

October 14, 2008

Submitted via regulations.gov
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
Status as Major Rule, 5 U.S.C. §§ 801 and 804
Federal Register docket ## FWS-R9-ES-2008-0093 and 0808011023-81048-01**

Dear Sir or Madam:

The undersigned organizations, which collectively have millions of members, write to ask the Department of Interior (“DOI”) and the National Oceanic and Atmospheric Association’s (“NOAA”) to withdraw the proposed changes to the Endangered Species Act (“ESA”) implementing regulations. See 73 Fed. Reg. 47868 (Aug. 15, 2008). If adopted, these changes to the ESA regulations would seriously weaken the safety net of habitat protections that we have relied upon to protect and recover endangered fish, wildlife and plants for the past 35 years. The proposed changes violate the spirit and the language of the ESA by reducing the role of scientific review of projects that may impact endangered fish, wildlife and plants in the following ways: (1) virtually eliminating informal consultations and reducing the number of formal consultations; (2) reducing the scope of consultations; and (3) allowing projects to proceed without scientific review based on an arbitrary deadline imposed on the U.S. Fish and Wildlife Service (“FWS”) and the National Marine Fisheries Service (“NMFS”). Thus, DOI and NOAA should withdraw the proposed changes.

In addition to objecting to the substance, we object to the process. Limiting public participation to just a 60-day public comment period and not accepting email comments is unacceptable. The proposed changes represent a dramatic (and illegal) shift in ESA implementation and DOI and NOAA should have ensured a full and fair opportunity for the public to comment, including public hearings.

Comments on Proposed Changes

NOAA and DOI propose to change ESA § 7 regulations in several ways, all of which are designed to enable federal projects to escape the scrutiny of the expert biologists at the FWS and NMFS (referred to here collectively as “the Service”). None of these changes should be enacted for the reasons set forth below:

1. Elimination of Informal Consultations and Reduction of Formal Consultations

ESA § 7 requires federal agencies seeking to carry out, fund or permit an action to consult with the Service regarding the impacts of that action on species listed as threatened or endangered. This provision is the main safety net for species in the ESA, covering a wide array of activities from logging and mining to filling of wetlands for subdivisions. If an agency project proponent (“action agency”) finds that its project will have no effect on listed species, the current regulations state that the action agency need not consult with the Service. However, if there is any effect whatsoever, the action agency must engage in either informal or formal consultation.

If as a result of informal consultation, the action agency and the Service concur that the project is not likely to have an adverse effect on listed species, then the project may go forward. Most (over 90 percent) ESA consultations conclude at this informal stage, oftentimes after the action agency agrees to modify the project for the benefit of listed species. The proposed changes would largely *eliminate* this crucial feature of the ESA. (proposed) 50 C.F.R. § 402.13, 73 Fed. Reg. at 47874. In essence, the proposed changes allow proponents of federal projects to decide unilaterally whether those projects have adverse effects on listed species and would eliminate the ability of the Service to review projects and employ its expert judgment about what is needed to protect species and habitats. 73 Fed. Reg. at 47871 (“[T]he proposed language allows a Federal action agency to make a ‘not likely to adversely affect’ determination without concurrence from the Services in limited circumstances.”). The only exception would be when the action agency voluntarily requests informal consultation. See (proposed) 50 C.F.R. § 402.13(a) (“informal consultation is a voluntary process”), 73 Fed. Reg. at 47874. This notion of “self consultation” has already been rejected by one court as contrary to the ESA. Washington Toxics Coalition v. U.S. Dept. of Interior, 457 F. Supp. 2d 1158 (W.D. Wa. 2006).

In addition, the proposed changes would also significantly reduce the number of formal consultations by eliminating the requirement for formal consultation any time that an action agency unilaterally determines that a project will have no adverse effect on listed species.

DOI and NOAA attempt to rationalize this radical change to the ESA by claiming that the action agency will err on the side of protecting listed species in making its judgment about adverse effects. 73 Fed. Reg. at 47871-72. This is contrary to the 35 years of history of the ESA, where action agencies have often resisted the Service’s efforts in the consultation process to protect species and have often understated the harmful impacts of their projects. In fact, DOI and NOAA allude to this history by citing to a 2004 GAO report finding that the action agencies dislike ESA consultations because they find them “burdensome.” Id. at 47872. Action agencies find ESA consultations burdensome because they inhibit the agencies from moving forward on their primary objective, getting the proposed project completed as quickly as possible at the least possible expense, which is often in conflict with the best interests of listed species.

Further, DOI and NOAA claim that the action agencies now have sufficient scientific expertise to determine whether a project affects listed species and thus requires consultation. Id. at 47871. However, this is directly contradicted by the experience with counterpart regulations that allow the U.S. Forest Service (“Forest Service”) and the Bureau of Land Management (“BLM”) to

make a determination on whether their projects under the National Fire Plan adversely affect over 40 listed species. One year after the regulations took effect, the Services conducted a study on the Forest Service and BLM's decisions under the regulations. NMFS & FWS, Use of the ESA Section 7 Counterpart Regulations for Projects that Support the National Fire Plan, Program Review: Year One (Jan. 11, 2008). In short, the Forest Service and BLM performed abysmally. For example, none of the 10 projects reviewed by NMFS met the scientific or legal criteria set by NMFS for a valid "not likely to adversely affect" determinations, *id.* at 12-13, and only 19 of the 60 projects reviewed by the FWS could be confirmed to meet the relevant criteria. *Id.* at 19. If agencies such as the Forest Service and BLM cannot make adequate determinations about their projects' impacts on endangered and threatened species and plants, there is no reason to believe that an agency such as the U.S. Department of Housing and Urban Development or the Federal Communication Commission, with limited-to-no biological expertise on staff, will make correct decisions.

Finally, in a wholesale departure from the requirements of the ESA, the proposed changes eliminate the consultation requirements for listed plants by limiting § 7's applicability to actions that result in "take." (proposed) 50 C.F.R. § 402.03(b)(1), 73 Fed. Reg. at 47870. Because ESA's prohibition against "taking" a listed species largely does not apply to plants, 16 U.S.C. § 1538, the proposed regulations would allow action agencies to carry out activities that have significant negative impacts on endangered plants without any scientific review or oversight.

Defining § 7's applicability in reference to whether an action results in "take" could also result in fewer consultations on animal species because "take" focuses on an action's impacts on an individual organism. An action could result in smaller or longer-term impacts to a listed species or its habitat that might not rise to the level of "take" but could eventually result in jeopardy.

2. New Justifications for Avoiding or Minimizing ESA Consultations Based on "Lack of Causation" Arguments

The proposed regulations would provide a host of new arguments to action agencies for avoiding ESA consultations or reducing their scope. (proposed) 40 C.F.R. §§ 402.02 & 402.03, 73 Fed. Reg. at 47874. These arguments all center around the idea that projects that could cause some harm to listed species should nonetheless escape ESA scrutiny because the causal link between the project and the anticipated harm is not sufficient. Thus, for example, the Federal Register notice states that projects with a "marginal" contribution to the harm will be outside the scope of the ESA – despite the fact that the cumulative effect of "marginal," piecemeal insults to habitat quantity and quality is one of the main causes of species decline and extinction. *See* 73 Fed. Reg. at 47870. The proposed changes would encourage action agencies to move forward with multiple, small-scale actions, each with "marginal" impacts, and thus avoid a thorough review of the cumulative harm to listed species. This approach was specifically rejected by the U.S. Court of Appeals for the Ninth Circuit. National Wildlife Federation v. NMFS, 524 F.3d 917, 930 (9th Cir. 2008).

Similarly, DOI and NOAA state that if an effect of the project would occur even without the project, it will now escape ESA scrutiny under the proposed regulations. *See* 73 Fed. Reg. at 47870. This new approach ignores that habitat destruction and degradation often result from

multiple causes. If a habitat area is at risk of degradation from both a subdivision and an invasive exotic plant, for example, it makes no sense to remove the subdivision from the ESA's scrutiny simply because a solution has not yet been devised for the invasive species problem.

The proposed regulations also state that an action agency need consult only on the part of the action that is causing the harm rather the entire action. *Id.* This limitation on the scope of consultation is contrary to decades of ESA law, which makes clear that consultation on the entire action is needed to get a comprehensive look at the challenges facing the species and the potential solutions. See, e.g., *National Wildlife Federation v. NMFS*, 524 F.3d 917, 928-29 (9th Cir. 2008) (amended opinion) (rejecting NMFS attempt to exclude nondiscretionary elements of an action from consultation). The proposed changes would limit the Service's ability to craft recommendations to eliminate adverse effects.

NOAA and DOI attempt to justify this weakening of the current rules governing causation analysis on the ground that global warming presents new challenges to the consultation process. 73 Fed. Reg. at 47872. However, the changes do not create a framework for addressing the impacts global warming impacts on listed species, even though the global warming is emerging as a top threat to the future of wildlife. If NOAA and DOI are serious about addressing the interplay between the ESA and global warming, they certainly would not propose weakening the ESA's most basic safety net features. As the science of climate change makes clear, conservation laws such as the ESA will need to be strengthened substantially to address the harmful effects of global warming on species and habitats.

DOI and NOAA have a responsibility to ensure that the Services and action agencies are incorporating the science of climate change's impacts on species and habitats into its consultations as well as every other aspect of ESA implementation. John Kostyack & Dan Rohlf, *Conserving Endangered Species in an Era of Global Warming*, 38 *Envtl. L. Rep.* 10203 (2008). DOI and NOAA's attempt to package these changes as a response to global warming simply adds insult to the injury that climate change already causes to endangered species.

3. Arbitrary Deadline Used to Enable Even the Most Harmful Projects to Escape ESA Scrutiny

Finally, DOI and NOAA propose to impose a 60-day deadline on the Services to respond to the action agency's request for consultation and, if this deadline is not met, to allow the project to go forward regardless of the impacts of the project on listed species. (proposed) 50 C.F.R. §402.13(b), 73 Fed. Reg. 47874. In contrast, if the consultation deadlines imposed on the Services under the current regulations are not met, the action agency has no authority to move forward with the project. Presumably, even a project that causes the certain extinction of a species would go forward under this new rule. Likewise, when consultations are delayed through no fault of the Services, such as when an action agency engages in stalling tactics when the Services are not provided with the funding they need to complete consultations, this new rule would nonetheless cause such consultations to be terminated and would allow projects harmful to endangered species to go forward. This proposal to shift the risk of delays to listed species and habitats would undermine the basic conservation goals and principles of the ESA.

Conclusion

DOI and NOAA must withdraw the proposed changes to ESA § 7's implementing regulations because they conflict with the intent and language of the statute. In a warming climate, it is more important than ever to ensure that agencies are complying with the safety net of the ESA and DOI. We look forward to working with DOI and NOAA to meet this goal.

Sincerely,

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