informal consultation process often results in substantial mitigation to protect listed species. A recent biological opinion on a highway widening project describes the give-and-take that not only cajoled the Federal Highway Administration ("FHWA") into conducting formal consultation but led to a substantial modification of the project. ESA § 7 Consultation Biological Opinion for SR 524, 24th Ave. West to SR 527 Widening (July 11, 2005). For the first year of informal consultation, FHWA insisted that the project would be NLAA, while NMFS believed the pollution would appreciably reduce salmon habitat functions and population viability. It was only after NMFS issued a draft biological opinion requiring no net increase of annual pollution that that FHWA agreed to modify the project to achieve this standard, which enabled NMFS to reach a no-jeopardy finding.

As these examples demonstrate, informal consultation plays two critical roles. First, the Services' expertise in endangered species needs and the best available science serves as a check on an action agency's initial view that a project may be relatively benign. Second, the give-and-take in informal consultation can convince the action agency to modify a project to mitigate or prevent harm to endangered species. By eliminating the Services' concurrences in pesticide-specific NLAAs, the counterpart regulations remove this safeguard in violation of § 7(a)(2).

CONCLUSION

The Organizations believe that the proposed rules should be discarded because they are in violation of the explicit requirements and purpose of the ESA. Broad and thorough consultation on federal agency actions is a cornerstone of the ESA's protections for species, ensuring that we examine potential effects of our actions on species and their critical habitat before it is too late.

¹⁰ Shockingly, on the matters reviewed by NMFS, NMFS found the FS and BLM's assessment of effects on species or their critical habitat, inadequate 100% of the time.

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Using the magnitude and complexity of the global warming problem as a stalking horse for changes that will place many species into jeopardy far more often is inexcusable and cannot serve as a reason for these improper proposals. The ESA has the safeguards and controls necessary to both protect species and to allow projects to proceed in a thoughtful and not harmful way and the rule changes are not needed. The Organizations urge withdrawal of the proposed rules.

Sincerely,

/s/ Janette K. Brimmer

Janette K. Brimmer
Staff Attorney, Earthjustice

On behalf of:
Conservation Northwest
Endangered Species Coalition
Pacific Coast Federation of Fishermen's Associations
Institute for Fisheries Resources
Sierra Club
Conservation Law Foundation
Oregon Wild
The Mountaineers
Washington Toxics Coalition